

Professional Reliance in British Columbia's Environmental Regulations

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What is Professional Reliance?

- BC Government: Cross-ministry Working Group Definition

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

What is Professional Reliance?

- We distinguished between 3 main types of PR:
 1. Common Reliance
 2. Information / Design Reliance
 3. Decision-making Reliance
- The term is also commonly used to describe political direction to extend deference to industry

Common Reliance

- What we all do when relying on expertise
- Some regulations require certain activities to be carried out by “qualified persons” who have received training in a given field
- Generally, this does not devolve decision-making authority to professionals, and government maintains its role in providing regulatory oversight

Information / Design Reliance

- Where a regulation requires preparation of information, plans or designs by a specified professional
- This serves a quality control function
- Government may or may not maintain its approval function
- Examples include:
 - Dam safety reports prepared by engineers, but approved by dam safety officer
 - Design of municipal wastewater facilities under Environmental Management Act's (EMA) *Municipal Wastewater Regulation*
 - *Mushroom Composting Regulation* – allows exemption from EMA if agrologist or engineer “reviews and confirms” pollution prevention plan
- Sometimes the involvement of the professional is mandated by the definition of “professional practice” in legislation
 - E.g. Forest stewardship plans prepared by foresters under FRPA

Decision-Making Reliance

- Where the professional function substitutes for a decision typically made by government
- Many examples:
 - Exemptions from the pollution provisions under various Codes of Practice under the *Environmental Management Act* if professional provides a certain function
 - Certification of compliance with Forest and Range Practices Act by persons with “prescribed qualifications” (i.e. agrologists, biologists, engineers or foresters).
 - Riparian area development if a “qualified environment professional” certifies there will be no harmful alteration, disruption or destruction of natural features that support fish (*Riparian Areas Regulation*)

Prof'l Reliance in Regulations

27 regulatory regimes using a form of professional reliance

- Contaminated sites
- Riparian development
- Sewage systems
- Changes in/about stream
- Certification that forestry plans comply with requirements
- Pesticides
- Greenhouse gas reduction plans
- Use of industrial byproducts as soil amendment
- Landfills for wood-process industry
- Use of industrial wood residue in foundations
- Waste discharges (coalbed gas, poultry slaughter/processing industry)
- Manure management
- Biomedical waste
- Organic matter composting
- Storm water discharge for petroleum storage
- Dam safety reviews
- Mining operations and engineering reports
- Vehicle dismantlers
- Vehicle air conditioners & firefighting equipment
- Water wells
- Water supply systems

Prof'l Reliance in Authorizations

- In addition to regulations, authorizations may incorporate professional reliance
- With or without statutory authority
- Examples:
 - Water licences
 - Environmental assessment certificates
 - Mines permits

Other Levels of Government

- Professional reliance is becoming more common in federal government regulation of the environment
- It is also extensively used by local governments, in bylaws and permitting
- But the focus of our report is provincial

What we Heard from Professionals

- Professional reliance is just deregulation and gives industry too much control over public land and resources
- Leads to “expert shopping”
- Conflicts of interest clearly exist, but aren’t being addressed
- There is a lack of checks and balances in the system
- There is a loss of expertise within government
- Lack of confidence in government monitoring and enforcement, which is need for PR regimes
- There are problems with independent monitoring
- Lack of confidence in professional disciplinary processes
- Loss of stewardship responsibility within agencies

What we Heard

- Reduced public involvement in resource management
- Professional reliance is leading to greater land use conflicts
- Government agencies don't seem to know what is happening in the field
- Cuts to agency staffing levels are having a real impact (both provincially and federally)
- PR leads to considerable business and peer pressure (esp. for consultants)
- There is undue filtering of information by proponents, compromising quality of information reported
- Deregulation has created lots of "grey areas"

What we Heard

- Inconsistent standards across industries
- There are big differences in proponent approaches to environmental risk
- There is so much development that inexperienced crews from out of province are being hired who don't know how to operate around fish streams, mountainous terrain, etc.
- Inexperienced junior staff are hired by consultants to do work that requires training, but they're not getting it because it costs \$\$.
- There is a broad failure to apply adaptive management
- We need professional reliance to work, but better.

A Threshold Question: When is PR Appropriate?

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

A Threshold Question: When is PR Appropriate?

Factors to Consider:

1. Environmental, Health and Safety Risks
2. Risk to Third Party Interests
3. Decisions Involving Trade-offs
4. Values vs. Technical Expertise
5. Latitude for Discretion
6. Scientific Certainty
7. Conflicts of Interest
8. Essential Government Functions
9. Availability of Alternatives to Professional Reliance

Where PR is Appropriate

- We suggest a [10 criteria](#) for regulatory “best practices” needed to maintain public confidence in resource management and environmental protection.
 1. Clarity on who is qualified to perform professional reliance functions
 2. Clarity on professional functions, responsibilities and objectives
 3. Role reserved for government
 4. Formal procedures and clear rules for certification
 5. Conflict of interest, self-interest and independence

Where PR is Appropriate

6. Record keeping, disclosure and transparency
7. Civil liability, insurance & bonding
8. Duty to report non-compliance
9. Auditing and reviews of professional work product
10. Monitoring, compliance and enforcement

1. Clarity on Who is Qualified

Issues:

- Some regulations are overly broad and result in professionals “self-determining” that they are qualified:
- Some regulations name numerous possible professions, without tailoring qualifications to a specific function (e.g. FRPA)
- Given the breadth of practices areas within most professions, even naming a single profession doesn’t ensure all members will be qualified

"qualified professional", in relation to a duty or function under this code, means an individual who

(a) is registered in British Columbia with a professional organization, is acting under that organization's code of ethics and is subject to disciplinary action by that organization, and

(b) through suitable education, experience, accreditation and knowledge, may reasonably be relied on to provide advice within his or her area of expertise, which area of expertise is applicable to the duty or function;

– From Code of Practice under the *Environmental Management Act*

1. Clarity on Who is Qualified

Some Solutions:

1. Prescribe greater detail as to who is qualified to perform a specific professional function;
2. Name specialization within a profession;
3. Require professional to be acceptable to regulatory agency;
4. Require membership in society or association with focused expertise and dedicated purpose (e.g. Contaminated Sites Approved Professionals society)
5. Have regulator maintain a roster of qualified professionals
6. Provide detailed policy, procedures and adjudication method (as MOTI does for highways under its “Registration, Identification, Selection and Performance Evaluation” system)
7. Specify training program

2. Clarity on the Professional Function, Responsibility, and Objectives

- Also need to be clear on what the professional's function is, and the management objective for performing that function

Example from *Water Regulation*:

- “provided that the storm sewer outfall is designed by a professional engineer, and constructed, maintained and used so as not to obstruct the flow of water in the stream or to cause erosion or scour in the stream”
- Many regulations do not specify the environmental objective, or have overly broad objectives

Example from *Forest Planning & Practices Regulation*

- The objective set by government for wildlife and biodiversity at the landscape level is, without unduly reducing the supply of timber from British Columbia's forests and to the extent practicable, to design areas on which timber harvesting is to be carried out that resemble, both spatially and temporally, the patterns of natural disturbance that occur within the landscape.

3. Role reserved for government

Credible professional reliance schemes require government to maintain the following:

- **Authorization role** (e.g. permit, licence, plan approval, etc.)
- **Quality control function** (authority to intervene where a proponent's professional provides an opinion of dubious quality)
- **Gatekeeper function** (over who is qualified to carry out a professional reliance function – relates to #1)

Government has abandoned these roles in some PR regimes:

- E.g. Riparian Areas Regulation, Forest and Range Practices Act

4. Formal procedures for certification

- The professional's content needs to be clearly identified, and not filtered by proponent
- There should be some formality and standardization of professional certifications
- Need to avoid "caveats" and "fine print"
- As the Ombudsperson pointed out in *Striking a Balance*, there needs to be post-development confirmation by the professional that operations were done according to plans, designs, etc.
- There has been disconnect between professional function and what happens on the ground

5. Conflict of Interest

- Given that most professionals are employed or retained by proponent, there is inherent potential for conflict between *duties to the client* and the public interest in environmental protection
- Three issues to be alert to:
 - Conflict of interest
 - Self-interest
 - Professional independence
- PR regimes are a relatively new development and most professional bylaws do not address this adequately.
- See Auditor General's report on verification of emission offsets in *An Audit of Carbon Neutral Government*

6. Records, Disclosure & Transparency

- Not all professions require retention of records
- APEGBC: “One need only review the findings from disasters to understand that poorly kept records can lead to poorly made decisions, and potentially fatal outcomes”
- In PR regimes, there is inherent tension between a professional’s duty of confidentiality to the client and the public interest in transparency
- BC Ombudsperson:
 - “The provision of adequate public information is central to the democratic principles of openness and transparency.
 - Information is a cornerstone of administrative fairness
 - Public information about environmental protection programs allows the public to have confidence that the government is meeting its obligations as a steward of the environment and our province’s natural resources, and contributes to a more informed public discussion.”

7. Liability, Insurance & Bonding

- Government is self-insuring, but professional reliance regimes reduce government's role in planning, approving, etc. and thereby reduce its ability to manage some risks
- Taxpayers should not be left on the hook for the negligence of independent professionals
- The shift from government to professional decision-making raises [public law v. private law](#) liability issues that are not being addressed adequately in the regulatory regimes
- Most professionals do not require liability insurance (only the contaminated sites regime does)
- The forestry regime even provides exemptions from liability for self-declaration that legal obligations are fulfilled

8. Duty to Report Non-Compliance

- A big part of introducing professional reliance regimes is downsizing of government staff
- There are far fewer eyes and ears in the field
- Interviews informed us that it can be very difficult for agency staff to book a vehicle and receive senior manager permission to carry out field visits
- Professional reliance should include duties to report to: a) regulatory agency, and b) professional association.
- There are some duties to report in some professional codes or bylaws, but the rules are inconsistent
- There are also additional bureaucratic hurdles for government staff to make complaints to professional associations

9. Auditing

- There are considerable differences in auditing practice among resource management regimes and the professions
- Some regimes do not have any auditing targets or goals
- Some have them but do not meet them
- One – contaminated sites regime – audits 1 in 8 submissions reviewed by Performance Assurance Committee
- Practices reviews by professional associations occur to varying degrees (including peer review) and are much broader than professional reliance functions
- Practice reviews are also confidential, so it is not clear if or how they can be part of adaptive management framework for PR

10. Monitoring, Compliance & Enforcement

- C & E has always been touted as key “pillar” of professional reliance
- Cohen Commission on Missing Sockeye Salmon – [government’s shift “toward a proponent or professional-reliance model demands a strong emphasis on monitoring.”](#)
- Large cuts to agency staff have led to reduced C & E efforts (see critiques by Cohen Commission and Ombudsperson at pp.76-78 of report).
- Government has no clear monitoring and C & E targets.
- Use of “independent monitors” raises additional issues – needs to be better regulated.

Appendix C – Some Field Issues



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