Date: **January 18, 2018**
To: **Mark Haddock**
From: **Sean Hern**
Re: **Review of Professional Reliance Model in British Columbia**

I. Introduction

1. I am a partner at the law firm Farris, Vaughan, Wills & Murphy LLP. Kevin Smith is an associate of mine at the firm who has kindly assisted with this submission. My practice is focused on administrative law and civil litigation, and in my work I have encountered and observed the professional reliance model on many occasions, whether advocating on behalf of private applicants or for statutory decision makers. Of particular relevance to this submission is the work I have done as counsel for the Shawnigan Residents Association in its opposition to a permit that was issued in August 2013 under s. 14 of the *Environmental Management Act* authorizing the discharge of 5 million tons of contaminated soil over 50 years in a quarry near Shawnigan Lake. I understand the Shawnigan case is one of two "test cases" for the purposes of your review. I will therefore begin this submission by summarizing the events the Shawnigan case and will then provide you with my perspective on what changes could be made to the professional reliance model so that it better serves the public interest.

2. This submission is made on my own behalf and is not made on behalf of my law firm or my clients. In my comments about suggested changes, I will focus on engineers and geoscientists in the context of Ministry of Environment authorizations and regulatory oversight, and leave you to extrapolate into other contexts as appropriate. Where I refer to "engineers", this should be understood to refer to engineers as well as geoscientists, hydrogeologists, and other professionals regulated by the Association of Professional Engineers and Geoscientists ("APEG").

II. Summary of Relevant Events in the Shawnigan Case

3. The Shawnigan case was a large one and spanned several years, so if you have any questions about its details, or wish to review any of the evidence or other

supporting records, please let me know.[1] For the purposes of this submission, I think the salient events in the Shawnigan experience are as follows:

a) In 2010, a property known in the litigation as Lot 21, located at 460 Stebbings Road in the Shawnigan Lake watershed, was owned by 0742484 B.C. Ltd. and was used as a "fill site" for non-contaminated soil that had been brought from development locations elsewhere and deposited for a fee. A huge amount of soil had been dumped on the property. Immediately adjacent to the west is Lot 21, a property owned by a related company named Cobble Hill Holdings Ltd. and on it a rock quarry was in operation. Another related company called South Island Aggregates Ltd. operated both the quarry and the fill site, and the principals of the company, Michael Kelly and Martin Block, were also the principals of the companies that owned the lands. I'll refer to the three closely related companies as "CHH".

b) In 2010, CHH consulted a small engineering and geosciences firm called Active Earth Engineering Ltd. ("Active Earth") about how to deal with some contaminated soil that had been dumped on Lot 21.[2]

c) In the course of the consulting work over the contaminated soil, CHH and engineers from Active Earth began discussing a business idea: rather than remediate the quarry by filling it in with clean soil, as was required by the mining permit, they could seek the necessary permissions to operate a contaminated soil landfill at the quarry (the "Landfill"). Filling in the mined out parts of the quarry with contaminated soil would allow them to make significantly more money than filling it with clean soil.

d) CHH agreed that the engineers should start investigating the viability of the obtaining a waste discharge permit for the Landfill but within a few months it was recognized that the engineering and consulting work required would cost more than CHH could afford.

e) An agreement was then proposed to form a partnership or joint venture whereby CHH and participating engineers from Active Earth (the "Engineers")[3] would together invest the time and money for the permit application and if successful

[1] Many (but not all) of the pleadings and affidavits are posted in the "legal archive" of the Shawnigan Residents Association's website at http://www.thesra.ca/about-the-sra/legal-action-archive

[2] An event which is the subject of ongoing litigation.

[3] Matt Pye, David Kneale, David Mitchell and Jeff Taylor

would jointly own the resulting permit and share the profits of the Landfill. The details of the agreement between these parties developed over time, but throughout the period of the site investigation and permit application, the understanding between the Engineers and CHH was that it was a jointly pursued business opportunity from which the Engineers would share 50-50 in the significant profits expected from the Landfill.[4]

f) The application for the permit to discharge contaminated soil in the quarry required a comprehensive Technical Assessment Report to be completed by qualified professionals and a public consultation process to be undertaken. CHH appointed the Engineers to prepare the Technical Assessment Report and lead the consultation process.

g) Decision-making under the *Environmental Management Act* in relation to the application was delegated by the Director, Waste Management, to Ministry of Environment employee Hubert Bunce (the "Delegate"). The Delegate had no expertise in issues of hydrogeology or contaminated waste.

h) The Engineers did not disclose to the Ministry of Environment that they were equity participants in the business of which they were providing an opinion about the suitability of the site for a Landfill and about the appropriateness and sufficiency of the engineered works they had designed to contain the contaminants from leaching and migrating off site.[5]

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[4] This evidence is comprehensive in the court record and I am happy to provide it if you would like to review it. The court described the evidence as "overwhelming" at paragraph 136 of *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)*, 2017 BCSC 107 and highlighted some parts of it.

[5] Recently, some statements were made in disciplinary proceedings involving the Engineers to the effect that in 2010 the Engineers told the Delegate verbally that they "might" take an equity interest in the project, and that the Delegate did not express any concerns about that because he believed it was not a relevant consideration for him to have. The dubious veracity of this new recollection is discussed below in paragraph (y), but in any event it only goes so far: the Engineers purportedly mentioned to the Delegate only that they "might" participate in the project and there was apparently no follow-up communication to inform the Delegate that they had followed through and had in fact taken an equity interest in the project. Their equity interest was never disclosed in writing and remained hidden from the public and government authorities until a signed copy of a secret agreement between the Engineers and CHH was anonymously disclosed in July 2014, as discussed below.

i) After submitting a Technical Assessment Report in which they opined that the quarry site was "ideal" for housing 5 million tons of contaminated soil, the Engineers led the public consultation activities on behalf of CHH and to that end attended meetings, made presentations, responded to questions and correspondence from the public and other government and health authorities, and completed a report on public consultation for the Delegate. At no time was the public informed that the Engineers had an equity interest in the Landfill about which they were giving supposedly independent assurances regarding the suitability of the site and the design of the engineered works. The aggressive language used in many of the Engineers' responses to public concerns and the contents of their public consultation report to the Delegate reporting on the level of public support for the project were, in retrospect, consistent with that of professional consultants who had a significant ownership interest in the outcome of the application.[6]

j) Internal emails among the Engineers and the principals of CHH which subsequently came to light are also instructive as they show the invested, rather than objective, approach the Engineers were taking to obtain the permit. The tone and language used in relation to the concerns of the public and of any other professionals who raised questions about the Engineers' work and conclusions is surprising, to put it mildly.

k) The Delegate consulted to a limited degree with internal hydrogeologists at the Ministry of Environment. This was consistent with the professional reliance model – that the primary work is done by the private sector engineers. Upon a request from a statutory decision maker, in-house government scientists will review particular aspects of a Technical Assessment Report, but will not do their own field work or conduct their own testing. It is a peer review function, often carried out with limited time and resources due to the volume of work.

l) In this instance, hydrogeology, the study of the movement of water through the ground, was the critical scientific field engaged, because the question was whether the contaminants would remain safely contained in the quarry for centuries to come, and not leach and be distributed into the ground water flowing through and under the site. None of the three in-house government hydrogeologists who were asked to look at issues relating to the Technical Assessment Report thought that enough field work had been done to draw the conclusions that the Engineers had

[6] If you wish to be directed to this material, please ask me, as it is readily available in the publicly filed exhibits in the legal proceedings.

drawn. They recommended that additional holes be drilled to better understand the hydrogeology of the site and that a number of additional tests be conducted before any permit was issued.

m) The Delegate, however, was being pressed by CHH and the Engineers as to when the permit was being issued, and he responded by disregarding the government hydrogeologists' advice and issuing the permit on August 21 2013.[7] The Delegate did stipulate that two more test holes were to be drilled in order to confirm the that the site was in fact a virtually impermeable layer of rock (as the Engineers had submitted in their Technical Assessment Report); however, by first issuing the permit and only requiring investigation after the fact, the Delegate had tied his hands because the legislation did not allow him to revoke or cancel the permit once issued. Only the Minister could do that.

n) At the end of August and in early September 2013, the Shawnigan Residents Association, the Cowichan Valley Regional District and three individuals appealed to the Environmental Appeal Board ("EAB") seeking to overturn the Delegate's decision to issue the permit. During that period, and throughout the fall, the Engineers and CHH were working together as business partners to complete the engineered works for the Landfill and open it for business. The Engineers' role in the joint venture was still unknown to the public or to government officials, and so as the Engineers worked on the business side, developing business plans and strategizing over potential customers, the Engineers continued to submit technical reports to the Delegate on which he was relying to determine whether the terms of the permit were being met such that the Landfill could begin operating.

o) Among the expert advice being tendered to the Delegate was a report on the results from the two additional drill cores, which the Engineers opined were sufficiently consistent with the other drill core results that their assertion of an impermeable layer of rock beneath the site remained valid. In fact, those drill cores revealed a very different picture as they had intercepted some fractures in the rock that were permeable and water bearing, consistent with the fractured bedrock hydrogeology that is the norm in that region, and which is generally unsuitable for a landfill due to the propensity for water running through the fractures to transport contaminants off-site.

p) In November, 2013, the EAB imposed a stay on dumping contaminated soils at the Landfill while the appeal proceeded. As was learned later, this created a strain on

[7] Permit 105809 authorizing waste and effluent discharge

the business relationship of the Engineers and the principals of CHH due to the combination of construction and legal fees without a revenue stream. The stay was modified in January 2014, but only to allow a limited number of truckloads of soil contaminated with salt to be deposited in the Landfill.

q) The EAB hearing commenced in March 2014 and heard evidence from independent hydrogeologists[8] called by the appellants who opined that the evidence cited in support of an impermeable layer of rock beneath the site was insufficient, internally inconsistent and inconsistent with the hydrogeology normally found in the area. They opined that the permit should not have been issued based on the information available to that point in time. The Engineers were not called to testify about their opinions or design. In retrospect, it appears highly likely that their interest in not being called as witnesses was to protect the secret business relationship they had with CHH. No documents had been disclosed by CHH and no testimony was given that revealed the equity interest of the Engineers. Instead, the principal of CHH who testified misled the EAB by asserting that an ordinary fee-for-service relationship was in place with the Engineers.[9] The appellants were of the view that, with the Engineers not having been called to testify or to put their reports in evidence, there was no evidence tendered to support the Landfill as required for expert evidence under the EAB's rules.

r) The EAB hearing concluded at the end of July 2014. Notwithstanding the expert evidence marshaled against the permit's issuance, the EAB, having employed processes that were later determined by the BC Supreme Court to have been procedurally unfair, dismissed the appeals on March 20, 2015. CHH quickly began preparing to operate the Landfill. Unknown to anyone at the time, with the permit having been issued, CHH was endeavouring to cut the Engineers out of the enterprise by taking the position that the Engineers hadn't sufficiently contributed to the joint venture and as a result they were no longer equity participants. Lawyers for CHH and the Engineers exchanged letters whereby the Engineers demanded CHH comply with a February 14, 2013 signed written agreement reflecting their 50% interest and cited CHH for default.

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[8] Including Dennis Lowen from Lowen Hydrogeology Consulting Inc., and Chad Petersmeyer and Bruce Ingimundson from Thurber Engineering.

[9] As was found by the BC Supreme Court at paragraphs 169-172 of *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)*, 2017 BCSC 107

s) On May 19, 2015, the Shawnigan Residents Association filed an Application for Judicial Review of the EAB's decision on grounds that the EAB's process was unfair and that the decision was substantively unreasonable.

t) Then, on July 6, 2015, a copy of the secret February 14, 2013 agreement between the Engineers and CHH was delivered by an anonymous source to the Shawnigan Residents Association. By this time, the Landfill was operational and thousands of tons of contaminated soil were being deposited in the quarry.

u) Starting July 7, 2015, the Shawnigan Residents Association brought a series of court applications for disclosure of records and correspondence relating to the equity interest of the Engineers in the Landfill, and cross-examined one of the Engineers and the two principals from CHH on affidavits they had filed which denied that the February 14, 2013 agreement had been formed or had effect.

v) Armed with the new evidence derived from the disclosure applications, in November 2015, the Shawnigan Residents Association amended their Application for Judicial Review to claim that the EAB had been misled and its decision upholding the permit ought to be overturned for that reason as well. Meanwhile, CHH was dumping contaminated soil into the Landfill at an accelerated rate and protesters at the site were being arrested.

w) The judicial review was heard in January and February 2016. Because of other commitments and hearings, the judge who heard the application reserved his decision until January 24, 2017. The court held that the process by which expert evidence had been admitted by the EAB was unfair and that the EAB decision upholding the permit had to be set aside. The court also found that the EAB had been misled about the role that the Engineers had in the Landfill. The court found that the evidence of the Engineers having an equity interest in the Landfill was overwhelming and the testimony of the principal of CHH before the EAB was not truthful.

x) Meanwhile, the Minister of Environment had grown increasingly dissatisfied with the manner in which CHH was operating the Landfill and its failure to comply with requirements stipulated by the Minister. Three days after the court's judgment was issued, the Minister suspended and then, on February 23, cancelled the permit.

y) During the process before the court, some concerned individuals filed complaints with APEG about the conduct of the Engineers and their conflict of interest. Those complaints were dismissed summarily in August 2017 by an APEG "Investigation

> Committee" (a large volunteer committee of APEG members tasked with screening complaints) on the basis of dubious and vague statements from the by-then-retired Delegate to the effect that that he recalled having been told in 2010, in a brief hallway conversation, that the Engineers "might" take an equity position in the Landfill. That recollection is materially inconsistent with the evidence led before the court. Moreover, it is astonishing that it would not have been recalled earlier given that it was essentially exculpatory of a serious allegation made by the Shawnigan Residents Association – that the Engineers had failed to disclose their conflict of interest to the Ministry of Environment. How the parties and witnesses only "remembered" in 2017 that there had in fact been a disclosure in 2010 of the key piece of information which the Engineers were being heavily criticized for *not* disclosing has not been explained and the Investigation Committee did not think to ask. The APEG Investigation Committee also inexplicably found that there was no agreement between the Engineers and Landfill Companies for a 50-50 interest, which was directly contrary to the court's finding that the evidence of such an agreement was "overwhelming", and the Investigation Committee had no new evidence on the subject. These findings of the Investigation Committee were made without even consulting with the individual complainants or the Shawnigan Residents Association, who could have taken APEG through the detailed evidence with which they were so familiar. The decision of the APEG Investigation Committee is accordingly deeply disturbing to anyone familiar with the facts of this case, and its handling of the discipline complaints seriously undermines public trust in that organization.[10]

4. Setting aside concerns about the APEG Investigation Committee process, the history above illustrates problematic features of the professional reliance model more broadly. Taken at its highest, even if one suspends disbelief and accepts that there was a reasonable factual basis for APEG to find that the Engineers had told the Delegate that they might take an equity interest in the Landfill, and that the Delegate had no concerns about this, it still demonstrates that APEG and its Code of Ethics are unsatisfactory and ineffective as safeguards to prevent engineers from rendering opinions when in a conflict of interest. Instead, it is the government that must establish the parameters for appropriate and effective conduct by engineers and other professionals who are being relied upon for their professional advice. It is therefore critically important that changes are made to the government's professional reliance model.

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[10] An application for judicial review of APEG's decision has been filed by two of the complainants.

III. Changes that Ought to be Made to the Professional Reliance Model

Introduction

5. In my view, the best way to revise the professional reliance model so that it more effectively assists statutory decision makers and regulators (who I will refer to here as the "Director"), and consequently the public, is to:

A. re-align the professional duties so that the primary substantive duty is to provide sound professional advice to the Director, shifting that primary duty away from the private party applying for a permit or seeking regulatory approval;

B. define and enforce conflict of interest rules for professionals providing reports and advice to the Director; and

C. entrust the Director to maintain lists of "approved professionals" to ensure that only professionals with requisite experience and integrity are relied upon by the Director in making decisions under the relevant legislation.

6. In APEG's Code of Ethics (the "Code"),[11] the duties owed by a professional engineer are already a combination of duties expressed as follows:

> Members and licensees shall … uphold the values of truth, honesty and trustworthiness and safeguard human life and welfare and the environment.

These "basic tenets" are then broken down into 10 principles including:

> 1) Hold paramount the safety, health and welfare of the public, the protection of the environment and promote health and safety within the workplace; […]
>
> 4) Act as faithful agents of their clients or employers, maintain confidentiality and avoid a conflict of interest but, where such conflict arises, fully disclose the circumstances without delay to the employer or client; […]
>
> 8) Present clearly to employers and clients the possible consequences if professional decisions or judgments are overruled or disregarded;

[11] Available at https://www.egbc.ca/getmedia/e8d858f5-e175-4536-8834-34a383671c13/APEGBC-Code-of-Ethics.pdf.aspx

> 9) Report to their association or other appropriate agencies any hazardous, illegal or unethical professional decisions or practices by members, licensees or others;

7. On their face, these principles appear sound, but in practice, there is often a tension between (a) the client's interests in achieving its business objectives and obtaining, at the least cost to its business, the approvals it needs from statutory decision-makers; (b) the professional's interests in being hired in the future by private sector parties on the basis that they are perceived to be capable of obtaining results for their clients; and (c) the professional's obligation to be a "faithful agent" of the client or employer and to maintain confidentiality.

8. In the Shawnigan case, in response to the argument the Shawnigan Residents Association advanced that the Engineers were in a conflict of interest, CHH submitted that as "qualified professionals", there was no obligation on the Engineers to disclose their financial interest because the statutory decision maker was not the client, but was rather a third party, as was the public. CHH argued as follows:

> The applicable Code of Ethics for professional engineers does not require disclosure of business relationships of any kind to third parties, even third parties relying on the professional's work. It requires disclosure of conflicts of interest to clients and employers. That is, the role of the qualified professional on a Sec. 14 application does not require classic independence. A qualified professional may be an owner, a co-venturer or otherwise interested person. The statutory process does not require more.[12]

9. In support of that submission, CHH cited discipline decisions from APEG for 13 years prior and noted that there was no decision from APEG that supported the Shawnigan Residents Association's position, and rather asserted there were two decisions that undermined it.[13]

10. CHH also drew a distinction between "qualified professionals" and the requirements for "approved professionals" under Protocol #6 for Contaminated Sites, which requires an "arm's length" Contaminated Sites Approved Professionals ("CSAPs")[14] and CHH submitted that it was entirely appropriate for the Engineers to serve as "advocates for the permit" on behalf of the client, CHH.[15] CHH also argued that

[12] See CHH Submission, Appendix E, paras 43 and 49
[13] CHH Main Submission, paras 108-117
[14] CHH Submission, Appendix E, paras 5-23
[15] CHH Submission, Appendix E, para 27 ad

"the essential existence of a conflict" had been disclosed because, while CHH had not disclosed the Engineers' ownership interest, CHH had disclosed that there was approximately half a million dollars in fees owing to Active Earth, which (it was argued) was tantamount to disclosing the conflict.[16]

11. While the court did not agree with many of those arguments, they demonstrate the weaknesses in the current structure of relationships that are established by the Code and the government's legislative regime, policies and protocols. In light of APEG's subsequent dismissal of the disciplinary complaints against the Engineers, it is clear that changes need to be made.

A. Recommendation 1: Re-alignment of Duties

12. My first recommendation is that legislation or regulations be enacted requiring that, when an engineer provides a report in support of an application or otherwise tenders advice or submissions to the Director about a project, the engineer has a primary duty to inform the Director about the risks involved in the proposed project and the ability of engineered works to mitigate them. The engineer should not be "an advocate" for the proposed project or approval, but rather serve as an objective advisor with paramount duties to the Director.[17] Consistent with that duty there should be no scope for the engineer to hold back confidential information from the Director that would be relevant to the Director's decision in the public interest. Accordingly, while the engineer could maintain confidences with the private party client about matters unrelated to the Director's work (for example, payment of the engineer's fee or information about the client's other businesses or plans) and could consult with the private party in confidence before an application is made to the Director, once the decision to go forward with that application is made, "client confidentiality" concerns would not impact or interfere with the Director receiving all information required to make sound decisions.

13. I am not here proposing that the Director become characterized as "the client": that term is not particularly clear, and means different things to different professionals. There will inevitably be a variety of obligations that continue to be part of the

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[16] CHH Submission, Appendix E, paras 50 and 55(e)

[17] Analogizing to courtroom processes, the engineer should be in a role like that of a neutral court-appointed expert because in an application for a permit or other authorization, there is no adversarial process giving the Director a balanced view with the benefit of competing expert opinions and arguments.

professional's "client relationship", such as a duty of confidentiality to parties other than the Director, duties to provide services to a reasonable professional standard, and duties to bill fairly and appropriately. Instead, I think the Director should simply require a consulting engineer hired by a private party and the private party applicant to sign a document certifying that they each understand and accept that the primary professional obligation of the engineer providing information to the Director is to inform and advise the Director, and that the engineer must not withhold any relevant information or professional advice from the Director on the basis of the engineer's contractual obligations of confidentiality to the private party. Where there are concerns on the part of the private party about disclosing commercially or otherwise sensitive information to the Director, the legislator could consider imposing an implied undertaking that such material, if identified as sensitive by the submitting party, not be used or disclosed other than for the purposes of the application.

14. Given that the Director is to make decisions that are in the public interest and protect the environment, the re-orientation described above can fairly be characterized as an extension of the engineer's paramount obligation to the public and environment that is already present in the Code.

15. I anticipate that the realignment of duties as recommended above would increase the value of the engineer's advice and the comfort level of the Director in relying on it. However, the Director would not, of course, be required to accept the engineer's opinions and in addition to consulting with professionals who are employed directly by the government, in my view the Director should have the discretion to require that a second opinion be obtained by the applicant from another private sector engineer, perhaps chosen by the applicant from a list of three names supplied by the Director. This would increase the costs of an application, and should be used with caution by the Director, but ought to be an option available to ensure statutory decisions are on a solid footing.

B. Recommendation 2: Defining and Reporting Conflicts

16. A redefinition of the rules around conflicts of interest for Qualified Professionals flows from the realignment of duties proposed above. The Shawnigan case demonstrates that the current lack of clarity in this regard is untenable. Both engineers advising the Director and applicants ought to have a positive duty to inform the Director in writing of any conflict or potential conflict and have it cleared in a written decision by the Director that is made publicly available. This positive duty should be addressed by having engineers and applicants fill out a form in every instance certifying whether they

have a financial, business or social relationship that could be reasonably perceived to give rise to a real or potential conflict of interest, or whether the engineers will be impacted financially from the granting of the authorization requested of the Director. The form should include a duty on the engineers and applicants to update the form with the Director if a conflict or potential conflict emerges in the course of the engagement. In the majority of cases, and particularly for any sizeable project with significant environmental risks, engineers should not be allowed to provide advice to the Director when an actual or potential conflict of interest is present.

17. The reason for having the applicants file such a form as well as the engineers is that it would become a basis for the Director to suspend or cancel an authorization granted to a party who misrepresented whether their engineers were in a conflict of interest.

C. Recommendation 3: Approved Professionals Registers

18. In my view, the Director ought to maintain a register of approved professionals from which the private parties can select an engineer for their particular proposed project. Lists of more experienced and seasoned professionals could be kept for projects involving greater complexity and/or risk, and broader lists could be maintained for more straightforward projects involving less risk to the environment and public. Where a professional is found to have been negligent or to have breached the Code or other professional duties, the government could remove or temporarily suspend that individual from one or more registers.

19. A register of approved professionals aligns with the concept of the engineer's primary duties being owed to the Director because the Director needs to be able to trust the engineer. This approach is already in use in the "approved professionals" designation in the contaminated sites regime where a heightened degree of risk to the public and the environment is present.

20. Some might suggest that the re-alignment of the relationship between engineers and the Director could go further and require the Director's staff to actually select the engineer or engineering firm to be used, instead of the applicant choosing which professional to work with. This would result in a shift of focus for the business of private sector engineering such that the primary marketing and working relationship would be between the professional and the Director, with the private party being something of a bystander who simply advises what authorization they need and pays the bill for the engineering work product. That structure would result in a higher level of protection from the potential biases of the engineer toward the private party's

objectives, but in my view it should be a policy option to keep under review pending an assessment of how the realignment of duties recommended above is working in practice. Adding a regulator-selection model would, I think, have significant ramifications on the business side of engineering work. It could also potentially lead to some liability exposure for the government if they select a professional who then does negligent work for the client. Such exposure could be alleviated by statute, but in the first instance, I think that the re-alignment of duties and clarification of conflicts rules as recommended above are worth implementing, then subsequently reviewing and assessing to see where further protections are required.

D. Minimizing Direct Contact between Decision Makers and Applicants

21. In the Shawnigan case, there were unverified reports that a business practice of CHH was to build direct relationships with statutory decision makers and regulators in order to do what was characterized as attempting to "pal them out", meaning become "pals" and thereby make it difficult for the decision maker, in the face of the friendly social relations, to make decisions or demands against CHH's interests.

22. In my view, the decision making and regulatory process should be insulated, to the extent reasonable in the circumstances, from personal contact, relationships and social pressures. This will assist in ensuring that decisions are made independently and on their merits. The proposed clarification of conflicts rules above (including requiring disclosure of "financial, business, or social relationships" that could give rise to a conflict) should help in this respect.

E. Application to the Test Cases

23. Although a hypothetical scenario, one might consider briefly how the recommendations above, if implemented, would have worked in the context of the Shawnigan case. Assuming they were on the register of approved professionals for a significant proposed project like the Landfill, the Engineers and CHH would have had to file and update a conflict of interest form informing the Delegate in writing of the Engineers' financial interest in the project. When such notice was received, given that the proposed Landfill was a large project with significant consequences if it failed, the Delegate's policies should have precluded the Engineers from having a role in the preparation of the Technical Assessment Report or application for the permit. If the Engineers and CHH falsely filled out the conflict of interest form and the Engineers were later revealed to have had an undisclosed interest in the project, they would be in breach of their duties to the Director, the resulting permit would be cancelled, and the

Engineers would be removed from the list of acceptable professionals for future jobs involving government authorizations.

24. I do not have a detailed understanding of the Mount Polley case, which I understand is the other test case for the purposes of your review. If there are allegations that the engineers who advised about the construction and expansion of the tailings dam knew things that the Director ought to have been alerted to, the recommended changes above would in all likelihood have helped. If the engineers were providing reports to the Director, their primary duty would have been to inform the Director of relevant information and therefore if the engineers had (a) made observations that gave them concerns, (b) made recommendations to the owners of the mine that were not being followed in a timely way, or (c) learned information from employees that gave rise to concerns, the engineers would have been duty-bound to disclose that information to the Director. It would not have been acceptable to simply tell the mine owners to inform the Director and no principle of client confidentiality or loyalty could stand in the way of the engineers reporting the concerns. Even where there was a close relationship between engineers and the client from years of working together, the risk to the engineers' careers from non-disclosure of problems that later resulted in an incident of environmental harm would, I expect, have been sufficient to motivate the engineers to disclose the information to the Director and raise the alarm. Again, I am not suggesting this was in fact the problem in the case of Mt. Polley, but I am using hypothetical facts as a means of illustration.

25. In my view the above-noted recommendations accord with the public interest, and to achieve them requires relatively little in the way of government expenditure. All that is required are some legislative, regulatory, and policy amendments followed by some education to interested parties about the re-configured relationship between the professionals and government and how it ought to function.

26. I am grateful for the opportunity to make submissions to your review, and I would be happy to clarify or discuss any of the above points should it assist.

Respectfully Submitted,

Sean Hern,
with the assistance of Kevin Smith