

PROFESSIONALS: QUALIFIED FOR WHAT ROLE ?

**WE MUST ABOLISH “PROFESSIONAL
RELIANCE” AS A (FAILED) REGULATORY TOOL**



Who's watching ?

Comments submitted to:
Government of British Columbia

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OUR CONCLUSIONS AND RECOMMENTATIONS

1. The ***complete elimination of “professional reliance” as a regulatory “tool”*** should be an immediate and first order of this government. This practice has to stop!
2. Each and every corporation, company, commercial entity, individual, and/ or association that is engaged in the use of or exploitation of public “resources” (land, water, forests, wildlife, fish, and birds) ***must be subject to scrutiny and regulatory oversight by an open, accountable, structured, disciplined and supervised Public Service Ministry.***

BACKGROUND DISCUSSION

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I. “Professional Reliance¹” undermines foundation Principles of Democracy, Fairness, Trust and Science

A significant link between the citizens and decision makers (like the Ministry of Forests, Land and Natural Resource Operations – FLNRO) must be one of cautious trust; that bridge is significantly weakened, and can be almost destroyed, when government delegates regulatory “accountability” to private sector actors like company and corporate employed foresters, biologists, hydrologists, agrologists or geologists. Consequently, where as the public expects its government to manage the public trust – biodiversity and our forest ecosystems – in our best interests, faith in government deteriorates rapidly and significantly, when government abdicates its social, moral and legal responsibility.

The public expects, at least to a degree, that the public service will be an “impartial manager” of public resources. We know that that is optimistic statement, but the basic principle enforcing honesty and impartiality is that the broader the sector of people that a public agency or public servant is accountable to, the greater the pressure to be impartial, and in general, the more likely it is the public agency and individuals behave impartially.

British Columbians have seen environmentally destructive *political* intervention and manipulation to impair public service impartiality - for example, regulatory constraints on environmental protection actions that have been, and are, politically defined as unacceptable if they impact the annual allowable cut (or harvest) by more than 10% ! This kind of political and special interest interference foments a great deal of distrust in the public service, and Ministries like FLNRO, where incapacity to manage based on scientific evidence and conservation principles, is publicly blamed on *both* the Public Service and the Cabinet Ministers that rule in favor of special interests.

“By effectively delegating regulatory authority to the industry itself, the agency’s power and authority is significantly weakened. It might not then be surprising that the agency is slow to challenge its long-held scientific practices. Raising new scientific questions or demanding more information from the industry would presume a position of power and authority, as it risks putting the agency in conflict with the regulated industry” (). Good science, after all, requires sound evidence, solid performance information and independent judgment.

Citizens expect the public service to act in the best interests of the public and society, and in a honest and accountable government, they are able to monitor the activity of the public service, through ministerial annual reports, and by directly asking for results of programs and actions.

¹ A non technical definition of Professional Reliance; The delegation of statutory Public Service authority to non government individuals (the private sector) who, personally, or in concert with their commercial – corporate employers, then make decisions that **they** decide are in the interest of citizens and society.

There is a shadowy second tier to Professional Reliance; the actions of Public Servants who engage in decisions and actions without a clearly defined regulatory structure and independent of clear standards of performance.

These democratic tools and expectations are in serious disrepair in British Columbia after decades of government shifting public responsibility to the private sector, but they don't exist at all for corporations and companies whose employees are granted "professional reliance" privileges.

For those of you who doubt this, try acquiring information on something like the extent of surface road erosion, or culvert effectiveness, or diversions of surface flow by road beds, from a company logging anywhere in the Province.

The injection of a third party – private corporations and their employees and contractors (I'll call them the beneficiaries of "professional reliance") - in the normal or "standard" citizen-public service (government) structure that has characterized democratic management of public lands (no matter how inadequate it has been, or is) for the past half century, **creates a "dead zone"** between the public's "right to know", and the public service who have a statutory obligation to fulfill this "right to know"! That private sector dead zone undermines even this tenuous flow of information by which citizens have tried to monitor the costs and benefits of various options for forest management and use of public lands!

In a judicial review of the legitimacy of a permit to a developer for long term storage of contaminated soil in a residence occupied watershed, a permit issued on the basis of professional reliance, a B.C. Supreme court Justice (Robert Sewell) wrote (at <http://www.courts.gov.bc.ca/jdbtxt/sc/17/01/2017BCSC0107.htm>) ;

"An important element in assessing any technical or scientific opinion is knowing whether the professional producing the opinion has any reason to be biased. The existence of a financial benefit to the Qualified Professional from a particular outcome is a clear example of a reasonable apprehension of bias in the person preparing the opinion." In a media report (Nikiforuk 2017) the decision is said to have "concluded that conflict of interest biased the decision-making process and undermined the integrity of the approval process set out in the province's Environmental Management Act."

These kinds of faulty decisions are widespread in B.C., and have been for decades, even though not often are they able to be challenged by citizens that has become alienated from the regulatory process. There exist numerous examples, one such being Dooling (1989), which expresses the principles of mistrust and doubt that arise when public values and resources are entrusted to private and corporate management. He questions the capacity of corporate forest managers "to responsibly work in the public's interest in non timber values, asking the question, decisions and management "by whom, for whom, for what"? Even back then, he points out (p. 6) "The arguments that favor TFL management of public forest lands over public forest ownership and management may well reflect an occupational bias of those who advocate it rather than a well-supported set of theoretical or empirical findings. The moral: our forests do not have to "go private to be productive."

Most commercial public land users in British Columbia **exploit** "professional reliance" to serve the expectations of private interests who have a long history of chafing at regulatory Public Trust restrictions. While this has led to unmeasured and unreported environmental degradation and economic loss, it also has **serious social**

impacts; it leads to and accelerates citizen disengagement from regulatory and political processes, an outcome damaging to citizens and democracy, but one that reinforces the constant complaints, media attacks, and opposition (the “chafing” mentioned above) from private sector land users to scientific and democratic accountable regulatory process.

Wildlife and habitat management have always had difficulties establishing a science – evidence based foundation; this is not because evidence and “science” are not “out there”, nor is it because there is an absence of citizens interested in the issues and searching for a legitimate, entrenched process through which they are entitled to participate and work to bring about a shift to evidence-science based management. The problem is a willingness, even a propensity, by Fish and wildlife, and particularly the Forest Service, to acquiesce to commercial, private sector, and political pressures and expectations, that reject, deny and undermine sound scientific population and habitat regulatory actions. The presence of professional reliance only exacerbates this weakness.

2. *Professionals qualified for what? And in whose service?*

I am not arguing that some of the “professionals” that are employed by or consulting to a given forest license holder are capable of estimating or measuring the cubic metres of wood on a ha of forest, or building a road across a stream or side slope, or determining the density of roads in a given drainage, or deciding the extent of livestock forage consumption on bighorn sheep winter ranger.

But I am arguing they are *NOT* capable of taking the public trust perspective, which includes establishing the “public trust doctrine” in their approach, analysis, and conclusions. Nor can they be relied upon to entrench operational decisions necessary to ensure ecosystem conservation (population viability, or recovery, or landscape protection) or equitable and optimal short, medium and long term social and financial return to taxpayers and citizens. The virtual absence of protected and roadless area designations in “managed” forests, particularly in Interior B.C., is stark evidence of this incapacity.

Establishing, and then policing, standards for estimating whether wood is green or dying, or whether a road or stream crossing should be 8 or 12 metres wide, or whether a given road density is adversely affecting grizzly bear or caribou population size or movements, or whether there is adequate forage available in February for bighorns and elk, is a responsibility that *MUST* be retained by government employees who are;

- > 1. directly and legally accountable to the people of B.C.,
- > 2. effecting their responsibility to citizens (doing their “job”),
- > 3. following regulations that protect and honor the public trust (following the law”), and
- > 4. conducting themselves ethically.

3. Grossly inadequate substitute for Environmental Impact Assessment (EIA)

There are thousands of corporate and commercial decisions made, and actions taken annually, regarding the utilization and exploitation of publicly owned resources on public lands in British Columbia. Virtually all of them escape the scrutiny of environmental impact assessment; almost all of these decisions and actions are endorsed, and most often not even considered for superficial evaluation, by “qualified professionals” whose personal and “professional” allegiance is to corporations or private commercial entities. These people are exploiting the weakness of “professional reliance” to skirt EIA and public scrutiny.

3. 1. Uncertainty and precaution not even on the radar screen.

When a “qualified professional” has a mandate to develop and exploit a resource, like forests, or rangeland, a waterway, or a roadless area (and yes, this is a distinct resource!) because they or “their” company stand to gain financially or professionally, any consideration of uncertainty, or any resistance that would characterize a precautionary approach, is essentially non existent, particularly given the near total absence of any regulatory requirement for EIA. Even on those few occasions when EIA is conducted, uncertainty and precaution are “missing in action” from most performances.

On those very few occasions when there is specific, high profile public and regulatory focus on EIA and consideration of uncertainty and precaution, it is often “not possible to determine whether the EA was intending to disclose or hide a gap in knowledge”, and “in many cases, after identifying specific knowledge gaps in ... the EIS, uncertainty due to such knowledge gaps was subsequently ignored in any further impact analysis” (Lees et al. 2016). Imagine the disregard shown for this issue in low profile , or NO profile, incremental and extended resource exploitation activities like logging, grazing, road building, mountain bike trail building, or subdivision, when the only form of accountability is “professional reliance”?

4. Institutional Betrayal; significant and growing

The disastrous shift to professional reliance in the environmental regulatory world in B.C. has only aggravated a sense of institutional betrayal that is now more pronounced than ever in the provinces history.

The failure to assume and protect regulatory authority, as evidenced by its abandonment of public structure and process, and its accumulating power in the hands of private interests and private individuals, has exploited the declining attachment of society to the natural world, as well as subsequent deteriorating personal accountability for the well being of the “environment”, particularly amongst those citizens growing into and reaching adulthood since the 1970’s (Wray-Lake et al. 2010). Professional “reliance” as practiced in the past several decades in B.C. has only increased alienation of citizens, including our younger generation, from their environment, and from “their” government. This has allowed a gap – now a chasm - to develop between existing practices and our citizens need and right to hold government decision makers accountable and our need and right to participate in government decision making.

A further “fall through the cracks” outcome of the estrangement between the Public Service and the people it was meant to serve, is the growing antagonism between the remaining emasculated public service and citizens who want to engage in government and our regulatory process.

These kinds of break downs in democratic and legal process are linked with a growing disenchantment and declining confidence in the legal system upon which regulatory accountability depends (Alberta Justice and Solicitor General 2014).

5. *Urgent Need for Convergent Reform of Public Service Regulatory Jurisdiction and process*

Advantages to be gained by abolishing professional reliance as a regulatory foundation will not be realized UNLESS there is reform of the Public Services Role – a resumption – of regulatory jurisdiction. That reform should include;

- > 1. Reestablish regulation of public resources as the domain of a professional public service,
- > 2. Revise and update legislation empowering the Public Service with management and protection of the Public Trust, and
- > 3. Integrate the Forest Practices Board into FLNRO to act as a *regulatory* administrative appeal body for citizens who wish to challenge Forest, Range and Wildlife Management decisions.²

6. *Grizzly Bear Hunt Moratorium could not happen under a Professional Reliance regime*

An example of how the existing practice of Professional Reliance had killed citizen trust and participation in government decision making is the recent decision to place a moratorium of grizzly bear hunting. If this decision had been placed in the hands of guides and outfitters and hard-core bear hunters, or those who fanatically defend hunting at any cost, or had remained in the hands of Ministry biologists philosophically aligned with licensed special interest “hunting” as a management tool - as it essentially has been for the past decades – British Columbia would not have a moratorium today in spite of 90% public support and reasonable scientific doubt about grizzly bear population viability amongst independent biologists and scientists.

This same state of affairs is infecting the management and conservation of B.C. forests! There are widespread calls for protecting old growth and establishing more and significantly large protected areas (wilderness) (see, for example, Sherrod and Goward 2018, or Gilbert et. al 2004, plus a long list of others), for reevaluation

² The Forest Practices Board of today is an offshoot of the Professional Reliance revolution. It was born to provide technical analysis of the consequences of Public Service and Ministry behavior but was designed deliberately to be neutered of regulatory authority.

While it produces report upon report of Ministry failures and land user misconduct, it remains but a pimple on the chin of the Ministry of FLNRO, and continues dutifully to have no material bearing on the actions of commercial and corporate land users.

of the Annual Allowable Cut, and for fear for timber industry impacts on endangered species and habitats (woodland caribou, marbled murrelets, spotted owls, for example), and yet the province (FLNRO and BC Timber Supply) continues to exploit forests under the scientifically offensive and social irresponsible agenda of “results based” management! Even a former Liberal cabinet minister condemned this political manipulation of forest “management”³ (Morris 2014).

7. *Forest Certification: another failed attempt at professional reliance*

Another example of undermining, or more directly, eliminating the public interest in regulatory management of public resources (like forests and public lands) is third party adjudication, management, control and endorsement of the extensive environmental consequences of the forest industry in B.C. as represented by Forest Certification - another variation of Professional reliance . This practice has morphed in a “regulatory” monster that continues to undermine

- > public scrutiny of environmental impact assessment,
- > establishment of publically vetted scientific protection standards (for example, road density and watershed fragmentation), and
- > the ability, or lack thereof, of the public to provide oversight, through “our” government, of forest industry actions and practices.

What better way could there be to avoid accountability than for the forest or range industry to point at certification and declare “they said it was OK”!

As has been shown in an analysis of public concerns about and interaction with certification of the seafood industry (Christian et al. 2013), private sector certification (that is, professional reliance), reveals “An analysis of the formal

³ Morris addresses the *The Forests and Range Practices Act*; strangely, he praises the Act, as a “results based” statute, but then points out “There are weaknesses in this legislation however that first need to be addressed. Nebulous and ambiguous terms are prevalent throughout some of the current legislation. For example, parts of the legislation pertaining to Forest Stewardship Plans employ words such as “material adverse impact”, “adversely altered ecosystem”, “must ensure”, and “maintain fish passage”. This language makes it impossible for monitors to clearly define outcomes and to measure progress and monitoring criteria.” And again, “In addition, statements like “without unduly reducing the supply of timber from British Columbia’s forests” is a very subjective “default” term that significantly lowers the threshold protecting our biodiversity. This ambiguity has contributed to a degradation of biodiversity and ultimately, a reduced ability for professionals to meet the spirit and intent of the legislation.”

As could be expected from a junior member of the legislature (at the time), in spite of exposing the inadequacy of the Act and process, his deference to existing policy and the presiding Minister seriously understates the debilitating inadequacies of regulation under an “after the fact” (results based), “professional reliance” based system. Under such an amorphous system, the latitude for personal and professional interpretation of intent and accountability, both in the commercial/corporate world and the Public Service, and for parsimonious or conservation considerate resource exploitation, is effectively unlimited, and subsequently of little use to a society who depends upon and values the Public Trust.

objections indicates that the MSC's (marine stewardship council) principles for sustainable fishing are too lenient and discretionary, and allow for overly generous interpretation by third-party certifiers and adjudicators, which means that the MSC label may be misleading both consumers and conservation funders."

Counter to this dismal shift toward private sector control of what's in the best interests of B.C. citizens, is evidence that citizens in B.C. and across much of the country, are looking for government to lead when it comes to environmental protection. When queried about how best to respond to global warming, for example, 53% of Canadians say government is the appropriate regulatory authority and they (government) should implement "new standards and regulations" to deal with the threat (EnviroNics Institute 2013). This relatively encouraging support for government regulations and control survives in spite of several decades of Public Service retreat in the face of a withering barrage of private sector ideology, downsizing, and deregulation, which has been particularly intense with respect to landscape, forest, and fish and wildlife conservation and management⁴.

8. Not Easily Undone; the damaging consequence of decades of decline under Professional Reliance.

It is a simple task to let the public management and protection of public resources deteriorate; its simply a matter of handing it off to someone else – private sector employees and consultants, for example – and claiming it saves taxpayers money and reduces regulatory "red tape". When done in an incremental manner, as has been the case in British Columbia over a span of almost two decades (Smith et al. 2017), it robs the public of legitimate financial returns, estranges citizens from their resources, and increasingly divorces citizens from oversight and interaction with their government.

For example, the disappearance (in the early 1990's) of publicly available annual reporting requirements from the Forest Service can be viewed as a duplicitous and deliberate effort to "dumb down" the public and absolve the Public Service of accountability. Professional reliance was another such scheme, in which consumption of, any subsequent damages to, public land, forests, fish and wildlife and watersheds would deliberately go unreported under the guise of "protecting" the "rights" of private enterprise to shield their activities from public scrutiny and competition.

Rebuilding a publicly accountable and participatory regulatory structure, on the other hand, requires determination, leadership, vision, and a substantial commitment and continuity of resources; more profession public service employees, more of the resources they require to fulfill their responsibility, standards by which performance can be measured, more supervision, and more interaction with and reporting to the public.

⁴ Past but recent efforts to abdicate legal accountability for wildlife conservation and management by turning the management of populations and habitat over to a "Board" of hunters and guides highlight how threatening "professional reliance" can be and how it could degenerate into complete regulatory chaos.

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