WEST COAST Environmental Law

200-2006 West 10th Avenue, Vancouver, BC V6J 2B3 | Coast Salish Territories
xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish) & sə̓lilwətaʔɬ (Tsleil-Waututh)
T 604.684.7378 | 1.800.330.WCEL | F 604.684.1312 | admin@wcel.org
@WCELaw | wcel.org

19 January 2018

BC Professional Reliance Review

c/o citizenengagement@gov.bc.ca

Dear Sirs/Mesdames:

Re: Appropriate use of professionals and avoiding regulatory outsourcing

Thank you for the opportunity to comment as part of the current "Professional Reliance Review." We support the institution of a new system which recognizes the role of professionals, but also ensures that they have the necessary supports, learning opportunities and accountability to protect the environment and public health.

Background

We rely upon professionals and their considerable training and expertise to play all sorts of important roles in society. Professional reliance can be applied in many ways. However, it should not mean blind faith in professionals, or setting up systems which undermine the ability of government to ensure environmental and public health protection and the ability of professionals to deliver professional results.

When BC moved towards wide-spread use of professional reliance, proponents suggested that it would offer a more flexible approach to environmental regulation, where efficiency and effectiveness are improved, innovation is encouraged, and the public's interests are better protected. The shift occurred as part of a broader desire to move away from traditional *command and control* style regulatory mechanisms. Beginning in the forestry sector (in the *Forest and Range Practices Act*), professional reliance subsequently expanded to other sectors.[1]

Unfortunately, in many cases the professional reliance systems which have been set up in BC might be better framed as "regulatory outsourcing", in which government and public functions, and decisions impacting public and First Nations rights, are turned over to professionals hired by private companies. In such cases, many of the procedural and substantive rights of the Public and of First Nations are compromised in favour of corporate profits.

Being opposed to regulatory outsourcing does not mean that we are opposed to the appropriate use of professionals in appropriate roles. But it does mean that great care needs to be taken in identifying which functions are appropriate to turn over to professionals and what systems need to be in place to ensure that professional reliance functions properly.

We have recently signed on to a joint letter that will be submitted as part of your review, entitled *Professional Reliance or Regulatory Outsourcing*. That letter lists some 6 principles that the signatories believe need to be in place in any system intended to avoid regulatory outsourcing while ensuring appropriate use of professionals.

We reproduce those principles here, and will then discuss each in turn, giving our perspective on the greater legal and public policy context.

---

[1] Mike Larock, Association of BC Forest Professionals. Presentation to Presentation to BC Chapter of IAIA WNC June 23, 2011 (insert title of his presentation?).; Task Force Paper.

Principles of Professional Reliance

We must:

- Stop degrading the health of BC's ecosystems, and restore the environment where degraded.
- Guarantee that an unbiased decision-maker hears from an informed public on decisions that affect their health or environment.
- Ensure that First Nations are engaged and their rights respected.
- Ensure that BC's laws are clear, enforceable and enforced.
- Use "professional reliance" only where appropriate and in ways that protect the environment and health.
- Set standards that require professionals to be professional.

1. Stop degrading the health of BC's ecosystems, and restore the environment where degraded.

In our view, the fundamental purpose of BC's environmental and public health frameworks must be to protect the environment and public health. This is the over-arching purpose that should inform decisions – whether by government or private professionals – under this legislation, and against which those decisions should be judged.

Professional reliance, as implemented in BC's statutes, was developed hand-in-hand with a shift to what was termed "results-based" legislation. The theory behind this shift was that government would set results, but industry and its professionals would work out how to achieve them. Unfortunately, the results were often vaguely worded and sometimes were inconsistent with an overarching duty to the public to protect the environment or public health.

Similarly, with the arguable exception of professional foresters, who have a statutory duty not to undermine the "principles of stewardship",[2] the obligation of professionals to further environmental protection or public health is not explicit and must be inferred, if at all, from general statements about public safety or duties to the public.

Case Study: Logging in Jefferd Creek – Government Evaluates Competing Professional Reports

An example of the tension between professional reliance in a forestry context and public health may be seen in the example of BC Timber Sales logging in Jefferd Creek. The watershed has a history of unstable slopes and has no current water treatment. As a result, local residents were concerned for their drinking water and health when BC Timber Sales approved logging in the watershed. Professionals with BC Timber Sales held that the risks to water could be kept to acceptable levels, but a professional retained by local residents told a different story. When BC Timber Sales moved to proceed with logging in September 2009, local residents turned to the local Drinking Water Protection Officer, Dan Glover, under the *Drinking Water Protection Act*. Mr. Glover reviewed both expert reports and concluded that the logging would be a "health impediment" within the meaning of the *Drinking Water Protection Act*. To its credit, BC Timber Sales then voluntarily reduced its logging in the watershed from 12.5 hectares to 1.5 hectares. In our submission, the *Drinking Water Protection Act* (which is not a professional reliance based act, and which is focussed on public health) resulted in a substantively different result than the professional reliance model and timber production focus of

[2] The term appears in the Foresters Act, [SBC 2003] CHAPTER 19, in 3 places, including in s. 1 which defines acts undermining principles of stewardship as conduct unbecoming. This vague term has been given some content via an ABCFP interpretation document: **http://member.abcfp.ca/WEB/Files/publications/Principles_of_Stewardship_2012.pdf**.

the *Forest and Range Practices Act*. This example remains the only one that we are aware of where a review under the *Drinking Water Protection Act* has restricted logging operations due to public health concerns.

In our view, the current Review must judge whether professional reliance and BC's current laws have advanced the health of BC's ecosystems and of public health and have promoted the restoration of the environment where it has been degraded. We further recommend that this be the overarching principle against which new recommendations be evaluated.

Given the urgency of reducing BC's greenhouse gas emissions, it would make sense to explicitly recognize climate change and the health of the atmosphere as a key aspect of that principle of environmental protection.

We believe that BC's environmental legislation should make it clear that this overarching objective – applied in a precautionary manner – should inform all decisions, including placing an obligation on all decision-makers, whether governmental or private professionals, to strive for these objectives.

Such overarching objectives are essential for the ongoing evaluation and improvement of professional reliance models. The success of a doctor is evaluated against the health of their patient, not compliance with a legislated objective. The collapse of a bridge or the crash of a plane is evidence of the failure of the system, and cause for re-evaluation, including evaluation of the role of professionals. The success or failure of BC's environmental and public health laws must be re-evaluated when they fail to achieve such results.

Recommendations:

- Government must enshrine environmental and public health protection as a basic legal and ethical obligation and focus of environmental and public health statutes.
- The success or failure of decisions – whether by government or external professionals – must be evaluated against the protection of environmental and public health.
- The current review must use protection of public health and the environment as a metre-stick against which to evaluate the current professional reliance regime.

2. Guarantee that an unbiased decision-maker hears from an informed public and makes the decisions that affect their health or environment.

Not all use of professionals amounts to regulatory outsourcing. Regulatory outsourcing occurs when the private professional is charged with making key decisions such as: what values are to be protected under the legislation, and how to balance of risks or costs to imposed on the public.[3] The balancing of risks and costs is a regulatory function, and turning it over to a contractor hired by a developer is problematic on many levels.

[3] Mark Haddock in *Professional Reliance and Environmental Regulation in British Columbia* (Environmental Law Centre, Victoria: 2015), at pp. 12-13, identifies three types of professional reliance: common reliance, information or design reliance and decision-making reliance. Regulatory outsourcing is a sub-category of decision-making reliance. It is important to note that there may be categories of decision-making reliance in which the professional is applying clear, government-set standards, according to a generally accepted methodology, which might be a form of decision-making reliance, but which does not necessarily constitute regulatory outsourcing. However, in many cases the agreed upon, science-based methodology that is a pre-requisite for this second type of decision-making reliance does simply not exist.

Examples of Impacts to Environmental and Human Health Protection from Outsourcing

Regulatory outsourcing may occur when decision-making involving values, risks and costs are explicitly turned over to private actors, but more commonly it occurs where a professional is asked to make a decision or determination on the basis of vague terms and/or where there is no agreed upon standards or methodology for the determination. As a result, the determination, which appears to be guided by legislation or government policy, is instead left largely to the discretion of the professional.

Examples include[4]:

- The *Forest and Range Practices Act* (FRPA) which requires government sign-off that Forest Stewardship plans are "consistent" with government objectives. However:
    - Forest Stewardship Plans (FSP) do not have to provide any specific details about where logging will occur, but only general areas of interest. Specifics as to where and how logging will occur are left to site-level plans which are not reviewed by the Crown.
    - Government objectives under the plan are generally vague and are all qualified by the vague term "without unduly compromising the supply of timber."
    - For certain objectives, notably involving Visual Quality Objectives, qualified professionals may sign-off on the FSP without government involvement.

  The result is that key decisions about balancing public and private rights are never reviewed by government or, where they are reviewed, they take place at an inappropriate scale that does not provide for any meaningful oversight.

- The *Riparian Areas Regulation* which provides for development in close proximity to fish habitat where a qualified environmental professional (QEP) certifies that the development will not harmfully alter, disrupt or destroy (HADD) fish habitat. The *Riparian Areas Regulation* provides a detailed methodology for determining adequate set-backs from fish habitat. However, as confirmed by the BC Court of Appeal,[5] development can occur within a set-back provided that a QEP certifies that a HADD will not occur as a result – and the regulation provides no real direction as to that certification, leaving this key question up to the individual professional. Riparian areas do not receive the intended protection from the law as a result of this outsourcing.

- The *Integrated Pest Management Act*, in a clear example of regulatory outsourcing that involves individuals with only minimal professional qualifications, allows proponents to authorize their own use of pesticides on Crown lands as long as their plans contain strategies to address certain issues (but with no standards as to how those issues are addressed).

The outcome in each situation is that professionals get to determine the level of protection available to public rights and values, through the interpretation of vaguely worded standards and requirements,

---

[4] This is not a comprehensive list, particularly when regulations are included. In our view, other examples of legislation that includes a notable degree of regulatory outsourcing include:

- *Contaminated Sites Regulation (Environmental Management Act)*
- *Municipal Sewage Regulation (Environmental Management Act),*
- *Sewerage System Regulation (Public Health Act),*
- *Groundwater Protection Regulation (Water Sustainability Act),*
- *Organic Matter Recycling Regulation (Environmental Management Act* and *Public Health Act*).

There are many other examples of regulations in other sectors such as public safety, health, housing and construction that have adopted regulatory outsourcing models, indicating the extent to which Government has come to value this regulatory model.

[5] *Yanke v. BC*, 2011 BCSC 309, para. 22.

and the resulting determination binds government and provides legal authorization to the professional's employer.

There are many problems with turning over such decisions to private professionals. First, the environment and human health can suffer. Equally significantly, turning over such decisions to private professionals undermines some of the best established legal protections granted to citizens under the common law and under the *Constitution Act, 1982*.

The common law has recognized for hundreds of years that a person affected by a government decision has a right to be heard before an unbiased decision-maker about why the decision should, or should not, be made. More recently Canadian courts have held that all government decisions should be made in a procedurally fair manner – which again includes an unbiased decision-maker and a right to be heard about decisions in which one has an interest.

The author has argued that in the case of government authorizations that have the potential to impact human health, section 7 of the *Canadian Charter of Rights and Freedoms* requires that decisions be made in accordance with the Principles of Fundamental Justice, and that this again requires an unbiased decision-maker and a right to be heard (among other requirements).

By turning over interpretation of the correct balance between public rights and the interests of a private party to professionals hired by that private party, the rule against an unbiased decision-maker is eliminated.

Professionals and pecuniary interest

Proponents of regulatory outsourcing argue that professionals hold obligations to the general public, in addition to their employer, and as such can be counted on to act in a fair manner, with regard to the interests of the public, notwithstanding that they receive compensation from their employer.

This position was taken to its logical conclusion in meetings between government staff and residents of Shawnigan Lake regarding the contaminated soil disposal development in their community. I attended one such meeting at which residents indicated that the approval for the site should be revoked in light of revelations that the engineering firm used by the project developer had an ownership interest in the project. Government staff were unimpressed, noting that professionals always have a financial interest in projects, and suggesting that an ownership interest is not fundamentally different.

Even if professionals are able to maintain this level of neutrality between their employer and the public, an appearance of bias remains from the perspective of the public. Judges and other government decision-makers – generally highly trained professionals – are all required to recuse themselves from decisions through which they or a relative stand to gain financially. This strict standard arose because of the importance of ensuring that such decision-makers are seen to be independent and only acting in the public interest.

Moreover, this claim of professional independence ignores a growing body of behavioural science which demonstrates that even professionals can be influenced by a range of financial, social and other influences. In *The (Honest) Truth about Dishonesty*, behavioural economist Dan Ariely gives a firsthand account of his experience as a paid expert witness in a court hearing. Before doing so, he reviewed the transcripts of testimony given by some of his colleagues in past trials:

> … I was surprised to discover how one-sided their use of the research findings was. I was also somewhat shocked to see how derogatory they were in their reports about the opinions and qualifications of the expert witnesses representing the other side – who in most cases were also respectable academics.

Ariely nonetheless agreed to testify and was "paid quite a bit to give my expert opinion." He became aware that the lawyers (on behalf of their clients) were "trying to plant ideas in my mind that would buttress their case." He explains:

> They did not do it forcefully or by saying that certain things would be good for their clients. Instead, they asked me to describe all the research that was relevant to the case. They suggested that some of the less favorable findings for their position might have some methodological flaws and that the research supporting their view was very important and well done. They also paid me warm compliments each time that I interpreted research in a way that was useful to them. After a few weeks, I discovered that I rather quickly adopted the viewpoint of those who were paying me. The whole experience made me doubt whether it's at all possible to be objective when one is paid for his or her opinion.

This study suggests that indebtedness actually changes the way that people perceive the world – and that they don't realize it. It also found that increasing the amounts of payments to the participants increased this bias.

Professionals can be very influenced by personal factors. For example, **one well-publicized study** showed that judges (highly trained professionals) are much more likely to grant parole to defendants at the beginning of the day, or after a snack, than those who appear before them when they are hungry.

In light of the above, it is crucial that private professionals not be placed in the position of making decisions which fundamentally involve a balancing of environmental and human health protection with the private interests of their employers.

Public participation

Rregulatory outsourcing removes any explicit requirement that the decision-maker (formerly a government, but now a private professional) hear from affected members of the public.

This is troubling on a number of levels:

- Participation and transparency in decision-making increase public confidence and acceptance of the resulting decisions.
- Local residents have valuable local knowledge about local conditions that may be relevant to the decision. In Salmon Arm's Smart Centres development, the proponent's professional, considering impacts on fish habitat, initially failed to address the fact that the property floods on a regular basis.
- Multiple studies show that public participation results in better decisions.

For all of the above reasons, it is absolutely essential that a decision-maker whose role involves making determinations as to the public interest and the balancing of public rights and interests against private rights and interests be unbiased and be charged with hearing from interested parties and the general public.

This is most obviously achieved through government representatives, rather than privately employed professionals, making the decisions. For decisions with the high potential to harm public health and

safety or to significantly compromise public values, public participation is essential.[6] This has the advantage of ensuring the decision-maker is ultimately accountable to elected officials.

For decisions where the impact on public values are more limited, it may be possible to design systems in which external professionals are largely independent, retained and ultimately accountable to the government and/or providing a clear right of appeal to affected members of the publics. Some of these structures are discussed in more detail below.

In all cases, the public should have a right to appeal decisions which affect them, as discussed further in Principle 5, below.

Recommendations:

- Ensure that decisions that have a significant impact on public health or the environment are not outsourced to industry professionals.
- Ensure that members of the public have a right to be heard by an unbiased decision-maker in regard to decisions that affect their health or environment, and a right of appeal from those decisions.
- Ensure that members of the public have a right of access to information on the possible impacts of development on their health or environment.
- Adopt structures which give external professionals independence from their employers (see Principle 6).

3. Ensure that First Nations are engaged and their rights respected.

Indigenous governments have an increasingly important role in land use, as society and the law slowly recognize the legal power of their Rights, Title and law making authority.

Section 35 of the *Constitution Act, 1982* gives these legal power constitutional status, and has resulted in the courts inferring a constitutional duty to consult and accommodate Indigenous governments in cases where their Rights and Title are not fully established. This obligation belongs to the Crown and can never be fully delegated to industry or other private parties.

Similarly, the *United Nations Declaration on the Rights of Indigenous Peoples* has been endorsed by the current BC government.

It is difficult to see how consultation and accommodation can occur if key decisions which impact asserted Rights and Title have been outsourced to private professionals. In the forestry context, this is addressed to a large degree by retaining a government right to refuse to grant cutting permits on grounds related to consultation, but it has not been addressed in many other cases where regulatory outsourcing occurs.

The obligation to consult in relation to the *Riparian Areas Regulation* has resulted in litigation on at least one occasion. However, while the decisions in *Neskonlith Band v. Salmon Arm (City)*[7] found that the city of Salmon Arm did not owe a duty to consult the Band regarding permits issued under the this

---

[6] This is not to say that government decision-makers cannot become biased towards the industry that they regulate, even where there is not a direct financial interest. Regulatory capture is a significant concern, arising from similar sociological factors as can undermine the professional independence of private professionals. Even for government professionals, systems need to be in place to prevent professional independence from being compromised.

[7] *Neskonlith Band v. Salmon Arm*, 2012 BCCA 379, affirming 2012 BCSC 499.

Regulation, they did not answer fundamental questions about how First Nations should be consulted and the role of the Province in that consultation.

Recommendations:

- Ensure that decisions that have a significant or potential impact on asserted or established Aboriginal Rights and Title, Treaty Rights or governance are not outsourced to industry professionals.
- Consult and meaningfully accommodate Indigenous Governments on a government-to-government basis.
- Consult Indigenous Governments on which decisions should be retained by government, made with (or by) Indigenous Governments, or outsourced to external professionals and on what terms.

4. Ensure that BC's laws are clear, enforceable and enforced.

Clear and enforceable

There are different reasons that a law that relies upon professionals may be unclear and/or unenforceable.

Complexity and uncertainty

One reason may be simply that the state of expert knowledge related to the topic still has a lot of uncertainty or the subject matter is, by its nature, complex. This means that the standards, no matter how well developed, will have to leave significant unanswered questions up to the professional. The internal minutes of the province's Provincial Compliance Committee report a discussion of the *Riparian Areas Regulation* in which the limits of the regulation were acknowledged, with private professionals often reaching different interpretations:

> [Staff] described their experiences with QPs [qualified professionals] where their performance was considered to be sub-standard. ... [O]ften, [Staff] are seeing performance [by professionals] that is not clearly non-compliant, is marginal, and it is less clear when action should be taken and that action should entail. ... For many of the Ministry's QP requirements, **it can be difficult to determine the performance standard**; it is not as clear as when an engineer's bridge collapses.[8] (emphasis added)

In the same document, the Committee wrote about gradations of "sub-standard" performance, only a few of which were clearly non-compliant:

- The extreme case where there was a "failure" in the work for which there is clear responsibility/liability and a sanction or discipline is appropriate. This type appears to be rare.

[8] https://www.wcel.org/sites/default/files/old/files/MoEMinutes7May2007.pdf.

- More often, Regions are seeing performance that is not clearly non-compliant, is marginal, and it is less clear when action should be taken and what that action should entail.

It is important to acknowledge that the *Riparian Areas Regulation* contains a detailed methodology that the Ministry spent considerable time and energy developing. And despite the fact that it can be "difficult to determine the performance standard," most concerns about sub-standard performance appear to relate to less-than-satisfactory work, which are not capable of enforcement.

In such cases, there are large gray areas where the professional is asked to made interpretations or decisions with no meaningful direction. As discussed above, behavioural scientists tell us that in such circumstances, financial and social pressures will strongly influence the resulting decisions.

It is not merely a matter of writing better standards: there are currently no standards that can clarify a fundamentally complicated and uncertain field. Rather, systems must be in place to ensure that decisions involving such uncertainty or complexity are carried out in a transparent and accountable manner, by experts who do not have a financial or social interest in the outcome and who have a clear responsibility to achieve the best results for the environment and public health.

Unscientific standards and vagueness

In other cases, standards may be written in ways that are difficult to enforce, or in ways that appear to intentionally limit protection for the environment or public health. We have already mentioned the standards in the *Forest and Range Practices Regulation* which only require protection to the extent that it does not "unduly limit the supply of timber." However, it is worth highlighting other vague terms in many of the government objectives, such as objectives to:

- "[C]onserve, at the landscape level" when several logging companies may be operating over the same landscape, and where conservation is not defined.[9]
- Conserve wildlife and biodiversity only "to the extent practicable."[10]
- Ensure that the government's objectives and other regulations do not "unduly constrain" each logging companies logging rights.[11]

Concerns have also been raised about the vagueness and enforceability of more specific landscape-level objectives set by government.

Not surprisingly, given the competing and vague objectives, the Forest Practices Board has warned that Forest Stewardship Plans, which are supposed to be "consistent" (itself a vague term) with these competing objectives:

> do not meet the public's needs, are not enforceable by government and provide little in the way of innovative forest management.[12]

The Board found that the plans themselves were vague and unenforceable.

---

[9] Forest Planning and Practices Regulation, s. 8.

[10] Ibid, s. 9.

[11] Ibid, s. 6.

[12] https://www.bcfpb.ca/wp-content/uploads/2016/04/SIR44-FSP-Are-They-Meeting-Expectations.pdf

Another example is the *Integrated Pest Management Act* and *Regulation* which allows a private party to authorize large-scale application of pesticides on Crown land simply by preparing a "pest management plan" and giving notice of that plan (but not the plan itself) to the government. The *Integrated Pest Management Regulation* lists various content requirements for Pest Management Plans, but no substantive direction or methodology to determine when, where or how pesticides should or should not be used.

For example, the *Regulation* requires a Pest Management Plan to include "strategies to protect fish and wildlife, riparian areas and wildlife habitat from adverse effects of pesticide use."[13] In a Fortis BC PMP for its Rights of Ways, the company lists only 1 strategy related to wildlife and wildlife habitat: "Appropriate precautions shall be taken when applying pesticides in critical wildlife habitat areas."[14] Technically this "strategy" might satisfy the vague requirements of the regulation, but it provides little actual direction to the company in applying pesticides that might impact wildlife.

Clearly complexity and scientific uncertainty represents challenges for professional reliance. The government must enshrine a strong precautionary approach that favours environmental and public health protection in the face of uncertainty. Moreover, regulatory outsourcing should be avoided in these cases. See Principle 6 for more recommendations on opportunities to learn from failures.

Compliance and enforcement

Compliance and enforcement is critical to achieving environmental and public health results with professional reliance.

In 2009, a review by Ministry of Environment staff[15] of the work done by the professionals found that 53% – more than half – of assessments had not been done properly for one reason or another. The rate of improper assessments by professionals rose to 62% for Vancouver Island. While this extraordinarily low rate of effectiveness was blamed on a learning curve for some professionals, it is unclear whether compliance has improved since this date. As noted by the Ombudsperson in a 2014 report, the Ministry has not been conducting sufficient site inspections to determine what level of compliance is being achieved.

A failure to enforce

During the same period that professional reliance was implemented, the BC government suffered a large decline in the numbers of convictions and tickets issued in respect of environmental statutes.[16] These declines appear to have occurred both due to cuts in staffing and resources but also because statutes which emphasize "results-based" professional reliance are often more difficult to enforce. Even when standards are clear and enforceable (which, as noted, is often not the case), taking enforcement action often requires the government to obtain baseline information about the areas impacted by the activities carried out by the professional and their client, and field-work to assess whether government objectives have been met. With decreasing field staff, this has meant a far lower level of enforcement.

---

[13] Integrated Pest Management Regulation, s. 58(3)(b)(ii).

[14] **https://www.fortisbc.com/Electricity/Environment/EnvironmentalInitiatives/Documents/FortisBC_ROW_PMP_2015_Final.pdf**, at p. 21.

[15] https://www.wcel.org/sites/default/files/old/files/Exh%201009%20-%20NonRT.pdf.

[16] See **https://www.wcel.org/blog/poor-mines-enforcement-undermines-social-licence** and earlier blog posts from West Coast.

We note that the decline in enforcement has been most serious in relation to convictions. Tickets, which have declined only moderately, carry very low penalties and will often not be appropriate for large corporate actors. We applaud the introduction of administrative penalties as an alternative to court proceedings. That being said, we note that enforcement issues are also present in relation to forestry,[17] which has long used administrative penalties.

A professional reliance regime must also include penalties for professionals who act incompetently or unethically. As far as we know, this is not currently occurring. A handful of ethics complaints have been made by individual members of the public related to professional ethics, but the regulatory associations have not, to our knowledge, found that ethics breaches occurred. We are not aware of any ethics complaints being made by the government. Given the vagueness of the duties placed on the professionals, this is probably not surprising, but it does raise questions about the ability of the professional reliance regime to identify and create consequences for bad actors.

As discussed below, we believe that a roster of approved professionals should be created for all major qualified professionals roles. It this were done, the threat of being removed from the roster might well represent an appropriate enforcement tool, if accompanied with clear standards and direction and the other recommendations in this submission.

Recommendations:

- Government standards must be written so as to prioritize protection of the environment and human health. Where uncertainty exists, a precautionary approach should be enshrined in law, and regulatory outsourcing must be avoided.
- The government must dramatically improve its ability to audit and review work done by professionals
- The government must improve its field staff and restore its ability and motivation to enforce the law.
- The government must work with First Nations, community groups and other allies to detect and address non-compliance, including providing for citizen enforcement of environmental statutes.

5. Use "professional reliance" only where appropriate and in ways that protect the environment and health.

Where appropriate

As discussed above, we believe that it is fundamentally important that professional reliance not deprive members of the public of a fair hearing by an unbiased decision-maker in a manner consistent with procedural fairness and their constitutional rights. Similarly, Indigenous governments must be consulted and the government must be able to accommodate their concerns.

However, there are other circumstances in which professional reliance is simply not appropriate, most of which can be tied to our concerns about regulatory outsourcing.

In his helpful report, Haddock's Recommendation #1 lists nine of factors that must be considered in determining whether the use of a privately retained professional in a decision-making function is

[17] https://www.wcel.org/blog/forestry-bc-few-inspections-low-consequences.

appropriate.[18] These factors broadly relate to the above principles – ensuring that decision-makers are unbiased and have appropriate direction and incentives to achieve protection of public values. Adopting these factors would help avoid regulatory outsourcing.

In cases where the use of a private professional is not appropriate, it is important to have decisions either reside with government, or with external professionals who are retained by and accountable to the government (see Principle 6).

In ways that protect the environment and health

Professionals do have a role in making decisions that protect the environment and promote public health – but in all cases the government must keep the power and responsibility to act as a "responsible owner" of public land and resources, and to ensure that decisions that could harm the public and First Nations are made by unbiased decision-makers.

In addition, a Sustainability Board or Court must be created with the power to investigate and monitor government and professional actions that could negatively harm human health and the environment, and to make recommendations for better practices. While drawing on existing tribunals, the Board must have broad powers to review and overturn unsustainable or unhealthy decisions made by professionals or government, and to issue sanctions and penalties, including against professionals.

The transition to "professional reliance" eliminated the right of appeal that members of the public and First Nations had under earlier legal regimes. For example, appeals in respect of pesticide use for members of the public were largely eliminated, as illustrated by the 2009 decision of the Environmental Appeal Board in *Hurst v. BC*.[19]

Moreover, since the judicial review procedures act is most often used against public bodies, it is not even entirely clear whether professionally sanctioned decisions could be challenged in court. Complaints could, of course, be made to the relevant professional associations, but those hearings would not reverse harmful decisions and are focused not on the correctness of the decision or its impacts on public health or the environment, but on whether there has been a significant breach of ethics.

A Sustainability Board or Court would be able to fill this void, creating a one-stop body that could provide recourse for parties harmed by poor statutory decisions under environmental and public health statutes – whether carried out by government or private parties. Like the Forest Practices Board or the Ombudsperson, the Sustainability Board would have the power to respond to complaints and what went wrong. Unlike the Forest Practices Board or Ombudsman, this body should also have the power to overturn harmful decisions and order environmental remediation or restoration where appropriate.

See also Principle 6 for suggestions of how to implement professional reliance in ways that protect the public.

---

[18] Haddock, above, p. 85.

[19] 2009-IPM-001(a).

Recommendations:

- Ensure that professionals making decisions are unbiased and have appropriate direction and incentives to protect public health and the environment.
- Establish a Sustainability Board or Court to receive complaints, investigate and redress environmental and public health problems.

6. Set standards that requires professionals to be professional.

The best professional in the world is still human – still influenced by their employer, by their desire to appear competent, and still fallible. We need structures that:

- encourage professionals to protect public health and the environment,
- ensure that decisions, including but not limited to unprofessional decisions, giving rise to such harm are detected and remedied, and learned from; and
- hold professionals accountable when they fail to live up to their obligations to the public.

Approved Roster of Professionals

Government must require proponents seeking government approval to use professionals from a roster of qualified individuals that have demonstrated specific qualifications in relation to statutory functions. Our recommendation is that in general the proponent should be required to take the next available expert in a given field, thereby restricting the power of both government and industry to select experts viewed as likely to deliver particular results. As indicated in Principle 1, the primary obligation of these professionals should be to protect the environment and public health.

As a matter of law, the professionals, although paid by a private party, should be legally co-employed by the province, with obligations to provide information and reports and work with provincial staff, as well as to the private party as required. As a result, all documents prepared by the project professional should be available under freedom of information laws.

Professionals who consistently fail to protect human health and the environment or who breach basic standards of professionalism should be suspended or removed from this roster. That being said, good-faith errors or unexpected results, particularly when reported by the professional and where the professional makes efforts to assist in correcting the problems, should not necessarily be a reason for suspension.

Mistakes detected, remedied and learned from

Although professionals can and do breach professional obligations, violate the law and/or act inappropriately, it is more common that professionals are caught within a system which awards loyalty to their employer at the expense of protection of the public. If this system is fixed, we believe that greater emphasis can be placed on cooperative approaches to identifying, remedying and learning from mistakes. The recommendations which follow presume that the other Principles have been implemented.

Behavioural researchers have demonstrated that in some cases professionals may be less likely than untrained lay people to admit their errors, precisely because to admit this would go against their

image of themselves as trained, independent professionals and because of the professional risks of having made a mistake. As a result, they are unable to learn from their mistakes.

In his book, *Black Box Thinking*, Matthew Syed examines examples of how prosecutors and judges, doctors and nurses, are – absent systems of oversight – unable to question and learn from errors and failures that they make.

> [The author of the book Medical Errors and Medical Narcissism] writes: "Health professionals are known to be immensely clever at covering up or drawing attention away from an error by the language they use. There is good reason to believe that their facility with linguistic subterfuge is cultivated during their residency years or on special training."
>
> A landmark three-year investigation published in the Social Science and Medical Journal revealed similar findings, namely that physicians cope with their errors through a process of denial. They 'block mistakes from entering conscious thought' and 'narrow the definition of a mistake so that they effectively disappear, or are seen as inconsequential.'[20]

Syed quotes one survey of healthcare professionals which found that 86% agreed or strongly agreed with the statement that "rationalisations that excuse medical errors … are common in hospitals," as well as the words of one prominent physician who acknowledges the emotional and psychological barriers to professionals acknowledging when a mistake has been made:

> Doctors hide their mistakes from patients, from other doctors, even from themselves … The drastic consequences of our mistakes, the repeated opportunities to make them, the uncertainty about our culpability, and the professional denial that mistakes happen all work together to create an intolerable dilemma for the physician. We see the horror of our mistakes, yet we cannot deal with their enormous emotional impact.[21]

In its 2015 report the Forest Practices Board notes, with apparent disbelief, that systematic problems with Forest Stewardship Plans that were observed in 2006 have not improved. Similarly, BC's courts ruled in 2011 that the government's understanding of how the *Riparian Areas Regulation* functioned was fundamentally incorrect. The 2014 report of the Ombudsperson recommended correcting this and other issues with the Regulation, and yet nothing has been done to correct the problem. As noted in Principle 4, above, the Ministry is not doing sufficient inspections to know whether compliance with the RAR has improved since 2009.

Environmental and public health is often compromised not by truly unethical breaches, but by the gray areas of the law or of professional practice. Syed notes that where an institution or industry institutes a culture of transparency, with aggressive identification of poor outcomes and maximization of efforts to investigate and learn from those failures, without assuming the guilt of those who made the error, professions can greatly improve their practices.

Professionals should have a positive obligation to report on work that falls below the required ethical standard, but also on work that has caused environmental or human health impacts, even if competently prepared.

Areas where methodology is unclear, terms and objectives are inappropriately vague or where there is simply a lot of scientific uncertainty or complexity. Such cases need to be thoroughly dissected,

---

[20] Syed, M. Black Box Thinking (John Murray, London: 2015), p. 96-97.

[21] Syed, M., above, p. 115, quoting physician David Hilfiker.

understood and learned from. Wrong doing must be be dealt with harshly. But in other cases, the focus should be less on blame, and more on improving the laws, tools and future outcomes.

That being said, where public health or the environment has been compromised, the focus of all concerned must be to restore and remediate those issues.

The Sustainability Board, discussed above, should play a major role in identifying and investigating failures of regulation, and identifying how they can be improved. The government, professional associations, and individual professionals should have a positive obligation to respond to each recommendation of the Board in detail and to subsequently report on implementation on a regular basis.

Insurance and liability

Governments should require professionals on the roster to carry insurance aimed at reimbursing the public, should harm occur from their actions. This could be done by introducing (or re-affirming) liability to the public for environmental and public health harms, or through index insurance, which need not be directly tied to fault. Index insurance identifies particular negative outcomes (triggers) which will automatically result in an insurance payment:

> **Index insurance is a relatively new but innovative approach to insurance provision that pays out benefits on the basis of a predetermined index** (e.g. rainfall level) for loss of assets and investments, primarily working capital, resulting from weather and catastrophic events, without requiring the traditional services of insurance claims assessors. It also allows for the claims settlement processes to be quicker and more objective.[22]

This would require the Crown to have base-line environmental and public health data, and for the insurance to automatically pay if certain environmental or public health results associated with a professional's project occurred. Index insurance may be challenging in cases where the complexity of a situation precludes an easy link between the professional's actions and the harm suffered, but may be appropriate in some cases.

Conclusion

The above Principles are inter-related and should all be applied We believe that each Principle and each recommendation depends upon the others.

It is very exciting to have the opportunity to rebuild a dysfunctional system. We need to put in place a new system which recognizes the role of professionals, but also ensures that they have the necessary supports, learning opportunities and accountability to protect the environment and public health.

Sincerely,

Andrew Gage,
Staff Lawyer

---

[22] http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/financial+markets/retail+finance/insurance/index+insurance+-+frequently+asked+questions