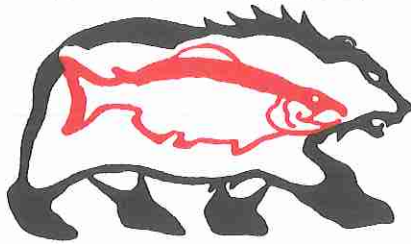


LHTAKO DENE NATION

(RED BLUFF INDIAN BAND)



BOX 4069
QUESNEL, BC
V2J 3J2

PHONE: 250-747-2900
FAX: 250-747-1341

January 18, 2018

By email: ENV.minister@gov.bc.ca

The Honourable George Heyman
Ministry of Environment and Climate Change Strategy
PO Box 9047 Stn Prov Govt
Room 112, Legislature Buildings
Victoria, BC V8W 9E2

Dear Minister Heyman:

Re: Professional Reliance Review Submissions and the Inclusion of First Nations

Please find below a submission from the Lhtako Dene Nation (“Lhtako”) for consideration in the provincial government’s review of the professional reliance model (the “Review”). We have also provided this document through the “govTogetherBC” stakeholder submission process.

We are pleased that the Province is undertaking this Review. However, we must at the outset express our disappointment that the Province is not prioritizing the input of Indigenous views of this matter. Lhtako was not invited to participate in this Review until over half way through the engagement period. Despite the narrow timeframe, the significance of professional reliance on Lhtako’s Aboriginal rights required Chief and Council to have its staff prioritize the preparation of this submission.

We also take issue with the terms of reference of this Review, which do not adequately account for Indigenous interests. The Review has a stated purpose of assuring the public that their interests are protected. While this is a valid pursuit, it is not enough. The Review should be broadened to address whether the current regime provides for an appropriate level of government oversight to ensure that First Nations’ unique interests are protected. The Review should be asking whether the professional reliance model is consistent with the Province’s constitutional and legal duties towards First Nations, as well as the Province’s commitments to the United Nations’ Declaration on the Rights of Indigenous Peoples and the Truth and Reconciliation Commission’s Calls to Action.

To ensure that the Province adequately engages with First Nations, we call on the Province to either extend the timeline of the Review or to add a process for soliciting First Nations' perspectives. We also request that the Province broaden the purposes of this Review to more directly ask whether this model is compatible with the protection of First Nations' interests.

Please find below our formal submissions critiquing the professional reliance model. We use the Province's requested outline to format our response:

1. Please tell us what you think is working well with the current professional reliance model in B.C., and what is not.
2. What changes, if any, are needed to maintain or improve public trust in the professional reliance model?
3. Do you have any other observations or recommendations you would like to make about this review?

Lhtako Dene Nation's Submission to Professional Reliance Review

1. What is and is not working well in the current professional reliance model in BC

We focus our critique on the use of professional reliance as implemented under the *Forest and Range Practices Act* ("FRPA") and related forestry acts and regulations. Our experience is that the professional reliance model (the "Model") is not compatible with the Province's obligations to consult, and where appropriate, accommodate our Aboriginal rights. There are two major reasons for this. First, under this Model, the discretion in determining how forest activities will be carried out effectively belongs to the forest industry itself. The professionals approving projects are being paid by the proponents of those very projects. This inherently puts professionals in a position of conflict. In our experience, the current condition of forestry and forest ecosystems in British Columbia leaves industry professionals in the unenviable position of choosing between profitability and all other values. Second, district managers have been stripped of their authority to effectively monitor forestry practices and to safeguard Aboriginal interests. At key junctures in the permitting process, district managers are not given adequate discretion to intervene in order to ensure that our Aboriginal interests are acknowledged and, if appropriate, accommodated.

We now discuss each reason in further detail, beginning with the conflict of interest inherent to professional reliance.

The pressure on forestry professionals to develop projects within Lhtako territory is, at this moment, immense. The bulk of our territory is composed of green timber profiles that largely

escaped the devastation of the mountain pine beetle. As licensees transition back into green profiles, they are now heavily targeting these profiles for harvesting. Dwindling timber supplies in the Cariboo are putting increased pressures on licensees and their professionals to quickly push through the planning and permitting processes in order to get to harvest. In the face of such pressure, we feel keenly the absence of a neutral party to provide regulation and oversight to protect both the environment and Aboriginal interests.

West Coast Environmental Law recently published an informative article by staff counsel Andrew Gage questioning whether professionals employed by industry players can ever be neutral.¹ In the article, Mr. Gage reviews behavioural economics studies that suggest that indebtedness changes the way that people perceive the world, often subconsciously. He writes:

If government establishes a standard but leaves it to industry professionals to interpret it, then even well-intentioned professionals may start to interpret ambiguities in favour of clients, rather than the public interest.

The behaviour discussed in this article coincides with Lhtako's observations of the behaviour of qualified professionals. As mills compete for dwindling timber, the values of profitability and efficiency are prioritized and environmental and aboriginal values become an afterthought. Furthermore, while these professionals may be qualified in their respective fields, they are largely *not* qualified to be consulting with First Nations or to be valuing our traditional practices so often put at risk.

All aspects of planning and permitting for forestry practices require neutrality, an objective that cannot be achieved by industry-hired professionals.

The second reason this Model is not working for Lhtako goes hand in hand with the first: decision-making authority has been given to qualified professionals and removed from the Province's district managers. We have found that district offices lack the capacity required to conduct meaningful reviews of the impacts forestry activities have on our Aboriginal rights. Further, when district offices do find capacity to engage with us, they often claim, perhaps correctly, that they do not have the authority to intervene. For instance, when we contact the Province and a licensee's professional to raise an issue with a cutting permit, the professional usually responds by pointing to the permit's adherence with the results and strategies in the Forest Stewardship Plan ("FSP") to claim that the First Nation's concerns have been addressed. Even if the district manager agrees with us that our concerns have not been addressed, there seems to be no mechanism for him or her to critique or reject the professional's interpretation or rationale; if the professional deems that the permit follows the FSP, the district manager must issue the permit.

¹ <https://www.wcel.org/blog/problem-relying-too-much-upon-professionals>

This response is especially problematic given the inadequate state of FSPs. A recent Forest Practices Board report found that a high proportion of FSPs contain strategies and measures that are not measurable, verifiable or enforceable and that many of these results or strategies do not demonstrate consistency with government's objectives.²

The Province must reserve for itself the ability to become meaningfully involved in consultation and accommodation. Legislation and professional reliance should not be fettering this discretion. The duty to consult "cannot be boxed in by legislation."³ District managers must be empowered with the legislative tools and workforce capacity to oversee natural resource activities and to safeguard Aboriginal interests.

2. Changes needed to improve public trust in the professional reliance model

We will answer a slightly different question: what are the changes needed to improve First Nations' trust in the professional reliance model? We suggest a few changes, but urge the Province to consult further with other First Nations to solicit a wider range of ideas. Once we've had more time to consider this matter, we may have further suggestions.

Suggested changes:

- The Province must return decision making authority and discretion to district managers so that they can effectively achieve the obligations of consultation and accommodation;
- District managers and the Province must have discretion to oversee consultation at all stages of a natural resource activity, from conception through to reclamation;
- The professionals who assess whether a given project meets prescribed criteria should be neutrally selected and not hired by industry; and
- The capacity of district offices should be increased, in order to adequately oversee natural resource approvals and First Nation consultation.

3. Our observations and recommendations about this review

We have touched on our observations and recommendations about this Review in the introduction to these submissions. Essentially, we see this Review as raising important issues for the First Nations of British Columbia and we urge the Province to more effectively and meaningfully seek out the views of First Nations. As the stewards of our traditional territories, First Nations are most impacted by the failure of the professional reliance model to protect wildlife, water, fisheries, biodiversity and many other values of critical importance to our way of life.

² Forest Practices Board, "Forest Stewardship Plans: Are They Meeting Expectations?" August 2015, FPB/SIR/44, at page 1. <https://www.bcfpb.ca/wp-content/uploads/2016/04/SIR44-FSP-Are-They-Meeting-Expectations.pdf>

³ *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 at para 121.

Sincerely,
LHTAKO DENE NATION

Per:



Chief Clifford Lebrun

Cc: Hon. Doug Donaldson; FLNRO
Erika Driedger; Resource Coordination Officer, MIRR