

Scope of Practice – Interpretation

Approved by Council June 5, 2002

INTRODUCTION

The March edition of the Professional Forester featured an article entitled "Scope of Practice Interpretation". The purpose of the article was to seek members' comments on the draft "interpretation" prior to the draft going to Council for approval. All comments were forwarded to the Blue Ribbon Panel in May of 2002 and the panel was asked to review the comments and make recommendations. The resulting document was approved by Council on June 5, 2002.

We now have an official, Council approved, Scope of Practice Interpretation. The main purpose of this document is to provide guidance to professional foresters, individuals in related professions and occupations, consumers, the public, employers and policy makers in interpreting the scope of practice of the profession of forestry in Ontario outlined in the Professional Foresters Act, 2000 ("the Act") and related by-laws, policies and guidelines of the Association.

In addition, the document identifies the steps that will be followed by the Association in the event that the Association decides to make an interpretation as to whether an activity, in a particular situation, is within the scope of practice of professional forestry or not. Members are encouraged to download this document for their personal reference.

DEFINITION – SCOPE OF PRACTICE

Forestry is a broad-based activity that crosses many boundaries of other professions, trades and occupations. Defining a scope of practice requires a flexible, "living" approach that can accommodate current practices and adapt to changes in techniques, education and management practices. The definition of the practice of professional forestry in the Act, together with the exemptions, has the flexibility to permit a multidisciplinary approach to continue. It also enables the core practice of a professional forester to evolve over time without necessarily amending the definition. This evolution will occur in conjunction with changes in the practice of forestry and forestry education which affect the interpretation of the definition.

The legislative aspect of the scope of practice of the profession of forestry in Ontario is set out in Sections 3 and 13 of the Act. The Act is professional licensing legislation, which requires individuals to obtain a certificate of registration before they can practice professional forestry. As a result, these sections do not define the full range of practices of professional foresters. They define the types of activities, the performance of which requires a certificate of registration.

Subsection 3(1) defines scope of practice:

The practice of professional forestry is the provision of services in relation to the development, management, conservation and sustainability of forests and urban forests where those services require knowledge, training and experience equivalent to that required to become a member under this Act and includes:

(a) the designing, specifying or approving of silvicultural prescriptions and treatments, including timber harvesting;

- (b) the appraisal, evaluation and certification of forests and urban forests;
- (c) the auditing of forest management practices;
- (d) the assessment of impacts from planned activities on forests and urban forests;
- (e) the classification, inventory and mapping of forests and urban forests; and
- (f) the planning and locating of forest transportation systems, including forest roads.

The key word in the definition is the word “includes”. This means that the examples (a) through (f) in subsection 3(1) below do not represent an exhaustive list of what constitutes the practice of professional forestry but are merely examples. There may be many other activities which fall within the definition. In the event an activity in question falls within one of the examples, it must still meet the tests which follow. In particular, it must require the knowledge, training and experience equivalent to that required to become a member under the Act before the person performing the activity will be required to obtain a certificate of registration.

FACTORS IN DECISION MAKING

Legislative Authority to Make Scope of Practice Decisions

The authority is derived from the fact that the legislation provides the opportunity for the OPFA to bring court action in instances where an individual is perceived to be in violation of sections of the Act dealing with the practice of professional forestry. This requires the OPFA to interpret and take a position on what is included within the scope of practice of professional forestry.

The principal object of the OPFA, as set out in subsection 5(1) of the Professional Foresters Act, 2000 (the Act), is to regulate the practice of professional forestry and to govern its members in accordance with the Act, the regulations and the bylaws in order that the public interest may be served and protected.

Professional Judgement

The determination of whether an action or activity is within the scope of practice of professional forestry is a matter of professional judgement and must be exercised on a case by case basis. In making this judgement it is useful to compare the activity in question against some general principles or criteria that will assist in identifying the extent to which “professional judgement” is required in carrying out the activity.

The first is whether the activity requires the knowledge, training and experience equivalent to that required for membership in the Ontario Professional Foresters Association. Knowledge includes the subjects of silviculture, forest ecology, silvics, forest soils, tree morphology and physiology and other related scientific subjects together with the ability to understand their interrelationships and interactions in different site and management conditions. These are all common knowledge requirements of an RPF. In addition, RPFs require an understanding of this detailed subject matter to properly consider and analyze possible outcomes and impacts of management alternatives from scientific, economic, ecological, social and cultural perspectives. Finally, the ability to understand the implications of the management and operational actions in

the forest and the possible impacts that may occur and the potential to achieve the identified objectives is acquired as a result of the combination of an RPFs' knowledge, training and experience.

The second involves the degree of professional judgement required in order to carry out the activity. As a general rule, the greater the degree of professional judgement required, the more likely that the activity is within the scope of practice of professional forestry. The less professional judgement required, the more likely that the activity could be performed by a member of another trade occupation or profession e.g. forest technician.

The third principle involves a determination of whether an activity is harmful if it is not done properly. Generally it can be said that if there is the potential for harm a Registered Professional Forester is required. However it is the likelihood of harm and the significance of it that will ultimately cause a judgement to be made in this matter. Issues that need to be considered include sustainability, the natural environment, and possible negative effects on biodiversity. Each of these areas needs to be examined in the context of the potential harmful impact of an activity if improperly carried out. Given that the primary determinant of whether an activity falls within the scope of practice of professional forestry is whether the activity (in a given situation) requires the "knowledge, training and experience equivalent to that required to become a member of the OPFA"; it can be expected that in some situations an activity will fall within the scope of practice and in other situations it will not.

A fact driven analysis is required for each situation.

Land Ownership

On Crown land, the Crown Forest Sustainability Act (CFSA) requires that a Forest Management Plan be prepared and signed by a Registered Professional Forester. In addition, the Forest Management Planning Manual identifies a number of specific activities that require the involvement of a Registered Professional Forester (see Appendix I for a general description of these activities).

That fact that the CFSA requires Registered Professional Foresters to be involved in certain activities in the preparation of a Forest Management Plan, does NOT mean that these activities automatically fall within the scope of practice of professional forestry. That determination is the responsibility of the OPFA and is made under a different set of circumstances.

The preparation of a Forest Management Plan on private land follows essentially the same process as used for Crown forests. Whether a plan is being developed for a 25 ha. property or for a 1,225,000 ha. property, the basic steps of plan preparation are the same. However, **the determination of whether the preparation of the plan and/or the carrying out of any specific planning activities fall within the scope of practice of professional forestry is the responsibility of the OPFA.**

The issue of forest ownership has no bearing on whether a particular activity is considered to be within or outside of the scope of practice of professional forestry.

OPFA as Regulator

As the regulator of the practice of professional forestry, the OPFA must be careful not to compromise its role by making predetermined judgements. As the regulator, the OPFA is entitled to determine the circumstances under which it will initiate legal proceedings to halt what it considers is the unauthorized practice of professional forestry. When asked, the OPFA can provide the principles developed to make this determination and can advise, using hypothetical examples, when it would consider taking action against an unauthorized practitioner.

However, the OPFA should stop short of providing opinions as to whether a proposed activity is within or outside of the scope of practice. The only exceptions to this rule are when the OPFA or a court of law has already made a determination regarding the proposed activity, or when the proposed activity is obviously and apparently within or outside of the scope of practice of professional forestry.

Exclusions

Section 13 of the Act states that:

“No person shall engage in or hold himself, herself or itself out as able to engage in the practice of professional forestry unless the person holds a certificate of registration issued by the Association.”

However, there are some exclusions and Subsection 3(2) outlines who is excluded from the application of the Act:

“The practice of professional forestry does not include acts performed in relation to the management or manipulation of forests if they are performed:

- (a) personally by individuals on land which they own;
- (b) by a person acting within the scope of practice of a profession, trade or occupation that is listed in the by-laws;
- (c) by persons responding to an emergency situation such as a forest fire;
- (d) by persons acting under the supervision of a member;
- (e) by students enrolled in a forestry education program and under the supervision of the course instructor in the program;
- (f) by a member of the armed forces while on duty; and
- (g) by a person engaged in scientific research.”

(see Appendix II for a detailed analysis of the contents of Section 3(2)).

DECISION-MAKING PROCESS RE: SCOPE OF PRACTICE

This section outlines the sequence of steps that would be followed in the event that the OPFA was requested or decided to make an interpretation as to whether an activity in a particular situation was considered to be within the scope of practice of professional forestry or not. This is different from a situation where the Association is attempting to prevent non-members from engaging in the practice of professional forestry.

Step1- legislative Authority

The authority is derived from the fact that the legislation provides the opportunity for the OPFA to bring court action in instances where an individual is perceived to be in violation of sections of the Act dealing with the practice of professional forestry. This requires the OPFA to interpret and take a position on what is included in the scope of practice of professional forestry.

The principal object of the OPFA, as set out in subsection 5(1) of the Professional Foresters Act, 2000 (the Act), is to regulate the practice of professional forestry and to govern its members in accordance with the Act, the regulations and the bylaws in order that the public interest may be served and protected.

Step 2 – The Three Tests

The OPFA interprets the Act as applying only to those activities which, by virtue of their specialised nature, require the involvement of an R.P.F. For activities which are not at a professional level and do not require the involvement of an R.P.F., or which fall within the exclusions, it will not be necessary for an individual to obtain a certificate of registration in order to continue to perform them. Taken as a whole, the legislation should only impact on foresters and situations where foresters should be involved by virtue of the specialized nature of the activity.

There are three tests flowing from the definition and exclusions to determine whether an activity falls within the ambit of the Act and whether the person performing the activity requires a certificate of registration:

1. Does the person performing the activity fall within the exclusions?

Yes: the person performing the activity does not require a certificate of registration under the Act.

No: Proceed to question 2.

2. Is the activity a service which relates to the development, management, conservation and sustainability of forests or urban forests, or is it included in one of the listed activities?

Yes: proceed to question 3.

No: the person performing the activity does not require a certificate of registration under the Act.

3. Does the activity require "knowledge, training and experience equivalent to that required to become a member" under the Act?

No: the person performing the activity does not require a certificate of registration under the Act.

Yes: the person performing the activity must apply for a certificate of registration under the Act as **the activity is considered to fall within the Scope of Practice as defined in the Act.**

Therefore, it is ultimately the "knowledge, training and experience equivalent to that required to become a member of the OPFA" that determines if a specific activity is within the scope of practice of professional forestry.

It is not necessarily the activity itself.

(see Appendix III for a discussion of the phraseology within the definition of the practice of professional forestry – Section 3(1))

Step 3 – Detailed Analysis

In the event that the 3 step test does not resolve, to the satisfaction of the OPFA, whether an activity falls within the scope of practice or not, the OPFA may undertake a detailed analysis of the activity in question in order to make an interpretation. In undertaking this analysis, it is assumed (for the purposes of this paper), that any evidence obtained by the OPFA must be from willing people. If cooperation is not forthcoming, there are search warrant provisions under the Provincial Offences Act.

The steps to be followed in undertaking the analysis would be as follows:

- the OPFA would engage 3 to 5 R.P.F.s (with competency in the activity in question), each of whom would be asked for a professional opinion as to whether the activity in question in the particular situation in question was within the scope of practice of professional forestry or not
- each R.P.F. would examine the situation and determine if the activity in question required the "knowledge, training and experience equivalent to that required to become a member in the OPFA"
- each opinion would have to identify the specific "knowledge, training and experience" that was required and be supported by:
 - an identification of the academic subject areas (at the university level) required for the "knowledge component" of the opinion
 - an identification of the type of training required to support the "training component" of the opinion
 - an identification of the experience required to support the "experience component" of the opinion
- once the opinions were received by the OPFA they would be passed to the Blue Ribbon Panel for advice
- once the advice was received from the Blue Ribbon Panel, that advice plus the original opinions would be placed before Council for an opinion
- the opinion of Council would then be communicated as appropriate

- this opinion would represent the interpretation of the Association (while the opinion is not legally binding, it would provide the basis for the OPFA to determine if a violation of the Act has occurred and if legal action is required).

Step 4 – Next Steps

Once Council has made an interpretation, the OPFA will advise the person or organization requesting the interpretation. While the interpretation is not legally binding, (this would only occur as a result of a court decision), it does represent the view of the OPFA. It serves to indicate to the public how the OPFA would respond to the same set of facts in deciding whether to pursue prosecution or other legal action to prevent unauthorized practice.

Appendix I

A general description of the activities requiring the involvement of a Registered Professional Forester is as follows:

a) Organizing for Planning

- Developing the methodology and designing the forest inventory

b) Planning Process and Plan Content Requirements

- Updating the forest inventory by identifying and accounting for depletions and accruals, past and present

c) Strategic Direction and Determination of Sustainability

- Describing the current condition of the forest
- Determining the silvicultural and timber objectives
- Determining the strategies to be followed to achieve the identified silvicultural and timber objectives
- Determining the need for and describing forest units
- Determining all silvicultural strategies
- Developing the management alternatives that will achieve the identified silvicultural and timber objectives
- Determining the available harvest area and/or level of harvest
- Determining the eligibility of stands for harvesting
- Determining primary road corridors with respect to long term wood supply

d) Operational Planning

- Establishing the selection criteria to be used in determining areas in which forest operations are to be carried out
- Determining areas selected for forest operations
- Identifying contingency areas for operations
- Developing forest operating prescriptions for all operating areas including input into operating prescriptions for areas of concern
- Developing forecasts and reporting for all harvesting, renewal and tending operations

including:

- Depletion
- Access roads
- Monitoring and Assessment
- Documentation including summaries

e) Plan Review and Approval

- Reviewing all sections of forest management plans that require an RPF to develop as stated in the Forest Management Planning Manual

f) Plan Amendments, Plan Renewal and Contingency Plans

- Certifying all plan amendments
- Preparing and signing all contingency plans

g) Annual Operations

- The development of silvicultural prescriptions and forest operations prescriptions must be certified by a Registered Professional Forester or some other person if elements of the prescription are beyond the standard expertise of a forester
- Preparing the annual work schedule
- Signing the title and approval page of the annual work schedule
- Developing the silvicultural assessment system
- Keeping the annual work schedule up to date

h) Monitoring and Reporting

- Preparing the annual report
- Preparing the report of past forest operations

Appendix II

Section 3. (2) deals with those who are excluded from the Act. An analysis of sub-sections (a) through (g) follows:

Exclusion (a): Acts performed personally by individuals on land which they own.

This is designed to exclude woodlot owners from the application of the Act. As a result, the rights of land owners with respect to their properties are unaffected by the Act, so long as activities are performed personally by owners on their own land. However, persons other than the landowner who perform activities on a property are potentially covered by the Act. This could include, for example, logging contractors performing activities which fall within the definition of the practice of professional forestry.

Exclusion (b): Acts performed by a person acting within the scope of practice of a profession, trade or occupation that is listed in the by-laws.

A regulation attached to the Act lists a number of professions, trades and occupations that are

excluded from the Act, including forest technician, arborist, and biologist. These are excluded because their scopes of practice potentially overlap that of the profession of forestry. For example, an activity being performed by a forest technician may fall within the definition of the practice of professional forestry, but it is also an activity that is normally carried out by forest technicians and is one for which they are normally trained and educated. In this case, the person carrying out the activity need not obtain a certificate of registration. However, if the activity falls within the definition of the practice of professional forestry, but is outside the scope of practice of the profession, trade or occupation in question, then the person performing the activity must obtain a certificate of registration.

The scope of practice of these professions, trades or occupations may or may not be codified. To determine whether or not an activity falls within their generally accepted scope of practice, representatives or members of the professions, trades or occupations in question may have to be consulted. The regulation reads as follows:

1. For the purposes of section 3(2)(b) of the Act, the Act does not apply to persons engaged in another established profession, trade or occupation provided that the person is acting within its generally accepted scope of practice, including the following professions, trades or occupations:

1. Natural Resource Technician and Technologist
2. Certified Forest Management Plan Approver
3. Certified Tree Marker
4. Biologist
5. Certified Arborist
6. Landscape Architect
7. Professional Planner
8. Certified Ontario or Canadian Land Surveyor
9. Botanist
10. Zoologist
11. Professional Engineer
12. Certified Property Appraisers
13. Agronomist
14. Ecologist

Exclusions (c), (e), (f) and (g): These are self-explanatory. It must simply be determined whether the facts of the situation meet the requirements of the exclusion. For example, in (c), was the situation in fact an emergency or reasonably perceived as such?

Exclusion (d): Acts performed by persons acting under the supervision of a member.

Whether a person is acting under the supervision of a member should be determined based on the circumstances of each case. A member can delegate responsibilities to a non-member but it must be reasonable delegation, subject to proper supervision and control. The test to be applied is whether the proximity of supervision is such that the member can reasonably monitor and accept responsibility for work of the person being supervised. A constant presence is not necessarily required (see, for example, R. v. Smith [1996] N.S.J. No. 449, paragraphs 26 and 28). A member should also distinguish between situations where it is reasonable to rely on the special knowledge of the person being supervised and situations that require their own special

judgement.

It must also be determined whether the member in question holds a certificate of registration enabling him/her to supervise the activity in question. For example, a certificate of registration may restrict a member from performing certain activities, or may limit a member from performing a limited number of activities in a particular geographic area.

Appendix III

Section 3. (1) is the definition of the practice of professional forestry. In applying the three tests it is important to have a clear understanding of the phraseology within that definition. There are two distinct components to the definition.

Component 1 “Provision of services which relate to the development, management, conservation and sustainability of forests or urban forests”

1. “Provision of services”. The OPFA interprets this to include prescribing, developing, directing, undertaking, supervising, investigating, evaluating, approving, planning, reporting on or advising on services.

2. “Services”. The Canadian Oxford Dictionary (Oxford University Press, 1998) includes the following definitions of “service”: “the act of helping or doing work for another or for a community etc.”; “work done in this way”; and, “assistance or benefit given to someone”.

3. “Development, management, conservation and sustainability”. These terms, not defined in the Act, should be interpreted according to their generally accepted meanings in the profession of forestry.

4. “Forests”. The term “forest” is not defined in the Act, nor is it defined in other Ontario legislation. A definition considered as acceptable by the Association in earlier versions of draft legislation defines forest to mean a plant community predominantly of trees and other woody vegetation, growing more or less closely together, its related fauna and flora and the values attributed to it. However, “forest ecosystem” is defined in the Crown Forest Sustainability Act (S.O. 1994, c. 25) to mean an ecosystem in which trees are or are capable of being a major biological component. Each of these appear to be reasonable interpretations of “forest”.

5. “Urban forests”. This term is defined in subsection 3(3) of the Act to mean tree-dominated vegetation and related features within an urban area and includes woodlots, plantations, shade trees, fields in various stages of succession, wetland and riparian areas.

Component 2 “Knowledge, training and experience equivalent to that required to become a member”

This is the key phrase in the definition. The effect of this restriction is that anyone can perform the activities covered by the definition unless to do so requires the knowledge, training and experience equivalent to that required to become a member under the Act. Membership requirements are contained in the bylaws of the Association. For example, Full Membership requirements include a degree in forestry or its equivalent.

Interpretation of the above phrase, as with other aspects of the scope of practice provisions, depends on the circumstances and facts of each situation. For this phrase, situations must be examined in relation to the current state of forestry education and training, the requirements to become a member of the Association, and the current state of forestry practice.

During the Class Environmental Assessment Hearings for Timber Management on Crown Land, the Association took the position that the core practice, education and training of a professional forester relates to the manipulation of forest cover. Forest cover is considered to mean trees and other woody vegetation in a forest. In an increasingly multidisciplinary working environment, foresters are the only professionals trained in principles and practices which relate to the manipulation of the forest cover, and who can be held accountable. This interpretation should be borne in mind when applying the definition to a given situation.

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