



# Industry Self-Inspection and Compliance in the Ontario Forest Sector



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# 1 Introduction and Overview

Ontario's Crown forests are fundamental to the environmental, economic and social well-being of Ontarians. Sixty-five per cent (69.1 million hectares) of Ontario is forested, and approximately 91% of these forest lands are owned by the province.<sup>1</sup>

Ontario's forests are home to a multitude of plants and animals, including a variety of mammals, birds, fish, amphibians and reptiles. Most of the province's 3,200 species of plants, 160 species of fish, 80 species of amphibians and reptiles, 400 species of birds and 85 species of mammals are forest dependent.<sup>2</sup>

The forest sector is also a major contributor to the province's economy. In 1996, the most recent year for which data is available, the Ontario forest products industry shipped approximately \$12.2-billion worth of forest products, with wood products (e.g., lumber) accounting for \$3.4-billion, while paper and allied industries contributed \$8.8-billion.<sup>3</sup>

This study examines the evolving relationship between the forest industry and the Ontario government. The study's focus is on the changes introduced following the 1995 provincial election, and in particular the self-inspection regime adopted by the Ontario Ministry of Natural Resources (MNR) in relation to the forest industry as of April 1998. This system, through which forest licence holders have taken primary responsibility for the conduct of compliance inspections on their operations, flowed from the dramatic reductions made to the MNR's budget in the fall of 1995 and spring of 1996, and the ministry's May 1996 Forest Management Business Plan.

The study examines this self-inspection arrangement in the context of the wider movement towards "alternative service delivery" by the Ontario government, and governments elsewhere in the developed world, focusing on issues of governance, accountability and performance. In that context, it has implications not only for the forest sector, but also for other natural resource sectors in Ontario, such as aggregates, petroleum, commercial fisheries, baitfish and fur, for which similar systems have been established.

It also has implications for other jurisdictions, such as British Columbia,<sup>4</sup> that are moving towards similar arrangements in their resource sectors, and, more broadly, the use of alternative service delivery arrangements in the management and protection of public resources and goods by Canadian governments.

Although this study examines the MNR self-inspection regime through the lens of alternative service delivery, rather than forest policy *per se*, it is important to note that the regime, and the larger transfer of responsibilities from the MNR to industry of which it was a central component, has had a major impact on forest management in Ontario. Industry demands for increased security of tenure in exchange for the additional costs assumed through self-inspection were, for example, a major factor in the initiation of the province's "Lands for Life" process in February 1997.<sup>5</sup>

The effectiveness of the self-inspection system has been the subject of consistent expressions of concern by the Environmental Commissioner of Ontario<sup>6</sup> and Provincial Auditor.<sup>7</sup> A review of the system is also especially timely given the scheduled 2003 expiry of 1994 Class Environmental Assessment of Timber Management on Crown Lands in Ontario, through which many of the current requirements for forest management in Ontario are defined.

This report consists of eight chapters. Following this introduction, Chapter two provides a brief contextual overview of the evolution of the province's forest management regime from its origins in the early nineteenth century to 1995. Chapter three outlines the changes to forest management implemented following the 1995 election, focusing on the self-inspection regime adopted for forest licence holders from 1998 onwards. Chapter four outlines a series of evaluative criteria related to governance, accountability and performance, against which the Ontario self-inspection system will be assessed. Chapters five, six and seven apply these criteria to the Ontario self-inspection system. Conclusions and recommendations are provided in Chapter eight.

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## 2 Background: The Ontario Forest Sector and the Evolution of the role of the Province

The management of Ontario's Crown forests has evolved through a number of distinct phases over the past 150 years. The overall direction has been a widening of the goals of the province's forest policies from revenue generation to ensuring sustainable yield and, more recently, to meeting the broader environmental, social and economic needs of Ontarians. At the same time, the security of tenure of forest companies has been expanded, and increasing reliance has been placed on the forest industry, rather than the provincial government, to carry out forest management activities.

### 2.1 Origins: From Revenue Maximization to Sustainable Yield

When the province first began to establish a regulatory regime to control access to Ontario's forests in the second half of the nineteenth century, the focus was on the generation of revenue through timber duties and the imposition of "manufacturing conditions" on access to wood supply.<sup>8</sup> Under these arrangements, pulp mills would be given a secure supply of wood in exchange for the construction of facilities and the maintenance of employment levels.<sup>9</sup>

Near the end of the nineteenth century and in the early decades of the twentieth, in the face of growing concerns over overharvesting and waste by the forest industry, the focus began to shift to ensuring the sustainability of the wood supply from Ontario's forests.<sup>10</sup> The Forest Reserve Act of 1898 authorized the provincial cabinet to set aside public lands as forest reserves for the purpose of ensuring future timber supplies. The Pulpwood Conservation Act of 1929 for the first time required pulp companies to submit Forest Management Plans and to manage the forest areas in which they held cutting rights on a sustainable yield basis. In practice, however, little was done to enforce compliance with requirements,<sup>11</sup> and

the Department of Lands and Forests' emerging capacity in forest management suffered major reductions following the election of Premier Mitchell Hepburn's government in 1934.<sup>12</sup>

### 2.2 The 1947 Kennedy Commission

The post-war Royal Commission on Forestry (the Kennedy Commission), which delivered its report in 1947, warned that the situation had reached a point where total depletion of Ontario's forests was likely if controls over cutting and regeneration requirements were not imposed. The commission stressed the need for the principle of sustained yield to be the basis of future forest policy.<sup>13</sup> In this context, the commission emphasized the need to separate the roles of companies involved in processing wood fibres (i.e., sawmills and pulp mills) from those managing the forest resource, due to the tendency for the need for wood supply to otherwise override other considerations, such as regeneration. To this end, the commission recommended that watershed-based forest operating companies be established to manage all woods operations within given areas, from which shareholding individuals and companies would purchase their wood supplies.<sup>14</sup>

Although the Kennedy Commission's recommendations regarding forest operating companies were not adopted, the Forest Management Act of 1947 required that pulp and paper companies, companies with holdings of more than 50 square miles, and the Ministry of Lands and Forests itself develop forest inventories, as well as long-term cutting plans and annual operating plans, subject to approval or amendment by the minister.<sup>15</sup>

The 1947 legislation was followed in 1953 by major amendments to the Crown Timber Act, consolidating the province's Crown timber legislation, and



revising the licensing structure so that the previous ministerial licences were replaced by 21-year licences issued by the Lieutenant-Governor in Council.<sup>16</sup> Under the amendments, responsibility for regeneration of harvested areas was assigned to the licence holders. However, by 1960 it was apparent that most licensees were not effectively regenerating the lands they had cut due to a combination of lack of expertise, absence of long-term concern for the forest and the failure of the government to enforce the Act.<sup>17</sup> As a result, the Crown Timber Act was amended again in 1963 to return responsibility for maintaining forest productivity to the province.<sup>18</sup> The province subsequently signed special contracts with major licensees to carry out regeneration activities on behalf of the government.



*St. Mary's paper mill in Sault Ste. Marie, Ontario.*

perpetual (“evergreen”) cutting rights provided that licensees met defined obligations for regeneration on a sustained-yield basis.<sup>22</sup>

Armson’s recommendations were the basis for the 1979 Crown Timber Amendment Act. The Act provided for the establishment of

Forest Management Agreements (FMAs) between the province and forestry operators. The agreements would give 20-year exclusive harvesting rights in exchange for complete management of an area of forest, including reforestation.<sup>23</sup> In the same year, the MNR announced a policy of bringing all company management agreements under FMAs.<sup>24</sup>

## 2.4 The Royal Commission on the Northern Environment and the Baskerville Report

In practice, implementation of the FMAs after the 1979 amendments to the Crown Timber Act proceeded slowly. Following the change in provincial government in June 1985, two further major studies of the management of the province’s Crown forests were tabled. The 1985 report of the Royal Commission on the Northern Environment highlighted the need for the principle of sustained yield to be mandated by law as an essential aspect of forest management in Ontario; movement away from clear-cutting in the boreal region and other environmentally sensitive and protected areas; and the establishment of an independent audit agency to report annually to the Legislature on the condition and management of Ontario’s forests.

The following year, an audit of forest management practices in Ontario was completed by University of New Brunswick Professor Gordon Baskerville. The Baskerville Report highlighted an excessive emphasis by the Ministry of Natural Resources on meeting the administrative requirements for forest management

## 2.3 The Armson Report and the 1979 Crown Timber Amendment Act

The next major review of the management of the province’s Crown forests occurred in 1976, when continuing concerns over regeneration led the Ontario Ministry of Natural Resources (MNR)<sup>19</sup> to commission a report on the condition of the province’s forests from Kenneth Armson, a forestry professor at the University of Toronto. Armson, noting that Ontario was coming to the end of its natural exploitable forests,<sup>20</sup> concluded that the separation of responsibility for harvesting and regeneration contained in the 1963 amendments to the Crown Timber Act had been an error, resulting in a focus among companies on exploitation rather than management.<sup>21</sup> Armson recommended that larger forestry companies be given security of tenure on public forest lands, as a means of providing them with an incentive to ensure the regeneration of the forest. This would be achieved through Forest Management Agreements (FMAs) that would allow

rather than on the actual outcomes seen in the field. As well, the report highlighted problems with the ways in which non-timber values, such as the conservation of wildlife habitat, were taken into account in forest management planning.<sup>25</sup>

In response to Baskerville's recommendations, the government set up a task force to develop a new forest production policy and also established the position of provincial forester. In addition, a Class Environmental Assessment of Timber Management on Crown Lands, delayed since the adoption of the province's Environmental Assessment Act in 1975, was submitted by the MNR to the Ministry of the Environment in December 1985.<sup>26</sup>

## 2.5 The Class Environmental Assessment Decision

The Class Environmental Assessment of Timber Management on Crown Lands in Ontario constituted the most extensive public review of forest management practices in the province's history. Following 411 days of hearings, running from early 1988 to November 1992, the Environmental Assessment Board (EAB) rendered its decision on the assessment on April 4, 1994. Although it approved the Ministry's undertaking<sup>27</sup> and its overall directions in forest management for the following nine years, the board imposed 115 terms and conditions in its decision. These terms and conditions addressed such issues as the development and approval of Timber Management Plans,<sup>28</sup> public participation in the forest management planning process,<sup>29</sup> the size of clear-cuts<sup>30</sup> and the protection of non-timber values.<sup>31</sup>

The board's decision also stressed the need for improved monitoring and reporting. The decision included: requirements for independent audits of compliance with timber management planning requirements, forest policies, procedures and legislation for each management unit every five years;<sup>32</sup> annual reports on timber management at the management unit and provincial levels;<sup>33</sup> and reports to the Legislature on the state of the forest every five years.<sup>34</sup>

Implementation of the Terms and Conditions of the Class Environmental Assessment was seen as a major undertaking by the Ministry. A total of \$35.7 million was allocated in the Ministry's 1995/96 budget for implementation of the assessment.<sup>35</sup>

## 2.6 The Crown Forest Sustainability Act, 1994

The province followed the EAB's decision with the enactment of the 1994 Crown Forest Sustainability Act (CFSA), which replaced the Crown Timber Act,<sup>36</sup> The new statute broadened the purposes of forest management in Ontario from the maximization of sustainable yield to include the social, economic and environmental needs of present and future generations.<sup>37</sup> Sustainability was to be defined through Forest Management and Planning Manuals to be developed under the Act to include the conservation of large, healthy and diverse forests and the maintenance of forest health through practices that emulate natural activities and avoid adverse effects.<sup>38</sup>

One of the key features of the CFSA was the replacement of FMAs with Sustainable Forest Licences (SFLs). These may be valid for up to 20 years, are renewable every five years and are required by the statute to be extended provided that the licensee has complied with the terms and conditions of the licence.<sup>39</sup> In addition to harvesting activities, licensees are required to carry out renewal and maintenance activities necessary for the sustainability of the forest covered by the licence.<sup>40</sup> SFLs are required, through the Act, to specify the following:

- Requirements for the preparation of inventories and plans by the licensee;
- Silvicultural and other standards to be met by the licensee in carrying out forest operations;
- Requirements for the submission of reports by the licensee to the minister;
- Procedures for the periodic review of the licensee's performance under the licence; and
- The term of the licence and any conditions applicable to the renewal of the licence.<sup>41</sup>

The CFSA also permits the minister to enter into other forms of licences, including “supply agreements” to supply persons with forest resources from a management unit.<sup>42</sup> and “other licences” (referred to by the Ministry as “Forest Resource Licences,” or FRLs) of not more than five years to harvest or use forest resources in a management unit.<sup>43</sup> The minister may enter into agreements with the holders of the latter type of licences regarding the maintenance and renewal of Crown forests in the licence area and to carry out obligations of the licensee in return for the payment of fees.<sup>44</sup> More than one FRL may be granted with respect to the same land.<sup>45</sup> “Supply agreements” and “other licences” are required to be consistent with the applicable Forest Management Plan.<sup>46</sup>

All forms of licences are subject to such terms and conditions as prescribed by regulation and specified in the licence,<sup>47</sup> and may be amended by the minister in accordance with the regulations.<sup>48</sup> In contrast to the provisions of the former Crown Timber Act with respect to FMAs,<sup>49</sup> SFLs are not required to be tabled in the Legislature.

The CFSA provides a number of mechanisms to enforce compliance with forest licences, plans and work schedules, and to protect the sustainability of forest resources. These mechanisms include the issuance of Stop,<sup>50</sup> Compliance<sup>51</sup> and Repair<sup>52</sup> Orders by the minister, the imposition of Administrative Penalties (APs) of up to \$15,000 or five times the

value of any forest resources harvested in contravention of a licence,<sup>53</sup> suspension or cancellation of forest licences,<sup>54</sup> or fines of up to \$100,000 on conviction of an offence under the Act.<sup>55</sup>

## 2.7 The Current Forest Management Regime

As a result of these developments, forest management and operations in Ontario are governed through both the provisions of both the CFSA and the Terms and Conditions of the Class Environmental Assessment of Timber Management on Crown Lands in Ontario.<sup>56</sup>

In practice, the province is divided into Forest Management Units (FMUs) as designated by the minister under the CFSA.<sup>57</sup> A Forest Management Plan is required for each unit.<sup>58</sup> The plans are developed by SFL holders for management units for which they hold licences or by the MNR for Crown management units; in either case, plans must be approved by the minister.<sup>59</sup> The overwhelming bulk of the province’s Crown forests are now under SFLs, and the province is pursuing a long-term policy of converting all of the remaining Crown management units to SFLs.<sup>60</sup> The extent of this transition over the past few years is show in **Table 1**.

In most cases, SFLs are granted to individual corporations. However, in a number of instances, particularly in northeastern Ontario, mills and contractors operating in a given management unit have established corporate entities to act as the SFL holders.<sup>61</sup>

**Table 1: Number of Forest Licences by Type and Productive Forest Area under Licence, April 1, 1996, and April 1, 1999<sup>62</sup>**

Licence Type	Number of Licences 1995/96	Number of Licences 1999/00	Forest Area 1995/96 (Hectares)	Forest Area 1999/00 (Hectares)
FRL < 100 Hectares <sup>63</sup>	4,773	3,439	3,620,500	99,848
FRL > 100 Hectares <sup>64</sup>	877	97	6,721,200	175,044
FRL: Salvage	100	33	43,100	17,035
SFL	30	52	14,803,800	24,753,730
Total	5,780	3,621	25,188,600	25,045,657

Forest Management Plans are developed every five years and outline the strategic management direction for a 20-year period and specific management operations for a five-year term. The plans must be developed in accordance with the Forest Management Planning Manual<sup>65</sup> issued under the Act<sup>66</sup> and lay out what may be harvested, how harvesting may occur, how renewal is to take place, and requirements around such things as the protection of archaeological sites, wildlife habitat, and recreational facilities.<sup>67</sup> Within this framework, Annual Work Schedules, which are also subject to ministerial approval, are prepared.<sup>68</sup> These work schedules contain such details as annual schedules for depletion, harvesting, wood utilization, renewal and maintenance operations, and access road construction and maintenance. Finally, the Ministry provides “cut approvals” for individual harvesting operations. Monitoring and reporting requirements are outlined in the Forest Information Manual (FIM)<sup>69</sup> issued under the Act.

## 2.8 Stumpage, Crown Payments and Forestry Revenues

Major changes were introduced to the Ontario stumpage pricing system in 1994. Prior to that date,

Crown stumpage charges were effectively a royalty system based on a percentage of the value of the forest product in question. Since 1994, the province’s Crown charges have consisted of four elements:

- A minimum charge per cubic metre;<sup>70</sup>
- A forest renewal charge to generate the funds for renewing harvested areas within each management unit;<sup>71</sup>
- A forestry futures charge to cover forest renewal and protection activities not covered by the forest renewal charge;<sup>72</sup> and
- A residual value charge, assessed when the price of forest products reaches a set threshold value.<sup>73</sup>

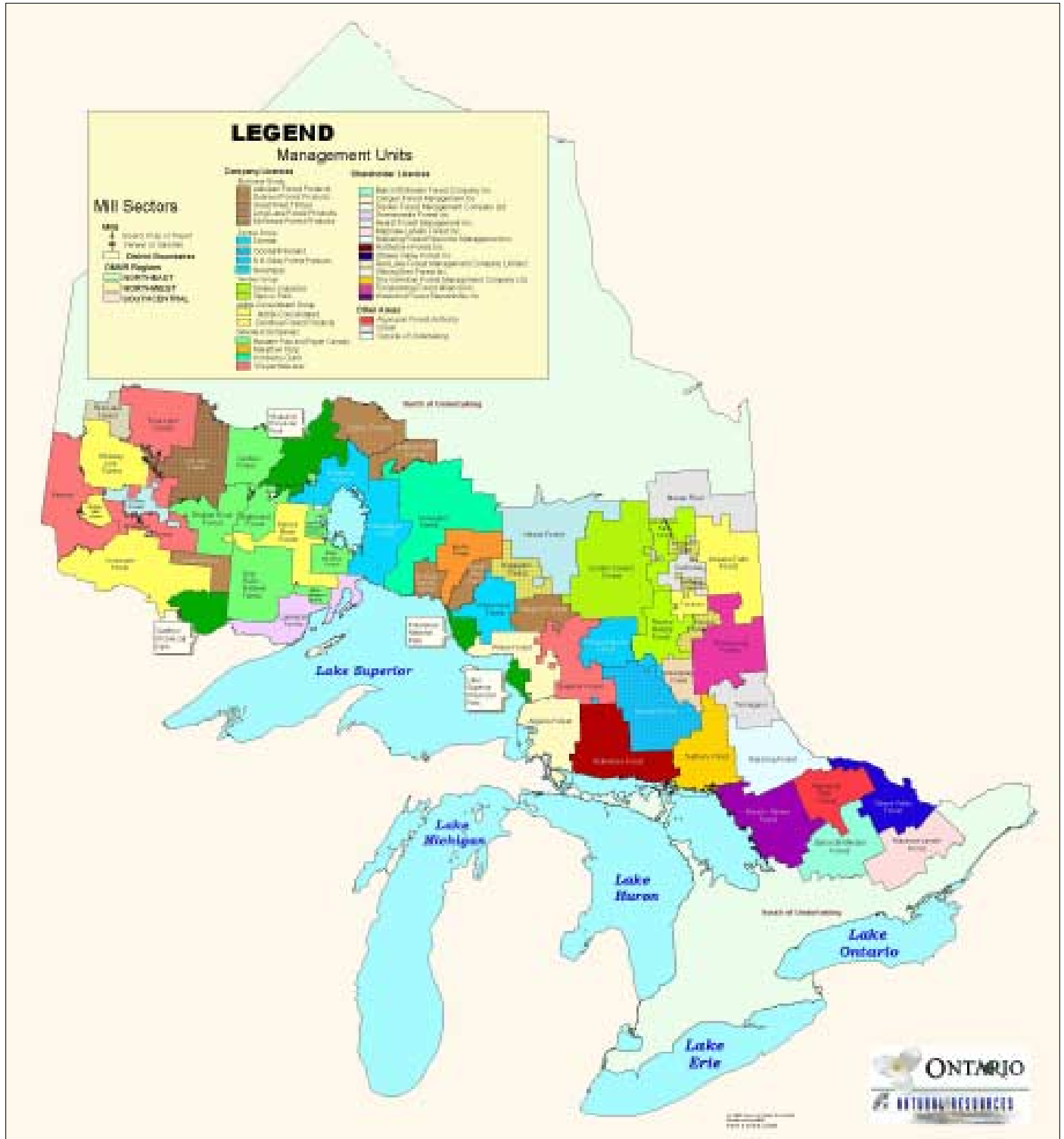
Revenues from the minimum charge and residual value charge go to the consolidated revenues of the province, while the revenues from the forest renewal charge and forestry futures charge go to dedicated trust funds established through the CFSA.<sup>74</sup>

As noted in **Table 2**, payments to the province from forestry operations have increased substantially since the adoption of the new system of charges.

**Table 2: Ontario Forestry Revenues, 1991/92 to 2001/2002 (\$ current millions)<sup>75</sup>**

Year	Area Charges <sup>76</sup>	Forestry Futures	Consolidated Revenue	Forest Renewal Trust	Forest Renewal Trust and SPA	Total Payments
1991/92	13.1	N/a	54.3	N/a	N/a	67.4
1992/93	9.3	N/a	63.0	N/a	N/a	72.3
1993/94	19.7	N/a	85.0	N/a	N/A	104.7
1994/95	14.4	6.0	98.7	N/a	33.0	152.1
1995/96	9.9	7.1	89.2	58.6	36.5	201.3
1996/97	11.3	7.9	111.7	51.6	34.8	217.3
1997/98	N/a	10.6	178.1	52.4	44.2	285.3
1998/99	N/a	20.6	157.5	71.3	28.9	278.3
1999/00	N/a	10.1	155.7	78.8	5.1	249.7
2000/01	N/a	Not yet available	105.2	Not yet available	Not yet available	Not yet available
2001/02	N/a	Not yet available	90.2	Not yet available	Not yet available	Not yet available

## Ontario's Forest Management Units



Source: Adapted from Forestry at a Glance, Ontario Ministry of Natural Resources, July 2002



## 2.9 Conclusions

The management of Ontario's Crown forests has evolved through a number of distinct phases. At first, the focus of the provincial regulatory framework was almost exclusively on maximizing the revenue realized by the province from the harvesting of public forests. Towards the end of the nineteenth century, the emphasis began to shift towards ensuring the sustainability of the supply of wood from the province's forests. This remained the dominant theme of the province's forest policies throughout most of the twentieth century. However, by the mid-1980s, growing public concern over the non-timber aspects of Ontario's forests, reinforced through the work of the Royal Commission on the Northern Environment, the Baskerville Report and the Class Environmental Assessment of Timber Management on Crown Lands in Ontario, began to have an impact on the province's forest policies. These wider policy goals were reflected in both the EAB's 1994 decision on the class environmental assessment and the Crown Forest

### Why Forestry Revenues Vary So Widely from Year to Year

The data available from the MNR shows a wide variation in the general revenues realized through forestry charges, ranging from \$178 million in 1997/98 to \$90 million in 2001/02.

There are a number of reasons for this variation. The basic stumpage fee (minimum charge) levied by the province has increased from \$1.25 per cubic metre in 1995/96 to its current (January 2003) level of \$3.44 per cubic metre.

However, the variation in revenues is principally due to fluctuations in the residual value charge, which is a function of selling prices and profit margins in the sector, especially softwood. The MNR has no breakdown of how much revenue comes from the minimum charge versus the residual value charge each year.<sup>77</sup>

The forest renewal charges and forestry futures charges have remained essentially constant since their introduction in 1994/95.

Sustainability Act, enacted in the same year. As a result, the purpose of forest management in Ontario has been broadened from maximization of sustainable yield to meeting the social, economic and environmental needs of present and future generations of Ontarians.

Since the 1920s, the province has sought to impose, with varying degrees of success, increasing planning and management responsibilities on companies harvesting the province's forests. The basis of the province's current approach was set through the 1976 Armson Report and the subsequent 1979 amendments to the Crown Timber Act, which established a system of FMAs through which forest companies assumed responsibility for

the management of an area of forest in exchange for exclusive harvesting rights over a 20-year period. The 1994 CFSA continued in this basic direction, strengthening the security of tenure of forest companies through the introduction of SFLs, which are automatically renewed on the basis of satisfactory performance by licence holders.

# 3 The “Common Sense Revolution” and the New Regime

## 3.1 The October 1995 Budget Cuts

Major reductions to the Ontario Ministry of Natural Resource’s (MNR) budget were announced in October 1995, following the election of a new Progressive Conservative government under Premier Mike Harris in June of that year. These reductions included a decrease of \$19.1 million in expenditures for sustainable forestry and implementation of the Terms and Conditions of the Class Environmental Assessment of Timber Management on Crown Lands in Ontario.<sup>78</sup> Further reductions to the Ministry’s budget were announced in April 1996, including a \$34.6 million reduction for forest management in 1996/97 and a \$45.9 million reduction for forest management for 1997/98.<sup>79</sup>

The Ministry’s plans to deal with these reductions in the budget of its forest management program were outlined the following month in a Forest Manage-

ment Business Plan.<sup>80</sup> The plan proposed a “significant shift in responsibilities between the forest industry and the government.”<sup>81</sup>

The Business Plan indicated that there would be a major reduction in the Ministry’s direct involvement in forest management operations and a transfer of those responsibilities to the forest industry, while the Ministry would continue to set the overall direction for forest management. The projected reductions in MNR staffing levels as a result of this shift are outlined in **Table 3**.

Certain aspects of the budget and personnel reductions reflected directions that were already established through the Forest Management Agreement (FMA) and Sustainable Forest Licence (SFL) regimes established in 1979 and 1994 towards greater reliance on the forest industry to carry out forest management functions. These functions included such things as

**Table 3: MNR Forest Management Branch, Projected Budget and Personnel Reductions 1995-1996<sup>82</sup>**

Business Process	1995 Person Years	1995 Dollars (Millions)	1996 Person Years	1996 Dollars (Millions)
Policy	60	7.70	19	3.30
Stewardship	173	21.25	127	10.90
Operations	637	41.30	287	17.45
Compliance	139	8.41	83	5.30
Science and Technology	377	40.30	148	16.00
Information Management	49	10.0	27	9.2
Industry Services	16	1.20	16	1.20
Seed and Stock Production	77	7.10	44	4.70
Business Infrastructure Support	13	13.79	13	5.60
Public Education		1.20		0.65
Core Competency	0	0.00	4	1.00
Totals	1541	152.25	768	75.30



the preparation of Forest Management Plans, Annual Work Schedules, silviculture, road and bridge construction, inventory and data collection, the conduct of surveys and assessments, and reporting on silvicultural activities. However, as a result of the reductions to the ministry’s forest management budget, this reliance on the industry for forest management activities was greatly increased and major changes to the ways in which the Ministry oversaw the activities of forest companies, and particularly the inspection and compliance system for forest management, introduced.

### 3.2 The SFL Holder Self-Inspection Regime

Under the 1996 Forest Management Business Plan, SFL holders were to be required to prepare compliance plans for their operations, conduct inspections, and identify and report areas of non-compliance to the Ministry. The Ministry indicated its intention to withdraw from regular inspections of forest operations, and to focus on undertaking spot checks, and conducting inspections and investigations where instances of non-compliance were identified through SFL-holder inspections.<sup>83</sup> The Ministry also indicated its plans to have all management units in the province covered by SFLs, or SFL-like arrangements,<sup>84</sup> with the implication that the new inspection system would eventually be applied on a province-wide basis. The major changes in the roles of the Ministry and SFL

holders in relation to inspection and compliance proposed by the Ministry are outlined in **Table 4**.

Essentially, SFL holders were to take responsibility for operational forest compliance—the planning and carrying out of compliance inspection activities. The MNR was to ensure compliance with the Crown Forest Sustainability Act (CFSA) and class environmental assessment terms and conditions by setting standards, reviewing SFL-holder compliance plans, and conducting audits and enforcement actions.<sup>86</sup> The new forest compliance system, which is summarized in detail in **Table 5**, would apply to all forest operations on Crown land under SFLs, while the MNR would retain responsibility for compliance monitoring, inspection and reporting for management units where no SFL existed.

### 3.3 Implementation of the New Regime

Pilot projects with seven SFL holders were initiated in November 1996 to test and operationalize the compliance planning, inspection, monitoring and reporting system outlined in the Forest Management Business Plan.<sup>88</sup> Then, as of April 1, 1998, all existing SFL holders assumed lead responsibility for compliance planning, inspection and reporting. This was achieved through amendments to the SFLs of the licence holders.

**Table 4: Changes in Forest Compliance Roles and Responsibilities, 1995 to 1996<sup>85</sup>**

Activities	1995	1996
Plan District Level Compliance	MNR Leads	MNR Leads
Plan Forest Operational Compliance	MNR Leads	MNR Leads
Conduct Inspections	MNR Does	Licensee Does
Provide Prevention Education	MNR Does	Licensee Does
Identify Compliance/Non-compliance	MNR Does	Licensee Does
Implement Immediate Action	MNR Does	Licensee Does/MNR Does
Conduct Investigations	MNR Does	MNR Does
Conduct Enforcement Actions	MNR Does	MNR Does
Analyze and Report	MNR Does	MNR Does

**Table 5: Forest Compliance System Summary, Post-April 1998<sup>87</sup>**

Function	MNR Roles	Industry Roles
Planning	<p>Prepares integrated district compliance plans:</p> <ul style="list-style-type: none"> <li>• Sets targets for compliance spot checks/audits</li> <li>• Involves other stakeholders through local citizens committees</li> </ul> <p>Sets standards for industry's Forest Compliance Plans in consultation with industry.</p> <p>Identifies common elements of Forest Compliance Plans such as</p> <ul style="list-style-type: none"> <li>• Background</li> <li>• Goal</li> <li>• Objectives</li> <li>• Strategies and actions</li> <li>• Company roles and responsibilities</li> <li>• Annual compliance priorities</li> <li>• Reporting schedule for monitoring and inspection</li> <li>• Criteria for inspection data reporting</li> <li>• Remedial action</li> <li>• Implementation schedule</li> </ul> <p>Assists industry in preparing Forest Compliance Plans.</p> <p>Approves Forest Compliance Plans.</p> <p>May participate in plan review/assessment.</p>	<p>Assists the MNR in identifying planning standards.</p> <p>Assists the MNR in identifying planning requirements.</p> <p>Leads preparation of Forest Compliance Plans for all Crown forests under SFL, including multi-year strategic plan and annual plan of action:</p> <ul style="list-style-type: none"> <li>• Involves other stakeholders (use of local citizens committees to be assessed)</li> <li>• May incorporate into plans their own systems for quality control to ensure effective compliance, monitoring and inspection</li> <li>• In future, Forest Compliance Plans will become part of Forest Management Plans.</li> </ul> <p>Identifies compliance priorities.</p> <p>Ensures staff meets requirements for competency and pays related costs.</p> <p>Assesses effectiveness of plans.</p>
Training	<p>Sets standards of competence, in consultation with industry, for all those conducting forest operations inspections.</p> <p>Ensures MNR staff are trained and qualified.</p>	<p>Identifies in the plan who will conduct forest operations inspections.</p> <p>Ensures company staff are trained and qualified.</p> <p>Establishes and delivers internal programs to promote compliance and prevent non-compliance.</p>
Inspection	<p>Records undesirable conditions which appear to be related to forest operations, such as road washouts.</p> <p>Sets standards for inspection data.</p> <p>Receives and retains company forest operations inspection reports.</p> <p>Spot-checks and audits according to District Compliance Plan (the MNR is to give industry opportunity to be present at spot checks).</p> <p>Analyzes data.</p> <p>Determines effectiveness of inspections.</p> <p>Adjusts standards.</p> <p>Develops electronic inspection and reporting system for MNR use and voluntary use by industry.</p>	<p>Records undesirable conditions that appear to be related to forest operations.</p> <p>Does forest operations inspections according to directions and schedule approved in company Forest Compliance Plan (e.g., frequency, timing and method). Content and frequency will be determined by compliance history; operation complexity; and the values, sensitivity or significance of the area.</p> <p>Provides forest operations inspections report to the MNR as identified in the company Forest Compliance Plan:</p> <ul style="list-style-type: none"> <li>• Reports all instances of non-compliance immediately</li> <li>• Advises the MNR of harvest road construction and water-crossing operations within 1 week of start-up</li> <li>• Advises the MNR when an operation is completed and in compliance</li> </ul>

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## The “Common Sense Revolution” and the New Regime

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Function	MNR Roles	Industry Roles
		<p>Formats and reports data in a standard way. Information may be transmitted via paper, diskette, e-mail or Internet.</p> <p>Transfers inspection data to the MNR according to schedule in the compliance plan, and according to MNR data standards.</p> <p>May use MNR electronic reporting system.</p>
Identifying Compliance and Non-compliance	Identifies compliance and non-compliance as part of spot-checking function. Provides company report within 5 working days.	<p>Verbally reports all significant cases of non-compliance to the MNR within 24 hours of occurrence; provides written report within 5 working days.</p> <p>Accepts need for remedial action in cases of non-compliance.</p>
Ordering/Taking Remedial Action	<p>Evaluates occurrence of non-compliance.</p> <p>Directs actions a company can and cannot take to remedy non-compliance.</p> <p>Receives reports of action taken by industry.</p>	<p>Takes voluntary remedial action or, if it receives a CFSA order, takes remediation action as specified by the MNR.</p> <p>Reports actions to the MNR.</p>
Investigating	<p>Investigates according to remedies and enforcement provisions of the CFSA and other statutes</p> <ul style="list-style-type: none"> <li>• Checks non-compliance reports by companies</li> <li>• Checks remedial action plans</li> <li>• Responds to public complaints</li> </ul>	May develop internal investigation processes for own workers and activities.
Enforcing	Enforces legislation: orders; Administrative Penalties (APs); suspension or cancellation of licences; seizure of wood or wood products; prosecutions.	
Analyzing and Reporting	<p>Collects data from spot checks and audits.</p> <p>Receives inspection data from industry.</p> <p>Makes company data available.</p> <p>Analyzes data.</p> <p>Issues required annual reports and State of the Forest Report.</p>	<p>May access own company data from the MNR for analysis, planning, identifying education needs.</p> <p>May participate with the MNR in analyzing own company data.</p>

Typical amendments to SFLs used for this purpose required the following:<sup>89</sup>

21.1 The Company shall prepare a forest compliance plan for planning, monitoring, reporting and education/prevention on its forest operations and those of any overlapping licensees to ensure compliance with all applicable legislation, regulations, the Forest Management Plan, and with Ministry manuals and guidelines affecting those operations. The forest compliance plan shall be prepared in accordance with standards established by the Minister, in consultation with representatives of Ontario's forest industry.

The forest compliance plan prepared by the company requires the approval of the Minister or delegate before operations may commence.

21.2 The Company is responsible to establish and deliver an internal prevention/education program and to provide for individual staff training to competency standards approved by the Minister of Natural Resources.

21.3 The Company must conduct inspections of forest operations, provide reports to the Ministry and otherwise comply with the requirements of the Company's approved forest compliance plan.

In practice, the MNR District Manager for the Forest Management Unit approves compliance plans.<sup>90</sup> These include both five-year strategic compliance plans as well as annual plans of action (schedules).<sup>91</sup> The legislation that the Ministry considers applicable to forest operations in addition to the CFSA for the purposes of inspections is outlined in **Table 6**.

### 3.3.1 SFL Inspection Responsibilities for "Overlapping" Licensees

An important feature of the new self-inspection system was that SFL holders were not only responsible for compliance inspections of their own operations, but also for those of any overlapping licence holders within the management unit covered by their SFL. This circumstance may arise in a number of ways:<sup>93</sup>

- A new SFL holder is an existing company with former independent FRL holders who are now overlapping licensees operating within the SFL management unit;
- The SFL holder is a new legal entity comprising a number of "shareholders,"<sup>94</sup> including FRL holders who now become overlapping licensees operating on the SFL management unit, who continue to operate in the same way as they did before the SFL came into being;
- The SFL holder is a new legal entity comprising a number of "shareholders," including independents who are former FRL holders who gave up their FRLs and are now operating under the SFL entity as independent operators.

Where overlapping FRL holders give up their FRLs, the SFL holder assumes responsibility for all forest practices and violations by itself and by its independent operators after three years.<sup>95</sup> Where there are overlapping licensees, it is understood that the overlapping licensee agreement with the SFL holder will include the licensee's responsibility for compliance.<sup>96</sup>

### 3.3.2 Inspections on Crown Management Units

Under the original provisions of the 1996 business plan, the MNR was to retain primary inspection responsibility in Crown management units for which SFLs have not been established. However, in practice, the Ministry has entered into Memoranda of

**Table 6: Legislation Other Than CFSA Related to Forest Operations in Ontario<sup>92</sup>**

Statute	Potential Offences
Aggregate Resources Act	<ul style="list-style-type: none"> <li>• Operating a pit or quarry without a licence</li> <li>• Removing a stockpile aggregate without permit</li> <li>• Operating in contravention of the site plan, conditions, etc.</li> <li>• Operating with suspended or revoked permit</li> <li>• Failing to carry out requirements of a suspension notice</li> <li>• Progressive and final rehabilitation</li> <li>• Failing to comply with provincial standards</li> <li>• Provision of annual compliance assessment reports</li> </ul>
The Criminal Code (Federal)	
Environmental Protection Act	<ul style="list-style-type: none"> <li>• Discharging a contaminant or causing or permitting the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect</li> </ul>
Fisheries Act (Federal)	<ul style="list-style-type: none"> <li>• Harmfully altering, or disrupting or destroying fish habitat</li> <li>• Depositing deleterious substances</li> </ul>
Forest Fires Prevention Act	<ul style="list-style-type: none"> <li>• Failing to provide information</li> <li>• Piling and burning flammable material</li> <li>• Failing to clear area of flammable debris</li> <li>• Failing to obey remedial order</li> <li>• Failing to obey order to extinguish fire</li> <li>• Failing to report fire out of control</li> <li>• Accumulating flammable debris</li> <li>• Smoking while walking in forest</li> <li>• Dropping/throwing incendiary materials</li> <li>• Interfering with forest protection equipment, building or structure</li> <li>• Having an inadequate spark arrestor on equipment</li> <li>• Starting fire under unsafe conditions</li> <li>• Failing to leave person in charge of fire</li> <li>• Failing to control/tend/extinguish fire</li> <li>• Improper piled wood fire</li> <li>• Improper outdoor incinerator</li> <li>• Fires in restricted fire zone</li> <li>• Failing to produce fire permit</li> <li>• Failing to fulfill fire extinguisher requirement for equipment and machinery</li> <li>• Operating a power saw</li> <li>• Accumulating debris on equipment/machinery</li> <li>• Altering a spark-arresting device</li> <li>• Traveling in restricted fire zone</li> </ul>
Fish and Wildlife Conservation Act	<ul style="list-style-type: none"> <li>• Damaging or destroying a beaver dam</li> </ul>
Lakes and Rivers Improvements Act	<ul style="list-style-type: none"> <li>• Dam construction approvals</li> <li>• Failure to follow orders to repair, reconstruct or remove dam</li> </ul>

Agreement with large licence holders in most of the remaining Crown management units, assigning primary inspection responsibilities to these operators. As a result, as of January 2003, the Ministry only retained primary inspection responsibilities in one Crown management unit (Temagami).<sup>97</sup>

### 3.3.3 Reporting Procedures

Information from forest inspection reports conducted by the MNR is required to be entered and maintained in the Ministry's Forest Operations Compliance Information System (FOCIS). SFL holders have the option of entering inspection reports directly into FOCIS or providing the information in a digital format specified by the Ministry in the Forest Information Manual (FIM) issued under the CFSA.<sup>98</sup>

Inspection reports must contain specified data, including the details of who conducted the inspection, the inspection type, date and fiscal year of the inspection and operations, and information regarding applicable licences, permits and legislation against which compliance was assessed. The reports must also identify the type of forest operation inspected, and check off specific items required to be addressed for each operation and operational activity inspected, and the mandatory information associated with each item.<sup>99</sup> The specific items inspectors are to consider and report on are outlined in **Table 7**.

SFL-holder inspectors are required to complete and submit their inspection reports within 10 working days of the completion of a forest operation, and within 5 working days of determination that there is a situation of non-compliance. Cases of "significant"<sup>101</sup> or "very significant"<sup>102</sup> non-compliance must be reported within 24 hours.<sup>103</sup> Inspection reports are signed off by company management prior to submission to the MNR.<sup>104</sup>

The FIM states that the MNR is to check the information in compliance reports for completeness and accuracy. This check includes verifying ground observations and the information related to those observations in the same time frame as the SFL holder is permitted to file a report of compliance or non-compliance (i.e., normally within 10 days of the completion of a forest operation, 5 days in the case of non-compliance and 24 hours in cases of "significant" or "very significant" non-compliance).<sup>105</sup> The "source" information on which SFL inspection reports are based, such as notes, photographs, maps and drawings are not required to be provided to the MNR as part of inspection reports.<sup>106</sup>

## 3.4 Summary and Conclusions

Major changes were introduced into the province's forest management regime following the 1995 provincial election. These changes flowed from major reductions to the MNR's forest management budget announced in the fall of 1995 and spring of 1996, which resulted in a 50% reduction in the Ministry's forest management staff.

One of the most important changes outlined in the Ministry 1996 Forest Management Business Plan, prepared in response to these reductions, was the transfer of primary responsibility for the conduct of inspections of forest company operations for compliance with forest management requirements from the Ministry to SFL and other forest licence holders. In SFL management units, the Ministry's role would be reduced to one of overall policy direction, and providing follow-ups, audits and spot checks on industry-conducted inspections. The new self-inspection system was adopted for all SFL holders in April 1998, and by January 2003, the MNR retained primary inspection responsibilities in just one of the province's 68 Forest Management Units.

**Table 7: Items Inspectors Are to Consider and Report On<sup>100</sup>**

Activity	Items to Consider
Road Construction	<ul style="list-style-type: none"> <li>• Road located outside of designated road corridor</li> <li>• Road not built to standards referred to in the Forest Management Plan</li> <li>• Road improperly drained</li> <li>• Road clearly not in accordance with CFSA requirements</li> <li>• Traffic safety not considered (signage, sightlines, etc.)</li> <li>• Maintenance not in accordance with the Forest Management Plan</li> <li>• Road abandonment not in accordance with guidelines</li> <li>• Other</li> </ul>
Aggregate Activity	<ul style="list-style-type: none"> <li>• Aggregate not removed in accordance with the Annual Work Schedule</li> <li>• Rehabilitation not done properly</li> <li>• Correct amount extracted not reported</li> <li>• Site plan not followed</li> <li>• Aggregate permit conditions not followed</li> <li>• Operation without necessary aggregate permit</li> <li>• Monthly return not filed</li> <li>• Other</li> </ul>
Water-Crossing Activity	<ul style="list-style-type: none"> <li>• Annual Work Schedule crossing details not followed</li> <li>• Short-term erosion protection not in place</li> <li>• Long-term erosion protection not in place</li> <li>• Sediment control plan not followed</li> <li>• Road approaches not stable</li> <li>• Road approaches not erosion mitigated</li> <li>• Fish passage not addressed</li> <li>• Traffic safety not considered (signage, sightlines, etc.)</li> <li>• Crossing not built to structural integrity standard</li> <li>• Crossing not abandoned according to guidelines</li> <li>• Maintenance not in accordance with the Forest Management Plan</li> <li>• Other</li> </ul>
Area of Concern Activity	<ul style="list-style-type: none"> <li>• Prescription in the Annual Work Schedule or Forest Management Plan not followed</li> <li>• Boundary not marked/improperly marked</li> <li>• Operation inside Area of Concern boundary</li> <li>• Debris left in waterbody or watercourse</li> <li>• Timing restriction not met</li> <li>• Other</li> </ul>
Cutting	<ul style="list-style-type: none"> <li>• Prescription in the Annual Work Schedule or Forest Management Plan not followed</li> <li>• Operation outside approved boundary</li> <li>• Cutting without authority</li> <li>• Cutting unauthorized species</li> <li>• Unnecessary damage to residual stand</li> <li>• Site damage (e.g., rutting)</li> <li>• Treatment not in accordance with the forest operation prescriptions</li> <li>• Other</li> </ul>
Wasteful Practices	<ul style="list-style-type: none"> <li>• High stumps left</li> <li>• Merchantable timber of any length left</li> <li>• Merchantable trees left standing</li> <li>• Lodged trees left</li> <li>• Wood-chip fibre not utilized</li> </ul>

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Activity	Items to Consider
Wood Measurement/ Movement	<ul style="list-style-type: none"> <li>• Scaling of Crown timber</li> <li>• of authority to haul unscaled Crown timber not followed</li> <li>• Other</li> </ul>
Fire Prevention	<ul style="list-style-type: none"> <li>• Inadequate number of fire-trained personnel on site</li> <li>• Inadequate number of serviceable fire suppression equipment readily available</li> <li>• Woods Modification Guidelines or other relevant guidelines not followed</li> <li>• Lack of appropriate communications capabilities on site</li> <li>• Machinery not checked for flammable material or material not removed/disposed of safely</li> <li>• Mechanical equipment not parked in area free of flammable material</li> <li>• Appropriate spark arrestors/mufflers not on all wood burning appliances/equipment</li> <li>• Lack of appropriate serviceable fires extinguishers for all equipment/chain saws</li> <li>• Power saws not placed in fire safe area or started within refuelling area</li> <li>• Smoking while walking/working in work site, or materials not extinguished safely</li> <li>• Burning regulations not followed</li> <li>• Other fire prevention/preparedness measures not followed</li> </ul>
Pesticide application	<ul style="list-style-type: none"> <li>• Treatment not in accordance with forest operations prescriptions</li> <li>• Operation not in accordance with the Annual Work Schedule or Forest Management Plan</li> <li>• Operation outside of approved boundaries</li> <li>• Approved pesticides not used</li> <li>• Posting not in place or notification not given</li> <li>• Other</li> </ul>
Renewal	<ul style="list-style-type: none"> <li>• Treatment not in accordance with forest operations prescriptions</li> <li>• Operation not in accordance with the Annual Work Schedule or Forest Management Plan</li> <li>• Unnecessary damage to residual stand</li> <li>• Site damage (e.g., rutting)</li> <li>• Other</li> </ul>
Tending	<ul style="list-style-type: none"> <li>• Treatment not in accordance with forest operations prescription</li> <li>• Operation not in accordance with the Annual Work Schedule or Forest Management Plan</li> <li>• Unnecessary damage to residual stand</li> <li>• Site damage</li> <li>• Other</li> </ul>
General	<ul style="list-style-type: none"> <li>• Garbage or waste on site</li> <li>• Spills (e.g., oil changes, fuel)</li> <li>• Other</li> </ul>



# 4 The Evaluative Framework

## 4.1 The MNR Self-Inspection Regime as Alternative Service Delivery

The self-inspection system adopted by the Ontario Ministry of Natural Resources (MNR) for forest licence holders in Ontario reflects a series of wider changes that have been taking place in the delivery of public services by governments over the past two decades. In the case of Ontario, it is one example of many “Alternative Service Delivery” (ASD)<sup>107</sup> arrangements established by the province as part of its overall move towards “New Public Management”<sup>108</sup> approaches to the delivery of public services since the June 1995 election. The province has experimented with a variety of forms, sometimes spinning-off special operating agencies—organizations that function under more flexible rules than are generally found in conventional departments, but which remain part of the structure of the state. In other cases, the province has privatized functions through the purchase of services under contract from private firms, or through their transfer to other levels of government, not-for-profit corporations, or, as is the case with the MNR’s forestry inspection functions, regulated entities themselves.<sup>109</sup>

These new approaches are intended to improve efficiency and effectiveness in the delivery of public services. One of their key features is an emphasis on the role of government in policymaking or broad direction setting (“steering”), while the actual imple-

mentation of those policy choices (“rowing”) can be made the responsibility of organizations somewhere outside of the governmental core, or even of non-governmental and private sector actors.<sup>110</sup> The intention is to provide better public services at lower cost, while at the same time maintaining democratic control and accountability over the content of public policy.



*The Ontario forestry industry is increasingly self-regulating.*

The MNR’s forestry self-inspection regime is a strong example of such a system, where the Ministry has stated its intention to continue to set the direction for forest management policy and to oversee its implementation, but to leave operational tasks to licence holders.

However, alternative service arrangements are widely seen to pose challenges to long-established principles of parliamentary control and accountability. The Auditor-General of Canada, for example, has observed that “accountability for the spending of public funds and the use of governmental authority can be put at risk by arrangements that involve others in governing who are not directly accountable to a Minister and not subject to parliamentary or legislative scrutiny.”<sup>111</sup> More broadly, questions have been raised about whether such arrangements actually result in better outcomes, and the degree to which they may alter power relationships between regulators and regulated entities in fundamental ways, particularly as regulatory agencies become dependent on regulatees for key information and the carrying out of important functions.<sup>112</sup>

The Ontario forestry self-inspection regime adopted in 1998 provides an excellent opportunity to examine these issues in a real-world context. Given the degree to which similar arrangements have been pursued with other sectors regulated by the MNR,<sup>113</sup> and in other jurisdictions with respect to their natural resources industries,<sup>114</sup> the findings of this study will have implications reaching well beyond the forestry sector in Ontario.

## 4.2 Criteria for Assessment

In this context, this study employs criteria built on the evaluative structure used in previous studies of ASD arrangements related to the management and protection of public goods, such as health, safety and the environment, in Ontario.<sup>115</sup> As with these previous studies, three major groups of criteria were established to evaluate the MNR's forest industry compliance self-inspection program. These include the following:

### Governance

Governance considerations include such questions as whether the ASD arrangements provide for a legally valid and clear assignment of responsibilities to those charged with carrying out specific functions;<sup>116</sup> whether those actors have the capacity to carry out the roles assigned to them;<sup>117</sup> whether the arrangements avoid obvious conflicts of interest;<sup>118</sup> and whether the delegating governments have the ability to oversee the activities of delegated entities.<sup>119</sup>

### Accountability

An accountability framework is also needed to provide for the appropriate assignment of responsibility in the event that something does go wrong in the delivery of public services. This is a basic requirement in any organization, but is particularly important in terms of the ability of citizens to evaluate the performance of their

elected governments.<sup>120</sup> Accountability structures are also central to ensuring that the authoritative and coercive powers of the state are not abused or misused.<sup>121</sup>

### Performance

Performance is defined in terms of the ability of the self-inspection regime to achieve its stated goals, and more broadly, to contribute to the achievement of the goals of the Crown Forest Sustainability Act (CFSA).

Within these three broad categories, specific evaluative criteria were established on the basis of the review of the previous studies of ASD models in Ontario, the general academic literature and governmental policy statements regarding alternative service delivery arrangements, and more specific commentaries on the application of ASD models to environmental protection and resource management, including examples from Canada, the United States, the United Kingdom, New Zealand and Australia.

#### 4.2.1 Governance

##### 4.2.1.1 The Legal Framework for the Self-Inspection Regime

Unlike similar transfers of inspection responsibilities in natural resource sectors in Ontario following the 1995 election, such as mineral aggregates and oil and gas,<sup>122</sup> no specific legislative amendments were made to the CFSA to facilitate the transfer of forest operations inspections to Sustainable Forest Licence (SFL) holders. Key questions related to the legal framework for the self-inspection regime include whether the authority exists under the CFSA, and related legislation such as the Ministry of Natural Resources Act, for the transfer of primary forest operations compliance inspection functions from the Ministry to forest licence holders. In addition, consideration must be given to whether the transfer is consistent with the Terms and Conditions of the Class Environmental Assessment of Timber Management on Crown Lands in Ontario.

**4.2.1.2 The Status of SFL-Employed “Inspectors”**

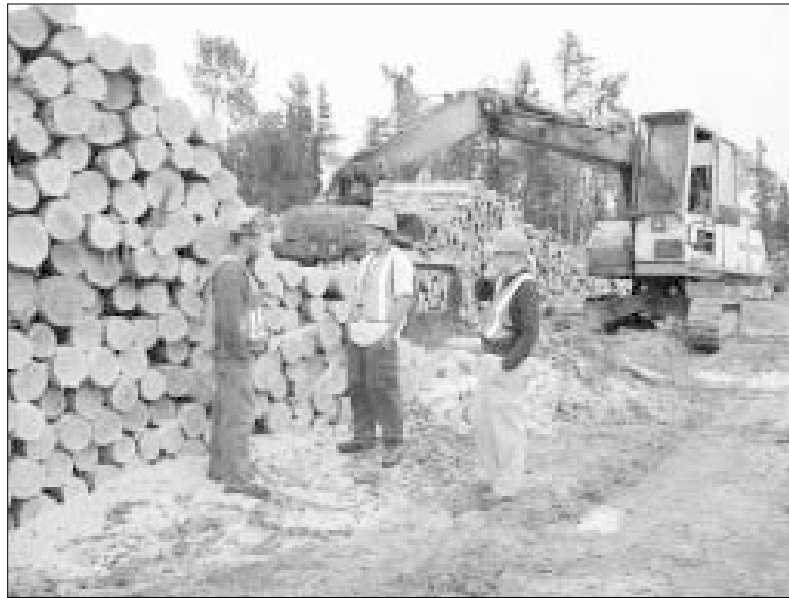
The self-inspection regime provides for the identification of SFL-holder employees as “inspectors.” A number of questions arise regarding the status and powers of these individuals, particularly in situations where they are inspecting the operations of third parties. These include: what is the nature of the authority for the designation of SFL-employed “inspectors” under the CFSA and related legislation? What is the basis for the inspectors’ exercise of inspection powers under the CFSA and other legislation regarding third parties (e.g., overlapping Forest Resource Licence [FRL] holders and independent operators)? What legal protections exist for SFL-holder-employed inspectors carrying out inspection and reporting functions against reprisals for reporting non-compliance by their employers?

**4.2.1.3 Self-Inspection and the Canadian Charter of Rights and Freedoms**

The Canadian Charter of Rights and Freedoms provides a number of fundamental legal rights to persons accused of an offence. Among these rights is a right against self-incrimination. The question may arise as to whether information generated by SFL holders through the self-inspection system can be used by the Crown in prosecutions against those SFL holders.

**4.2.1.4 The Capacity of the Forest Industry to Undertake the Transferred Functions**

One of the major issues that arises with alternative service delivery arrangements is the capacity of delegated agents to actually undertake the delegated functions. Key questions in this regard include consideration of what assessments of industry capacity to undertake the delegated functions were conducted prior to delegation, and what requirements have been established for the training and certification of SFL-employed “inspectors.”



*Companies must report on their own compliance with logging rules.*

**4.2.1.5 Conflict of Interest**

The potential for conflict of interest in delegation arrangements is frequently raised as a concern with respect to alternative service delivery arrangements involving self-inspection or regulation systems.<sup>123</sup> There may be a number of dimensions to this issue in the case of the MNR system, including the implications for the liability of SFL holders for penalties under the CFSA on the basis of their self-inspection reports, and the economic relationships that may exist between SFL holders and smaller overlapping licence holders, for which SFL holders have compliance responsibility.

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## 4.2.2 Accountability

### 4.2.2.1 MNR Oversight of Industry Performance

A major issue with respect to alternative service delivery arrangements is the ability of the delegating agency to oversee the activities of the delegated actor.<sup>124</sup> In the case of the forestry self-inspection regime, questions to be examined include whether the MNR has the capacity to oversee the performance of SFL holders in the conduct of inspections in terms of such factors as resources (budget and personnel), information access by the Ministry and penalties/enforcement mechanisms. Consideration should also be given to the MNR's capacity to withdraw the transfer of inspection functions if the performance of SFL holders is inadequate.

#### 4.2.2.2 Oversight by Legislative Officers

One of the major issues that can arise through alternative service delivery arrangements is the possibility that service delivery responsibilities will be transferred to non-governmental actors over which legislative officers, such as the Provincial Auditor or Ombudsman, have no jurisdiction to review and report to the Legislature and the public on these actors' activities, operations and decisions.

#### 4.2.2.3 Oversight by the Public

Similarly, transfers of governmental functions to non-governmental actors can result in situations where the public loses important right of access to information or the ability to participate in decision-making processes. Legislation establishing these rights, such as the Freedom of Information and Protection of Privacy Act, may not apply to the entities to whom the functions are delegated.<sup>125</sup> Key questions to be considered in this context include whether members of the public have access to the information necessary to form assessments of the effectiveness of the SFL self-inspection regime, and how the public's right of access with respect to inspection and compliance information is altered by the system.

### 4.2.2.4 Implications for Crown Liability

Alternative service delivery arrangements can give rise to significant issues related to the liability of the Crown for the actions of delivery agents, such as SFL holders, in terms of liability for harm to third parties on the basis of acts or omissions of non-governmental delivery agents.

## 4.2.3 Performance

### 4.2.3.1 Enforcement Outcomes

Given the nature of the MNR self-inspection regime, the impact of the system on compliance levels and enforcement outcomes is a critical consideration. These outcomes may be measured in terms of the numbers of inspections carried out, compliance rates of forest activities with MNR requirements, the performance of MNR field-inspection staff versus SFL-holder inspectors in identifying instances of non-compliance, and overall trends in the application of enforcement tools and penalties under the CFSA.

### 4.2.3.2 Information Flows

One of the major issues with alternative service delivery arrangements revealed through the Walkerton disaster was the potential for the transfer of governmental functions to non-governmental actors to disrupt key information flows, as policies regarding the distribution of important information may not be binding on non-governmental entities now delivering a service.<sup>126</sup>

In addition, concerns have been raised regarding the impact of the "de-coupling" of operational and policy functions, through the delegation of operational functions to non-governmental delivery agents.<sup>127</sup> Such arrangements may cut policymakers off from key information sources with respect to what is actually happening in the field.<sup>128</sup>

**4.2.3.3 Cost-effectiveness**

Alternative service delivery arrangements may require substantial oversight and backstopping capacity on the part of the delegating government. This requirement can have significant implications for the overall costs of delegation arrangements relative to traditional service delivery by governments, as it may require the duplication of capacity and functions between the delivery agent and the delegating government.<sup>129</sup>

**4.3 Summary of Assessment Criteria**

The evaluative criteria to be used in this study of the MNR forestry self-inspection regime are summarized in **Table 8**.

These criteria are applied to the Ontario forestry self-inspection regime and reviewed in the following three chapters, dealing with Governance, Accountability and Performance.

**Table 8: Evaluative Criteria for the Study of the Ontario Forestry Self-Inspection Regime**

<b>Governance</b>	<b>Accountability</b>	<b>Performance</b>
<ul style="list-style-type: none"> <li>• Adequacy of legal and policy framework</li> <li>• Charter issues</li> <li>• Industry capacity to undertake transferred functions</li> <li>• Conflict of interest</li> </ul>	<ul style="list-style-type: none"> <li>• MNR capacity to oversee industry performance</li> <li>• Oversight by legislative officers</li> <li>• Oversight by the public</li> <li>• Implications for Crown liability</li> </ul>	<ul style="list-style-type: none"> <li>• Enforcement outcomes</li> <li>• Information flows</li> <li>• Cost-effectiveness</li> </ul>

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# 5 Governance

## 5.1 Legal Framework for the Self-Inspection Regime

### 5.1.1 Consistency with the Crown Forest Sustainability Act and the Terms and Conditions of the Class Environmental Assessment of Timber Management on Crown Lands

As noted earlier, the requirements for Crown forest management in Ontario are defined by both the provisions of the Crown Forest Sustainability Act (CFSA) and the Terms and Conditions of the Class Environmental Assessment of Timber Management on Crown Lands in Ontario. The transfer of responsibility for primary compliance inspections to Sustainable Forest Licence (SFL) holders must therefore be consistent with the overall legal framework established through the Act and terms and conditions of the class environmental assessment.

#### 5.1.1.1 Consistency with the CFSA

The CFSA, enacted in 1995, contained no explicit provisions regarding the delegation or transfer of compliance inspection responsibilities to SFL holders. Nor, in contrast to the Ministry's approach to the establishment of self-inspection systems for the aggregate and petroleum industries,<sup>130</sup> which occurred at approximately the same time as the introduction of the new system in the forest sector, were amendments made to the Act to provide for such arrangements.

Rather, the MNR has relied on the minister's general power under the CFSA to amend the terms and conditions of forest resource licences (FRLs)<sup>131</sup> to implement the new system, amending each individual SFL to add conditions requiring the preparation and implementation of forest compliance plans by SFL holders.

However, it is important to note that the minister's power to amend SFL terms and conditions is not unlimited. Rather, such amendments must be in accordance with regulations issued under the Act.<sup>132</sup> These regulations, also adopted in 1995, contain no explicit provisions permitting the amendment of SFLs for the purpose of transferring inspection responsibilities from the Ministry to SFL holders, or more generally, regarding the reallocation of responsibilities between the Ministry and SFL holders.<sup>133</sup> In fact, the only matter related to compliance with respect to which amendments are permitted is regarding "methods used to measure compliance with silvicultural and other standards and with forest operations prescriptions."<sup>134</sup> This language appears to contemplate changes in the specific technical methodologies used to measure compliance, rather than with respect to the basic roles and responsibilities of the Ministry and SFL holders.

These limitations on the minister's powers to amend SFLs raise questions as to whether the amendment of SFLs to transfer primary compliance inspection responsibilities to SFL holders exceeded the minister's statutory power to amend SFLs.

#### 5.1.1.2 Consistency with the Terms and Conditions of the Class Environmental Assessment of Timber Management on Crown Lands

Term and Condition 78 of the Environmental Assessment Board's (EAB) decision with respect to timber management on Crown Lands deals with monitoring and reporting. The term and condition specifically requires that "MNR shall monitor timber management activities for...compliance with approved Timber Management Plans and any other conditions imposed on operations by legislation or policy..." It is an offence under the Environmental Assessment Act to violate terms and conditions of an environmental assessment approval.<sup>135</sup>

There is no provision for delegation of these monitoring requirements in Term and Condition 78, and there is no general delegation authorized or recommended in the class environmental assessment decision. Together with Terms and Conditions 85 to 87 (“Audits”), Term and Condition 78 acknowledges the MNR’s obligation to ensure that licence holders comply with the law.

It may be argued that Term and Condition 78 requires MNR to “monitor” forest operations rather than conduct inspections itself, and that the “monitoring” function is carried out through the collection and review of SFL inspection reports. However, there is no evidence to indicate that the board contemplated that these functions would be carried out by entities other than the MNR in drafting its decision, as the Ministry is clearly referred to as the active agent (“MNR shall”) in the term and condition. At best, the self-inspection regime would seem to contradict the spirit of the term and condition, if not its letter.

Andrea Maenza

**5.1.1.3 Inspections by Licence Holders on Crown Management Units**

As noted earlier, the MNR has entered into Memoranda of Agreement with major licence holders in most of the remaining Crown management units for which SFLs have not been established. These agreements transfer primary compliance inspection responsibilities to these licence holders.

The legal basis of these transfers is unclear, as unlike the situation with SFL holders, they have not been undertaken as licence amendments, and there is no general authority for the delegation of ministerial responsibilities to non-governmental entities in either the CFSA or the Ministry of Natural Resources Act.

**5.1.2 The Status of Licensee-Employed “Inspectors”**

**5.1.2.1 Designation**

A second major aspect of the transfer of primary compliance inspection responsibilities from the MNR to SFL holders is the framework for the identification or designation of SFL employees who act as “inspectors” under the post-April 1998 system. The CFSA includes provisions granting employees, “agents” of the Ministry and other persons appointed by the minister certain powers related to inspection, including entry onto private land and the inspection of records required to be kept under the Act.<sup>136</sup>

However, the Act includes no process for the designation of Ministry “agents.” This is in contrast to other MNR legislation, which includes explicit provisions regarding the designation of “agents” and “inspectors” who are not Ministry employees.<sup>137</sup> Nor were any references related to the designation of SFL employed “inspectors” included in the SFL amendments through which the self-inspection regime was implemented.



*MNR is supposed to inspect company reported infractions.*

The MNR states that SFL-employed inspectors are not considered “agents” for the purposes of the CFSA.<sup>138</sup> Rather, SFL-employed inspectors are simply individuals identified by their supervisors as being able to conduct inspections and file reports on the basis of “their skills and knowledge of forest management and forest operations.”<sup>139</sup> The Ministry indicates that company inspectors may be such individuals as foremen, forest technicians or foresters.<sup>140</sup>

Training has been made available by the MNR to SFL-employed inspectors. However, there are currently no mandatory certification or training require-

ments for SFL employees designated as inspectors, although the Ministry indicates that such requirements are under development.”<sup>141</sup>

The MNR is able to exercise some control over who is designated as an inspector through its approval of the five-year SFL-holder compliance strategies, in which SFL holders are required to identify their “inspectors.”<sup>142</sup> However, the absence of any specific criteria or qualifications for the designation of “inspectors” suggests that it is unlikely the Ministry would challenge SFL-holder nominees.

SFL holders may assign inspection functions to overlapping licensees for the operations of those licensees through written agreements with such licensees. In such cases, inspection reports are provided by the overlapping licensee to the SFL holder and then forwarded to the MNR.<sup>143</sup> These arrangements are subject to MNR approval as part of the annual compliance plan, and are required to be acceptable to all who are operating on the management unit.<sup>144</sup>

### **5.1.2.2 The Powers of SFL-Holder-Employed Inspectors in Relation to Third Parties**

In addition to conducting compliance inspections of their own employers’ operations, SFL-employed inspectors may also be required to conduct inspections on the operations of overlapping licence holders, if those responsibilities are not assigned to the overlapping licence holder. However, as the SFL-holder-employed inspectors are not designated as MNR “agents” or appointees, they have no powers related to inspection under the CFSA, such as the right of entry onto private lands or to inspect records.<sup>145</sup> Rather, they are limited to evaluating and reporting on the compliance of overlapping licence holders on the basis of what they are able to observe on public lands.

### **5.1.2.3 Protections for Licensee-Employed Inspectors**

As discussed in more detail in section 5.4, there are strong incentives for SFL holders to minimize the occurrences of non-compliance with forest management requirements reported through the self-inspection system. Reports of non-compliance can lead to the imposition of administrative penalties (APs) and, in the long term, even threaten the renewal of SFLs. This may lead to situations where SFL-employed inspectors are pressured by their employers to under report incidents of non-compliance.

Surprisingly, however, no explicit protections for SFL-holder-employed inspectors have been built into the self-inspection system, either through the CFSA or the implementing amendments to SFLs. Some limited protection may be provided by the requirement that company inspectors be identified in SFL holder five-year compliance strategies, which are subject to MNR approval.<sup>146</sup> This may limit the ability of SFL holder management to replace more rigorous inspectors, who consistently identify and report higher levels of non-compliance, with non-designated employees. However, it would not prevent management from reducing the inspection component of the work of more rigorous inspectors, re-assigning their inspection work to other inspectors identified in the strategy, or otherwise dismissing, penalizing, disciplining, coercing, intimidating or harassing such employees.

The lack of protections for SFL-holder-employed inspectors is of particular concern given that SFL-holder management reviews and signs off on inspection reports before they are provided to the MNR.<sup>147</sup> Company management will therefore have detailed knowledge of what individual inspectors are reporting.

In the absence of any formal protections within the self-inspection system introduced in 1998, the only protection available to SFL-employed inspectors is that provided through Part VII of the Environmental Bill of Rights (EBR), enacted in 1993.



Part VII of the EBR allows any person to file a complaint with the Ontario Labour Relations Board that an employer has taken reprisals against an employee on a prohibited ground. Prohibited grounds include taking reprisal against an employee who has done or may do any of the following:

4. Comply with or seek the enforcement of a prescribed *Act, regulation or instrument*.
5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a *prescribed* policy, *Act*, regulation or instrument.
6. Give evidence in a proceeding under this Act or under a *prescribed Act* [emphasis added].<sup>148</sup>

No distinction is made, either in the EBR generally or in Part VII, between government and non-governmental employers.

Once an employee who believes that his or her employer has taken reprisals on a prohibited ground files a complaint with the Ontario Labour Relations Board, the board may assign a labour relations officer to inquire into the matter and report back to the board, or the board itself may inquire into the matter. Where the board undertakes the inquiry, the onus is on the employer to prove that he or she did not take reprisals on a prohibited ground. The board may then order the employer to reinstate the employee, cease the behaviour and/or order that compensation be paid to the employee. The decision of the board is enforceable as an order of the Ontario Superior Court of Justice, with the implication that a recalcitrant employer could be found in contempt for failure to comply.<sup>149</sup>

The CFSA is a prescribed statute for the purposes of Part VII of the EBR, and therefore SFL employees would enjoy the protections of the Act while carrying out their duties.<sup>150</sup> However, the use of these provisions of the EBR has been very limited, and there are concerns that the remedies provided by the provisions, such as reinstatement and/or back pay, may be viewed as weak in comparison to the potential consequences a whistleblower may suffer.<sup>151</sup> Moreover, the

provisions of Part VII of the EBR were drafted in contemplation of one-off whistleblower situations, not a situation in which primary compliance inspection responsibilities were being carried out by employees of the inspected entity on a routine basis. The provisions of the EBR are also weaker than the comparable provisions of the Environmental Protection Act. That legislation explicitly prohibits the taking of reprisals against whistleblowers, and establishes that such action constitutes an offence under the Act, as well as being subject to the same remedies available through the Ontario Labour Relations Board under the EBR.<sup>152</sup>

The need for stronger protections for licensee employees should be considered not only in terms of the inspection regime, but more generally in terms of the MNR's heavy reliance on SFL and other licensee-holder staff for forest management information.

## 5.2 Self-Inspection and the Canadian Charter of Rights and Freedoms

### 5.2.1 Self-incrimination

Under the self-inspection regime adopted in Ontario, the application of APs and the initiation of prosecutions by the Crown will depend heavily on inspection reports and source materials generated by SFL holders themselves rather than MNR inspectors and investigators. This situation raises the question of whether the use of reports and source materials for the purposes of law enforcement would constitute a form of self-incrimination by SFL holders.

A 1995 decision of the Supreme Court of Canada deals with many of the questions raised in this context. In *R. v. Fitzpatrick*,<sup>153</sup> La Forest J. wrote for a unanimous court, rejecting the appeal of the accused from conviction on charges of catching and retaining fish in excess of quotas, contrary to the British Columbia Fishery (General) Regulations made under the federal Fisheries Act. The accused had been acquitted by the trial judge. A conviction was substituted for the acquittal by the British Columbia Court of Appeal on the basis that the trial judge had im-

properly excluded a “hail report” and “fishing logs” (the records) from evidence, ruling that including these records in evidence violated Fitzpatrick’s rights under section 7 of the Canadian Charter of Rights and Freedoms.

The hail report and fishing log records are required, by the fishery regulations and s. 61 of the Fisheries Act, to be submitted by every fisher before and after landing a catch. The hail report is “called in” to the Department of Fisheries and Oceans (DFO) before landing in port; DFO officials then reduce this report to writing in a “groundfish hail report” that records estimated weight of each species reported caught. The daily fishing log is to include similar information and is submitted by the fisher in writing to DFO after landing. Together, these records assist DFO in setting and adjusting quotas and catch limits.



*Is self-incrimination self-incrimination?*

Failure to provide the records may result in a fine or, in the case of a second or subsequent offence, imprisonment. Fitzpatrick had a previous conviction and therefore faced possible imprisonment on this charge. (La Forest J. reiterates at para. 20, p. 137, the established Supreme Court of Canada dicta that the threat of imprisonment engages s. 7 of the Charter.) The status of the records pursuant to the Charter was the sole issue, as they constituted the sole evidence against the accused at trial.

In evaluating the Charter implications of the Fisheries Act reporting regime, La Forest J. rejects applying “a broad, abstract principle against self-incrimination as a principle of fundamental justice under s. 7, which would prevent the use of information in all contexts in which it is statutorily compelled,”<sup>154</sup> insisting

instead on “a concrete and contextual analysis of the circumstances raised before us, and the ways in which concerns about self-incrimination may or may not be legitimate” on the facts.<sup>155</sup> The following comparative analysis of *Fitzpatrick* and the Ontario forest regime takes the same approach.

### 5.2.1.1 Section 7 and Legal Rights under the Charter

In *Fitzpatrick*, the accused apparently sought to rely primarily on s. 7 of the Charter, but also cited s. 11(c) (“Any person charged with an offence has the right...[c] not to be compelled to be a witness in proceedings against that person in respect of the offence”) and s. 13 (“A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence”). The court’s analysis was undertaken primarily in the context of s. 7 which, as will be seen, disposed of the matter on the facts in *Fitzpatrick*, making detailed analysis of the implications of ss. 11(c) and 13 unnecessary.<sup>156</sup>

In *Thomson Newspapers v. Canada*,<sup>157</sup>...the five-judge bench of the Supreme Court of Canada...was unanimous that the “principles of fundamental justice” in s. 7 could still contain some “residual” elements of the right against self-incrimination. In other words, the scope of the right was to be discerned not from the relatively precise language of ss. 11(c) and 13, which explicitly deal with the right, but from the vague language of s. 7, which refers only to the principles of fundamental justice.

...In *Thomson Newspapers*, the five judges came up with no less than five different theories as to what additional content s. 7 added to ss. 11(c) and 13: a right to remain silent (Sopinka J.), a right not to give an incriminating answer (Lamer J.), a right to have all evidence derived from the compelled testimony excluded from subsequent proceedings (Wilson J.), a right to have only that derivative evidence that could not have been discovered apart from the compelled testimony excluded from subsequent proceedings (La Forest J.), no right additional to ss. 11(c) and 13 (L'Heureux-Dubé J.). The range of opinion is remarkable. Yet, each of the judges was confident that he or she was articulating a principle or tenet of the justice system that was so basic that, through s. 7, it should prevail over the inconsistent [law challenged in *Thomson*].<sup>158</sup>

A principle against self-incrimination exists as a principle of fundamental justice, but by no means should it be “absolute” or freestanding. The context of each case should be at the forefront of the analysis.

Throughout the judgment in *Fitzpatrick*, La Forest J. emphasizes that important regulatory objectives (state conservation and management of the fishery) are behind the scheme requiring production of the records. This requires caution in applying rules against self-incrimination to a regulatory regime into which a licensee has entered voluntarily and which is designed in the public interest in managing fish stocks. In fishery regime, the state and the regulated party are partners. By contrast, the criminal justice system (and potential self-incrimination therein) is of an adversarial or, at a minimum, an inquisitorial nature.

### 5.2.1.2 The Principle against Self-incrimination

La Forest J. quotes then Chief Justice Lamer in *R. v. Jones*, where the principle against self-incrimination was articulated in a way that has since become settled law:

Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.<sup>159</sup>

In the Ontario forest self-inspection regime, information provided by a forest licence-holder, like the records in *R. v. Fitzpatrick*, is likely

...not provided “in a proceeding in which the individual and the state are adversaries.” Instead, it [is] provided in response to a reasonable regulatory requirement relating to fishery [or other resource] management. Second, the “coercion” imposed on the appellant is at best indirect, for it arose only after he had made a conscious choice to participate in a regulated area, with its attendant obligations.<sup>160</sup>

As La Forest J. writes in *R. v. Fitzpatrick*, the records are not compiled primarily for use later against the fishers who submit them. Rather, “the purpose of the self-reporting obligation is to provide fisheries officials with up-to-date information necessary for the effective regulation of the fishery.”<sup>161</sup> The same can probably be said for reporting in the Ontario forest self-inspection regime (although the reporting may be less timely than the fishery scheme, this is probably not a material distinction). Rather than adversaries, the SFL holder and the MNR are working in partnership (1) to protect the forest as a valuable resource through conservation measures and (2) to fairly allocate forest values among those who seek access to them.<sup>162</sup>

In terms of whether coercion took place in the context of the regulated fishery scheme, La Forest J. found that the obligation to submit the records did not constitute “the denial of free and informed consent.” The terms and conditions of Fitzpatrick’s fishing licence, like forest resource licences in Ontario, included the obligation to provide the records

“in such manner and to such persons as the Fisheries Act and regulation may stipulate,”<sup>163</sup> with the implication that the licence would be suspended or cancelled for failure to comply. When a resource user is subject to a licensing system that includes a quota or limits on catches or cutting, exceeds those limits, writes La Forest J., “can it be said that it will be a matter of surprise to him that the Crown seeks to rely on his own hail report and fishing logs in order to prosecute him? Did he not realize in submitting this report and these logs that this might be one of their uses?”<sup>164</sup>

Here La Forest J. invokes the court’s “licensing argument,” which provides that those who engage in a regulated activity should be deemed to have accepted certain terms and conditions, including a commitment to maintain a minimum standard of care in the performance of that activity.

The licensing justification is based not only on the idea of a conscious choice being made to enter a regulated field but also on the concept of control. The concept is that those persons who enter a regulated field are in the best position to control the harm which may result, and that they should therefore be held responsible for it.<sup>165</sup>

The “control” aspect very clearly applies where licensees of the industry have assumed self-inspection functions.

La Forest J. viewed the facts in *Fitzpatrick* as “a paradigmatic example of a licensing scheme, in that the appellant literally cannot participate in the commercial fishery without a licence. In accepting his licence, he must accept the terms and conditions associated with it, which include the completion of hail reports and fishing logs, and the prosecution of those who overfish.”<sup>166</sup> To that extent, the potential prosecution of SFL holders on the basis of information submitted in the Ontario forestry self inspection system is almost perfectly analogous to *Fitzpatrick* and therefore would tend not to trigger the principle against self-incrimination.

There are two possible qualifications to the analogy. First, in the case of the Ontario forest self-inspection regime, the MNR may need to take on an investigatory role that requires the use of industry self-reporting to identify the site of possible violations. In *Fitzpatrick*, DFO appears to have relied entirely on fishers’ reports to lay charges; in other words, no “investigation” separate from the fishers’ self-reporting took place. In Ontario, the summary nature of information provided by licence holders through the Forest Operations Compliance Information System (FOCIS) may comprise insufficient evidence, in some cases, to make out a conviction. This scenario seems more likely for “offences” (s. 64, the CFSA) as contrasted with “administrative penalties” (s. 58), because offences will require more rigorous, criminal prosecution-style protections and standards of proof.

However, in this case as would have been the case in *Fitzpatrick* (leaving aside the impractical possibility of monitoring every day of fishing, or every forestry operation), the self-reporting scheme is the only significant way of detecting violations, particularly in remote areas, where the identification of problems by members of the public, or inspectors from other parts of the MNR or other ministries is improbable. Given the comments above about the features of the regulatory scheme, it seems unlikely that a court would distinguish *R. v. Fitzpatrick* on this basis.

The second possible qualification is that the Ontario forest regime is distinct from the fishery context because companies operating under SFLs are generally not competing for the same trees. Fish in a given zone, however, are a common resource and it is just as likely that one or another licensed fisher will catch them on a given day. There may be somewhat less motivation for SFL holders to report violations in an area where they have a monopoly.

### 5.2.1.3 Conclusion

La Forest J.’s concluding remarks in *R. v. Fitzpatrick* are useful in their potential application to the facts in the Ontario forest regime:

For all of the above reasons, I conclude that the principles of fundamental justice, and in particular the principle against self-incrimination, do not prevent the Crown from relying on fishing logs and a hail report at the appellant's trial for overfishing simply because these documents are statutorily required. It is not contrary to fundamental justice for an individual to be convicted of a regulatory offence on the basis of a record or return that he or she is required to submit as one of the terms and conditions of his or her participation in the regulatory sphere. In this context, the balance between societal and individual interests under s. 7 of the Charter suggests that the principle against self-incrimination should not be applied as rigidly as it might be in the context of a purely criminal offence. Its realization does not require the appellant to be provided with immunity against the use of statutorily compelled information. There is no need, then, to consider the issue of justification [i.e., reasonable limits on rights and freedoms that can be demonstrably justified in a free and democratic society] under s. 1 [of the Charter].<sup>167</sup>

The self-inspection arrangements appear, therefore, not to engage s. 7 Charter protections. This is largely a consequence of the regulatory (as opposed to criminal) nature of the current forestry compliance scheme, and of the licensing justification. The situation would, therefore, not likely be much different if only the MNR were performing the inspection functions. The fact that industry actors are performing this compliance function may increase the incentives for under reporting or failure to report violations. These incentives are further discussed below.

### 5.2.2 Self-Inspection and Unreasonable Search and Seizure

The issue of the role of the SFL and other large licence holders in conducting inspections on the operations of overlapping licence holders raises the question of whether such inspections might raise issues related to Charter s. 8 protections regarding unreasonable search and seizure. However, given that

licence-holder employed inspectors are not designated as MNR agents for purposes of the CFSA, and therefore have no powers of entry or inspection with respect to private lands or documents under the Act, the arrangement does not give rise to Charter s. 8 issues.

However, this fact suggests an additional weakness in the self-inspection system as the inspection powers of licence-holder-employed inspectors in relation to third parties are limited relative to those enjoyed by Ministry inspectors under the CFSA.

### 5.3 Capacity of SFL Holders to Undertake Inspection Functions

Many commentators on the use of alternative service delivery arrangements emphasize the importance of assessing the capacity of entities to carry out the governmental functions that to be transferred to them.<sup>168</sup>

In the case of the self-inspection system for the forestry sector, the MNR relied on the outcomes of seven pilot projects initiated in November 1996 to test, operationalize and amend compliance planning, inspection, monitoring and reporting systems.<sup>169</sup> The Ministry provided no public information on the outcomes of these pilot projects prior to the adoption of the self-inspection system on a province-wide basis in April 1998.

In addition, in the absence of training and certification requirements for SFL-employed inspectors, there is no means for the MNR to confirm the capacity of SFL employees identified as inspectors in SFL Compliance Strategies to undertake the functions assigned to them.

More generally, the MNR did not undertake assessments of the capability of individual SFL holders, beyond the experience gained through the seven pilot projects, to carry out primary compliance inspection responsibilities prior to the April 1998 transfer. Nor have any specific assessments been undertaken of the capacities of the holders of new SFLs granted since

then prior to the assignment of inspection responsibilities to them.<sup>170</sup>

Under Term and Condition 86 of the class environmental assessment decision, independent audits of Forest Management Units are required to be conducted every five years.<sup>171</sup> However, the protocol for the conduct of these audits provided by the MNR includes no specific requirements regarding the review of compliance plans or inspection capacity.<sup>172</sup>

As a result, the level of detail contained in forest audit reports with respect to inspection and compliance issues varies widely from no discussion at all<sup>173</sup> to detailed assessments of staffing and management infrastructure.<sup>174</sup> The transfer of compliance inspection responsibility was not conditional on the outcome of these reviews, although

audit findings are considered in determining SFL-holder compliance with licence terms and conditions for the purposes of renewal.

## 5.4 Conflicting Roles and Responsibilities of SFL Holders

The self-inspection regime adopted in 1998 may place SFL holders in conflicting roles in a number of different ways.

### 5.4.1 Links to Enforcement Regime

Perhaps the most obvious conflict inherent in the self-inspection regime is that SFL holders are required to identify instances of their own non-compliance with forest operations requirements. APs may be

applied<sup>175</sup> and, in some cases, investigations and even prosecutions may be initiated against SFL holders on the basis of the reports of non-compliance provided by SFL inspection reports. In addition, in the longer term, non-compliance with the terms and conditions of an SFL may threaten the five-year renewal of licences.<sup>176</sup> These considerations may provide incentives to SFL holders to minimize reported incidents of non-compliance and indications of their significance.



*Licence holders have strong incentives to minimize the reported instances of non-compliance. The culvert above was not buried 10% in the streambed as required by the guidelines.*

Incentives to minimize reports of non-compliance are particularly important in the context of the requirement that inspection reports prepared by SFL-employed inspectors are required to be “signed off” by company management prior to their delivery to the MNR.<sup>177</sup> In effect, this requirement provides management

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an opportunity to screen reports before they are provided to the Ministry. There are no provisions built into the system limiting the ability of management to request that reports be altered or modified before they are submitted to the MNR.

### 5.4.2 Implications of the SFL Relationship with Overlapping Licence Holders

Another potential area of conflict of interest relates to the role of SFL holders in conducting inspections of overlapping licensees. SFL holders have ultimate responsibility for the inspection program in the area covered by their licence<sup>178</sup> and may undertake inspections of overlapping licence holders themselves or assign this function to the overlapping licensee at their discretion.<sup>179</sup>

In some cases the relationships between larger SFL holders and overlapping licensees can be competitive and even conflictual in terms of access to and control of the supply of timber.

The assignment of responsibility for inspections of overlapping licensees to SFL holders offers SFL holders the opportunity to place overlapping SFL holders at a disadvantage by adopting a more intensive inspection regime, and by taking a more stringent approach to the identification of “non-compliance” relative to their own operations.

## 5.5 Summary and Conclusions

- The legal authority for the transfer of primary inspection responsibility to licence holders is uncertain. The amendments to SFLs to transfer responsibility to SFL holders may have exceeded the minister’s authority to amend SFLs under the CFSA. The legal basis for the agreements transferring primary inspection responsibilities to licence holders on Crown management units is also unclear. Although it may be possible to accommodate the transfer through a very broad reading of the terms and conditions of the class environmental assessment, such an arrangement was clearly not contemplated by the EAB in its decision.
  - There is no statutory or regulatory framework for the designation of SFL-employed inspectors other than nomination by SFL holders in their compliance plans. The MNR indicates that licensee-employed inspectors are not considered agents of the Ministry, and therefore have no inspection powers with respect to overlapping licensees except for what they are able to observe on public lands.
  - There are no provisions to protect SFL-employed inspectors from interference or reprisals by their employers for reporting non-compliance. The only protections available to SFL-employed inspectors in such circumstances are those provided by the general provisions of the EBR. These provisions provide relatively weak protections compared to those in other provincial statutes, such as the Environmental Protection Act, and did not contemplate situations in which employees would have primary inspection responsibilities with respect to their employer’s activities, as opposed to one-off whistleblower situations.
- The self-inspection system does not appear to raise major Charter issues.
    - The Supreme Court of Canada’s 1995 *R. v. Fitzpatrick* decision indicates that licence-holder-generated information and reports, such as those produced under the Ontario forestry self-inspection system, can be used for enforcement purposes by regulatory agencies.
    - Given that SFL holders are not MNR agents for purposes of the CFSA, and therefore have no powers of entry or inspection with respect to private lands or documents, the self-inspection system does not give rise to Charter s. 8 (unreasonable search and seizure) issues. However, this fact suggests a serious weakness in the arrangements whereby competing actors have both a potential conflict of interest in inspecting one another’s operations, and where the powers of inspectors are limited compared to those traditionally enjoyed by Ministry inspectors.
  - The MNR did not undertake assessments of the capacity of individual SFL holders to take on inspection responsibilities prior to the 1998 transfer, beyond the conduct of seven pilot studies. No mandatory training and certification requirements have been established for SFL-employed inspectors through which the Ministry might confirm their qualifications to carry out inspections.

- Some subsequent assessments of this SFL capacity have occurred, through the five-year independent forest audit process mandated through the class environmental assessment, although the level of attention given to inspection capacity issues in these audits varies widely. There are no requirements for review of inspection capacity or performance in the current MNR protocol for the conduct of these audits.



*There are no mandatory training requirements for industry employed inspectors.*

- The self-inspection regime raises significant issues of conflict of interest. SFL holders have strong incentives to minimize the instances of non-compliance reported to the MNR through the

system, as such reports may make them liable for administrative penalties or prosecutions under the CFSA, and may even threaten the renewal of their forest licences. The absence of protections for SFL-employed inspectors is particularly problematic in this context. There may also be economic conflicts in situations where SFL holders have inspection and compli-

ance responsibilities for overlapping licence holders.

- The bias or appearance of bias that may arise from the conflicts of interest inherent within the system may also cast doubt on the credibility of SFL-employed inspectors and the reliability of the information they provide.



# 6 Accountability

## 6.1 The Ministry of Natural Resources Capacity to Oversee Industry Performance

### 6.1.1 Overall Reductions in the MNR's Budget

The transfer of primary compliance inspection responsibilities to the forest industry in 1998 occurred within the context of, and was in fact driven by, major reductions in the Ontario Ministry of Natural Resources' (MNR) operating budget and staff. As illustrated in **Table 9**, the Ministry's budget had undergone reductions during the New Democratic Party government in the 1990 to 1995 period, but was then subject to the dramatic fiscal constraints adopted by the new Progressive Conservative government in the fall of 1995 and April 1996.

**Table 9: MNR Operating Budget, 1991/92 to 2002/03<sup>180</sup>**

Year	Total Operating Budget (Current \$ Millions)
1991/92	568.6
1992/93	458.3
1993/94	528.8
1994/95	497.6
1995/96	486.9
1996/97	317.4
1997/98	331.6
1998/99	329.6
1999/00	312.5
2000/01	314.5
2001/01	340.8
2002/03	333.5

As a result, the Ministry's overall operating budget has fallen from nearly \$570 million in the early 1990s to \$497.6 in 1994/95, to a low of \$312.5 in 1999/00 and has recovered slightly since then.

These budgetary reductions have resulted in significant overall losses in personnel, particularly since 1995, with total staff falling by 48% between 1995 and 2002, as illustrated in **Table 10**.

**Table 10: MNR Total Staff, 1995 to 2002**

Date	Personnel
March 31, 1995 <sup>181</sup>	6,639
March 31, 1998 <sup>182</sup>	4,643
Fiscal 2001/02 <sup>183</sup>	3,425

The Ministry's Field Service Division, which includes direct oversight of forestry, fish and wildlife, and land and water management has undergone major staff reductions since 1994/95 as part of the overall reductions in size of the Ministry's complement. As of March 31, 1995, total staff in the division was 5,156,<sup>184</sup> of which 4,427 were engaged in regional field operations. By March 31, 1998, this figure was down to a total of 2,498, of which 2,275 were engaged in regional field operations, a reduction, consistent with the overall decline in staffing levels at the Ministry, of nearly 50%.<sup>185</sup> Total staffing figures for field operations are not available for the 2002/03 year, but the total figure provided for staff engaged in natural resource management, including regional field operations, in the Ministry's 2001/02 business plan is 2,545. However this figure includes forestry, fish and wildlife, and land and water management policy and administrative staff in addition to field staff.

### 6.1.2 Reductions in the MNR's Forest Management Budget

The reductions in the overall budget of the Ministry have had a major impact on the resources available for forest management activities. Changes in accounting practices by the Ministry make it difficult to compare the period between 1997/98 and the

present with the situation between 1991/92 to 1995/96, as there were no specific line items in estimates and public accounts for forest management during those years. However, the annual total operating budget, and allocations salaries and wages related to forest management are presented in **Table 11**.

This table shows a reduction of nearly 70% in total spending since 1990/91 and a reduction of approximately 50% in expenditures on salaries and wages over the same period.

**Table 11: MNR Forest Management Operations Budget, 1990/91 to 2002/03<sup>186</sup>**

Year	Salaries and Wages (Current \$ Millions)	Total (Current \$ Millions)
1990/91	61.1	196.6
1994/95	n/a	152.3 <sup>187</sup>
1995/96	n/a	75.3 <sup>188</sup>
1996/97	34.7	64.0
1997/98	30.0	75.4
1998/99	35.9	87.9
1999/00	38.3	68.8
2000/01	39.3	62.9
2001/02	43.7	60.7
2002/03	33.1	60.5

Although specific figures on the total number of field staff dedicated to forest management activities are not available from the Ministry, forestry staff typically accounted for 37.5% of total operational field staff in the mid-1990s,<sup>189</sup> and their number can be expected to have fallen in proportion to the overall 49% reduction in field staff seen within the Ministry since 1995.<sup>190</sup>

More specific figures are available for policy and information management related staff at the Ministry's Forest Management Branch. The number of staff in these positions fell from 170 as of March 31, 1998,<sup>191</sup> to 116 as of March 31, 2001.<sup>192</sup>

With respect to inspection and compliance, the number of MNR staff engaged in forestry inspection-

related activities fell from 139 full-time equivalents (FTEs) as of March 1998 to 45.5 FTEs today.<sup>193</sup> This amounts to 0.67 FTEs per management unit, or one MNR inspector per 550,000 hectares of Crown forest under licence.

The Forest Information Manual (FIM) imposes significant obligations on the MNR once Sustainable Forest Licence (SFL) holders file inspection reports. The manual commits the MNR to check the data provided for completeness and accuracy, including:

- The fulfillment of minimum and mandatory data requirements;
- Data format;
- The provision of comments sufficient to determine significance of each instance of non-compliance;
- The accordance of the information received with the company compliance plan and prescribed timelines;
- The completeness of references and traceability of source data; and
- In some cases, verification of ground observations and information related to those observations.<sup>194</sup>

The Ministry is required to carry out these checks and confirm with the SFL holder that the information provided is complete and accurate in the same amount of time as the SFL holder is permitted to file reports of compliance or non-compliance (i.e., 10 days in case of compliance, 5 days in case of non-compliance).<sup>195</sup>

A 1999 review of the compliance system conducted by the MNR indicated that the Ministry was having difficulty responding to SFL-holder reports of non-compliance within these prescribed timelines<sup>196</sup> and, more generally, meeting its commitments to develop district compliance plans.<sup>197</sup>

More broadly, the Environmental Commissioner of Ontario has highlighted the problems faced by MNR staff in assessing the significance of damage arising from instances of non-compliance without detailed field knowledge of pre-existing local conditions

against which to assess the impact of specific activities. Given that the bulk of MNR inspectors' time is now spent following up reports of non-compliance rather than more general inspection activities, it is unlikely that they would have the opportunity to establish such a knowledge base.<sup>198</sup>

Furthermore, given the pressures on MNR inspectors to respond to reports of non-compliance, the time that they will have available to undertake more general inspection activities of forestry operations is very limited. This makes the timely detection of non-licence holder-reported non-compliance much less likely. The environmental commissioner has noted that this has been a particularly significant problem given the limitation periods for the initiation of prosecutions under the Public Lands Act (six months) and the Crown Forest Sustainability Act (two years). In fact, in one case that was raised through the Environmental Bill of Rights (EBR) request for investigation process, the limitation period for certain contraventions that were subsequently confirmed by the MNR had expired by the time the Ministry conducted an investigation.<sup>199</sup> The Public Lands Act was subsequently amended to extend the limitation period on the initiation of prosecutions under the Act to two years.<sup>200</sup>

More generally, the MNR's difficulties in meeting the terms and conditions of the class environmental assessment, such as the delivery of annual reports on forest management, due to resource limitations have been consistently noted by the environmental commissioner<sup>201</sup> and Provincial Auditor.<sup>202</sup> The Ministry's lack of adequate resources was also a major factor in its slow delivery of the Forest Management Planning Manual and the Forest Information Manual (FIM) under the Crown Forest Sustainability Act (CFSA), as highlighted through successful litigation brought against the Ministry by a number of environmental groups in 1998.<sup>203</sup>

### 6.1.3 Information Access by the MNR

The Minister of Natural Resources is required to gather information with respect to planning and

compliance with the CFSA in accordance with the provisions of the FIM, issued in 2001. The minister has no general powers under the Act to gather information beyond what is prescribed by the manual. Part D of the manual includes detailed provisions related to the self-inspection system adopted in 1998.

Inspection reports are to be provided by SFL holders to the MNR, either in a specified digital format or directly to the Ministry's Forest Operations Compliance Information System (FOCIS).<sup>204</sup> The FIM indicates that the source materials upon which these reports are based, such as the original notes of the inspector, are not considered to be information "products" for the purposes of the manual.<sup>205</sup> Consequently, SFL holders are not normally required to provide access to or copies of the source materials. Access to these materials is central to the Ministry's ability to oversee and verify the accuracy of reports provided by SFL holders. The source materials would also likely constitute critical evidence in the event of a prosecution arising from a report of non-compliance filed by an SFL holder.

However, the FIM states that, given reasonable notice, Forest Resource Licence (FRL) holders<sup>206</sup> must grant access to source data, records and information upon request by the MNR,<sup>207</sup> although the manual also indicates that the MNR will consult with SFL holders to obtain such data and determine confidentiality, sensitivity or intellectual property rights.<sup>208</sup> Forest operations inspection reports and source data, records and information are required to be archived on retrievable computer media by both SFL holders and the Ministry.<sup>209</sup>

Despite these provisions, the delays inherent in the self-inspection system, even with the 24-hour reporting requirement for serious violations, may present significant challenges to the MNR in pursuing enforcement actions. It is possible, in following up on licensee reports of non-compliance, for the Ministry to find physical evidence of violations in relation to such things as water crossings, road construction, and operations inside the borders of areas of concern,

some time after the completion of operations. However, certain types of violations can only be detected and confirmed by direct and immediate observation. This is particularly true, for example, with respect to forest fire prevention practices, where such things as the number of trained personnel and fire suppression equipment/extinguishers on-site, the condition and operation of equipment, or fuel-handling practices at any given location or date, can only be confirmed through direct and immediate observation.

#### 6.1.4 Penalties and Enforcement Mechanisms

In theory, a range of enforcement mechanisms is available to the Ministry with respect to the self-inspection system. The inspection obligations are established as a term and condition of SFLs. The penalties under the CFSA for failure to comply with terms and conditions of a licence include an Administrative Penalty (AP) of up to \$15,000 or five times the value of the harvested resource in contravention of the licence,<sup>210</sup> or conviction for offence with a fine of up to \$100,000.<sup>211</sup> In addition, the Ministry could issue a compliance order if an SFL holder is not in compliance with the terms and conditions of its licence.<sup>212</sup> More broadly, failure to comply with the terms and conditions of an SFL can be grounds for non-renewal.<sup>213</sup>

With respect to the provision of information, the penalties under the CFSA for failure to provide information as required under the Act or regulations include APs of up to \$2,000<sup>214</sup> or, on conviction for an offence, a fine of up to \$10,000.<sup>215</sup> An AP of up to \$5,000 may be applied for failure to keep prescribed records, or for interference with the inspection of records.<sup>216</sup> The penalties for making false statements with respect to any matter under the Act or regulations include a conviction for an offence with a fine of up to \$10,000.<sup>217</sup>

These penalties are very modest relative to other environmental statutes with respect to information issues. The federal Canadian Environmental Protection Act, 1999, for example, provides for penalties of up to \$1 million and imprisonment for up to three

years for the provision of false or misleading information under the Act.<sup>218</sup> Similarly, the Ontario Environmental Protection Act provides for penalties up to \$500,000 per day or per occurrence<sup>219</sup> for corporations and up to \$100,000<sup>220</sup> per day or per occurrence as well as imprisonment for individuals for the provision of false or misleading information under that Act.<sup>221</sup>

The relative weakness of the penalty structure under the CFSA is particularly noteworthy given the MNR's heavy reliance on SFL-generated data for compliance purposes and more general forest management purposes. The extent of this dependence, in the context of the 1995 and 1996 budget cuts, may not have been fully anticipated when the CFSA was drafted.

It is also important to note that there is no general obligation on the part of SFL holders to report all known or potential violations established through the CFSA, SFLs, regulations or the FIM. This is in contrast to other environmental legislation in the province, such as the Environmental Protection Act, which includes a number of provisions requiring that potential violations of the Act or regulations or approvals made under it, be reported immediately to the Ministry of the Environment.<sup>222</sup>

#### 6.1.5 MNR Capacity to Withdraw the Transfer of Inspection Responsibilities

Many observers of alternative service delivery arrangements have highlighted the importance of the delegating agency having a fallback or alternative plan if the delegated entity is unable to carry out the functions delegated to it.<sup>223</sup> In the case of the forestry sector in Ontario, this would imply that the MNR have a plan to resume primary compliance inspection responsibilities in the event that an SFL holder was unable to carry out these functions.

However, the resumption of inspection functions by the MNR does not appear to be contemplated by the Ministry, even as a response to consistently poor SFL-holder performance. There is no mention, for exam-

ple, of the possibility of the re-establishment of MNR inspection activities in any of the SFL amendments, policies, guidelines or other documents related to the self-inspection initiative.

In legal terms, the withdrawal of the transfer of inspection responsibilities could be achieved through further amendments to an SFL holder's licence.<sup>224</sup>

The key problems with re-establishing an MNR inspection presence may be more practical. With the increasing prevalence of SFLs, and the transfer of primary inspection responsibilities in most of the remaining Crown management units to major licence holders, the Ministry now only maintains primary inspection capacity in one of the province's 68 Forest Management Units.<sup>225</sup> This implies that the capacity to resume primary inspection functions in other management units may not be available, regardless of licensee performance. The near total withdrawal of the MNR from primary inspection responsibilities will also remove the ability to benchmark the performance of licensee-employed inspectors against that of MNR staff in the conduct of primary compliance inspections.

In the absence of the credible possibility that the MNR would re-establish its inspection functions, the incentives to licence holders to carry out effective inspection programs may be limited.

## 6.2 Oversight by Legislative Officers

One of the major issues that can arise through alternative service delivery arrangements is the possibility that service delivery responsibilities will be transferred to non-governmental actors over whose activities legislative officers, such as the Provincial Auditor, Information and Privacy Commissioner and Provincial Auditor, have no jurisdiction to review and report to legislature and the public.

### 6.2.1 The Provincial Auditor

The provincial auditor is an officer of the Legislative Assembly, mandated to audit agencies of the Crown

with respect to their stewardship of public funds and the achievement of value for money in government operations.<sup>226</sup> As demonstrated by his 2000 audit of the MNR's forest management program, the Provincial Auditor can review the MNR's own inspection activities and its oversight of SFL-conducted inspections.<sup>227</sup> However, as SFL holders are not agencies of the Crown as defined by the Audit Act,<sup>228</sup> the Provincial Auditor would probably have no jurisdiction to review their inspection activities directly.

With respect to access to information, the Audit Act provides the provincial auditor with access to all records, reports and files belonging to or in use by the MNR.<sup>229</sup> This would the Auditor with a right of access to SFL-generated inspection reports filed with the Ministry and source materials provided to the Ministry by SFL holders at the Ministry's request. However, the Provincial Auditor would likely have no right of access to source materials that are not requested by and in the possession of the Ministry, as he or she has no right of access to the records of private entities.

### 6.2.2 The Ombudsman

The Ombudsman is an officer of the Legislature, whose position is established through the Ombudsman Act. The Ombudsman's mandate is to investigate complaints made by Ontario residents against provincial government organizations. Where the Ombudsman identifies problems with government actions or decisions, he or she can make recommendations to the government to address these problems. If these recommendations are not acted upon, the Ombudsman can report the case to the Legislature.<sup>230</sup>

The Ombudsman's jurisdiction is limited to decisions made by "governmental organizations."<sup>231</sup> The Ombudsman could investigate a complaint with respect to the MNR's conduct of its inspection activities. However, the Ombudsman would have no direct jurisdiction to investigate if, for example, an overlapping licensee were to file a complaint with respect to an SFL holder's conduct of inspections on an overlapping licensee's operations.<sup>232</sup>

### 6.2.3 The Information and Privacy Commissioner

The Information and Privacy Commissioner is also a legislative officer. In addition to his or her role in the disposition of appeals by members of the public of decisions regarding access to information by institutions covered by the Freedom of Information and Protection of Privacy Act, the commissioner also provides a more general oversight role on public access to information and the protection of privacy. This includes the submission of annual reports to the Legislative Assembly on the effectiveness of the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act. These reports also provide information on the compliance of specific institutions with the Acts and commissioner's recommendations<sup>233</sup> and more general commentary on systemic monitoring and reform.<sup>234</sup> The scope of this oversight may be reduced in relation to forest management activities as more and more information on forest management is generated and held by licence holders rather than the MNR.

## 6.3 Oversight by the Public

### 6.3.1 The CFSA and the Environmental Bill of Rights

In contrast to the Forest Management Agreements under the former Crown Timber Act,<sup>235</sup> SFLs and other forms of licences issued under the CFSA are not required to be made available to the public. This means that members of the public do not have an automatic right of access to individual SFLs, including those provisions dealing with compliance.

The Environmental Bill of Rights (EBR), enacted in 1993, provides members of the public with a right to public notice and an opportunity to comment on proposed legislation, as well as regulations, policies and instruments (e.g., specific licences and approvals) under specified legislation, before they are adopted by the provincial government.<sup>236</sup>

The CFSA is a prescribed statute for the purposes of Part II of the EBR. However, under the Act, ministries are required to issue a regulation "classifying" their instruments for the purposes of the Act, before the Act's notice and comment provisions are applicable to such instruments. The MNR did not issue an instrument classification regulation under the EBR until June 2001, meaning that prior to that date no instruments, such as SFLs and other forms of licences, were subject to public notice and comment under the EBR.

Furthermore, none of the major licences and other instruments under the CFSA were classified as instruments for the purposes of the EBR by the Ministry.<sup>237</sup> As a result, there remains no right of public notice and comment under the EBR on the issuance of SFLs and other licences, the amendment of such licences for such purposes as the establishment of self-inspection requirements, the approval of five-year Forest Management Plans and Annual Work Schedules, or the compliance strategies and plans contained within them. Nor were the new compliance and inspection policies used to train MNR and industry staff on the new compliance system posted on the EBR registry.<sup>238</sup>

The Ministry has followed a practice of voluntarily posting draft five-year Forest Management Plans on the EBR registry as information notices, inviting members of the public to participate in the development of the plans.<sup>239</sup> However, on the whole, the Ministry's approach has circumvented the main instrument for public accountability for governmental decisions affecting the environment, namely the EBR, in the case of the transfer of forest inspection functions to forest licence holders.<sup>240</sup>

### 6.3.2 Public Participation in Forest Management Planning under the CFSA

The MNR's Forest Management Planning Manual for Ontario's Crown Forests, issued by the MNR in 1996, includes provisions related to public participation in the development of five-year Forest Manage-

ment Plans.<sup>241</sup> These include provisions for the establishment of local citizens committees (LCCs) to assist plan authors (the MNR or licence holders) in the preparation of the plan and formal public consultation including public notices, information meetings, opportunities to review draft plans, and provisions public access to approved plans.<sup>242</sup> However, the manual includes no provisions regarding public consultation in relation to Annual Work Schedules, or amendments to Forest Management Plans.



*Self-inspection has reduced public rights of access to information about forest industry compliance with forestry rules.*

### 6.3.3 Public Access to Information under the Freedom of Information and Protection of Privacy Act

The Freedom of Information and Protection of Privacy Act (FIPPA) gives every person a right of access to a record (or a part of a record) in the custody or under the control of a government institution (which for present purposes includes the MNR) unless the record falls under one of the exemptions listed in the Act, or the head of the institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.<sup>243</sup> It is important to note that the underlying purpose of the Act is not to make individual documents available to individual members of the public who request them, but rather to promote government accountability by making such information accessible.<sup>244</sup>

There is no express statement in the CFSA about its relationship to the FIPPA. Rather, the CFSA states that:

The Minister may deal with any information obtained under this section as if the Minister had created the information.<sup>245</sup>

Therefore, both the CFSA and the FIPPA apply to information gathered by the Ministry for the purposes of the CFSA. Absent an express statement in the CFSA either limiting or eliminating the effect of the FIPPA, any conflict between the FIPPA and the FIM would be resolved in favour of the FIPPA.

Consistent with this interpretation, the FIM defers to the FIPPA in terms of how information gathered under the auspices of the manual may be given to the public.<sup>246</sup> Information gathered under the authority of s. 21(2) of the CFSA is to be treated as if the minister had created the information; such information would clearly meet the FIPPA criterion of being under the custody or control of the Ministry.

#### *Information in the “Custody or Control of the Ministry”*

A threshold test with respect to public access to information generated through the SFL self-inspection system is whether inspection reports and source materials are in the “custody or control of the Ministry.” As inspection reports are required to be provided by SFL holders to the Ministry either through the FOCIS or in other digital formats specified by the Ministry, there seems little doubt that they would be considered to be in the Ministry’s “custody or control” once filed by SFL holders.

The situation with respect to the source materials upon which these reports are based, however, is more complex. Inspection report source materials generated by MNR inspectors either prior to the 1998 transfer, or in relation to inspections which they themselves conduct on Crown or SFL forests would clearly be in the “custody or control” of the Ministry

and therefore valid objects of a freedom of information request by a member of the public.

However, the FIM indicates that the Ministry will not routinely require the provision of source data, records and information by SFL holders,<sup>247</sup> but, rather, will require access to this material on a case-by-case basis. Where the Ministry requires that an SFL holder provide source materials to it, such materials would come under the “custody or control” of the Ministry, and therefore be valid objects of a freedom of information request. However, where these source materials are not requested by the Ministry, as the FIM indicates would normally be the case, then they may not be considered to be in the “custody or control” of the Ministry, and therefore no public right of access may exist.<sup>248</sup> This would be a significant change from the pre-1998 transfer situation, where members of the public would have been able to request access to both inspection reports and source materials.

#### *FIM provisions regarding Access to Source Data, Records and Information*

The FIM includes provisions related to both MNR and public requests for source data, records and information. Determinations of such access requests are to be made by the MNR district manager, subject to appeal to the MNR Regional Director.<sup>249</sup> Factors to be considered in decision-making by the Ministry in this regard include:

- The relevance of the information for the purposes of forest management planning or ensuring compliance with the CFSA;
- The sensitivity of the information requested;
- Implications and provisions of the FIPPA;
- Copyright implications;
- The potential uses of the requested information;
- The costs of producing the information;
- The degree of access needed to meet the information request;

- Any fees applicable to creating or making the information available;
- The Ministry’s resolution of similar cases in the past; and
- Other factors or unique circumstances relating to the request.<sup>250</sup>

This administrative process might be used to deal with a public request for access to inspection source data, although to date it has never been invoked.<sup>251</sup> In any case, the process is ultimately subordinate to the rules established by the FIPPA, provided that a formal request for information is made in accordance with the FIPPA.

#### *Exemptions to the Public Right of Access to Information under the Freedom of Information Act*

Exemptions to the general public right of access to information are contained in ss. 12 to 22 of the FIPPA. The exemptions that might relate to source materials and inspection reports, whether generated by a licensee or by the MNR, include those related to law enforcement and confidential information.

#### *Section 14 – Law Enforcement*

Section 14 of the FIPPA deals with exemptions to the general right of public access to information on the basis that such access might interfere with law enforcement activities. The provisions of the section read as follows:

14. (1) A head [of an institution; in this case the designated head is the minister of Natural Resources<sup>252</sup>] may refuse to disclose a record where the disclosure could reasonably be expected to,
- (a) interfere with a law enforcement matter;
  - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;



- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;...

(2) A head may refuse to disclose a record,

- (d) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;...

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

The operation of paragraphs 14(1)(a), (b) or (c) would not likely be different whether forest resource licensees or the MNR generated a record. Moreover, these provisions are only engaged where an offence is actually being investigated.

### “Agency”

As to subsection 14(2), what constitutes an “agency” for the purposes of the FIPPA? The Ontario Information and Privacy Commissioner (IPC) has ruled that the Ministry of Finance, in the context of its inspection functions under the Loan and Trusts Corporations Act,<sup>253</sup> was an “agency” under s. 14(2)(a) of the FIPPA.<sup>254</sup> The MNR is therefore an agency in terms of the FIPPA, in the context of Crown forests.

Is a forest resource licensee an “agency” for the purposes of the FIPPA? In the same IPC Order, the auditing firm KPMG was formally retained by the Ministry of Finance to work on its behalf.

...[T]he Ministry indicates that KPMG was carrying out an inspection of [a] Corporation pursuant to section 183 of the LTCA on behalf of the Ministry. This section of the LTCA is part of the policing, inspection, and investigation authority of the Ministry. The Ministry further

indicates that KPMG was authorized by the Director under section 185 of the LTCA to carry out an examination of the Corporation, under the supervision and direction of the Ministry.

In my opinion, given the provisions of section 183 and 185 of the LTCA, the fact that certain records were prepared by an outside consultant, (KPMG), does not affect the application of section 14(2)(a) in the circumstances of this appeal. *These reports were prepared with the authority of the Ministry* which, as a result of its statutory powers and sanctions, was in a position to insist upon the full cooperation of the management of the Corporation in the process. Accordingly, I find that Records 99, 101, 102, 103, 105, and 109 were prepared by an agency which has the function of enforcing and regulating compliance with a law.<sup>255</sup>

This reasoning suggests that for the purposes of the FIPPA, the word “agency” also includes an outside party that is duly authorized to carry out inspection and/or enforcement activities. A forest resource licence (FRL) holder carrying out inspections would fit this description.

### “Report”

In order to be exempted from disclosure under s. 14(2)(a), the record must be a “report.” The Information and Privacy Commissioner has concluded that “mere observations or recordings of fact” are insufficient to qualify as a report.”<sup>256</sup> For example, “police occurrence reports did not qualify as “reports” for the purpose of [the Municipal Freedom of Information and Protection of Privacy Act<sup>257</sup>] equivalent to section 14(2)(a), as *they consisted primarily and essentially of descriptive material, and notwithstanding that they contained a few comments which might be considered evaluative in nature.*”<sup>258</sup>

In another case, “area inspection reports” compiled by the MNR to monitor compliance with work orders issued under the Public Lands Act in relation to the construction of a hydroelectric dam, including

photographs and a map, did not qualify as “reports” for the purpose of the s. 14(2)(a) exemption.<sup>259</sup>

By analogy, it is difficult to imagine source materials collected for the purpose of compliance with the CFSA (and collected in order to file inspection reports) as more than “descriptive material”; it is unlikely they would have any evaluative content whatsoever. Neither source materials nor inspection reports generated by FRL-holders would therefore trigger a discretionary refusal to disclose records under s. 14(2)(a).

#### *Section 14(4)*

The mandatory disclosure provided in s. 14(4) had its origin in a provincial commission report that held “it would be inappropriate to withhold routinely from public scrutiny all material relating to routine inspections and other similar enforcement mechanisms in such areas as...environmental protection [among others].”<sup>260</sup>

The Ontario IPC decisions considering s. 14(4) indicate that inspections conducted by SFL holders are “routine” in nature: they are required to be made on a routine basis and are generally distinguished from “complaint-driven” inspections or higher level inspections undertaken in the context of suspicion of offences having been committed (i.e., investigations). “The existence of a discretion to inspect or not to inspect is an important factor in deciding whether an inspection is “routine”:<sup>261</sup> generally, if there is no discretion, the record should be disclosed.

While no compliance plans were available for consideration as part of the current project, inspections conducted by licence holders are likely to be conducted on a regular basis, under the terms of the licence and compliance plan.

The MNR would therefore be compelled equally to release inspection reports generated by either SFL-holder-employed inspectors or by MNR inspectors, provided they were routine in nature.

#### *Section 17 (1) – Confidential Information*

The other exemption to the general right of public access to information that might be applicable to the Ontario forest regime is in s. 17(1) of the FIPPA. This mandatory exemption requires the head of an institution to

...refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

There is an exception to the exemption laid out in s. 17(1), where the person to whom the information relates consents to the disclosure.<sup>262</sup> The FIM indicates that the MNR will normally treat source materials that it requests from SFL holders as confidential information for the purposes of public access to this information.<sup>263</sup>

In order to support an exemption from disclosure under this section, institutions or affected parties must establish each part of the following three-part test:

1. The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. The information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in section 17(1) will occur.<sup>264</sup>

The first part of the test would appear not to apply either to source records or inspection reports submitted under the forest regime. Such information would be descriptive in nature and would primarily indicate instances of non-compliance, not reveal trade secrets or business information.

As to the second and third parts of the test, “section 17(1)(b) was not intended to protect information which is provided pursuant to a statutory obligation.”<sup>265</sup> Furthermore, the nature of the information provided in order to meet FRL inspection obligations does not suggest the need for confidentiality, as it deals with the rather straightforward question of whether forestry operations are in compliance with the law.

In the case of both the first and second parts of the test, it seems likely that forestry source records or inspection reports not subject to an s. 14 exemption will not be of such character that their disclosure will result in harm or prejudice to the licence holder or any other person. At the very least, any portions of such records whose disclosure might conceivably cause prejudice could be severed from those revealing non-compliance.

The third part of the test requires that there be a reasonable expectation that harm or prejudice will result from disclosure of the information in question. Parties resisting disclosure must demonstrate such harm on the balance of probabilities. Consistent with

the above remarks concerning the first two parts of the test, it is difficult to imagine how the disclosure of notes, photographs, maps, etc., or the “check-list”-type inspection reports to which they give rise would cause harm to a licensee. Moreover, as all parts of the test are required to be met, even if the third part is met in order for s. 17(1) to apply, it is unlikely that the first and second parts can be met.

In any case, inspection reports as required by the CFSA and the Forest Compliance Handbook, and as described by the FIM, should be subject to disclosure. The FIM is generally consistent with this conclusion.

### 6.3.4 FIM Provisions regarding Public Access to Information

The FIM includes a number of general provisions related to public access to information.

The manual states that the public will normally be provided with access to all information and information products prescribed by the FIM, unless otherwise determined by the minister in consideration of sensitive information about resource features and values, or the FIPPA. The manual also states that the minister may determine conditions by which access is provided, and may prescribe fees for providing information products. Finally, the FIM states that the minister may determine how information or information products prescribed by the manual may be used by third parties, and that the minister may enter into agreements or arrangements with third parties and specify the conditions by which third parties may use the information provided to them.<sup>266</sup>

A number of these provisions appear to be inconsistent with the provisions of the FIPPA. The FIPPA, which, as noted earlier, would prevail over the FIM in the event of a conflict, includes no provisions that would allow denial of access to a record on the basis of it containing sensitive information about resource features or values, or more generally for public interest purposes.<sup>267</sup> Nor does the Act permit the imposition of conditions on access to records, fees

beyond the normal search fees prescribed by the Act, or the imposition of limitations on how records to which access is provided can be used by third parties, provided that information is requested under the Act.

In part, these provisions seem to arise from a lack of clarity in the FIM regarding the relationship between copyright and access to information statutes. The Ontario Information and Privacy Commission has made the following observations regarding the relationship between access to information and copyright legislation:

I think that it is important to note that providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Specifically, sections 27(2)(I) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.<sup>268</sup> Thus, even if the information in the report may be subject to copyright, **disclosure** of it pursuant to the Act is not an infringement of copyright.<sup>269</sup>

### 6.3.5 Conclusion

The foregoing analysis indicates that the public would have a right of access under the FIPPA to inspection reports and source materials provided to the MNR by SFL holders, subject to the s. 14 and s. 17 exemptions as might be applicable. However, the public likely does not have a right of access to source materials except when these materials are requested

from an SFL holder by the MNR. The FIM indicates that this will not normally be the case. This constitutes a significant loss of public access to information

relative to the situation that existed prior to the transfer of primary inspection responsibilities to SFL holders in 1998. In addition, as the Ministry does not collect source materials as a matter of routine, the public would have neither a means of knowing what information is held by the Ministry, nor therefore what information would be a valid object of a freedom of information request.

More generally, the FIM attempts to impose a number of restrictions on access and use of information gathered under its auspices that are inconsistent with the provisions of the FIPPA. The FIM cannot, however, trump the FIPPA, provided that information is requested using the formal process established by the FIPPA.

## 6.4 Implications for Crown Liability

### 6.4.1 Direct and Vicarious Liability

Depending on the circumstances, a licence holder, its employees and/or the Crown could be liable for the act or omission (including negligence) of any or all of them. To give a very simple example, a company forest worker and a company inspector who leave or fail to detect a tree limb that later falls and harms a member of the public who is legally in the Crown forest might be directly liable in negligence. If their employer instructed the forest worker to leave the limb intact, not only the worker but also the employer may be liable either in negligence or on the basis of an intentional<sup>270</sup> tort.



*Is MNR liable for the work of company inspectors?*

The doctrine of vicarious liability arose a common law as a way of assigning responsibility to a master (employer) for the acts or omissions of its servants (employees), on the basis that the master should bear the risks generated by the conduct of the master's business.<sup>271</sup> The common law doctrine has found its way into the Crown liability legislation of various jurisdictions, which impose liability on the Crown in respect of torts committed by its servants or agents. The relevant provisions of Ontario's Proceedings Against the Crown Act<sup>272</sup> include the following:

Liability in tort

5. (1) Except as otherwise provided in this Act, and despite section 11 of the *Interpretation Act*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

- (a) in respect of a tort committed by any of its servants or agents;
- (b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
- (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
- (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

“‘Servant’, when used in relation to the Crown, includes a minister of the Crown”<sup>273</sup> for the purposes of the Proceedings Against the Crown Act; otherwise, the servant must have been “appointed by” or “employed by” the Crown.<sup>274</sup> It is unlikely that either situation applies to an SFL holder; the licensee performs duties as a condition of the licence (i.e., not by “appointment” or as an employee). Moreover, the MNR does not view SFL holders as agents.<sup>275</sup> While it is conceivable that a court might find that a licensee exercising inspection duties on public lands acts in the nature of either a servant (or even more remotely, an agent<sup>276</sup>) as a result of the assignment of inspection duties to the licensee, it is unnecessary to view SFL holders as Crown servants or agents for purposes of liability.

### 6.4.1.1 Determination of Liability in Simple Negligence

Analysis for regulatory negligence normally begins with analysis for simple negligence. First, in order for a “duty of care” to be owed, there must be a sufficiently close relationship between the alleged wrongdoer (the defendant) and the person who has suffered harm that would give the defendant reasonable cause to anticipate that his carelessness might arise in harm to that person. Second, what considerations would limit or eliminate (a) the scope of the duty, (b) the class of persons to whom it is owed and (c) the damages that might arise as a result?<sup>277</sup> This two-fold test is referred to below as the “*Anns* test.”

### 6.4.2 Contributory Negligence

One must also consider the possibility that by being on public lands where logging operations take place, a plaintiff can be seen to have assumed certain risks for which s/he may be found negligent. Again, a court may apportion some or all of the responsibility to the plaintiff, depending on the circumstances. The nature of the plaintiff's activity on the land may be relevant, as activities in remote areas may be viewed as carrying an increased element of risk.

### 6.4.3 Regulatory Negligence

In determining the liability of a public body in negligence, a court will apply the first part of the *Anns* test to determine whether the applicable legislation imposes a private law duty of care on the public body.<sup>278</sup>

Regulatory negligence, generally speaking, applies to operational as opposed to policy decisions by public bodies. For example, where a city inspector required a builder to follow a plan intended to repair defective foundations during the course of construction, but then failed to follow up in requiring the plan to be implemented, the city was found to owe an “operational” duty.<sup>279</sup> The enactment of a construction by-law was a “policy” decision; this gave the inspector the “operational” duty to enforce the by-law. Once the policy decision has been made to enact a regime,

some reasonable degree of implementation will be expected. While there is often considerable discretion in implementing a regulatory regime, complete inaction or non-enforcement (at one end of the possible spectrum of activity) is not a “policy decision taken in the *bona fide* exercise of discretion.”<sup>280</sup>

Where falling rocks on a mountain highway killed or injured the occupants of a car, a policy decision to maintain the highways free of such rocks triggered an operational duty to perform the task reasonably.<sup>281</sup>

In a falling-tree case, the policy decision to inspect trees differed in that its purpose was not to remove dangerous trees, but to apply for funds to do so. The scarcity of funds available and a provincial government’s decision on how to allocate them were important factors. There was no operational decision at play in this case; instead, “the province’s actions [in not automatically providing for the removal of trees] were considered to be part of a ‘policy decision’ and therefore immune from liability.”<sup>282</sup>

A second “falling rock” case from British Columbia takes the analysis to the stage where a third party, not a public body, carries out operations. In *Lewis (Guardian ad litem of) v. British Columbia*,<sup>283</sup> the Ministry of Transportation and Highways gave an independent contractor the job of inspecting and scaling (removing rocks from) cliff faces along BC’s notorious Highway 99. Rocks fell from a cliff face through a car windshield, fatally injuring a driver. The trial court found the contractor negligent. The sole issue in the Supreme Court of Canada was whether the province was also negligent.

The court found that the applicable statutes indicated that the Ministry of Transportation and Highways had ultimate responsibility for all matters relating to construction, repair and maintenance of the highways. That statutory authority, when exercised, gave rise to a duty to perform that work with reasonable care. The Ministry’s responsibility to exercise reasonable care in overseeing the work also extended to

independent contractors engaged by the Ministry to perform the work.

As part of his analysis, Cory J. considered a 1914 Supreme Court of Canada case, *Vancouver Power Co. v. Hounsome*,<sup>284</sup> where a private company was given the statutory power to build a tramway. The company (as opposed to the government, as in *Lewis v. British Columbia*) delegated its power to a contractor, who was negligent in carrying out the work. Duff J. wrote that the delegation did not allow the company to

...escape responsibility for the performance of its own duty, the burden of which it necessarily undertakes when it puts in exercise the authority the legislature has conferred upon it. The beneficiary of statutory authority, such as a railway company, cannot appropriate the benefit of the powers with which the legislature has invested it without at the same time assuming full responsibility for the performance of the obligations by which its right to exercise those powers is conditioned.<sup>285</sup>

In comparing the Vancouver Power situation, where the private company delegated statutory powers, with the delegation of statutory powers by a public body, Cory J. said in *Lewis v. British Columbia*:

If a private entity is found to be liable for its contractor’s negligence as a result of the benefit derived from the statutory authority, then in the situation presented in this case *where the public entity’s statutory authority and its ancillary duty to take reasonable care in carrying out maintenance and repairs are specifically designed to benefit the safety of the public, the basis for the imposition of liability for an independent contractor’s negligence is even stronger*.<sup>286</sup>

In other words, the government cannot escape liability simply by assigning some responsibilities to a third party.

Nor must the government's duty to perform work with reasonable care be expressed by statute. Cory J. cited with approval the following words from the British House of Lords:

If...the legislature authorises the construction and maintenance of a work which will be safe or dangerous to the public according as reasonable care is or is not taken in its construction or maintenance, as the case may be, *the fact that no duty to take such care is expressly imposed by the statute cannot be relied on as showing that no such duty exists*. It is not to be expected that the legislature will go out of its way to impose express obligations or restrictions in respect of matters which every reasonably minded citizen would take for granted.<sup>287</sup>

Another aspect of Crown liability addressed in *Lewis v. British Columbia* is the option for the Legislature to require the contractor to indemnify the government body in case of negligence. That option might also be open to the government where the duty to inspect is assigned by licence rather than by contract.

...The Crown can always stipulate whatever form of indemnification for negligently performed work that it requires from an independent contractor as a condition of entering into the contract.... Indeed, the pertinent statutes may always be amended so as to absolve the respondent from any liability in the performance of construction, repairs or maintenance of highways....<sup>288</sup>

Such amendments have not been adopted -in the case of the Ontario forest regime.

#### 6.4.3.1 Analysis

In the Ontario forest regime, the entire legislative structure (including forest management planning and the licence obligation to inspect), in the context of public lands, suggests that injury to a person in a Crown forest is sufficiently foreseeable that a duty of care is owed to members of the public. A critical aspect of this logic is the purpose of inspecting forest

operations, which must be considered to include not only sustainability of the Crown forest, but also the safety of workers and others. Almost any forest operation prescription standard can be seen as having an "environmental" aspect (for example, a minimum cutting distance from a stream is meant to ensure that fish and the riparian habitat are not impaired) as well as a human safety aspect (an artificially eroded stream bank could be a hazard) that is reasonably foreseeable even if not explicit in the prescription. Another aspect of foreseeability might be the frequency and nature of visits by members of the public to a given forest: in a more remote area, a public safety aspect would be assumed to be less integral to the inspection process than the case, for example, of an area visited more frequently. Such considerations would also be relevant to the second stage of the *Anns* analysis.

In the context of regulatory negligence, the MNR could be found liable for a failure to inspect at the operational level, on the basis of the above cases. While the Ontario forest regime includes a *policy* decision to require licence holders to conduct inspections, suggesting a decreased government presence does not excuse the government from either the ultimate responsibility for ensuring compliance or at least shared liability in negligence.

By analogy to *Lewis v. British Columbia* and *Vancouver Power Co. v. Hounsome*, although the MNR has assigned part of its authority to inspect forest operations by licence (rather than by contract), the Crown probably has a non-delegable duty to ensure that forest operations are sustainably and safely carried out. Also, there appears to be nothing in the CFSA that limits or negates the liability of the Crown in negligence in the Crown forest regime.

The above discussion is meant to illustrate that a number of heads of liability, of which regulatory negligence is one, may arise in a given situation where a person suffers harm in a Crown forest. It is difficult to predict how liability might be apportioned between several potential defendants and the plaintiff in the absence of an actual fact situation.

*Lewis v. British Columbia* is also a useful reference in the discussion of the “non-delegable duty of care” that applies when government assigns by contract (and, by analogy, by licence) an authority to inspect. It was concluded in the discussion on delegation that the SFL regime implies no “delegation.” This conclusion is consistent with the doctrine of a non-delegable duty of care. The *authority* to inspect has been assigned (in this case, by licence) to SFL holders, but the government’s ultimate *duty* to inspect in such a way as to ensure both sustainability and public safety is non-delegable.

Members of the public may be able to sue licence holders for negligence for damages arising from failures in the conduct of inspections. Furthermore, in their capacity to be sued, licence holders may not have the same protections as the provincial government. Public authorities have a discretionary right to implement enforcement programs on the basis of established public policy and budgetary resources.<sup>289</sup> However, as private entities, licence holders may not be able to avail themselves of this public policy defence.

#### 6.4.4 Officially Induced Error

The MNR’s Forest Compliance Handbook raises the issue of “officially induced error,” where an inspector fails to point out a potential violation of the CFSA or other statutes to a licence holder.<sup>290</sup> “Officially induced error” is generally understood more broadly to include any incorrect information provided by an official.

The leading cases on “officially induced error” are *R. v. Cancoil*<sup>291</sup> and *R. v. Jorgensen*.<sup>292</sup> The following excerpt from *R. v. Cancoil* sets out the scope of the concept:

The defence of “officially-induced error” is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the

administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.<sup>293</sup>

In *R. v. Jorgensen*, then Chief Justice Lamer made the following remarks in a minority judgment of the Supreme Court of Canada. The majority of the court neither agreed nor disagreed with this aspect of Chief Justice Lamer’s dissent:

Officially-induced error of law functions as an excuse rather than [as] a full defence. It can only be raised after the Crown has proven all elements of the offence. In order for an accused to rely on this excuse, she must show, after establishing she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions.<sup>294</sup>

The application of officially induced error to the Ontario forest regime, in which some inspection functions have been assigned to licence holders, can thus be dealt with quite easily.

First, the accused must have relied on the advice of an “official”; it is unlikely that a licence holder’s employee could be thus characterized. As to the reasonableness of an accused’s reliance on the erroneous advice, reliance of a forest worker or company on his colleague, an employee or a competitor, as the case may be, would not likely be deemed reasonable. In keeping with Lamer C. J. in *R. v. Jorgensen*, even if the accused were advised by the company inspector that the accused was in compliance, in order to establish officially induced error the accused would have to consult an “appropriate” official and obtain reasonable advice. In the imaginable circumstance of



a forest operations violation, this would require seeking the advice of the regulator, namely the MNR, which, after all, retains ultimate authority for the enforcement aspects of the CFSA.

## 6.5 Summary and Conclusions

- The MNR’s capacity to oversee the self-inspection regime effectively is doubtful.
  - There have been major losses of capacity within the Ministry as a whole, and with respect to forest management activities in particular. There has been a reduction of approximately 50% of field staff relative to 1994/95.
  - The staff reductions are even more significant with respect to forest management inspections. The number of MNR inspectors in forest operations has declined by 67% from 1994/95 to today. With a total of 45.5 MNR full-time equivalents now dedicated to forest inspection activities, there is currently less than one MNR inspector per management unit, or one MNR inspector per 550,000 hectares of Crown forest under licence.
  - The MNR’s internal reviews of the self-inspection system have indicated that the Ministry is having trouble meeting the prescribed timelines for follow-up to SFL-holder reports of non-compliance and fulfilling other commitments under the self-inspection regime.
  - The Environmental Commissioner of Ontario and others have highlighted that the resources available to the Ministry to conduct inspections beyond responses to SFL-identified non-compliance are very limited; in some cases the MNR has been unable to follow up before the limitation period for initiation of prosecution under the relevant legislation has expired.
- More generally, it is difficult to envision how the MNR can assess how well the self-inspection system is working without the capacity to conduct proactive inspection activities, in addition to responding to licence-holder reports of non-compliance.
- The delays inherent in the self-inspection system, where the MNR responds to licensee-generated reports of non-compliance, may make the pursuit of effective enforcement actions difficult, particularly with respect to violations, such as those related to forest fire prevention practices, that can only be detected and confirmed through immediate and direct observation.
- The CFSA’s penalties related to information issues, under which compliance inspection reporting system falls, are very weak relative to other legislation, such as the federal CEPA, and provincial Environmental Protection Act. This is particularly noteworthy given the Ministry’s heavy reliance on licensee generated information for both compliance and more general forest management purposes.
- There is no general obligation on the part of SFL holders to report all potential violations of forest management requirements or applicable laws and regulations established through the CFSA, SFLs, regulations, or manuals. The Environmental Protection Act, in contrast, contains a number of provisions requiring the immediate reporting of potential violations to the Ministry of the Environment.
- The MNR’s capacity to withdraw the transfer of inspection responsibilities to licence holders, in the event that the inspection program is delivered ineffectively, is doubtful given the Ministry’s lack of resources, and declining role and experience in the conduct of primary

compliance inspections. Indeed, the withdrawal of the transfer of inspection responsibilities to SFL and other licence holders does not appear to be contemplated as a possibility by the Ministry, regardless of SFL-holder performance.



*Public access to information about management of public forests must be ensured.*

- The self-inspection system has resulted in some loss of oversight capacity by the Provincial Auditor, Information and Privacy Commissioner and Ombudsman. The Provincial Auditor, for example, no longer has access to SFL-holder-generated inspection source materials, in contrast with when all inspections were conducted by the MNR, except when these source materials have been requested from SFL holders by the Ministry.
- Public access to key documents and instruments related to the self-inspection regime is limited. This is a result of the absence of provisions in the CFSA requiring that licences be tabled in the legislature, and the provisions of the MNR's instrument classification regulation adopted under the EBR in June 2001. The instrument classification regulation fails to designate SFLs, SFL amendments and any related instruments, such as five-year Forest Management Plans and Annual Work Schedules, as instruments for the purposes of the EBR, meaning that there are no

public rights of notice and comment under the EBR with respect to these instruments. The Ministry has voluntarily posted notices of the major stages in five-year Forest Management Plan development on the EBR registry, and the Forest Management Planning Manual does establish public consultation require-

ments related to the development of five-year plans.

- The SFL self-inspection regime has also had a significant impact on public access to information. Except where inspection-related source materials are requested from licence holders by the MNR, members of the public may have no right of access to these materials under the FIPPA. A right of access would exist, subject to the normal exemptions in the FIPPA related to law enforcement and confidential third-party information, with respect to MNR-generated inspection-related source materials.
- Finally, it is important to note that the MNR remains liable for regulatory and other forms of negligence in the event of harm to a third party resulting from an act, omission or oversight by a licensee-employed inspector. Licensees conducting inspections may not be able to avail themselves of the public policy defence available to public authorities in cases of regulatory negligence.

# 7 Performance

## 7.1 Enforcement Outcomes

### 7.1.1 Numbers of Inspections

As illustrated in **Table 13**, the total number of forest compliance inspections conducted in Ontario, counting inspections conducted by the Ontario Ministry of Natural Resources (MNR) and forest licence holders, has risen significantly since the introduction of the self-inspection regime in 1998. The number of inspections by the MNR has fallen substantially, reflecting the reductions in MNR inspection staff, while the number of inspections conducted by Sustainable Forest Licence (SFL) holders has increased, accounting for 68% of all inspections conducted in 1999/00.

The total number of inspections, reported through inspection reports, at 6,600 in 1999/00, remains significantly lower than comparable totals for other jurisdictions. In British Columbia, for example, between 1995 and 1998, the Ministry of Forests carried out an average of over 37,000 inspections of forest operations each year.<sup>295</sup>

## 7.1.2 Performance of MNR Inspectors versus SFL-Employed Inspectors

### 7.1.2.1 2000 Report of the Provincial Auditor

An audit of the MNR's forest management program completed by the Provincial Auditor in 2000 included a review of the SFL-holder self-inspection program. The Provincial Auditor concluded:

In areas where the Ministry continued to perform compliance inspections after the responsibility for such inspections has been delegated to forest management companies, ministry inspectors found significantly more violations than industry inspectors did. This indicated a need to upgrade the forest industry inspection program and develop a more formal ministry oversight program.<sup>296</sup>

The Provincial Auditor concluded by stating that alternatives to the self-inspection system need to be considered, such as more direct oversight of company inspectors where necessary or performing ministry inspections on a cost-recovery basis.<sup>297</sup>

**Table 13: Forest Operations Compliance Inspection Reports, 1995/96 to 2001/02<sup>298</sup>**

Source	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02
Industry Generated	No data available	0	0	2,932	4,538	Not yet available	Not yet available
MNR Generated	No data available	3,509 (includes reports from 7 case study units)	2,939 (includes reports from 7 case study units)	2,184	2,106	Not yet available	Not yet available
Total	No data available	3,509	2,939	5,116	6,644	Not yet available	Not yet available

### 7.1.2.2 MNR and Industry-Employed Inspector Performance

The data upon which industry and MNR inspector performance can be compared are extremely limited. The rates of reports of non-compliance provided by MNR inspectors versus industry inspectors in the annual reports on forest management and in the 2001 five-year State of the Forest Report, are presented in **Tables 15** and **16**.

**Table 16: Non-compliant Reports Generated by Industry and the MNR as a Percentage of Total Reports: Water Crossings and Fish Passages 1998/99 to 2000/01<sup>301</sup>**

Source	Water Crossings	Fish Passage
Industry Generated	1.3%	1.6%
MNR Generated	23.3%	22.8%

**Tables 15** and **16** seem to confirm the Provincial Auditor's finding that MNR inspectors have a much higher rate of identification of violations. However, the value of these comparisons is limited by the consideration that the figures for MNR inspection results include not only the results of MNR-conducted primary inspections in Crown management units and MNR spot checks in SFL units, but also MNR verification inspections in SFL management units following-up reports of non-compliance in industry-generated inspection reports. MNR inspectors would be expected to confirm the findings of non-compliance reported by SFL-employed inspectors in such situations.

The situation is further complicated by the consideration that MNR has entered into Memoranda of Agreement with large licence holders in most of the remaining Crown management units, assigning primary inspection responsibilities to these operators.<sup>302</sup> The MNR is unable to provide figures that differentiate between situations where MNR inspectors were conducting primary inspections themselves, and where MNR inspectors were following up on reports of non-compliance by SFL or other licence holders.

As a result, there is very little data available upon which to make comparisons of the performance of MNR inspectors and SFL-holder-employed inspectors in the identification of instances of non-compliance, and the pool of available data is shrinking. As noted earlier, this will limit the ability of the Ministry and outside observers to measure the performance of licensee-employed inspectors relative to that of MNR staff in the identification of instances of non-compliance in the future.

In fact, the Temagami Crown Management Unit remains the only location where the MNR performs most forest management functions, including primary compliance inspections. As illustrated in **Table 17**, data from the Temagami Crown management unit indicates that MNR inspectors identify instances of non-compliance at a rate of two to three times the average rate of identification (5%) of non-compliance by their licence-holder-employed counterparts.

Historical data from other management units where the MNR was until recently the sole inspection agent, as illustrated in **Table 18**, also supports this conclusion.

**Table 15: Non-compliant Reports Generated by Industry and the MNR as a Percentage of Total Reports, 1995/96 to 2001/02<sup>300</sup>**

Source	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02
Industry Generated	No data available	0	0	4.6%	6.6%	Not yet available	Not yet available
MNR Generated	No data available	No data available	No data available	22.2%	24.4%	Not yet available	Not yet available

### 7.1.3 Compliance Rates and Significance

The MNR presents figures on compliance rates<sup>306</sup> for different aspects of forest management activities

(access, harvest, renewal, maintenance and protection) from 1995/96 to 1999/00 in the 2001 State of the Forest Report.<sup>307</sup> The trends reported are illustrated in **Table 19**.

**Table 17: Inspection Results for the Temagami Crown Management Unit 1999/00 to 2001/02<sup>303</sup>**

Year	Number of Inspections	Number of Instances of Non-compliance Recorded	Percentage of Inspections Identifying Non-compliance
1999/00	57	6	11%
2000/01	184	24	13%
2001/02	109	19	17%

**Table 18: Inspection Results for Other MNR-Inspected Management Units 1999/00 to 2001/02**

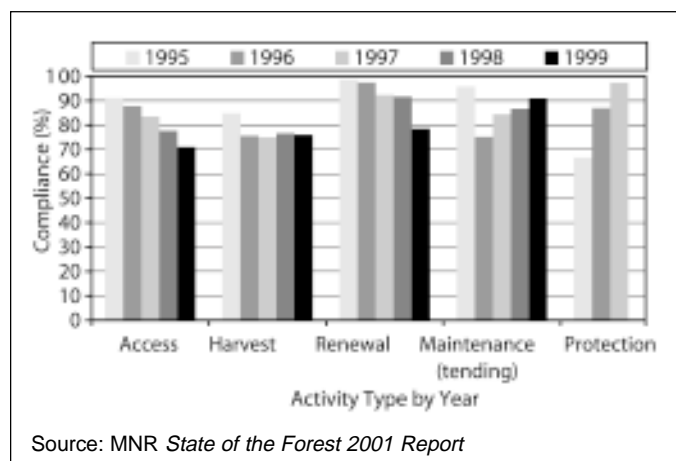
Unit	Year	Number of Inspections	Number of Instances of Non-compliance Recorded	Percentage of Inspections Identifying Non-compliance
Kapuskasing <sup>304</sup>	1999/00	12	4	33%
Kenora <sup>305</sup>	1999/00	75	8	11%
Kenora	2000/01	110	9	8%
Kenora	2001/02	29	2	7%

**Table 19: Ontario Forest Industry Compliance Rates 1995/96 to 1999/00**

Management Activity	Description	Compliance Rates
Access	Road construction, aggregates, water crossings, areas of concern, general (e.g., garbage) and fire prevention.	There is an increase in reported non-compliance from less than 10% in 1995/96 to nearly 30% in 1999/00.
Harvest	Land management, logging, areas of concern, fire prevention, road construction, wasteful practices, and wood measurement and movement. These operations make up the bulk of forest company operations and account for 70% of all inspections conducted.	Overall compliance rates fell from 85% in 1995/96 to 75% in 1997/98 and have remained at that level since then.
Renewal	Silvicultural practices, regeneration, site preparation, pesticide application, site damage, damage to residual stands and fire prevention.	Non-compliance rates in this area were less than 10% between 1995/96 and 1998/99, but increased to over 20% in 1999/00.
Maintenance	Tending, pesticide application, site damage, damage to the residual stand and fire prevention.	Reported compliance rates decreased from 96% in 1995/96 to 75% in 1996/97, and then they increased steadily to over 90% in 1999/00.
Protection	Fire prevention and pesticide application.	The number of inspections varies widely year to year, from 0 to more than 110. Reported compliance rates rose from less than 70% in 1995/96 to over 90% in 1997/98. Too few inspections were carried out in 1998/99 and 1999/00 for meaningful assessments.

**Figure 1** indicates that there has been a general increase in non-compliance rates in the key areas of access, harvest and renewal from 1995/96 onwards.

**Figure 1: Overall MNR Compliance (%) for All Activities by Year (Based on Data Current to Nov. 2001)**



The Ministry also assigns a significance level to all reported instances of non-compliance. The significance levels reported from 1995/96 to 1999/00 are outlined in **Table 20**.

Consistent with the trend in overall non-compliance rates, the rate of significant incidents of non-compliance rose from 1995/96 onwards. The increase in numbers of significant incidents was concentrated in the areas of access and harvest, where the largest portion of forestry activity occurs.<sup>309</sup>

Overall, the rates of forest industry compliance in the key areas of access and harvest have fallen significantly since the initiation of the major reductions to the MNR's operating budget in 1995 and 1996. In addition, the numbers of significant instances of non-compliance have risen over this period.

**Table 20: Significance Levels of Reported Non-compliance in Ontario, 1995 to 2000 per cent of Total)<sup>308</sup>**

Significance Level	1995/96	1996/97	1997/98	1998/99	1999/00
Minor	70.9	56.2	73.4	71.9	68.7
Moderate	26.9	26.6	19.2	20.6	21.8
Significant	2.2	17.2	7.5	7.5	9.5

It is important to note that the figures available from MNR may understate the extent and significance of industry non-compliance, given the heavy reliance on licence-holder reporting, and the tendency of SFL inspectors to under report instances of non-compliance relative to MNR inspectors.

#### 7.1.4 Fines and Penalties

Total enforcement actions and penalties taken under the Crown Forest Sustainability Act (CFSA) are shown in **Table 12** (see next page).

The data show significant variation in the levels of fines and Administrative Penalties (APs) applied from year to year, and 90% decline in the application of APs in 2001/02 relative to the previous year. The MNR provided no explanation for these variations.

In his 2000 Special Report to the Legislative Assembly, the Provincial Auditor noted that the ministry's enforcement system for forest management did not identify or track repeat offenders, the ministry used penalties and warnings inconsistently among districts, and often failed to impose escalating penalties where this would have been appropriate.<sup>310</sup>

## 7.2 Role of Discretion in Investigation and Enforcement

One of the central issues raised by the self-inspection system established by the MNR is the role of discretion in the identification of instances of non-compliance. According to the MNR, under the self-inspection and reporting system, SFL holders are not to assess the "significance" of violations. They are only to assess whether a violation has occurred.

Table 12: Remedy and Enforcement Actions Taken under the Crown Forest Sustainability Act, 1996/97 to 2001/02<sup>299</sup>

Method	1996/97 Count	1996/97 Fines	1997/98 Count	1997/98 Fines	1998/99 Count	1998/99 Fines	1999/00 Count	1999/00 Fines	2000/01 Count	2000/01 Fines	2001/02 Count	2001/02 Fines
Administrative Penalty	50	\$217,124.17	26	\$182,160.01	49	\$171,917.72	53	\$207,909.18	55	\$287,637.77	11	\$29,103.04
Offence Charge	5	\$4,400.00	33	\$54,635.00	36	\$34,748.25	26	\$26,110.00	48	\$4,958.00	35	\$11,155.00
Stop Work Order	0	n/a	3	n/a	2	n/a	5	n/a	3	n/a	1	n/a
Repair Order	5	n/a	4	n/a	7	n/a	16	n/a	10	n/a	4	n/a
Compliance Order	4	n/a	15	n/a	16	n/a	18	n/a	19	n/a	8	n/a
Warnings	31	n/a	47	n/a	21	n/a	27	n/a	21	n/a	19	n/a
Investigations	1	n/a	0	n/a	4	n/a	2	n/a	3	n/a	1	n/a
Total	96	\$221,524.17	128	\$236,795.01	135	\$206,665.97	147	\$234,019.18	159	\$292,595.77	79	\$40,258.04

In practice, however, determining whether a violation has taken place can itself be very difficult and extremely subjective. The problem is particularly significant in an area as complex as forest management, where judgments need to be made about the applicability of requirements to a wide range of circumstances and locations.

This is especially noteworthy in the case of forest management in Ontario, as the requirements for environmental protection and other practices are scattered through a long list of guidelines, codes, laws, regulations, plans, work schedules, permits and cut approvals.<sup>311</sup> Nor is the guidance that is available clear and easy to follow. In fact, MNR staff themselves have noted that the Ministry's guidance documents with respect to protection of fish habitat and riparian areas,<sup>312</sup> for example, are "collectively ambiguous and confusing."<sup>313</sup>

The issue of the role of discretion in the definition, categorization and prosecution of non-compliance has been highlighted in a series of studies undertaken by the Sierra Legal Defence Fund and the Algonquin Wildlands League on forestry compliance issues in northern Ontario between 1998 and 2001.<sup>314</sup> These studies involved the conduct of site-specific audits of forest industry compliance with environmental protection requirements in its harvesting operations. In a number of instances, the environmental organizations and forest companies involved disagreed as to whether violations had occurred and their significance.<sup>315</sup> The question of the significance of infractions also arose in the Ministry's own 1999 review of the compliance program.<sup>316</sup>

The Forest Information Manual (FIM) indicates that the MNR relies on company comments provided as part of the forest operations inspection reports to determine the extent and significance of each instance of non-compliance.<sup>317</sup> As a result, companies have a degree of discretion not only in terms of deciding whether a violation has occurred, but also in indicat-

ing its significance. The latter will have implications in terms of the level of response and follow-up likely to be pursued by the Ministry.

The Ministry itself has indicated in its annual reports on timber management that SFL holders do not report all violations. This is attributed to differences in interpretation between MNR and company inspectors, and the consideration that in some cases, SFL holders may remedy the situation and "deem" the infraction too minor to report.<sup>318</sup>

SFL holders are in an obvious conflict of interest in exercising this discretion regarding the identification and significance of instances of non-compliance, given that reports of non-compliance may prompt MNR follow-up, and the potential application of APs or even more significant penalties against companies. In fact, in some instances, the MNR portrays this right to exercise discretion as a reward for good behaviour by SFL holders.<sup>319</sup>

The issue of the exercise of discretion is central to the entire self-inspection system, given the complex nature of regulatory rules applicable to forest operations and the Ministry's near-total reliance on SFL inspections as its primary means of detecting violations in SFL management units. An essential question is whether this discretion in the interpretation of the applicable rules is appropriately located in the hands of industry actors who have strong economic interests in their widest possible interpretation.

### 7.3 Information Flows

One of the major concerns raised with respect to the adoption of alternative service delivery arrangements relates to situations where operational functions, such as inspections, are delegated to non-governmental delivery agents, while policymaking functions are retained by government agencies. In theory, such arrangements are intended to allow the use of more efficient, non-traditional mechanisms for program



delivery (“rowing”), while governments retain responsibility for policy development and direction (“steering”).

However, such arrangements may result in the “decoupling” of operational and policy functions,<sup>320</sup> cutting policymakers off from key information sources on what is actually happening in the field, and thereby limiting opportunities for the modification of policy on the basis of operational experience.<sup>321</sup> This is seen as a particularly serious problem where policy advisers need detailed knowledge of operational issues to supply good policy advice.<sup>322</sup>

The overall structure of the MNR self-inspection regime is built on this sort of decoupling of operational and policy functions, with SFL holders undertaking more and more operational functions, such as inspections, while the MNR retains nominal responsibility for oversight and policymaking. However, the decreased presence of MNR inspectors in the field means that the Ministry has suffered a significant loss of first-hand information on what is actually happening on the ground. Rather, the Ministry now depends on written reports generated by SFL and other licence holders, rather than direct observation by MNR staff, as its primary source of information on forest operations.

The self-inspection system also illustrates the practical difficulties in achieving the complete separation of policy and operational functions, as decisions made at the operational level can cumulatively constitute policy change.<sup>323</sup> In this case, the Ministry spends most of its compliance efforts responding to what SFL holders identify as significant occurrences

through their inspection reports, rather than those seen as priorities by the Ministry.

Although the compliance inspection regime is perhaps the most significant area where these problems exist, the Ministry is generally increasingly dependent on industry-generated information as the basis for its forest management activities. In the longer term, this raises the possibility that the regulator may reach a point where it lacks the ability to generate the information necessary to be able to regulate effectively.

Similar questions have been raised in relation to the devolution of the technical aspects of forest management planning to licensees through the SFL process. Observers have noted that in British Columbia, the pursuit of similar

approaches has led the former Ministry of Forests<sup>324</sup> to a point where it lacks the ability to operate on the same technical level as licensees, and therefore it can no longer act as an effective regulator.<sup>325</sup>

approaches has led the former Ministry of Forests<sup>324</sup> to a point where it lacks the ability to operate on the same technical level as licensees, and therefore it can no longer act as an effective regulator.<sup>325</sup>

## 7.4 Cost-effectiveness

The delegation of operational functions by governments to non-governmental entities may require substantial oversight and backstopping capacity on the part of the delegating government in order to ensure that public resources, health and safety are protected. This requirement can have significant implications for the overall costs of delegation arrangements relative to traditional service delivery by governments. It may demand the duplication of capacity and functions between the delivery agent and the delegating government.<sup>326</sup>



*Policymakers need good information to make decisions.*

This problem is illustrated by the self-inspection system adopted in Ontario, where, in effect, a double inspection system has been created. Under the self-inspection system, SFL holders do the initial compliance inspections on their operations. Where violations are noted, the MNR then does a second inspection as required to assess the significance of violations.<sup>327</sup>

In result, the total cost of the self-inspection system may be higher than when inspections were conducted by the MNR alone. SFL holders have had to hire and train new staff to carry out inspections previously carried out by trained MNR staff,<sup>328</sup> while the MNR has retained some portion of its original staff, in order to be able to carry out verifications, spot checks and follow-up inspections.<sup>329</sup> Although a precise calculation is not possible due to the lack of data on the exact numbers of active licensee employed inspectors, it seems likely that more total staff are required to conduct inspections than would be the case if inspections were conducted by the MNR alone. Consideration must also be given to the capital costs associated with the re-creation of expertise previously held by now surplus MNR inspectors among licensee-employed inspectors.

## 7.5 Summary and Conclusions

- There are major gaps in the available information regarding forest management and compliance in Ontario. This makes assessments of the performance of the self-inspection regime difficult. The most recent data publicly available from the MNR on forest management, for example, is for the 1999/00 fiscal year.
- The total number of inspections conducted on Ontario forest operations has risen significantly since the adoption of the self-inspection system in 1998. However, the total number of inspections remains low relative to other comparable jurisdictions with large forest industries, such as British Columbia.
- There are significant differences in the performance of the MNR versus licensee-employed inspectors in the identification of instances of non-compliance. The shrinking role of the MNR in the conduct of primary inspections, even in Crown management units, makes comparisons of the performance of MNR and licensee staff increasingly difficult. However, what evidence that is available indicates that MNR inspectors identify instances of non-compliance at a much higher rate than licensee inspectors, and MNR itself admits that licensee holders under report incidents of non-compliance.
- Reported compliance rates in the key areas of access and harvest have declined significantly since 1995/96. At the same time, the portion of significant incidents of non-compliance has risen. Given the tendency of SFL holders to under report instances of non-compliance, these figures may underestimate the extent and significance of instances of non-compliance.
- There have been significant variations in the levels of fines and administrative Penalties (APs) applied under the CFSA from year to year over the 1996/97 to 2000/01 period and a 90% reduction in the application of APs in 2001/02 relative to the previous year. The MNR provided no explanation for these variations.
- The self-inspection system highlights the issue of the exercise of discretion in inspection and enforcement issues. This is particularly relevant in the case of forestry in Ontario, where the MNR itself admits that the definitions of forest management requirements can be “ambiguous and confusing.” The Ontario self-inspection system gives rise to the question about whether such discretion in the identification and determination of the significance of violations should rest in the hands of actors who have strong interests in minimizing the number and significance of reported incidents of non-compliance.

- The self-inspection system carries with it a significant loss of first-hand information for MNR staff on forestry field conditions and operations, given the greatly reduced presence of MNR inspectors in the field. The same observation can be applied more generally to the post-1995 SFL-based system, where the Ministry is heavily dependent on information provided by licence holders to determine the state of the province's forests and the impact of forestry operations on them.
- Finally, the cost-effectiveness of the system must be questioned as, in effect, a double inspection system has been created, where MNR inspectors must follow-up on licensee inspections in cases of reported non-compliance. The possibility exists that the same number of inspections might be provided more effectively by the MNR at less total cost to the Ministry and the industry.

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# 8 Summary, Conclusions and Recommendations

## 8.1 Overview and Context

The Ontario government's system for the management of the province's Crown forests has undergone major changes since its first establishment in the middle of the nineteenth century. The system's focus has evolved from an initial emphasis on the maximization of economic returns from the exploitation of the resource, to, from the early twentieth century onwards, a growing concern with the sustainability of the province's forests in the face of harvesting pressures from the forest industry. Beginning in the 1970s, consideration of wider non-timber values, such as biodiversity protection, articulated by non-forest industry interests also emerged as a major factor in the management of the province's forests. This was reflected in the report of the Royal Commission on the Northern Environment, the Baskerville audit report, the Class Environmental Assessment of Timber Management on Crown Lands in Ontario decision, and the 1994 Crown Forest Sustainability Act (CFSA).

The province's relationship with the forest industry has also evolved over time. From the 1920s onward, the province has sought to impose, with varying degrees of success, increasing planning and management responsibilities on companies harvesting the province's forests. The 1994 CFSA is the latest expression of the basic direction set by the 1976 Armson Report of trading off increased industry responsibilities for greater security of tenure, particularly through the introduction of Sustainable Forest Licences (SFLs). Under the Act, SFLs are automatically renewed on the basis of licence-holder compliance with licence terms and conditions.

The mid-1990s were a period of rapid change in the management of the province's Crown forests. These changes initially flowed from the terms and condi-

tions of the class environmental assessment decision delivered in April 1994 and the CFSA adopted later the same year. The outcome of the June 1995 provincial election then set in motion major reductions to the Ontario Ministry of Natural Resources' (MNR) forest management budget. These cuts, announced in the fall of 1995 and spring of 1996, resulted in a 50% reduction in the Ministry's forest management field staff and a 67% reduction in forest-related field inspectors from 1998 to today.

One of the most important changes outlined in the MNR's May 1996 Forest Management Business Plan, prepared in response to these reductions, was the transfer of primary responsibility for the conduct of inspections of forest company operations for compliance with forest management requirements from the Ministry to SFL and other forest licence holders. In SFL management units, the Ministry's role would be reduced to one of overall policy direction, follow-ups, audits and spot checks on industry-conducted inspections. The new system was adopted for all SFL holders in April 1998, and by January 2003, the MNR retained primary inspection responsibilities in just one of the province's 68 Forest Management Units.

This study examined this self-inspection system in the context of wider changes in the delivery of government services in Ontario and elsewhere in the 1990s, under the general heading of "Alternative Service Delivery" (ASD). The study employed three major groups of criteria to assess the MNR system: governance; accountability; and performance. These criteria were developed on the basis of a review of the academic and other literature on ASD, and criteria used by the authors in previous studies of ASD arrangements in the environmental and public safety fields in Ontario.<sup>330</sup>

## 8.2 Governance

The study's major findings against the governance criteria are outlined in **Table 21**.

The study concludes that the legal framework for the transfer of primary inspection functions to licence holders by the minister is both uncertain and inadequate. In addition to the doubtfulness of its consistency with the provisions of the CFSA and the class environmental assessment decision, the lack of a mandatory process for the training, qualification, designation and protection of licensee-employed inspectors is identified as a major gap in the self-inspection system.

With respect to the capacity of licence holders to take on self-inspection responsibilities, the study finds that the MNR failed to undertake assessments of individual SFL holders' ability to undertake the transferred inspection functions, beyond the conduct of seven pilot studies, prior to the 1998 transfer. Nor has the Ministry undertaken such assessments for licensees who have been granted SFLs since 1998, or other licence holders who have assumed inspection responsibilities on Crown lands. The lack of mandatory training and certification requirements for licensee-employed inspectors remains a significant barrier to the Ministry's ability to assess the inspection capacities of licensees or the effectiveness of the system as a whole.

At the same time, the self-inspection system is found to incorporate major conflicts of interest on the part of SFL and other licence holders. Licence holders have strong incentives to minimize reported instances of non-compliance, given the potential for such reports to result in investigations, Administrative Penalties (APs), prosecutions and even the threat of licence non-renewal. The lack of specific protections for licensee-employed inspectors is particularly problematic in this context.

More broadly, the self-inspection system alters the power relationships between the Ministry and the regulated industry, and between the regulated industry and all other stakeholders in fundamental ways. The system leaves the Ministry heavily dependent on industry cooperation for both information and operational functions in ensuring the compliance of operators with forest management requirements. It also places the industry in a close operational relationship with the Ministry that is not shared by other non-governmental stakeholders.

## 8.3 Accountability

The study's major findings against the accountability criteria are outlined in **Table 22**.

The study finds that the MNR's capacity to effectively oversee the transfer of inspection functions to licensees is open to serious question in light of the Ministry's limited resources and the weak legislative and penalty framework in relation to the transfer. Despite the importance of inspection functions in ensuring licensee compliance with forest management requirements, the Ministry's capacity to resume inspection functions in the event of licensee non-performance is doubtful. In fact, the Ministry does not appear to contemplate the possibility of the withdrawal of transfers regardless of licensee performance. This has significant implications for the Ministry's leverage in dealing with licence holders.

Public right of access to inspection-related information under the Freedom of Information and Protection of Privacy Act (FIPPA) have been reduced as a result of the transfer, specifically with respect to the right of access to inspection-related source materials generated by licence holders, relative to the situation when Ministry inspectors generated these materials. The ability of legislative officers, particularly the Provincial Auditor, to access these materials is also limited.

**Table 21: Summary of Findings against Governance Criteria**

Criteria	Assessment
Adequacy of Legal and Policy Frameworks	<p>The legal basis for the transfer of primary inspection responsibility from the MNR to licence holders is uncertain.</p> <ul style="list-style-type: none"> <li>• The amendments to SFLs transferring responsibility to SFL holders may have exceeded the minister's authority to amend SFLs under the CFSA.</li> <li>• The legal basis for the agreements to transfer of primary inspection responsibility to non-SFL licence holders on Crown management units is unclear.</li> <li>• Although it may be possible to accommodate the transfer of primary inspection responsibility to licence holders through a very broad reading of the terms and conditions of the Class Environmental Assessment, such an arrangement was clearly not contemplated by the Environmental Assessment Board in its decision.</li> </ul> <p>There is no statutory or regulatory framework for the designation of SFL-employed inspectors other than nomination by SFL holders in their compliance plans. The MNR indicates inspectors are not considered agents of the Ministry, and therefore they have no inspection powers with respect to overlapping licensees except for what they can observe directly on public lands.</p> <p>The only protections available to SFL-employed inspectors in these circumstances are those provided in the general provisions of the Environmental Bill of Rights (EBR). These protections are relatively weak compared with those in other provincial statutes, such as the Environmental Protection Act, and do not contemplate situations in which employees would have primary inspection responsibilities with respect to their employer's activities, as opposed to one-off whistleblower situations.</p>
Charter Issues	<p>The self-inspection system does not appear to raise major Charter issues. The Supreme Court of Canada's 1995 <i>R. v. Fitzpatrick</i> decision indicates that licence-holder-generated information and reports, such as those produced under the Ontario forestry system, can be used for enforcement purposes by regulatory agencies.</p> <p>SFL holders are not MNR agents for purposes of the CFSA, and therefore they have no powers of entry or inspection with respect to private lands or documents. Therefore the arrangements regarding inspections of overlapping licence holders do not give rise to Charter s. 8 (unreasonable search and seizure) issues.</p>
Industry Capacity to Undertake Transferred Functions	<p>The MNR did not undertake assessments of the capacity of individual SFL holders to take on inspection responsibilities prior to the 1998 transfer, beyond the conduct of seven pilot studies. Nor have such assessments been undertaken on SFLs issued post-1998.</p> <p>No mandatory training and certification requirements have been established for SFL-employed inspectors through which the Ministry might confirm qualifications to carry out inspections.</p> <p>Some subsequent assessments of SFL capacity have occurred through the five-year independent forest audit process mandated through the class environmental assessment, although the level of attention given to inspection capacity issues in these audits varies widely. The review of compliance and inspection systems is not mandated in the MNR protocols for the conduct of these audits.</p>
Conflict of Interest	<p>The self-inspection regime raises significant issues of conflict of interest.</p> <p>SFL holders have strong incentives to minimize the instances of non-compliance reported to the MNR through the system. Such reports may make SFL holders liable for APs or prosecutions under the CFSA, and may even threaten the renewal of their forest licences. The absence of protections for SFL-employed inspectors is particularly problematic in this context.</p> <p>Potential economic conflicts exist in situations where SFL holders have inspection and compliance responsibilities for overlapping licence holders.</p> <p>More generally, the self-inspection system involves a fundamental alteration of the power relationships between the Ministry and regulated industry, and regulated industry and all other stakeholders in forest management. This problem is not limited to the inspection aspects of the system.</p>

**Table 22: Summary of Findings against Accountability Criteria**

Criteria	Assessment
MNR Oversight Capacity	<p>The MNR's capacity to oversee the self-inspection regime effectively is doubtful.</p> <ul style="list-style-type: none"> <li>• There have been major losses of capacity within the Ministry as a whole and with respect to forest management activities, with a reduction of approximately 50% of field staff relative to 1994/95.</li> <li>• Losses are even more significant with respect to forest management inspections, with a 66% reduction in the number of MNR inspectors related to forest operations relative to 1994/95. With a total of 45.5 MNR full-time equivalents now dedicated to forest inspection activities, there is currently less than one MNR inspector per management unit, or one MNR inspector per 550,000 hectares of Crown forest under licence.</li> <li>• The MNR's internal reviews of the self-inspection system have indicated that the Ministry is having trouble meeting the prescribed timelines for follow-up of SFL-holder reports of non-compliance, and in fulfilling other commitments under the self-inspection regime.</li> <li>• The Environmental Commissioner of Ontario (ECO) and others have highlighted that the resources available to the Ministry for the conduct of inspections beyond responses to SFL-identified non-compliance are very limited. In some cases, the MNR has been unable to follow up before limitation periods for initiation of prosecutions under the relevant legislation have expired.</li> <li>• It is difficult to envision how the MNR can assess how well the self-inspection system is working without the capacity to conduct proactive inspection activities, in addition to responding to licence-holder reports of non-compliance.</li> <li>• The ECO, the Provincial Auditor and litigation initiated by environmental groups have raised questions as to whether the MNR has sufficient overall resources to implement the terms and conditions of the class environmental assessment and the requirements of the CFSA.</li> <li>• The delays inherent in the self-inspection system, where the MNR responds to licensee-generated reports of non-compliance, may make the pursuit of effective enforcement actions difficult, particularly with respect to violations, such as those related to forest fire prevention practices, that can only be detected and confirmed through immediate and direct observation.</li> <li>• CFSA penalties related to information issues, under which compliance inspection reporting system falls, are very weak relative to other legislation, such as the federal Canadian Environmental Protection Act and the provincial Environmental Protection Act. This is particularly noteworthy given the Ministry's heavy reliance on licensee-generated information for both compliance and more general forest management purposes.</li> <li>• There is no general obligation on the part of SFL holders to report all potential violations of forest management requirements or other applicable legislation under the CFSA or the licences, regulations, or manuals made under it. This is in contrast to the provisions of the Environmental Protection Act, which includes a number of provisions requiring that potential violations be reported to the Ministry of the Environment immediately.</li> <li>• The MNR's capacity to withdraw the transfer of inspection responsibilities to licence holders is doubtful given the Ministry's lack of resources, and declining role and experience in the conduct of primary compliance inspections. Indeed, the withdrawal of the transfer of inspection responsibilities to SFL and other licence holders does not appear to be contemplated as a possibility by the Ministry, regardless of SFL-holder performance.</li> </ul> <p style="text-align: right;">continued on next page ►</p>

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Criteria	Assessment
Oversight by Legislative Officers	<p>The self-inspection system has resulted in some loss of oversight capacity by the Provincial Auditor, Information and Privacy Commissioner and Ombudsman. The Provincial Auditor, for example, no longer has a right of access to SFL-holder-generated inspection-related source materials, contrary to when all inspections were conducted by the MNR, except where these materials have been requested from SFL holders by the Ministry.</p> <p>The scope of the Information and Privacy Commissioner's oversight function is also reduced as more and more information on forest management is generated and held by licence holders rather than the MNR.</p> <p>The role of the ombudsman in overlapping licensee inspection situations is uncertain.</p>
Oversight by Public	<p>Public access to key documents and instruments related to the self-inspection regime is limited. This limited access is a result of the absence of provisions in the CFSA requiring that licences be tabled in the legislature, and the provisions of the MNR's instrument classification regulation adopted under the EBR in June 2001. The instrument classification regulation fails to designate SFLs, SFL amendments and any related instruments, such as five-year Forest Management Plans and Annual Work Schedules, as instruments for the purposes of the EBR. As a result, there are no public rights of notice and comment under the Act with respect to these instruments.</p> <p>The Ministry has voluntarily posted notices of the major stages in five-year Forest Management Plan development on the EBR registry. The Forest Management Planning Manual does establish public consultation requirements related to the development of five-year plans.</p> <p>The SFL self-inspection regime has also had a significant effect on the public right of access to information. Except where inspection-related source materials are requested from licence holders by the MNR, members of the public are unlikely to have a right of access to these materials under the FIPPA. A right of access would exist, subject to the normal exemptions in the FIPPA related to law enforcement and confidential third-party information, with respect to MNR-generated inspection-related source materials.</p> <p>More generally, the FIM attempts to place restrictions on the use of information generated under its auspices in a manner inconsistent with the FIPPA.</p>
Implications for Crown liability	<p>The Crown is liable for regulatory and general negligence on the basis of oversights by SFL-employed inspectors. The government's duty of care in implementing the statutory duty to inspect is non-delegable.</p> <p>SFL holders may be liable for negligence in cases of oversights of their inspectors and will not have the policy defence available to governments in regulatory negligence situations.</p>



More broadly, public access to key information, documents and decision-making related to the compliance system and forest management generally is limited under both the CFSA and the MNR's EBR instrument classification regulation. Public participation processes have been established through the Forest Management Planning Manual with respect to five-year Forest Management Plans. However, no processes exist with respect to the establishment or amendment of SFLs and other forms of licences, and amendments to Forest Management Plans or the Annual Work Schedules through which plans are implemented.

Finally, the study finds that the Crown likely remains liable in the event of injury to third parties as a result of oversights by SFL-employed inspectors or other licensee-employed inspectors. This highlights the importance of the Ministry's ability to effectively oversee the inspection activities of forest licence holders.

## 8.4 Performance

The study's major findings against the performance criteria are outlined in **Table 23**.

There are major gaps in the available data from the MNR, making assessment of the performance of the self-inspection system difficult. The most recent complete datasets available from the Ministry via the 2001 State of the Forest Report and annual reports on timber management are for the 1999/00 year (i.e., the year ended March 2000).

The total number of inspections of forest operations has risen since the adoption of the self-inspection system in 1998, although the total number of inspections on forest operations remains low in relation to comparable jurisdictions with major forest industries, such as British Columbia. Moreover, the available data give rise to major questions in relation to the quality of the inspections conducted by licensee-employed inspectors relative to those carried out by MNR staff. MNR inspectors have identified instances

of non-compliance by licence holders at a much higher rate in primary inspection situations than licensee-employed inspectors. The Ministry itself acknowledges that licence holders do not report all instances of non-compliance.

In addition, the overall levels of licensee compliance with forest management requirements reported by the MNR fell substantially between 1995/96 and 1999/00. This is particularly noticeable in the key areas of access and harvest, where most forest operations take place, and where the highest potential for environmental damage exists. The rate of significant incidents of non-compliance in relation to access and harvest operations has risen during the same time period.

The self-inspection system involves a significant decoupling of policy and operational functions by the Ministry, and has resulted in a major loss of first-hand information of what is happening in the field by the MNR. Rather, the Ministry is increasingly dependent on licensee-generated information in relation to compliance with forest management requirements, and for more general forest management purposes. On the basis of experience in other jurisdictions, this may limit the Ministry's ability to function as an effective regulator in the long term.

Finally, the efficiency of the self-inspection system must be questioned, as it has created what is in effect a double-inspection system, with MNR inspectors conducting inspections to follow up industry inspections that generate reports of non-compliance. A quantitative assessment of the cost-effectiveness of the system was not possible, due to a lack of data on the number of licensee staff involved in inspection activities and the portion of their time dedicated to these functions.

## 8.5 Overall Conclusions

The movement towards internalization of management costs by forest companies, and realization of revenues by the province more reflective of the true

**Table 23: Summary of Findings against Performance Criteria**

Criteria	Assessment
Enforcement Outcomes	<p>There are major gaps in information available from the MNR on which to base assessments of the performance of the self-inspection system. The most recent publicly available information is for 1999/00 (i.e., the year ending March 2000).</p> <p>The total number of inspections conducted on Ontario forest operations has risen significantly since adoption of the self-inspection system in 1998.</p> <p>The shrinking role of the MNR in conduct of primary inspections, even in Crown management units, makes comparisons of the performance of the MNR and licensee staff increasingly difficult.</p> <p>The evidence that is available indicates that the MNR inspectors identify instances of non-compliance at a rate two to three times higher than licensee-employed inspectors in primary inspection situations.</p> <p>Reported compliance rates in the key areas of access and harvest have declined significantly since 1995/96. At the same time, the portion of significant incidents of non-compliance has risen. Given the tendency of SFLs to under report instances of non-compliance, these figures may underestimate the extent and significance of instances of non-compliance.</p> <p>There have been significant variations in the levels of fines and administrative Penalties (APs) applied under the CFSA from year to year over the 1996/97 to 2000/01 period and a 90% reduction in the application of APs in 2001/02 relative to the previous year. The MNR provided no explanation for these variations.</p> <p>The self-inspection system highlights the issue of the exercise of discretion in inspection and enforcement issues. This is particularly relevant in the case of forestry in Ontario, where the MNR itself admits that the definitions of forest management requirements can be “ambiguous and confusing.” The Ontario system gives rise to the question whether such discretion in the identification and determination of the significance of violations should rest in the hands of actors who have strong interests in minimizing the number and significance of reported incidents of non-compliance.</p>
Information Flows	<p>The self-inspection system involves a major “de-coupling” of operational and policy functions.</p> <p>The self-inspection system carries with it a significant loss of first-hand information for MNR staff on forestry field conditions and operations, given the greatly reduced presence of MNR inspectors in the field.</p> <p>The MNR conducts field inspections on the basis of what SFL holders identify as “significant.” In effect, SFL holders have the ability to shape what is seen as significant.</p> <p>More generally, the Ministry is increasingly dependent on industry-generated information as a basis for forest management policies under the SFL regime.</p>
Cost-effectiveness	<p>The self-inspection system creates a double- inspection regime, due to the requirement for the MNR to follow up industry inspections. It may be more cost-effective for all inspections to be conducted by the MNR.</p>

value of the resource since the mid-1990s can be seen as consistent with more general principles of environmentally sustainable resource management in terms of the removal of subsidies for resource extraction. However, the transfer of so much operational responsibility for the management of the province's forests to the industry, through combination of the move to SFLs under the CFSA and the 1995 and 1996 budget cuts, needed to be counterbalanced by a strengthening of the government's (and the public's) ability to oversee the activities of the forest industry. Unfortunately, this did not happen, and instead the Ministry's oversight capacity was significantly weakened at the same time.

The resulting situation puts the sustainability and health of the province's forests at risk, as reflected in the decline in the rates of industry compliance with forest management requirements since 1995/96. More generally, the MNR's ability to function as an effective regulator is increasingly open to serious question, as the Ministry's operational knowledge, experience and presence in the field declines. Such an outcome would be of serious public concern, given the environmental and economic importance of Ontario's Crown forests.

## 8.6 Recommendations

The capacity to observe and inspect forest operations is central to the MNR's ability to understand what is happening in the field. It is also central to formulation and implementation of appropriate policy responses to ensure the health and sustainability of the province's forests. The transfer of primary inspection responsibilities to forest licence holders has significantly weakened the ability of the Ministry to carry out these functions. The transfer has also resulted in losses of accountability with respect to the carrying out of inspection functions. Finally there is strong evidence that the conduct of inspections by forest licence holders is less effective in the identification of instances of non-compliance with forest management requirements, than the conduct of inspections by MNR staff.

In the context of these findings, the transfer of primary inspection functions from the MNR to licence holders should be reconsidered, as recommended by the Provincial Auditor in his 2000 report on the Ministry's forest management system.<sup>331</sup> A number of options are available to the Ministry in this regard.

### 8.6.1 Alternatives to the Self-Inspection Regime

#### 8.6.1.1 Re-establishment of MNR Forest Inspection Capacity and Functions

The Ministry could re-establish its own capacity to conduct inspections by reallocating some of the increased revenues realized by the province from forestry operations since changes to the forest charge regime were introduced in 1994. As illustrated in **Table 25**, these revenues are now well in excess of the Ministry's spending on forest management functions.

**Table 25: MNR Forest Management Operating Budget versus Forest Payments to Consolidated Revenues<sup>332</sup>**

Year	MNR Forest Management Operating Budget (Current \$ Millions)	Forest Payments to Consolidated Revenues (Current \$ Millions)
1990/91	196.6	68.9
1994/95	152.3 <sup>333</sup>	98.7
1995/96	75.3 <sup>334</sup>	89.2
1996/97	64.0	111.7
1997/98	75.4	178.1
1998/99	87.9	157.5
1999/00	68.8	155.7
2000/01	62.9	105.2
2001/02	60.7	90.2
2002/03	60.5	Not yet available

In the event that the province is unwilling to reallocate some of these revenues, the option of a cost recovery system for the conduct of inspections by the Ministry could be considered, as was suggested by the Provincial Auditor in his 2000 report.<sup>335</sup>

### 8.6.1.2 Establishment of a Profession of Forest Operations Inspectors

Another possibility would be to create a profession of independent inspectors. These individuals could be required to be professional foresters, but would not be employed directly by licence holders. Rather, such individuals could be paid by the MNR out of general forest revenues, or the Forestry Futures Trust, as has been done with the auditors for the five-year forest management audits required under the class environmental assessment decision.

This option would require legislative changes to establish the qualifications, powers and duties of a professional class of forest operations inspectors. An increase in the Forestry Futures Trust charge from the \$0.48 per cubic metre level, (where it has remained since its introduction in 1994/95) would be necessary if this option was to be financed through that mechanism.

### 8.6.2 Modifications to the Self-Inspection Regime

In the event that the Ministry decides to continue with the delegated inspection system, then a number of measures need to be taken with respect to the governance and accountability frameworks for the system, and generation and provision of public access to information regarding the system's performance.

#### 8.6.2.1 The Governance Framework

This study identifies a number of major gaps in the legal and policy framework employed by the Ministry to delegate its primary inspection functions to forest licence holders. These include the lack of clear legal

authority for the transfer, the lack of provisions regarding the designation, qualifications, powers and duties of non-MNR employees carrying out inspection functions, the lack of a general duty on the part of licence holders to report instances of non-compliance with forest management requirements, an inadequate penalty structure with respect to information-related offences under the CFSA, and the absence of specific protections for licence-holder employees carrying out inspection functions against retaliation by their employers for reporting instances of non-compliance.

## Recommendations

### *Legal Authority for Delegation*

1. The Crown Forest Sustainability Act should be amended to
  - Provide explicit authority to the Minister of Natural Resources for the transfer of primary compliance inspection functions to SFL and other licence holders;
  - Establish criteria, including the confirmation of licensee capacity to carry out inspection functions, that must be met before such transfers can take place;
  - Provide for the designation of non-MNR employed inspectors under the Act, and to establish their powers and duties;
  - Establish mandatory training and certification requirements for any non-Ministry employee designated as an inspector for the purposes of the Act; and
  - Establish a public register of designated and certified non-MNR employed inspectors for the purposes of the Act.

*Mandatory Reporting of Non-compliance with Forest Management Requirements*

2. The Crown Forest Sustainability Act should be amended to require that licence holders notify forthwith the MNR of all instances of non-compliance with forest management requirements as established under the CFSA and other federal and provincial legislation, and regulations affecting forest operations. Failure to notify should constitute an offence under the CFSA.

*Information-Related Offences under the Crown Forest Sustainability Act*

3. The Crown Forest Sustainability Act's provisions and penalties related to the failure to provide required information and the provision of false or misleading information to the MNR should be strengthened. Specifically, the penalty structure for violations related to information matters should be made comparable to those found in other federal and provincial environmental legislation, such as the Canadian Environmental Protection Act and the Ontario Environmental Protection Act.
4. The Crown Forest Sustainability Act should be amended to establish the alteration or modification of inspection reports, as completed by inspectors, prior to their submission to the MNR, as an offence under the Act.

*Protections for Licence-Holder-Employed Inspectors*

5. The Crown Forest Sustainability Act should be amended to establish that it is an offence under the Act for an employer to dismiss, discipline, penalize, coerce or intimidate or attempt to coerce or intimidate, an employee for complying with the requirements of the Crown Forest Sustainability Act or other federal or provincial legislation affecting forest management in Ontario, or regulations, plans, approvals orders, or

other instruments made under those Acts, or for providing the Ministry with information regarding non-compliance with those statutes, regulations or instruments.

**8.6.2.2 Accountability**

This study has identified a number of gaps in the Ministry's accountability framework with respect to the self-inspection regime. These include major questions regarding the Ministry's ability to oversee the inspection activities of licence holders, and gaps in the public's ability to obtain information and have access to decision-making regarding forest management in general, and with respect to compliance inspections in particular.

**Recommendations**

*MNR Oversight Capacity*

6. The MNR should strengthen its field inspection capacity with respect to forest operations. This is essential to oversee the operations of the self-inspection system and to enhance the Ministry's knowledge of actual field conditions and operational practices. A doubling of inspection capacity to 90 positions would increase costs from \$5.2 million to \$10.4 million per year.<sup>336</sup>
7. The MNR should retain primary inspection responsibility in the remaining Crown Forest Management Units. This is necessary in order to retain operational experience, provide the capacity to resume functions if required elsewhere, and to provide a benchmark against which to measure the performance of licensee-employed inspectors.
8. The MNR should establish mandatory training and certification requirements for non-MNR employees carrying out inspections of forest management operations.

9. The MNR should conduct and make public assessments of the capacity of licence holders to carry out inspection functions before transferring inspection responsibilities to them.
  10. The MNR should modify the provisions of its SFL amendments and inspection-related guidelines and policies to provide that inspection reports be submitted directly to the MNR by licensee-employed inspectors, without company management/supervisor sign-off prior to submission.
  11. The MNR should amend the protocol for five-year audits of management units to include assessments of licence holder compliance inspection capacity and performance.
  12. The Crown Forest Sustainability Act should be amended to provide general information-gathering power to the Minister of Natural Resources, requiring that licence holders provide any information related to the management of forests under licences issued under the Act at the request of the minister.
- Annual Work Schedules and amendments to these schedules; and
  - All regulations, guidelines and policies made under the CFSA.
14. The Crown Forest Sustainability Act and Forest Information Manual should be amended to state that for the purposes of the Freedom of Information and Protection of Privacy Act and the Audit Act, all source materials related to information products required under the Crown Forest Sustainability Act, are considered to be in the custody or control of the MNR.

### 8.6.2.3 Measuring and Assessing System Performance

The study encountered numerous problems in accessing timely and comprehensive information related to forest operations and inspections from the Ministry. This makes meaningful assessments of the performance of the system in achieving the goals of the CFSA by the Ministry and the public difficult. The most recent publicly available general information on forest management in Ontario, for example, related to the year that ended March 31, 2000.

### Recommendations

13. The MNR's instrument classification regulation under the Environmental Bill of Rights should be reviewed and modified regarding CFSA instruments and approvals. Instruments subject to the EBR's notice and comment provisions (Part II) should include the following:
  - Sustainable Forest Licences and all other forms of licences issued under the CFSA;
  - Amendments to any licences issued under the CFSA;
  - Five-year Forest Management Plans and any amendments to these plans;
15. Additional resources should be provided to the MNR to ensure timely public reporting of forest management activities through annual reports on timber management and other documents.
16. The MNR should modify its reporting practices regarding forest operations inspections to clearly separate the data on instances of non-compliance identified through primary inspections by MNR staff from data on situations where MNR staff are following up reports of non-compliance by licence holders.

### *Oversight by Legislative Officers and the Public*

17. The Ministry should modify its accounting and invoicing practices to clearly separate revenues from the minimum charge for timber resources and revenues from residual value charges.

18. Revenues and expenditures for the Forestry Futures Trust and Forest Renewal Trust established under the CFSA should be reported annually to the Legislature through the Ministry's public accounts.

As has been noted by many outside observers, and the Ministry itself, the MNR's current system of standards and prescriptions for forest management are scattered through a wide range of legislative and guidance documents. This has lead to confusion within the Ministry and among licence holders and non-governmental stakeholders with respect to the definition of non-compliance, and leaves excessive discretion in the hands of licence holders, particularly in the context of the self-inspection regime.

19. The Ministry should accelerate its efforts to clarify and consolidate its prescribed "rules" with respect to forest management to minimize the level of discretion available in their interpretation by licence holders.

## 8.7 Concluding Observations

The 1990s were a period of enormous change in the management of Ontario's Crown forests. The class environmental assessment decision, adoption of the CFSA, and 1995/96 budget cuts and restructuring initiatives each introduced major alterations to the legal and policy framework for forest management, and the roles and responsibilities of the Ministry and forest industry.

Many aspects of these charges are still being implemented and, as noted in this study, there are major gaps in the publicly available information with which to assess the outcomes and impacts on the health and sustainability of Ontario's forests.



*The Timber EA should have a fixed expiry date.*

In the context of the extent of these changes, and the gaps in information regarding their consequences, it would be unwise to allow the current system to continue without further overall independent review. Currently, the only mechanism available under Ontario law for the conduct of such a review is the renewal of the 1994 class environmental assessment approval of timber management on Crown lands. That approval will expire in May 2003.

In its submissions regarding the renewal of the approval, the MNR has sought a perpetual "evergreen" approval of its forest management undertakings.<sup>337</sup> This would elimi-

nate the need for future formal and independent reviews of the Ministry's forest management activities. Given the findings of this study, and the extent of the changes made to forest management in Ontario in the past decade, such an "evergreen" renewal would be unwise.

## Recommendation

20. The Minister of the Environment should only renew the approval of the Class Environmental Assessment of Timber Management on Crown Lands in Ontario for a fixed and limited time period, following a complete review of the MNR's compliance with the terms and conditions of the existing approval.

Although focused on the self-inspection system adopted for forest licence holders in Ontario since

1996, this study also raises a number of more general questions about the province's approaches to the management of Crown forests, particularly the pursuit of the conversion of virtually all forests to SFLs.<sup>338</sup>

The wisdom of the pursuit of the SFL model on a universal basis must be questioned. The granting of SFL status should have been limited to where the capacity to carry out forest management functions over the long term has been consistently demonstrated by potential licence holders. SFL status and the responsibilities, autonomy and level of control over public resources that go with it should be a privilege, not a default situation.

Unfortunately, the adoption of the SFL model may be difficult to limit or reverse, as it now has been extended to almost all of Ontario's Crown forests. The termination or non-renewal of SFLs seems an increasingly remote possibility. This has significant implications for the MNR's leverage in dealing with licence holders, particularly given the MNR's limited resources and heavy dependence on licence holders for information and forest management functions.

The situation also severely limits the province's future policy options in forest management, particularly with respect to modifications of the forest tenure system. The Ministry's ability to experiment with alternative management models, or even to benchmark the performance of the SFL model against alternative approaches to forest management is significantly constrained. This is especially problematic given the difficulties that have been identified in adapting long-term tenure systems to the needs of potential non-corporate licence holders, such as Native bands, municipalities, community forest

associations and individuals.<sup>339</sup> The province should give consideration to the option of modifying the SFL system so that some portion of the forest under licence reverts to the Crown for future alternative allocation when licences are renewed.

The concerns raised by this study regarding the compliance self-inspection system, and more generally the increased reliance on the forest industry for forest management functions and information, may extend to other regulated sectors where such a model has been applied by the Ministry. This includes gravel pits and quarries (aggregates), petroleum resources, commercial fisheries, fur and baitfish. External assessments of these arrangements should be carried out, employing similar criteria to those used in this study.

This study also suggests that other jurisdictions considering similar self-inspection systems for their resource industries should consider alternative approaches. These might include a cost-recovery approach or the conduct of inspections by an independently employed and funded professional group.

In the event that a self-inspection regime is adopted, careful consideration must be given to its design in order to ensure the capacity of the delegating agency to oversee and evaluate the carrying out of the delegated functions and to confirm the capacity of agents to whom functions are delegated to carry out those functions. Measures also need to be in place to protect the employees of delegated agents from retaliation if they report violations, ensure access to information and oversight by legislative officers and the public, and to minimize the level of discretion exercised by delegated actors. In the absence of such measures, as is the case in Ontario, public resources, safety and the environment may be placed at serious risk.



# Appendix

## A Note on the Ministry of Natural Resources Proposed Terms and Conditions for the renewal of the Timber Class EA Review, and the Ministry of the Environment's Proposed Declaration Order Renewing the Class EA.

### Forest Operations Inspections

The Ministry of Natural Resources (MNR's) proposes to replace Term and Condition 78 of the 1994 Environmental Assessment Board Decision with its proposed recommended terms and condition 27.<sup>1</sup>

The MNR's proposal would alter the original term and condition in a number of important ways. The existing Term and Condition 78 states that the "MNR shall" conduct monitoring of timber management activities for compliance with Timber Management Plans and any other conditions imposed on operations by legislation or policy. MNR proposes that the term and condition be altered to read that "MNR shall ensure that monitoring of forest management activities...take place through a forest operations inspection program."

The MNR's proposal would remove the reference to the Ministry as the active agent in compliance monitoring, and simply require that the Ministry ensure that monitoring take place through some means. Although the self-inspection program is not specifically referenced in the MNR's proposal, the proposal is clearly intended to accommodate the self-inspection system.

The MNR also proposes to remove a number of specific requirements for monitoring activities, including the removal of requirements to record undesirable conditions, such as road washouts in Areas of Concern, wastage of timber, and trespass of timber operations onto reserves. The specifications regarding the contents of inspection reports would also be removed from the terms and condition.

In its proposed Declaration Order, the Ministry of the Environment proposes to accept these proposals by the MNR, subject an additional requirement that individual inspection reports be made available to the public, and that the most recent five years of inspection reports be available for public viewing and use in independent forest audits.<sup>2</sup>

### Commentary

Although the Ministry of the Environment's proposed alternation to the MNR's proposed term and condition 27 would improve public access to inspection information and reports, it fails to address any of the other issues related to the MNR's self-inspection regime for forest operations identified in this study. These include:

- The need to consider alternatives to the self-inspection system;
- The lack of training and certification requirements for non-MNR employed inspectors;
- The lack of protection for such inspectors in the carrying out of their activities from reprisals by their employers;
- The lack of requirements for assessments of the capacity of forest licence holders to carry out inspections prior to the delegation of inspection responsibilities to them;
- The lack of any requirements regarding the MNR's capacity to oversee licence-holder compliance inspection programs;
- The lack of public and legislative officer access to the source materials upon which licence-holder inspection reports would be based;
- The lack of provisions regarding the assessment of compliance monitoring programs in the MNR's protocols for independent forest audits; and
- The absence of any requirement that licence holders report all potential violations of any conditions on forest operations imposed by legislation, licence, regulation or policy.

These gaps should be addressed in the Ministry of the Environment's proposed declaration order.

<sup>1</sup> Ministry of Natural Resources, [A Review by the Ministry of Natural Resources Regarding the Class Environmental Assessment for Timber Management on Crown Lands in Ontario](#) (Toronto: MNR, July 2002).

<sup>2</sup> Ministry of the Environment, [Timber Class EA Report](#) (Toronto: MoE, March 2003), pg.7.

# Endnotes

- 1 [www.mnr.gov.on.ca/MNR/forests/t&t\\_overview/overview.htm](http://www.mnr.gov.on.ca/MNR/forests/t&t_overview/overview.htm) (October 12, 2001)
- 2 [www.mnr.gov.on.ca/MNR/forests/t&t\\_overview/overview.htm](http://www.mnr.gov.on.ca/MNR/forests/t&t_overview/overview.htm) (October 12, 2001)
- 3 [www.mnr.gov.on.ca/MNR/forests/t&t\\_forestindustry.industry.htm](http://www.mnr.gov.on.ca/MNR/forests/t&t_forestindustry.industry.htm) (October 12, 2001)
- 4 See SLDF, *Who's Minding Our Forests? Deregulation and the forest industry in British Columbia* (May 2002). B. Jang, "B.C. logging companies to monitor themselves," *The Globe and Mail*, November 5, 2002.
- 5 M. Winfield and G. Jenish, *Ontario's Environment and the 'Common Sense Revolution': A Four Year Report* (Toronto: Canadian Institute for Environmental Law and Policy, October 1999), pp.4-3-4-4.
- 6 Environmental Commissioner of Ontario, *Annual Report 1998* (Toronto: ECO, 1999) pp.185-189; Environmental Commissioner of Ontario, *Annual Report 1999/2000* (Toronto: ECO, 2000), pp.95-100.
- 7 Provincial Auditor, *Special Report of the Provincial Auditor of Ontario to the Legislative Assembly* (Toronto: Queen's Printer, 2000), Chapter 13.1; Provincial Auditor, *2002 Report to the Legislative Assembly* (Toronto: Queen's Printer, 2002), Chapter 4.13.
- 8 For a good overview of the early development of forest legislation and policy in Ontario, see R. S. Lambert and P. Pross, *Renewing Nature's Wealth: A Centennial History* (Toronto: MNR, 1967) Parts I and II.
- 9 The first such arrangements were established with respect to the pulp and paper industry in 1895. See Lambert and Pross, *Renewing Nature's Wealth*, p. 251.
- 10 See, for example, Royal Commission on Forest Reservation and National Park, *Report* (Toronto: 1893); and Royal Commission on Forest Protection in Ontario, *Report* (Toronto: 1897).
- 11 Royal Commission on the Northern Environment, *Final Report* (Toronto: Queen's Printer, 1985), p. 5-14; Lambert and Pross, *Renewing Nature's Wealth*, p.199.
- 12 Lambert and Pross, *Renewing Nature's Wealth*, p. 331 and pp.335-353.
- 13 Royal Commission on Forestry, *Report* (Toronto: King's Printer, 1947), Recommendation 1.
- 14 Royal Commission on Forestry, *Report*, Chapter XXI.
- 15 Lambert and Pross, *Renewing Nature's Wealth*, pp. 408-412.
- 16 Lambert and Pross, *Renewing Nature's Wealth*: p. 414.
- 17 Royal Commission on the Northern Environment, *Final Report*, p. 5-14.
- 18 Lambert and Pross, *Renewing Nature's Wealth*, p. 418.
- 19 The Department of Lands and Forests was renamed the Ministry of Natural Resources through the Government Re-Organization Act of 1972.
- 20 K. Armson, *Forest Management in Ontario* (Toronto: Ministry of Natural Resources, 1976), p. 1.
- 21 K. Armson, *Forest Management in Ontario*, p. 7.
- 22 K. Armson, *Forest Management in Ontario*, p. 27.
- 23 M. A. Ross, *A History of Forest Legislation in Canada 1867 to 1996* (Calgary: Canadian Institute of Resources Law, March 1997).
- 24 Royal Commission on the Northern Environment, *Final Report*, pp. 5-15.
- 25 G. L. Baskerville, *An Audit of Management of the Crown Forests of Ontario* (Toronto: MNR, August 1986).
- 26 The Ministry of Natural Resources had been granted eight extensions of the deadline for submission of the assessment between 1976 and 1984 by the provincial cabinet.
- 27 Defined as its management of Crown forests in the areas under licence.
- 28 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Terms and Conditions 21-77.
- 29 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Terms and Conditions 4-14.
- 30 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Term and Condition 23.
- 31 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Term and Condition 27.
- 32 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Term and Condition 86.

- 33 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Terms and Conditions 79 and 82.
- 34 Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario*, EA-87-02, April 20, 1994, Term and Condition 84
- 35 Management Board Secretariat, The Estimates, 1995-96: Ministry of Natural Resources.
- 36 The Act was declared in force in April 1995.
- 37 *Crown Forest Sustainability Act, 1994*, S.O. 1994 c. 25, s. 1.
- 38 *Crown Forest Sustainability Act, 1994*, s. 2.
- 39 *Crown Forest Sustainability Act, 1994*, s. 26.
- 40 *Crown Forest Sustainability Act, 1994*, s. 26(1).
- 41 *Crown Forest Sustainability Act, 1994*, s. 26(5).
- 42 *Crown Forest Sustainability Act, 1994*, s. 25.
- 43 *Crown Forest Sustainability Act, 1994*, s. 27.
- 44 *Crown Forest Sustainability Act, 1994*, s. 27(3).
- 45 *Crown Forest Sustainability Act, 1994*, s. 38.
- 46 *Crown Forest Sustainability Act, 1994*, ss. 25(2) and 27(4).
- 47 *Crown Forest Sustainability Act, 1994*, s. 28.
- 48 *Crown Forest Sustainability Act, 1994*, s. 34. Amendments to SFLs require the approval of the Lieutenant-Governor in Council (CFSA, s. 34(3)).
- 49 *An Act to Amend the Crown Timber Act 1979*, S.O. 1979, C. 92, s. 5(4).
- 50 *Crown Forest Sustainability Act, 1994*, s. 55.
- 51 *Crown Forest Sustainability Act, 1994*, s. 57.
- 52 *Crown Forest Sustainability Act, 1994*, s. 56.
- 53 *Crown Forest Sustainability Act, 1994*, s. 58.
- 54 *Crown Forest Sustainability Act, 1994*, s. 59.
- 55 *Crown Forest Sustainability Act, 1994*, s. 64.
- 56 The Ontario Divisional Court has noted that “nothing in the CFSA purports to exempt its administration from the conditions of the EA approval,” Ontario Divisional Court, *“Algonquin Wildlands League v. Ontario (Minister of Natural Resources)”*, February 6, 1998, 26 C.E.L.R. (N.S.) at para 141.
- 57 *Crown Forest Sustainability Act, 1994*, s. 7.
- 58 *Crown Forest Sustainability Act, 1994*, s. 8.
- 59 *Crown Forest Sustainability Act, 1994*, s. 9.
- 60 As of April 2003, only three Crown management units will remain: Moose River, Cochrane and Temagami. It is anticipated that as of April 2004, only the Temagami unit will remain a Crown management unit. Personal communication, Forests Division, MNR, November 26, 2002.
- 61 As of November 2002, 14 such “shareholder” licences existed. Members of these corporations have votes on their boards of directors. In some cases this is on an equal basis, while in other cases, votes are based on the proportions of annual harvest held in the unit. Personal communication, Forests Division, MNR, November 26, 2002. SFL-shareholder corporations typically have a staff of 4–5 to conduct operations and contract out work, although this varies widely from case to case. Personal communication, Forests Division, MNR, November 27, 2002.
- 62 Source: Ministry of Natural Resources, Annual Report on Forest Management 1996/97 (Toronto: Queen’s Printer for Ontario, October 2000) Figure 5; MNR, Annual Report on Forest Management 1999/00 (Toronto: Queen’s Printer for Ontario, September 2001) Table 3.
- 63 < 300 hectares in 1999/2000.
- 64 > 300 hectares in 1999/2000.
- 65 MNR, Forest Management Planning Manual for Ontario’s Crown Forests (Toronto: Queen’s Printer, September 1996).
- 66 *Crown Forest Sustainability Act, 1994*, s. 8(2) and s. 68.
- 67 MNR, Annual Report on Forest Management 1999/00, pp.15–16.
- 68 *Crown Forest Sustainability Act, 1994*, s. 42.
- 69 MNR, Forest Information Manual (Toronto: Queen’s Printer, April 2001).
- 70 The charge has risen from \$1.25 per cubic metre in 1995/96 to \$3.40 per cubic metre as of November 2001.
- 71 These funds may only be used for regeneration and maintaining the health of Crown forests.
- 72 Managed by committee established by the MNR. Eligible projects include renewal of fire-damaged Crown forests, renewal where licensee becomes insolvent; forest protection from disease or insect infestation; or intensive stand management related to critical wood supply.
- 73 Ministry of Natural Resources, State of the Forest Report 2001 (Toronto: Queen’s Printer for Ontario, January 2002) pp. 3-152–3-153.
- 74 *Crown Forests Sustainability Act, 1994*, Part V. The Provincial Auditor conducted a detailed review of the Forestry Futures and Forest Renewal Trusts in his 2000 Special Report on Accountability and Value for Money, s. 3.13.
- 75 Source: MNR, Annual Report on Forest Management 1995/96, Figure 6; Annual Report on Forest Management, 1999/00, Table 4.
- 76 Incorporated into minimum charge (stumpage) payable to the Consolidated Revenue Fund

- 77 See [http://www.mnr.gov.on.ca/mnr/forests/businessweb/stumpage/historical\\_matrix.htm](http://www.mnr.gov.on.ca/mnr/forests/businessweb/stumpage/historical_matrix.htm). Also Personal communication. Forest Division, MNR, January 10, 2003.
- 78 Office of the Premier, “Government-Wide Operating Budget Reductions,” October 6, 1995. This was a reduction of 47% of the funds originally allocated for these functions in the 1995/96 fiscal year.
- 79 Management Board Secretariat, “Interim Report on Business Planning and Cost Savings Measures,” April 11, 1996.
- 80 Forest Management Branch, Forest Management Business Plan (Toronto: MNR, May 28, 1996).
- 81 Forest Management Branch, Forest Management Business Plan, p. 1.
- 82 Forest Management Branch, Forest Management Business Plan, Table 1.
- 83 Forest Management Branch, Forest Management Business Plan, p. 28.
- 84 MNR, “Ontario Restructures Forest Management” Background, May 28, 1996. The business plan indicated that this might involve offering adjoining “true SFL” holders the opportunity to provide management services for a fee, offering other groups (community groups, forest management boards, etc.) the opportunity to become management agencies, or smaller licensees banding together to provide management services, p. 31.
- 85 Adapted from MNR, Forest Management Business Plan, pp.15 and 22.
- 86 Compliance Transfer Team, Understanding Compliance in Forest Operations (Toronto: MNR, March 1997), Executive Summary.
- 87 Adapted from Compliance Transfer Team, Understanding Compliance in Forest Operations, pp.13–16.
- 88 MNR, Annual Report on Forest Management 1997/98 (Toronto: Queen’s Printer, December 2000) pg.41.
- 89 MNR, “Draft Generic SFL for Shareholder SFL’s,” 2002.
- 90 MNR, “Forest Operations Inspection Program” Policy No. ENF 22.02.01, Issue Date: December 1, 1999.
- 91 MNR, Forest Information Manual, p. 270.
- 92 Adapted from MNR “Index to Non-CFSA Legislation for Ontario Forest Operations,” Bulletin No. CFSA. 005, December 1, 1999.
- 93 These scenarios are outlined in MNR, “Application of Administrative Penalties to Sustainable Forest Licensees,” Policy ENF.14.12.01, Issue Date: January 16, 1998.
- 94 Fourteen such “shareholder” SFL entities currently exist in the province. Personal communication. Forests Division, MNR, November 26, 2002.
- 95 MNR, “Application of Administrative Penalties to Sustainable Forest Licensees,” Policy ENF.14.12.01, Issue Date: January 16, 1998, s. 3.
- 96 MNR, “Application of Administrative Penalties to Sustainable Forest Licensees,” Policy ENF.14.12.01, Issue Date: January 16, 1998, ss. 2 and 3.
- 97 Personal communication. Forests Division, MNR, November 20, 2002.
- 98 MNR, Forest Information Manual, p. 271.
- 99 MNR, Forest Information Manual, pp. 272–274.
- 100 MNR Procedure ENF22.02.02, Appendix I, Issued December 1, 1999.
- 101 These are defined as infractions “caused by activities that were not documented in the Forest Management Plan and negatively impact upon the objectives and strategies of the FMP.” MNR, “Forest Operations Inspection Program,” Procedure No. 22.02.02, Issue Date: December 1, 1999, p.6.
- 102 These are defined as infractions that “impact the larger forest ecosystem.” Examples include infractions that occur in areas excluded from the forest land base for societal reasons, such as Old Growth stands, and Native burial sites. MNR, “Forest Operations Inspection Program,” Procedure No. 22.02.02, Issue Date: December 1, 1999, p. 6.
- 103 MNR, “Forest Operations Inspection Program,” Procedure No. 22.02.02, Issue Date: December 1, 1999, p. 5.
- 104 MNR, Guideline for Forest Industry Compliance Planning, April 23, 2001. Revision, p. 4, identifies the following potential signatories: management forester; operations forester; chief forester; manager of operations.
- 105 MNR, Forest Information Manual, p. 275.
- 106 MNR, Forest Information Manual, p. 276.
- 107 See, for example, N. D’Ombrain, “Alternative Service Delivery: Governance, Management and Practice”, in D. Zussman and G. Sears eds. Change, Governance and Public Management: Alternative Service Delivery and Information Technology (Ottawa: KPMG and Public Policy Forum, May 2000).
- 108 On “new public management” generally see M. Charih and A. Daniels eds. New Public Management and Public Administration in Canada (Ottawa: Institute of Public Administration in Canada, 1997).
- 109 These options are described in detail in Alternative Service Delivery Framework (Toronto: Management Board Secretariat (MBS), September 1999 Revision), pp.15–30.
- 110 See generally D. Osborne and T. Gaebler, Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector (New York: Plume Books, 1993); M. Charih, and A. Daniels, eds. New Public Management and Public Administration in Canada (Toronto: Institute of Public Administration of Canada, 1997).
- 111 Auditor General of Canada (OAG) November 1999 Report to the House of Commons, Chapter 23, “Involving Others in Governing: Accountability at Risk,” para. 23.16.

- 112 See generally N. D’Ombain “Alternative Service Delivery.” See also M. Charih and L. Rouillard “The New Public Management,” in M. Charih and A. Daniels, eds., New Public Management and Public Administration in Canada (Ottawa: Institute of Public Administration of Canada 1997); Richard Mulgan, “Comparing Accountability in the Public and Private Sectors,” Australian Journal of Public Administration Vol. 59, No. 1, March 2000; Office of the Auditor General of Canada, November 1999 Report, Chapter 23, esp. para. 23.15, 23.89.
- 113 Similar self-inspection regimes have been implemented with respect to the aggregate, petroleum, commercial fisheries, baitfish and fur sectors in Ontario.
- 114 See SLDF, Who’s Minding Our Forests? Deregulation and the forest industry in British Columbia (May 2002). B. Jang, “B.C. logging companies to monitor themselves,” The Globe and Mail, November 5, 2002.
- 115 See M. Winfield, D. Whorley and S. Kaufman, “Putting Public Safety into Private Hands: A Study of Ontario’s Technical Standards and Safety Authority,” Canadian Public Administration Volume 45 no. 1 - Spring /printemps 2002; M. Winfield and H. Benevides, Drinking Water Protection in Ontario: A Comparison of Direct and Alternative Service Delivery Models (Ottawa: Pembina Institute for Appropriate Development, June 2001).
- 116 See, for example, Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A, D’ Ombain, “Machinery of Government for Safe Drinking Water,” para. 368.
- 117 Australian Productivity Commission, Arrangements for Setting Drinking Water Standards, Attachment 1A.
- 118 Management Board Secretariat, Guide to Preparing Business Case for Alternative Service Delivery, (Toronto: Queen’s Printer, 1997) pp. 9–10; H. Bakvis, “Pressure Groups and the New Public Management,” Charih and Daniels eds., New Public Management and Public Administration in Canada, p. 298 (describes NAVCanada as “the embedding of the interests of the user groups in a self-managed entity sanctioned by the state.”); M. Winfield, D. Whorley and S. Kaufman, The New Public Management Comes to Ontario: A Study of the Technical Standards and Safety Authority (Toronto: CIELAP, 2000), esp. Chapter III.
- 119 See, for example, D. Whorley, “The Anderson-Comsoc Affair: Partnerships and the Public Interest,” Canadian Public Administration, Nov. 33, No. 3, (fall 2001).
- 120 R. Mulgan, “Accountability: An Ever Expanding Concept?” Public Administration, Vol. 78, No. 13, 2000, pp. 555–573. Mulgan highlights the importance of ensuring voters can make elected representatives answer for their policies and accept electoral retribution; ensuring legislators can scrutinize actions of officials and make them answerable for their mistakes; and ensuring that members of the public can seek redress from government agencies and officials.
- 121 P. Aucoin and R. Heintzman, “The Dialectics of Accountability for Performance in Public Management Reform,” in Peters and Savoie, eds., Governance in the Twenty-First Century, p. 260.
- 122 See, for example, the Aggregates and Petroleum Resources Statute Law Amendment Act, 1996, S.O. 1996, c.30.
- 123 Management Board Secretariat, Guide to Preparing Business Case for Alternative Service Delivery, (Toronto: Queen’s Printer, 1997) pp. 9–10; H. Bakvis, “Pressure Groups and the New Public Management,” Charih and Daniels eds., New Public Management and Public Administration in Canada, p. 298 (describes NAVCanada as “the embedding of the interests of the user groups in a self-managed entity sanctioned by the state.”); M. Winfield, D. Whorley and S. Kaufman, The New Public Management Comes to Ontario: A Study of the Technical Standards and Safety Authority (Toronto: CIELAP, 2000), esp. Chapter III.
- 124 See, for example, D. Whorley, “The Anderson-Comsoc Affair: Partnerships and the Public Interest,” Canadian Public Administration, Nov. 33, No. 3, (fall 2001).
- 125 Auditor General of Canada, November 1999 Report, Chapter 23, para. 23.87–23.115.
- 126 The Hon. D. O’Connor, Report of the Walkerton Inquiry: Part I (Toronto: Queen’s Printer for Ontario, 2000) Chapter 10.
- 127 See, for example, Thomas, “Change, Governance and Public Management, pp. 67 and 75.
- 128 Boston, “Organizing for Service Delivery,” pp. 296–297.
- 129 See, for example, Winfield and Benevides, Drinking Water Protection in Ontario, p. 44.
- 130 See The Aggregate and Petroleum Resources Statute Law Amendment Act, 1996.
- 131 The Crown Forests Sustainability Act, 1994, s. 34.
- 132 The Crown Forests Sustainability Act, 1994, s. 34(1).
- 133 Ontario Regulation 167/95, s. 10.
- 134 Ontario Regulation 167/95, s. 10(1)7.
- 135 Environmental Assessment Act, R.S.O. 1990, C. E.18, as amended s. 38.
- 136 The Crown Forests Sustainability Act, 1994, ss. 60, 61 and 62.
- 137 The Public Lands Act, R.S.O. 1990, c.P.43 provides for appointment of officers for purposes of Act (s. 5) and defines their powers, such as entry onto public lands. The Forest Fires Prevention Act, R.S.O. 1990, c. F.24 provides for designation of Officers (ss. 4–8) and “agents” (definitions and s. 9); The Lakes and Rivers Improvements Act provides R.S.O. 1990, c. L.3 for appointment of “engineers” and “inspectors” by the minister and definition of their duties and powers (ss.19–20); and the Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41, provides for designation of “agents” to kill wildlife through regulation (s. 31(2); s. 112(19); there are also extensive provisions regarding the appointment of conservation officers and powers (s. 87–93).

- 138 Personal communication. Forests Division, MNR, August 20, 2002.
- 139 MNR, Forest Compliance Handbook, Policy No. ENF 22.02.01, p. 4, December 1, 1999 Issue.
- 140 MNR, Guideline for Forest Industry Compliance Planning, April 23, 2001, Revision, p. 4.
- 141 Personal communication. Forests Division, MNR, February 2002.
- 142 MNR, Guideline for Forest Industry Planning, p. 4.
- 143 MNR, Guideline for Forest Industry Planning, p. 5.
- 144 Personal communication. Forests Division, MNR, November 20, 2002.
- 145 For example, *The Crown Forests Sustainability Act, 1994*, ss. 61 and 62.
- 146 MNR, Guideline for Forest Industry Planning, p. 4, indicates that inspection reports may be signed off by the management forester, operations forester, chief forester or manager of operations.
- 147 MNR, Guideline for Forest Industry Planning, p. 4.
- 148 *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, s. 105(3).
- 149 See Paul Muldoon, “Ontario’s Environmental Bill of Rights: User’s Guide” (undated; Environmental Bill of Rights Office; Ministry of Environment and Energy), at p. 28.
- 150 See Ontario Regulation 73/94, s. 12. It is conceivable that the protection provided by these provisions in relation to the MNR self-inspection system is partial. Only some of the statutes for which the SFL-employed inspectors are responsible for reviewing compliance are designated for the purposes of Part VII of the EBR. The Ministry indicates that SFL-employed inspectors are responsible for reviewing compliance in relation to the CFSA and its regulations, manuals and guidelines, as well as *The Aggregate Resources Act, Forest Fires Prevention Act, Fish and Wildlife Conservation Act, Lakes and Rivers Improvements Act, Endangered Species Act, Environmental Protection Act*, and the federal *Fisheries Act* and *Criminal Code*. However, *Forest Fires Prevention Act* and federal *Fisheries Act*, both important statutes in the context of forest operations, are not prescribed for the purposes of Part VII of the EBR.
- 151 See, for example, Office of the Environmental Commission of Ontario, The EBR Litigation Rights: A Survey of Issues and Six-Year Review (Toronto: ECO, May 2000), pp. 18–22.
- 152 *Environmental Protection Act*, R.S.O. 1990, c. E.19 s. 174.
- 153 1995 129 D.L.R. (4th) 129–152.
- 154 *R. v. Fitzpatrick*, para. 21, p. 137.
- 155 *R. v. Fitzpatrick*, para. 25, at 140.
- 156 Additional factors that may be present in the Ontario forestry context, but not in *R. v. Fitzpatrick*, can be dealt with summarily: the protections provided in ss. 11(c) and s. 13 applied to licence holders even before inspection functions were delegated to industry, and are therefore unlikely to be affected by the new arrangements.
- 157 [1990] 1 S.C.R. 425.
- 158 P. Hogg, Constitutional Law of Canada (Toronto: Carswell, 199?) at 44-21–44-22.
- 159 (1994), 89 C.C.C. (3d) 353, 114 D.L.R. (4th) 645, [1994] 2 S.C.R. 229; endorsed by Iacobucci J. for a majority of the Court in *S. (R.J.)* (1995), 96 C.C.C. (3d) 1, 121 D.L.R. (4th) 589, [1995] 1 S.C.R. 451.
- 160 *R. v. Fitzpatrick*, at para. 34, p. 143.
- 161 *R. v. Fitzpatrick*, at para. 35, p. 143.
- 162 See *R. v. Fitzpatrick*, at para. 36, p. 144.
- 163 *R. v. Fitzpatrick* at para. 39, p. 145.
- 164 *R. v. Fitzpatrick* at para. 39, p. 145.
- 165 Cory J., *R. v. Wholesale Travel Group* (1991), 67 C.C.C. (3d) 193 at 245, 84 D.L.R. (4th) 161 at 213, [1991] 3 S.C.R. 154, quoted by La Forest J. in *R. v. Fitzpatrick* at para. 40, p. 146.
- 166 *R. v. Fitzpatrick* at para. 41, p. 146.
- 167 *R. v. Fitzpatrick*, para. 54 at p. 151.
- 168 See, for example, Australian Productivity Committee, Arrangements for Setting Drinking Water Standards.
- 169 MNR, Annual Report on Forest Management 1997/1998 (Toronto: Queen’s Printer for Ontario, 2001), p. 41.
- 170 Personal communication. Forests Division, MNR, December 5, 2002.
- 171 The audits are conducted by non-MNR or company auditors and funded through the Forestry Futures Trust. Auditors are selected by the Trust Committee. Personal communication. Forests Division, MNR, April 3, 2002.
- 172 MNR, Independent Forest Audit: Process and Protocol (Toronto: Queen’s Printer for Ontario, March 2001).
- 173 See, for example, Geomatics International, Independent Forest Audit of the Timmins Management Unit for the Period 1991 to 1998, January 1999, p. 31.
- 174 See, for example, Arbex Forest Development Co. Ltd., Final Report: Ontario Ministry of Natural Resources Independent Forest Audit of the Lakehead Forest, 1999, pp. 38–39.
- 175 See MNR, Forest Compliance Handbook, “Determining Significance of an Infraction,” Policy No. ENF14.13.01, July 1, 1999 Issue; and “Guide to Assessing Penalties,” Policy No. ENF 14.13.02, June 1, 1999 Issue.
- 176 *Crown Forests Sustainability Act, 1994*, s. 26.
- 177 MNR, Guideline for Forest Compliance Planning, April 23, 2001, Revision, p. 4.

## Endnotes

- 178 See condition 22 of the Generic SFL amendment.
- 179 MNR, Guideline for Forest Compliance Planning, April 23, 2001, Revision, p. 5.
- 180 From Management Board Secretariat, Annual Estimates 1991/92–2002/03 (Toronto: MBS).
- 181 M. Winfield and G. Jenish, Ontario’s Environment and the ‘Common Sense Revolution:’ A Third Year Report (Toronto: CIELAP, June 1998), Table vi.
- 182 Winfield and Jenish, Ontario’s Environment and the ‘Common Sense Revolution:’ A Third Year Report, Table vi.
- 183 MNR, 2001-02 Business Plan (Toronto: 2001).
- 184 Winfield and Jenish, Ontario’s Environment and the ‘Common Sense Revolution:’ A Third Year Report, Table vi.
- 185 Winfield and Jenish, Ontario’s Environment and the ‘Common Sense Revolution:’ A Third Year Report, Table vi.
- 186 From Management Board Secretariat, The Estimates: Ministry of Natural Resources, except as noted.
- 187 From Forest Management Branch, Forest Management Business Plan, Table 1.
- 188 From Forest Management Branch, Forest Management Business Plan, Table 1.
- 189 Based on a review of the salaries and wages for field operations in the 1997/98 MNR estimates.
- 190 The 1996 Forest Management Business Plan projected a reduction in operational personnel from 637 in 1995 to 287 in 1996; a 55% reduction.
- 191 Winfield and Jenish, Ontario’s Environment and the ‘Common Sense Revolution:’ A Third Year Report, Table vi.
- 192 Forest Management Branch and Forest Industry Relations Branch, MNR response to freedom of information request, received August 7, 2002.
- 193 Personal communication. Forests Division, MNR, November 22, 2002. The 1996 Forest Management Business Plan also provides a figure of 139 compliance staff for 1995.
- 194 MNR, Forest Information Manual, p. 275, s. 5.3.
- 195 MNR, Forest Information Manual, p. 275, s. 5.3 and p. 278, s. 5.4.
- 196 MNR, Report on Forest Operations Compliance Program Review (Sault Ste Marie: MNR, June 1999), p. 14.
- 197 MNR, Report on Forest Operations Compliance Program Review, p. 8.
- 198 Environmental Commissioner of Ontario, Annual Report 1998 (Toronto: Office of the Environmental Commissioner, 1999), p. 188.
- 199 ECO, Annual Report 1998, pp.185–189. This case arose from the Sierra Legal Defence Fund/Wildlands League Cutting Around the Rules report published in April 1998.
- 200 See the *The Red Tape Reduction Act, 2000*, Schedule L.
- 201 See, for example, ECO, Annual Report 1996, p. 26; ECO Annual Report 1998, pp.185–189; ECO Annual Report 1999/2000, pp. 95–100.
- 202 See, for example, Provincial Auditor of Ontario, Special Report of the Provincial Auditor of Ontario to the Legislative Assembly, Section Chapter 3.13; and Provincial Auditor of Ontario, 2002 Report to the Legislative Assembly, Chapter 4.13.
- 203 See, *Algonquin Wildlands League et.al. v. Minister of Natural Resources et.al.*, Ontario Divisional Court, (1998) 26 CELR (N.S.) 163 February 6, 1998, and *Algonquin Wildlands League v. Minister of Natural Resources*, 29 C.E.L.R. (N.S.) 29 (O.C.A.) October 27, 1998. For a good summary of these decisions see See R. Brooks, K. Mandzy and L. Molloy, Clearing the Forest; Cutting the Rules (Toronto: Sierra Legal Defence Fund and Earthroots, November 2002), p. 11.
- 204 MNR, Forest Information Manual, p. 271.
- 205 MNR, Forest Information Manual, p. 276.
- 206 This includes SLF holders.
- 207 MNR, Forest Information Manual, p. 16, Part A, s. 1.4.2.
- 208 MNR, Forest Information Manual, p. 276, s. 5.3.1.
- 209 MNR, Forest Information Manual, p. 277, s. 5.3.4.
- 210 *Crown Forests Sustainability Act, 1994*, s. 58(1)(b).
- 211 *Crown Forests Sustainability Act, 1994*, s. 64(1)(b).
- 212 *Crown Forests Sustainability Act, 1994*, s. 57(1). There is no specific penalty for non-compliance with a compliance order. However, the imposition of a compliance order opens the option to the minister to seek an injunction or mandamus order and contempt of court penalty.
- 213 *Crown Forests Sustainability Act, 1994*, s. 26.
- 214 *Crown Forests Sustainability Act, 1994*, s. 58(1)(g).
- 215 *Crown Forests Sustainability Act, 1994*, s. 64(1)(g).
- 216 *Crown Forests Sustainability Act, 1994*, s. 58(1)(h).
- 217 *Crown Forests Sustainability Act, 1994*, s. 64(1)(f).
- 218 *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 273. Even on summary conviction, CEPA provides for penalties of up to \$200,000 and six months imprisonment in relation to information issues.
- 219 \$250,000 on first occurrence and up to \$500,000 on subsequent occurrences.
- 220 \$50,000 on first occurrence and up to \$100,000 on subsequent occurrences.

- 221 *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss.184 and 187.
- 222 *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss.13(1), 15(1) and 92(1).
- 223 See, for example, Commissioner for Environment and Sustainable Development, 1999 Report to the House of Commons (Ottawa: Minister of Public Works and Government Services, May 1999), Chapter 5, para. 5.91.
- 224 Assuming the amendment of the SFL to incorporate the self-inspection was a valid use or the ministers power to amend SFLs in accordance with the provisions of regulation 167/95 (see section 5.1.1.1 of this report). As SFLs are not prescribed instruments, this would not even require the minimum 30 days public notice under the *Environmental Bill of Rights*.
- 225 The Temagami management unit.
- 226 <http://www.gov.on.ca/opa/english/english.htm>.
- 227 Provincial Auditor, Special Report of the Provincial Auditor of Ontario to the Legislative Assembly, Chapter 3.13.
- 228 *Audit Act*, R.S.O. 1990, c. A35, s. 1.
- 229 *Audit Act*, R.S.O. 1990, c. A35, s. 10.
- 230 Summary from [www.ombudsman.on.ca/faq\\_en.htm](http://www.ombudsman.on.ca/faq_en.htm).
- 231 These are defined by Section 1 of the *Ombudsman Act* as “a Ministry, commission, board or other administrative unit of the Government of Ontario and includes any agency thereof” *Ombudsman Act*, R.S.O.1990, c. O.6, s. 1.
- 232 A complainant may, however, have recourse to an ombudsman’s investigation by challenging the MNR’s approval of the SFL holder’s compliance strategy, insofar as that strategy involved inspections of the overlapping licensee’s operations.
- 233 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 58.
- 234 *Freedom of Information and Protection of Privacy Act*, s. 59.
- 235 *Crown Timber Act, 1979*, s. 5(4).
- 236 *Environmental Bill of Rights, 1993*, Part II.
- 237 The only form of CFSA licence classified under the regulation is for the construction of new forest resource processing facilities. Ontario Regulation 261/01, amending O.Reg. 681/94, s. 10.5.
- 238 Environmental Commissioner of Ontario, Annual Report 1997 (Toronto: ECO, April 1998), pp. 42–44.
- 239 See, for example, EBR Registry Number: PB02E3002, Forest Management Plan for the French/Severn Forest for the period April 1, 2004, to March 31, 2024—Invitation to Participate, posted 2002/11/25.
- 240 For a detailed critique of the Ministry’s approach to its instrument classification regulation, see Environmental Commission of Ontario, 2001-02 Annual Report Supplement (Toronto: ECO, September 2002), pp. 134–142.
- 241 MNR, Forest Management Planning Manual for Ontario’s Crown Forests (Toronto: Queen’s Printer for Ontario, September 1996), Chapter 3.
- 242 Note that the Planning Manual indicates that three notices are “required” to be placed on the EBR registry: Invitation to Participate, Draft Plan Review, and Approved Plan Inspection. Forest Planning Manual, p. A-153.
- 243 *Freedom of Information and Protection of Privacy Act*, subs. 10(1).
- 244 See Commission on Freedom of Information and Individual Privacy, Report: Public Government for Private People (Toronto: Ministry of Government Services, 1980).
- 245 *Crown Forests Sustainability Act, 1994*, s. 21(2). As noted earlier, the minister’s power to gather information from forest resource licence holders must be exercised in accordance with the FIM. CFSA, s. 21(1).
- 246 MNR, Forest Information Manual, s. 1.3, p. 14.
- 247 MNR, Forest Information Manual, s. 1.4.2., pp. 16–17 and s. 5.3.1., p. 276.
- 248 The provisions of the FIM could be read in a manner to suggest that such source materials, because the MNR can compel them or gain access to them, are “in the control of” the MNR. However, no sufficiently similar cases were found to support this interpretation of the phrase “in the custody or under the control.”
- 249 MNR, Forest Information Manual, s. 1.5, pp. 18–20.
- 250 MNR, Forest Information Manual, s. 1.5, pp. 20–21.
- 251 Personal communication, Forests Division, MNR, November 28, 2002.
- 252 See *Freedom of Information and Protection of Privacy Act*, s. 2(1) “head” (b).
- 253 R.S.O. 1990, c. L.25, as amended (LTCA).
- 254 IPC Order P-480, per Inquiry Officer Anita Fineberg.
- 255 IPC Order P-480.
- 256 See IPC Order PO-1988, citing Orders M-1109, M-364 and MO-1238.
- 257 R.S.O., 1990, c.M.56, as amended.
- 258 See IPC Order PO-1988, per Adjudicator Sherry Liang (emphasis added).
- 259 See IPC Order PO-1988.
- 260 Commission on Freedom of Information and Individual Privacy, Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy (Toronto: Queen’s Printer, 1980) (the Williams Commission Report), quoted in IPC Order PO-1988.
- 261 See IPC Order PO-1988, citing also Order P-480 and Order P-1120.
- 262 *Freedom of Information and Protection of Privacy Act*, s. 17(3).



## Endnotes

- 263 MNR, Forest Information Manual, s. 1.4.2., p. 17.
- 264 See reports of numerous IPC orders at <http://www.ipc.on.ca/english/orders/p-14-19.htm#s17>.
- 265 IPC Order P-323.
- 266 MNR, Forest Information Manual, s. 1.6, p. 21.
- 267 A narrower discretionary exception to disclosure is found in s. 21.1 of the FIPPA, respecting fish and wildlife species at risk.
- 268 Sections 27(2)(i) and (j) of the *Copyright Act*, R.S.C., 1985, c. C-42, read as follows:
- The following acts do not constitute an infringement of copyright:
- (i) the disclosure, pursuant to the Access to Information Act, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material;
- (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information; ...
- 269 IPC Order P-1509, per Inquiry Officer Marianne Miller, quoting from Order M-29, per former Commissioner Tom Wright (emphasis in original). The Municipal FIPPA is, for present purposes, identical to the FIPPA.
- 270 On the basis of a “constructive” or “imputed” intention: see Wright, Linden and Klar, Canadian Tort Law: Cases, Notes & Materials, Ninth Edition (Toronto: Butterworths, 1990), at p. 2-2.
- 271 Hogg, Peter W. and Patrick J. Monahan, Liability of the Crown (3rd edition) (Toronto: Carswell, 2000), at pp. 114–115.
- 272 R.S.O. 1990, c. P-27.
- 273 *Proceedings Against the Crown Act*, s. 1.
- 274 *Proceedings Against the Crown Act*, para. 2(2)(c).
- 275 Personal communication. Forests Division, MNR, August 2002.
- 276 See Chapter 12, “Crown Agents,” in Hogg and Monahan, Liability of the Crown. SFL holders are not designated Crown agents either in the licence or by statute.
- 277 *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752 (H.L.); as articulated in the Canadian context in *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at 10-11, per Wilson J.
- 278 M. Faieta, et.al., Environmental Harm: Civil Actions and Compensation (Toronto: Butterworths, 1996), at p. 106.
- 279 See *City of Kamloops v. Nielsen*, above.
- 280 See *City of Kamloops v. Nielsen*, above, at p. 24.
- 281 See *Just v. British Columbia*, [1989] 2 S.C.R. 1228.
- 282 M. Faieta, et.al., Environmental Harm, at 109 (discussing *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445.
- 283 [1997] 3 S.C.R. 1145.
- 284 [1914] 49 S.C.R. 430.
- 285 See *Lewis v. British Columbia* at para. 27.
- 286 *Lewis v. British Columbia* at para. 28, per Cory J. (emphasis added).
- 287 *Lewis v. British Columbia* at para. 30, citing Lord Morris in *Darling v. Attorney-General*, [1950] 2 All E.R. 793 at 796-7 (House of Lords), who was citing in turn *Fisher v. Ruislip-Northwood U.D.C.*, [1945] 2 All E.R. 458 (C.A.) (emphasis added).
- 288 *Lewis v. British Columbia* at para. 37.
- 289 See *City of Kamloops v. Nielsen*, *Just v. British Columbia* and *Lewis v. British Columbia* cases above.
- 290 Forest Compliance Handbook, “Documenting Suspected Infractions of CFSA,” Procedure ENF14.10.02, Issued June 1, 1999, p. 2.
- 291 *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.).
- 292 *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 (S.C.C.).
- 293 *R. v. Cancoil Thermal Corp.* per Lacourcière J.
- 294 *R. v. Jorgensen* per Lamer C.J.
- 295 G. Hoberg, “The British Columbia Forest Practices Code,” in Howlett, ed., Canadian Forest Policy, p. 366.
- 296 Provincial Auditor of Ontario, Special Report to the Legislative Assembly, p. 222.
- 297 Provincial Auditor of Ontario, Special Report to the Legislative Assembly, p. 232.
- 298 MNR, Annual Reports on Forest Management 1995/96, 1996/97, 1997/98, 1998/99, 1999/00.
- 299 MNR, Annual Reports on Forest Management, 1995/96, 1996/97, 1997/98, 1998/99, 1999/00, and the MNR response to freedom of information request, September 10, 2002, MNR Reference Number A-2002-00062.
- 300 From data in MNR, Annual Reports on Forest Management 1995/96, 1996/97, 1997/98, 1998/99, 1999/00.
- 301 MNR, State of Forest Report, 2001, pp. 3-74–3-75.
- 302 Personal communication. Forests Division, MNR, November 20, 2002.
- 303 Temagami management unit, AR-12 Annual Reports on Forest Operations Inspections, 1999/2000 to 2001/02.
- 304 SFL was established for this unit until it was consolidated with the Gordon Cousens Forest on March 31, 2000.
- 305 There was no SFL holder for this unit until October 2002. Personal communication. MNR Information and Privacy Office, February 20, 2003.

- 306 Expressed as the percentage of inspection reports on these types of operations reporting that the operations were in compliance with MNR requirements.
- 307 MNR, State of the Forest Report, 2001, pp. 3-144–3–147.
- 308 From MNR, State of the Forest Report, 2001, Table 7.7.2a.
- 309 MNR, State of the Forest Report, 2001, p. 3-146.
- 310 Provincial Auditor of Ontario, Special Report to the Legislative Assembly, pp.233-234, and Provincial Auditor, 2002 Annual Report to the Legislative Assembly, chapter 4.13 (follow-up to section of 3.13 of the 2000 Special Report.
- 311 Sierra Legal Defence Fund and Algonquin Wildlands League, Cutting Around the Rules: The Algoma Highlands Pay the Price for Lax Enforcement of Logging Rules (Toronto: SLDF and Wildlands League, April 1998), p. 23.
- 312 Specifically, the Timber Management Guidelines for Protection of Fish Habitat and Code of Practice for Timber Management Operations in Riparian Areas.
- 313 MNR Investigation Team, EBR Investigation of Forestry Practice in Algoma Forest Management Unit (Sault Ste. Marie: MNR, November 1998), pp.9 and 17.
- 314 Sierra Legal Defence Fund (SLDF) and Algonquin Wildlands League, Cutting Around the Rules; Sierra Legal Defence Fund and Algonquin Wildlands League, Grounds for Concern: An Audit of Compliance with Ontario Forest Protection Rules: Algonquin Park and the Magpie Forest (Toronto: SLDF and Wildlands League, January 2000); and Improving Practices, Reducing Harm: Making Best Practices a Practical Reality in Forest Management (Toronto: SLDF and Wildlands League, November 2001).
- 315 See, for example, Improving Practices/Reducing Harm pp. 11 and 18, including copies of correspondence between SLDF and Wildlands League and Domtar ltd.
- 316 MNR, Forest Operations Compliance Review (MNR, June 1999), p. 14.
- 317 MNR, Forest Information Manual s. 5.3., p. 275.
- 318 MNR, 98/99 Annual Report on Timber Management, p. 48.
- 319 Compliance Transfer Team, Understanding Compliance in Forest Operations (MNR, March 1997), p. 3.
- 320 See, for example, Thomas, “Change, Governance and Public Management,” pp. 67 and 75.
- 321 Boston, “Organizing for Service Delivery,” pp. 296–297.
- 322 Boston, “Organizing for Service Delivery,” pp. 296–297.
- 323 See, for example, H. Mintzberg and J. Jorgensen, “Emergent Strategy for Public Policy,” Canadian Public Administration, 1987, Vol. 30, No. 2.
- 324 Now the Ministry of Sustainable Resource Management.
- 325 B. Cashore, G. Hoberg, M. Howlett, J. Rayner, and J. Wilson, In Search of Sustainability: British Columbia Forest Policy in the 1990’s (Vancouver: University of British Columbia Press, 2001), p.156.
- 326 See, for example, Winfield and Benevides, Drinking Water Protection in Ontario, p. 44.
- 327 MNR, Forest Information Manual, s. 4.5, p. 270.
- 328 The MNR has no precise number of industry inspectors at this time, but estimates that approximately 200 MNR staff and industry personnel have been through the training course, and 100 more are anticipated next year. Personal communication. Forests Division, MNR, November 22, 2002.
- 329 The MNR currently has 45.5 FTEs dedicated to this purpose (approximately 2 per district).
- 330 See Winfield, Whorley and Kaufman, The ‘New Public Management’ Comes to Ontario: A Study of Ontario’s TSSA; Winfield and Benevides, Drinking Water Protection in Ontario: A Comparison of Direct and Alternative Delivery Models.
- 331 See Provincial Auditor, Special Report of the Provincial Auditor of Ontario to the Legislative Assembly.
- 332 Derived from Tables 2 and 11.
- 333 From Forest Management Branch, Forest Management Business Plan, Table 1.
- 334 From Forest Management Branch, Forest Management Business Plan, Table 1.
- 335 Provincial Auditor, Special Report to the Legislative Assembly, p. 232.
- 336 Provincial Auditor, Special Report to the Legislative Assembly, p. 232.
- 337 MNR, A Review by the Ministry of Natural Resources Regarding the Class Environmental Assessment for Timber Management on Crown Lands in Ontario (“MNR’s Timber Class EA Review” (Toronto: MNR, July 2002), Recommended Terms and Conditions 51–53.
- 338 Howlett and Raymer, “The Business and Government Nexus” p. 43.
- 339 Howlett and Raymer, “The Business and Government Nexus,” p. 43.



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