Professional Reliance and Environmental Regulation in British Columbia

Environmental Law Centre
UNIVERSITY OF VICTORIA

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ENVIRONMENTAL LAW CENTRE
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About the Environmental Law Centre

The Environmental Law Centre (ELC) is a non-profit society that operates the ELC Clinic at the Faculty of Law, University of Victoria. A key part of our mandate is to improve access to justice by advocating reforms to environmental laws through thoughtful, scientifically sound, and pragmatic legislative proposals. To that end, we are hopeful for a broad dialogue with the many interests, parties and officials who strive to protect the BC environment.

THE LAW FOUNDATION OF BRITISH COLUMBIA

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Preface

Just over a decade ago, the British Columbia government embarked on a significant regulatory experiment. It adopted an ambitious goal of cutting or deregulating one-third of the regulations, coupled with an equivalent reduction in the size of the public service. Natural resource management and environmental protection laws and agencies were a prime focus for this initiative as government believed resource companies were significantly over-regulated. Knowing that many British Columbians care deeply about the environment, former premier Gordon Campbell sought to assure the public that environmental standards would not diminish; instead, they would be overseen by professionals in the private sector, rather than government bureaucrats. To bolster this claim, government revised legislation for self-governing professions, such as foresters and agrologists, and passed legislation establishing a new college for biologists. Professional accountability would be maintained primarily through the enforcement of codes of ethics and the disciplinary processes of professional associations, rather than through the approval of plans, permits and licences by government agencies. This was the "new era of professional reliance."

These regulatory reforms introduced a host of new issues to environmental governance. Resource and environment professionals have always had an important role in environmental management, but repeal of government permitting and discretionary decision making authority elevated the role and significance of independent professional judgment considerably. In some cases the same individual can be the evaluator, planner, approving professional and the supplier of goods and services. In many cases that professional may be an employee or contractor of the proponent, with duties of loyalty that may conflict with optimal environmental outcomes. Government has significantly increased its reliance on the judgment of independent professionals and on the ability of professional associations to address any problems that arise through disciplinary procedures to achieve its environmental objectives.

This research project sought to answer the following questions:

- To what extent has British Columbia come to rely on qualified professionals in the environmental regulatory sphere?
- What issues have arisen in this new regulatory model, and how have they been addressed?
- How do the various professional reliance models in BC compare and contrast to each other, and to those in place in other jurisdictions?
- Are the qualifications for professionals adequately defined, and do they ensure that decisions are made by competent experts?
- How have the professional associations responded and adapted to this new regulatory model?
- What are the indicia of effective professional reliance regulatory models?
- Are there areas of environmental regulation that do not lend themselves to the professional reliance model?

- Are there adequate checks and balances in the model, or in the system of government and professional association oversight?
- Are there any lessons to be learned from BC's experience with this regulatory model to date?

Our focus in this report is not on the performance of individual practicing professionals, or of the professional associations they belong to, but rather on the overall robustness of the regulatory regime. Government has long maintained that it believes in adaptive management and continuous improvement. The new approach has been around long enough now to merit close evaluation and "tune up" or "major servicing." Many problems have been identified by independent watchdog agencies within government over the course of the last decade, yet government has not been very responsive to these reform recommendations. In addition to what has already been said by others, we have attempted to bring the insights from the study of law to this exercise – ideas about regulatory design, how courts interpret laws, and how other jurisdictions handle similar issues. We approach this task not just abstractly, but as lawyers who care about protection of the BC environment.

In carrying out this research we were aided by numerous interviews with government agency staff, independent professionals, staff of professional associations, oversight organizations within government, and several engaged citizens throughout British Columbia who have been watching this regulatory experiment unfold where it counts – on the landscape, forests and waterways of this province. The ELC is deeply thankful for their knowledge and service to this province.

The ELC's Law Reform Report Series on Environmental Regulation

Over the last five years, the Environmental Law Centre has produced a series of in-depth reports that examine key issues in environmental regulation that deserve attention here in British Columbia. This report is the third in that series.

In November 2010 we published a report on Environmental Assessment in British Columbia[1] that noted the importance of professionalism among the staff and consultants to industry proponents. We recommended that regulators and professional associations provide a greater level of guidance to those preparing impact assessments to incorporate best practices, improve consistency, and to provide a higher degree of accountability for the information contained in the assessments.

The environmental assessment regime does not incorporate professional reliance in a formal, regulatory sense because government retains decision making authority and is not legally compelled to accept the conclusions of professionals retained by the proponent. However, there has been talk of expanding professional reliance into the BC environmental assessment regime[2], and through interviews we became aware of situations in which some government

[1] See http://elc.uvic.ca/publications/documents/ELC_EA-IN-BC_Nov2010.pdf

[2] Means of introducing professional reliance into the environmental impact assessment regime were discussed by BC government speakers at a seminar entitled "Perspectives on Professional Reliance in Impact Assessment" on June 23, 2011 in Vancouver, BC sponsored by the International Association for Impact Assessment – Western and Northern Canada Affiliate. Former link: http://www.for.gov.bc.ca/hti/pr/files/iaia_prof_reliance.pdf. Broader expansion of professional reliance also has been referenced in

agency reviewers of environmental assessment certificate applications were challenged to justify their right to disagree with a proponent's expert. This shows that even where professional reliance is not built into the regulatory regime itself, it has now become part of the culture of environmental agencies in British Columbia.

In January 2011, we published the second report in this series entitled Environmental Tribunals in British Columbia.[3] This report explored the efficacy of public participation in environmental decision making and considered the various barriers and challenges associated with enhancing both the quality of these decisions and the accessibility and transparency of the processes by which they are made. Among the issues we identified as deserving of attention were:

1) inconsistent and unduly narrow "standing" rules;
2) diminished rights for citizens to pursue environmental appeals as the result of decisions to deregulate or exclude certain activities from environmental appeal processes; and
3) the rapidly escalating costs incurred by citizens associated with participating in appeal processes including legal and expert witness fees.

While this report was not about professional reliance *per se*, its conclusions point to the importance of a robust regulatory structure that proactively seeks to avoid or mitigate environmental impacts before they happen, rather than relying on citizen appeals[4] to administrative tribunals after the fact.

Our hope is that, through in-depth, independent and thorough reports such as these, the ELC can help to ensure that BC's environmental regulatory regime is subjected to rigorous evaluation and critique, and that debate over future directions in environmental regulation is focused and informed. Feedback on these reports from governments, businesses, First Nations, conservation organizations and the public at large suggests that they are indeed fulfilling these objectives.

Thanks to the unstinting efforts of Professor Haddock and his team, I believe that this report will serve as an important and enduring complement to its predecessors.

This report series was made possible as a result of project funding from the Law Foundation of British Columbia. We are grateful to the Law Foundation for recognizing the importance of supporting publication of this report series. The ELC would also like to acknowledge and express its deep gratitude for the ongoing core support that it receives from the Tula Foundation.

Chris Tollefson
Executive Director, Environmental Law Centre
Hakai Chair in Environmental Law and Sustainability

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sworn testimony of government employees before the Environmental Appeal Board, and in a letter of direction May 24, 2011 from Deputy Minister Konkin to managers in the Ministry of Forests, Lands and Natural Resource Operations.

[3] See http://elc.uvic.ca/press/documents/ELC_ET-IN-BC_Feb2011.pdf

[4] In British Columbia, unlike in some jurisdictions, environmental agencies may not appeal contested decisions to administrative tribunals.

Executive Summary

British Columbia is well served by resource management and environmental professionals whose expert judgment is relied upon by the public routinely. British Columbians always have been and always will be reliant upon the judgment of professionals for sustainable management of land, air and water.

Over the last decade the BC government embarked on a major law reform initiative to reduce the "regulatory burden" on industry, reduce the size of the civil service and its role in resource management governance, and thereby increase our collective dependence upon professionals employed by industry proponents to meet the public interest in natural resource management and environmental protection. These initiatives have been described by various monikers, such as "deregulation," "results-based management" and "professional reliance." In Section 1 of this report we discuss the background and context for the development of these regimes.

The political level of government has given direction to resource agencies to expand the opportunities for downsizing and professional reliance. However, now that this regulatory approach has had sufficient time to develop and adjust, it would be prudent to first evaluate its ability to meet government and societal objectives for sustainable resource management and environmental protection.

Despite professed support for "adaptive management," there has been negligible effort to assess the effectiveness of the current professional reliance regimes, or resolve to address known problems identified by the Auditor General, Ombudsperson, Forest Practices Board and others. One exception, however, is Minister Steve Thomson's commitment to address the issues identified by the Ombudsperson in her investigation of the *Riparian Areas Regulation*. The substance of the response will not be known until new regulations are passed: this was to happen by October 2014, but remains outstanding as of January 2015. In our view, the Ombudsperson's critical assessment of this regulation applies equally to many other similar regulations that also call out for correction.

At the same time, the approach to professional reliance is variable across regulatory regimes. Therefore, it would not be credible to make a blanket statement that "professional reliance is a success" or "professional reliance is a failure." The contaminated sites regime, for example, has a well-structured approach to the role of independent professionals through detailed regulations and agreements between the BC government and professional oversight bodies. But many regulations have an unduly loose, unstructured approach that fails to address known concerns.

An objective analytical approach to assessing professional reliance regimes would evaluate each individual regime against generally accepted principles of sound management and good

governance for this regulatory model. However, identifying those principles is not an easy task because BC's regulatory experiment is somewhat unique, particularly given the extent to which it devolves important decision making to industry professionals.

Fortunately, British Columbia has three independent agencies with a mandate to hold government accountable for its stewardship of public resources: the Auditor General, Ombudsperson and Forest Practices Board. The first two have very broad mandates and duties that occasionally address natural resource management issues, while the third has a very narrow mandate limited to forest practices, which excludes many other aspects of forestry regulation. Nevertheless, we found the analytical approaches adopted by these offices to be very informative to questions of sound management and good governance.

In addition to being informed by the approaches of these independent bodies, we found additional sources of guidance among commissions of inquiry (such as the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River), common law principles, international law and norms, academic literature, other jurisdictions, and practices within relevant professions (both within the resource management area of practice, and others such as the accounting, law, and health professions).

We conclude that much of BC's deregulation goes too far in handing over what are essentially matters of public interest to those employed by industry. Proponents should not be decision makers for matters involving the weighing and balancing of multiple, often competing, environmental and societal values. This raises irresolvable conflicts of interest and a lack of democratic accountability for many resource management decisions. In Section 4 we suggest a "threshold test" that considers nine factors to determine when professional reliance is appropriate, and recommend a review of current professional reliance regimes against those factors before any further expansion of this approach.

Where the threshold test finds professional reliance to be appropriate, we propose a set of ten criteria for regulatory "best practices" needed to maintain public confidence in resource management and environmental protection. These are found in Section 5 and include the following:

- Criterion #1: Clarity on who is qualified to perform professional reliance functions
- Criterion #2: Clarity on professional functions, responsibilities and objectives
- Criterion #3: Role reserved for government
- Criterion #4: Formal procedures and clear rules for certification
- Criterion #5: Conflict of interest, self-interest and independence
- Criterion #6: Record keeping, disclosure and transparency
- Criterion #7: Civil liability, insurance & bonding
- Criterion #8: Duty to report non-compliance
- Criterion #9: Auditing and reviews of professional work product
- Criterion #10: Monitoring, compliance and enforcement

We reviewed 27 regulatory regimes in BC that incorporate some form of professional reliance (Appendix A). We offer an initial analysis of a selection of these regimes against the ten criteria

(Appendix B). In our evaluation, some fare better than others when measured against these ten criteria. For example, the contaminated sites regime employs many of the best practices we recommend. At the other end of the spectrum are riparian areas regulations under the *Fish Protection Act*, some codes of practice under the *Environmental Management Act,* sewerage system regulations under the *Public Health Act*, and the forest practices regime under the *Forest and Range Practices Act*.

In Section 6 we make recommendations for ways to improve professional reliance regimes in order to make it more robust: by plugging loopholes, addressing conflicts of interest, incorporating better checks and balances, improving environmental performance, restoring government approvals where needed, and thereby increasing public confidence. These reforms should be developed and tested before any further expansion of this regulatory approach.

1. Introduction

The past decade has seen a new generation of environmental legislation in British Columbia accompanied by deregulation, restructuring and reduction in the size and budgets of the civil service. Regulations governing natural resource extraction have been revised in order to "cut red tape" and signal that BC is "open for business." These major changes took place early in the mandate of the Gordon Campbell Liberal government and were guided by a broader "Core Services Review" across government programs and overseen by Minister of State for Deregulation, MLA Kevin Falcon, who was to deliver on government's commitment "to reduce the red tape and regulatory burden in British Columbia by one-third over three years."[5]

In June 2013, Premier Christy Clark appointed Energy and Mines Minister Bill Bennett to be in charge of a new core services review that once again is to "look for redundancies and duplications" and "situations where perhaps the public taxpayer is paying for something that could be more effectively delivered by the private sector." In June 2013 Minister Bennett told CBC News "…everything is on the table. Nothing is sacred."[6] This review was to be completed by December 2014, and the minister has stated that it will address not just government spending but programs and policies such as the Agricultural Land Commission, which oversees the agricultural land reserve (indeed, controversial changes were made in May 2014 by passage of the *Agricultural Land Commission Amendment Act, 2014*).

As the provincial government made cuts to regulations and natural resource agencies, it promoted the notion of "professional reliance" (PR) as a new, more efficient "regulatory model" that replaces the outdated, bureaucracy-laden "command and control" model previously in place. It explicitly sought to have "less government oversight of professional work."[7]

British Columbia now has a decade of experience with this approach to regulation, but it has not been studied for effectiveness or best practices, nor have reform measures been developed to address known problems. Yet in 2011 direction was given to expand professional reliance "across all natural resource sectors" because "the full potential of PR has not yet been realized."[8] A 24-person Cross-Ministry Working Group was established to "support and coordinate the advancement of use of qualified professionals and persons."[9] The working group developed an "opportunity assessment tool" to identify where and how the professional reliance regime could be expanded, and at the time of writing is just beginning to develop case studies to examine some of the current PR regimes.[10]

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[5] Information Bulletin, October 9, 2001.
[6] CBC News, June 26, 2013.
[7] Strategic Direction for Advancing Professional Reliance, July 29, 2010.
[8] "Advancing Professional Reliance" Memorandum, May 25, 2011.
[9] Professional Reliance Cross-Ministry Working Group Terms of Reference
[10] Use of Qualified Persons: Opportunity Assessment Tool, March 2012

Through our discussions with government agencies, citizens, environmental organizations, professionals, professional associations and independent watchdogs, we became aware of many concerns with the way in which professional reliance approaches were being implemented. The purpose of this report is to evaluate this regulatory approach by identifying issues and examining what appears to be working well and what is not, and to make recommendations for improvement where warranted.

Government's current core services review along with its promotion of expansion of non-conventional natural gas development, province-wide pipelines, mining, energy and a host of other development projects, make this discussion not just an academic one but a very live issue.

What is Professional Reliance?

It is important at the outset to be aware of differing notions of professional reliance: the term has different meanings to different people, and in different contexts. We will distinguish between three broad types of reliance: 1) "common" reliance; 2) "information or design" reliance; and 3) "regulatory" reliance. There are likely other ways to categorize professional reliance, or additional categories, but these seem to commonly arise in natural resource management.

1. **Common Reliance**

To some, professional reliance is merely a description of what we all do every day: in a technological society we place our faith in experts, be they automotive engineers who design our cars, mechanics who maintain them, engineers who design bridges we drive over, or architects who design buildings. Understood in this sense, our reliance on professionals is both ubiquitous and inevitable. We will call this **"common reliance"** because it is widespread, everyday reality that is not necessarily connected to any law or regulatory regime. However, some regulations specify that certain activities may only be undertaken by a "qualified person" who has received training in a given field, such as domestic water well drilling. Even though the amount of training may not be onerous, this type of provision serves consumer protection objectives by ensuring that the person carrying out the work has been educated about a number of issues such as health and safety. It does not necessarily displace government's role in providing regulatory oversight of activities that could harm human health or the environment.

2. **Information or Design Reliance**

Another type of professional reliance occurs when government requires those seeking permits or licences to provide information that is prepared or endorsed by a professional. This occurs broadly across natural resource-related activities and includes plans for industrial activities on Crown land, designs for structures where there is an environmental or safety aspect, or certification that infrastructure has been built or operated in a manner that conforms to regulatory standards or professional norms. For example, an applicant for a water licence may have to provide water measurement baseline data that has been collected, prepared or

overseen by a professional with qualifications in hydrology. Once the licence is issued, it could require that a professional carry out an aspect of project design, or supervise an aspect of project construction.

The purpose of these requirements is to ensure a certain level of quality control over site-specific information that may be important for assessing risks to human safety or the environment, and mitigating those through permit conditions. Government relies on the training and presumed competence of professionals (or other "qualified" persons) in evaluating whether to grant the permit or licence, making for a more efficient approval system. This type of professional reliance might be called **"information or design reliance."** This type of reliance has been employed for some time in BC, and is common in other jurisdictions, wherever regulation intersects with a field of professional practice. Usually, but not always, government retains discretion to withhold the permit or licence. Some agencies may have a mandate under enabling legislation that creates a duty to ensure that the public interest in sustaining environmental values or human health and safety is maintained, and their vetting of applications reflects that duty. The approving agency may or may not have its own expertise and familiarity with the technical, environmental or safety issues that are likely to arise. If the agency lacks such expertise, or if the government has chosen not to retain a decision making function over the information/design provided, the extent of its reliance on the applicant's professional is obviously much higher.

3. **Decision Making Reliance**

A third type of professional reliance is newer to British Columbia, and involves not just the provision of information to statutory decision makers, but the substitution of professional opinion from experts inside of government for that of professionals in the employ of proponents. These are situations which formerly required agency approval of plans, permits or licences, but through deregulation government has chosen to put independent professionals – i.e. employees or contractors to the party carrying out the activity – in the driver's seat by having them make decisions instead of government officials. We will call this **"decision making reliance"** because it involves a shift from government oversight to placing trust in the decision making of professionals or other qualified individuals through major reforms to regulations. Decision making reliance may be explicit (by expressly stipulating the role of the professional and repealing or limiting the role of government) or implicit (by simply deregulating an activity that formerly required government approval).

All three types of professional reliance are important to British Columbians. However, the main focus of this report is "decision making reliance." This new approach to the role of professionals *vis-à-vis* government has been given the label "professional reliance" by the British Columbia government. It equally could be called "professional deference" because it requires experts in government to suspend their professional opinions and defer to those professionals hired by the regulated entity. This type of reliance has had a profound effect on some agencies, both in terms of their mandate and morale. Through deregulation government has essentially told many professionals inside government that it does not value their expert opinion on resource management and that they are to defer to industry. Some professionals in government prefaced their comments with phrases such as "Since we lost our stewardship mandate…" We expect that many British Columbians would find this a somewhat surprising statement, but it is

borne out in how far deregulation has gone in some natural resource sectors. This is not true of all professional reliance regimes in BC however: there is broad gradation in the extent to which government has delegated stewardship responsibilities to private proponents.

While it is clear that there always has been and always will be professional reliance of the *common* and *information/design* variety, the BC government has taken a significant step further by removing or limiting the discretion of government when it comes to regulating activities, granting permits, approving plans or issuing licences. In some cases, a statutory decision might remain in theory but is constrained by rules that compel approval if the professional hired by the applicant provides certain information or follows certain steps.

Adding to the complexity of this discussion is the fact that a given regulation might not be neatly classified as falling solely into one particular category but may adopt *information/design reliance* in one provision and *decision making reliance* in another.

A further complexity is that different terminology is used in different regulations, varying from "qualified professional," "qualified person," "qualified environment professional," or "qualified registered professional" to "approved professional" and "authorized persons." Appendix A sets out the various terms and functions as they appear in different regulations.

Professional Reliance as Euphemism for Political Direction

Adding further still to possible confusion in terminology is the fact that "professional reliance" has become a euphemism for deregulation. Politicians and professionals alike sometimes refer to regulatory systems as "professional reliance" even though the scheme might not actually incorporate any of the typical elements of intentional professional reliance regimes and is simply deregulation that removes the oversight role previously performed by government. The term professional reliance is used in some agencies to describe a new *modus operandi* of deference to industry, reflecting the political direction provided by ministers to staff. This obviously "ups the ante" in terms of society's reliance on industry proponents to uphold the public interest. In other words, deregulation takes government out of the picture and leaves health, safety and environmental protection outcomes to the "social licence" to operate for a given proponent or industry. Most proponents employ or contract with professionals in the course of carrying out their business, but merely doing so does not indicate a deliberate or conscientious system of professional reliance backed by rules and regulations that provide checks and balances.

Our Focus on the Regulatory Framework

Our primary concern in this study is with the design and function of regulations affecting the environment, and not the competence of individual professionals or any group of professionals. The distinction is important because much of the debate on professional reliance in BC has been framed as whether or not the public can place its trust or have confidence in foresters, engineers, geoscientists, biologists, agrologists and other practitioners.[11] Some professionals

[11] Unless otherwise noted, we will use the term "professional" broadly to include those with specialized post-secondary education who are members of self-governing professions as well as technicians who become "qualified" after a short amount of training.

have felt personally affronted by criticism of the professional reliance regulatory regime, and some professional associations seem to feel they have to defend this regulatory approach in order to maintain public confidence in the training and competence of their members.

Having been told that British Columbia has entered a "new era of professional reliance," some members of the public understandably but perhaps unduly focus on the integrity of individual professionals or the disciplinary oversight of professional associations, when their real underlying concern is inadequate environmental protection and the lack of openness and democratic accountability that results from shifting environmental decision making from government officials (who are ultimately accountable to an elected minister) to industry employees or contractors (who are accountable primarily to their employers and occasionally to their professional associations if their conduct is egregious enough to warrant discipline). However, there are many circumstances in which professionals should be personally accountable for their decisions.

Some debates seem to be the product of miscommunication, particularly when parties equivocate between different notions of reliance. At times parties seem to be talking past each other by confusing common reliance, information/design reliance, decision making reliance and the euphemistic jargon that reflects political direction. The issue of the competence of individual members of a profession is a completely separate issue that existed before and after the deregulation of the last decade in British Columbia. It is important to remain cognizant of the distinction between the performance of professionals and the regulatory structure under which they operate, because confusing these two aspects of professional reliance can lead to miscommunication and failure to identify the real nub of some environmental disputes.

By way of analogy, business and commerce is highly dependent upon the trustworthiness of lawyers who may hold vast sums of money in trust accounts pending transactions for their clients. Most lawyers would consider themselves to be honest and trustworthy, yet occasionally a lawyer absconds with trust funds and that trust is egregiously broken. Notwithstanding that this is a very rare event, the seriousness of the consequences to the client, to the business climate, and to the reputation of lawyers more broadly is such that it is widely accepted that it is in the public interest to strictly regulate the handling of trust funds – not just for the lawyers who might be vulnerable to temptation in a time of moral weakness or personal crisis – but for everyone all of the time. The rules need to be designed to proactively guard against the potential for abuse. Discussion about the system of trust fund rules is different than discussion about whether lawyers can be trusted.

Likewise, natural resource extraction and environmental protection measures in British Columbia raise clear issues of public interest. We all know them: the public has an interest in clean water, clean air, soil, sustainable fisheries and forestry, threatened and endangered species, scenic vistas, parks and protected areas and more. Reasonable regulation would establish a baseline for industry performance that meets sustainability objectives for the environmental values held by British Columbians, provide a system of checks and balances

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Technicians may or may not belong to associations, and most are not self-regulating bodies. Resource agencies now use the more generic term "qualified persons" to capture the full panoply of actors. We view the main issues addressed in this report to be essentially the same regardless of whether the person belongs to a professional association, an association of technologists, or has simply taken a course and obtained a certificate.

proactively to avoid or mitigate harm to the environment, and impose consequences on those operating outside of these parameters.

As in all lawmaking, there are legal, policy and political aspects to the regulatory exercise. The real challenge lies in determining the appropriate role for industry and the professionals it employs, and government agencies headed by elected ministers who are democratically accountable for activities allowed on public land or that impact the public interest in land, air and water. The issue in a nutshell is "What checks and balances need to be in place in a professional reliance regime to ensure that environmental values are sustained?"

To continue with the earlier analogy, if a wayward lawyer steals from a trust account, rules require that the victim be compensated through a fund all lawyers pay into, so that public confidence in the legal system is hopefully maintained. However, this type of compensation does not exist for environmental harm caused by professional negligence. Where environmental harm constitutes an offence there might be enforcement action, but that is often aimed at punishing offenders more than restoring environmental values that are lost. Most often, environmental losses are simply written off as something Her Majesty consented to as owner of the public resource. No one has been held accountable for the loss of spotted owls, mountain caribou and sockeye salmon, for example, all of which are in decline in British Columbia.

The British common law adopted by the Canadian constitution has traditionally approached natural resources through private property rights, rather than as publicly held, common interests to be managed in trust for current and future generations. One could argue that there is a major disconnect between the common law and commonly held values or expectations in this regard. Many British Columbians ascribe to a land ethic that embraces duties of stewardship and sustainability owed to future generations. Most natural resource and environmental legislation in BC does not expressly incorporate this ethic. Governments tend to avoid placing limits on economic development, so natural resource legislation primarily focuses on schemes for the granting of rights, and in some cases regulations that addresses practices, often in a highly discretionary manner. Hence, natural resource management and environmental protection in BC tends to be subject to broad, pendulous swings determined by the politics of the day. This adds another contextual layer to our discussion of effective and efficient means of incorporating professional reliance into modern environmental regulations.

Among the justifications for deregulation and agency downsizing is the claim that government no longer needs to play a paternalistic, approval role for many private activities that impact the environment. The rationale is made that employees and consultants hired by industry have the same training as government employees, belong to the same professional associations and are subject to the same code of ethics and disciplinary measures for violating them; therefore, having civil servants review and approve the activities amounts to unnecessary duplication, red tape, and increases costs to industry. It is also asserted that requiring government approval stifles professional innovation – that standards-based regulation results in an undesirable "cookie cutter" approach that is not sufficiently adaptable. Because this rationale is prevalent in BC, particularly for forestry, we will briefly discuss the role of professional associations in professional reliance regulatory regimes and report on perspectives we heard during the interviews held for this project. This is not an audit of professional association performance, but rather a survey of some of the issues that arose in our study.

Working Definitions of Professional Reliance in BC Government

As noted above, the BC government has given direction to natural resource and environmental agencies to expand opportunities for professional reliance. The Cross-Ministry Working Group has adopted the following definition of professional reliance:

> *…the practice of accepting and relying upon the decisions and advice of professionals who accept responsibility and can be held accountable for the decisions they make and the advice they give.*

As resource agencies have been required to identify further opportunities for professional reliance, expanded definitions and descriptions have emerged. For example, the Ministry of Forests, Lands and Natural Resource Operations (MFLNRO) has stated:

> *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. Professional reliance is also a measured approach to providing and receiving sound advice between non-government professionals and government professionals. It is a mechanism that allows parties to exchange and rely on data or information that is used to manage and administer the province's forest resources. It is definitely not an avenue to divest responsibility or elude accountability, nor an excuse for blind deference by either.* (emphasis added)

It is unclear whether these are intended as descriptive or normative statements. If normative, they suggest an intent to capture the objectives for professional reliance; if descriptive, and they purport to be factual statements about the practice of professional reliance in the current regulatory system, it is open for debate as to whether current approach is a "measured response" that assures "accountability," "quality," "sound advice" to government and reliable data. Some professional reliance regimes might attain these qualities, and some might not. In some cases, little agency discretion remains to approve or disapprove an activity, so government does not in fact always receive advice to support *its* decision making: the decisions are made by professionals or practitioners outside of government – employees or contractors of the person carrying out the activity. While the above definitions certainly use terms that identify some of the key issues in professional reliance, whether or not a particular regime meets them must be judged according to the regulatory requirements and objective criteria and indicators on a case-by-case basis.

The Qualified Persons Cross-Ministry Working Group is alert to this issue. At the time of writing it is planning to carry out case studies across professional reliance regimes to assess the following three elements in what it calls the Qualified Persons Framework:[12]

1. **Competency:** QP competence has to be backed by appropriate education, training, and experience. Moreover, QPs must be able to act independently and not be fettered.

[12] Qualified Persons Case Study Project Summary, October 2013. Province of British Columbia. Unpublished.

2. **Guidance**: QPs need clear guidance as to the objectives, standards, guidelines and protocols that are relevant to the work they undertake. Clear expectations also support quality assurance, and standards, guidelines and protocols can be used to monitor or audit performance.

3. **Accountability:** To help ensure acceptable performance, there have to be clear mechanisms for accountability, with consequences for QPs if performance is unacceptable. This can be achieved through complaint resolution, compliance and enforcement actions by government, monitoring, or independent audits that assesses individual competence in a given field.

Professional Reliance in Federal and Local Governments

The Government of Canada and local governments in British Columbia are also adopting the professional reliance regulatory model to varying degrees. One example of three levels of government doing this cooperatively is represented by the BC *Riparian Areas Regulation,* which relies on the judgment of "qualified environment professionals" hired by developers to assess impacts to fish habitat. This regulatory model operates by way of an Intergovernmental Cooperation Agreement.[13] Other federal adoption of the professional reliance regulatory model is beyond the scope of this report, but over the course of our study was identified as a growing concern because of extensive cutbacks to federal agencies and weakening of federal environmental laws using a similar "professional reliance" theme or rationale.

Local governments commonly incorporate requirements to consult qualified professionals into bylaws or permits. Local governments are aware of the potential problems that can result from a given development or activity but often do not have staff with the necessary expertise, or do not wish to become potentially liable for providing expert advice to developers and residents. This mechanism attempts to shift the onus back onto the person carrying out the activity to ensure that professional standards are met and may also serve to expand the "liability net" to include the experts providing independent advice if things go wrong. That is, if an adjoining landowner is harmed by a development and brings legal action against the local government that approved it, that government might look to the professional as a third party who could be exclusively or jointly liable if professional negligence led or contributed to the harm.[14] We will not address professional reliance in local government bylaws in detail in this report but note here that in our review of several such bylaws it seemed that they adopt very similar terminology and drafting as provincial regulations. It follows that many of the comments and recommendations in this report will be relevant to local governments. We provide examples of local government bylaws incorporating professional reliance in Appendix E.

[13] Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, July 16, 2008.
[14] For example, see Terms of Reference: Professional Reports for Planning Services, Regional District of Central Okanagan, May 2006.

2. Professional Reliance Regimes in BC

While British Columbia's professional reliance regime is often spoken of in generic terms, there are in fact several different regimes and roles played by professionals and government. The Cross-Ministry Working Group has identified 14 functions performed by professionals in their engagement with government. These include:

- Developing standards
- Predicting impacts
- Preparing plans
- Designing operational programs
- Conducting activities
- Certification
- Gathering and providing information
- Peer review
- Preparing applications
- Supervising activities
- Designing facilities and structures
- Reporting
- Consultation
- Supporting statutory decision makers

The role reserved for government varies from one regulatory regime to another. For example:

1. While it is common to require that a professional prepare a plan or application, some regulations stipulate that a government official is the statutory decision maker who makes the final approval decision, whereas others narrowly limit government decision making.

2. Some regulations require that the professional be acceptable to government, some require membership on a roster, and some allow the professional to self-declare that they are qualified to perform the function in question.

3. One regulation allows an agency official to enter into contracts with approved professionals to assess the adequacy of plans and compliance with the law and ministry policy;[15]

4. At least two regulations allows professionals to certify that the information in a plan complies with the statutory requirements, and this cannot be questioned by government professionals;[16]

5. One regulation specifies practice standards but allows proponents to depart from them if certified by a qualified professional;[17]

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[15] *Contaminated Sites Regulation*, s.10.
[16] See *Forest Act*, s.16 (1.01) and the *Forest Planning and Practices Regulation*, s.22.1. See also the *Riparian Areas Regulation*, under the *Fish Protection Act*.
[17] *Ozone Depleting Substances and Other Halocarbons Regulation*, s.25.

A detailed list of activities that incorporate the use of professionals in environmental regulations is found in Appendix A.

Professional Reliance through Authorizations

Some regulations are silent on the use of professionals, but agencies incorporate professional reliance into the terms and conditions of permits granted under a statute or regulation. This type of professional reliance is just as significant as regulation-based reliance, but not always visible unless one has a copy of the authorization. Sometimes the authority to do so is explicit in the legislation, and other times it is presumed. There are several examples:[18]

- The *Mines Act* authorizes the chief inspector to require the use of qualified professionals in section 10 permits. Examples include requiring the use of qualified professionals for new impoundment structures, determinations of winter high water tables, and permanent water-control structures.[19]
- *Water Act* licences for waterpower and other projects may require the use of an independent professional engineer to provide design review and ensure construction adheres to design.
- Environmental assessment certificates issued under the *Environmental Assessment Act* may impose conditions on a project requiring the use of qualified professionals and independent environmental monitors.

[18] A more extensive list of these policy-based uses of professionals in Appendix 2 of Reliance on professionals in the Provincial administration and management of natural resources in British Columbia: Inventory and Status Report, June 2011. Amended December 21, 2011. Professional Reliance Working Group, Government of British Columbia.
[19] The *Forest Act* has a similar provision in s.35(1)(i) for tree farm licences regarding the services of professional foresters, although we are advised by the Ministry of Forests, Lands and Natural Resource Operations that this provision is not utilized.

3. Issues Identified Through Interviews

In the course of carrying out our research we interviewed biologists, foresters, engineers, agrologists and technicians who are consultants to and employees of various industry proponents, government agencies and professional associations. We also interviewed individual citizens and some non-government organizations that have experience of the professional reliance system.[20]

It is clear from our interviews and research that there are many supporters of the professional reliance model, particularly among proponents and industry, and at the political, executive and senior manager levels of government. Support from proponent and industry observers tends to point to what some call the "freedom to manage" operations without costly and bureaucratic "red tape" or paperwork. Some regulatory regimes previously required multiple levels of agency approval for operations to commence, and delays in obtaining approval were an aggravation. Cost savings and greater efficiency are the primary benefits of professional reliance for this community of interests.

Promoters of professional reliance at the senior levels of government point to these same benefits but add that the changes are necessary because British Columbia cannot afford a civil service sufficient in size to approve or monitor all operations or developments that may impact the environment. There is clearly a degree to which the changes are political or ideological in nature. For many managers, the budget cuts, staff downsizing and agency reorganizations over the last decade made greater reliance on industry professionals a pragmatic reality – given these decisions at the political level of government, there is simply no choice but to redirect and refocus agency direction. From a public interest perspective, the focus is on the degree of risk and actual environmental degradation that results from deregulation.

These views were well known to us prior to undertaking this project. What was uncertain was how these changes are playing out at the field level and whether they are impacting the environment. What we heard at this level from practitioners is a cause for great concern. For many types of industrial activity it is apparent that government staff are not particularly aware of what is happening on the ground. Many are concerned about proponent bias affecting on-the-ground performance. Where permits require proponents to retain independent monitors, many of the monitors we interviewed expressed high levels of concern about what they see in the field, their lack of power to enforce environmental requirements, and their inability to get appropriate backup from compliance and enforcement staff in government agencies. They also noted a wide discrepancy in the diligence and practice among independent monitors themselves in terms of reporting environmental incidents to agencies.

[20] The Human Research Ethics Board of the University of Victoria determined that these interviews required research protocols that provide anonymity and confidentiality to participants due to the potential for the information provided to have repercussions for them in their business or workplace.

We will summarize the main points heard during our interviews, particularly from those involved at the field level, but as noted above, professional reliance applies across a broad spectrum of activities, so these comments will not be applicable to all of the professional reliance regimes, some of which are more robust than others. Many of these concerns should not be surprising because professionals raised them in feedback to government received by the Cross-Ministry Working Group in March 2012.[21]

Professional reliance is a euphemism for deregulation and giving industry too much control over public land and resources

We encountered high levels of skepticism about professional reliance regimes that are touted as embracing and respecting professional judgment but are simply deregulation that removed important checks and balances from industrial activity.

Expert shopping

Every proponent has a right to retain a consultant of its choosing. Normally the consultant's report would form part of an application that gets vetted by specialists within a government agency. But when government approval or review is removed from the equation, the power of the consultant's report increases significantly and millions of dollars can ride on what it says. Professional integrity becomes highly significant because the consultant is retained and paid by the proponent. Some consultants told us that they have had their expert opinion challenged by proponents who are unhappy with environmental cautions or findings expressed in them, accompanied by requests to change content or phrasing, and even threats of non-payment, loss of future work opportunities and cancellation of current contracts for other projects. The consultants were cautioned that they "are not the only game in town" and could be replaced by other consultants who are "more flexible."

We were informed of one situation where a developer hired three different biologists to get the desired opinion regarding fish habitat impacts under the *Riparian Areas Regulation*, which was the one that was submitted to government. In this case, the regulations have tied government hands – there is nothing they can do even if they and the two other professionals have sound reasons for disagreeing with the advice given by the third. In one case brought to our attention the threat was explicit – the professional was told to affirm that there would be no harmful alteration to riparian habitat if the development was within 15 metres of the fish stream, or risk not being paid.

Clear conflicts of interest exist, but aren't being addressed effectively

Related to the above issue, many expressed concern that some professional reliance regimes are rife with potential or actual conflicts of interest that are not being acknowledged or addressed effectively. The situation arises because the proponent hires the professional of its choice, creating a contractual client relationship. The professional has a duty to her or his client,

[21] Developing a Professional Reliance Opportunity Assessment Tool: Challenge Paper Feedback, BC Ministry of Forests, Lands and Natural Resource Operations, March 2012.

but the public interest in environmental protection depends upon the professional exercising professional judgment in a disinterested, unbiased and independent manner. A lack of checks and balances in the system makes it questionable whether this is achieved consistently. We were also informed that conflicts also arise because some professionals are involved at multiple levels of a project: they may be retained for project design or aspects of construction for the proponent, and then act as the qualified professional confirming that the law has been complied with, or an environmental objective has been met. In doing so they are in effect passing judgment on their own work.

Lack of checks and balances

The professional reliance system has been good at extending important decision making to professionals outside of government, but it has not been good at ensuring those professionals are held accountable for the adverse impacts of poor quality work.

Loss of expertise within government

Even where a regulation might meet all or most of the best practices we recommend for professional reliance regimes, cutbacks and downsizing within government have led to situations in which government agency staff are not sufficiently qualified to judge the soundness of plans or designs submitted by professionals. For example, the review of plans or designs submitted by professional engineers may be carried out by non-engineers who are not qualified to assess the adequacy of the plan or design. Also, professional reliance has shifted agency attention to other areas, and with attrition and retirement, new staff have no experience in areas formerly regulated by government and rife with problems (e.g. the former role of public health officials in approving sewerage systems).

Lack of confidence in government monitoring and enforcement

While enforcement is supposed to be an essential backstop for a functioning professional reliance regime, many expressed the view that government is not in fact delivering on this promise. Several independent monitors felt there was no real "backup" for the non-compliances they reported. They are required to be government's eyes and ears in the field, but do not have statutory powers. We were informed that one project had about 20 environmental incidents reported and still no government enforcement personnel came out to investigate.

Government agency people advised that this happens due to workload and inadequate budgets. Some regional staff reported significant difficulties just booking a vehicle to carry out field visits, and the need for management approval for field visits: this claim was confirmed by a headquarters-based senior manager. They also noted that many natural resource development projects are in remote locations and some require helicopter access, which they have no budget for. All regretted that this sends a clear signal that government will not enforce its permit requirements. One consultant said that despite well over a decade of work in the field he has never seen a fine imposed for infractions he has observed, recorded and reported. Many reported that enforcement is seen as a "major headache" that is discouraged within agencies.

A consistent message that we heard from field-based professionals was that there is a complete lack of DFO fish habitat biologists to inspect or enforce the *Fisheries Act*. Fish habitat issues therefore fall back to the province, but they do not have sufficient staff either.

Problems with independent monitoring

Government sometimes requires proponents to hire independent monitors to observe projects under construction, and in some cases, to monitor impacts for a certain period in the early operational phase. They are to "observe, record and report" environmental incidents they witness and document. Both the independent environmental monitors and government agency staff pointed to problems with independent monitoring. Monitors are supposed to act in public interest, but are hired by proponent and susceptible to the conflict issues mentioned above. Their work involves considerable discretion when it comes to reporting to government, especially in the absence of clear practice standards and reporting rules.

Some noted that issues such as the timing of reporting need to be addressed by a more structured approach because some monitors will wait too long for the incident to be relevant to compliance and enforcement staff (if they are able to attend). Because resource development occurs in remote areas seldom visited by government enforcement staff, there are no downsides or consequences to the under-reporting of environmental incidents. Proponents know this and use it to their advantage. It was reported that some proponents lobby monitors very hard to "manage the record" that gets reported to government. Members of the public reported considerable difficulty in getting meaningful and timely access to independent monitoring reports. These problems create a non-level playing field, in which diligent monitors have to compete for work against those who are willing to turn a blind eye to problems or exploit the grey areas which some felt were too numerous.

Lack of confidence in professional disciplinary processes

A key "pillar" of the professional reliance regulatory regime is that government does not need to maintain decision making or a strong field presence because the professionals involved in development projects are members of self-governing professional associations that have codes of ethics and disciplinary procedures that effectively govern unprofessional conduct. We heard widespread doubt among professionals about the ability, willingness, or appropriateness of relying on professional associations to oversee the types of judgment being exercised by their members in reliance regimes. Several different reasons were given:

- A lack of guidance and professional practice standards, leaving too much open to discretionary judgment;
- Some professional associations lack the refined disciplinary tools needed to deal with the situations that arise and are reluctant to impose the cruder "sledge hammer" remedies they do have;
- Strong peer reluctance to report unprofessional conduct because it seems too much like a personal attack on a colleague;

- Impediments to government staff (who are sometimes in the best position to know about errant practice) to make complaints by virtue of government policy;
- The inability or reluctance of some professional associations to investigate alleged malpractice without a formal written and signed complaint, even if they are aware of questionable conduct (we found different practices among associations in this regard, as some have disciplinary staff step into the role of formal complainant in some circumstances);
- Reluctance on the part of disciplinary committees to find and penalize wrongdoing.

Professional associations reported that they detect poor understanding of their disciplinary processes and unreasonable expectations of what it can be used for in terms of resolving policy-oriented resource management disputes.

Loss of stewardship responsibility

Within government agencies we encountered many who felt that the professional reliance regime devalued their own professional expertise and judgment. This was particularly true for those working under the *Forest and Range Practices Act* and the *Fish Protection Act*, where deregulation substantially removed the information provided by proponents to government, and removed the need for agency approval, or the discretion to reject or place conditions on approvals. Related comments included:

- Under some professional reliance models, industry or private interests effectively make the decisions that affect or determine the public interest, including the trade-offs between environmental values formerly considered the domain of government. Many viewed professional reliance as tantamount to the privatization of public resources;
- Once government deregulates an area of responsibility there is little impetus or opportunity for agencies to stay involved in that field, resulting in a loss in agency expertise and understanding of industry operations;
- All of these factors lead to a loss of environmental stewardship within government. It amounts to "trickle down stewardship" – whatever stewardship industry is willing to agree to. Some operators maintain good stewardship standards, but others do not and take advantage of how lax the regulatory system has become.

Reduced public involvement in resource management

A corollary of reduced information and government decision making is a reduction in public involvement in resource management. Members of the public, including other tenure holders such as ranchers, water licence holders, guide outfitters, trappers, tourism operators, etc., have less information upon which to assess impacts to them and feel that the absence of government as a mediator in resource decision making significantly reduces their power and the chance that

their concerns will be heard. Taking concerns directly to an industry proponent is a lot different than taking them to a statutory decision maker who reports ultimately to an elected minister. In this sense, some felt that professional reliance results in a loss of democratic principles and accountability.

Professional reliance is leading to greater user conflicts

Some professionals believe that there are more user conflicts because of the above factors. Many of these are documented in the complaint and special investigation reports of the Forest Practices Board of BC.[22]

Government agencies don't actually know much about what is going on in the field

Members of the public and some professionals reported that government agencies are much less aware of what is happening on public land. Some have a reduced approval role, but even where agency approval is required, there is little field presence despite the promise that professional reliance would lead to a concerted focus on monitoring and enforcement. Members of the public indicated that when inquiring about operations government frequently just refers them to industry or its consultants. Several government staff agreed with this perception.

Cuts to agency staffing levels are adversely affecting government stewardship

Many of the observations above can be linked to reduced staffing levels, but agency staff also indicated that with emerging industries, such as private power production, pipeline development and oil and gas operations, there are many more projects being proposed and built than previously when they had higher staffing levels, which compounds the impact and significance of the cuts. Given the range of impacts a project can have, statutory decision makers are not necessarily qualified to assess all of the resource issues impacted by their decisions. Sometimes decision makers need and want advice from agency experts, but they either no longer exist or are assigned to other duties, leaving the decision maker with only reports from proponent and its consultants. We also learned of situations where agency staff refused to provide advice to statutory decision makers because of the structure of the professional reliance regime and their inability to verify proponent information in the field, depriving decision makers of an important, independent second opinion.

Considerable business pressure and peer pressure

Independent consulting professionals acknowledged that the professional reliance model puts both business and peer pressure on them to accede to their client's wishes, particularly if a competitor is willing to provide advice or sign off on a lower environmental standard of practice. They felt it is unrealistic and naïve for government to expect every company in an industry to

[22] For example, see Cumulative Effects: From Assessment Towards Management, Forest Practices Board of British Columbia, 2011.

comply with professional advice. Some independent monitors reported that their clients accused them of not being a "team player" when advised that certain practices would have to be reported as non-compliance.

Filtering of information by proponents or others

Some professionals reported frustration with having their information and advice "filtered" by the proponent or layers of organization within a large proponent company. This affects the quality of information provided to senior management or reported to government.

Deregulation has created more "grey areas"

Many consulting professionals we interviewed were experienced in the regulatory regimes that predated the current professional reliance models and accompanying deregulation. They commented that there is a considerable difference between regulated practice standards, guidelines in a handbook, and non-mandatory "best practices" when it comes to their ability to encourage good environmental performance in the field, and when it comes to reporting incidents to government. They felt that standards published by the Resources Information Standards Committee were previously considered mandatory but are now frequently treated as optional. Many felt there was a need for more firm regulation, not optional best management practices, particularly if they were involved in monitoring and reporting. Some professionals with major project experience in northern Canada felt that standards were more clear and firm in places such as the Northwest Territories than British Columbia, which they view as lax by comparison.

Inconsistent environmental standards across industries

Field level professionals commented that there are inconsistencies in the environmental standards required from one industry to another. For example, forest companies, which have a two-decade history with forest practices regulation, are expected to follow standards for a number of environmental values (streams, old-growth forest, wildlife habitat areas, etc.) that are not expected of newer industries, such as independent hydroelectric power production. They noted that this continues to be the case even though the same ministry (Forests, Lands and Natural Resource Operations) now issues the permits for each industry. They found it odd that some activities are non-compliant and "reportable" if they are done by a forest company, but not if they are done by a private power producer. They question the validity and scientific integrity of professionals compartmentalizing issues they identify in the field according to which industry is undertaking them.

Big differences in proponent approaches to environmental risk

Some consulting professionals commented that their practice involves high performing, diligent industrial actors and lower performing, less diligent risk takers. The environmental practices of the diligent actors have not changed much before or after the introduction of professional reliance. However, the professional reliance regime and attendant deregulation tends to

reward the lower performing actors who can get away with environmentally risky decision making and practices because of fewer rules and the much-reduced presence of government in the field.

Inexperienced crews operating in British Columbia

Field level professionals reported that the sheer volume of industrial activity in BC has seen an influx of workers from outside the province who do not have experience working in mountainous areas or near salmon streams, resulting in considerable unnecessary damage. One example given was of a hydropower project being constructed in heavy fall rains on steep slopes. When siltation resulted the crew was asked for, but had never heard of, a Sediment Erosion Control Plan. This issue could arise with or without a professional reliance regime, but was offered as an example of environmental impacts that occur when there is reduced government enforcement presence, coupled with a lack of enforcement authority being vested in independent monitors.

Inexperienced junior staff

Some professionals reported problems when consultants use inexperienced junior staff who are not properly trained, resulting in unreliable information. The type of training that would be provided to government agency staff is not always provided in the private consulting world. With less government oversight and review of these reports (for example, South Coast regional staff were directed that they could not review application materials for a number of independent power projects), these errors are not caught. Examples provided include:

- Lack of knowledge of RISC (Resources Information Standards Committee) standards for inventories, resulting in unreliable wildlife inventory data.
- Cutting corners in terms of level of inventory effort (e.g. hours of effort, times and locations), resulting in considerable savings to the proponent but sub-standard information upon which significant decisions are being made.
- Electroshocking for fish in high elevation streams without knowing that the equipment required different procedures for such streams due to low conductivity, leading to the under-classification of fish streams.
- Sometimes the information eventually came to light – but after the projects were constructed, resulting in a loss of mitigation measures being taken or compensation for habitat loss.

Failure to apply adaptive management

Some of the professionals we interviewed reported that government has known about many of the above problems for a considerable time (many years). Its failure to adequately respond to and fix these problems was seen as evidence that adaptive management is only given lip service

and is not a reality for some professional reliance regimes. This comment was particularly applied to new industries, such as private energy projects.

Professional reliance is fundamentally flawed due to mistaken core premises

Professional reliance is fundamentally flawed due to mistaken core premises that "all scientists in a given field are fundamentally the same, in certain basic ways. First, their collective knowledge base is essentially congruent. Second, their approach to their work is essentially dispassionate and free from bias. Third, non-scientific influences like personal belief, funding source, employer, political priorities or broad social norms have no bearing on the outcome of their scientific work."[23]

"We need professional reliance to work"

Despite all of these shortcomings, many indicated their belief that professional reliance is "here to stay" and therefore "needs to be fixed" so it can be credible and reliable. They feel that British Columbia is unlikely to return to past levels of government staffing, and even if it did, there are efficiencies to be gained in a properly functioning system of checks and balances and accountability to assure better environmental outcomes than they are currently seeing in the field.

[23] R. Warren Bell, "Why the Professional Reliance Model is Doomed to Fail," BioNews,Vol.22,No.2, p.10, Association of Professional Biology.

4. When is Professional Reliance Appropriate? An Important Threshold Question

British Columbia's professional reliance regimes have developed in an *ad hoc* manner for different reasons and at different times. In some cases, the evolution of the regime was a natural part of the development of a new regulatory field where government did not have sufficient numbers of staff experts to meet the demand for services (such as for the contaminated sites regime). In others, government was well equipped with in-house professionals who had been carrying out regulatory functions for decades, but adopted the professional reliance regime in response to industry complaint that the previous regime was too costly, bureaucratic and restrictive, which coincided with government's desire to cut costs and the size of the civil service (such as for forest practices and urban development in riparian areas).[24] Some of these regimes were developed quickly under strong political direction, bypassing more typical agency policy development processes.

The Forest Practices Board of British Columbia, an independent watchdog agency, has been auditing and investigating the professional reliance regime under the *Forest and Range Practices Act* for the last decade: it reports that this regulatory model has limitations and "it is unrealistic to expect professional reliance to carry the majority of the weight for balancing forest management interests."[25] An important question that needs to be addressed therefore is: When is professional reliance appropriate? More specifically:

- What functions and capacity should government retain over natural resource operations and environmental decision making?
- When, and for what types of activities, is it appropriate to rely upon or defer to professionals in industry?
- What factors should be considered in determining when professional reliance is appropriate for a particular regulatory field?

Some professional reliance regimes have given these questions careful thought, particularly those that were less politically driven. The government's Qualified Persons Cross-Ministry Working Group has been considering these questions in response to the directive to explore how professional reliance can be expanded.

We will not propose a full set of prescriptive answers to these questions: our intent is mostly to identify an important threshold question that should be asked of all professional reliance

[24] See Cutting Up the Safety Net, West Coast Environmental Law, 2005.
[25] Professional Reliance in BC Forests: Is it really the issue?, Forest Practices Board, June 2013.

schemes, including those that are now ensconced. This would demonstrate commitment to adaptive management and continuous improvement.

In the course of our research and interviews with practitioners, several factors were identified as relevant to these threshold questions:

1. Environmental, Health and Safety Risks

A critical factor justifying regulation and agency oversight is the degree of risk an activity poses to the environment and public health and safety. Government should regulate activity that poses a moderate to high degree of risk. In situations where the impacts are clear and well known, government should adopt "practices-type" rules.[26] They create a more level playing field and a clear means of providing accountability. In situations requiring a greater degree of flexibility and site-specific judgment, government can regulate through approval of plans or designs, or through issuance of permits, licences or other authorizations. The significance of risk as a factor in determining the suitability of professional reliance seems to be well accepted notionally in British Columbia, but its application has not been sufficiently justified and transparent, resulting in moderate to high-risk industrial activity becoming exempted from permitting in the absence of adequate practice-type regulations.[27] Many professionals we interviewed believe that professional reliance is not limited to low risk situations but includes medium to high-risk activities affecting fish, wildlife and water.

2. Risk to Third Party Interests

Industrial and natural resource extraction activities can pose risks to private property rights (e.g. pipelines on farm land), rights acquired through other Crown tenures (water licences, woodlot licences, commercial recreation tenures, etc.) and Aboriginal rights and title. In some cases the degree of risk to these rights, and power imbalances in the ability of those third parties to defend them legally, argue for a role for government maintaining a greater degree of approval authority.

3. Decisions Involving Trade-offs

Many activities in the natural resource sector involve trade-offs between proponent interests and public interests in fish, wildlife, water, air, soil, scenic viewscapes, outdoor recreation, and more. Practices-type regulations cannot always effectively anticipate or

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[26] For example, see the Codes of Practice under the *Environmental Management Act*, or Part 4 of the *Forest Planning and Practices Regulation*.

[27] The Cross Ministry Working Group seems to acknowledge this in its Opportunity Assessment Tool published in March 2012, which points to twelve risk factors (see pp.7-8). While the risk factors are appropriate, the discussion does not adequately justify how it applies them to proponent-hired vs. government agency professionals. What is needed is for these risk factors to be applied across natural resource sector activities to identify which should remain within government or return to greater levels of government oversight through approval mechanisms.

address all of these issues. It is inappropriate to delegate decision making over trade-offs to private interests, unless the issues are minor and the activity poses low risk to these public interests.

4. Values versus Technical Expertise

Closely related to the above factor is the nature of the decision making around natural resource activity as compared to the nature of the expertise applied by a professional. Matters that are highly technical and clearly fall within the professional's training and expertise are less problematic than those that are essentially about the values society places on a given resource that will be impacted by the activity or decision. For example, it is one thing for a forester to prescribe seedling and stocking standards in a relatively uniform lodgepole pine stand without species at risk, and quite another to prescribe a harvesting system in a complex old growth forest that provides habitat for species at risk. The latter crosses over into issues requiring wildlife habitat expertise, and is not simply a technical issue squarely within a forester's training.

5. Latitude for Discretion

Another factor to consider is the range of discretionary judgment involved in a given natural resource decision. Well-understood technical matters on which there is broad professional consensus concerning a narrow range of acceptable standards are quite different from lesser-understood matters involving a number of variables and discretionary factors with many different opinions, options and outcomes. There is a lower risk of environmental harm in the former, making it more acceptable to defer to professionals, and easier to apply oversight functions by government or professional associations. In situations with broad latitude for discretion there is considerable merit in retaining the expertise resident within government agencies, and incorporating public input into decision making.

6. Scientific Certainty

Closely related to the latitude for discretion issue is that of scientific certainty. There is a big difference between the engineering and biology advice required to construct a bridge or fish stream crossing, and the biological advice required to predict and evaluate broader ecosystem and wildlife impacts. Biologists we spoke with questioned the merits of applying a professional reliance regime to broad biological and ecological issues for a number of reasons, including: 1) the inherent complexity and variability of biological responses, making them difficult to predict and monitor; and 2) the corresponding difficulty of assessing and ensuring competence and accountability on the part of independent professionals.

7. Conflicts of Interest

The regulatory system needs to be more alert to the potential for conflicts of interest. When government delegates decision making to professionals who are retained or employed by proponents, it introduces a risk of biased decisions. Natural resource operations are often complex, and while most professional associations require some observance of the public interest, a professional's duty to their client is very prominent. Failure to acknowledge and address conflicts of interest results in undue reliance on codes of ethics and professional disciplinary processes. There are limits to the ability and willingness of professional associations to discipline conduct that complies with the law but may prefer client interests to the public interest. They expect government to determine the public interest. While some situations of conflict may be manageable through proper rules, checks and balances, some are probably irresolvable.

8. Essential Government Functions

Some matters are essential government functions and should never be delegated to independent professionals employed by proponents. One example is compliance and enforcement. As one paper notes, "enforcement…is the responsibility of legally designated and authorized government officials and not something generally delegated to QPs [*qualified persons*]. The information and expertise QPs provide in verifying compliance are often used as a basis for initiating an enforcement action," but "government has an overarching accountability and oversight role for verifying compliance and enforcement of requirements in statutes, regulations, and authorizations."[28]

Another example would be the granting of tenure rights to Crown or public resources. We are not aware of this occurring, but in some natural resource sectors the professional reliance regime comes very close to it by allowing tenure holders surprising levels of autonomy over what resources they will take and where and when they will take them, with significant limitations on government's ability to say "no."

[28] The Use of Qualified Persons for Compliance Verification and Enforcement, Draft for Discussion, October 22, 2012.

9. Alternatives to Professional Reliance

Inherent in the notion of professional reliance is the need or desire to rely on a person with expert qualifications for matters that require discretionary judgment. However, in the natural resources sector there are many activities that have reasonably well known impacts that can be regulated in other ways, such as through international engineering standards (e.g. ASTM International), or other industrial practice standards, sometimes known as Codes of Practice. There are several examples of these in regulations under the *Environmental Management Act*, and in the *Forest Planning and Practices Regulation*, Part 4. Given the risks that are introduced by a professional reliance regime, government should justify its decision to use professional reliance rather than planning or practices regulations, and explain why it is the optimal means of regulating public resources in a given field.

5. Essential Elements of Professional Reliance

Once it is determined that the threshold criteria are met and some degree of professional reliance is appropriate for a given field or activity, the question arises as to the best practices for incorporating it into regulation. The Cross-Ministry Working Group has identified three important criteria that apply at a high level:[29]

> **Competency:** A professional's competence has to be backed by appropriate education, training, and experience.
>
> **Clarity of expectations**: Clear guidance is needed as to the objectives, standards, guidelines and protocols that are relevant to the work professionals undertake. Clear expectations also support quality assurance, and standards, guidelines and protocols can be used to monitor or audit performance.
>
> **Accountability:** To help ensure acceptable performance, there have to be clear mechanisms for accountability, with consequences if performance is unacceptable. This can be achieved through complaint resolution, compliance and enforcement actions by government, monitoring, or independent audits that assesses individual competence in a given field.

These are valid criteria that need to be applied in very concrete ways to particular settings in order to be meaningful. Based our research and interviews with professionals we identified ten criteria that build upon these three and are important to the credibility and robustness of a professional reliance regime. Failure to address these issues in a professional reliance regime leads to a lack of professional and public confidence, and marks the difference between a robust regime and a "blind leap of faith" approach.

Criterion #1: Clarity on who is qualified

The need for regulations to be clear on which professionals are qualified to carry out which functions may sound trite and obvious, but we identified several examples of a failure to do so among BC professional reliance regimes. This can be a challenging issue in the natural resource and environmental protection field for two related reasons:

1) The sector is very broad and requires diverse expertise. This is evident if one simply considers the variety of professionals required to carry out a competent environmental assessment for a major project, or the curriculum in university and post-secondary

[29] http://www.nro.gov.bc.ca/nrs/qp/

training programs for environmental studies, engineering, geoscience, biology, agrology and forestry. Even within a single profession there is a broad range of specialization, and membership in the profession does not entail competence in every aspect of the profession;

2) This complexity is compounded by the fact that some expert functions can be carried out competently by individuals from various professions provided they have adequate training and experience. For example, terrain stability assessments can be conducted well by some foresters, some agrologists, some engineers and some geoscientists. Past attempts to assign a particular function to a single profession have met with resistance from other professions whose members have traditionally carried out the same function and had the necessary qualifications and experience. These disputes have been resolved by developing more inclusive criteria for who is a "qualified professional." However, some disputes remain, even within government agencies undergoing reorganization such as BC's new super-ministry for natural resources, the Ministry of Forests, Lands and Natural Resource Operations, where who is qualified to apply for which job has been problematic.

   Despite this complexity, solutions are not elusive. There are many ways to craft provisions that ensure only competent individuals carry out professional reliance functions for specific activities, and some regulations already incorporate these approaches. While some of the examples below are stronger than others, they demonstrate attempts to resolve some of the problems identified.

   a. **Prescribing detail as to who is "qualified" in a regulation**: for example, one Ontario regulation contains considerable detail concerning which professionals are qualified to carry out risk assessments, specifying the university degrees, years of experience, and the precise type of risk assessment experience needed.[30]
   b. **Specifying a specialization within a profession**: for example, the BC *Groundwater Water Protection Regulation* provision that well closure specifications be prepared by a "qualified professional who has competency in the field of hydrogeology or geotechnical engineering with respect to the requirements for deactivating or closing the well."[31] The *Mushroom Compost Facilities Regulation* requires that pollution prevention plans be reviewed and confirmed by "a professional engineer or agrologist…whose area of professional specialty includes the preparation and implementation of these pollution prevention plans."[32]

[30] *Records of Site Condition Regulation*, s.6.
[31] *Ground Water Protection Regulation*, s.9.
[32] Mushroom Compost Facilities Regulation Schedule, s.2. We comment in Appendix B on the possible circularity of this definition, but the intent is understood.

c. **Requiring the professional to be acceptable to a government official**: where there are issues concerning who may be qualified to carry out certain work, government can reserve the right to approve the professional the proponent wishes to utilize. For example, the *Mines Act* allows a mines inspector to require "an independent study prepared by an engineer or other licensed professional acceptable to the inspector;"[33]

d. **Requiring membership in a society** whose dedicated purpose is to regulate the professionals who are approved to carry out certain functions requiring expertise that are not common knowledge across the membership of any one profession. An example of this is the Society of Contaminated Sites Approved Professionals of British Columbia, which oversees a roster of professionals who have specific roles in the remediation of contaminated sites.[34]

e. **Having a statutory decision maker maintain a register** of qualified persons based on objective criteria and proof of qualifications, as provided for in the *Water Act*.[35]

f. **Having a detailed policy, procedures and adjudication method** that fairly sets out exactly what combination of professional credentials and work experience qualifies one to be eligible to undertake certain professional functions. For example, the Ministry of Transportation and Infrastructure, which must rely on professional consultants to perform a broad array of tasks requiring various levels of expertise, has a detailed Policy and Procedure Manual for its RISP program (RISP refers to Registration, Identification, Selection and Performance Evaluation);[36]

g. **Incorporating successful completion of a specific training program** into the definition of who is qualified can be sufficient for some professional reliance functions;[37]

Unfortunately, many BC environmental regulations have taken a surprisingly lax approach to this important issue in one of two ways:

1. By having overly broad definitions that are not tailored to the professional reliance function, thereby leaving it to individuals to self-determine whether they are qualified. For example, several regulations have adopted a generic approach similar to this definition found in a Code of Practice under the *Environmental Management Act*:[38]

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[33] *Mines Act*, s.18.
[34] See http://csapsociety.bc.ca.
[35] *Water Act*, s.71.
[36] See RISP Policy & Procedure Manual and RISP Adjudication Criteria.
[37] For example, see the *Sewerage System Regulation*, s.7. The adequacy of the training program is a separate issue which the Environmental Law Centre has addressed in *Reforming the Regulation of BC's Sewerage Systems: An Urgent Need to Protect Public Health.*
[38] Code of Practice for Industrial Non-Hazardous Waste Landfills Incidental to the Wood Processing Industry, s.1; see also

> ***"qualified professional"*** *, in relation to a duty or function under this code, means an individual who*
>
> > *(a) is registered in British Columbia with a professional organization, is acting under that organization's code of ethics and is subject to disciplinary action by that organization, and*
> >
> > *(b) through suitable education, experience, accreditation and knowledge, may reasonably be relied on to provide advice within his or her area of expertise, which area of expertise is applicable to the duty or function;*

Many regulations contain the same or similar definitions of qualified professionals. There seems to be circularity in this definition because rather than telling the regulated community who is qualified it restates (or begs) the question by leaving open which professionals from the exceptionally broad class of possibilities may "reasonably be relied upon to provide advice." In whose opinion? The proponent's? The professional who wants the business? One of the many professional associations that has a code of ethics? The government?

The *Riparian Areas Regulation* has a similar but narrower definition, and an investigation by the BC Ombudsperson concluded that even within that smaller pool of potential professionals the Ministry of Forests, Lands and Natural Resource Operations "has not taken adequate steps to confirm that all persons acting as QEPs and submitting reports to the ministry are registered and in good standing with an appropriate professional association."[39]

2. By naming every profession whose members *might* be qualified to carry out the functions. For example, the *Forest Planning and Practices Regulation* which lists agrologists, biologists, engineers and foresters as all having "prescribed qualifications" to certify that ten different aspects of forest stewardship plans conform to the *Forest and Range Practices Act*,[40] even though it is not very likely that all of these professionals would be qualified to certify compliance with each of the subject matters. The matters are as diverse as visual quality, invasive plants, range, free-growing status for regenerating forests stands, and a host of designations for non-timber values. This regime allows any professional from this broad group to self-determine whether they are qualified in a given field. Anecdotal reports suggest that this aspect of the *Regulation* is not utilized frequently. Nevertheless, it was reported to us that some employees and consultants have felt pressured by their employer/client to sign off on plans or assurance statements that the professional considers to be outside of their expertise. The Ombudsperson cautioned against self-determination of qualifications in her 2014 report on professional reliance under the *Riparian Areas Regulation – Striking a Balance.* Clearer qualifications would guard against abuse and the potential for unwarranted pressure from employers/clients.

We also note that some local government bylaws seem overly broad in defining who a qualified professional is. One specifies "professional engineer, geoscientist, architect, biologist, planner

[39] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014.
[40] Forest Planning and Practices Regulation, s.22.1. For a discussion of how this issue arises even in more specific land use orders see Katrina Andres' award-winning paper Professional Reliance in the Great Bear Rainforest: A Case Study.

or other professional…with experience relevant to the applicable matter."[41] However, many local government bylaws were more specific than provincial regulations when it came to specifying the expertise required for certain functions (e.g. by naming arborists, engineers, certified irrigation designers, landscape architects as appropriate) and the standards to be met. We provide a sampling of local government bylaws incorporating professional reliance in Appendix E.

In her report on the *Riparian Areas Regulation* the Ombudsperson commented:

> *Professional associations have an important role in regulating QEP (qualified environmental professional) conduct, but it is not sufficient to rely on them to ensure that QEPs are completing assessment reports within their area of expertise. QEPs come from a variety of backgrounds and professional associations, and they conduct assessments within a regulatory framework that establishes specific methods and requirements. It is reasonable, and consistent with the Professional Reliance Cross-Ministry Working Group's draft framework, for the ministry to establish competency and accountability mechanisms that relate specifically to the role of QEPs…"*

We agree and find that these conclusions are applicable well beyond the *Riparian Areas Regulation*.

Criterion #2: Clarity on functions, responsibilities and objectives

In addition to providing clear criteria concerning *who* is qualified to undertake a professional reliance function, the regulation or authorization in question should clearly specify *what* that function is, what the responsibilities of the professional are, and the objectives to be met by the professional. A corollary of this is that the professional's functions need to be rooted in her or his qualifications and expertise.

In some professional reliance regimes the professional's role is passive or unknown and indistinguishable in a proponent's documentation, making it difficult or impossible to tell what professional advice was provided that may have been modified or rejected by the proponent. For example, some forest stewardship plans and environmental assessment certificate applications do not clearly identify the professionals who prepared the material or what their role was, because that is not required by the regulations.

Reliance on professionals in the employ of industry proponents entails certain risks when it comes to the public interest, so the role they undertake needs to be clearly demarcated. Where their role is left somewhat undefined, professional reliance becomes more of a leap of faith or blind trust that is too contingent upon the individual's competence and integrity. Where the responsibilities and objectives are not clear, there is inevitably less accountability because there is no measure for evaluating performance.

Some professional reliance regimes in British Columbia meet this criterion, while others do not.

[41] City of Kelowna, Bylaw 10540, Development Application Procedures Bylaw.

For example, the *Water Regulation* provides an exemption from the permit requirement for the construction or maintenance of storm sewer outfalls, "provided that the storm sewer outfall is designed by a professional engineer, and constructed, maintained and used so as not to obstruct the flow of water in the stream or to cause erosion or scour in the stream."[42] The role of the engineer and the management objective is fairly clear here.

Contaminated sites regimes routinely incorporate professional reliance and do a good job of meeting this criterion. For example, Ontario's *Record of Site Condition Regulation* sets out in considerable detail the functions and responsibilities of "qualified persons" carrying out environmental site assessments. The objectives of the professional reliance function are also specified clearly.[43] The British Columbia regime achieves something similar through the Practice Guidelines adopted by the Society of Contaminated Sites Approved Professionals of British Columbia (CSAP). While labeled guidelines, CSAP states that professionals should follow them, and that they form the basis for audits of professional work:[44]

> *Practice guidelines are intended to establish guidance that CSAPs should follow to fulfill their professional obligation to the Society, the Ministry as well as to the public and the environment. The guidelines specify tasks and identify general standards of professional practice that CSAPs should follow when conducting CSAP work. The guidelines also serve as a basis for performance assessments for CSAP work under the bylaws of the Society.*

By contrast, the Auditor General has noted that the forest practices regime lacks clarity both for timber and conservation of biological diversity. In an audit of timber resource management the Auditor stated: "This lack of clarity is of particular concern given the significant issues and risks currently facing British Columbia's forests."[45] The audit of biodiversity concluded that: "Government does not know whether its actions are resulting in the conservation of biodiversity."[46]

This lack of clarity in government objectives has adverse implications for professional reliance when it comes to forest stewardship plans. A Forest Practices Board report that examined forest stewardship plans found that forest company commitments in these plans "tend to be somewhat vague and non-measurable, which could lead to problems for government enforcement officials."[47] While it is possible for the professionals preparing these plans to provide more meaningful results and strategies to meet the broadly stated government objectives, the Board also noted, "there is no incentive for licensees to propose innovative approaches, and in fact there is a disincentive in that they will be held accountable for whatever they do propose."

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[42] Water Regulation, s.44(1)(l).
[43] O.Reg. 153/04 - Record of Site Condition, Schedule D, ss.16-18.
[44] CSAP Practice Guidelines, July 2010.
[45] Auditor General of British Columbia. Report 11: Managing British Columbia's Timber Resource, February 2012.
[46] Auditor General of British Columbia. Report 10: An Audit of Biodiversity in B.C.: Assessing the Effectiveness of Key Tools, February 2013.
[47] A Review of the Early Forest Stewardship Plans Under FRPA, Forest Practices Board, May 2006.

Criterion #3: Role reserved for government

To some readers it might seem odd to suggest that reserving a role for government is suggested here as an important criterion, because many would assume that government would not relinquish its ultimate authority as a matter of course. However, some professional reliance regimes in British Columbia explicitly limit or divest government of approval functions and even preclude government from taking remedial measures in the face of mistaken or poor judgment on the part of professionals hired by proponents. We consider this to be an extreme form of reliance that is not common in other jurisdictions, and might be viewed as regulation of government more than regulation of industry.

One example is the regime governing forest practices, which removed the discretionary authority of Ministry of Forests district managers to approve logging plans if they "adequately managed and conserved forest resources of the Crown" and substituted a mandatory approval requirement if the plans included prescribed content.[48] While forest stewardship plans have to meet government objectives, those objectives are so broadly (some say vaguely) expressed that it would be very difficult for a manager to show that they are not met. When one statutory decision maker rejected a plan submitted by Babine Forest Products on the grounds that it failed to meet visual quality objectives in a scenic area important to fishing lodges and boaters, the company appealed to the Forest Appeals Commission on the grounds that he had no authority to reject the plan. The matter was settled through a compromise reached between the ministry and company, so there is no ruling from the Commission on that point.

Another example involves the *Riparian Areas Regulation* under the *Fish Protection Act*. That regulation requires proponent-hired "qualified environment professionals" to follow a certain procedure to determine whether developments will harmfully alter fish habitat. If the professional "certifies" that he or she followed the procedure, the professional's judgment cannot be questioned, even if fisheries biologists in the federal Department of Fisheries and Oceans or provincial Ministry of Environment disagree, and if it does not conform to the preponderance of professional opinion. When the City of Salmon Arm conditionally approved development within 15 metres of a stream (rather than the 26 metres determined to be the streamside protection and enhancement area) subject to the professional's opinion being accepted by the Ministry of Environment and Fisheries and Oceans Canada, the property owner took the City to court, arguing that it had no right to impose that condition. The courts agreed, stating, "[t]here is no provision allowing any governmental body to vary the extent of the streamside protection and enhancement area." Although the province took issue with the adequacy and correctness of the professional's report, the court found that "[t]he regulation appears to entrust the issue of compliance with assessment methods to the professional judgment of the qualified environmental professional."[49]

The question that must be asked from these two cases is "Why has the British Columbia government given up so much of its authority on matters of public interest involving public land, water and riparian habitat?" Most professional reliance regimes reserve to government the

[48] See section 41 of the *Forest Practices Code of British Columbia Act*, and section 16 of the *Forest and Range Practices Act*.
[49] *Yanke v. Salmon Arm (City)*, 2011 BCAA 309 (CanLII).

ability to intervene where public land and resources are involved, and even where the issue primarily involves private land (such as the contaminated sites regime).

While government is often attracted to the cost savings of professional reliance (achieved through staff reductions and devolving greater responsibility for expert research and opinion to proponents), the benefits are not always certain or inevitable. To establish a credible professional reliance scheme, government needs to be involved at certain levels of decision making, particularly when the activity involves moderate to high risk to the environment, health and safety, and other public interests. Higher risk functions require more elaborate checks and balances, and an inadequate professional reliance scheme might simply shift the focus of regulatory attention from managing environmental protection directly to managing an overly risky bureaucratic scheme. There could be a false economy in resorting to professional reliance in high risk, overly discretionary, and conflict-laden areas. We feel there is an inconsistent approach to this issue across the current array of professional reliance schemes in BC.

There are three key roles to be reserved for government in situations where professional reliance is appropriate:

1. **Maintaining an authorization role** (e.g. permit, licence, plan approval, etc.) where there is considerable room for professional discretion that could affect environmental protection, health and safety, and other public interests. This would have to be a meaningful role, not a highly constrained one where statutory decision makers are forced to approve and cannot apply their own expertise and exercise their own professional judgment.

2. **Maintaining a quality control function** and authority to intervene where a proponent's professional provides an opinion of dubious quality. While this should be non-controversial from a policy perspective, in practical terms it can be difficult to implement because the professional's opinion is typically based on field information that she or he has gathered (or someone working under the professional's direction), and currently at least, agency staff face severe resource constraints when it comes to checking that information. For example, the accuracy of information concerning whether a stream proposed for energy development is fish bearing is an important issue that often can only be verified by considerable field effort. Nevertheless, whether such matters are checked through audits or in response to third party challenges to the information, it is incomprehensible that government would not want the authority to respond to mistaken facts or incorrect professional opinion.

3. **Maintaining a gatekeeper function** over who is qualified to carry out a professional reliance function, if that issue is not otherwise addressed under Criterion #1.

The importance of these functions was also noted by the Ombudsperson in her report *Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection – British Columbia's Riparian Areas Regulation.*[50] Of course, these are not the only appropriate roles for government; others will be discussed below under other criteria.

[50] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014.

The engineering profession has developed a concept that may be helpful in this regard: that of the "knowledgeable owner." Unlike a lay person who lacks any knowledge or expertise about the professional services being provided, a knowledgeable owner is one who is informed and has a level of competence and sophistication, such as the following:

1. The in-house expertise to know how to do the work;

2. Knowledge of the qualifications required for individuals who are capable of doing the work, and be able to assess whether an individual has the qualifications;

3. Knowledge of the right questions to ask of someone carrying out the work and the ability to converse with them in refining the understanding of the problem; and

4. Ability to assess, understand, evaluate and interpret the results received from the retained professional, plus an understanding of the limitations and risks of the management issue and the results.

The BC Ministry of Transportation and Infrastructure Engineering Roundtable has developed the following criteria to aid its understanding of what it means for the agency to retain "knowledgeable owner" status:

- Application of engineering and business judgment
- Understanding of provincial interests in addition to technical requirements
- Value for money and the reality of available budgets
- Risk management (including identification, assessment, and mitigation) and tolerance
- Consideration of other priorities (community, economic, etc.)
- Legislative obligations and requirements (non-delegable duties)
- In house technical expertise in the six core engineering disciplines
- Technical continuity through project phases
- Research and development responsibilities, being on the forefront of industry knowledge
- Manage, review and accept work to ensure appropriate level of quality and value for money

As owner and steward of public land and resources, and trustee of the environment for existing and future generations of British Columbians, we suggest that at a bare minimum the province should never reduce its regulatory capacity in any given field below the level of "knowledgeable owner."

It is interesting to note that a similar concept has now made its way into the common law as it relates to First Nations who hold Aboriginal title. In its 2014 *Tsilhqot'in Nation* decision the Supreme Court of Canada held that:[51]

> *The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those*

[51] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII).

uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations... This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations….

Criterion #4: Formal procedures and clear rules for certification

There are many circumstances in which professional reliance functions should involve some degree of formality to inculcate a sense of personal responsibility and accountability, and to clearly identify and document the professional's role. Several professional reliance regimes already do this, but others do not. In our interview process we were informed that some professionals were putting caveats on their opinions and reports, which can undercut or defeat the integrity of the professional reliance regime if the practice becomes part of the 'fine print' in professional documents. Because some professional reliance regimes are relatively young, some of this might just be part of the learning process, but practices need to be standardized to make the process efficient for agencies and for all of the stakeholders affected by professional reliance to gain confidence in the system.

In the contaminated sites regime, where the cost of remediation can be significant, government seeks assurance statements from professionals. It has received some push back from professionals concerning the certification about site conditions, resulting in negotiations over the terms and conditions of the certification document or assurance statement, and over the availability, cost and terms of insurance requirements.

In some cases professional associations have recognized the need to fill a void in the regulations. The Association of Professional Engineers and Geoscientists joined with the Association of BC Forest Professionals to require their members to complete "Crossing Assurance Statements" whereby the professional responsible for planning and design of a bridge confirms that laws and professional guidelines have been followed and that the bridge was constructed consistently with those plans. The guidelines define assurance as meaning that "a Professional Engineer or Registered Professional Forester has undertaken the work that in his or her professional judgment, is considered necessary to ascertain whether the significant aspects of the crossing project are in general conformance with the plans and supporting documents."[52] This is an excellent example of professional associations developing a formal procedure to instill responsibility among members engaged in work that poses risks to the environment and safety. Unfortunately, a 2014 investigation by the Forest Practices Board found high levels of non-compliance, and has asked the professional associations to report how they intend to address the findings.[53]

We do not wish to be prescriptive about a set of procedures that should be adopted in every situation, as there is merit in considering what is most suitable for a given regime or professional reliance function. Requiring the professional's signature and/or seal on the document that represents the function they have carried out is an obvious and simple step. However, in many situations there is merit in requiring a clear attestation, oath or affirmation concerning the

[52] See Guidelines for Professional Services in the Forest Sector -- Crossings, Appendix A, March 2005, APEGBC & ABCFP.
[53] Bridge Planning, Design and Construction: Special Investigation, Forest Practices Board, March 2014.

professional reliance function, which is specified in a form or schedule of a regulation to avoid inconsistencies and the prospect of professionals devising their own reservations, qualifications or caveats that increase government's burden. Depending on the circumstances, best practices could include the following:

- Certifying that specified procedures were followed in all respects (e.g. a procedure set out in regulation, policy, or other document such as RISC inventory standards);
- That information utilized is the best and most current available;[54]
- That the professional followed practice guidelines and/or generally accepted principles in the profession;[55]
- That the information supplied conforms to the relevant regulations and agency policies;[56]
- Where important in the context, that the professional believes that specified objectives will be met by the undertaking if his or her plan or measures are followed;
- That the professional consulted all known sources of relevant data available (e.g. Conservation Data Centre, Terrain Resource Information Management Program (TRIM) Database, etc.)
- That the professional does not have any conflicts of interest, as defined in the relevant regulation or legal document (discussed further below);
- Where important in the context, that the professional is independent and arm's length from the proponent (discussed further below); and
- That the professional has visited the site post-construction or post-operations and certifies that his or her professional advice (whether conveyed through a plan, prescription, design, etc.) was followed by the proponent.

We will illustrate these concerns with one example. In 2004 the BC government removed some of these formalities from the forestry regime while at the same time saying it was shifting to professional reliance. Since the 1980s professional foresters had been required to sign and apply their professional seal to pre-harvest silviculture prescriptions that set out logging and reforestation plans for individual cutblocks.[57] Professionals involved in drafting this regulation informed us that the purpose of this requirement was to promote the objective that logging plans be based on foresters' knowledge of forest ecosystem requirements and not just the wishes or demands of their forest company employers. Requiring the professional's signature

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[54] For example, see section 28 of Ontario's *Record of Site Condition Regulation*, O. Reg. 153/04.
[55] One limitation in this however is that some professions have not developed these to a significant degree, when compared to longstanding professions. Of the professions relevant to this report, the Association of Professional Engineers and Geoscientists appears to have the most well developed guidance documents for members.
[56] For example, see section 63 of the *Contaminated Sites Regulation*. See also Section XI – Professional Signatures, in Section 7 of the Ministry of Environment's Site Risk Classification Report. See also the signature block on page 50 of the *Forest Practices Code*'s Silviculture Prescription Guidebook.
[57] See section 12(d) of the *Forest Practices Code of British Columbia Act*.

and seal theoretically gave the professional added power in the dynamic between the tenure holder and the agency, and enhanced the professionalism of the practice of forestry.

Since 2004 these plans are no longer approved by or even submitted to government, and neither the current site plans nor forest stewardship plans require the signature or seal of a professional forester. This is a concern because some foresters we interviewed indicated that this move signaled government's direction not toward *professional* reliance but rather towards *licensee* or *industry* reliance. In the event of disagreement, it is a forester's employer or client who has the final say and has to be satisfied with the logging plans, not the professional. The removal of this simple requirement for a forester's signature and seal could undercut professional reliance when it comes to forest planning and practices.

The Association of BC Forest Professionals (ABCFP) has a mandate under the *Foresters Act* to specify requirements for "professional documents," but the bylaws do not define that term, even though the "preparation, review, amendment and approval of professional documents" is within the definition of the "practice of professional forestry."[58] The bylaws define professional work as including a requirement for foresters to sign and seal all "estimates; specific actions; reports; letter reports; letters; memoranda; documents; plans; and all such other professional papers and things containing professional opinion or work product." However, the signing and sealing of statutorily required documents doesn't appear to be strictly required by the bylaws.[59] This could allow for some blurring of what is the client/employer's work product and what is the forest professional's work product.

The Importance of Post-Development Reports Certifying Compliance

In her investigation of the *Riparian Areas Regulation*, the Ombudsperson identified the importance of post-development reports in which a professional certifies that the proponent has complied with the professional's advice and regulatory requirements. The rationale for this is:

> *Post-development reports are an effective and efficient way of mitigating the need for enforcement by providing proponents with motivation to follow the [professional's] recommendations and encouraging the ongoing involvement of the [professional] throughout the project.*

In her review of 40 reports submitted by different professionals, only four or 10% had post-development reports. The Ombudsperson pointed out that some professional reports were prepared and submitted well before development, calling into question its relevance to current conditions and whether the developer or proponent followed professional guidance. This is a significant issue for any professional reliance regime, because the mere preparation of plans, designs or reports by a professional is but one initial aspect of achieving sound resource management and environmental protection. A system that only requires up-front involvement by a professional is not truly accountable because in the event of non-compliance it is too easy for the professional to simply say the proponent or employer did not follow his or her advice. Without a requirement for professional advice to be followed and a post-development

[58] *Foresters Act,* ss.1, 9.
[59] ABCFP Bylaw 10, April 2014.

professional certification or assurance statement that it has been, is to miss the "reliance" aspect of professional reliance. It is a system that is based on "blind faith" rather than "professional reliance."

Another reason why this is an important issue is that professional associations do not typically require professionals to report non-compliance of one's client or employer (see discussion under Criterion #8).[60] The regulatory system should impose more formal procedures for certification to ensure that professional reliance is meaningful.

Criterion #5: Conflict of interest, self-interest and independence

The interrelated issues of conflict of interest, self-interest and independence of the professional arose frequently and intensely in our interviews: some considered it to be the "elephant in the room" that everyone knows is a serious issue but is reluctant to address.

Professionals themselves identified conflicts of interest arising from their sense of duty to their client, the public interest, and their self-interest as it related to ongoing contractual relationships and business competition from peers who might not be as concerned about the public interest. One concerned citizen expressed surprise at hearing a biologist promoting the purchase of shares in a private energy company to which he had provided consulting services, and asked, "What am I to conclude about the objectivity of the fisheries advice he provided?" Some regimes seem to have conflict of interest built right into them, such as the deregulated sewerage system regulations that replaced public health official approval of sites and systems of with approval by an "authorized person" who can be and often is the same person selling, installing and maintaining the sewerage system to homeowners.[61]

While professional associations generally have paid much attention to ensuring that members avoid situations giving rise to conflict between their personal or firm's interests and those of their client, a prevalent risk in the natural resource sector arises when professional and client interests conjoin to the detriment of the public interest. In this situation, the professional's self-interest is seen as one and the same as the client's corporate or business interest, and this merger leads to a loss of objectivity.

A third and related concept is that of independence. This arises where it is important that the expert opinion provided is truly independent from biased influences. The accounting profession has defined the need for independence as freedom from "any influence, interest or relationship which…impairs the professional judgment or objectivity of the member…or which, in the view of a reasonable observer, would impair the professional judgment or objectivity of the member."[62]

Regardless of whether they are operating within a professional reliance regime, professionals need to avoid conflicts of interest and, at the very least, openly declare them where they exist

[60] There are exceptions to this: for example, section 4 of the College of Applied Biology Member Code of Ethics provides that confidentiality obligations do not apply where the biologist's "employer/client actions are unlawful, in which case the member is obliged to report the activity to the appropriate authority."
[61] http://www.elc.uvic.ca/press/documents/SSR-Reform-Submission-Mar4.09-FINAL.pdf
[62] Rules of Professional Conduct, Institute of Chartered Accountants of British Columbia, July 2012.

or may be perceived to exist. This issue is generally acknowledged in the Codes of Ethics of the governance bodies for foresters, biologists, engineers, geoscientists, agrologists, and science technologists. Most codes acknowledge that members have duties to one's client, the profession and the public.

However, professional reliance regimes heighten the need for special attention to conflicts of interest, self-interest and independence because the diminished role of government reduces oversight for the public interest. Where they have an approval role, government agency staff are called upon to balance many public and private interests, and are ultimately accountable to their ministers. But when government – the traditional guardian of the public interest – is out of the picture for plan approvals or authorizations, conflict situations can intensify and professionals may find themselves in a bit of a pressure cooker because they face a significant additional duty to the proponent that is their client or employer.

These duties are not speculative, but very real. One professional association advises its members that:[63]

> *In providing services to a client, members should consider themselves part of the client's organization or team, with high regard for the client's interests. This is implicit in the term "faithful agent" and should be the basis of the member/client relationship.*

The client or employer relationship also comes with duties respecting the client or employer's information, and members are further advised that they are "obliged not to disclose confidential information of the client/employer and should avoid the use of such information to the disadvantage of the client/employer."[64] Yet that information might be highly relevant to the public interest.

These professional duties are not surprising or even inappropriate. However, their existence presents a major challenge for professional reliance regimes, some of which seem to assume that ethical codes deal with conflicts adequately and sufficiently for all regulatory contexts, or that disciplinary processes will be adequate to resolve all of the conflicts issues that might arise. For example, recall the definition of "qualified professional" under *Environmental Management Act* regulations cited above, in which government places significant weight on members of a professional association who are "acting under that organization's code of ethics and is subject to disciplinary action by that organization."

While some professions provide a few examples of scenario-based guidance to members that embellish upon codes of ethics, others seem content to allow the general principles to speak for themselves. Some attempts to provide guidance seem to confirm the struggle within a profession to deal with these conflicting duties while maintaining the public interest. For example, the Association of BC Forest Professionals has probably gone further than any other profession to develop guidance for foresters on these issues. Its guidance document states, "While professionals have certain obligations as employees or consultants, they are

[63] Code of Ethics Guidelines, Association of Professional Engineers and Geoscientists of British Columbia (APEGBC).
[64] Code of Ethics Guidelines, APEGBC.

independent from their employers or clients. This is a cornerstone of professionalism." It then goes on to advise members that:[65]

- Members should manage forests, forest lands, forest resources and forest ecosystems based on sound ecological principles;
- Given a conflict among objectives, members must weigh which ones they think should prevail and present a rationale for their preference;
- Company managers have management prerogative to make decisions supporting the well-being of their companies;
- Provided that the alternatives are within the law, rejection of a member's preference does not compromise her or his integrity;
- If legislation or regulation (i.e.: public interest) did not provide adequate direction for good stewardship of forest land, members should consider advocating for change of that legislation.

While appreciating the attempt here to provide conscientious advice to foresters, the guidelines are notable for a few points:

1) they equate the public interest with current laws and regulations (see underlining above), which glosses over the enormous amount of discretionary judgment involved in the practice of forestry when it comes to sustaining multiple forest values on public land;
2) they acknowledge the conflict between proponent interest and the public interest, and essentially come down on the side of proponent interest "so long as it is legal;" and
3) they presume that it is practical or realistic to expect a forester whose employer/client rejects his or her professional advice to commence a law reform campaign to ultimately win the day on a given issue, contrary to the wishes of the employer/client. Given the structure of the rules and regulations governing forest practices all of this guidance is not particularly surprising, but it highlights the serious limitations of relying on professionals employed by an industry to uphold the public interest.

This guidance is borne out in disciplinary decisions. In one complaint investigation involving a forester's plan for logging in marbled murrelet habitat the disciplinary committee concluded:

> *Our stewardship obligations require us to advocate for stewardship, but the legal power to determine what is protected lies solely with government as the representative of the public interest assigned by society. Our professional obligations are limited by our legal authority. We have no legal authority to set provincial policy regarding endangered species or ecosystems.*

[65] ABCFP Code of Ethics -- Guidelines for Interpretation, March 2009. In addition, the ABCFP has provided guidance for foresters on interpreting the publics' interests: see http://www.abcfp.ca/regulating_the_profession/documents/guideline-public-interest.pdf

In another complaint involving the logging of a rare Coastal Douglas Fir forest ecosystem on Vancouver Island the disciplinary committee held:

> *Our members have a professional obligation to make their employers aware of potential stewardship issues. However, the government retains the right to issue a licence and determine what environmental protection measures are appropriate. Our members were well aware that the CDFmm is an endangered ecosystem. They did make their employers aware that there were environmental concerns and issues with CDFmm. In this case, despite the efforts of our members to highlight the concerns regarding the area of land in question, a decision was made to issue a licence. As professional foresters, our members do not have the power to stop potential harvesting or to ensure there will be no logging within the CDFmm.*

Our purpose here is not to take issue with these ABCFP disciplinary decisions, but rather to point out that despite references to the public interest in codes of ethics, professional associations do not see it as their job to police it. There are many public interests, and even where a member's conduct harms threatened species or endangered ecosystems, it is not unprofessional conduct if it is otherwise legal and consistent with client interests and government licensing decisions. In other words, professional codes of ethics and disciplinary processes are not sufficient to ensure responsible environmental stewardship. Government messaging around professional reliance schemes suggests that they are, but the professions resist, effectively pushing back on government and saying, "No, that ball is in your court."

Resource management professionals carry out their business across a broad range of practice areas, and it would be very difficult if not impractical to write codes that cover the conflicts issues that could arise for every member. The Association of Professional Engineers and Geoscientists of British Columbia captures this in its message to members:[66]

> *The purpose of the Code of Ethics is to give general statements of the principles of ethical conduct in order that Professional Engineers and Professional Geoscientists may fulfill their duty to the public, to the profession and their fellow members…. Precise rules in conflict of interest are not possible. Members should use their conscience and sense of honour for guidance.*

Many professionals and members of the public we interviewed do not believe that public interest issues are adequately or appropriately addressed by professional associations. While professional associations could likely develop more refined guidance for members on conflict issues, they are in a difficult position when it comes to defining and regulating the public interest, particularly when it strays into subject matter that is not within the expertise of that profession, or areas in which a weighing of public values could be seen as a political rather than professional issue. They might rightly insist that is government's job: this was, in fact, the position expressed by staff of some professional associations that we interviewed. We also consulted with legal counsel who specialize in self-governing professions and who advise governments on professional legislation, who expressed the view that the natural resource management sector is atypical of other professional governance situations because there are so many different public interests, and because it involves trade-offs between so many

[66] Code of Ethics Guidelines, APEGBC.

environmental and societal values, including values outside of the expertise of any one profession. By contrast, defining the public interest when it comes to health professionals is focused on a narrower range of matters such as professional competence, disclosure, obtaining free and informed consent of patients, etc.

Government needs to acknowledge the reality of conflicts of interest, self-interest and independence in the natural sector, and the limitations of professional associations to address it, by establishing regulatory requirements tailored to the professional reliance function in question. What is necessary will probably vary according to the situation.

Some assistance may be found among the rules of other professions that have suffered a loss of public confidence. These issues have become major for the accounting profession, particularly with the collapses of large financial institutions in the last several years, and the huge losses faced by individual investors and pension funds. Jackling *et al* write that: [67]

> *Increased awareness of the public interest is considered to be an important ethical issue that challenges the professional accountant in today's environment…Self interest threats arise where there is a conflict of personal interest and the interests of those served by the professional, leading to the possibility of compromise. Parker (1994) observed that the public interest is readily declared, but the private interest remains submerged, yet powerful. The conflict between the public interest and self interest is increasingly under scrutiny, with highly publicised corporate collapses and alleged accounting failures.*

The Institute of Chartered Accountants of British Columbia has developed detailed rules addressing these issues, which it summarizes as follows:[68]

> *The public interest in the objectivity of a member engaged to perform an assurance engagement or a specified auditing procedure requires that the member be, and be seen to be, free of influences which would impair the member's objectivity. Accordingly, the rules specifically require a member who engages to perform an assurance or specified auditing procedures engagement to be independent. The ethical standard of independence requires the member to be and remain free of any influence, interest or relationship, in respect of the client's affairs, which impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity.*

The Forest Practices Board of British Columbia has highlighted the importance of independence in its Audit Reference Manual, which provides that:[69]

> *Members of an audit team working on behalf of the Forest Practices Board must, by all reasonable tests, be independent, and be perceived to be independent, of the party(s) being audited, must utilize due care, and must maintain an objective state of mind throughout the conduct of the audit.*

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[67] Jackling, *et al*. "Professional accounting bodies' perceptions of ethical issues, causes of ethical failure and ethics education." Managerial Auditing Journal Vol. 22 No. 9, 2007 pp. 928-944.
[68] Rules of Professional Conduct, Institute of Chartered Accountants of British Columbia, July 2012.
[69] 2012 Compliance Audit Reference Manual, Section 210 – Audit Standards, Forest Practices Board of British Columbia.

Ontario's *Endangered Species Act* requires independence in two ways: it requires the members of a committee on the status of species at risk to "perform their functions in an independent manner, and not as representatives of their employers or of any other person or body." It also requires the minister to be assured of the independence of experts the ministry consults concerning permits affecting species at risk and their habitat.[70]

The closest similar provisions we were able to find in the British Columbia professional reliance regime addressing the issue of professional independence arose in two areas:

1) through water licence conditions for some hydroelectric power projects, which require the proponent to hire an independent engineer and an environmental monitor whose duties are spelled out in an appendix to the licence, reporting requirements to a *Water Act* official;[71]

2) for verification of emissions offsets under the *Emission Offsets Regulation*.

Under the *Emission Offsets Regulation*, professionals who verify that a proponent's plan or project is "fair and reasonable" with respect to greenhouse gas reductions must provide assurance that they followed procedures or policies that "ensure their independence and the lack of any conflicts of interest."[72] In 2013 BC's Auditor General determined that two of the early emission offsets purchases by the Pacific Carbon Trust were not credible and pointed to multiple roles played by a project developer and the validator that led to conflicts of interest. This audit highlights the importance of each of the individual factors discussed here: conflict of interest, self-interest and independence. Independence alone does not assure that a professional's work will be free from conflict of interest or self-interest, and public confidence may be undermined if these are not diligently addressed. Introducing professional reliance into "regulatory assurance" schemes is very complex and rife with challenges. The Auditor General recommended a greater degree of oversight by government itself, concluding that "the Climate Action Secretariat should be more active in developing guidance and assessing the PCT's offset purchases to ensure they meet government's intention of achieving carbon neutrality."[73]

A follow up investigation by the *Vancouver Sun* reported that the situation uncovered by the Auditor General (in terms of eligibility for funding) was a pervasive problem, affecting 22 out of 25 projects funded by the Pacific Carbon Trust. When *The Sun* sought documentation supporting eligibility under the requirements of the *Emissions Offsets Regulation* it was unsuccessful:[74]

> *The Sun asked the Pacific Carbon Trust to provide this documented evidence, but it refused and deferred questions to validators who had qualified the projects.*

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[70] See s.3(5) and s.17(2)(d). *Endangered Species Act*, 2007, S.O. 2007, CHAPTER 6. Section 17 was judicially considered in *Sierra Club v. Ontario*, 2011 ONSC 4655 (CanLII).
[71] See Appendix H – Scope of Information and Reports of the Environmental Monitor.
[72] See sections 4 and 6 of the *Emission Offsets Regulation*, B.C. Reg. 393/2008.
[73] See An Audit of Carbon Neutral Government, Auditor General of British Columbia, March 2013.
[74] G. Hoekstra, Carbon Trading: Projects outside trust's criteria but reaping benefits criticized, *Vancouver Sun*, April 21, 2012.

> *The accounting firm KPMG, which has an arm that qualifies greenhouse gas reduction projects, has validated and verified several projects awarded money by the Carbon Trust.*
>
> *However, KPMG said it is restricted in providing that evidence because of confidentiality agreements with its company clients.*

This raises an additional challenge for professional reliance regimes: with so much regulation happening privately under contract, these regimes can breed public suspicion because they lack the openness and transparency expected of government, especially surrounding the expenditures of large sums of public money, which in this particular case came from the budgets of schools, hospitals and other agencies which were already facing fiscal challenges.

We conclude that British Columbia's professional reliance regime could benefit significantly by addressing these important issues more comprehensively in regulations. The greater the degree of reliance on the professional's information and expert opinion to upholding the public interest in environmental protection, the more robust the provisions for conflict of interest, self-interest and independence need to be. Government should not completely rely on professionals or their associations to uphold the public interest for environmental values that are properly the purview of democratic government. It is unrealistic to expect professional associations to do government's job when it comes to balancing environmental values, assessing whether a choice of trade-offs is appropriate, or determining whether the public interest has been met in management decisions.

The primary role of professional associations is to protect the public from incompetent and dishonest practitioners, not to police nuances in professional judgment across the many grey areas that arise in environmental management. And in the absence of clear, verifiable and measurable government objectives, it is a near impossible task for professional associations. For many of the professionals we interviewed, this issue is highly important, and goes to whether government intends to establish a *bona fide* professional reliance regime, or simply deregulation that gives industry control over what happens to public resources on public land.

Criterion #6: Record keeping, disclosure and transparency

Record Keeping and Retention:

When independent professionals are delegated various roles and functions formerly undertaken by government, important issues relating to record keeping, public disclosure and transparency inevitably arise. When the functions reside in government, these issues are governed by laws governing public records, such as the *Document Disposal Act*, *Freedom of Information and Protection of Privacy Act,* and by government's Operational Records Classification System policies. Government has legal duties regarding the retention and disposal of records, and the provision of public access to those records. However, when the relevant information is held by independent professionals outside of government, those rules do not apply unless there is a legal duty to provide the documents to government and they become government records.

Some professionals have a duty to maintain and keep records under the rules of their professional association. For example, engineers and geoscientists have a duty under APEGBC Bylaw 14 to maintain project records for a minimum of ten years:

> *14 (b) Members and licensees shall establish and maintain documented quality management processes for their practices, which shall include, as a minimum:*
> *(1) retention of complete project documentation which may include, but is not limited to, correspondence, investigations, surveys, reports, data, background information, assessments, designs, specifications, field reviews, testing information, quality assurance documentation, and other engineering and geoscience documents for a minimum period of 10 years;*

Quality Management Guidelines issued by APEGBC address creating, revising, issuing, archiving, storing and destroying records. The Association notes that "project documentation is critical to professional practice, and assists APEGBC professionals in holding public safety paramount and serving the public interest." Citing a gas line explosion disaster, the Association advises its members that "One need only review the findings from disasters to understand that poorly kept records can lead to poorly made decisions, and potentially fatal outcomes."[75] Practice guidelines for approved professionals under the contaminated sites regime also must keep records for ten years.[76] This is standard for other professions as well, such as law.

Biologists are obliged under their Code of Ethics to ensure "appropriate documents, files, and filing systems are maintained."[77] Auditing forms provide that "As a College member, you are responsible to ensure that your documents/reports/field notes and project correspondence are accessible, recoverable and protected."[78]

However, foresters, agrologists and science technicians do not appear to have a professional duty to maintain records in their association's legislation or bylaws. Any such obligation would only arise if the statute under which they are operating imposed it. BC's natural resource and environmental legislation does not seem to require much in the way of a duty for professionals to maintain records. Deregulation has worsened the situation in some settings: for example, the *Forest and Range Practices Act* repealed an earlier requirement to have site level logging plans submitted to and approved by government (although they do have to be provided to the public on request).

This stands in contrast to some professional reliance regimes in Ontario which have imposed clear duties to keep, file and disclose records relating to professional functions. For example, subsection 168.4(5) of the Ontario's *Environmental Protection Act* requires retention of reports by both the professional and proponent:

> ***Retention of reports***
> *168.4(5) If a qualified person has relied on a report in making a certification referred to in subsection (1) or (2) in a record of site condition that has been filed under this*

[75] See Quality Management Guidelines for Retention of Project Documentation, APEGBC.
[76] CSAP Society Practice Guidelines, November 2010.
[77] CAB-BC Code of Ethics, s.3.
[78] See "member form" for CAB-BC Audit program: https://www.cab-bc.org/audit-program

section, the following persons shall retain a copy of the report for the period prescribed by the regulations:

1. *The owner of the property who filed the record of site condition.*
2. *The qualified person who made the certification.*

Regulations add considerable detail to the professional's obligation to consult, document and maintain records.[79]

Filing, Disclosure and Transparency

Professional reliance regimes give rise to special challenges when it comes to disclosure of professionally produced information and transparency. A professional retained by a proponent may be under a duty of confidentiality regarding client records or information, while citizens may face difficulty gaining access to records that pertain to activity on public land that affects public resources and the environment. For example, professional foresters have a duty to their clients and employers "not to disclose confidential information without the consent of the client or employer except as required by law."[80] Interpretive guidelines instruct foresters to "consider all information received from a client or employer as confidential unless such information is in the public domain."[81]

Likewise, agrologists must keep confidential "all information concerning the business and affairs of the client and/or employer acquired in the course of the professional relationship, and must not divulge any such information unless disclosure is expressly authorized by the client or employer or is required by law or by a court."[82] Similar provisions apply to biologists, engineers and geoscientists.[83]

While duties of confidentiality and client loyalty are important in any professional undertaking, the delegation of professional reliance functions should not inadvertently trump the public interest in environmental management and protection involving public land and resources. The solution is to ensure that regulations incorporate obligations to record, file and disclose relevant information so that it is available to those who may be adversely affected by, or who have a bona fide interest in, the scientific information and policy rationales behind the exercise of professional reliance functions. A legal requirement to record, file and disclose such information resolves the client/employer confidentiality concern, and will lift the cloak of secrecy concerning professional work that effectively grants development rights to the client/proponent in a professional reliance context.

Unfortunately, BC regulations seem to be weak in this regard. The best example we found of recording, filing and disclosing reports, studies and rationales prepared by professionals is the e-PIC (electronic Project Information Centre) of the Environmental Assessment Office, which is mandated by the office's enabling legislation.[84] We have argued elsewhere that the rules

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[79] See Records of Site Condition, O. Reg. 153/04.
[80] See ABCFP Bylaws, s.11.5.2.
[81] ABCFP Code of Ethics -- Guidelines for Interpretation, p.24
[82] BC Institute of Agrologists, Code of Ethics, s.2(d).
[83] See College of Applied Biology Code of Ethics, s.4; APEGBC Code of Ethics, s.14(a)(4).
[84] *Environmental Assessment Act*, S.B.C.2002, s.25.

governing e-PIC should be tightened and made more explicit;[85] nevertheless, the e-PIC system seems better than what is available for many other provincial agencies with responsibility for licensing of Crown resources. The environmental assessment regime is not a *decision making* professional reliance regime because government ministers decide whether to issue environmental assessment certificates, but professional reports submitted by proponents carry significant weight in this proponent-driven system, and at a minimum it is certainly a *common* professional reliance regime.

In *Striking a Balance* the Ombudsperson commented:[86]

> *The provision of adequate public information is central to the democratic principles of openness and transparency. Information is a cornerstone of administrative fairness as it allows the public to know and understand whether programs are being operated in a fair and reasonable manner. Public information about environmental protection programs allows the public to have confidence that the government is meeting its obligations as a steward of the environment and our province's natural resources, and contributes to a more informed public discussion.*

Public disclosure need not involve government resources: a legal duty to record, file and disclose documents could be met by the professional or proponent directly through filings on a website. However, there is likely merit in an easily searchable, well-known, central filing system. In the Internet age these issues are easily dealt with where there is a will to do so: examples from other jurisdictions include the US Federal Energy Regulatory Commission[87] and Canada's National Energy Board,[88] where correspondence and reports relating to regulatory matters are uploaded to websites.

Criterion #7: Civil Liability, Insurance & Bonding

Government's approach to risk management in carrying out most natural resource management functions is to be self-insuring, so liability for any errors or negligence is borne ultimately by the taxpayer. Government manages this risk by hiring and training competent staff. One of the motivations for establishing professional reliance regimes is the anticipated cost savings associated with government staff no longer performing the approval or oversight functions that are devolved to professionals, often accompanied by staff reductions.

However, the liability of the independent professionals to whom resource management functions have been delegated is often not addressed explicitly in the regulatory regime. This may be due in part to an assumption that the professional's potential liability would be addressed by the common law (e.g. lawsuits in negligence, nuisance, trespass or other causes of action), or that the licence holders who employ them could be liable for any breaches of the terms and conditions of their licence, if applicable.

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[85] Environmental Assessment in British Columbia, pp.38-40.
[86] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, p.90.
[87] See http://www.ferc.gov/docs-filing/docs-filing.asp.
[88] See http://www.neb-one.gc.ca/clf-nsi/rthnb/rgltrydcmnt/rgltrydcmnt-eng.html

The potential for liability is an important issue that raises policy considerations. If independent professionals benefit from providing services in resource management and environmental protection, should they not be accountable for those services just like other professionals such as accountants, doctors and lawyers? Put another way, if government puts itself in the position of being unable to manage some risks because it is no longer hiring or training staff to carry out certain functions, taxpayers should not be left on the hook for the negligence of independent professionals who financially benefit from the provision of services formerly provided by government. Facing consequences for negligent performance of professional tasks is a form of accountability.

Surprisingly, while promoted as a "results-based" professional reliance regime, the *Forest and Range Practices Act* provides protections from liability. Section 107 allows a licensee to self-declare that its legal obligations have been fulfilled, and the obligations are deemed fulfilled on the date that a written declaration is submitted. The onus then shifts to the minister to determine that the obligations have not been met within 15 months. If challenging the declaration, the minister must provide the person with an opportunity to be heard, followed by notice of an order and written reasons for the minister's determination that obligations remain outstanding.[89] When considered alongside staff and budget cuts, and the expanding duties of compliance and enforcement staff within the larger Ministry of Forests, Lands and Natural Resource Operations, these provisions could shield licensees from liability unless government makes the resources available to fully address this risk to the public purse.

The shift from government decision making to professional reliance also raises issues of public law versus private law. Canadian courts have tended to insulate public authorities from liability in negligence on the grounds that:

1) many decisions are considered to be "policy" decisions of a planning or political nature (e.g. decisions such as the budgets for government agencies, the number of staff in an agency, and the extent of its oversight);
2) some decisions are "legislative" and attract government prerogative or deference (such as the content of regulations); and
3) there is insufficient "proximity" between the plaintiff claiming harm and the government decision-maker to give rise to a "duty of care."[90]

These factors do not apply to private law disputes, which suggests that courts might be more likely to find independent professionals liable in negligence than civil servants. Where there is a private law duty of care for harm that is reasonably foreseeable (e.g. damage to property owned by a plaintiff) a negligent professional may indeed be liable. However, across natural resource management other factors frequently come into play, such as the legal standing of a party to sue. Where professional negligence harms public resources such as air, water, Crown land, fish and wildlife, etc. courts expect that the Crown is the proper litigant (as represented by the federal or provincial government, depending on constitutional jurisdiction). The agency downsizing that accompanies professional reliance often leaves the civil service less aware of what is happening in the field, and less capable of monitoring and enforcement. In addition, the Crown rarely pursues civil law remedies for harm to public resources, and at most tends to look

[89] *Forest and Range Practices Act*, s.107, and *Forest Planning and Practices Regulation*, s.97.
[90] Linden, Allen M. and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham: LexisNexis, 2011).

to regulatory remedies (offences or administrative penalties) if applicable. Some jurisdictions have addressed this enforcement gap by allowing members of the public to bring "citizen suits" seeking restitution for harm to public environmental values.[91]

Professional reliance regimes give rise to special considerations about liability, insurance and bonding. Incorporated professionals and proponents can structure their affairs to limit financial risk exposure and in the event of significant liability may even go bankrupt. There are many examples of the public purse having to clean up and remediate environmental damage in such situations. Government can limit this exposure and provide support for the "polluter pay" principle by specifying insurance and bonding requirements. This has arisen primarily in the contaminated sites regime where professional liability and insurance requirements are expressly dealt with as an eligibility requirement for approved professionals.[92]

Some local governments in BC have developed policies to address this, perhaps to a greater extent than the provincial government. For example, the Regional District of Central Okanagan requires performance and maintenance bonds for developments that involve mitigation, maintenance, ecological restoration or monitoring plans. The developer's qualified professional and the regional district must agree on the amount, form and duration of the bond.[93]

In many circumstances outside of the natural resource sector, professional liability insurance is required as a condition of membership in a professional association: however, of the professionals involved in natural resource and environmental management, only approved professionals under the contaminated sites regime are required to have professional liability insurance. Engineers and geoscientists have a duty to inform their clients notify their clients in writing "whether or not professional liability insurance is held and whether that insurance is applicable to the services in question" prior to providing professional services.[94] Others do not, even if they are providing the very same services.[95]

Based on our interviews there appears to be an assumption that the potential liability of most professionals will be covered by the insurance policies of their employers, be they proponents or consulting firms. Government and others retaining professional services may also impose insurance requirements contractually. Nevertheless, we believe there is merit in reviewing professional reliance regimes with a view to addressing the liability, insurance and bonding issues more explicitly according to the nuanced circumstances of each professional reliance regime, for the following reasons:

1. Deregulation and reduction in government oversight that accompanies professional reliance regimes comes with added risk to publicly owned natural resources and environmental values. Industries will often financially benefit from the lower operating costs associated with reductions in government permitting, and should shoulder some of the associated

[91] In Canada, the *Fisheries Act* and *Canadian Environmental Protection Act* have such provisions, although they are seldom used. In the USA, eight federal laws provide for citizen suits, including the *Clean Water Act*, *Clean Air Act 1970, Safe Drinking Water Act* and *Endangered Species Act*.
[92] Birchall, *et al*., Liability Protection for Approved Professionals in British Columbia, May 2005.
[93] Terms of Reference: Professional Reports for Planning Services, Regional District of Central Okanagan, May 2006.
[94] APEGBC Bylaws, s.17(a), October 2013.
[95] For example, see the joint APEGBC – ABCFP Guidelines for Forest Sector Crossings, s.1.2.6.

risks: the public should not bear the same liability burden as it does when civil servants are engaged in plan approval and permitting decisions.

2. There is a practical problem in balancing the liability burden following deregulation because government often reduces enforcement effort following staff reductions. The spirit of deregulation may also instil a climate of non-enforcement in government agencies, sometimes referred to in British Columbia as the "velvet glove approach." Yet from a public policy perspective, the potential for liability is an important aspect of accountability that should be the *quid pro quo* for reduced industry costs accompanying deregulation. It also upholds the polluter pay principle.

3. Although government is sometimes shielded from liability when performing its regulatory function, courts have held that governments can be potentially liable in negligence for failing to properly supervise or oversee professional reliance regimes. For example, following a fatal helicopter crash near Duncan, BC, Transport Canada's limited role in certifying and auditing "approved maintenance organizations" and "persons responsible for maintenance" was sufficient for a court to find potential government liability, even though the aircraft maintenance is conducted by independent, qualified persons.[96] In the natural resource management context, explicitly addressing liability and insurance requirements of professionals may advance the polluter pay principle and lessen the chance for government to be seen as the "deep pockets" that comes to the rescue of victims of professional negligence.

4. More explicit provisions for professional liability could improve the standard of professional performance and inculcate individual responsibility. Addressing liability more explicitly could also find a good policy balance between risk and liability in a proactive manner, rather than leaving it to the courts.

Criterion #8: Duty to report

When government establishes professional reliance regimes it is essentially delegating some aspects of government oversight to industry professionals. In British Columbia, government has frequently suggested that professional associations will henceforth provide a key role in oversight. For example, when deregulating forestry legislation the BC government also replaced the *Foresters Act, Agrologists Act* and passed a new *College of Applied Biology Act*, establishing the college as a new self-governing body for registered professional biologists. Minister de Jong informed the Legislature that there was a key linkage between deregulation and the professions:[97]

[96] See *Chadwick v. Canada*, 2010 BCSC 1744 (CanLII).
[97] *Hansard*, November 18, 2002. Vol.10, No.7

> *Recently I introduced the Forest and Range Practices Act, which establishes a workable results-based code and reduces the forestry regulatory burden without compromising environmental values. The key to meeting this commitment is to ensure that the government, natural resource industries and the people of British Columbia can rely upon highly trained, dedicated, accountable professions to make sound resource-management decisions.*

As mentioned earlier, in some regulations the definition of "qualified professional" specifies that the professional must be a person who is "acting under that organization's code of ethics and is subject to disciplinary action by that organization," implying that professional associations will fill in where government retreats from oversight.

But independent professionals do not have law enforcement powers and are often working for the regulated industry. With government playing a diminished role in decision making and oversight, and increasing its reliance on independent professionals, it calls to be asked what rules are in place to ensure that enforcement agencies are made aware of environmental incidents involving public land and resources. Should professionals have a duty to report environmental incidents or non-compliance, just as many industries must self-report the results of effluent or emissions testing under pollution permits? A second related question is "What duties exist to report unprofessional conduct to professional associations?"

8.1 Duty to Notify Enforcement Agency

For many natural resource sectors in BC, the advent of professional reliance regimes has been accompanied by government downsizing. Government has consistently stated that this type of regulatory regime depends upon clear rules and objectives, followed up by "tough enforcement." To quote Minister de Jong again:[98]

> *Again, I want to underscore to the House that the key objectives of the Forest and Range Practices Act remain the same: a focus on results, not paperwork, and a focus on high environmental standards supported by tough compliance and enforcement.*

Yet government's reporting on compliance and enforcement shows that the number of inspections of forest operations by government inspectors dropped from 25,154 in 2002 to only 8,117 in 2012. The number of compliance actions arising from the inspections of major licensees was down from 810 to 174.[99] The Professional Employees Association reports that there has been a 27% reduction in foresters and a 23% reduction in agrologists employed by the BC government just between 2009 and February 2014.[100] This does not take into account earlier staff reductions since the professional reliance regime first came into effect. In 2004 West Coast Environmental Law reported that there had been a 30% staff reduction the Ministry of Water, Land and Air Protection alone, totaling 320 positions.[101] Another report indicates that 1,006

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[98] *Hansard*, October 7, 2003, Vol.16, No.10.
[99] See C & E Annual Report, 2002 and C & E Annual Report, 2012
[100] Review and Assessment of the Impacts of the Province of British Columbia's Cutbacks in Government Licensed Science Officers, Professional Employees Association, March 2014. Online: http://endangeredexperts.ca/report/PEA_Report.pdf
[101] Please Hold - Someone Will Be With You: A Report on Diminished Monitoring and Enforcement in the Ministry of Water, Land and Air Protection, West Coast Environmental Law, 2004.

positions were chopped from the former BC Forest Service between 2001 and 2010, with a significant impact to compliance and enforcement functions in regional and district offices.[102]

In the course of our interviews with government staff we were informed that many offices face logistical limitations in getting out into the field to check on the exploitation of natural resources on public land, even if they are the ones who issued the permits. It was reported that in some regional offices multiple employees from different branches must share a single vehicle, that senior managers must approve any field visits in advance, and that there are often insufficient funds to pay for travel costs. Remote areas requiring boat or air access are even more of a challenge. While some positions have not been cut back in numbers as severely as others (e.g. conservation officers), they nevertheless face practical limitations due to low staffing numbers to begin with and much-reduced administrative support which results in less time available for field work. Long distances and travel times from fewer field offices is also an issue: not just up north, but also for staff based on Vancouver Island who might be responsible for the Lower Mainland and Sunshine Coast.

With fewer eyes and ears on the ground, the question must be asked as to whether this era of "professional reliance" ought to include an obligation for professionals to report environmental incidents to government agencies. Government has always relied to some extent on self-reporting by industry. For example, we do not expect, nor could society afford, government inspectors to attend every industrial operation every day. Therefore, pollution permits frequently incorporate obligations to take samples of effluent or air emissions, test them, record the results and file reports to government periodically. Likewise, the *Environmental Management Act* contains obligations respecting spill reporting and the escape of polluting substances into the environment: failure to report is an offence.[103] The federal *Fisheries Act* also has notification and reporting duties in relation to serious harm to fish and the deposit of unauthorized deleterious substances.[104] Advances in pollution control and other technology make it possible to have continuous, "real time" remote monitoring uploaded to a website so data is publicly available.

A robust professional reliance regime would take advantage of these systems and technologies, and apply them to other spheres of resource and environmental management. The details concerning what should trigger a notification or reporting requirement will vary according to the activity in question and risk of environmental harm. This is already in place for some types of activities, such as the use of independent monitors to report "environmental incidents" for some major projects such as hydro-electric projects and mines. However, these efforts are often time-limited to the project construction or the early operational phases.

In addition to actual environmental incidents, imminent risks to the environment and safety should also be reportable. While the question of what constitutes a "reportable risk" would need to be tailored to each regulatory regime, guidance may be found in existing legislation such as the *Environmental Management Act* provision for pollution prevention orders where an activity or operation "is likely to release a substance that will cause pollution."[105]

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[102] Parfitt, Ben. Axed: A Decade of Cuts to BC's Forest Service, Canadian Centre for Policy Alternatives and Sierra Club of BC, December 2010.
[103] *Environmental Management Act,* SBC 2003, c.53, ss.79, 120.
[104] *Fisheries Act,* RSC 1984, c.F-14, s.38.
[105] *Environmental Management Act,* SBC 2003, c.53, s.81.

If the environment and natural resources of British Columbia are truly being managed by professionals, they should have clear reporting obligations. These need to be set out in legally binding regulations with consequences for non-reporting. Professionals face enormous pressure not to report their clients, employers or peers to government agencies. A legal obligation to notify government of clearly specified environmental incidents could help rebalance the scales toward the public interest and raise the level of professionalism. We heard through our interviews that there is considerable peer pressure to maintain the "team player" or "old boys" culture among professionals in BC's natural resources sector. This will make it difficult from a practical perspective to rely solely on new notification and reporting duties, and underscores the ongoing need for a sound compliance and enforcement regime. Nevertheless, if professional reliance is to be a credible alternative to "command and control" type regulation, the experience of jurisdictions (such as the USA and Europe) that have embraced this type of approach to a more significant degree than Canada suggests that it is worth considering.

Among the professional associations involved in natural resource management, only APEGBC and the Association of Applied Science Technologists and Technicians (ASTT) require members to report "hazardous, illegal or unethical professional decisions or practices" of members or others to the appropriate agencies.[106] The College of Applied Biology requires its members to report unlawful activity to the "appropriate authority."[107]

In our interviews some professionals felt that such a positive duty to report was an important counterbalance to negative peer attitudes toward "whistleblowing" on colleagues. However, what we are asking here is whether there is merit in: a) locating such a duty in the professional reliance regime itself (i.e. the applicable regulations) rather than simply codes of ethics; and b) specifying reportable incidents in a broad and objective way, rather than limiting them to matters that a professional must first determine to be "illegal" or "unethical." It is one thing to report about environmental harm or safety risk, and another to allege illegal or unethical behavior, because this requires legal skill or normative moral judgment. It is a line that many professionals are reluctant to cross. However, a duty to report objectively observable field conditions may not have this disincentive, and would aid the "results" side of results-based regulation and compliance and enforcement programs.

Some scholars refer to this type of "environmental information disclosure mechanism" as a "third paradigm" for environmental regulation that seeks to overcome deficiencies in traditional regulatory approaches such as "command and control regulation" and "classical rules-based systems." While this literature and regulatory approach is usually focused on corporate reporting, we feel that it applies equally to professionals in regulatory regimes that specifically purport to be about *professional* reliance.

Some scholars argue that there are strong legal and economic rationales for this type of "informational regulation," particularly when agencies face inadequate administrative and enforcement resources, pointing to empirical evidence that it yields positive environmental outcomes and improves corporate environmental performance, particularly when mandatory. One study concludes that "policymakers should capitalize on this opportunity to improve the existing system's capacity to promote environmental performance improvement beyond that

[106] See APEGBC Code of Ethics and ASTT Code of Ethics.
[107] See CAB-BC Code of Ethics, s.2.

achievable by traditional approaches."[108] In our view there are opportunities to incorporate this approach more fully in the professional reliance regimes in British Columbia.

8.2 Duty to Report to Professional Associations

As discussed above, in moving to professional reliance regimes the BC government has always promoted the notion that professional associations would play a key role in the oversight of their members. Given the remote location of much natural resource development, and limitations on public access to some industrial sites and roads that are gated and off-limits, those most likely to become aware of on-the-ground "practices-type" issues are the professionals associated with proponents. In some situations there may be independent monitors and occasionally government enforcement personnel as well. Professionals involved in the planning and design aspects of resource development may also become aware of situations that could lead to environmental harm.

All of the professions involved in natural resource management have disciplinary processes with investigative powers, but these are usually responsive to complaints being made. If government is relying on professional associations to enforce their codes of ethics in place of its own oversight, should professionals have a duty to report environmental incidents, questionable resource management practices, or poor planning to their associations? If so, what should trigger the duty to report? There is considerable variation among the professions on these points.

Engineers and geoscientists have a positive duty to report knowledge of "any hazardous, illegal or unethical professional decisions or practices by engineers, geoscientists, or others" to the association.[109] ASTT technicians and technologists have a nearly identical duty.

Agrologists must report to the Registrar where they have reasonable grounds to believe that another member may have engaged in professional misconduct or unprofessional conduct.[110]

Foresters and biologists are expected to follow a two-stage process that first involves contacting the member responsible for the questionable conduct. Where a forester "believes a practice is detrimental to good stewardship of forest land," he or she is "to advise the responsible person promptly and if the matter is not resolved, to inform council immediately in writing of the particulars." If that is not possible, or if it is inappropriate in the circumstances, the forester must inform council immediately in writing of the particulars.[111]

Where a biologist believes that another member has engaged in poor practice or has contravened the College's rules, she or he is expected to "approach the other member privately to seek clarification of the actions before making any public statements or notifying the College." Where it is not possible for the biologist to raise the matter directly with the other, or

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[108] Case, David W. "Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective." 76 U. Colo. L. Rev. 379 (2005).
[109] APEGBC Code of Ethics.
[110] BCIA Code of Ethics.
[111] ABCFP Code of Ethics - Guidelines for Interpretation, Bylaw 11.3.4.

where discussions have not resolved the situation, the member must report the allegations by filing a complaint.[112]

In addition to first approaching the member responsible for "reportable" conduct, the code of ethics for foresters and biologists both caution against harming the reputation of members. Foresters are advised that "[t]he sensitivities associated with these circumstances are such that it is also advisable for a member to first confirm that the action(s) is a matter of fact and the action(s) at issue is not a consequence of legitimate difference in the application of professional judgment. A member must take professional care…when assessing the situation."[113] While at one level this guidance seems reasonable, at another it may act as a deterrent against reporting because the focus of inquiry easily shifts to the person reporting and whether they are justified in doing so.

Some professionals have broader duties to report. For example, chartered accountants must "promptly report to the Professional Conduct Enquiry Committee any information concerning an apparent breach of these rules of professional conduct or any information raising doubt as to the competence, reputation or integrity of a member…"[114] Lawyers must report any "conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer."[115] For a comparison of the regulation of health professionals to environmental professionals, and for a review of best practices for professional self-governance, please refer to Emma Hume's memoranda in Appendix F and Appendix G.

The Situation for Government Professionals Reporting to Associations

Professionals employed by government are bound by the same codes of ethics as non-government members. At times they may be the ones in the best position to see issues that could trigger a duty to report to professional associations as they review plans or make field observations.[116] But should they do so? Are they free to do so?

It is not surprising that there can be differences of opinion about resource management between professionals working for government and industry. The province was not long into the current professional reliance era before a number of issues arose over the quality and reliability of some of the work being undertaken by independent professionals, particularly where it had the effect of authorizing activity that previously required government approval. What degree of oversight remained in the new regimes? What power did government have to reject work its professionals found to be of poor quality? If the Legislature had taken away discretion or approvals from the bureaucracy and pointed to the professional associations as the proper arbiters of what is and is not competent practice, when would it be appropriate for government employees to make a complaint to those associations?

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[112] CAB-BC Code of Ethics.
[113] ABCFP Code of Ethics - Guidelines for Interpretation
[114] Rules of Professional Conduct, Institute of Chartered Accountants of British Columbia, 2012.
[115] Code of Professional Conduct for BC, Law Society of British Columbia, 2013.
[116] The BC Ombudsperson came to the same conclusion in her April 2014 report, stating: "The Ministry of Forests, Lands and Natural Resource Operations, with a staff that includes biologists and other resource professionals, is in the best position to review reports and determine whether a QEP has acted within his or her area of expertise and has followed the assessment methods." See Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014.

This issue remains a critical one for professionals within government. The appropriate response to substandard professional work might vary from one regulatory regime to another, depending on the availability of alternative remedies. The problem was more acute where the regulatory regime removed most or all government's former decision making authority, such as for development in riparian areas and forest practices of the logging industry. While there are differences among professional reliance approaches, the messaging of the political level of government was clear: this new era was one in which less "red tape" and faster permit and licencing approvals were all to signal that BC was "open for business again." To industry professionals, challenges to their opinions were seen as the continuation of old regime thinking explicitly rejected by the current government: a failure to "get with the program."

The political level of government seemed to support this interpretation and tilted strongly towards government agencies acquiescing and placing greater trust in industry consultants and employees. A plethora of complaints to professional associations about the quality of work by industry professionals would not have a receptive audience with ministers or ministry executives. On the one hand, government professionals were bound by the same codes of ethics as their colleagues and could have a duty to make a complaint in certain situations. On the other hand, government's agenda would not be served well by a host of complaints being made. Senior managers fell somewhere in the middle of this tension, often understanding the scientific basis for disagreement but having to manage the bureaucracy in adjusting to the new regime. There are many discretionary grey areas in natural resource management, and even where government professionals might agree on the substantive issues of science, they might have different views on whether or when a matter should be reported to a professional association. The Ministry of Environment developed a policy that acknowledges the independent duty of professionals, but at the same time places either due process or bureaucratic hurdles – depending on the situation and one's point of view – between government professionals trying to uphold the public interest in environmental protection and the disciplinary processes of professional associations.

The policy adopted by the Environmental Stewardship Division of the Ministry of Environment in 2008 is known as "Guidance for Responding to Unsatisfactory Performance by Qualified Professionals." The policy states that it does not intend "to fetter the discretion of an employee who, as a member of a professional association adhering to a code of ethics, feels obligated to report the misconduct of another member directly to the association." But over the course of 11 pages it sets out detailed assessment procedures, methodology and chain of command to be followed before a complaint to a professional association should be made:

- The policy is framed as addressing the possibility of complaints for "professional misconduct" that includes incompetence, negligence or ethical violations. Negligence is defined according to the elements needed to prove the tort of negligence in a court of law, a surprisingly high burden of proof for this situation;
- The policy states that formal complaints to a professional association will in most cases be made by a Branch Director or the Director of Regional Operations, and that the Director will want assurance that a long list of steps have been taken first, including attempts to resolve concerns directly with the professional, followed by consultation

with management and evaluation of the work time and resources that a complaint would require from the ministry.

In her investigation into the professional reliance regime under the *Riparian Areas Regulation*, BC's Ombudsperson was critical of this policy's statement that proponents are primarily responsible for professional's performance:[117]

> *The guidelines state that unless there is a "significant" actual or potential risk to the environment, human health or safety, the onus for addressing unacceptable QEP (qualified environment professional) performance should be on the proponent. This means that even if the ministry encounters evidence of QEP non-compliance in an assessment report, the guidelines discourage ministry staff from directly addressing concerns about a QEP's work. However, the proponent is unlikely to have the specialized knowledge to question the extent to which a QEP's report does or does not meet the requirements of the RAR. Furthermore, making the proponent responsible for addressing QEP non-compliance is inconsistent with the Protocol of Interaction for Responding to Non-Compliance. Fortunately, staff in the regional offices have developed a practice that improves on the inadequate policy set out in the guidelines. During our investigation, we obtained examples of ministry staff, in cases where they had reviewed reports, directly contacting QEPs rather than the proponent to raise concerns about the content of an assessment report. We believe this is a more effective approach, and the ministry should address this divergence between the actual practice of its staff and the guidelines.*

There is justification for requiring government officials to follow due process in order to prevent unnecessary disciplinary investigations that cannot be supported on the evidence, and to ensure that some sober second thought is applied before complaints to professional associations are made. However, it is also not surprising that some professionals in government feel that the policy sets too high a bar for making the case for filing a complaint, which is seen as a last resort for the worst possible situations of "professional misconduct." Some felt that they should face a stronger duty to report substandard professional work to professional associations, and not face what seems like a prosecutor's burden of proof to justify a complaint being made. The Ombudsperson reported that:[118]

> *One barrier to an active reporting program is that ministry staff anticipate there would be a significant amount of work in preparing a submission to a professional association, and then responding to anything received from the QEP in question if the professional association investigated the complaint. Staff believe fitting this extra work into their schedules would be difficult.*

We were informed that in one region there have been about ten situations in recent years where these issues have arisen. A manager reported that although there is often reluctance on the part of government staff to directly confront the independent professional, there has been successful resolution of the disputes leading to the government's advice being followed in all but one instance. That instance led to a complaint to the professional's association, and disciplinary process ruled in favour of the government's complaint.

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[117] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, p.69.
[118] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, p.70.

While successful dispute resolution between government and a professional may satisfactorily address the immediate situation on a particular issue, there could be situations where it is important for the professional association to know about the member's conduct and the settlement agreement, depending on the seriousness of the issues. Private resolution of these issues also deprives other members of the profession and the public from learning about these practice issues and does not carry deterrence value for the profession as a whole.

Additional Challenges

For many professionals, the prospect of a complaint investigation by their governance body is very troubling and comes with high risks to one's reputation and employment or business prospects. This goes to the heart of the problem with BC's approach to professional reliance, particularly where deregulation has removed discretionary government approval: it has substituted relatively low-stakes agency oversight for high-stakes professional disciplinary processes. There is a big difference between having an agency reject a proposed plan or design, and triggering a disciplinary investigation process. Broad reluctance to invoke the disciplinary processes of professional associations can lead to acceptance of substandard practices that would not have been approved in the former regime. Many professional reliance regimes lack adequate alternative mechanisms to challenge questionable work product.

Some professional association staff we interviewed stated that the disciplinary process and the remedies typically available can seem like a "sledge hammer" approach to matters of professional judgment when it comes to the "grey areas" of natural resource management and environmental protection. Legal experts in professional governance advised us that these types of situations are not well suited to professional disciplinary processes because the more typical role of professional associations is to protect the public from incompetent and dishonest practitioners, not to identify the optimal planning or practices necessary to protect the environment.

Occasionally the heavy hand of disciplinary investigation is the most appropriate response. One such instance involved outright fraud by the forging of a certificate relating to contaminated site remediation, and resulted in prosecution and conviction under the *Environmental Management Act*. The APEGBC member resigned while under disciplinary investigation.[119]

But general reluctance to elevate professional disagreements over resource management to the level of triggering disciplinary complaint investigation has another consequence: it means that disputes about the public interest in environmental protection on public land may go ignored by government officials, particularly where they lack the discretionary power to decline approval of a permit or plan. The Ministry of Environment's policy of no longer reviewing riparian assessment reports is a case in point.

We found one significant exception to this trend. The *Contaminated Sites Regulation* requires a director who rejects the recommendation of an approved professional to report that incident to the relevant professional association within 15 days.[120] This is a commendable requirement that

[119] APEGBC, *Innovation*, November/December 2012, p.36.
[120] *Contaminated Sites Regulation*, BC Reg 375/96, ss. 15, 43, and 47.

should be replicated for other professional reliance regimes. Unfortunately, many regimes have taken away government approval altogether, but that would be reinstated if our recommendations under Criterion #3 are implemented.

In preparing this report we consulted with many professionals about their confidence in the disciplinary processes of their associations to address the resource management problems they reported. Where possible we followed this up by reading most of the disciplinary investigation reports publicly available from the associations discussed here. Only the BC Institute of Agrologists does not make these publicly available and declined our request for this information. It is beyond the scope of this report to pass judgment on the outcomes of these disciplinary investigations, and it would be inappropriate to do so because we do not have access to the evidence. However, we do note the following:

- Generally speaking, there is a surprising lack of investigations on the substantive issues that have been identified in this report and that arose in our interviews with professionals. This could indicate that professional disciplinary processes are not seen as appropriate venues to address many resource management and environmental protection issues.
- The vast majority of complaints are dismissed, and there is considerable variability in reporting about dismissed complaints. Some associations describe the substance of the complaint, while others disclose very little for its members or the public to comprehend what the complaint was about.[121] There is a legitimate need to protect the privacy rights of innocent professionals who face unsupportable complaints, based on case law. However, this cannot account for the variability in reporting, which gives rise to concerns about public accountability. If there is too little information reported how can the public have confidence that the professional association is dismissing complaints for sound reasons?
- Many professionals we spoke with do not have confidence in the disciplinary processes of their associations to resolve these problems. At the same time, professionals associations we interviewed feel their processes are poorly understand by members and the public, that they face limitations that are not fully appreciated, and that they have made improvements in response to past criticism that are not being recognized.
- There appear to be a large number of complaints relating to communications by a member about another member, or comments made at a public meeting. This seems especially true for foresters and biologists. Because the BC Institute of Agrologists does not make its disciplinary decisions public we cannot independently confirm this; however, there have been very vocal complaints by nine senior agrologists – seven of whom had won "Agrologist of the Year" awards –that the disciplinary process was making them feel "muzzled."[122]

[121] Of the reports available, we found that CAB-BC provided the sparsest information for dismissed complaints.
[122] See http://thetyee.ca/News/2008/10/30/Agrology/ and Letter to BCIA from Concerned Agrologists, December 14, 2008.

- The code of ethics for biologists requires members to "comment with restraint" to "avoid injuring the reputation of others through malice or negligence." In one case a member was suspended and fined for the manner in which he communicated in an e-mail about the decision of another member who was a government official in relation to approval of a high profile, controversial project. The disciplinary panel acknowledged that there was a serious dispute about the project and that the member had "honestly held strong views with respect to that dispute," but it never investigated the substance of that dispute. We understand that this was because he never laid a formal complaint about the decision.[123] Government declined to authorize the project in subsequent years.

- Although all of the associations will accept complaints from the public, there have been concerns about receptivity to those complaints. As mentioned earlier, a decade ago a conservation organization concerned about logging of marbled murrelet habitat (an avian species at risk) filed a complaint about a forester who prepared plans for his employer to log in habitat for this species. The Association of BC Forest Professionals initially refused to investigate the complaint. The complainant successfully challenged that decision in court.[124] The Registrar was ordered to reconsider the complaint, and he did so but rejected the complaint a second time. This decision too was successfully challenged in court.[125] We expect that most members of the public would not go to this much trouble and expense to have their complaint heard. These decisions were made in 2005 and 2007, and the Association believes that it has made major changes to the disciplinary investigation process that warrant the public's confidence.

However, perhaps a more significant question is whether the disciplinary processes of professional associations is a reasonable substitute for government decision making and accountability. There are many reasons to suggest that the BC government's reliance on professional discipline is inappropriate or misguided for most resource management disputes:

- Codes of ethics are general expressions of principle that speak only generally to resource management, and as such only lend themselves to findings of unprofessional conduct in the most egregious of circumstances. They are "coarse filters" that do not lend themselves well to the "fine filter" analysis required for many of the discretionary grey areas of resource management and land use;

- Professional codes of ethics are not land use ethics. For example, there may be all kinds of technically competent clearcuts, resource roads and pipelines in the wrong locations. A clearcut prescription or road construction may be perfectly sound from a legal and technical perspective, but the wrong prescription for a location if species at risk are to

[123] However, we note that the current CAB-BC Rule 15.5 authorizes the College to initiate a complaint in its own name by referring a matter in writing to the Registrar.
[124] *Sunshine Coast Conservation Association v. Association of British Columbia Forest Professionals et a*l, 2005 BCSC 1226 (CanLII).
[125] *Sunshine Coast Conservation Association v. Association of British Columbia Forest Professionals et al*, 2007 BCSC 193, (CanLII).

be protected. Association guidance to members on this type of issue has been somewhat helpful but does not resolve the underlying land use objectives. These are largely matters for agencies with a mandate for public land and resources to resolve, reporting to ministers who are democratically accountable.

- Resource management and environmental protection decisions are often far more complex than the issues facing more technical professions that operate within a narrower band of societal values. Resource management decisions are often qualitatively different than many other decisions by other professionals, as they involve trade-offs of multiple interests and not, for example, just the relationship between a health professional and patient. We can rightly expect the College of Dental Surgeons of British Columbia to determine objectively whether a dentist's procedures were competent and "consistent with the standards of the profession."[126] We can expect the Association of Professional Engineers and Geoscientists to assess technical issues such as whether an engineer exercised due diligence in recommending a certain type of material to be used for bridge construction. But many resource management decisions are not "technical" decisions in this manner. They often require a strategic choice selected from a broad range of professionally or technically competent options. The real problem is often is the lack of clear management direction in the regulatory framework, as has been identified by agencies such as the Forest Practices Board and Auditor General.
- Disciplinary processes involve high stakes reputational risks that are adjudicated by other members of the same profession. If a conflict arises across professions, or from interests that are in competition for resources or land use with that profession, they may not be sufficiently neutral, or be seen to be neutral. Also, association officials elected by the professional membership are not accountable to the public in the way that elected ministers and civil servants are.

In conclusion, while a duty to report non-compliance or unprofessional work to both enforcement agencies and professional associations is an important criterion for sound professional reliance, it is important to recognize the role and limitations of the disciplinary processes. It seems that the BC approach to date has over-estimated the ability of these processes to substitute for democratically accountable resource management decision making.

Criterion #9: Auditing and Reviews of Professional Work Product

Professional reliance regimes should include periodic and systematic reviews of the work delegated to qualified professionals to provide a reasonable level of assurance of compliance and quality control. But there are considerable differences in auditing practice among resource management regimes. The key issues are:

[126] College of Dental Surgeons of British Columbia. Code of Ethics. May 2011.

1) who is best to carry out the review or audit;
2) whether the audit process targets the professional reliance functions delegated to professionals (as opposed to generic practice reviews of a broader nature);
3) the frequency of audits and the likelihood of being audited; and
4) the consequences following an audit or practice review.

Some regimes have specific procedures in place that provide for routine checking of work by those engaged in specific professional reliance functions, while others do not seem to have any specific quality assurance strategy in place and rely on the more general practice reviews or voluntary peer reviews carried out from time to time by professional associations. The question of who is in the best position to carry out audits probably depends on the circumstances and variables such as expertise and resources. If the professional reliance function is specialized and the expertise resides in the regulatory agency, it may be the most efficient auditor. Auditing is consistent with government's mandate for continuous improvement, adaptive management and compliance and enforcement.

At the other end of the spectrum are professional reliance functions that draw from expertise that is found broadly across the profession, and is well within the ability and mandate of the professional associations to audit. The main issue becomes whether the associations have the resources, capacity and willingness to carry out the level of auditing needed to meet the public interest in quality assurance.

There may be some situations that call for a different approach, for example, where the professional reliance function that needs to be audited requires some fairly specialized knowledge that isn't common across a profession or even government agencies. This situation arose among contaminated sites professionals, many of whom are engineers although other professionals may become qualified as well. Given that the contaminated sites regime was a fairly new regulatory development for British Columbia in the 1990s, government did not have a long history of policy or technical expertise in this field and was reliant on outside experts for assistance since inception. The contaminated sites program was never staffed to the level anticipated by its developers and was put in an even more difficult situation following downsizing over the last decade. A unique approach was developed in which a roster of approved professionals is overseen by a society whose purpose is "to facilitate the review of contaminated site submissions on behalf of the British Columbia Ministry of Environment."[127]

The Contaminated Sites Approved Professionals Society probably has the best auditing program of any of the professional reliance regimes in BC. A Performance Assurance Committee oversees review of one in eight submissions relating to contaminated sites identification and remediation. Panels of qualified members who are free of conflict of interest carry out the assessments.[128] The focus of the reviews is the specific work that government is relying on approved professionals to provide, and is not a generic practice review. Performance assessments may be random, or non-random if recommended as a remedial measure by a prior assessment, or requested by the CSAP society board or Ministry of Environment. The conduct of performance assessments is guided by CSAP society rules and supplementary guidelines. The

[127] See http://csapsociety.bc.ca/about/governance/

[128] Examples of conflict include members who (or whose firms) worked on the project, provided a proposal for a project, who worked on adjacent properties or who have standing contract with corporations who may be involved with either the project or projects on adjacent properties.

outcome of a performance assessment will be a finding that the professional's documentation is sufficient or deficient, and could lead to remedial measures or disciplinary investigation. Protection of human health and the environment is to be the paramount guiding principle for the Performance Assessment Panel. The Ministry of Environment is kept informed of performance assessment outcomes.[129]

Professional associations carry out performance or practice reviews of members that may include review of specific professional reliance functions where they arise in the members' records.[130] For example, in 2012 foresters carried out 70 mandatory "peer reviews" out of a membership of over 5,300 (just over 1%). The members are chosen by a combination of random and risk-based processes. Peer reviews are described as "mentorship and confidential advice offered by a trusted colleague." Members who submit to peer reviews are exempt from mandatory reviews for ten years. Results of the reviews are confidential and accessible only to certain ABCFP staff and the continuing competence committee. Confidentiality seems to be the case for all of the professions, so it is not clear how these practice reviews or audits can inform government about its professional reliance programs. It seems that only the CSAP society specifically provides for sharing information about performance assessments with the regulating agency.

Another problem with relying on practice reviews by professional associations is that they might not be specific enough to provide government with the feedback needed to determine how or whether the professional reliance regime is meeting governmental objectives. Associations governing professionals typically audit for much broader purposes. For example, practice audits for agrologists "may include their professional development hours, participation as institute members, and a review of their competence in their declared fields of expertise in agrology."[131]

Another potential problem with relying on practice reviews is that they are subject to the resources and capacity of professional associations to carry out. This will be less of an impediment for longstanding professions with large membership and sufficient dues to sustain a robust audit program, but it is an issue for smaller, newer professions with less revenue. The following table gives a sense of the membership, budget and audits of the main self-governing professions involved in natural resource management.

[129] See http://csapsociety.bc.ca/members/performance-assessment/
[130] See Agrologists Act, s.19. See also APEGBC Practice Review Program; ABCFP Practice Review; CAB-BC Audit Program; ASTT Regulations, s.4.7.
[131] BCIA Bylaws.

Profession	Membership (2013)	Budget (2013)	# of Practice Audits per year
Agrologists (BCIA)	1,308	$640,700 ($490 per member)	40 in 2013; 80 in 2012
Biologists (CAB-BC)	2,118	$733,617 ($346 per member)	26 audits in 2013
Foresters (ABCFP)	5,326	$2,325,677 ($437 per member)	70 in 2012
Engineers & Geoscientists (APEGBC)	27,360	$13,139,387 ($480 per member)	189 in 2012/2013
Contaminated Sites Approved Professionals (CSAP Society)	101	Not willing to disclose (annual membership fee is $500 per member)	15 in 2013 [policy is to review 1 of every 8 submissions for environmental certificates]
Science Technicians & Technologists (ASTTBC)	9,600	$2,740,553 (2012) ($285 per member)	Complaint driven, but ASTTBC plans to conduct random practice audits where there are public safety or environmental concerns

None of the professions studied here have practice review policies that are as frequent as those of the BC Institute of Chartered Accountants:[132]

> *All firms that obtain a practice licence will be subject to a practice review within one year of being licensed. After the initial review, a risk adjusted cycle is used. In most cases, a firm will be reviewed once every three years after they pass their first review.*

In addition to the limitations of practice reviews, recall from Section 2 above that there are many "qualified persons" who do not belong to any self-governing professional association. Any auditing and oversight of the people delivering these professional reliance functions must be carried out by government.

As an example of the limitations of practice reviews to identify specific professional reliance issues adequately, a recent investigation of bridge planning, design and construction, the Forest Practices Board discovered high levels of non-compliance with the professional guidance provided to foresters and engineers by their associations.[133] The investigation examined 216 bridges and found:

- incomplete plans for 40% of bridges;
- one-third of bridges did not have a professional seal of approval in the form of a crossing assurance statement;
- designers did not consider the ability of a bridge to pass the expected peak flow of water for 36% of bridges;

[132] ICABC FAQ - Practice Review.
[133] See http://www.bcfpb.ca/reports-publications/reports/bridge-planning-design-and-construction, Forest Practices Board of BC, March 2014.

- 15% of bridges were not safe and sound, meaning there were obvious safety issues (32 bridges had significant safety concerns).

In addition, the Board found that many of the professionals – who self-declare their competencies – were not actually qualified to carry out bridge planning, design and construction. Some felt under pressure from licensees to approve bridges even though they did not have the expertise, so that their employer/client would not have to go out and retain a bridge expert. This points to a failure of the forest practices regime to address Criterion #1 above concerning clarity over qualifications. The Board requested that ABCFP and APEGBC advise it of the steps planned to address these professional practice issues, and the associations did so in October 2014.[134]

In *Striking a Balance* the BC Ombudsperson commented on the inadequacy of government review of professional work product relating to riparian assessments:[135]

> *Until July 2009, the ministry reviewed every assessment report it received. In 2009, the ministry determined that reviewing 20 per cent of reports submitted in each region would be an appropriate rate of review. The ministry did not provide us with a clear rationale for this decision. The ministry did not have information to determine whether reviewing 20 per cent of assessment reports in each region was adequate or appropriate. Having established this audit goal, though, the ministry did not meet it.*

The Ombudsperson was also critical of government policy direction to defer to the professional judgment of independent professionals working for proponents:

> *When the ministry is reviewing few or no reports in many of its regions, however, this "respectful regard" for professional judgment can quickly become complete deference. A return to reviewing all reports would result in a balance being struck between professional expertise and effective public oversight.*

She recommended that the Ministry of Forest, Lands and Natural Resource Operations review all of the *Riparian Areas Regulation* assessment reports submitted by professionals to the ministry each year, pointing out that this would only take about 30 minutes each (for an annual total of 42.5 hours to review 85 reports in the South Coast Region): the ministry has agreed to review all reports, but only for a two-year period.[136]

Criterion #10: Monitoring, Compliance and Enforcement

The need for professional reliance regimes to be accompanied by strong monitoring programs, compliance measures and enforcement actions where necessary is well documented. The Cohen Commission of Inquiry into the Decline of the Fraser River Sockeye Salmon concluded

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[134] See http://www.bcfpb.ca/reports-publications/reports/bridge-planning-design-and-construction
[135] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014.
[136] Correspondence dated February 14, 2014 from Hon. Steve Thomson, Minister of Forests, Lands and Natural Resource Operations to Ombudsperson Kim Carter, in Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, pp.112-114.

that government's shift "toward a proponent or professional-reliance model demands a strong emphasis on monitoring."[137] In *Striking a Balance* the BC Ombudsperson noted: "The role of public servants in this professional reliance model is to monitor compliance by these professionals with statutory or regulatory requirements."[138] As noted above, Minister de Jong emphasized that professional reliance would be "supported by tough compliance and enforcement."

Within the civil service it seems well understood that monitoring, along with compliance and enforcement measures, are needed in a professional reliance system. The Professional Reliance Cross-Ministry Working Group identified the need some time ago for "monitoring and audit systems to periodically to check compliance with required statutes, policies, competencies, and standards, and effectiveness of the professional reliance model."[139] The working group noted the importance of accountability as a key element of a professional reliance framework, stating that: [140]

> *To help ensure acceptable performance, there have to be clear mechanisms for accountability, with consequences for QPs if performance is unacceptable. This can be achieved through complaint resolution, compliance and enforcement actions by government, monitoring, or independent audits that assesses individual competence in a given field.*

One of the discussion papers developed through this working group process considered how to use qualified professionals for "compliance verification and enforcement."[141] The paper discusses the current use of independent professionals for compliance purposes in the fields of contaminated sites, greenhouse gas emissions reporting, and riparian areas regulation, and acknowledges some limitations on non-government professionals particularly when it comes to enforcement powers. Since this discussion paper was written, the Ombudsperson and Auditor General have identified problems with the use of outside professionals for compliance verification relating to riparian areas regulation and greenhouse gas emissions reporting.[142] Nevertheless, there may be merit in some utilization of professionals as independent monitors provided their employment is properly structured and regulated. Independent environmental monitors themselves see the need for a more coherent set of rules governing their work, to reduce the number of grey areas, to strengthen mandatory reporting of incidents, and to counter appeals from proponents to overlook environmental incidents they encounter so the project can "keep a clean record."

We conclude from this that there is broad agreement that this criterion is an important requirement for any professional reliance regime. As noted above, the promise of "tough compliance and enforcement" was touted as a pillar of the professional reliance regime for forestry. The main issues are what constitutes an adequate monitoring, compliance and

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[137] *The Uncertain Future of Fraser River Sockeye*, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, Volume 3, p.45.
[138] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, p.7.
[139] Professional Reliance Cross-Ministry Working Group, Terms of Reference, 2011.
[140] Professional Reliance Cross-Ministry Working Group, Terms of Reference, 2011.
[141] The Use of Qualified Persons for Compliance Verification and Enforcement, October 2012.
[142] See Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014; and An Audit of Carbon Neutral Government, Auditor General of British Columbia, Report 14: March 2013.

enforcement effort to provide for a sound professional reliance regime, and whether government is meeting those requirements.

Evaluating the appropriateness of government enforcement efforts is not an easy task because what is appropriate varies according to the regulatory regime and different risk factors within each regime. Some of the variable factors include risk to the environment and human health, the degree of government's reliance on professionals, and the availability of remedies, corrective measures and enforcement options. General guidance may be provided by the generally accepted auditing principles followed by the accounting profession, but these do not apply specifically to the natural resources sector and environmental protection. The best guidance available in BC specific to the natural resource sector appears to be that found in the Audit Manual of the Forest Practices Board. The Manual notes the following (adapted here to apply more generically to natural resource management):

- There is not a fully-developed and common set of standards against which to assess the appropriateness of enforcement activity;
- However, the appropriateness of government enforcement may be measured against generally accepted criteria, such as the following:
    - Government agencies establish, through plan or tenure approval and related processes, expectations for practices that are enforceable and in accordance with regulations.
    - Government agencies obtain, use and maintain adequate information on resource extraction and related activities subject to enforcement.
    - Government agencies have an effective way of identifying risks associated with resource extraction and related activities and utilizing risk in inspection planning.
    - Government agencies conduct a sufficient number of inspections in a fair, objective and effective way, and accurately record and report results.
    - Investigations are conducted in all applicable situations and only when warranted. They are performed in a fair, objective and consistent way, and are accurately recorded and reported.
    - Determinations are made in all applicable situations and only when required. They are performed in a fair, objective and consistent way, and are accurately recorded and reported.
    - Government agencies' organizational structures, policies and processes contribute to and support appropriate enforcement of the law.
    - The decisions and actions of different parts of government responsible for enforcement of the law are appropriate and coordinated.
    - Reporting systems provide adequate information on agency performance in relation to enforcement objectives.

These are generic criteria that would be the starting point for more specific criteria tailored to a given regulatory regime. The Board has a legal duty to assess the adequacy of government enforcement, but only in relation to forest practices. It acknowledges difficulties in applying these in the current context of a much-expanded mandate of the recently established Ministry of Forests, Lands and Natural Resource Operations, particularly given the Board's narrow mandate affecting a small subset of that ministry's C & E efforts. Moreover, the above criteria were developed prior to the deregulation brought in by the *Forest and Range Practices Act* and therefore do not specifically address regimes with heightened degrees of professional reliance.

Despite government acknowledgement of the importance of monitoring and enforcement, some regimes seem to have no concrete plans or goals, while others have specific monitoring, compliance and enforcement goals but do not met them. An example of the latter is the *Riparian Areas Regulation* regime, which developed a monitoring framework goal of being 90% confident that non-compliance is no greater than 10%. Both the Cohen Commission and the BC Ombudsperson have been critical of the lack of adequate compliance and enforcement under this regime.

Commissioner Cohen made several critical observations in his 2012 report:

- *If a project proponent does not file a proposed project with Department of Fisheries and Oceans (DFO), the department is unable to monitor the project because it might not even know that the project exists;*
- *Although DFO acknowledges that monitoring for compliance, effectiveness, and fish habitat health are all important for ensuring the sustainability of Fraser River sockeye, at the time of the hearings, DFO was doing only some compliance monitoring, and no monitoring of effectiveness or fish habitat health;*
- *At the time of the hearings in June 2011, the time frame for (the BC government) developing an effectiveness monitoring plan was still uncertain (although the regulation was passed in 2004), and DFO is not engaged formally in Riparian Areas Regulation monitoring, even though it has jurisdiction over fish streams;*
- *Local government and developer compliance with the Regulation is low. Only 60 percent of local governments were found to be compliant, meaning that 40 percent did not have the appropriate bylaws in place to trigger regulatory action under the RAR. Developer compliance was 38 percent on Vancouver Island and 48 percent in the Lower Mainland;*
- *No compliance reports had been completed since 2009 and no changes to the regulation were made on the basis of compliance reporting results. I heard no evidence that anything other than the compliance assessments and the actions taken by the ministry in relation to QEP reports has been done to ensure achievement of the RAR compliance target of 90 percent with a 90 percent confidence level;*
- *The BC Court of Appeal decision in Yanke v. Salmon Arm means that DFO has no proactive input into the development process, even though it is responsible for the protection of fish habitat and has extensive experience in this issue.*

Commissioner Cohen concluded that British Columbia ought to amend the *Riparian Areas Regulation* to require provincial approval of such setback variances. In other words, professional reliance was not working and the provincial government should step back into its role as regulator.

In April 2014 the BC Ombudsperson concluded a follow-up investigation that found these criticisms still valid. In *Striking the Balance*, the Ombudsperson took the analysis of this particular professional reliance regime further and noted:

- *The importance of ongoing monitoring of QEPs is recognized in the ministry's own documents. However, this monitoring is not a priority in most regions. The monitoring that has been done has identified levels of non-compliance that need follow-up to ensure that QEPs are working within the requirements of the RAR.*
- *The ministry has not established adequate and consistent requirements for monitoring proponent compliance with the RAR after an assessment report has been accepted by the ministry.*
- *Even though local governments had been granted several time extensions to comply with the regulation by 2006, eight years later "the ministry was not able to provide us with an exact number of non-compliant local governments because it has not undertaken any recent assessments of local government compliance. In those jurisdictions with no or insufficient bylaws, the RAR is ineffective."*
- *Despite low levels of compliance the ministry reduced its monitoring target of professional assessment reports from 100% down to 20%. Despite the lack of justification for this, "the ministry has not met its own requirements for reviewing 20 per cent of reports from all regions in the nearly five years since establishing them. But as of August 2013, only the West Coast region reviewed reports at a rate at or above the ministry's 20 per cent goal. Clearly, compliance monitoring varies dramatically between regions. The ministry told us that these disparities are a result of regional priority setting and budgetary constraints."*
- *In the course of our investigation, the ministry did not identify any exceptional circumstances that would justify the failure of most regions to meet the ministry's goal of reviewing 20 per cent of reports.*
- *Because the ministry does not meet its own review targets, it has no way of knowing whether reviewing 20 per cent of assessment reports is sufficient to ensure an acceptable level of QEP compliance.*
- *Although the ministry's reports on the RAR have been limited, it is clear from those that do exist that proponent non-compliance with the RAR is an issue. In 2008, the Ministry of Environment…partnered with the Conservation Officer Service to monitor 63 sites on Vancouver Island for RAR compliance. That monitoring identified the proponent non-compliance rate as 62 per cent. In the Lower Mainland, proponents were responsible for more than half (52 per cent) of all cases of non-compliance.*

- *As with the assessment report reviews, there are also noticeable disparities between the regions in the number of site visits conducted. The South Coast region, for example, did not conduct any routine on-site monitoring in 2009 and 2011 and, citing lack of staff, indicated it did not anticipate conducting any site visits in 2013.*
- *Under the Fish Protection Act and the RAR, the ministry has not been given powers to take action on proponent non-compliance… there is no statutory or regulatory authority…to require proponents to make changes to their development to bring it into compliance, or to impose consequences on proponents if they do not make the necessary changes.*
- *The ministry has not conducted the number of site visits required by its own compliance framework since the framework was established. Additionally, the number of sites with encroachment on the SPEA is significantly more than the maximum allowable under the framework. Clearly, the ministry has never met its goal of being 90 per cent certain that non-compliance in any given year is less than 10 per cent since it established the framework. The ministry has not taken steps to address these issues.*

We have quoted from the Cohen Commission and Ombudsperson reports at length because they represent neutral but probing investigations that clearly show the seriousness of deficiencies in monitoring, compliance and enforcement in one of the showcase professional reliance regimes designed by the BC government. They also show the severity of the situation federally by revealing the extent to which the federal government has divested itself of its constitutional responsibility to protect fish habitat (at the time of the Cohen Commission) and weakened section 35 of the *Fisheries Act* by abandoning fish habitat protection measures in place since 1977 (by the time of the Ombudsperson investigation).[143] In March 2014 the BC Minister of Forests, Lands and Natural Resource Operations indicated that he accepted 24 out of 25 of the Ombudsperson's recommendations, but as of January 2015 the ministry has not amended the *Riparian Areas Regulation.*

The problems identified in these reports are not unique to the *Riparian Areas Regulation*. The situation is likely worse for professional reliance regimes that do not have any ostensive targets for monitoring and enforcement. We will not repeat here the above-noted problems associated with cuts to other government compliance and enforcement staff, and the significant reductions in the number of inspections and compliance actions, discussed under Criterion 8, but they suggest a much broader, systemic problem across the natural resource and environmental protection ministries of the BC government.

What is Needed?

For professional reliance regimes to properly protect the public interest in resource management and environmental protection they need to incorporate monitoring programs and real compliance and enforcement actions. We glean the following "lessons learned" from the BC experience to date:

[143] Bill C-38 Changes to the Fisheries Act: A New Environmental Era for Canada?, Miller Thompson LLP, September 2012.

1. Monitoring of both Professionals & Proponents

As the Ombudsperson noted in *Striking a Balance*, for professional reliance to work, monitoring programs need to distinguish between and apply to two separate parties:

1) the professionals who deliver the professional reliance function – whether that be planning, designing and certifying a project or development; and
2) the proponent responsible for the project or resource management activity.

Monitoring of professional work product could be done by government or professionals associations, depending on the nature of the work, resources available and need for public accountability. In many cases it may be more efficient for this monitoring to be done by government, as the Ombudsperson has recommended for assessment reports under the *Riparian Areas Regulation.* Factors in favour of government monitoring include situations where there is:

- Specialized knowledge residing within government;
- A need to review the exercise of the professionals' judgment against particular governmental regulatory objectives;
- A lack of resources and clear obligations within professional associations to undertake this type of monitoring;

Monitoring by professional associations may be appropriate where there is:

- Standardized requirements supported by measurable criteria in the regulations, as opposed to broad discretion involving multiple resource values;
- Adequate feedback mechanisms and accountability to the professional membership, government and the public;
- Specialized knowledge residing within a professional organization that has clear capacity and adequate resources, monitoring duties and reporting obligations.

Monitoring of proponent compliance should be done by government. This task is outside the mandate of professional associations. Use of independent environmental monitors is justified provided that they are regulated in a manner that addresses the known concerns and weaknesses identified in Section 3 above.

Compliance monitoring needs to include site visits, and not just paper-based reviews, for the reasons set out by the Ombudsperson in *Striking a Balance.*[144]

[144] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, pp.76-80.

2. Monitoring should be legally required

The BC government does not have a good track record when it comes to following through on political recognition of the need for compliance and enforcement with adequate budgets and prioritization. Moreover, the continual decline in compliance and enforcement efforts while increasing professional reliance and deregulating natural resource management and environmental protection regimes is inconsistent with those commitments. Ministry service plans are too vague to give this important issue justice: while they theoretically include performance measures, the measures have recently become vague and ineffectual. For example, the latest (2014/15 – 2016-17) service plan for the Ministry of Forests, Lands and Natural Resource Operations shifted the Compliance and Enforcement performance measure away from a results-based measure to a percentage of field staff capacity present in the field.[145] The former measure was based on achieving an 80 to 90% target for the regulated community's compliance with statutory requirements. While in the past the performance measures shifted somewhat from one year to another, at least in the past they were measurable and results-based. Meeting them was hampered by a consistently declining number of compliance actions over time, a reduced field presence and an expanding number of duties for C & E staff due to consolidation of responsibilities in this large, new super-ministry.

Regulating minimum monitoring standards would better support compliance and enforcement staff and provide greater assurance of Treasury Board approval for realistic agency C & E budgets. For example, Ontario's *Independent Forest Audits Regulation* requires all forest management units to be audited at least once every five years, and sets out standards for the use of independent auditors, public consultation, and reporting.[146]

Guidance from the USA[147]

In the USA, the Environmental Protection Agency (EPA) has issued "compliance monitoring strategies" for the *Clean Water Act* (CWA) and *Clean Air Act* (CAA) in an effort to address the inconsistency of compliance inspections among the states. These strategies serve as guidance, and do not impose legally binding requirements on the EPA, the individual states, or other parties regulated under the CWA and CAA. However, they are useful as examples of quantitative monitoring strategies that go beyond merely aspirational strategies.

Last updated in 2007, the *Clean Water Act* National Pollutant Discharge Elimination System ("NPDES") Compliance Monitoring Strategy recommends state and regional authorities undertake one comprehensive inspection of "major" permittees (i.e. facilities with discharge flows greater than one million gallons per day) every biennial, and one inspection every five years for minor facilities (i.e. facilities with discharge flows less than one million gallons per day) and large and medium sized confined animal feeding operations.[148]

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[145] See http://www.for.gov.bc.ca/mof/serviceplans.htm.
[146] Independent Audits Regulation, O.Reg.160/04.
[147] The author is grateful to Ashley White of the Environmental Law Alliance Worldwide for the information in this section of the report.
[148] EPA Clean Water Act Compliance Monitoring Strategy, 2007.

In 2010, the EPA revised its *Clean Air Act* Stationary Source Compliance Monitoring Strategy to suggest a minimum frequency of inspection for a number of CAA permitted operations.[149] For example, some facilities that meet the CAA's definition of a "major source" (i.e. a stationary source that has the potential to omit ten tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, should be subject to a full compliance evaluation once every two years.

Louisiana's *Environmental Quality Act* states, "The protection of the environment and public health requires timely and meaningful inspections of all facilities." The Act requires preparation of "a compliance monitoring strategy designed to achieve meaningful environmental results."[150] The Louisiana Department of Environmental Quality requires inspections that are more frequent than those recommended under the EPA's strategies. "Louisiana's Department of Environmental Quality's Inspection Division Compliance Monitoring Strategy – Fiscal Year 2013-2014"[151] is a remarkable contrast to the vagueness of the current Service Plan for the BC Ministry of Forests, Lands and Natural Resource Operations. For most environmental media, 50% of licensed operations are to be inspected annually.

3. Need for Consequences

Despite a decade of experience with professional reliance regimes, BC does not seem to have a convincing system of consequences for professionals who do not comply with rules and expectations. The Ombudsperson found that the Ministry of Forests, Lands and Natural Resource Operations did not have adequate compliance and enforcement mechanisms under the *Riparian Areas Regulation* and should establish clear consequences for failure to submit post-development reports. The Forest Practices Board found the same when it came to the failure to comply with guidelines for logging road bridges and stream crossings. Both investigating bodies found that professional associations were not filling the enforcement gap.

A 2010 ministry audit of compliance with the *Riparian Areas Regulation* (RAR) stated: "Developers who encroach [*into streamside protection areas*] do not seem to face consequences... Encroachment occurs and is observed by the RAR auditor, but then what? Monitoring results is important for results-based regulations, but there need to be teeth in it if results show non-compliance." The Ombudsperson noted similar concerns and found: "The RAR has no provisions to enforce proponent compliance with the measures set out in the assessment report. A proponent who does not follow the measures prescribed in a QEP's report can end up encroaching on streamside protection and enhancement areas (SPEAs), potentially damaging important fish habitat."[152]

There seem to be few provisions expressly sanctioning non-compliance by professionals in BC's regulatory regimes, suggesting that the government has so far intended that professional associations will deal with these matters, and rely on sanctions against the proponents and licensees who hire them. For example, there are no explicit means for regulators to decide that a professional is not qualified to perform a given professional reliance function, or that remedial

[149] EPA Clean Air Act Stationary Source Compliance Monitoring Strategy, 2010. For additional information on compliance monitoring of the CAA's different programs, see the U.S. EPA website: http://www2.epa.gov/enforcement.
[150] Louisiana Environmental Quality Act, Louisiana Revised Statutes Title 30, sec. 2012(D).
[151] Louisiana Department of Environmental Quality Compliance Monitoring Strategy, 2013-2014.
[152] Striking a Balance, Office of the Ombudsperson, Public Report No.50, 2014, p.82.

measures are required for further work. There have been consequences to professionals in serious matters such as fraud (e.g. a member resigns prior to investigation by a professional association), but there seems to be a dearth of adequate tools for dealing with less egregious non-compliance. Relying on the prosecutorial process under the *Criminal Code* or a resource statute is often not efficient due to the time, costs, burden of proof, and remedy: it may be quite appropriate for egregious situations but overkill for others.

In our research we discovered a sanction handed down by India's Ministry of Environment and Forests in a matter involving a consultant who inserted the same ambient air quality data into the environmental assessments for five different mining projects, which he claimed was due to a "cut and paste" error. He was debarred from preparing environmental assessment for three years, and the five mining projects were rejected. The professional accreditation body was notified and the order was published on the Ministry of Environment and Forests website. Natural resource and environmental protection statutes that incorporate professional reliance should be reviewed to ensure that there are clear sanctions that apply to professional misbehaviour. A range of prosecutorial and ticketable offences tailored to the professional reliance functions should be incorporated to provide deterrents and promote compliance.

There should also be clear provisions enabling government to overturn approvals that are based on misinformation and order remediation if needed.

4. Citizen enforcement provisions

Adequate government enforcement of natural resource and environmental protection laws is the first preference, but some jurisdictions allow for citizen enforcement actions or citizen appeals that can add a measure of accountability to professional reliance regimes. For example, when Ontario moved to a self-certification process for mine closures, notice of the mine closure plans had to be placed on the environmental registry established by the Ontario *Environmental Bill of Rights* (EBR). Citizens could apply to the Environmental Review Tribunal for leave to appeal the mine closure plan. In addition, the EBR has a citizen right to sue provision that applies in respect of proponent actions that "cause significant harm to a public resource of Ontario."[153]

Citizen enforcement provisions exist in the USA under eight statutes dealing with clean water, clean air, contaminated sites, endangered species, and more.[154] The Environmental Law Centre recommended law reform on this issue in *Maintaining Natural BC for Our Children*.[155]

[153] Mine Development and Closure Regulation, O.Reg. 240/00; Environmental Bill of Rights, S.O.1993, c.28.
[154] Greve, M. The Private Enforcement of Environmental Law, 65 Tul. L. Rev. 339.
[155] See Maintaining Natural BC for Our Children, chapter 29, pp.129-132;

6. Recommendations:

Recommendation #1

Natural resource and environmental protection agencies should develop threshold criteria to determine when professional reliance is not appropriate. For the reasons stated in Section 4 we suggest that *decision making* professional reliance is not appropriate in the following situations:

1. Where the activity poses moderate to high environmental, health and safety risks;

2. Where the activity poses moderate to high risk to third party interests, such as nearby property owners, Crown tenure holders, and Aboriginal rights;

3. Where the activity requires decision making involving trade-offs between private proponent interests and the public interest in resource values such as fish, wildlife, water, air, soil, scenic viewscapes, outdoor recreation;

4. Where the activity requires decision making that is values-laden as opposed to technical expertise squarely within a professional's expertise;

5. Where the subject matter involves a broad latitude for discretion with a number of variables and many possible options and outcomes, as opposed to narrower technical issues with professional consensus;

6. Where the subject matter lacks scientific certainty, perhaps due to being an emerging field or involving highly interdisciplinary or complex sciences, such as ecology;

7. Where the combination of issues, parties and relationships render the matter rife with irresolvable conflicts of interest;

8. For matters that are essential government functions, such as compliance and enforcement (acknowledging that there is a valuable role for independent environmental monitors if properly regulated);

9. For classes of activities where there are more effective and efficient alternatives to professional reliance, such as practices-type regulations.

Existing professional reliance regimes should be reviewed against these criteria before any further expansion of this regulatory approach. Some decision making and oversight functions will have to return to government.

Recommendation #2

Where the threshold criteria are met and professional reliance is appropriate for a given field, the regulatory regime should be evaluated against the ten criteria we have proposed in Section 5. See Appendix B for an initial attempt to do so for eight current regimes. Existing regulations should be modified where necessary to address deficiencies and adopt best practices. There may be different ways to achieve this depending on the particular circumstances of a given regime.

In addition to the regulations that formally adopt professional reliance, these ten criteria could serve as a checklist to be applied to the contractual use of professional reliance through authorizations such as permits, licences and approvals.

Professional Reliance Functions in BC Environmental Regulations

	Activity	Legislation	Description of Professional Function
1	Remediation of contaminated sites	Environmental Management Act	• Prepares recommendations to director of waste management for summaries of site condition, including whether a site is contaminated; soil relocation agreements; • May review reports or plans under contract to director and provide professional opinion on their adequacy, need for remediation and compliance with laws; • May grant approval in principle for remediation plans for low to moderate risk sites, if director delegates this authority; • May make recommendation to director as to whether a certificate of compliance should be issued for low to moderate risk sites.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	A local government must not approve developments close to fish streams unless a "qualified environmental professional" (QEP) has prepared and submitted an assessment report that: • Provides the opinion that there will be no harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes if a development is implemented as proposed; • Determines the size of streamside protection and enhancement areas in relation to development near fish streams.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	• Sewerage systems must be constructed and maintain by authorized persons, or under the supervision of an authorized person; • An exemption from regulatory setbacks from wells relating to sewerage systems and holding tanks is allowed if a professional provides written advice that a lesser distance would not likely cause a health hazard.
4	Drilling of water wells Well pump installation Deactivating and closing wells	Water Act, Groundwater Protection Regulation	This regulation stipulates requirements for various types of professionals, including qualified well drillers, qualified pump installers, engineers and qualified professionals who have competency in the field of hydrogeology or geotechnical engineering.
5	Construction of water supply systems	Drinking Water Protection Regulation (Drinking Water Protection Act)	• Requires qualifications to operate, maintain or repair certain water supply system under the Environmental Operators Certification Program; • Allows for professional engineers to approve construction permits for water supply systems if delegated by a drinking water officer.

6	Certain changes "in and about a stream"	Water Regulation (Water Act)	• Allows for exemption from approval or licence requirement for changes in and about a stream if culverts, storm sewer outfalls, or cofferdams are designed by a professional engineer; • Allows exemption from permit requirement for use of water if qualified professional or qualified well driller complies with specified conditions.
7	Certification that forest stewardship plan conforms to requirements of Act	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	• Agrologists, biologists, engineers and foresters may certify that a forest stewardship plan conforms to certain contents requirements in section 5 of the Forest and Range Practice Act; • Certification of compliance may be made for the following: o Maps are accurate o Intended results or strategies in the plan are consistent with Government's visual quality objectives; o Wildlife areas, scenic areas, old growth management areas, community watersheds and nine other issues set out in s.14(3)-(4) of the FPPR are accurate o Measures to prevent the spread of invasive plants will be effective; o Reforestation obligations are appropriate • If a professional certifies compliance for these matters it cannot be questioned and the minister must approve the plan. • While these are the formal "regulatory reliance" provisions, the entire FRPA regime is considered to a professional reliance regime because of limitations on ministerial powers.
8	Preparation of site plans, forest development plans, and forest operations schedule (pilot project only)	Fort St. John Pilot Project Regulation	• A number of licences in the Fort St. John area are exempt from statutory and regulatory requirements if a participant prepares a sustainable forest management plan; • "Qualified registered professionals" must prepare site plans unless a licence holder determines the area has a low likelihood of landslides; • Independent "qualified auditors" assess compliance at least once every two years "in accordance with audit principles that are generally accepted for use in the forest industry;" • A "qualified auditor" is any "person who is competent to assess compliance with this regulation."

9	Scaling (measurement and grading) of wood logged by licensed scalers	Forest Act, Scaling Regulation	• Timber harvested from Crown land may not be processed until it has been "scaled" by an "official scaler" appointed under s.100 of the Forest Act. • Official scalers must pass an examination and hold a licence. The government is therefore placing reliance on independent scalers who measure and grade timber, which determines how much "stumpage" (payment) is due to the Province. • While this system has been in place for many years there was a time when only public servants could scale timber.
10	Application of pesticides	Integrated Pesticide Management Act	• A certificate is required for dispensers and applicators of restricted pesticides • An administrator may require a person who is mishandling pesticides to obtain the services of a "qualified monitor". • This is about basic training and competency more than a professional reliance regime.
11	Greenhouse gas reduction projects – validators and verifiers for emission offsets projects and plans	Greenhouse Gas Reduction Targets Act, Emission Offsets Regulation	• Allows a "validation body" to validate a proponent's project plan for greenhouse gas reduction according to ISO standards; • The validation body must sign a statement of assurance that the claims in the plan are fair and reasonable; • After a project is operational, a "verification body" must provide a statement of assurance that assertions in the proponent's project report are materially correct and are a fair and reasonable representation of the project's greenhouse gas reduction.
12	Use of industrial byproducts for soil amendment	Code of Practice for Soil Amendments	This Code grants an exemption from the pollution provisions of the EMA and the need for a waste management permit if a qualified professional: • Prepares and signs applications for soil amendments (i.e. applying industrial waste residues onto land); • Certifies that the application was carried out in accordance with the land application plan; • Carries out sampling and analysis of soil amendments.
13	Landfills for the wood processing industry	Code of Practice for Industrial Non-Hazardous Waste Landfills Incidental to the Wood Processing Industry	This Code grants an exemption from the pollution provisions of the EMA and the need for a waste management permit if a qualified professional: • Prepares waste characterization reports for large landfills (>5000 m3 of waste capacity, or discharge of 500 m3 per year); • Prepares design plans, operational plans for large landfills; • Prepares final closure plans all wood waste landfills.

14	Waste discharges from coalbed gas operations	Code of Practice for the Discharge of Produced Water from Coalbed Gas Operations	This Code grants an exemption from the pollution provisions of the EMA and the need for a waste management permit if a qualified professional: • Supervises sampling and hydrometric gauging; • Interprets and reports on monitoring results; • Designs a quality assurance and control program; • Analyzes produced water prior to discharge into environment and designs a program for ongoing analysis, and supervises that program; • Prepares and signs a report on results and environmental risk; • Recommends whether discharges should continue if certain monitoring thresholds are exceeded; • Designs environmental baseline monitoring program and signs report with recommendations for ongoing monitoring; • Assesses effect of waste discharges on drinking water and irrigation water.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	This Code grants an exemption from the pollution provisions of the EMA and the need for a waste management permit if a qualified professional: • Designs a plan for the subsurface discharge of wastewater that may contain blood, fat, oil, grease, industrial cleaners and other liquid wastes produced by the slaughter industry or the poultry processing industry, as well as domestic sewage; • Designs a nutrient management plan for wastewater irrigation (spreading of slaughter waste on land as fertilizer); • Evaluates landfill plans and designs groundwater monitoring • Prepares landfill closure plan.
16	Landfill gas management	Landfill Gas Management Regulation	Qualified professionals must be used to manage greenhouse gases at landfill sites with >100,000 tonnes of waste. The qualified professional: • Conducts a landfill gas generation assessment; • Prepares a report and certifies that it complies with information requirements; • Prepares landfill gas management facilities design plan and certifies that it complies with guidelines; • Certifies that the facilities were installed according to design plan; • Prepares shutdown report and certifies that annual methane production is less than 500 tonnes; • Prepares supplementary reports if required; • Reports and plans are deemed to be accepted by the director unless additional information is requested within 60 days of submission.

17	Municipal wastewater operations	Municipal Wastewater Regulation	A qualified professional must: • Design the wastewater facility, prepare operating plan and annual discharge reports according to criteria; • Conduct an environmental impact study; • Certify that all regulatory requirements are met.
18	Mushroom composting operations and pollution prevention plans	Mushroom Composting Pollution Prevention Regulation	This Regulation grants an exemption from the pollution provisions of the EMA and the need for a waste management permit if a professional agrologist or engineer: • Reviews and "confirms" a pollution prevention plan. The plan is deemed accepted unless director requires changes within 45 days; • Supervises design and construction of composting facility.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	This Regulation grants numerous exemptions for manure management relating to watercourse setbacks and domestic water sources if a report is submitted to the director by "a person with professional qualifications in the field of environmental assessment and licensed to practice in British Columbia."
20	Biomedical wastes	Hazardous Waste Regulation	Medical or infection control professionals may certify that animal wastes do not contain certain viruses and are not biomedical waste.
21	Organic matter composting plans and operational specifications	Organic Matter Recycling Regulation	Composting facilities must have a qualified professional: • Prepare and sign a land application plan; • Certify that the application of organic matter to land was done in accordance with the plan; • Prepare an environmental impact study acceptable to the director; • Prepare plans and specifications for construction and operation of new composting facilities; • Certify that facility has been constructed in accordance with those plans and specifications; • If the discharger does not want to follow regulatory standards for leachate management, a professional must demonstrate through environmental impact assessment that the environment will be protected and appropriate water quality criteria satisfied.
22	Standards for motor vehicle air conditioners and firefighting equipment	Ozone Depleting Substances and Other Halocarbons Regulation	Professional engineers may certify that air conditioners and fire extinguishing equipment that does not meet SAE standards "performs similarly" to those standards.

23	Design of storm water drainage system for petroleum storage facilities	Petroleum Storage and Distribution Facilities Storm Water Regulation	Professional engineers are required to design separator systems that remove petroleum from wastewater, and certify that system has been constructed in accordance with that design.
24	Environmental management plans for vehicle dismantling and recycling operations	Vehicle Dismantling and Recycling Industry Environmental Planning Regulation	Vehicle dismantling and recycling operations must have an environmental management plan that is approved by a (broadly defined) qualified professional.
25	Use of industrial wood residue in foundations at construction sites	Waste Discharge Regulation	This Regulation grants an exemption from the pollution provisions of the EMA if industrial wood residue is used in foundations at construction sites "under the direction" of a professional engineer.
26	Dam safety reviews	British Columbia Dam Safety Regulation (Water Act)	• Requires a dam safety report be prepared by a professional engineer who has qualifications and experience in dam safety analysis; • Requires some activities to be supervised by a professional engineer; • The comptroller or regional water manager may require a dam owner to retain an independent expert to prepare a report and expert opinion; • Reports must be acceptable to a dam safety officer.
27	Mining operations and engineering reports	Mines Act, and the Health, Safety and Reclamation Code	• A mines inspector may require a mine owner, agent or manager to provide an independent report on health and safety by a professional engineer or other licensed professional; • A "qualified person" responsible for compliance must be present during the mine manager's absence; • The Code requires design and construction, and numerous other specified actions, to be supervised by a professional engineer; • A "qualified professional" may determine whether a stream is a fish stream.

Evaluation of Selected Regimes against Criteria

Time did not permit a thorough assessment of all 27 professional reliance regimes against the ten criteria we propose as important or essential to sound professional reliance. To do so would assume that we are qualified to assess each regime, and would require 270 separate evaluations. However, we have selected a range of regulatory regimes that demonstrate the range of outcomes from good to poor. Some of the regimes we did not evaluate are very similar to ones we did: for example, many of the codes of practice under the *Environmental Management Act* share similarities. We would encourage government and professionals to undertake the larger exercise of evaluating each regime in greater detail.

Criterion #1: Clarity of qualifications to perform professional reliance functions			
App.A#	**Activity**	**Legislation**	**Comments**
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – qualified professionals are clear; professional must be named on a roster, and there are clear competency requirements that must be proven, overseen by CSAP society incorporated for this specific purpose.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – class of qualified environmental professionals is too broad, and relies on self-declaration of qualifications. See pp.46-49 of the Ombudsperson's Report for a critical analysis and reform recommendations.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Good – Section 7 of regulation has clear requirements of who is qualified to act as a ROWP by incorporating ASTTBC course specific to professional reliance function, backed by a registration requirement through the Onsite Wastewater Registration Board. Given the extent of problems in this field however, there may be issues with respect to the adequacy of training and testing.
6	Certain changes "in and about a stream" relating to storm sewer outfalls	Water Regulation (Water Act) s.44(1)(l)	Moderate – exceptions to approval requirement for "changes in and about a stream" specify that storm sewer outfall maintenance may be exempt if system is designed by a professional engineer. While some engineers may not be qualified, this is much more specific than regulations that list a host of professions.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – class of potential certifiers is overly broad and not linked to expertise. Self-declaration of competency is poor policy, as noted in pp.46-49 of the Ombudsperson's Report on Riparian Areas Regulation.

15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – overly broad definition of "qualified professional" (which is common to many Codes of Practice under the Environmental Management Act); Self-declaration of competency is poor policy, as noted in pp.46-49 of the Ombudsperson's Report on the Riparian Areas Regulation.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – pollution prevention plans must be reviewed and confirmed by an agrologist or a professional engineer "whose area of professional specialty includes the preparation and implementation of these pollution prevention plans." This seems to be a circular definition that does not link to the required competencies, and relies completely on past work – good or bad. People have died from mushroom facility pollution – this should be treated as a very serious issue. It also relies on self-declaration of competency, which is poor policy as noted in pp.46-49 of the Ombudsperson's Report on the Riparian Areas Regulation. A system of proven competencies akin to the contaminated sites regime would be better.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – it is not at all clear who is "a person with professional qualifications in the field of environmental assessment and licensed to practice in British Columbia." Many may be involved in environmental assessment, but have no qualification regarding manure management and water quality.

Criterion #2: Clarity on professional functions, responsibilities and objectives			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – approved professionals may only provide services falling within clearly specified classes of activities, reports, and recommendations. There are clear
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Good – the professional function is clear (preparing an assessment report according to a schedule of assessment methods), as is the environmental objective (avoidance of harmful alteration, disruption or destruction of the "natural features, functions and conditions that support fish life processes in the riparian assessment area").
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – while professional function is clear (construction of systems) it is not adequately tied to environmental objectives; it assumes that all trained ROWPs will know and meet the intended objectives.
6	Certain changes "in and about a stream" relating to storm sewer outfalls	Water Regulation (Water Act) s.44(1)(l)	Good – storm sewer outflows must be constructed, maintained and used so as not "to obstruct the flow of water in the stream or to cause erosion or scour in the stream." This clearly specifies the results-based environmental objective, so is better than "blind faith" reliance in professionals.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – while function is clear (certification of compliance), there is inadequate linkage of the certification to the competencies of the lengthy list of qualified professionals, plus inadequate linkage to environmental objectives. This seems to be a "blind faith" regime.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – completely lacks environmental objectives and assumes that all plans and monitoring systems designed by any qualified professional will meet unspecified environmental objectives. This seems to be a "blind faith" regime.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Moderate – the professional function is clear, although there could be greater clarity around what it means to "confirm" a pollution prevention plan. Section 3 of the regulation has clear requirements for the professional to meet, however, there may be room for greater incorporation of results-based requirements and objectives in addition to the current requirement not to cause pollution.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Moderate – the professional function relating to reports concerning pollution from agricultural waste is clear, however, there is no detail concerning the evidence or report content required to satisfy the director as to pollution of watercourses or domestic water supply.

Criterion #3: Role reserved for government			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – for many purposes approved professionals have a recommendatory role, reserving a decision-making role for the director if necessary. In addition, under s.42 of the Act the director may suspend a qualified professional from the roster on terms and conditions.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – the BC Court of Appeal has held in *Yanke v. Salmon Arm (City)* that an assessment report filed by a qualified environment professional may not be questioned. Given the significant latitude for disagreement concerning assessment reports, the Ombudsperson has recommended reforms to give the ministry clear authority to review assessment reports and require amendments.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – the government has vacated the field of public health issues relating to sewerage systems by granting a monopoly to qualified professionals without giving itself clear authority to intervene when problems result. Approvals by public health officials should be reinstated.
6	Certain changes "in and about a stream" relating to storm sewer outfalls	Water Regulation (Water Act) s.44(1)(l)	Good – while the regulation itself does not reserve a role for government, the Act gives strong powers to the comptroller and regional water manager to make orders where necessary. We have not researched this fully, but it appears to allow a means for government to intervene if necessary.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – certifications of compliance are uncontestable by district managers or other ministry authorities. Ministry discretion to approve/reject plans was repealed through deregulation. Site plans no longer submitted to government.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Moderate – the regulation does not reserve a decision-making role for government, and is highly reliant on the adequacy of professional designs, however Part 7 of the Act allows the director to make orders concerning pollution abatement and prevention where necessary.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Moderate – the regulation does not reserve a decision-making role for government, and is highly reliant on the adequacy of professional designs. However, director may require changes to submitted plans and designs if able to review within 45 days. Also, Part 7 of the Act allows the director to make orders concerning pollution abatement and prevention where necessary.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Moderate – the regulation does not reserve a decision-making role for government, and is highly reliant on the adequacy of professional designs, however Part 7 of the Act allows the director to make orders concerning pollution abatement and prevention where necessary.

Criterion #4: Formal procedures and clear rules for certification			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – Ministry of Environment requires consistent procedures and clear, standardized forms attesting to site conditions and recommendations by approved professionals.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Moderate – Riparian assessment reports require QEPs to sign reports affirming that the assessment procedure has been followed and making one of two certifications regarding riparian impacts, using standardized language found in template reports in the Schedule of Assessment Methods. However, the Ombudsperson noted a major deficiency in that the certification may be made well before project construction and there is conflicting information as to whether a post-development report is required to certify that the project was constructed consistently with the QEP's recommendations.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation, s.9	Moderate – authorized persons must file a letter of certification within 30 days of completing construction of a sewerage system, affirming that construction was "in accordance with standard practice." There should be much more detailed reporting and certification requirements that provide more information concerning site conditions to health authorities and home owners.
6	Certain changes "in and about a stream"	Water Regulation (Water Act) s.44(1)(l)	n/a
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – there are no formal procedures or clear rules regarding certification by a "person with prescribed qualifications" that a forest stewardship plan conforms to the requirements of the Act, either in s.16 of the Act or the Forest Planning and Practices Regulation. Similar concerns apply to s.107 declarations that legal obligations have been fulfilled. Professionals should have to certify compliance with plans post-operationally.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – the Code has no formal procedures or clear rules for certification of plans prepared by qualified professionals. Plans are not filed with the director. The Code merely requires notification by the industrial owner that they have been prepared.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – there are no formal procedures for certification of professional content in pollution prevention plans. A facility operator must file the plan with the director, indicating that a professional has "reviewed and confirmed" the plan. The regulation provides no guidance as to what this entails.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor -- the regulation has no formal procedures or clear rules for certification of reports prepared by professionals. It simply requires that a report prepared by a professional be provided to the director within 12 months if requested.

Criterion #5: Conflict of interest, self-interest and independence			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Moderate – July 2010 guidelines for approved professionals address conflicts of interest and potential conflicts, better than any other regime discussed here. However, guidelines are not binding and the guidance could provide more detail concerning what would constitute a conflict of interest. Documents signed by professionals do not seem to require confirmation of no conflicts. The APEGBC Code of Ethics mentions conflict of interest, but in the context of avoiding and disclosing conflicts of interest with clients.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – not addressed.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – not addressed. Conflicts of interest seem built into this regulation because of the multiple roles and monopoly given to ROWPs when it comes to designing, constructing and maintaining sewerage systems.
6	Certain changes "in and about a stream"	Water Regulation (Water Act) s.44(1)(l)	n/a
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – not addressed. Conflicts of interest appear inevitable in this scheme because the professionals certifying compliance will often be employees or contractors of the licensee.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – not addressed.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – not addressed.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – not addressed.

Criterion #6: Record keeping, disclosure and transparency			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – July 2010 guidelines require approved professionals to maintain complete records for a minimum of 10 years. Section 43 of the Environmental Management Act requires that a site registry be maintained and the registrar must provide reasonable public access to information.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Moderate (record keeping) to Poor (disclosure, transparency). Assessment reports must contain prescribed content and be filed with the Ministry of Environment. Members of the public reported difficulty gaining access to assessment reports and related documents.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Good (record keeping) to Poor (disclosure, transparency) – regulation requires authorized person to file plans and specifications with the health authority and property owner, and a letter of certification following construction. Owners must also keep records. However, public notice requirements were removed in deregulation, and appeal rights were extinguished when health authority approval was repealed.
6	Certain changes "in and about a stream" relating to storm sewer outfalls	Water Regulation (Water Act) s.44(1)(l)	Poor – the regulation allowing permit exemption just requires that storm sewer outfall be designed by a professional engineer. No records are required to be filed or produced, and therefore will not be available to the public. However, APEGBC Bylaw 14 requires engineers to keep records for 10 years, and s.22 of the Water Act provides authority for the comptroller and regional water manager to require that records be produced.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – regulations do not require record keeping, and most qualified professionals listed (except engineers) do not have a corresponding professional duty. Plans must be disclosed to public at certain times and certain places: public has reported difficulty in getting access. Some licensees offer more transparency than others, resulting in inconsistency.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – regulation has no filing requirements for professional work, and s.13 records do not stipulate professional work. Public access would be near impossible because records are not subject to FOIPA. Broad definition of qualified professional makes record keeping through professional association rules uncertain.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Moderate – pollution prevention plans and facility designs must be submitted to the director.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – no requirement to submit professional reports to director. Although they must be produced within 12 months of director's request, this does not adequately allow for public disclosure or transparency because it is dependent on director's request.

Criterion #7: Civil liability, insurance & bonding			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – approved professionals must carry liability insurance.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – none required by regulation or professional associations.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – none required by regulation or professional associations.
6	Certain changes "in and about a stream"	Water Regulation (Water Act) s.44(1)(l)	Poor – none required by regulation or professional associations.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – none required by regulation or professional associations.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – none required by regulation or professional associations.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – none required by regulation or professional associations.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – none required by regulation or professional associations.

Criterion #8: Duty to report non-compliance			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – if the director rejects the recommendation of an approved professional he or she has a duty to report that to the relevant professional association within 15 days.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – none in regulation; relies on professional association bylaws
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – none in regulation; relies on professional association bylaws
6	Certain changes "in and about a stream"	Water Regulation (Water Act) s.44(1)(l)	Poor – none in regulation; relies on professional association bylaws
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – none in regulation; relies on professional association bylaws
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – none in regulation; relies on professional association bylaws
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – none in regulation; relies on professional association bylaws
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – none in regulation; relies on professional association bylaws

Criterion #9: Auditing and reviews of professional work product			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Good – CSAP Society Performance Assurance Committee audits one in eight submissions. However, we wonder whether this rate of audit could be improved upon.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – Ministry has not been reviewing assessment reports submitted in some regions, and only 20% in others. See Ombudsperson report for recommendation that ministry review 100% of submitted reports. This is the one recommendation that the Minister has not fully accepted.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – we were advised that public health officials are essentially "out of the business" of reviewing ROWP work.
6	Certain changes "in and about a stream"	Water Regulation (Water Act) s.44(1)(l)	Poor – no audits or reviews required by regulation. Unduly relies on practice reviews by or public complaints to professional association.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – no audits or reviews required by regulation. Unduly relies on practice reviews by or public complaints to professional association.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – no audits or reviews required by regulation. Unduly relies on practice reviews by or public complaints to professional association.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – no audits or reviews required by regulation. Unduly relies on practice reviews by or public complaints to professional association.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – no audits or reviews required by regulation. Unduly relies on practice reviews by or public complaints to professional association.

Criterion #10: Monitoring, compliance and enforcement			
1	Remediation of contaminated sites	Environmental Management Act, Contaminated Sites Regulation	Moderate – field monitoring is difficult and expensive due to nature of contamination, which is why this regime has several checks and balances built into the reporting process.
2	Assessment reports for impacts of development near fish-bearing streams	Fish Protection Act, Riparian Areas Regulation	Poor – monitoring not carried out, and structure of regulation makes compliance and enforcement difficulty and problematic.
3	Installation and maintenance of residential sewage systems	Public Health Act, Sewerage Systems Regulation	Poor – public health officials essentially removed from this function; system is reactive to complaints once problems arise.
6	Certain changes "in and about a stream"	Water Regulation (Water Act) s.44(1)(l)	Poor – not monitored by agency to best of our knowledge. May be seen as lower C & E priority due to risk level.
7	Certification that forest stewardship plan conforms to requirements of Act and preparation of plans	Forest and Range Practices Act, Forest Planning and Practices Regulation (FPPR)	Poor – see Forest Practices Board investigation reports cited in main report.
15	Landfills and waste discharges in the poultry slaughter and processing industry	Code of for the Slaughter and Poultry Processing Industries	Poor – not monitored by agency to best of our knowledge, even though this could carry higher-level risk to human health and environmental.
18	Mushroom composting operations and pollution prevention plans	Mushroom Compost Facilities Regulation	Poor – not monitored by agency to best of our knowledge, even though this could carry higher-level risk to human health and environmental.
19	Storage of agricultural waste from livestock and mushroom composting operations	Agricultural Waste Control Regulation	Poor – not monitored by agency to best of our knowledge, even though this could carry higher-level risk to human health and environmental.

Some Forest Practices Issues

Photo courtesy of Forest Practices Board

High Levels of Soil Disturbance from Logging in Kootenay Region

The *Forest Practices and Planning Regulation* states that the government's objective for soil is "without unduly reducing the supply of timber from British Columbia's forests, to conserve the productivity and the hydrologic function of soils." Licensees are required to propose an intended result or strategy that meets that objective, or simply commit to not causing the amount of soil disturbance on the net area to be reforested to exceed 5% or 10%, depending on soil sensitivity rating. We cannot say what the amount of soil disturbance is in the above photo, but it appears to be very high.

How does this relate to professional reliance? A forest professional would have had to prepare a site plan for this cutblock, but there is no requirement that the plan to be approved by or even submitted to government. Nor is there any requirement that the professional be onsite during operations, or to afterwards certify that the operations were carried out in compliance with the plan and the regulations. And there is no obligation for a forest professional to report non-compliance to authorities. However, where a professional "believes that a practice is detrimental to good stewardship of forest land" he or she has a duty under the ABCFP Code of Ethics to report that to the responsible person (i.e. the licensee/client) and to the ABCFP Council.

In this case an investigation by the Forest Practices Board found that the licensee engaged in "unsound forest practices" and that government, although it knew of many instances of non-compliance for five years, was too slow to carry out enforcement measures. Government eventually suspended the licence temporarily, and in April 2014 held a hearing as to whether the licence should be cancelled altogether. However, reports suggest that the government and taxpayers could be left on the hook for unfunded liabilities as well as environmental harm.[1]

Here are some excerpts from the Forest Practices Board Complaint Investigation 110998: Meadow Creek Cedar Ltd., May 2012.

> *In recent years, many forest management decisions have been moved outside the regulatory framework and, therefore, outside the direct control of government officials and into the hands of licensees. In making these decisions, licensees use professionals to plan, advise and carry out complex tasks, and to balance the interests of their employers and the public.*
>
> *However, it is the licensee, not the professional forester, who ultimately decides how to address government objectives, and, under the Forest and Range Practices Act (FRPA), government has committed to hold licensees accountable through its compliance and enforcement activities. In this instance, MCC exercised its discretion and decided not to implement some plans, prescriptions and recommendations made by its professional foresters and professional engineers. This resulted in unsound forest practices that put forest resources at unnecessary risk.*
>
> *Government tried to encourage MCC to improve its forest practices but, after five years, there was little sign of improvement and government has only now suspended the forest licence. In instances such as this, where there is a continuous and prolonged contravention of a licensee's obligations and continuing evidence of unsound forest practices, government needs to be able to act much sooner. Failure to do so undermines public confidence in FRPA, and the ability of government, tenure holders and the professionals who work for them, to manage the forest resource competently. Failure to address unsound practices before damage results leads to remediation, rather than prevention.*

This situation highlights several issues discussed in this report:

1. As the Ombudsperson found in *Striking a Balance*, having professionals merely prepare plans in advance with no requirement for follow-up and no post-development certification that the plans were followed and in compliance with regulations, does not serve government's environmental protection goals. (see our Criteria #2, 4 & 6)
2. The importance of a duty to report; (Criterion #8)
3. The need for effective monitoring, compliance and enforcement; (Criterion #10)
4. The need for liability, insurance and bonding issues to be properly addressed (Criterion #7).

[1] See http://www.nelsonstar.com/news/244626251.html; and http://www.nelsonstar.com/news/255098041.html

Photo courtesy of Forest Practices Board

The above photo shows and unsafe bridge structure due to improper footings on uncompact loose soils, wood abutments and not following a professional design, from Forest Practices Board Special Investigation Report 38, Bridge Planning, Design and Construction, March 2014.

Under the Forest and Range Practices Act regime, site plans for roads no longer require submission to, or approval by, government. However, Part 5 of the *Forest Planning and Practices Regulation* sets out some standards for road and bridge construction and maintenance.

Due to a number of well-known environmental and public safety issues relating to stream crossings, the Association of BC Forest Professionals and Association of Professional Engineers and Geoscientists jointly developed a guidance document for their members, outlining additional standards for professional practice. The guidelines include a checklist of issues that professionals should address their minds to when providing advice and services relating to crossings. They also include a "Crossing Assurance Statement" that members should sign attesting that they are responsible for planning or design and field reviews, and that the crossing construction conforms to those plans. This is an excellent way that professional associations can support professional reliance regimes, and can fill gaps in the regulatory regime. For example, it goes a long way towards addressing the issues raised in Criterion #4 of our report, and similar recommendations of the Ombudsperson in *Striking the Balance*.[2]

[2] However, we feel that the wording of the assurance statement could be improved to include an attestation that the crossing design and construction conform to FRPA requirements, and not just to the plans and revisions on file.

Unfortunately, the Forest Practices Board found significant levels of non-compliance with the guidelines, and asked the associations to advise it of the steps planned or taken to address the professional practice issues identified in the investigation. The two associations did so in October 2014.[3]

Photo courtesy of Forest Practices Board

The above photo shows failure of 3 year old logging road due to lack of water management structures and organic matter placed in the roadbed. The former *Forest Road Regulation* had prescriptive rules governing road construction, modification and maintenance. The current *Forest Planning and Practices Regulation* is much less prescriptive when it comes to road construction, which increases government and public reliance on the involvement of professional engineers and foresters in forestry roads. APEGBC and ABCFP have jointly issued guidelines for professional services involving forest roads which recommend that professionals prepare "conformance statements" post-construction, but this is not a regulatory requirement. These guidelines raise similar issues to those identified by the Forest Practices Board in its Investigation Report on Bridge Planning, Design and Construction, as well as issues raised by the Ombudsperson in Striking a Balance.

[3] See http://www.bcfpb.ca/reports-publications/reports/bridge-planning-design-and-construction

Photo courtesy of Forest Practices Board

Timber in "burn pile" on transmission line operations in northwestern BC. Merchantable timber may be wasted lawfully in BC so long as stumpage is paid to the Province. We were informed that a forest company operating nearby wished to utilize this timber, but was unable to do so. Many energy sector operations – hydroelectric, oil and gas – frequently harvest but do not use merchantable timber, which is seen as a "non-target" resource. For the foresters involved, how is the professional obligation to "practice good stewardship of forest land based on sound ecological principles to sustain its ability to provide those values that have been assigned by society" to be applied in this situation? (See ABCFP Code of Ethics, Bylaw 11.3.1).

This also raises issues of consistency in the application of professional reliance and stewardship principles across natural resource sectors in British Columbia.

A forester must uphold "principles of stewardship that are the foundation of the practice of professional forestry." Failure to do so is "conducting unbecoming a member" of the ABCFP. [4] But what is the proper role of a forester when it comes to utilization of timber by her or his employer or client? Is it merely to provide advice about sound forest management and principles of stewardship, recognizing that the licence holder is in the "driver's seat"? Or does the forester's duty extend beyond advising due to the broad definition of "the practice of professional forestry?" If so, would the ABCFP disciplinary process find fault with a forester who failed to ensure sound utilization? Or, as in the case of the complaints concerning marbled murrelet habitat and an endangered coastal Douglas fir ecosystem (discussed on pp.49-50), would it conclude that the matter is essentially between government and licence holders to determine what is legally required?

Recent waste pile in the Boundary Timber Supply Area includes 7 – 14" diameter logs

Some of this discussion is complicated by weak forestry laws: cutting permits include utilization rules, but weak enforcement and penalties for non-compliance can render compliance a matter of a licensee's willingness to pay the penalty.

A similar issue arises for allegations of over-cutting the timber supply in the BC interior to the detriment of the future timber supply: does this practice contravene professional forester principles of stewardship, or is it acceptable so long as the stumpage penalty is paid according to the law?[5]

[4] See Foresters Act, ss.1, 4 and 11.

[5] See Timber Harvesting in Beetle-Affected Areas, Forest Practices Board, Special Report SR/FPB/44, March 2014; and Penner, D., Future of Sawmill Industry Jobs Jeopardized by Overharvesting, Vancouver Sun, April 29, 2014.

Mining Issues

Mount Polley Mine Tailings Impoundment Breach (photo courtesy of Farhan Umedaly, Vovo Productions)

The collapse of the large tailings impoundment dam at the Mount Polley Mine near Likely, BC on August 4, 2014 raises many professional reliance issues. The *Mines Act* did not undergo deregulation in the last decade as other legislation has. Mines inspectors have broad powers to order mine owners, agents or managers to provide independent engineering or other licensed professional reports relating to the safety of mine "equipment, buildings, workings or structures." The *Mines Act* also gives the chief inspector of mines broad authority to specify permit conditions "that the chief inspector considers necessary." The permit holder "must deposit security in an amount and form satisfactory to the chief inspector" in order that "there will be money necessary to perform and carry out properly" all of the permit conditions and orders and directions of the chief inspector.

These are broad, discretionary powers that retain a significant degree of government authority to regulate mining operations, which is discussed under Criterion #3 in Section 5 of our report. In this regard, the regulatory approach is an example of Information or Design Reliance rather than Decision Making Reliance, as discussed in Section One of this report. However, as the Mount Polley Independent Expert Engineering Investigation and Review Panel ("Expert Panel") pointed out in its report released on January 30, 2015, "The Regulator is not the designer, and this limits the degree of inquiry that is manageable" for government.[6] The existence of broad discretionary powers such as those described above is a necessary condition, but not a *sufficient* condition, to prevent disasters such as this one.

The permit for the Mount Polley Mine required annual inspections by a professional engineer and a Tailings Storage Facility Inspection Report: there was reasonable clarity on who was qualified and what the professional role and objectives were, addressing our Criteria #1 & #2. But the professional engineer's authority over construction and maintenance the tailings

[6] See Report on Mount Polley Tailings Storage Facility Breach at https://www.mountpolleyreviewpanel.ca/final-report, p.131.

storage facility itself seems to be an issue. Government has not made all of the inspection reports available to the public at the time of writing, but Environmental Law Centre students found and reviewed reports for 2009 and 2010: both reports noted several problems with the operation of the tailings storage facility, including broken piezometers, improper dispersal of the tailings, a tension crack, water balancing issues, and issues about whether the tailings dam was properly classified in terms of risk.[7] The Expert Panel and reporters have addressed these and additional inspection reports and communications between the professional engineers and Mount Polley Mining Corporation.[8]

While the regulatory regime for mines relies on the expertise and diligence of professional engineers to inspect and report on tailings dam safety issues, it is unclear whether they have power or authority to require that the mining operation actually make those changes. The Ministry of Energy and Mines has stated that it considers engineering recommendations related to health, safety or geotechnical stability to be mandatory requirements, but there is some question as to whether this well understood and complied with by mine operators. This regulatory gap is compounded by the lack of a clear requirement for government itself to respond to engineer inspection reports in a timely manner and to ensure that engineering recommendations are implemented.

The ability of Ministry of Energy and Mines to inspect has been hampered by cutbacks over the last decade, and days before release of the Expert Panel report the BC government pledged to increase the budget of that ministry to enable the hiring of inspection staff and to facilitate speedier permit approvals. But there needs to be a legally effective mechanism for the remedial measures identified by professional dam safety engineers to be followed; failure to do so should have a legal consequence and should be considered non-compliance. We cannot do a complete analysis of these issues until government releases all of the relevant documents.

Despite being arguably better than some other professional reliance regimes discussed in this report, this major failure of a tailings storage facility points to systemic failures of the regulatory system as a whole. In particular, it seems that the following criteria for a sound professional reliance regime were not adequately addressed:

> **Criterion #4: Formal procedures and clear rules for certification**: given the cautions expressed by the professional engineers as reported in documents released to date, it would seem doubtful that the professional engineers inspecting the tailings storage facility (TSF) would certify that it conformed to design and operational requirements (see footnote 8). But it is not clear that there was any formal requirement for certification. The professionals simply reported on the problems and made recommendations on how to address them. We cannot comment on the legal significance of this situation without access to all of the relevant information.

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[7] *Not an Act of God: The Embankment Failure at Mount Polley Mine*, Environmental Law Centre, University of Victoria, December 2014.

[8] For a summary, see Vaughn Palmer, Vancouver Sun, "A 'dangerous game' at Mount Polley preceded disaster, according to senior engineer," Feb.2, 2015 and "Documents missing, unanswered questions on Mount Polley dam breach," Feb.3, 2015.

Damage along Hazeltine Creek (photo courtesy of Chris Blake)

Criterion #5: Conflict of interest, self-interest and independence: the Expert Panel has recommended the appointment of Independent Tailings Review Boards to provide third-party advice on the design, construction, operation and closure of mines, noting that the World Bank and other financial institutions often require these as a "best applicable practice" to provide professional peer review that ensures the integrity of engineering advice.

Criterion #6: Record keeping, disclosure and transparency: timely public disclosure of mine inspection reports might have resulted in greater awareness of the problems and risks, and greater motivation to follow engineering recommendations by the mine owner before the disaster occurred. Some jurisdictions make these documents readily available on websites.[9]

Criterion #7: Civil Liability, Insurance & Bonding: at the time of writing the full remediation costs are not known, but estimates of $100 million have been reported. This is a complex issue because of numerous deficiencies in the insurance and bonding requirements for mining.[10]

Criterion #8: Duty to report to government agencies and professional associations: here there was a duty to report to government, but it is not clear that appropriate remedial action was taken.

[9] See our submission to the Office of the Information and Privacy Commissioner, October 8, 2014. It seems that the BC government is taking steps in this regard: see G.Hoekstra, Vancouver Sun, December 2, 2014.
[10] See The Raven Mine: A Regulatory and Fiscal Black Hole? And Maintaining Natural BC for Our Children,chapter 6.

Criterion #9: Auditing and Reviews of Professional Work Product: we do not know what TSF inspection reports said in the years after 2010 because they have not been made available by government. But the question should be asked as to whether in addition to government oversight there is a heightened role for professional associations such as APEGBC to play in auditing and reviewing professional work product for situations of high environmental and safety risk

Criterion #10: Monitoring, Compliance and Enforcement: the issues raised in the TSF inspection reports for 2009 and 2010 give rise to important questions about the adequacy of government monitoring and enforcement.[11]

[11] See G. Hoekstra, Vancouver Sun, August 26, 2014, October 14, 2014, and December 19, 2014.

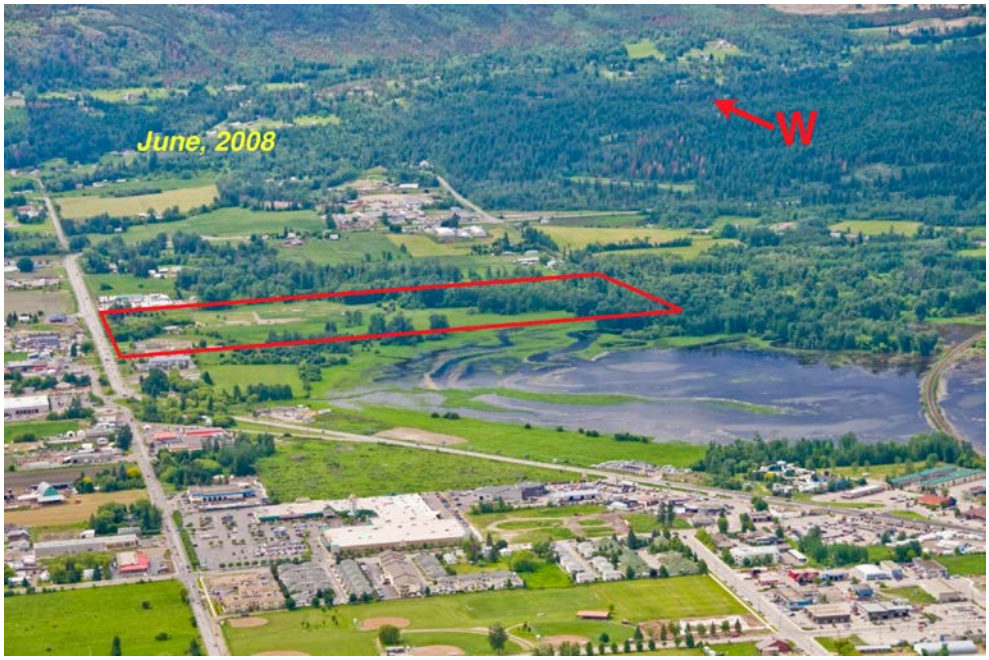
Agricultural Land Issues

Farmers and neighbours living near this agricultural land in Richmond became concerned that the owner was bringing construction demolition waste with concrete and rebar onto the farm, while the Farm Plan submitted by an agrologist indicated there would only be "granular fill." The Farm Plan also indicated that fill operations would be overseen by an "on-site agrologist," and the residents disputed that this was being complied with. They also disputed descriptions of the farm as unproductive and having excessive water leading to moderate crop damage and loss, stating that it had been in production for many years previously and neighbouring farms were productive. They were also concerned about contaminants from the construction waste affecting their farms.

This raises many of the same issues identified by the Ombudsperson in her 2014 investigation into the Riparian Areas Regulation, including the need to address gaps between paper-based plans and actual operations; for qualified professionals to be required to attend during operations and have to submit post-development reports that certify compliance with the approvals; and for regulatory agencies to not just carry out paper reviews but to attend on-site and monitor compliance, and take enforcement action where necessary. In this case the Agricultural Land Commission issued a stop work order, which was later lifted after a compliance officer determined the operations were legal.

Links:
http://farmwatchbc.blogspot.ca/2013/03/farmers-ask-alc-to-reconsider.html
http://www.richmondreview.com/news/206514051.html

Riparian Areas Regulation



The above photo shows the Salmon River delta in Salmon Arm, BC, before construction of a shopping centre development on the property outlined in red. The main issue was how far development could extend into the riparian area given the environmental values and historic flooding in this delta. At the time, the Ministry of Environment (MOE) reviewed riparian assessment reports, and on three separate occasions noted errors and sought corrections from the qualified environmental professional (QEP). The fourth submission was approved by MOE without a site visit, but was determined by knowledgeable residents to be in error. An independent consultant was retained by MOE (not standard practice) and a fifth assessment report was required of the QEP. In the end, the developable area was reduced from about 24 hectares to about 6.5 hectares – a major reduction in developable area that could have been a significant issue in the purchase price of the property had it been known in advance. It also delayed development for years which presumably was costly. From the citizens' perspective this was a major ordeal that undermined their confidence in government, professionals and environmental protection laws.

This saga calls into question whether professional reliance under the *Riparian Areas Regulation* is reliable and efficient. It was passed in 2004 to make riparian development rules less prescriptive and to enhance the role of QEPs by having them certify that they followed assessment procedures and formed the opinion that development will not result in "harmful alteration, disruption or destruction of natural features, functions and conditions that support fish life processes in the riparian assessment area."

While this particular riparian area was protected ultimately due to the unusual degree of scrutiny it received, that level of oversight was atypical and short-lived. In 2011 the BC Court of Appeal found that there is actually no legal authority to question or "go behind the certification" of the QEP. In relation to another Salmon Arm property the court held "The

regulation appears to entrust the issue of compliance with assessment methods to the professional judgment of the qualified environmental professional."[12] The Cohen Commission of Inquiry into the Decline of the Fraser River Sockeye Salmon was critical of this regulatory regime. More recently, BC's Ombudsperson carried out a detailed investigation and made 25 recommendations for reforming the regulation. Minister of Forests, Lands and Natural Resource Operations Steve Thomson has accepted all but one of the recommendations. How the government chooses to respond to the Ombudsperson will likely be known by October 2014.

Sewerage System Regulation Issues

In 2005 the BC government deregulated rules for domestic septic systems by removing standards for design and construction, and vacating the approval function of public health authorities. In 2009 the Environmental Law Centre and the Sewerage System Regulation Improvement Coalition reported on problems with professional reliance and deregulation of sewage disposal regulations. Our submission to the responsible Cabinet ministers identified the following problems:

- No government inspection or approval of sewerage systems;
- Conflicts of interest due to the fact that "registered onsite wastewater professionals" were both stepping into the approval role and selling and installing these systems at the same time;
- Removal of public health officials powers;
- No public notice or right of appeal for those affected by sewerage systems (approvals were formerly appealable to the Environmental Appeal Board);
- Lack of monitoring and effective discipline by professional associations;
- The substitution of enforceable technical standards with overly complex but non-binding guidelines;
- Insufficient professional accountability to government and the affected public;
- Inadequate provisions for liability.

Government responded partially in 2010 with amendments to the regulation by reintroducing 30 metre setbacks from wells, but allowing for exemptions if a professional provides written advice "that it would not likely cause a health hazard."

[12] *Yanke v. Salmon Arm (City)*, 2011 BCCA 309 (CanLII), http://canlii.ca/t/fm4p1.

The above photo shows a leaking septic mound in the BC interior: the mound system is used where conventional septic fields cannot be built due to impermeability (or excessive permeability) of the soil. Septic liquid waste is supposed to be filtered by mound sands but if the soil permeability is too low, liquid is not absorbed fast enough, resulting in surface ponding of unsanitary liquids.

Problems with this regime have been numerous. For example, since passage of this regulation sewage systems have been installed on properties that previously could not pass public health inspector approval due to impermeable soils, causing harm to neighbouring wells and water bodies. At the other end of the spectrum are costly "overkill" systems that result from the regime's practice monopoly for engineers and wastewater practitioners, some of whom design, construct and maintain sewage systems that exceed what is needed to protect health, costing homeowners in the vicinity of $30,000 to $60,000. The professional associations involved (APEGBC and ASTTBC) have received more complaints in this field of practice than any other area of practice carried out by engineers or science technicians.

The above photo shows sewage waste entering an open ditch on Vancouver Island.

For more information see ELC report Reforming the Regulation of BC's Sewerage Systems: An Urgent Need to Protect Public Health and "Re-Regulating Private Septic Systems" (chapter 15) in Maintaining Natural BC for our Children: Selected Law Reform Proposals.

For a student memorandum on oversight of registered onsite wastewater practitioners (ROWPs) by the Applied Science Technologists and Technicians of British Columbia (ASTTBC), see Appendix D.

Memorandum on Registered Onsite Wastewater Treatment Practitioners

By Natasha Gooch, ELC articled student (2013)

Purpose

The purpose of this Note is to describe the Registered Onsite Wastewater Practitioners (ROWP) program run by the Applied Science Technologists and Technicians of BC (ASTTBC). This note will also outline the main themes emerging from the ROWP disciplinary decisions, including a discussion of the situations where the investigations emerge and the types of outcomes after an investigation. Finally, I will provide my general conclusions arising from my research in this area.

Legislative Scheme

The *Sewerage System Regulation* (SSR) was introduced on May 31, 2005.[1] ASTTB was given a professional oversight role under that regulation. ASTTBC registers individuals who are "competent to construct and maintain a sewerage system that uses a treatment method classified as Type 1 or Type 2" as ROWPs.[2] There are three categories of ROWPs under the SSR: Planner, Installer, and Maintenance Provider. The ASTTBC also registers ROWPs as Private Inspectors, although this category is not required under the SSR.[3]

ROWP Planners and Installers may respectively plan/design or install onsite wastewater systems including sewage lagoons but excluding industrial work camp systems and holding tanks. ROWP Maintenance Providers are required to maintain those same types systems if they were installed after May 31, 2005.

Training for these positions is offered by different Training Providers that generally are accredited by the ASTTBC under the Education Accreditation Policy which provides a "framework for accreditation of training programs and ... identif[ies] the competencies that learners need for registration as a ROWP."[4] Under this Policy, to gain the knowledge necessary to become registered as an ROWP, students are required to attend a common course of core occupational skills that takes approximately 3-5 days of classroom learning.[5] Further, as a minimum, Planning students then must attend a further 10-12 days while Installation and Maintenance Provider students must attend a further 4-6 days beyond the common requirements.[6] Students who wish to become Private Inspectors are required to take the common course as well as the Planning course and the Maintenance course.[7]

After successfully completing these courses from their chosen provider, students may then apply to the ASTTBC for registration as an ROWP. There are currently 438 Planners, 519 Installers and 140 Maintenance Providers registered with the ASTTBC in BC.[8]

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[1] *Sewerage System Regulation,* BC Reg 326/2004 (*Public Health Act*).
[2] *SSR*, s. 7.
[3] ASTTBC, Onsite Wastewater Registration Program, Home, online: http://owrp.asttbc.org/p/index.php.
[4] ASTTBC, *Onsite Wastewater Registration Program Education Accreditation Policy*, at 1, online: http://owrp.asttbc.org/p/documents/OWRPPolicyAppendixJ-EducationAccreditationPolicy.pdf
[5] ASTTBC, *Accreditation Policy*, s. 8.4.1
[6] ASTTBC*, Accreditation Policy*, ss. 8.4.2, 8.4.3 and 8.4.4
[7] ASTTBC, *Accreditation Policy*, s. 8.4.5
[8] ASTTBC, Onsite Wastewater Registration Program, Home, online: http://owrp.asttbc.org/p/index.php.

ROWPs are responsible for complying with the BC Standard Practice Manual (SPM)[9] the SSR and the Code of Ethics[10]. The ASTTBC has noted that the various Health Authorities around the province use different forms to indicate the required information for a filing. However, despite the fact that these forms may indicate that less information than would be required under the SSR or SPM is enough, that is not in fact the case. The ROWP is still responsible for providing the full information required under the SSR/SPM. [11]

The BC Onsite Sewage Association (BCOSSA) has the responsibility to carry out the training procedures required for registration with the ASTTBC.[12] BCOSSA produced the second version of the SPM in 2007 as requested by the BC Ministry of Health.[13]

Complaints with the ASTTBC regarding ROWPs

The Practice Review Board is responsible for enforcing the Code of Ethics for ROWPs. When a complaint is submitted in writing to the ASTTBC Registrar, an ASTTBC will review the complaint and an Investigator may contact the complainant to gather more information. If there is enough information to reasonably substantiate the complaint, a copy of the complaint is forwarded to all parties for their feedback.[14] At the completion of the Investigation, the Practice Review Board will review the file, and make a recommendation.[15] If necessary, a Disciplinary Hearing before the Disciplinary Committee (as appointed by the Practice Review Board) may be held under the *Applied Science and Technologists and Technicians Act*.[16]

Complaints regarding ROWPs "increased significantly" and as a result, beginning in 2008, the ASTTBC began doing random checks of the filings made by ROWPs with the local Health Authorities.[17]

The themes or common problems as described by the ASTTBC (and substantiated by my review) that arose include the following:

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[9] BCOSSA, Sewerage System Standard Practice Manual, Version 2 (21 September 2007), online: http://owrp.asttbc.org/p/pdf/SPM_V2_2007.pdf

[10] ASTTBC, Code of Ethics, online: http://owrp.asttbc.org/p/pdf/Code_of_Ethics.pdf

[11] ASTTBC, Onsite Wastewater Registration Program, Information and Updates, online: http://owrp.asttbc.org/p/information.php

[12] BCOSSA, About Us, Achievements, online: http://owrp.asttbc.org/p/information.php

[13] BCOSSA, above, note 8.

[14] ASTT Act Regulations, s. 4.7(d), online: http://www.asttbc.org/about/docs/ASTTActRegs.pdf

[15] ASTT Act Regulation, s. 4.7(d)(v). This section of the Regulation states that:

> v)The Practice Review Board, in its sole discretion may:
>
> A) Dismiss the complaint;
>
> B) Issue a letter of censure to the member or registrant;
>
> C) Enter into a Stipulated Order with the member or registrant;
>
> D) Cause formal charges to be issued to the member or registrant and appoint a Discipline Committee to adjudicate the charges by means of a hearing; or
>
> E) Take any other action that it deems advisable in the circumstances including, subject to paragraph (vi) below, the temporary suspension of the membership, registration certificate or licensing of the member or registrant in the Association.

[16] ASTT Act Regulations, s. 4.7(d)(v)(D).

[17] ASTTBC, Onsite Wastewater Registration Program, Information and Updates, online: http://owrp.asttbc.org/p/information.php

1. missing and/or inadequate Filing information;
2. information not provided because it wasn't specifically required by the Health Authorities;
3. inadequate contracts or lack of contract completely, Letter of Certification (LoC) not completed due to contract dispute;
4. Installers not providing Planners with a LoC;
5. ROWPs working on Native Land (i.e. Indian reserves) in a way that is not compliant with ASTTBC's policies and Code of Ethics;
6. work related to subdivisions;
7. working outside registration and/or training;
8. not using proper equipment onsite;
9. relying on another party's paperwork without verification; and
10. failing to respond to client's request for assistance in a timely fashion.[18]

For the purposes of your Report, I believe that the problems regarding the lack of information, subdivision work, and work done outside of registration/training are the most problematic. Some of the other issues are either business practice related (e.g. contracts and contract disputes, or ROWP failure to contact clients requesting assistance) or didn't appear as often in the complaint decisions (e.g. ROWPs working on Indian reserve lands, and failure to use proper equipment). While problems with missing and/or inadequate information were the most common problem until 2011, an increase in complaints about Private Inspectors rose sharply.[19] Below, I will discuss each of these issues in turn.

1. Missing and/or Inadequate Information

From my review of the Practice Review Board decisions regarding ROWPs from September 2006 – June 2010 (attached to this memo) the most common problem leading to an investigation was a lack of detail included in Filings submitted to the local Health Authority. The investigations usually followed a complaint from the Health Authority staff, or more often (after 2008) after a random check of the Filings by ASTTBC staff.

The missing information often included issues such as a lack of design rationale, missing or incomplete soil logs, poor drawings, or a lack of site plan etc.

2. Private Inspectors

In a September 2011 News Bulletin, the ASTTBC stated that complaints against Private Inspectors "took a sudden rise and are being followed by civil litigation against the ROWPs, several stepping beyond Small Claims Court dollar value limitations."[20] From a brief search of the more recent Practice Review Board decisions, it appears that complaints regarding Private Inspectors related to inadequate inspections or faulty advice regarding whether a system was in proper working order or not. Often, these inspections

[18] ASTTBC, Onsite Wastewater Registration Program, Information and Updates, online: http://owrp.asttbc.org/p/information.php
[19] ASTTBC, Onsite Wastewater Registration Program, Bulletin #5, online: http://owrp.asttbc.org/p/documents/ROWPNewsBulletin5Sept2011.pdf
[20] ASTTBC, Onsite Wastewater Registration Program, Bulletin #5, at 4, online: http://owrp.asttbc.org/p/documents/ROWPNewsBulletin5Sept2011.pdf

were relied upon during the sale of the property, and reports that were either unnecessarily damming or not thorough enough were both problematic.

3. *Subdivision Work*

Courses taken while becoming a ROWP do not include training for subdivision work, as it does not fall under the scope of the *SSR*. However, many of the decisions dealt with ROWPs doing inadequate work on newly subdivided properties. The ASTTBC recommends that only those ROWPs who have appropriate skills and training from other sources or are working in conjunction with a qualified professional should undertake such work. The complaints arising related to the work resulted in findings that the ROWPs subject to the complaints did not have sufficient skills and training to undertake such work, and were unfamiliar with Health Authority and Regional District processes.

4. *Work done outside registration/training*

Many investigations by the Practice Review Board found that ROWPs were offering services to the public that were beyond their registration. For example, a Planner may have installed a system without having the Installer registration or a registered Installer may have planned a system without proper registration and training. These situations are problematic because the ROWPs in question do not have sufficient training or may not be aware of the requirements of the SPM or the SSR in those areas. The further away an ROWP is from using standard practice, the greater the potential liability they face and the higher the likelihood they will make serious mistakes.[21]

Outcomes following complaints

For the most part, ROWPs who had been found to have breached the Code of Ethics or not met the requirements of the SSR or SPM were simply required to take further courses to update their knowledge. Specific courses would be required depending on the area in which the ROWP lacked knowledge.

Another common outcome was a requirement for the ROWP to undertake a Practice Assessment at their own cost, or to submit the next several files for review before completion.

Only in a very few cases were the registrations of the ROWPs withdrawn, and it generally only occurred where the ROWP had failed to respond to the investigation or the requirements of the Practice Review Board.

Concluding Thoughts

During my review of the disciplinary decisions, I came across several issues that I thought were potentially problematic:

1. The large number of decisions, suggesting real problems with this regime;
2. Missing information on Filings is a significant problem, and may be partially due to the fact that not all Health Authorities clearly require the same information as is required under the SSR or SPM;
3. Random checks of the Filings often turned up several more problematic Filings for a single ROWP prior to 2008, the outcomes sometimes only required an ROWP to submit a letter assuring

[21] ASTTBC, Onsite Wastewater Registration Program, Information and Updates, online: http://owrp.asttbc.org/p/information.php

future compliance with the filing process (although since then, remedial coursework became much more commonplace);

4. The Review Board didn't ever impose fines against a member; and
5. Registration was removed only in very rare cases where an ROWP simply failed to respond to requirements set by the Board (or failed to keep up to date with payment of dues).

The ASTTBC recognizes the fact that the number of complaints is problematic, and in the fall of 2008, began to do random checks of the Filings with the local Health Authorities.[22] Additionally, more recently the ASTTBC has begun assessing random Practice Assessments in targeted areas "in an effort to deal with problems that have come to light."[23] Both of these efforts are commendable, although are arguably somewhat reactionary.

Another significant problem is the fact that a large number of Filings with the various Health Authorities are found to not contain sufficient information as required by the SSR and SPM. One of the reasons for this, as identified by the ASTTBC is that individual Health Authorities use different forms for Filing, and do not specifically require the same level of information. The ASTTBC has recognized that this is problematic and has begun to develop a province wide Filing form together with the Ministry of Health and the Health Authorities, so as to standardize the reporting.[24] It is perhaps surprising that this task was not accomplished earlier.

Finally, it seems that the amount of training required before being registered as an ROWP is quite limited. This is especially the case when one considers the very real potential for human health concern or environmental damage related to a faulty sewerage system.

It is my general impression that the ASTTBC has struggled somewhat to meet its legal mandate to ensure that members follow the code of ethics since it was tasked with that job in 2005. The ASTTBC Bulletins to ROWPs outline many of the problems the organisation faces, including complaints and disciplinary decisions, discussions with Health Canada and Regional Districts to try and create a unified Filing requirement, complaints from other ROWPs, illegal systems and service pricing issues.[25]

While the ASSTBC is taking steps to deal with some of these issues, it is apparent that the changes to the profession as a result of the 2005 legislative changes have created some confusion or a lack of knowledge amongst its membership, and the ASTTBC likely still has a ways to go before public perception of the ROWP profession becomes more positive.

[22] ASTTBC, Bulletin #1, 15 July 2009, at 4, online: http://owrp.asttbc.org/p/documents/ROWPNewsBulletin1.pdf
[23] ASTTBC, Bulletin #7, September 2012 at 2, online: http://owrp.asttbc.org/p/documents/ROWPNewsBulletin7September2012.pdf
[24] ASTTBC, Bulletin #7, September 2012 at 2, online: http://owrp.asttbc.org/p/documents/ROWPNewsBulletin7September2012.pdf
[25] For example, all of these issues were discussed in Bulletin #7, online: http://owrp.asttbc.org/p/documents/ROWPNewsBulletin7September2012.pdf

Examples of Local Government By-laws or Permits that require the use of independent professionals for various activities by property owners and developers that relate to the environment

1. **Kelowna:**
    a. Development Permits - QPs
        i. certify a report of development approval information, certify work was done properly
        ii. Professional qualified... – estimate costs that would be required to do certain works
        iii. Natural Environment Development Permit - QPs
            1. Landscape plan
            2. Habitat Restoration Plan
            3. Environmental Monitoring Plan
            4. riparian area assessment
            5. hydrogeological professional: hydrogeological assessment prior to the installation of earth energy systems
        i. Hazardous Condition Development Permits
            1. hazard tree assessment
            2. wildfire risk assessment
            3. slope stability assessment
            4. soil removal
                a. sediment and erosion control plans
        ii. environmental impact assessment

2. **Whistler:**
    a. Tree and Environmental Protection Bylaw
        i. Environment, fish, and riparian impact assessment
    b. Hazard assessment
    c. Design and installation of fencing
    d. Development Permits
        i. Ecological restoration projects
        ii. Vegetation management for wildfire hazard reduction
        iii. Removal of hazardous trees
        iv. Wetland and riparian areas assessment and monitoring
        v. Fish habitat assessment
    e. Zoning and Parking By-law
        i. Temporary Use Permits during the Olympics:
            1. Snow management analysis
            2. Fish habitat assessment
            3. Environmental assessment

3. **Surrey:**
    a. Tree cutting permit
        i. Arborists: Prepare reports, audit other arborists reports, supervise cutting or pruning, provide technical advice
        ii. Engineer: Tree survey
    b. Sewage
        i. Professional Engineers record discharges, design pump units
        ii. Independent Agency analyze samples (not clear what this is)
    c. Stormwater
        i. Professional Engineer designs pump units and Works
    d. Soil Conservation
        i. Professional Engineer assess load capacity and prepares monthly reports
        ii. Surveyor or Professional Engineer determines quantities of soil
    e. Erosion and Sediment Control
        i. Professional Engineer and various professionals design plans and monitor progress

4. **Saanich:**
    a. Fill
        i. Professional Engineer prepares application plans, certifies fill is completed properly, designs compensating flood storage area
        ii. Agrologist prepares report
    b. OCP
        i. QEP prepares restoration plans
        ii. Qualified Professional Agrologist provides evidence about exclusion from the ALR
    c. Pesticide
        i. Professional reports on ecosystem harm for permit application
    d. Soil Removal
        i. Professional Engineer prepares a plan
    e. Tree Protection
        i. Qualified geotechnical engineer prepares report
        ii. Certifies arborist confirms pruning would benefit tree and supervises pruning

5. **Victoria:**
    a. Fuel Equipment and Storage
        i. Professional Engineer certifies installations or removals were done in accordance with rules
    b. Land Use

i. Professional marine biologist or other professional prepares an impact study where required for complicated development

c. Tree Preservation
   i. ISA certified arborist confirms pruning would benefit the tree and supervises pruning

6. **Prince George:**
   a. Development Procedures
      i. Qualified professionals prepare impact assessments and cost estimates where required
   b. Flood Plain Regulation
      i. Professional Engineer or other professional submits a report saying the proposed use is safe
   c. Heritage Alteration
      i. Qualified professional does a Heritage Impact Assessment

7. **Cranbrook:**
   a. Erosion and Sediment Control:
      i. ESC Professionals; Professional Engineer; QP prepare; check; and, review ESC plans, respectively

8. **Fraser Valley Regional District:**

   a. Soil Removal and Deposit Bylaw
   b. Development Permit
      i. Geotechnical report
      ii. Resource extraction environmental impact study
      iii. Sewage disposal report
      iv. Environmental impact assessment
   c. Tree cutting permit report

Memorandum Comparing the Regulation of Health Professionals and Environmental Professionals

By Emma Hume, ELC articled student (2012)

This memorandum compares and contrasts the regulation of health professionals with environmental professionals.

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Summary

This memorandum compares and contrasts the regulation of health professionals under "state of the art" legislation in Ontario, Alberta and BC with the regulation of "environmental professionals" (professional foresters, agrologists, biologists, geoscientists and applied science technologists and technicians) in BC. The focus of this comparison has been on frameworks for professional discipline.

Professional discipline of health professionals tends to have four stages: detection, investigation, hearing and appeal. As a result, I have chosen to compare legislation based on these stages and indirectly answered the questions I was initially asked to focus:

(1) Who can file complaints;
(2) What role do complaints have in investigative or disciplinary processes;
(3) When are investigations required;
(4) When are disciplinary processes invoked;
(5) What remedial authorities do professional bodies have; and
(6) What are important procedural aspects of these processes (i.e. are they publicly accessible).

While these questions are not answered directly they inform my comparison of the legislation, which shows how the legal frameworks governing the discipline of environmental professionals in BC are particularly weak with regards to the detection of complaints, public access to the decision making process and the broad discretion given to the associations.

In my conclusion I make general comments with regards to the questions I was initially asked to answer.

General Legislative Scheme

In Alberta, BC and Ontario the majority of health professionals are regulated in accordance with one overarching piece of legislation for each province.[1] In BC 25 different health professions are regulated in accordance with the *Health Professions Act,* the legislation in Alberta and Ontario is similarly broad in scope.[2] This legislation sets out the roles and responsibilities of the colleges and establishes that the overarching goal of these bodies is the protection and service of the public interest. Some of this legislation also creates independent bodies to review decisions made by the colleges in each jurisdiction. For example, in BC the Health Professions Review Board is an independent tribunal that reviews the registration of members and the timeliness and disposition of complaints made against college registrants by the inquiry committee.[3] In addition the health minister is empowered to initiate inquiries, as required by the public interest, into the administration or operation of any college, or the state of

[1] See: BC *Health Professions Act*, RSBC 1996, c 183; Alberta *Health Professions Act,* RSA 2000, c H-7*;* Ontario *Regulated Health Professions Act 1991*, RSO 1991, c 18 ['*RHPA'*].
[2] In Alberta all health professions except paramedics are regulated under the *Health Professions Act*. In Ontario 21 health professions are regulated under the *Regulated Health Professions Act.* The scope of regulated health professions is broad, including doctors, surgeons and nurses, as well as dental hygienists, occupational therapists, midwives and persons practice traditional Chinese medicine and psychotherapy.
[3] BC *Health Professions Act*, at s. 50.6.

practice of a health profession in BC, a specific region, or a specific facility.[4] Similar provisions exist in Alberta[5] and Ontario.[6]

In BC environmental professionals (professional foresters, agrologists, biologists, geoscientists, and science technologists and technicians) are governed by separate pieces of legislation, which vary significantly. The *Engineers and Geoscientists Act* appears to be the most comprehensive, while the *Applied Science Technologists and Technicians Act* is the most basic, leaving the vast majority of the regulatory framework up to bylaws and rules created by the council of Applied Science Technologists and Technicians of BC.[7] The *Agrologists Act* and *College of Applied Biology Act* are somewhere in the middle and are very similar in terms of their structure and wording. The *Foresters Act* is similar to these Acts. While these acts create a general duty to the associations to "uphold and protect the public interest" a review of this legislation, when contrasted with similar legislation governing the regulation of health professionals, reveals numerous deficiencies, particularly in regards to the detection of complaints, public access to the decision making process and the broad discretion given to the associations.

Detection

Health Professionals

The primary mechanism for detecting problematic behaviour of health professionals in BC, Alberta and Ontario is through patient or client complaints,[8] as well as through reports from other professionals and employers.[9] Reports resulting from inquiries into practice initiated by ministers or colleges may also constitute a complaint, triggering an investigation.[10] While all three pieces of legislation impose requirements on professionals and employers to report troubling behaviour by their peers (including those in other professions). In Alberta employers who terminate an employee for unprofessional conduct are fined a minimum of $4,000 if they fail to report the person to the college.[11]

Once a complaint or report is received the body that does an initial assessment must either refer it on for further investigation, or dismiss the claim on specified grounds (i.e. for being frivolous, vexatious or made in bad faith). If dismissed the complainant is notified within 30 days of the decision and given an opportunity to apply for a review of the decision.[12]

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[4] BC *Health Professions Act,* at s.18.1.
[5] See provisions related to practice visits and inspections under the Alberta *HEALTH PROFESSIONS ACT*, at s. 11, 51, 53.1-53.4.
[6] *RHPA* at s. 5.
[7] *Applied Science Technologists and Technicians,* at s. 17, 18.
[8] *Canadian Health Law and Policy*, at p78.
[9] Alberta *Health Professions Act,* at s. 57, 1.1(1); BC *Health Professions Act,* at s. 32, 32.2 – 32.4; Ont. *Health Professions Procedural Code* at s. 85.1 – 85.6.2.
[10] See, for example, Alberta *Health Professions Act,* at s. 51.
[11] Alberta, *Health Professions Act,* at s. 57(3).
[12] In BC, the independent Health Professions Review Board reviews these decisions. In Alberta, complainants are given 30 days to apply to the complaint review committee for the review (*Health Professions Act,* at s. 55(3)).

Environmental Professionals

The detection, and treatment, of complaints against environmental professionals is problematic in three ways when compared to the regulation of health professionals.

(1) No duty (or corresponding fine) is imposed on professionals, government employees, or employers to report professional misconduct.

Detection of professional misconduct and incompetence relies on complaints from "persons" filed with professional bodies, but no one has a duty to report this behaviour.[13] This is problematic because there is a disconnect between the impact of this behaviour (on the public interest) and the individuals most likely to be aware of this behaviour. One way to address this would be to impose a duty on all qualified professionals, government employees, and employers and contractees, to report problematic behaviour or behaviour that results in their termination.[14] Fines for failing to fulfill this duty may also be imposed.[15] In the context of environmental professionals, imposing such a duty seems particularly important given the limited interaction between members of the public and the professionals in question.

(2) The scope of acceptable complaints is too narrow, placing a burden of proof on complainants and allowing for the dismissal of complaints before an initial investigation.

The way that complaints must framed, and the discretion given to agencies to dismiss complaints, places a burden on complainants to prove their case even before an investigation is initiated.

First, with the exception of the *Engineers and Geoscientists Act,*[16] an initial limit is placed on the scope of complaints. For example, the *Agrologists Act* allows persons to make complaints where they believe a member has "(a) practiced agrology in an incompetent manner, or (b) been guilty of professional misconduct, conduct unbecoming an agrologist, or a breach of this act or the bylaws."[17] The *College of Applied Biology Act*[18] uses similar wording. The *Foresters Act* is even narrower, allowing persons to make a complaint if they believe that a member has "(a) incompetently engaged in the practice of professional forestry, (b) engaged in conduct unbecoming a member, or (c) contravened this Act, the bylaws or the resolutions."[19] Complaints about foresters must also "include particulars."[20]

Second, the committees and registrars that process complaints may dismiss claims even before an investigation is initiated (again, with the exception of the *Engineers and Geoscientists Act*).[21] In contrast, complaints about health professionals may only be dismissed prior to an investigation or alternative dispute resolution where they meet specific criteria, such as being found to be "frivolous, vexatious or

[13] No duties to report are imposed under the *Agrologists Act*, *Foresters Act*
[14] See for example, duties imposed on other health professionals and employers of health professionals under the BC *Health Professions Act*, at s. 32.2-32.3; Alberta *Health Professions Act*, at s. 57;
[15] See for example, Alberta *Health Professions Act* at s. 57(3) where there is a sliding scale of fines on employers who terminate an employee for unprofessional conduct and fails to report.
[16] *Engineers and Geoscientists Act*, at s. 29. There is no restriction on complaints.
[17] *Agrologists Act*, at s. 20(1).
[18] *College of Applied Biology Act*, a s. 23.
[19] *Foresters Act*¸at s. 22(1).
[20] *Foresters Act,* at s. 22(3).
[21] See *Engineers and Geoscientist Act*, at s.29(3).

made in bad faith",[22] and even then such a disposition is subject to an external review should the complainant wish to pursue one.[23] Instead of requiring investigations where specific grounds for dismissal are not met, the majority of legislation governing environmental professionals tends to establish that committees "may" initiate investigations where "there is reason to believe" such an investigation is warranted.[24] The *Foresters Act* also states that complaints "must" be accepted where the registrar is "satisfied that" the complaint meets certain requirements.[25] The BC Supreme Court has recognized that this aspect of the *Foresters Act* creates a gatekeeping function, ensuring the ABCFP "pursues only those complaints which, if the allegations are proven, would amount to a breach of the applicable legislation, bylaws or resolutions."[26]

When compared to the complaints process for health professionals this narrow scoping of complaints, and the discretion bodies have to dismiss complaints or refer them on to investigation, is problematic as it places an initial burden of investigation on the complainant, rather requiring a troubling event or experience (i.e. an unexpected windfall on a cutblock) to trigger an investigation. It seems likely that the combined effect of this would be to limit the number of complaints investigated, increase the number of complaints dismissed, and the ability bodies to address minor concerns. Given the lack of interaction between the public and environmental professions it seems unreasonable to place such a burden on the public. While the members of the public may be well equipped to identify troubling events in their environment they may lack the wherewithal, access to information, and capacity to file complaints about unprofessional conduct.

(3) Established timelines and notification requirements are inadequate.

Legislation fails to establish timeframes for addressing complaints nor provides for notice about the status of complaints. Notice requirements are set by bylaw, if at all. Statutes tend to only include general notification requirements, for example that the complainant must be advised of the "disposition of the complaint."[27] Under the *Foresters Act* notice to the complainant must be given for the receipt of the complaint and disposition of the complaint, however not timeframes for this are set.[28] The legislation also fails to establish whether reasons for the disposition are required. Under legislation governing health professionals the best practice appears to be notice for of receipt complaints, and notice about each decision (i.e. to dismiss or refer on to investigation/hearing). The dismissal of complaints may also be appealed by complainants, under health legislation, something that is not

[22] BC, *Health Professions Act*, at s. 36 (also allows for a dismissal of complaints where it "does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee"; Alberta, *Health Professions Act* at s. 55(1)(e)-(f) where complaint may be dismissed if it is "trivial or vexatious" or the complaints director is "satisfied there is insufficient or no evidence of unprofessional conduct."
[23] Alberta, *Health Professions Act*, at s. 55(3); BC *Health Professions Act* right to appeal to the Health Professions Review Board.
[24] See: *Agrologsts Act*, at s. 20(4); *Foresters Act* at s. 24(1); *College of Applied Biology Act* at s. 24(1).
[25] Complaints must be accepted where the registrar is satisfied that (a) the complaint concerns a member or former member, (b) sufficient information has been provided to allow an investigation to proceed, (c) the allegations, if proven, involve a breach of this Act, the bylaws or the resolutions of the association, and (d) the parties cannot resolve the matter on a reasonable and appropriate basis (*Foresters Act*, at s. 22(6)).
[26] *Sunshine Coast Conservation Association v Association of BC Forest Professionals,* 2007 BCSC 193, [2008] BCWLD 1067, at para 44 (see also para 45-49).
[27] *Agrologists Act*, at s. 20(3); *College of Applied Biology Act* at s.23(3).
[28] *Foresters Act*, at s.22(4).

provided for in the regulation of environmental professionals.[29] Legislation also fails to stipulate timeframes in which complaints much undergo an initial assessment and either be dismissed or referred on for investigation.[30]

Recommendations

Recommendation 1: A duty should be imposed on government employees, other professionals, and persons employing or contracting environmental professionals to report professional misconduct, conduct unbecoming and incompetent performance that they are aware of or have a reasonable suspicion of. If a professional is let go because of such conduct their employer or contractee should have a duty to report this to the appropriate college or professional association. A failure to fulfill this duty should result in a fine.

Recommendation 2: All complaints and reports of professional misconduct, incompetence or conduct unbecoming should trigger an investigation unless found to be frivolous, vexatious or made in bad faith, or that if proven, the allegations would not be contrary to applicable Acts, bylaws, and codes of ethics or conduct.

Recommendation 3: Complainants should be notified, with reasons, of the dismissal of complaints and be given an opportunity to appeal the decision to an independent review board.

Investigation

Health Professionals

Investigations are generally mandatory, unless the claim is dismissed for being unwarranted, (see discussion above as to when complaints may be dismissed) and the powers of investigators or generally set out by statute.[31] The intent of investigations is to resolve charges as quickly as possible and to gather evidence about those which will proceed to the next stage of the process. In Alberta an initial decision about the complaint must be made within 30 days of receiving it.[32] After an initial investigation the issue may also be referred to alternative dispute resolution, with approval of the parties involved.[33]

Investigations help committees determine whether a complaint has merit and will dismiss the claim, may attach minor conditions with the consent of the professional to their practice,[34] or, if serious, refer

[29] Reviews are only available for decisions from discipline hearings. See *Agrologists Act,* s. 30, 24; *College of Applied Biology Act*, at s. 33; the *Foresters Act* and *Engineers and Geoscientists Act* only provide for reviews to BC Supreme Court. While bylaws may provide for internal reviews these have not been examined.

[30] It should be noted that many of the bylaws establish timeframes for notification.

[31] See, for example, BC *Health Professions Act,* at s. 62, 63, 65.

[32] Within 30 days of receiving a complaint the complaints director can do a variety of things, including dismissing it, require further investigation, request an expert assess the evidence and provide a report on the complain, refer the matter to alternative complaint resolution, attempt to resolve the complaint, or encourage the parties to resolve the complaint on their own. (See Alberta *Health Professions Act,* at s. 55). In BC, the inquiry committee must "investigate the matter raised by the complainant as soon as possible" (BC *Health Professions Act,* at s. 33). In Ontario, complaints must be disposed of within 150 days (*Health Professions Procedural Code,* at s. 28).

[33] See for example, Alberta *Health Professions Act,* at s. 58; Ontario *Health Professions Procedural Code,* at s. 37.

[34] Reprimand or remedial action result from an investigation, with the consent of the professional, and may involve an undertaking not to repeat the matter, to take education courts, or to "consent to any other action specified." See BC *Health Professions Act,* at s. 33(6). In Alberta, the investigation committee is only empowered to dismiss

the complaint on to disciplinary hearing. If allegations are serious enough conditions may be attached to a professional's practice (or they may be temporarily suspended) pending a decision by the discipline committee[35] or completion of an investigation.[36] Generally, before a hearing commences the professional has the opportunity to submit a written admission of their conduct.[37] The complainant is notified of any such action and notified of opportunities to appeal.

Environmental Professionals

When a complaint against a health professional is not dismissed it is subject to an investigation, unless it is referred to another forum for resolution (i.e. Alternative Dispute Resolution or the professional makes an official admission). As discussed above, complaints about environmental professionals can be easily dismissed as a result of discretion granted to parties to initiate an investigation. Legislation tends to establish that committees "may" initiate investigations where "there is reason to believe" such an investigation is warranted.[38]

The legislation does not require, or explicitly provide for, any engagement with the complainant during this process. As noted above, the extent to which notification is required is established by bylaw. Statutes should require complainants be promptly notified of any disposition following an investigation, including reasons.

Recommendations

Recommendation 1: As discussed with regards to detection, legislation should favour investigation over the preliminary dismissal of complains and reports.

Recommendation 2: Practice and procedure for investigations should be established by statute rather than bylaw and establish specific timeframes (i.e. 30 days) for an initial assessment of complaints.

Discipline Hearing

Health Professionals

Complaints are forwarded to discipline committees for hearings on the recommendation of councils or committees following investigations. If a complaint was initially dismissed and appealed to a review board or committee, it may also be submitted to a hearing.

Panels hear evidence and decide if the conduct in question is inappropriate and deserves sanction. The complainant, college and professional are all parties to the hearing and may be represented by

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the complaint or refer it for a hearing.(See: Alberta *Health Professions Act,* at s. 66). In Ontario the complaint may be referred on to the Discipline Comitt or the Inquiries, Complaints and Reports Committee or, the panel may "take action it considers appropriate" (See: *Health Professions Procedural Code* at s. 26).

[35] See for example, *Health Professions Procedural Code* at s. 36.

[36] See for example, Alberta *Health Professions Act,* at s. 65.

[37] See for example, Alberta *Health Professions Act,* at s. 70(1); BC *Health Professions Act,* at s. 37.1

[38] See: *Agrologsts Act*, at s. 20(4); *Foresters Act* at s. 24(1); *College of Applied Biology Act* at s. 24(1). Under the *Agrologist Act* council "may [...] authorize an investigation [...] if there is reason to believe that the member may have been guilty of one or more of the following (i) professional misconduct; (ii) conduct unbecoming an agrologist; (iii) incompetent performance of duties".[38] Similarly, under the *Foresters Act* following a complaint "the agent may investigate the conduct or competence of the member to determine if grounds exist for a discipline hearing".[38] The triggering of an investigation under the *College of Applied Biology Act* is similarly broad.[38]

counsel.[39] Professionals are generally given more notice (i.e. 30 days)[40] of a hearing than complainants (i.e. 14 days[41] or "prior to the hearing"[42]). Based on their findings panels will dismiss complaints or make a remedial orders (discussed below).[43]

All hearings are open to the public, unless committees rule otherwise.[44] When hearings are closed the best practice is to have reasons for closure publicly available.[45]

Environmental Professionals

Councils and Committees have wide discretion to initiate disciplinary hearings.[46] The *Foresters Act, Agrologists Act* and *College of Applied Biology Act* establish that a hearing "may" be initiated where there is "reasonable basis" [47] or "reason to believe"[48] that the professional has been incompetent, engaged in unbecoming conduct or contravened the Act. Under the *Engineers and Geoscientists Act* an inquiry must be held following a recommendation from the investigation committee, which may be made where it "has reasonable and probable grounds to believe" the professional has contravened the Act, bylaws or code of ethics, or has demonstrated incompetence, negligence or unprofessional conduct.

Applicable statutes are largely silent with regards to the practice and procedure or hearings, including timeframes, notification of complainants and the role of parties in the process, leaving it up to college bylaws to establish practice and procedure.[49]

Statutes are silent as to whether hearings and inquiries are open to the public, and whether hearings times are publicly available.

<u>Recommendations</u>

Recommendation 1: General practice and procedures for hearings should be established by statute rather than bylaws. For example, statutes should establish that the complainant, professional, and college may all be parties at the hearing.

Recommendation 2: Complainants and the public should be notified in advance of hearings.

Recommendation 3: All hearings should be public, subject to specific exceptions.

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[39] See for example, BC *Health Professions Act,* at s. 37.1.
[40] BC *Health Professions Act,* at s. 37(2).
[41] BC *Health Professions Act,* at s. 37(3), Alberta *Health Professions Act,* at s. 77(a).
[42] Alberta *Health Professions Act,* at s. 77(b).
[43] *Canadian Health Law and Policy*, at p78.
[44] BC *Health Professions Act,* at s. 38; Alberta *Health Professions Act,* at s. 78(1); *Health Professions Procedural Code* at s.45(2).
[45] Alberta *Health Professions Act,* at s. 78(2).
[46] Discipline hearing *may* be initiated under *Agrologists Act*, at s. 21(1)(d);
[47] *Foresters Act*, at s. 24(4).
[48] *College of Applied Biology* at s. 24(1); *Agrologists Act*.
[49] The *Engineers and Geoscientists Act* is the exception. See section 32-32.1. However, notification for complainant is not required.

Remedial Powers

Health Professionals

Remedial powers are similar across all three jurisdictions and include: requiring remediation of the professional (i.e. through prescribed continuing education or counselling); placing restrictions or conditions on the professional's practice, suspending or revoking their licence; and imposing fines or costs of the complaints process on the professional.[50]

Dispositions are publicly reported and name professionals. In addition, when public safety is at stake, a professional's practice can be suspended, or significantly curtailed, until the complaint has been addressed by the college.[51]

Environmental Professionals

Penalties that may be imposed on environmental professionals are similar to those imposed on health professionals and include: reprimand, imposing conditions or practice, requiring continuing education, suspending or cancelling membership or imposing fines or costs on the member.[52] It should be noted that members in training may be subject to weaker penalties,[53] which does not appear to be the case for health professionals.[54] Furthermore, there do not appear to be provisions that allow for the temporary suspension of permits pending outcome of a hearing.

Requirements for the publication of decisions are set by bylaw, and tend to give committees discretion to decide whether or not to make hearing decisions public.[55]

Recommendations

Recommendation 1: Regulatory bodies should be empowered to impose temporary restrictions on professionals subject to the resolution of complaints.

Recommendation 2: All dispositions must be publicly reported and include the professional's name.

Appeals

Health Professionals

When complaints are dismissed complainants have the right in Alberta, BC and Ontario to apply to a committee of the professional body to have the decision reviewed. In BC and Ontario an independent body deals with all such applications for all regulated health professionals,[56] whereas in Alberta there is

[50] See: *Health Professions Procedural Code* at s. 51; Alberta *Health Professions Act* at s. 82; BC *HPA* at s. 39.
[51] See for example, *Health Professions Procedural Code* at s. 36; Alberta *HPA* at s. 65.
[52] *Engineers and Geosceintists Act*, at s. 33(2); *College of Applied Biology Act*, at s.27(5); *Foresters Act* at s.27(4); *Agrologists Act* at s. 24(5).
[53] See: *College of Applied Biology Act*, at s.27(6), *Agrologists Act* at s. 24(6).
[54] Regulation of health professionals applies equally to all members of a college, however, it may be the case that students are not members of the college and therefore not subject to the same rules.
[55] No requirement for publication under *Agrologist Act*, Section 140 of the bylaws allow for discretion in this decision; See also *Foresters Act* and bylaws at s.14.55, 14.78; *College of Applied Biology Act* and college rules at r.15.4; no publication requirement under *Engineers and Geoscientists Act,* but decisions are published.
[56] BC *Health Professions Act,* at s. 50.6; Ont. *Health Professions Procedural Code* at s. 29.

an internal college review board.[57] The scope of the appeal is not limited by the statutory language and can decisions can be appealed on questions of fact or law.[58]

When a disposition is made by a committee both the professional and the college have a right to appeal the decision, either to an appeal council[59] or divisional court.[60] Following this initial appeal, the college and the professional can appeal the decision, with leave, to the Court of Appeal.[61] Complainants are explicitly parties to these appeals.[62]

Environmental Professionals

Complainants, professionals and colleges/institutes have limited opportunities to appeal the disposition of complaints. Legislation lacks internal review mechanisms and appeals to court are limited to questions of law and jurisdiction. The result is that factual determinations are not reviewable.

Under the *Agrologists Act* and the *College of Applied Biology Act* complainants and members have 30 days to apply for a review of determinations and discipline hearing decisions and orders. [63] These reviews are on the record, unless special circumstances warrant the submission of new evidence.[64] Following a review of the decision by council either party may apply for a review of the decision to the BC Supreme Court, however the scope of the review is limited by statute to questions of law or jurisdiction.[65] A BCSC decision may be appealed to the Court of Appeal.[66]

Under the *Foresters Act* the only option for appealing a decision is to the BC Supreme Court, and this right may only be exercised by members or the association and may only be on a question of law or jurisdiction.[67] There are no statutory rights to have a decision internally reviewed, through applicable bylaws and rules may create such an opportunity. Decisions may be subsequently appealed to the Court of Appeal.[68]

Under the *Engineers and Geoscientists Act* "any person who feels aggrieved by an order of the discipline committee" may appeal the order to the BC Supreme Court within 42 days of the decision.[69] The Act does not limit appeals to questions of law or jurisdiction and is silent on the right to appeal to the Court of Appeal.

Public Involvement – notification

Health Professionals

In Alberta, BC and Ontario colleges are required to publish annual reports and maintain publicly accessible websites. Legislation also requires the names of professionals to be published, or at the

[57] Alberta *Health Professions Act,* at s. 68.
[58] See, for example, Ont. *Health Professions Procedural Code* at s. 70(2).
[59] Alberta, *Health Professions Act,* at s. 87.
[60] BC, *Health Professions Act,* at s. 40; Ont. *Health Professions Procedural Code* at s. 70.
[61] See: Alberta, *Health Professions Act,* at s. 87; BC, *Health Professions Act,* at s. 40.
[62] See, for example, BC *Health Professions Act,* at s. 40(5).
[63] *Agrologist Act*, at s. 30(1); *College of Applied Biology Act* at s. 33.
[64] *Agrologist Act*, at s. 30(3); *College of Applied Biology Act* at s. 33(5).
[65] *Agrologist Act*, at s. 31; *College of Applied Biology Act* at s. 34.
[66] *Agrologist Act*, at s.31(4); *College of Applied Biology Act* at s. 34(4).
[67] *Foresters Act*, at s. 30.
[68] *Foresters Act*, at s. 30(4).
[69] *Engineers and Geoscientists Act,* at s. 39(2).

minimum to be available on public request.[70] Descriptions of decisions rendered against members, including the imposition of conditions on practice, must also be published or available on request. Depending on jurisdiction, this information, including the name of the professional, may be withheld in specific circumstances.[71]

Environmental Professionals

There are no statutory requirements to publish annual reports or notify the public about the disposition of complaints. Under none of the acts is there a requirement to publish the names of professionals along with the conditions, limitations or orders rendered against them. However, bylaws do provide that associations "may" publish hearing decisions.[72]

Recommendations

Recommendation 1: Requirements should be established for the prompt notification (i.e. within 30 days) of all dispositions.

Recommendation 2: Descriptions of decisions rendered against professionals should be publicly available.

Recommendation 3: Bodies should be required to publish annual reports that include the number of complaints received each year and how they were disposed of.

Recommendation 4: Bodies should be required to have information on complaints process publicly available on their website.

Public Involvement – committee composition

Health Professionals

The best practice is to have one-third of committees and decision making bodies made up of members of the public, who are ideally appointed by an independent (and non-political) body.[73] Legislated requirements in Alberta and BC live up to this recommendation to some extent with regards to committee composition, but appointment processes risk being politicized as individuals are appointed by ministers or the Lieutenant Governor in Council rather than by an independent body.

In BC one-third of a college's board must be members of the public appointed by the minister, however the composition of committees is set by bylaw. [74] The College of Physicians and Surgeons requires public members make up one-third of discipline and investigatory committees. [75]

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[70] In Alberta, disciplinary decisions do not have to be published, however other members of the profession must be notified of the decision (i.e. member's employer, hospital etc..), and information must be provided to members of public at their request. See: Alberta *Health Professions Act,* at s. 119.

[71] In BC public notification is not required where privacy interest outweigh public interest. However, if such a situation occurs, the public must be notified that the information has been withheld. See: BC *Health Professions Act,* at s. 39.

[72] Agrologist Bylaws, at s. 140; Foresters Bylaws, at s.14.55, 14.78; Biologists Rules, at r. 15.6.

[73] See: Manitoba Law Reform Commission – Regulating Professions and Occupations, Oct. 1994 at "Safeguards for self-governing bodies" at p 60.

[74] BC *Health Professions Act,* at s.17(4).

[75] *Bylaws* of the College of Physicians and Surgeons of BC at s.1-16; 1-17.

In Alberta, legislation requires that members of the public, chosen from a list put together by the Lieutenant Governor in Council, [76] make-up 25% of the College council, complaint review committee and hearing tribunal. The legislation also stipulates that these members be present for key decisions made by these bodies. [77]

In Ontario there does not appear to be any requirement that members of the public be on College committees or boards.

Environmental Professionals

The bodies which regulate professional agrologists, foresters, biologists, geoscientists, and applied science technologists and technicians lack public representation on their committees, councils and decision making bodies. The Council of the Association of BC Forest Professionals is the only body required to have 25% of councillors appointed by the Lieutenant Governor in Council.[78] While the bylaws made by the various associations and institutes provide that non-members be appointed to committees dealing with complaints and disciplinary matters[79] none of the statutes require such representation.[80]

Recommendations

Recommendation 1: One-third of committees and decision making bodies should be members of the public, ideally appointed by an independent body.

Conclusion

(1) Who can file complaints?

Anyone can file complaints about health professionals and environmental professionals, however health professionals and employers of health professionals have an added duty to report behaviour they have a reasonable belief constitutes professional misconduct, incompetence or conduct unbecoming.

(2) What role do complaints have in investigative or disciplinary processes?

Complaints play a central role in triggering investigations and disciplinary proceedings against both health professionals and environmental professionals, however investigations into the conduct of health professionals may also be triggered following site visits and inquiries initiated by health ministers.

(3) When are investigations required?

[76] Alberta *Health Professions Act,* at s.13(1).
[77] Alberta *Health Professions Act,* at s. 12.
[78] *Foresters Act*, at s. 7.
[79] Only bylaws under the *Foresters Act* require lay people be represented on the complaints resolution committee. All other bylaws stipulate such representation is possible, but do not require it.
[80] See for example, Foresters

Investigations into the conduct of health professionals are required so long as complaints are not dismissed on criteria set out by statute. While these criteria vary by jurisdiction, generally complaints against health professionals can only be dismissed on the basis that the complaint:

(a) Is trivial, frivolous, vexatious or made in bad faith; or

(b) Does not contain allegations that, if proven, would constitute a matter subject to an investigation.

It must be noted that when complaints are dismissed on these statutory grounds complainants have a right to have decisions reviewed by either an internal, or independent, review board.

Professional associations have significant discretion to initiate investigations and dismiss complaints. The result is that only complaints that contain clear allegations of incompetence, misconduct, conduct unbecoming or a breach of the applicable act and bylaws require an investigation.

(4) When are disciplinary processes invoked?

For health professionals disciplinary hearings are initiated following an investigation where the professional committee or panel decides the complaint needs to be resolved by a disciplinary committee or significant disciplinary action is required. Under health professions legislation hearings occur when and investigation or inquiry committee has found that

(a) the matter should not be dismissed for being trivial, frivolous or vexatious;

(b) the matter cannot be resolved by working with the complainant and member (i.e. by requesting that they work together or engage in alternative dispute resolution); and

(c) the professional will not consent to suggested reprimand or remedial action (i.e. undertaking not to repeat conduct, or engage in continuing education).

For environmental professionals disciplinary hearings “may” be initiated following investigations. The applicable legislation gives professional bodies significant discretion in deciding what to do following an investigation, and a disciplinary hearing is one option that may be pursued. The grounds for proceeding to a hearing are not set out by statute.

(5) What remedial authorities do professional bodies have?

Professional bodies regulating health and environmental professionals have very similar authorities in granting remedies. These include: reprimand, imposing conditions or practice, requiring continuing education, suspending or cancelling membership or imposing fines or costs on the member.

(6) What are important procedural aspects of these processes (i.e. are they publicly accessible)?

Key procedural aspects of the regulation of health and environmental professionals include:

- Notice requirements;
- Appeal rights of complainants;
- Whether disciplinary hearings are open to the public;
- Whether disciplined professionals are named and the extent to which the public knows about any actions taken;
- Whether professional bodies have publicly available annual reports that include the number of complaints filed against professionals and information on how those complaints were resolved; and
- Whether committees include members of the public.

The statutes governing the regulation of environmental professionals fall below the best practices established by the regulation of health professionals in BC, Alberta and Ontario on each of these issues. While the bylaws under some of these statutes address these aspects they are often weak and subject to change by the professional bodies given their statutory powers with regards to creation and amendment of bylaws.

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Memorandum on Best Practices for Professional Self-Governance

By Emma Hume, ELC articled student (2012)

This memorandum outlines the best practices for self-governing professional regimes based on the following reports, which I was asked to review:

- Manitoba, Law Reform Commission, *Regulating Professions and Occupations,* Report #84 (1994);
- Ontario, *Royal Commission Inquiry into Civil Rights,* Report Number One, Vol. 3;
- Reports published by the Pew Commission on professional regulation; and
- Reports published by Alberta running up to the creation of the new *Health Professions Act*.

The recommendations from these reports that focus on protecting the public interest and ensuring strong disciplinary processes, as well as general recommendations for overall legislative frameworks are summarized below. I have only summarized those recommendations that remain current.[1]

Contents

[1] While the Ontario Royal Commission Inquiry into Civil Rights makes some foundational recommendations, some of its recommendations are outdated, for example recommending that disciplinary hearings be closed to the public in order to protect professional's reputations (at 1197).

Ensuring the Public Interest is Protected

> The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to the public interest. The power is not conferred to give or reinforce a professional or occupation status. The relevant question is not, "do the practitioners of this occupation desire the power of self-government?", but 'is self-government necessary for the protection of the public?" The power of self-government should not be extended beyond the present limitations, unless it is clearly established that the public interest demands it.
>
> – John McRuer, Royal Commission of Inquiry into Civil Rights.[2]

The protection of the public interest in professional self-governance is essential, as identified by the Ontario Royal Commission Inquiry into Civil Rights in 1968 and subsequently affirmed by numerous reports.

Self-regulation is traditionally justified by the understanding that it is best for the public because "members of a profession are best qualified to ensure that proper standards of competence and ethics are set and maintained."[3] Self-regulation is also a way for governments to reduce costs of error and enforcement in the regulatory process and for professions to be regulated more efficiently.[4] However, self-regulation poses "a real risk that the power [delegated to professional associations] may be exercised in the interests of the profession or occupation rather than in that of the public interest."[5] Because of this safeguards are required to ensure that the public interest is protected.[6] The remainder of this document sets out essential protections.

Public Representation on Self Governing Bodies

> "Public members are supposed to challenge and complement board decision-making from a critical, non-professional perspective; they are the "social conscience" of a board."
> – Pew Health Professions Commission.[7]

In the United States the majority of health professions boards have public or "other" professional members on their boards. As a result it has been found that, "[p]ublic membership has democratized professional regulation."[8] The best practice is to have members of the public appointed to the bodies of self-governing professions, however recommendations as to the proportion of public members, how

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[2] Ontario, *Royal Commission Inquiry into Civil Rights* Report Number One, Vol. 3 (Toronto: Queen's Printer, 1968) at 1162 [Ontario, *Royal Commission Inquiry*].
[3] Ontario, *Royal Commission Inquiry, supra* note 2, at 1166.
[4] Manitoba, Law Reform Commission, *Regulating Professions and Occupations* (Winnipeg: 1994) at 47 ["Manitoba, *Regulating Professions*"].
[5] Royal Commission Inquiry into Civil Rights, at 1166.
[6] Manitoba, *Regulating Professions*, *supra* note 4 at 50.
[7] Finocchio L J, Dower C M, McMahon T, Gragnola C M and the Taskforce on Health Care Workforce Regulation, *Reforming Health Care Workforce Regulation: Policy Considerations for the 21st Century* (San Francisco, CA: Pew Health Professions Commission, 1995) at 16 ["Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*"].
[8] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 16.

they are appointed and what their roles and responsibilities are have varied over the years. Recommendations from various reports include:

- "Lay members should be appointed by the Lieutenant Governor in Council to the governing bodies of all self-governing professions and occupations."[9]

- Governments "should redesign health professional boards and their functions to reflect the interdisciplinary and public accountability demands of the changing health care delivery system."[10] One way to do this is to ensure members of the public are on professional boards, however three concerns must be addressed in appointing lay persons to boards:
    (1) There must be an appropriate identification and selection process;
    (2) The roles and responsibilities of public members must be clear; and
    (3) Training and support for public members must be adequate.[11]

- Non-practitioners should be represented on bodies in order to represent the public interest and increase public confidence in the system. Members of the public should be appointed to both councils and committees.[12] How they are appointed, their relative numbers, their ability to serve on key committees and the means by which they are encouraged to maintain their assertiveness and independence are also important. Ways to address these concerns include:
    - Having an independent body point members of the public to professional bodies based on names submitted by interested groups and individuals in order to avoid political appointments; [13]
    - Ensuring a minimum of 1/3 of bodies be made up of public representatives;[14] and
    - The role of public representative's role as advocates for the public interest and a corresponding duty to challenge the actions of practitioners when this interest in threatened should be explicitly set out by legislation.[15]

- While the best practice in Canada is to have one-third of boards and committees public members, it has been recommended that there be equal representation of public members and professionals on committees and boards.[16]

Accountability and Openness

Accountability and openness have been identified as important on a theoretical as well as practical level. Theoretically, "[o]ne of the basic principles of a democracy is that those who hold delegated powers must be held accountable for their exercise. It follows, then, that self-governing bodies must be held

[9] Ontario, *Royal Commission Inquiry, supra* note 2, at 1166.
[10] *Reforming Health Care Workforce Regulation* at 14-17.
[11] *Reforming Health Care Workforce Regulation* at 22.
[12] Manitoba, *Regulating Professions*, *supra* note 4 at 63.
[13] Manitoba, *Regulating Professions*, *supra* note 4 at 63.
[14] Manitoba, *Regulating Professions*, *supra* note 4 at 63.
[15] Manitoba, *Regulating Professions*, *supra* note 4 at 65.
[16] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 17.

accountable for their use of the powers granted to them."[17] From a more practical perspective accountability "will help to ensure that the public interest is served [...] and improve public confidence that this is so."[18] Recommendations that have been made to ensure accountability and openness include:

- Annual reports should be mandatory for all self-governing bodies. These should include the number of complaints filed each year against professions, their dispositions, the names of practitioners disciplined, the reasons for discipline, sanctions imposed and the methods and mechanisms used to provide for continuing competence of practitioners.[19] Additional information, such as a description of the structure of the profesisonal body may also be included.

- The rules, regulations and bylaws of a self-governing body must be publicly accessible.[20] More recent reports have recommended that these be presented in a way that is easily understandable by the public.[21]

- The names of all practitioners currently licensed or certified by the body must be publicly accessible.[22]

- The public should have access to information about the current practising status of practitioners and that "records of practitioners' 'convictions' should be made available for public scrutiny for at least three years after the end of a disciplinary sanction."[23] Additional information about practitioners might include education and training and employment and credential history (including conditions and restrictions placed on licenses of privileges).[24]

- Self-governing bodies should be actively required to publish information about disciplinary measures imposed on practitioners.[25]

- The public should have access to meetings of self-governing bodies as well as access to meeting minutes. However, "self-governing bodies ought to be granted a discretion to exclude the public from meetings [...however] *in camera* proceedings should be exceptional; they should not be allowed to become the general rule."[26]

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[17] Manitoba, *Regulating Professions*, *supra* note 4 at 56.
[18] Manitoba, *Regulating Professions*, *supra* note 4, at 56.
[19] Manitoba, *Regulating Professions*, *supra* note 4, at 57.
[20] Manitoba, *Regulating Professions*, *supra* note 4, at 58.
[21] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7.
[22] Manitoba, *Regulating Professions*, *supra* note 4, at 58.
[23] Manitoba, *Regulating Professions*, *supra* note 4, at 60.
[24] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 21.
[25] Manitoba, *Regulating Professions*, *supra* note 4, at 60.
[26] Manitoba, *Regulating Professions*, *supra* note 4, at 61.

Even where all of these recommendations are implemented they alone "will not [...] be sufficient to hold self-governing bodies accountable for their use of power. Government must also accept responsibility for overseeing the powers which it has delegated and ensuring that they are exercised in a manner consistent with the goal of public protection."[27] The recommendation which stems from this is that:

- A government body should be tasked with supervising the activities of self-governing bodies to ensure compliance with legislation. "A general power to supervise and investigate improper behaviour as revealed in annual reports, rules, regulations or by-laws or by public complaint is [...] imperative."[28]

Disciplinary Processes

Uniformity of disciplinary procedures amongst self-governing bodies is important. While all bodies do not have to be governed by the same legislation, uniformity with key elements of the disciplinary process is essential.[29] Today uniformity of complaints and discipline processes have been identified as the best practice, be it through one statute that creates the framework for multiple professions (i.e. the *Health Professions Acts)*[30] or modeling all Acts off one piece of legislation.[31]

Detection

Because consumers may not be aware of improper practice or be reluctant to file complaints "relying on consumers to detect improper practice is, by itself, inadequate as a method of enforcing practice standards and ensuring the safety of the public."[32] To address this concern self-governing bodies should ensure other types of detection ="including practitioner-initiated complaints, routine testing of practitioner competence and periodic practice checks."[33] Furthermore, it has been recommended on multiple occasions[34] that "the body responsible for supervising self-governing bodies should be required to review and approve the programs of detection employed by self-governing bodies."[35] A transition away from reactive disciplinary programs might include:

- Developing proactive programs and targeted site visits. [36]

- Require professionals to "periodically demonstrate competence through appropriate testing mechanisms."[37] Such testing might be "triggered" by the number of disciplinary actions, lack of

[27] Manitoba, *Regulating Professions*, *supra* note 4, at 62.
[28] Manitoba, *Regulating Professions*, *supra* note 4, at 62.
[29] Manitoba, *Regulating Professions*, *supra* note 4, at 69.
[30] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 29-34
[31] Ontario, *Royal Commission Inquiry, supra* note 2, at 1210.
[32] Manitoba, *Regulating Professions*, *supra* note 4, at 70.
[33] Manitoba, *Regulating Professions*, *supra* note 4, at 70.
[34] The Pew Report has made similar recommendations. See: Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 29-34.
[35] Manitoba, *Regulating Professions*, *supra* note 4, at 70.
[36] The Pew Report has made similar recommendations. See: Reforming Health Care Workforce Regulation: Policy Considerations for the 21st Century at pg 29-34.

specialty, or length of time practicing. [38] Another way to assess competence may be through random or targeted reviews of professionals.[39]

- Assessments should include specific and detailed feedback.[40]

- Targeted retraining for identified deficiencies should be available. [41]

Investigation

The following recommendations have been made with regards to investigations:

- Investigation should take place prior to a hearing to "eliminate frivolous and harassing complaints with a minimum expenditure of time and effort".[42]

- Where complaints are dismissed before a hearing "complainants should be permitted to appeal a decision to dismiss a complaint prior to a hearing."[43] This appeal should be to an outside body responsible for supervising self-governing bodies. If the appeal is to an internal body "[m]embers of a disciplinary body should be prohibited from sitting on an appeal from decisions in which they have participated."[44]

- Investigations should be completed within 90 days of receiving a complaint.[45] If further time is needed for an investigation permission may be granted to extend the deadline.

- Mediation should be available where the dispute only involves the complainant and practitioner. Where the concerns about public safety or well-being are at issue the complaint should be resolved at a disciplinary hearing.[46]

Disciplinary Hearings

The following recommendations have been made with regards to disciplinary hearings:

- The body supervising self-governing professions should "design suitable evidentiary and procedural rules" for disciplinary panels, including rules around evidence.[47]

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[37] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 25.
[38] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 25.
[39] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 25.
[40] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 28
[41] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 28
[42] Manitoba, *Regulating Professions*, *supra* note 4, at 70.
[43] Manitoba, *Regulating Professions*, *supra* note 4, at 70.
[44] Ontario, *Royal Commission Inquiry, supra* note 2, at 1209
[45] Manitoba, *Regulating Professions*, *supra* note 4, at 71.
[46] Manitoba, *Regulating Professions*, *supra* note 4, at 72.
[47] Manitoba, *Regulating Professions*, *supra* note 4, at 72.

- Disciplinary hearings should be open to the public. However, in circumstances that are compatible with the public interest, hearing may be closed.[48]

- Professionals must be given a minimum of 10 days notice prior to hearings.[49]

- "[C]omplainants should be given notice of the hearing and be allowed to be present and the hearing and give evidence if required."[50] Complainants also should "be informed in writing of the "verdict" reached by the panel and the punishment, if any, imposed on the practitioner." The Manitoba Law Reform report warned against providing too large of a role to complaints, noting that the goal of hearings "should be to protect the public from harm resulting from incompetence or unethical conduct on the part of practitioners, not to settle personal disputes or to satisfy a desire for retribution."[51]

- At least[52] one-third of the disciplinary panel should be made of public representatives.[53]

- A "well-qualified lawyer [should sit] on each disciplinary body, to whom arguments of law may be addressed and whose advice on law will be reflected in the written reasons of the committee".[54]

- A right to counsel should be recognized in all statutes.[55]

- Disciplinary bodies should "have a full range of sanctions made available to them, ranging from reprimand to revocation of the right to practise".[56]

- Disciplinary processes should appropriately link disciplinary action with the severity of the complaint. [57]

- Fines for statutory breaches "should be paid into the public treasury".[58]

- Outcomes of complaints must be publicly available and understandable, unless there is a compelling public policy reason to maintain confidentiality (i.e. public safety). [59]

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[48] Manitoba, *Regulating Professions*, *supra* note 4, at 58.
[49] Ontario, *Royal Commission Inquiry, supra* note 2, at 1193.
[50] Manitoba, *Regulating Professions*, *supra* note 4, at 73.
[51] Manitoba, *Regulating Professions*, *supra* note 4, at 73-74.
[52] Recommendations that 50% of committees be made of public members have been made. See: Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 17.
[53] Manitoba, *Regulating Professions*, *supra* note 4, at 72.
[54] Ontario, *Royal Commission Inquiry, supra* note 2, at 1189.
[55] Ontario, *Royal Commission Inquiry, supra* note 2, at 1195.
[56] Ontario, *Royal Commission Inquiry, supra* note 2, at 1195.
[57] Reforming Health Care Workforce Regulation: Policy Considerations for the 21st Century at pg 29-34.
[58] Ontario, *Royal Commission Inquiry, supra* note 2, at 1207.

Appeals

The following recommendations have been made with regards to appeals:

- "There should be a right to appeal from all disciplinary decisions". [60]
- Both the practitioner and complainant should have a right to appeal decisions of disciplinary panels.[61]
- "No new evidence should be submitted [on appeal] unless it was unavailable at the time of the hearing."[62]
- Because legal issues may arise during the course of an appeal, it is recommended that appeals be to courts.[63] Should an appeal be to an internal body (i.e. as is the case in Alberta under the *Health Professions Act*) "[m]embers of a disciplinary body should be prohibited from sitting on an appeal from decisions in which they have participated."[64]

Overarching Legislative Framework

It is a well established principle that "occupational regulation should be designed to serve the public rather than to benefit practitioners."[65] However, to ensure this the recommendations outlined above must be implemented, with an emphasis on greater government supervision of self-governing bodies (i.e. through the establishment of an independent body) and more public access to, and involvement in, professional regulation.[66] These recommendations are essential as it is well established that "a decision to grant self-government will not be in the public interest unless safeguards are established to ensure that self-governing powers are used appropriately."[67]

Appropriate Statutory Protections (regulations vs. bylaws)

The regulation of professionals involves two branches of power – the power to make rules respecting policy matters (i.e. admission requirements and discipline) and the power to make rules regarding the administration of affairs. The best practice is to have all rules regarding public policy matters subject to

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[59] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 29-34.
[60] Ontario, *Royal Commission Inquiry, supra* note 2, at 1210.
[61] Manitoba, *Regulating Professions*, *supra* note 4, at 74.
[62] Manitoba, *Regulating Professions*, *supra* note 4, at 74.
[63] Manitoba, *Regulating Professions*, *supra* note 4, at 75.
[64] Ontario, *Royal Commission Inquiry, supra* note 2, at 1209
[65] Manitoba, *Regulating Professions*, *supra* note 4, at 104.
[66] Manitoba, *Regulating Professions*, *supra* note 4, at 104.
[67] Manitoba, *Regulating Professions*, *supra* note 4, at 104.

approval by Governor in Council, while only rules or bylaws regarding administration of bodies can be set by the bodies themselves.

Ontario's Royal Commission Inquiry into Civil Rights recommended that "by-laws should deal only with matters of administration and domestic affairs [...] while rules dealing with policy or adjudication, e.g., admission standards, discipline, etc., should be contained in regulations [...]. All regulations should be approved by the Lieutenant Governor in Council."[68] The Inquiry also identified that "the governing bodies of the designated professions and occupations cannot be left to formulate their own rules of procedure and to conduct their hearings in their own way without considerable effective supervision."[69] Statutory provisions and Governor in Council approved regulations must be put in place to ensure the appropriate protections are put in place. The main recommendation is that:

- "All matters relating to admission and discipline should be dealt with by regulations made by the Lieutenant Governor in Council."[70]

Continuing Reform

Even when best practices are implemented recent assessments of professional regulation have identified remaining problems in self-governance frameworks. One major concern is that "[r]egulatory systems have largely failed to implement mechanisms to evaluate their effectiveness and correct shortcomings."[71] Recommendations to address this problem include the following:

- "[L]egislation should establish a responsive and transparent public engagement framework with which to gather input from the public on an ongoing basis while also requiring engagement with the public on all future legislative and regulatory changes.[72]

- Both internal and external regulatory assessments must occur. "Internal self-assessments allow boards to regularly examine operations and make improvements. External assessments provide more objective viewpoints".[73]

- Legislators should be required to review the regulation of new professions and the benefits of continuing to regulate existing professions. These evaluations "should measure operational efficiency, the effectiveness of boards at meetings their missions and objectives, and public perception of, and satisfaction with, regulatory processes and accountability."[74]

[68] Ontario, *Royal Commission Inquiry, supra* note 2, at 1171.
[69] Ontario, *Royal Commission Inquiry, supra* note 2, at 1186.
[70] Ontario, *Royal Commission Inquiry, supra* note 2, at 1211.
[71] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 36.
[72] Alberta, Legislative Assembly, "Putting People First: Recommendations for an Alberta Health Act" (September 2010).
[73] Pew Health Professions Commission, *Reforming Health Care Workforce Regulation*, *supra* note 7, at 36.
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Appendix H

Guide for Waterpower Projects

Scope of Information and Reports by the Environmental Monitor

A. Preamble

[**Name**] (the "Licensee") is proceeding with the construction of the [**Name**] Waterpower Project (the "Project"). The Project, located on [name of stream], is authorized by Conditional Water Licence [**Number**] (the "Licence"), which forms part of this document. The works of the Project are described under clause (h) of the licence.

The Licensee is required under clause (i) 3) of the Licence to prepare an environmental management plan (the "EMP") for the management and mitigation of construction impacts, which plan is to be to the satisfaction of the Engineer under the *Water Act* (the "Engineer").

The Licensee is required under clause (i) 2) of the Licence to retain a person with professional qualifications (the "Environmental Monitor") who will monitor environmental impacts from the construction of works. The monitor will also provide information and reports under the direction of the Engineer on compliance of the construction with the EMP. The Licensee is also required to retain an Independent Engineer as set out in the Licence.

The EMP are the provisions that meet the collective requirements of (**list the provincial and federal agencies that contributed to the development of the EMP**) and the Engineer under the *Water Act* (the "Engineer") to mitigate the effects of the construction activities.

The information and reports by the Environmental Monitor will be provided to (**list the provincial and federal agencies that contributed to the development of the EMP**) and the Engineer. Each agency will take action on the information and reports provided by the Environmental Monitor in accordance with the jurisdiction of the agency.

B. Regulation of the Construction of Works

The Engineer has the power to regulate the construction of works, which regulation may consider the construction activities that may adversely affect the public, the environment and the interests of licensees, riparian owners and owners of land adjacent to the works.

If the Engineer has determined that the construction activities may be hazardous to the interests of licensees, riparian owners and owners of land adjacent to the works and the environment, the Engineer may issue an order that directs the Licensee to change the manner in which the works are constructed to remove the hazardous condition.

C. Information and Reports

The Environmental Monitor is responsible for observing the methods of construction and preparing information and reports on the compliance of the construction activities with the EMP.

The information and the reports to be provided by the Environmental Monitor to (**list the provincial and federal agencies that contributed to the development of the EMP**) and the Engineer and must include the following:

1. Review the EMP and develop a work plan that sets out the following:
    - The frequency of inspecting the construction activities.
    - The manner in which notice is to be given to the parties for a construction activity that is not in compliance with the EMP.
    - A process for escalating enforcement of compliance of construction activities with the EMP.
    - The format and frequency for the preparation of reports on the compliance of the construction activities with the EMP.
2. Reports on meetings with the Licensee and the Construction Engineer to develop a strategy to communicate to the workers on the construction site the following:
    - the requirements of the EMP,
    - the potential environmental impacts, and
    - the authority of the Environmental Monitor.
3. Reports on matters that arise during the construction and testing of the works that are not described in the EMP. If cannot be resolved by discussion with the licensee and the Construction Engineer, obtain direction from the Engineer and (**list the provincial and federal agencies that contributed to the development of the EMP**) for the mitigation of these matters.
4. Provide any other information or advice required by the Engineer and (**list the provincial and federal agencies that contributed to the development of the EMP**) that is required to ensure that the construction and commissioning of the works is in accordance with the EMP.

D. Independent Engineer

The Licensee is required under clause (i) 1) of the Licence to retain an Independent Engineer who will provide information and reports under the direction of the Engineer regarding the design and construction of the works.

The Independent Engineer and the Environmental Monitor will communicate with each other during the construction of the works to coordinate their activities to provide information to the Engineer for proper regulation of the construction of the works.

E. Delegation of Duties of Environmental Monitor

When the Environmental Monitor is unable to personally observe and report on the construction activities, the persons who have the same authority as the Environmental Monitor to observe and report on construction activities are:

1. Name 1
2. Name 2

F. Testing the Operation

When the Licensee submits a schedule for testing the operation of the works, the Environmental Monitor will inspect the site and report to (**list the provincial and federal agencies that contributed to the development of the EMP**) and the Engineer on any matters that would make the works a hazard to the public and the environment.
The Environmental Monitor will observe the testing of the operation of the works to determine if the operation poses a hazard to the public and the environment, and submit to the Engineer a report on the outcome of the monitoring.

G. Authority to Stop Construction Activities

The plan prepared by the Environmental Monitor for escalating the enforcement of compliance of construction activities with the EMP includes a provision that the Environmental Monitor may direct the Construction Engineer to stop a construction activity.

The authority of the Environmental Monitor to stop a construction activity pertains only to those matters under the jurisdiction of (**list the provincial and federal agencies that contributed to the development of the EMP**).

An order to stop a construction activity that affects the interests of licensees, riparian owners and owners of land adjacent to the works may only be given by the Engineer.

H. Acceptance

The information and reports to be provided by the Environmental Monitor to the Engineer as set out above is acceptable to:

Name: _____ Date: _____

Environmental Monitor

AND

The Licensee agrees to retain the Environmental Monitor to provide the information and reports to the Engineer set out above.

Name: _____ Date: _____

Licensee

Appendix A - Contact List

Engineer under the *Water Act*
Name:
Position Title:
Office Phone Number:
Mobile or Alternate Phone Number:
Mailing Address:

Independent Engineer
Name:
Position Title:
Company:
Office Phone Number:
Mobile or Alternate Phone Number:
Mailing Address:

Licensee Representative
Name:
Position Title:
Company:
Office Phone Number:
Mobile or Alternate Phone Number:
Mailing Address:

Design Engineer
Name:
Position Title:
Company:
Office Phone Number:
Mobile or Alternate Phone Number:
Mailing Address:

Construction Engineer
Name:
Position Title:
Company:
Office Phone Number:
Mobile or Alternate Phone Number:
Mailing Address:

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