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19 January, 2018

The Honourable George Heyman
Minister of Environment and Climate Change Strategy
P.O. Box 9047 Stn Prov Govt
Victoria, BC.
by email: CitizenEngagement@gov.bc.ca

Dear Hon. Minister

Re: Professional Reliance in Natural Resources Management

It is commendable that your government is now re-examining the policy of 'professional reliance' as the current approach to management decisions and practices conducted on lands and resources in British Columbia.

The review is timely. The professional reliance approach (perhaps more aptly known as 'regulatory out-sourcing') has been an experiment, initiated by the provincial government a decade or so ago without any substantive evidence or analysis at the time to demonstrate its presumed superiority to the traditional in-house regulatory model.

This submission argues that there is now sufficient evidence and analysis to demonstrate the opposite effect—that professional reliance is inferior to in-house regulation. There have been some significant failures in the management of lands and resources in the province as a result of this approach, and the public interest has suffered as a result.

There is also good analysis (described below) that points to a tangle of complex issues that would seemingly undermine any attempt at establishing an environmentally viable regime under a professional reliance approach.

In the view of this writer it is time to roll back the use of professional reliance and to reinvigorate the various resource agencies with the expertise and budgets they need to fulfill their mandates.

There may be ways to vary the traditional in-house civil service model to make certain kinds of improvements in terms of service delivery and costs, but the overriding principle of having the required Qualified Professional (QP) expertise within government appears from the experience to date to be superior, and it should be restored as the operating model.

Haddock provides a comprehensive review of the deficiencies of the current model in their 2015 review of professional reliance in BC,[1]

> 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

[1] Haddock, M. *Professional Reliance and Environmental Regulation in British Columbia*. Environmental Law Center. University of Victoria Faculty of Law. February, 2015.

> 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. [p.10]

In support of that conclusion Haddock documents [p22-26] a litany of the problems arising from application of the professional reliance model in BC, including:

- for many types of industrial activity government staff are not aware of what is happening on the ground, and there are concerns about proponent bias affecting on-the-ground performance;
- many independent monitors have high levels of concern about observed activities in the field, but lack enforcement power and the ability to get appropriate backup from compliance and enforcement staff in government agencies;
- a wide discrepancy is apparent in the diligence and practice among independent monitors in terms of reporting environmental incidents to agencies;
- the removal of government oversight heightens both the impact of a consultant's report and the need for the consultant's professional integrity (given cases where proponents attempt to influence consultants' reports in various ways—e.g., cancellation of contracts, loss of future job opportunities, threats of non-payment, etc.);
- 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 but the public interest in environmental protection depends upon the professional exercising professional judgment in a disinterested, unbiased and independent manner;
- professional reliance has been ineffective at ensuring professionals are held accountable for the adverse impacts of poor quality work;
- cutbacks and downsizing within government have led to incapacity or inability of agency staff to effectively judge the soundness of plans or designs submitted by professionals, or to have effective "backup" for reported non-compliances;
- enforcement activities are often seen as "major headaches" and are discouraged within agencies;
- in some situations industry or private interests effectively make the decisions that affect or determine the public interest, including trade-offs between environmental values formerly considered the domain of government;
- professional reliance viewed by many as tantamount to the privatization of public resources;

- there is little impetus or opportunity for an agency to stay involved in the management of a resource field once government outsources its responsibility, with the ultimate result of a loss in agency professional expertise and understanding of industry operations.

The consequences of all these deficiencies, as Haddock [p.27] puts it, are that:

- there are apparently more user conflicts (many of these are documented in the complaint and special investigation reports of the Forest Practices Board of BC);
- government agencies are much less aware of what is happening on public land;
- statutory decision-makers are not necessarily qualified to assess the resource issues affected by their decisions;
- decision-makers cannot get advice from agency experts since they either no longer exist or are assigned to other duties;
- agency staff refusing 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;
- business and peer pressure visibly increased on independent QPs to accede to their client's wishes; and,
- standards of performance published by the Resources Information Standards Committee, previously considered mandatory, are now frequently treated as optional. (QPs with major project experience elsewhere in Canada reported that standards in BC are lax by comparison.)

Haddock also noted that another independent agency, the Forest Practices Board of BC, has for the past decade audited the professional reliance regime under the *Forest and Range Practices Act* and it concludes that "…it is unrealistic to expect professional reliance to carry the majority of the weight for balancing forest management interests."

At the end of his investigation Haddock concluded, among other things, that…

1. all of these factors lead to a loss of environmental stewardship within government, amounting to "trickle down stewardship";
2. the regulatory system needs to be more alert to the potential for conflicts of interest. Delegating decision-making to professionals employed by proponents introduces a risk of biased decisions;
3. there are limits to the ability and willingness of professional associations to discipline poor conduct;
4. some matters, such as compliance and enforcement, are essential government functions and should never be delegated to independent professionals employed by proponents;

5. 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; and,

6. 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.

If you intend to consider continuance of the professional reliance model it would be critical (as point 6 above indicates), both in terms of public trust and long-term environmental sustainability, that its viability first be meaningfully demonstrated. This should entail vigorous and thorough investigation to collect the relevant evidence and carry out a proper analysis of the actual outcomes of the policy as we have seen it played out over the last decade or so.

However, and evidentiary needs aside for the moment, there is an underlying foundational problem with the PR model that cannot be resolved through the mustering of additional evidence. Its utility rests clearly on the starting assumption that QPs, when acting in accordance with both the professional standards set out by their professional affiliations and a given a set of specified management objectives, will all act consistently and objectively in any given situation, arriving at more or less identical solutions and, ultimately, achieving the targeted outcomes.

It is this assumption that proponents of professional reliance base their belief in the utility of the policy. There are three substantive arguments against this contention. The first is that for British Columbia this assumption has never been tested by government in any systematic or credible sense so as to justify the use of the PR model.

The second is that there is to date no apparent evidence to support it. In fact, as I describe below, there is substantial evidence to demonstrate the contrary view—i.e., the assumption is wrong and that QPs do not necessarily act in this way.

The notion of proof in this situation is critical—government must be able to point to convincing evidence that demonstrates the efficacy of regulatory outsourcing in order to ensure itself (and the public) that the expected outcomes are being achieved.

The third flaw in the assumption, as Bell puts it, is because,

> .. it discounts that most fundamental of human characteristics… which is to favour those with whom one is connected, and especially those upon whom one's present and future security – whether financial, emotional, political or communitarian – is directly dependent.[2]

Haddock makes the same point in his review [p.48];

> 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

[2] R. Warren Bell. Why the Professional Reliance Model is Doomed to Fail. *Bionews*. Summer 2012.

> relationships and business competition from peers who might not be as concerned about the public interest.

Developers of provincial resources presumably like the approach since it does not typically require the same degree of oversight or scrutiny that traditional government regulatory agencies provide.

As a result, the provincial government has been persuaded over the past decade or so to shift into a regime wherein environmental and natural resource policy outcomes are often characterized by high uncertainty and an attendant increased risk of failure. These conditions set the stage for the imposition of substantial costs to government and the public and for potentially far-reaching and long-term environmental impacts.

The recent Mt Polley case is a revealing example of exactly this problem.

As noted, the case for professional reliance rests on a fundamental assumption that is easily disproved. The proof is easily discoverable in court proceedings and various independent regulatory tribunals (such as the BC Utilities Commission, the BC Auditor General, Provincial Ombudsman Office) where QPs openly debate the issues.

In my professional experience, independent environmental assessment panels have particular relevance since they provide the kind of venue where transparency, impartiality and scientific rigour concerning technically complex environmental issues come into play in a theatre of interacting QPs representing the different players.

For the purpose at hand the key quality of independent EA panels is that the technical information and analyses prepared to support, to understand and, in some cases, to oppose the proposed project are brought forward and debated in the panel's public process. Submissions by a proponent, questions and arguments presented by intervenors, and the panel's own use of QPs to examine the proponent's proposal— all these are subject to close examination and tested in the process by the participants. In such a forum, the QPs participating can all take (and defend) various positions to make their opposing cases—much like a court proceeding in this regard.

The important point for the issue at hand is that all these QPs, presumably acting in accordance with their professional association standards and working to the same objectives of project quality, often as not end up advancing radically different positions with respect to the technical needs for project design and operation in order to guarantee the environmental viability of the proposal under scrutiny.

There are excellent examples of this documented in the proceedings of various federal EA panels conducted for BC projects over the past few decades.[3]

A recent case rather dramatically illustrates the point. Teztan Biny (or Fish Lake, as it is more widely known) in Tsilhqot'in traditional territory was the site initially selected for the deposit of

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[3] In BC this field is occupied primarily by federal assessment panels since the provincial EA process apparently has only a single example of review by an independent panel.

mine waste rock from Taseko Mine's proposed open-pit Prosperity Mine. The history of this proposal, winding its way through three environmental assessment processes as well as a judicial review in federal court, serves as a graphic example wherein studies and conclusions made by participating QPs about the potential impacts of the project were, figuratively speaking, all over the map. In the end, the QPs acting for the intervenors and the federal government were able to convince the panel of the substantive technical deficiencies in the plans proposed by the proponent's QPs.

A short review of those events makes the case for the inherent risks in depending upon only one source of professional reliance in the context of a major resource development decision.

Taseko's Prosperity project entered the provincial EA process in 1995, following which the BC EAO convened meetings with various affected parties, including potentially affected First Nations, to discuss information needs. A key objective of this exercise was an attempt to engage the federal assessment agency, CEAA, in implementing a joint review. The governmental QPs involved in these discussions could not agree on the scope or terms of a joint process, and so the federal team withdrew.

This is the first indication in the Prosperity story of a significant gap in the views of the participating QPs—all presumably working in adherence to the ethics of their respective professional associations and with the same objectives in delivering a meaningful assessment to their respective employers, yet not being able to agree what should or should not be in the assessment box.

The project was put on hold by the proponent for a few years but reactivated in the mid-2000s, at which time the BC EAO proceeded with the provincial assessment. In his 2009 final report the EAO Exec Director determined that the proposed project would result in a single significant adverse effect—that being the complete loss of fish and fish habitat in Teztan Biny. The report noted that there had been no federal input into the process to date.

The provincial Minister of Environment subsequently determined that the use of Fish Lake for a tailings pond was justifiable in the circumstances and issued an approval for the project.

In the interim the federal panel proceeded without provincial involvement, issuing its final report in July 2011. QPs representing an array of interests participated in the federal hearings and presented evidence, or questioned the evidence of others, on various technical aspects of the project. As it turns out, technical evidence presented by QPs on behalf of federal agencies, the Tsilhqot'in National Government and others, all not available to the provincial EA process, was instrumental in the Panel's ultimate finding that, overall, the project would result in a high magnitude, long-term and irreversible effect arising from a number of interacting specific impacts, including:

- impacts to navigation;
- impacts to current use of lands and resources for traditional purposes by First Nations;
- impacts to cultural heritage;

- impacts to certain potential or established Aboriginal rights or title;
- cumulative effects on grizzly bears in the south Chilcotin region;
- cumulative effects on fish and wildlife habitat;
- failure of the proposed replacement lake for fish habitat;
- failure of the proposed fish restoration program to assure replacement fish would be safe for human consumption;
- no assurance that creating a new lake with adjacent spawning and rearing channels would be successful (no information was presented about the efficacy of lake and stream replacement as a self-sustaining ecosystem);
- no demonstration that the plan would meet requirements for the establishment of a self-sustaining rainbow trout population;
- perpetual maintenance of spawning channels would be required; and,
- proposed fish and fish habitat compensation plan would not mitigate the loss of fishery in Fish Creek watershed.

Something could be said here about the substantial difference in quality of the two assessment processes, but the germane point for this submission is the stark differences in the professional opinions of the QPs participating in the federal panel.

The panel was presented with a wide range of professional opinion about the nature and degree of the potential impacts, what would and would not work by way of environmental protection, compensatory measures or mitigation, what the lasting effects would be, and so forth. The record of the proceeding makes it very clear that the opinions of the participating QPs—all presumably acting according to their professional standards— were frequently at great variance with one another on the substantive issues.

The federal process resulted in the federal Minister of Environment's determination that the identified effects were not justifiable in the circumstances and, consequently, the Prosperity mine proposal was rejected.

That then stimulated the proponent to revise its proposal into a redesigned project called New Prosperity. In November of 2011 the federal minister announced the creation of a second federal panel to assess the new project. The Province declined to assess it, presumably because it had already issued an approval for the previous version of the project.

Taseko submitted its new environmental impact statement in September, 2012. In Taseko's new plan Fish Lake would not be emptied and used for the placement of mine wastes—rather, these would now be placed in constructed waste storage areas upstream from Fish Lake. However, over time Fish Lake water quality would suffer from poor quality drainage from the upstream storage areas for tailings and wasterock such that a water treatment process would be required in perpetuity to keep the lake water usable for fish.

All QPs, including those for the company, agreed that water quality in Fish Lake would suffer over the long-term from drainage originating up-gradient from the stored mine wastes. Where opinion diverged concerned the rate of the seepage and the efficacy of the proposed plans to permanently recirculate and treat lake water. Here, opinions of the QPs differed widely.

NRCan questioned the accuracy of the seepage modeling work done by the proponent's QPs as described in the EIS, identifying…

> "…deficiencies with both of Taseko's models, the data upon which they were based, Taseko's proposal to rely on adding estimates from both models, and Taseko's proposed mitigation measures."[4]

At NRCan's suggestion the Panel requested that Taseko redo its groundwater model to address the identified deficiencies. Taseko declined, so at the Panel's request NRCan then remodeled the seepage flow, returning an estimated rate of seepage from the tailings impoundment to be an order of magnitude greater than the proponent's estimate.

In its conclusions the Panel accepted the higher estimates advanced by NRCan, determining that Taseko had underestimated the volume of tailings water seepage leaving the storage facility, thereby resulting in "potentially higher loading of contaminants in the receiving environment." [5]

One further example of the wide gulf in QP views in the New Prosperity case makes the point. Here is an audio link to an eloquent 15-minute testimony by Dr. John Stockner of DFO addressing the New Prosperity panel about the quality of the work done by the proponent's QPs, and explaining what will eventually happen to Fish Lake if the mine is built:

https://www.dropbox.com/s/lkuhlfa327gfipt/DrJohnStockner.wav?dl=0

My objective in providing these examples here is to demonstrate the fallacy of the fundamental premise on which the case for professional reliance rests. Simply put, the presumption is not true that QPs acting alone can be uniformly relied upon by regulators to provide consistent, coherent and rigourous technical direction on the environmental management aspects of industrial resource activities.

The two federal panels established for Taseko's projects were successful in stopping what they concluded to be environmentally harmful projects because the QPs working for various intervenors had a relatively unfettered opportunity to question and counter the information put forward by the proponent's QPs. Such opportunities do not readily arise under a professional reliance system.

Without substantive evidence that can clearly demonstrate its effectiveness, the concept of professional reliance should be rejected as a basis for regulation of the natural resources sector (in its broadest interpretation). Past governments have failed to provide such evidence, and the record now seems to indicate that what evidence exists points in the opposite direction.

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[4] 2017 12 05 Judicial Review Judgement Taseko v Panel T-1977-13. p.8

[5] as above. p.13

The proper course now for government should be to dispense generally with the PR model and return to a strengthened regulatory and scientific expertise housed within the civil service. The concept of charging proponents the costs of major and/or non-routine reviews or regulatory actions could also be considered as a means of minimizing or compensating government costs if that is an issue.

The long-term impact of maintaining the present course is likely to be an overall permanent impairment of environmental quality in BC.

Respectfully submitted,

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