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Government Liability

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It should be noted that the current government is making a substantial number of change to legislation in all areas. This includes the ongoing revisions of the Forest Practices Code Act, the Regulations under that Act and the accompanying standards or procedures designated by the Ministry of Forests. As these aspects of the law are changed either subtly or substantially, so will the relevant analysis of government liability.

The Ministry of Forests has recently adopted a policy decreasing the maintenance requirements for forest service roads. Any policy allowing for decreased maintenance of forest roads must be closely observed due to the threat improperly maintained forest roads present to the environment. The Forest Practices Board has identified the failure to properly maintain logging roads as a factor causing equal or greater environmental impact as logging itself. This is mostly due to the high incidence of landslides associated with sedimentation caused by improperly maintained roads. The possibility that decreasing maintenance will result in foreseeable harm imposes important questions on the potential liability of the government for property and environmental damage occurring as a result of the decision not to maintain a portion of the provinces forest roads.

Traditionally, the Ministry of Forests has categorized roads as either status or non-status. Status roads were maintained while non-status were not. The Ministry of Forests has recently changed their Standard Operating Procedures in the wake of the liberal governments 'core review' process. Chapter VIII of the Ministry of Forests Engineering Manual, 'Administration of Forest Service Road Maintenance' was recently amended effective May 1, 2002 in an effort to reduce spending on forest service road maintenance.[1]

The Ministry will not officially designate any more roads as non-status. However, it will re-classify status roads into four designations. Categories of Forests Service Road (FSR) which will continue to receive full maintenance will include "Industrial Use FSRs", which are those roads used for all or part of any year by an industrial user and "Public Use FSRs" which are those roads providing access to communities. "Closed FSRs" are roads barricaded where immediate hazards are present. Practically, the most significant change in road maintenance occurs in the designation of "Wilderness FSRs". Wilderness Roads are any roads not being used industrially or providing access to communities. These roads will be maintained for primarily environmental concerns.

Prior to this plan approximately 2/3 of status roads were maintained for 'Industrial Use' with the remaining maintained by the Ministry of Forests as 'Public Use'. Of the1/3 formerly maintained for public use a significant portion will be designated as Wilderness Road. In accordance with the *Forest Practices Code of British Columbia Act* ("*Forest Practices Code Act*")[2], environmental maintenance requirements for Wilderness Roads are set out in the Engineering Manual as:

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[1] see Appendix A

[2] *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159

(b) rank environmental projects for expenditure according to the service plan.
(c) provide environmental project maintenance in accordance with section 18(1)(b),(c) and (d) of the *Forest Road Regulation*; carry out slope and other structural repairs that would restore access only if access can be achieved concurrently with and at no additional cost to providing environmental protection, or if access is required for other environmental projects further up the road.

The noted sub-sections of s. 18 of the *Forest Road Regulation*[3] states that a person who maintains a road must inspect and repair the road to ensure that:

> (b) the drainage systems of the road are functional,
>
> (c) the transport of sediment from the road prism and its effects on other forest resources are minimized,
>
> (d) safe passage for fish is provided at fish stream crossings constructed or modified after June 15, 1995…

Section 18(3)(a) and (5)(b) of this Regulation confirms that any person required to maintain a Wilderness Road must do so "in a time that is reasonable" taking into account the potential risk to the environment.

The new operating procedure and associated Regulations appear to make a commitment to environmental maintenance of Wilderness status roads. While this is heartening, it is unclear exactly to what extent inspection and repair will take place. There appears to be a procedure in place, but adherence to this procedure, including the rate of inspection, the requirements of inspection and the assigning of risk areas are left to each district to manage independently based on their fiscal capability. In other words, while the plan for environmental protection exists, its practical use will be based on the districts' allocation of funding from the provincial government. This could result in minimal attention being given to the inspection and maintenance of roads where environmental threats are identified. An important legal question surfaces from this situation. What is the government's exposure to liability, if any, for property or environmental damage caused by landslides or other environmental instability caused by unsatisfactorily inspected and maintained Wilderness Roads? Further, this legal question need not be directed only to damage arising on newly designated Wilderness Roads, but may extend to look at environmental damage caused by lack of proper maintenance on any type of forest service road.

The leading case dealing with the potential liability of government is *Just v. British Columbia ("Just")*[4]. Whether the government may be held liable first depends on

[3] *Forest Road Regulation*, B.C. Reg. 206/2002
[4] *Just v. British Columbia* [1989] 2 SCR 1228

whether the government owes a duty of care in the particular situation. If a duty of care is owed, the government may still be exempt from liability based on an explicit statutory exemption or the characterization of the governmental decision as 'policy' rather than 'operational' in nature. If a duty of care is owing and no exemption via statute or policy-decision exist a traditional tort analysis ensues. It must also be noted that even a policy decision may be challenged on the basis that the government has acted in bad faith.[5]

Each of these steps will be explored further in the context of the Ministry of Forests duty to maintain forest roads. Judicial history has shown it is difficult to make concrete predictions of where a court may hold the government liable. As will be highlighted, particularly in the area of distinguishing operational from policy decisions, there is a large grey area which can make interpretation extremely difficult. An additional level of uncertainty exists in this analysis as it remains unknown exactly how the Ministry of Forests new standards will be applied. However, despite these uncertainties a hypothetical analysis of the government's exposure to liability surrounding these decisions is useful in monitoring the effectiveness and legality of this new procedure.

Duty of Care

A duty of care is said to have arisen where there is a relationship of sufficient proximity to warrant the imposition of such a duty (*Just*). The specific question to be asked in this situation is whether damage suffered by those with property interests adjacent or linked to forest road sites would be damage readily foreseeable if the forest roads were not maintained?

All evidence indicates the answer to this question would be that a foreseeable harm does exist. The Forest Practices Board itself has openly acknowledged that landslides occur due to improperly maintained or completely abandoned forest roads.

Additionally, case law has dictated that evidence of a prescribed statutory duty will buttress establishing a duty of care (*Just, Brown*). In the situation at hand, the duty to maintain forest service roads is prescribed in s. 18 of the *Forest Act Regulation* and the Operating Engineering Manual as noted, (both under the *Forest Practices Code Act*, s. 63(6)), which provides for government maintenance in the following manner:

> (6) Subject to subsection (7), the government must maintain forest service roads in accordance with the requirements of
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> (a) any forest development plan, and
>
> (b) the regulations and standards,

[5] *Gobin v. British Columbia*, 2002 BCCA 373, *Brown v. British Columbia* (1994) 112 DLR (4th) 1, *Kamloops (City) v. Nielsen* [1984] 2 SCR 2

until the road is deactivated under a forest development plan.

In light of the government's commitment to forest road maintenance under this legislation and the aforementioned Regulation and Engineering Manual, it is likely a court would find that a relationship of proximity exists in the context of a situation where damage arose from the improper or incomplete maintenance of forest roads.

Statutory Exemption

Despite a duty of care the government may still be shielded from liability by way of a specific statutory exemption. This factor will be a major hurdle in assigning any liability to the government with respect to decisions made in accordance with the *Forest Practices Code Act* due to the strong exclusion clause at s. 160(4) which states:

> 160 (4) Despite subsection (2), the government is not liable in respect of any loss or damage caused or resulting, directly or indirectly, by or from,
>
> (a) the enactment of this Act or a regulation or standard made under this Act, or
>
> (b) anything done or omitted in the exercise or performance or purported exercise or performance of a power or duty conferred under this Act, the regulations or the standards, unless the person who brings the action proves that the person exercising or performing or purporting to exercise or perform the power or duty was not acting in good faith.

This clause could remove any prospect of assigning the government with liability for failure to maintain roads in accordance with the *Forest Practices Code Act*. Strict reading of this section only allows for actions to be brought against the government where the party bringing the action can prove that the government "was not acting in good faith". This is likely drafted to reflect the similar standard found in the case law, which indicates that despite the characterization of a government decision as policy in nature, there is always room for a complainant to attack a government decision on the basis that it "is shown to have been made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion" (*Brown*)

In all likelihood this statutory exemption renders the operational/policy distinction a moot point. It would seem that this clause only leaves room for an attack on the road maintenance issue on the grounds that it was made in bad faith tantamount to the government exceeding its discretion. However, courts have previously shown some willingness to get around exemption clauses in order to engage the policy/operational question.

In *Australian National Airlines Commission v. Newman*[6], the Australian High Court disregarded a clause providing for a limitation on actions "arising out of anything done or purporting to have been done under this Act." In that case the court was able characterize the failure of maintaining a kitchen an issue pertaining to the provision of safe access to work and therefore not something "done or purported to be done under the act", since the court held the act in question did not cover this broad a scope.

In *Erickson v. Elsom*[7], the court held that no statutory immunity existed for a Public Trustee who negligently settled a minor plaintiffs claim while acting as guardian. The courts reasoned that the activity of representing a minor was allowed by a different statute than the one which contained the immunity clause, and therefore the immunity clause did not apply.

It is difficult to accurately analyze what options for evading s. 160(4) may exist while in the realm of the hypothetical. It is very difficult to imagine any success in limiting the scope of the *Forest Practices Code Act* in an *Australian National* fashion. This argument would require characterizing the failure to properly maintain logging roads and the ensuing environmental damage as an issue different than what is purported to be covered by the legislation, and therefore outside the scope of the exemption clause. This seems relatively impossible given that the wording of the legislation, regulations and manual make specific reference to continuing maintenance for protection against environmental damage.

There may be slightly more room for escaping the exemption clause in an *Erickson* fashion by arguing that the government is acting under alternative legislation not subject to this specific clause. The *Forest Act*[8] has no government liability exemption clause but does include provisions for the maintenance of forest roads:

> **121** (1) The minister, for the purpose of providing access to timber or for any other purpose consistent with this Act or the *Forest Practices Code of British Columbia Act* may
>
> (a) construct, maintain and modify roads and trails,

Possibly an argument could be made that reference to the *Forest Practices Code Act* in this statute indicates that the Minister's overriding power to maintain roads actually comes from the *Forest Act*. Section 121 only referentially incorporates the *Forest Practices Code Act* insofar as construction and maintenance of roads go, but not extending to provisions of that Act dealing with government exemptions for liability.

It must be emphasized that getting past the statutory exemption in the *Forest Practices Code Act* is a long shot at best. In all likelihood any action for damage arising from the failure to properly maintain forest roads will depend on fulfilling the

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[6] *Australian National Airlines Commission v. Newman* (1987) 70 ALR 275 (H.C.)
[7] *Erickson v. Elsom* (1992) 72 BCLR (2d) 106 (S.C.)
[8] *Forest Act*, R.S.B.C. c. 157.

substantially high threshold of proving the damage was caused by actions carried out in bad faith. However, on the chance that this exemption clause could be overlooked or weakened, a policy vs. operational analysis should be examined.

Policy or Operational

In *Just*, the court states that where government decisions are truly policy in nature the government is shielded from liability:

> . . . True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political, or economic factors.[9]

However, before a government decision is deemed of a policy nature and shielded from liability the court must first weigh the circumstances of the particular case in establishing whether the decision was truly of a policy nature, or whether such decision was actually operational in nature. Where a decision is deemed operational in nature, or where the government is negligent in an operational aspect of a policy decision, the government may be open to liability. Where a decision is deemed to be of a policy nature, the government is not open to liability.

Whether a decision is of a policy or operational nature is often difficult to discern. In *Just*, the court explains that generally decisions made at a higher level of government would be policy decisions, although this factor is not determinative. The court also notes that decisions concerning the allotment of funds for government agencies are very likely policy in nature. In the context of inspection programs specifically, the court notes that the decision not to inspect at all or reduce the number of inspections would be a true policy decision. However, policy decisions may have operational components. If an inspection system is put in place it must be carried out reasonably in light of the circumstances, including the funds allocated for it. So, within the implementation of a policy decision to inspect the government must meet the requisite standard of care.

Further consideration in distinguishing policy and operational considerations have been articulated by the courts as follows:

> True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
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> The operational area is concerned with the practical implementation of the formulated policies; it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of

[9] *Just, supra* at note 4, para. 18.

> administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[10]

In the situation at hand, the government has given individual districts the discretion to formulate and carry out procedures of inspection and maintenance on environmental hazards of wilderness roads. Therefore, the degree to which any districts forests roads are actually maintained within the bounds set by s. 18 of the *Forest Act Regulation* will depend greatly on decisions made at lower levels of government. As discussed, past decisions of the court have indicated that decisions made at a higher level of government would be more likely characterized as a policy decision while those at a lower level would be more likely characterized as operational. However, strong indications from *Just* and *Brown* indicate that ultimately the "characterization of such a decision rests with the nature of the decision and not the identity of the actors."[11] Where a decision is shown to be based on the allocation of finite financial resources the court will likely characterize the decision as policy in nature despite the level of government making the decision.

The courts have previously considered the characterization of inspection situations somewhat analogous to those in question here. From these cases it is apparent that decisions regarding an inspection system cannot be labeled operational in nature if these decisions regard the frequency of inspection, or even the thoroughness of inspection if it may be shown that inspections were conducted less thoroughly due to budgetary constraints. In *Brown*, the decision to maintain a summer work schedule into November when a winter schedule would usually be in place was found to be a policy decision since it was based on considerations involving matters of finance and personnel. However, the court did find that an operational aspect existed in the continued implementation of that summer policy. In *Swinamer v. Nova Scotia*[12], the court held that a system of inspection, although not sufficiently thorough to detect the problem which ultimately arose, was beyond attack in tort since the decision not to retrain personnel or spend more time on the inspection was due to low resources and therefore policy in nature.

As discussed, in the situation at hand each district will be responsible for allocating resources for inspection of maintenance of forest roads in accordance with the noted regulations and procedure manuals. The Ministry estimates that inspections of Wilderness Roads will happen approximately one time per year, a rate very comparable to the rate of inspection of these roads under their former designation as Public Use. Potential risk areas will be assigned as status low, medium or high, and maintenance planned to remedy the problems accordingly. However, the Ministry admits that decisions pertaining to frequency of inspection and assignment of risk areas may not be uniform as they are determined district by district. Whether any landslides or other

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[10] Brown, quoting Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705, 45 M.P.L.R. 1, [1990] I.L.R. 93,049; Barratt v. North Vancouver (District) (1980), 114 D.L.R. (3d) 577, [1980] 2 S.C.R. 418, 14 C.C.L.T. 169; and Just, *supra* at note 4.

[11] *Just, supra* at note 4., *Brown, supra* at note 5.

[12] *Swinamer v. Nova Scotia (Attorney General)* [1994] 1 SCR 445

environmental damage slipping through the cracks of this system are a result of policy or operational decisions will depend largely on the specifics of each case.

It appears from a canvass of the case law that damage arising from an inspection system that is improperly employed due to the negligence of Ministry of Forests employees would be of an operational aspect and leave the government exposed to liability. This may be the case where a hazard is assigned a lower risk factor than it should, or where maintenance construction on an area is not in itself performed properly. However, it is crucial to note that if any oversight is related to the availability of funds a court will likely spin the problem into a policy context.

The very frustrating aspect in these 'inspection' cases is that the policy vs. operational characterization causes the courts to look at the effectiveness of inspection systems in a very impractical manner. Removing ones mind from the cavern of the policy versus operational doctrine, it seems irrational that the operational aspect of an inspection system is not assessed on its frequency. Common sense dictates that how effectively problems are identified depends greatly on how often you look. While the goals of the judiciary in preserving the discretion of the government to manage its own finite resources are noble, important and necessary, the effect of this doctrine when applied to inspection systems leads to an analysis of a falsehood. In court, liability is currently determined by bizarre nuances involving allocation of funds. In the real world, the government is effectively choosing to turn its back on a portion of its duties. This may be necessary and justified, but it should not be beyond examination on its merits. I tend to agree with the logic of the trial judge at first instance in *Swinamer*, who held that " 'lack of funds' as a reason for a failure to act does not stand up to scrutiny."[13] While it must be acknowledged that this decision was necessarily overturned because it is not the law, I do not find that the subtle distinctions presently being made, which shield the government from the merits of its duty of care to the public, equate with justice. The acknowledgement of the governments need to allocate resources can still be taken into account in applying a traditional tort analysis which commands the proper standard of care be determined. At a standard of care stage of tort analysis, as already suggested by *Just*, the court may assess the standard of care in light of the budgetary restraints or any other factors affecting the decision.[14] In this manner, the court could examine the reality that governmental negligence may lie in the choice of where to allocate funds and allow for an assessment of this on its merits.

Completion of the Test- Traditional Tort Analysis *or* the Good Faith Standard

Traditional Tort Analysis

Although relatively unlikely, if the court does choose to overlook the statutory exemption in s. 160(4) of the *Forest Practices Code Act*, and if the specific facts of the

[13] *Swinamer, supra* at note 12.
[14] *Just, supra* at note 4.

case indicate the decision involving damage was operational rather than policy in nature, a traditional tort analysis will ensue. Whatever the specific facts of the case are, it is important to note that establishing liability will still depend on showing the government failed to meet the requisite standard of care. This standard of care may not be as stringent as that normally required of an individual responsible for a single roadway. The prospective lessening of such a standard of care was suggested in *Just,* where the court made it clear that the standard of care would likely be lessened due to the Crown's responsibility for maintenance of such a large area of highway. [15] The Ministry of Forests responsibility over a large area of forest roads is analogous. It may be expected that even operational decisions subject to a tort analysis will be assessed in light of a relaxed standard of care.

In addition to dealing with a relaxed standard of care, any party seeking to assign the government liability for damages in this context may also run into problems establishing causation. In *Brown*, the court held that an unreasonable delay in dispatching a sanding truck in response to a request for sanding an icy road was due to the negligence of the Crown.[16] However, it was found that the subsequent accident at the site where the sanding was requested could not have been prevented even if a reasonably effective process were in place. For this reason, the court found the negligence of the crown to have no effect on the accident and the Crown was not found liable.

The "Good Faith" Standard

Given the likelihood that any action against the Crown will either, a) fail on the statutory exemption, or b) be found to be in relation to a policy, any successful claim will likely hinge on proving the government acted in bad faith. From the outset, it must be acknowledged that this 'bad faith' threshold will be extremely difficult to meet.

It will be assumed for this analysis that the definition contained in the statutory exemption of "not acting in good faith" would be interpreted by the court as encompassing or being closely related to the standard established in the associated case law referring to the government acting in bad faith, in a patently unreasonable manner or beyond its discretion.[17] In *Gobin*, citing *Brown*, the court confirms that the test in this situation is beyond the tort standard of reasonableness and one of a bona fide exercise of discretion.[18]

Attacking government action in a narrow sense, a party suffering damages as a result of an improperly maintained forest road may seek to prove bad faith in a specific lower level policy decision of the district in question. However, districts will be heavily

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[15] *Just, supra* at note 4, para. 33.
[16] *Brown, supra* at note 5.
[17] *Gobin*, *supra* at note 5, *Brown supra* at note 5, *Kamloops*, *supra* at note 5.
[18] *Gobin*, *supra*, at note 5.

governed by budgetary constraints that would likely be used to explain away nearly any policy.

Attacking government action in a broader sense, a party suffering damages may choose to target the legislation, regulations and associated manuals and/or service plans as a whole. This attack would encompass policy decisions including the new designation of the Wilderness Roads, the plan to maintain for environmental damage, and the decision to leave wide discretion to the individual districts for the implementation of inspection and risk assignment programs.

There is ample evidence indicating that prior to these further cutbacks to the maintenance of forest roads, environmental damage due to poorly maintained roads was already beyond the control of the resources available. It is arguable, and many would say probable, that the government has simply developed a policy which will be effectively impossible to meet given that the districts, despite being provided the policy mandate, have not been provided even close to adequate funding to properly carry out this mandate. While maintaining forest roads to avoid environmental damage is addressed effectively on paper through s. 18 of the *Forest Act Regulations* and through the Operating Manual, when coupled with the financial reality, or lack thereof, the districts will simply be unable to practically apply the prescribed inspection and maintenance programs with any kind of effectiveness.

This line of argument reverberates with the type of 'financial considerations' courts have traditionally shown so much deference for, even when presented with facts involving serious personal injury. There is little doubt litigants opposing the government will face a great challenge. However, what is proposed here is not a policy which is being implemented within the constraints of a budget, but rather a policy adopted while the government knowingly provides inadequate resources for its effectiveness. If, when the smoke clears so to speak, there is evidence that the government adopted this policy on paper to appease environmental concerns while taking no practical steps to make its implementation a possibility, an "acting not in good faith" argument could surface.

Conclusion

Any chance of assigning liability with the government for decisions made surrounding the maintenance of forest roads is very fact dependent and very much an uphill battle.

Most likely, a party would have to prove damages suffered were a result of the government "acting not in good faith". If the court could be persuaded that the statutory exemption did not apply and that the negligence in question was a matter of an operational aspect, a traditional tort analysis would ensue. In either case, the government has a significant veil to avoid liability given the courts overwhelming tendency to defer to decisions based on the allocation of resources.