

PROFESSIONAL RELIANCE OR REGULATORY OUTSOURCING?

THE NEED TO REBUILD PUBLIC TRUST IN THE MANAGEMENT OF BC'S PUBLIC LAND AND WATER

January 2018

[This document has been developed by a range of community and professional individuals and organizations concerned about the degree to which the regulatory nature of resource management in this province has been outsourced and compromised¹.]

1. INTRODUCTION (See section 4 for a more detailed backgrounder)

Over the past decade there has been increased public and ENGO concern about the form of professional reliance (PR) and that ‘the fox is now guarding the hen house’. It seems clear that government’s regulatory outsourcing has gone too far in handing over what are essentially matters of public interest to individuals employed by industry and the private sector. Since 2013 (because of public complaints), the Environmental Appeal Board, the Forest Practices Board, the Office of the Auditor General and the Office of the Ombudsperson have each investigated whether the current PR model performs the requirement to provide independent, objective advice to government regulators. In addition, the Environmental Law Centre and the Professional Employees Association have produced a series of informative reports.

Each report has highlighted the need for improved oversight of qualified professionals, along with concern related to specific instances of compromised decision making based on the current PR model, for example: the Mount Polley event, ALR enforcement, the Shawnigan Lake contaminated waste situation, fracking in the NE, the overriding/ignoring of First Nation rights, community watersheds, environmental assessment (with particular concern for mining) and forest mismanagement - especially riparian management, the liquidation of old growth and critical fish and wildlife habitat.

2. THE PUBLIC PROCESS

In response to this situation, and because of pressure from the Green Party, in early October 2017 the NDP government announced that they will conduct a review of the professional reliance model of the natural resource sector to ensure that the highest professional, technical and ethical standards are being applied. The review report is to be delivered to the Minister of Environment and Climate Change Strategy on May 1 2018. This announcement is good news, especially as the government has hired Mark Haddock to research and write this review report.

The initial review phase has been established by the government through the Engage BC public engagement website. Here are a few key points:

- The Engage BC professional reliance public engagement process is available until Friday January 19 at 4:00pm
- Please go to this site: <https://engage.gov.bc.ca/professionalreliance/>
- On the website, you will notice that there are two ways to respond. If you have time #2 is the best option as you can personalize your response and include some of your own personal examples.

¹ Any questions/comments about this document please contact: Bob Peart bobpeart@shaw.ca

1. Submit your Feedback is for general feedback based on their series of questions.
2. Stakeholder Submission Process is for more specific personal response and provides the ability to attach PDF's and provide detailed links.

Please respond, and please encourage as many of your friends and colleagues to respond as well. It is very important that the BC government get feedback from a broad range of concerned people and organizations.

3. FRAMING YOUR RESPONSE

To assist in helping you respond to the Engage BC process the following outline has been developed to help frame your feedback.

Thank you for your assistance in getting as much feedback to the provincial government as possible. Please respond and encourage as many of your friends and colleagues to submit their concerns.

Overarching Message

To correct the current regulatory outsourcing regime and to rebuild public trust in the resource management of this province, we must:

- *Stop degrading the health of BC's ecosystems, and restore the environment where degraded.*
 - *Correct BC's laws so they are clear and enforceable.*
 - *Ensure that First Nations are engaged and their rights respected.*
 - *Monitor and enforce BC's laws and encourage the public to help.*
 - *Keep the public informed. Be transparent.*
 - *Provide a professional reliance system that grants the environment a fair and just hearing.*
 - *Set legal objectives and standards that allow professionals to be professional.*
 - *Rebuild provincial government staff capacity and expertise.*
- *For over a decade BC's laws have undermined the public right to have a healthy and ecological rich natural environment, and to not be exposed to health risks. This legal approach was deliberate and has occurred through excessive reliance on regulatory outsourcing; whereby, key government decisions related to public and environmental safety have been turned over, in whole or in part, to professionals hired by private industry.*
- *The current legislation related to professional reliance is weak and too many of the regulations have been outsourced to business and the private sector to monitor and enforce.*
 - *As a result, a number of regulations need to be made stronger and the government mandate strengthened.*
 - *In particular, the objectives identified in the Forest and Range Management Act (FRPA) need to be modified to include biodiversity and water values, so the public can have confidence in how the landscapes, watersheds and wildlife habitat are being managed.*
 - *Government has lost their staff capacity to enforce and monitor, so for any PR to be successful - even if legislation is changed - we need government staff capacity to be rebuilt².*
 - *Whistleblower protection legislation needs to be reinstated.*

² Estimates are that government capacity has dropped by a minimum of 25% over the last 10-15 years. This reduction in capacity (staff and money) has caused government to not be able to conduct the scientific and research work that would best support changes in policy. Instead policy has most often developed as a result of political pressure from select interest groups, in particular tenure holders and industry stakeholders.

Detailed Messaging

(If you wish to provide more detailed information in your response following is some information that may be of assistance.)

The focus of concern is the current inadequate environmental protection and the lack of openness and democratic accountability, not the integrity of the professional individuals involved. Any messaging needs to distinguish between the performance of professionals and the regulatory structure under which they operate. It needs to be clear that the concern related to professional reliance is with the design, function and delivery of current regulations and policy; and is not a critique of the competence of individual professionals or any group of professionals.

- The current approach to professional reliance be reset so that other planned government environment and natural resource reforms (such as: land use planning, endangered species protection, reconciliation, mining reform, fish and wildlife management, water sustainability, forest management and retention of old growth, salmon management and fish farming) will have the proper regulatory regime in place to ensure and support the opportunity for success.
- The BC government's approach to professional reliance program has gone too far in regulation outsourcing and handing over what are essentially matters of public interest to those employed by industry; by substituting professional opinion from experts inside of government for that of professionals in the employ of proponents.
- Regulatory outsourcing has had far-reaching impacts across the province, with:
 - Harm to the environment
 - Mismanagement of fish and wildlife habitat
 - Damage to local economies
 - Increased user conflicts
 - Inconsistency in application
 - Increased risk to public safety
 - Lack of public involvement and transparency in decision-making
 - Limited government and public oversight.

Resulting in a breakdown in trust and confidence in natural resource sector decision-making for BC's public lands and waters.

- We need to protect public interest and rebuild public trust and confidence in government and industry decision-making, by:
 - Updating current laws, regulations and policy to bring decision-making and required expertise back into the government. In particular, the clarification of objectives.
 - Outlining a clear role and appropriate actions for qualified professionals and their organizations.
 - Re-building government expertise and capacity (staff and funds).
 - Bolstering efforts at compliance, enforcement and independent monitoring.
 - Updating policy to allow scientific and other experts to communicate externally.
- Ensuring whistle-blower protection.

4. BACKGROUNDER

Professional reliance is not a result nor an activity, it is not an objective nor a strategy; instead it is an approach or attitude that involves two or more parties and two or more behaviours – one party which accepts or relies upon the other, and another party which accepts responsibility and can be held to be accountable³.

Professional reliance (PR) is the process where resource sector activities are overseen by qualified professionals in the private or government sector, monitored by self-governing professional organizations⁴ responsible for enforcing codes of ethics, professional standards and disciplinary processes. Professional reliance is a measured approach to receiving advice or delegating work and shared accountability by an employer or government official to a professional with the intent to ensure quality. It is a mechanism that allows parties to exchange and rely on data or information that is used to manage and administer the provinces land, air and water environments.

The approach to PR has changed dramatically as a result of the BC government's de-regulatory reform initiatives of the proceeding 12-15 years⁵. The changes were undertaken to reduce the regulatory burden on industry, reduce the size of the civil service and its role in resource management governance⁶. The stated approach was that professional accountability across all natural resource sectors would be maintained primarily through the enforcement of codes of ethics and the disciplinary processes of the professional associations. In certain situations, PR was changed to the degree that qualified professionals were even delegated the authority and associated responsibilities to make statutory decisions on government's behalf⁷.

As a result, over the past decade there has been increased public and ENGO concern about this form of professional reliance and that 'the fox is now guarding the hen house'. It seems clear that government's regulatory outsourcing has gone too far in handing over what are essentially matters of public interest to individuals employed by industry and the private sector. Since 2013 (because of public complaints), the Environmental Appeal Board, the Forest Practices Board, the Office of the Auditor General and the Office of the Ombudsperson have each investigated whether the current PR model performs the requirement to provide independent, objective advice to government regulators. In addition, the Environmental Law Centre⁸ and the Professional Employees Association^{9 10} have produced a series of informative reports. Each has highlighted the need for improved oversight of qualified professionals, along with concern related to specific instances of decision making based on the current PR model, for example: the Mount Polley event, ALR enforcement, the Shawnigan Lake contaminated waste situation, fracking in the NE, the overriding/ignoring of First Nation rights, community watersheds, environmental assessment (with particular concern for mining) and forest mismanagement - especially riparian management, the liquidation of old growth and critical fish and wildlife habitat.

³ from Building Public Confidence in Forest Management. Healthy Forests: Healthy Communities. 2017

⁴ College of Applied Biology, Engineers and Geoscientists of BC, Association of BC Forest Professionals, Applied Science Technologists and Technicians of BC, BC Institute of Agrologists.

⁵ In particular, in 2005 when there was a change in legislation from the previous Forest Practices Code (FPC) to the current Forest and Range Practices Act (FRPA).

⁶ These initiatives have also been described as: deregulation, results-based management and adaptive management.

⁷ There are ~ 27 natural resource sector regulatory regimes that currently rely on qualified professionals.

⁸ http://www.elc.uvic.ca/wordpress/wp-content/uploads/2015/02/Professional-Reliance-and-Environmental-Regulation-in-BC_2015Feb9.pdf

⁹ <http://endangeredexperts.ca/>

¹⁰ Also, Evidence for Democracy Report <https://evidencefordemocracy.ca/en/research/reports/bc>

PR should never have been purposely designed to be the avenue to divest responsibility or elude accountability, nor become the excuse for blind deference that it has become.

In response, and because of pressure from the Green Party¹¹, in early October 2017 the NDP government announced that they will conduct a review of the professional reliance model of the natural resource sector to ensure that the highest professional, technical and ethical standards are being applied. The review report is to be delivered to the Minister of Environment and Climate Change Strategy on May 1 2018. This announcement is good news, especially as the government has hired Mark Haddock to research and write this review report.

However, there is building concern from the public, First Nation, NGO and Union sectors that individuals with the resource proponents, the professional associations and government will challenge this report and work their connections to stifle the government report and/or have the potential recommendations watered down. Even as this review has begun here has been evidence of reluctance and intransigence, with the concerned parties holding discussions regarding how best to counter the upcoming report.

It seems clear that certain matters must be addressed to restore public confidence, such as: clarity on who is qualified to perform PR functions, what roles must be reserved for government and not be delegated to industry, enforceable conflict of interest guidelines, transparent record-keeping, the duty to report non-compliance, and a process for regular monitoring, compliance and enforcement as well as formal audits. In particular, the three critical pillars of scientific integrity – capacity, communication and independence – must be honoured.

It needs to be clear that any such review distinguishes between the performance of professionals and the regulatory structure under which they operate. It is essential to understand that the concern related to professional reliance is with the design, function and delivery of current regulations and policy; and is not a critique of the competence of individual professionals nor any group of professionals. The focus of concern is the current inadequate environmental protection and the lack of openness and democratic accountability, not the integrity of the professional individuals involved.

Correcting the government's approach to PR and how we manage resource development is a defining issue with far-reaching environmental impacts throughout the province. We need PR that can be trusted to ensure that other planned government reforms (such as improved land and use planning, protecting endangered species, updating the Mining Act, water sustainability, wildlife management, forest practices, salmon management, and First Nation reconciliation) will have the proper resource management framework in place for success. Someone described professional reliance as 'that bar in the closet on which all your clothes hang.'

Rebuilding public trust around PR is timely, critical and clearly has province-wide ramifications. To this end, the public needs to be assured that when the final report is submitted to the Minister of Environment in May 2018 that it will fall on 'fertile ground'. Cabinet must feel confident they have the 'political capital' and 'social license' to make the necessary policy and regulatory changes to re-establish a professional reliance resource management regime that will provide the ethical, technical and professional decision-making required to keep the environment healthy and ecosystems intact, as well as provide community-based employment.

¹¹ The 2017 Confidence and Supply Agreement between the BC Green Caucus and the BC NDP Caucus states: *review and address failures in the professional reliance model in BC so that British Columbians' faith in resource management can be restored.*