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Professional Reliance in Natural Resources
Stakeholder submission

To Whom It May Concern,

The following submission is set out in order of the questions posed for stakeholder feedback:

1. **Please tell us what you think is working well with the current professional reliance model in B.C., and what is not**

The public is not informed. Part of the challenge of answering this question is that, by shifting key assessment and decision making roles to industry, the professional reliance or "regulatory outsourcing" model hampers the public's ability to access information about what is happening to BC's resources, which in turn hampers the ability to meaningfully respond to this question.

Because of the professional reliance model, it is now more challenging that it was in the past for the public to gain an understanding of activity at the landscape and local level. For example, 2 decades ago an interested member of the public could engage with government for information regarding approval of logging on crown land, reviewing logging plans which showed the location and manner of logging and associated activities such as road building. But, the regulatory outsourcing model manifested in the *Forest and Range Practices Act* (FRPA) permits landscape level logging plans, called "forest stewardship plans", to satisfy planning requirements merely by committing to meet objectives defined by law without, as noted by the Forest Practices Board, setting out measurable outcomes. Quite simply, the plans may be so vague they do not provide the public (or government) with meaningful information about what will happen where.

Logging companies then prepare site plans which require no further approval. These must be made available to the public if requested but with the responsibility to share the information in the hands of industry, ease of public access is ad hoc or inconsistent and as noted by the Forest Practices Board, has been frustrated by licensees (e.g. Forest Planning and Practices at East Creek, FPB/IRC/20 6).

When regulatory outsourcing was proposed in the early 2000s, the government of the day promised that the regulatory overhaul would be complemented by enhanced compliance, enforcement, monitoring, and public reporting. This did not occur (except in limited circumstances) and as a result, both the provincial government and public know less about resource activities in BC.

In Ecojustice's experience representing clients throughout the province, regulatory outsourcing has increased the barriers to public awareness and participation in resource decision making.

The lack of access to information frustrates participation in the current review. Hopefully, government impetus to meaningfully address regulatory outsourcing doesn't depend on a strong public response to

the consultation, since for over a decade the system, by design, eroded the public experience needed to enable the public to respond.

BC's "laws" are not laws and do not protect the public interest. BC's version of regulatory outsourcing has swung the pendulum too far, taking BC laws and the BC government largely out of the business of regulating resource extraction in favour of granting industry almost complete discretion. Indeed, some of BC's laws are focused more on *constraining government or the public in their oversight role* than they are about regulating industry behaviour.

Turning again to the forestry example, as described above, the key documents industry must develop to enable logging are either not required to be specific in relation to activities (forest stewardship plans), or, if specific, do not require government review and approval (site plans). This frustrates government understanding and oversight, as well as public awareness and participation.

But BC's regulatory outsourcing goes further, acting to restrict government oversight and enabling industry discretion to the point where the "law" is almost meaningless.

To test this assumption, in 2014 Ecojustice represented the Wilderness Committee in a case challenging continued approval of logging in the Coastal Douglas Fir community on Vancouver Island.

Coastal Douglas Fir is iconic in BC, so much so that it is on the logo for BC's forest service. It is also prized by loggers. Where formerly it dominated Vancouver Island and BC's south coast, only a small fraction still exists. On Vancouver Island, as little as 20 square kilometres remains, about 2.75 square kilometres of which is old growth. As such, the Coastal Douglas Fir community is appropriately designated as a species at risk under BC's forestry legislation.

Ecojustice determined to ask, "How bad must things be before FRPA limits logging?"

Ecojustice posited that if FRPA contained any meaningful limitations on logging, this would be triggered in relation to logging Coastal Douglas Fir. The government's obligation under FRPA would manifest in the form of issuing notices to logging companies to take this endangered species into account in preparing forest stewardship plans so as to ensure Coastal Douglas Fir was preserved. To state clearly, this was not a case to stop logging. This was a case only to test whether the government must give notice of an endangered species to logging companies so that industry would account for the endangered species in their logging plans.

More particularly, Ecojustice sought, in the context of the facts, an interpretation of section 7(1) of the *Government Actions Regulation* which set out the objective for species at risk:

> s. 7(1) The objective set by government for wildlife is, without unduly reducing the supply of timber from British Columbia's forests, to conserve sufficient wildlife habitat in terms of amount of area, distribution of areas and attributes of those areas, for (a) the survival of species at risk…
>
> (2) A person required to prepare a forest stewardship plan must specify a result or strategy in respect of the objective stated under subsection (1) only if the minister responsible for the Wildlife Act gives notice to the person

In *Western Canada Wilderness Committee v. British Columbia (Forests, Lands and Natural Resource Operations*), 2014 BCSC 808 (CanLII), the BC Supreme Court found that the obligation to protect species at risk was subject to the constraint "without unduly reducing the supply of timber". Because the law does not say notice "must" be given, combined with the requirement of "without unduly reducing the supply of timber", the court found no mandatory requirement to give notice to companies of the location of endangered Coastal Douglas Fir so as to enable logging company professionals to mitigate harm posed by logging (and the court identified no independent obligation for professionals in the absence of notice).

It's not unreasonable to conclude that if having only 2.75 square kilometres of formerly 2,555 square kilometres of Coastal Douglas fir old growth does not trigger mandatory behaviour, the "law" doesn't contain any clear, enforceable outcome related to preserving species at risk. Moreover, as described above, FRPA's key role was to constrain government oversight.

Professions do not take responsibility for stewardship. Again applying the example set out above, Coastal Douglas Fir continues to be logged according to plans prepared by members of the Association of British Columbia Professional Foresters (ABCFP). The failure of the profession, in this example, to appropriately steward BC's resources is self-evident.

Moreover, Ecojustice has represented clients in complaints to the ABCFP several times since the introduction of FRPA regarding logging that posed a risk to forest-dependent species at risk. These complaints were unsuccessful and generally the ABCFP found its members acted according to the ABCFP's standards. This was possible mainly because the profession did not accept that their standards encompassed ensuring appropriate stewardship of BC's forest resources.

Ecojustice's experience with the ABCFP was consistent with conclusions drawn by the Forest Practices Board (FPB) which in 2008, in the Special Investigation report on Marbled Murrelets (FPB/SIB/22), stated:

> The ABCFP recognized that members are "often called upon to determine the appropriate balance of economic, ecological and social benefits." However, the ABCFP does not set forest management standards, which it views as government's role. If legislation or government policy reflects government's stewardship choices and a particular balance of public interests, the ABCFP feels that forest professionals can rely on that. In their estimation, it is not a forester's job to decide how much murrelet habitat should be conserved. The Association provides guidance to its members but does not require members to independently assess stewardship." (pp.10-11)

The ABCFP takes the position that law or policy ultimately guides their behaviour. Where the law or policy provides no guidance, the profession bears no independent obligation to, as the Forest Practices Board stated, "assess the soundness of resources stewardship or balance resource values in the public interest."

How do members of a "profession" reconcile the continued decline of old-growth-dependant species at risk with the decisions they must take as they practice their "profession"? The answer to that question is unclear and, in the context of forest-dependent at risk species, implies that the ABCFP's standards, like

the law, may actually define no minimum threshold for behaviour. In any event, a reasonable response would be to restore clarity and enforceability to the law so as to define the standard professionals must meet, because they cannot or will not do so.

Ecojustice's experience is that the regulatory outsourcing model adopted by BC has made the law unenforceable, reduced or eliminated appropriate governmental stewardship of our resources, restricted public involvement, falsely relied on professionals to fill the stewardship gap, and resulted in a degraded environment.

2. What changes, if any, are needed to maintain or improve public trust in the professional reliance model

Ecojustice shares the BC environmental community position regarding necessary changes to BC's regulatory outsourcing model:

- **We must stop degrading the health of BC's ecosystems, and restore the environment where degraded.**
    - All natural resource management and environmental protection laws must enshrine the precautionary principle and ensure that projects promote sustainability and public health. In particular, our environmental assessment laws must ensure that projects make a net contribution to sustainability and address cumulative impacts, including on climate.

- **We must guarantee that an unbiased decision-maker hears from an informed public on decisions that affect their health or environment.**

    - Regulatory outsourcing deprives the public of one of the most basic rights in relation to government decisions – the right to be heard about decisions affecting you by an unbiased decision-maker. The payment of a decision-maker by an interested party creates an apparent bias that undermines public confidence in the decision. In cases involving threats to human health the right to be heard takes on a constitutional dimension.[1] All decisions which pose a substantial threat to human health or to the environment must be made by government staff or (if necessary) by professionals retained by and accountable to government, rather than to any party.
    - To allow them to participate fully, the public must have access to information about environmental and health laws, including access to all reports prepared by private professionals. The public must have a broad right of appeal where decisions harm the environment or public health.

- **We must ensure that First Nations are engaged and their rights respected.**

    - First Nations have the right to be engaged, on a government to government basis, about decisions which affect their health and constitutionally protected Rights and Title, in a manner, consistent with the United Nations Declaration on the Rights of Indigenous

[1] *Canadian Charter of Rights and Freedoms*, s. 7. We assert that decisions affecting public health without a hearing and before a biased decision-maker constitute a violation of the "principles of fundamental justice."

Peoples and that takes into account Aboriginal Traditional Knowledge. This means that decisions potentially impacting Indigenous Rights and Title in a substantial way cannot be outsourced to private interests, but must remain primarily the responsibility of government.

- **We must ensure that BC's laws are clear, enforceable and enforced.**
    - Under regulatory outsourcing, the laws that private professionals interpret are often vague and difficult to enforce – meaning that professionals are forced to balance the interests of their employers with the rights of the public. Laws that protect human health and the natural environment must set clear, verifiable and measurable standards and creates clear consequences for non-compliance.
    - The government must ensure that government agencies charged with oversight and enforcement have resources, training and culture that enables them to detect and prosecute law breakers. Laws and policies must encourage and protect whistle blowers and citizens who call for enforcement against law breakers.

- **We must use "regulatory outsourcing" only where appropriate and in ways that protect the environment and health.**
    - The government must ensure that regulatory outsourcing does not deprive members of the public of the right to be heard by an unbiased decision-maker and that the government retains in all cases the power and responsibility to act as a "responsible owner" of Crown land and resources.
    - A "Resource Practices Board" must be created with a mandate to investigate and monitor government and professional actions with the potential to negatively harm human health and the environment and to make recommendations for better management of the environment. While drawing on the current roles of the Forest Practices Board, the Oil and Gas Appeals Tribunal, and the Environmental Appeal Board, the Board must have expanded powers to review and overturn unsustainable or unhealthy decisions made by professionals or government, issue sanctions and penalties, including against professionals.

- **We must set standards that requires professionals to be professional.**
    - Professionals must be accountable for harm, or inappropriate risk, to human health and the environment, and unprofessional decisions giving rise to such harm must be detected and remedied. Government must maintain a roster of qualified individuals that have demonstrated specific, required qualifications of a "professional" for specific statutory functions. Individuals who fail to maintain a standard of professionalism should be removed from this roster.
    - Government must also enact laws clarifying the responsibility of professional associations in relation to public functions, clarify the circumstances in which professionals will be held liable for their decisions and require insurance or bonding related to those circumstances, require professionals to report on work that falls below professional standards and ensure that there is periodic auditing and review of work done by professionals.

3. **Do you have any other observations or recommendations you would like to make about this review?**

The BC government, after receipt of the expert's report, must promptly set out the steps that they will take to repeal and replace BC's failed regulatory outsourcing regime.

If you have any questions, please contact me at 604-685-5618 x233.

Sincerely,

Devon Page
Executive Director