

Professional Reliance in the Natural Resources Sector

“Best Practices of Professional Organizations Regulating Qualified Professionals”

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I. Introduction

The Province of British Columbia is undertaking a review of professional reliance in the natural resources sector. I was selected to provide advisory services to the project with respect to the governance of the professional organizations. The purpose of my report is to identify policy options and “best practices” that would enhance the oversight by self-regulating professional organizations of their members practicing in the area of professional reliance.

In this report I use the following terms:

- “Professional Reliance”: I use this term in the way it is used in the report “Professional Reliance and Environmental Regulations in British Columbia”¹ (referred to as the “Professional Reliance Report”). Professional reliance involves amending the legislative structures to significantly reduce the amount of direct government oversight and instead to rely on decision-making by a range of professionals. As stated in the Professional Reliance Report: “Professional accountability would be maintained primarily through the enforcement of codes of ethics and the disciplinary processes of professional associations, rather than through the approval of plans, permits, and licenses by government agencies.”² I use the term “Profession Reliance” to refer to “decision making reliance.”³ As explained by British Columbia’s Ombudsperson: “Many governments have moved towards a less prescriptive model of environmental protection that relies on proponents of a development hiring or having their own professionals conduct assessments of environmental effects of certain activities. This change is based on the expectation that such professionals will apply the correct methodology, produce consistent results and provide the best advice available for protecting the environment. The role of public servants in this professional reliance model is to monitor compliance by these professionals with statutory or regulatory requirements.”⁴
- “Professional Organizations”: I use this term to refer collectively to the five professional regulatory organizations whose members work in professional reliance in the natural resources sector- Engineers and Geoscientists of British Columbia; Association of BC Forest Professionals; College of Applied Biology of British Columbia; British Columbia Institute of Agrologists; and the Applied Science Technologists and Technicians of BC.
- “Qualified Professional” or “QP”: I use these terms to refer to professionals who are members of Professional Organizations and who practice in the area of professional reliance.

¹ “Professional Reliance and Environmental Regulation in British Columbia”, Environmental Law Centre, University of Victoria, Author: Mark Haddock, February 2015. Definitions of “professional reliance” are addressed at page 6 and 14 of the Report.

² Page 6

³ Professional Reliance Report, page 14

⁴ Office of the Ombudsperson, “Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection- British Columbia’s Riparian Areas Regulation”, March 2014, page 7

- “Discipline Committees”: I use this term to refer to the committee that adjudicates allegations of unprofessional conduct against QPs under the legislation establishing the Professional Organizations.

II. Scope of Review

As part of my analysis I reviewed a broad range of material including information relating to the Professional Organizations such as their legislation, regulations, rules, bylaws, standards of practice, other professional guidance documents, policies, selected discipline decisions, and material available to the public on their websites. I also reviewed the Professional Organizations’ submissions to the review process and a summary of information from interviews by project staff. I reviewed reports that relate to professional reliance such as Professional Reliance Report and the report by the Office of the Ombudsperson on professional reliance.⁵ I also obtained extensive background through discussions with Mark Haddock. I assessed all this information in the context of my knowledge of “best practices” with respect to self-governing professions. My review did not include any direct discussions or contact with the Professional Organizations.

III. Over-Reliance on Professional Reliance

This report will include a number of recommendations designed to enhance the oversight provided by Professional Organizations over QPs. The implementation of these recommendations has the potential to make a very positive impact in the field of professional reliance. However, I wish to make it clear that even if all the recommendations were implemented, I do not consider this to be sufficient to address the very significant public policy issues identified with respect to the system of professional reliance.

I am a very strong believer in the societal value of self-regulating professions when they are properly focused on protecting and promoting the public interest. I have also become strongly convinced that there has been “over-reliance” on professional reliance as a regulatory model in the natural resources sector. A brief summary of my concerns about professional reliance in the context of self-regulation of the professions follows:

1. Self-regulation of the professions is a system of quality control and assurance designed to ensure the competent and ethical delivery of professional services. However, self-regulation has never been intended to be a “stand-alone” system of quality control. Instead, the system of professional self-regulation is designed to be one system of quality control that functions within a broader environment of quality control systems. For example, a QP making a decision that has a significant environmental impact would be subject to a number of quality assurance influences including the person’s professional judgment, their employer’s policies and procedures, oversight by the person’s Professional Organization, the obligation to comply with environmental regulations, and oversight by government bodies of environmental decisions.

⁵ Office of the Ombudsperson, “Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection- British Columbia’s Riparian Areas Regulation”, March 2014

These are all aspects of the overall quality assurance system. Removing environmental regulations and oversight by government bodies of environmental decisions results, in my view, in an over-reliance on the system of professional regulation increasing the risk of inappropriate decision-making.

2. Regulating natural resources requires a “big-picture” perspective of all the systems that affect the environment. Governments generally can utilize jurisdiction over entire systems. On the other hand, the jurisdiction of self-regulating professional organizations is generally restricted to individual professionals without authority over any other parts of the “systems” that affect decision-making in the natural resources sector.
3. Proponents of the professional reliance system justified elimination of direct government oversight on many different grounds but placed considerable emphasis on the quality assurance value of the professional discipline system of Professional Organizations. An effective professional discipline system is a corner-stone of self-governance. Professional discipline systems have many strengths but also many weaknesses. Such weaknesses include the reactive nature of the professional discipline process which is triggered only when a complaint is received. Another major concern is that discipline committees generally only have jurisdiction over the individual professional. Suppose a QP made a decision affecting a particular environment and it was alleged that the decision was incompetent. Someone makes a complaint to the Professional Organization that investigates and refers the matter to a hearing. A discipline committee finds that the decision by the QP was wrong but was caused by a confluence of factors including: carelessness by the QP; an individual from another profession contributed to the poor decision-making; the QP’s company failed to provide satisfactory supervision; the companies’ policies contributed to the problem because they were too vague; and the environmental legislation contributed to the failure because it failed to clearly identify obligations in these circumstances. In this scenario the discipline committee only has authority to determine if the carelessness of the QP in the entire scenario constitutes unprofessional conduct. If so, they can impose sanctions on the QP but they have no jurisdiction to require remedial action by members of the other profession, by the company with respect to supervision or policies, and of course cannot address the vague environmental legislation. In other words, the discipline committee only has jurisdiction over one small part of the overall system (the individual QP) that contributed to the poor outcomes in this case.⁶
4. Proponents of professional reliance also placed considerable weight on the ability of professional organizations to engage in practice reviews and audits of its members. While practice reviews/audits are a useful part of the quality assurance system managed by Professional Organizations, these processes have significant limitations. In particular, such processes typically apply to only a very small percentage of the membership each year. Depending on their design, practice reviews/audits may not constitute an in-depth review of a QP’s practice. Finally, the jurisdiction to implement a practice review/audit may be restricted by the legislation.

⁶ Case 2016-03 of the Association of BC Forest Professionals is an example of the limitations of the disciplinary process to address the full system that resulted in a sub-optimal decision. Concerns were raised about the visual impact of logging of several cutblocks. The Complaints Resolution Committee identified contributing factors that certain district manager policies were not available at the time of his assessment; there were significant inter-organizational challenges between the government and employer that created a “complex working environment”; and he was impeded by confidentiality requirements. Given the “challenging circumstance”, the Committee did not recommend further investigation and the complaint was closed.

5. Where a system of professional reliance reduces or eliminates government oversight of professional reliance decisions made by QPs, then in order to ensure that the public is adequately protected the Professional Organizations need to enhance the oversight of their members practicing in the area of professional reliance. This reality places very significant demands on all the Professional Organizations. This gives rise to serious issues about whether the Professional Organizations have the capacity to effectively increase their level of oversight to make up for the loss of government oversight. Additional difficulties are encountered because there is wide variation among the Professional Organizations with respect to the financial and organizational capacity required to enhance the oversight of QPs.

Strengthening the oversight of QPs by Professional Organizations can result in a significant strengthening of the system of professional reliance. However, for the reasons set out above I don't consider that this is sufficient in and of itself to address the public policy issues with respect to the professional reliance system. Other parts of the project will consider whether greater levels of direct government oversight of natural resource decisions should be re-established.

IV. Types of Professional Regulatory Processes

Professional regulation constitutes an elaborate system of quality control focused on ensuring the competent and ethical delivery of professional services. There are various types of regulatory processes or "tools" designed to ensure that regulated professionals are competent and ethical. Before considering specific recommendations to address issues in the system of professional reliance, it is useful to survey the types of quality assurance processes that are generally available in the professional regulatory system:

1. Scopes of Practice

Scopes of practice prescribe the professional activities that may be undertaken by a particular profession. Scopes of practice act as a quality assurance mechanism since they are designed to ensure that only those professions whose members are competent to perform an activity are authorized to do so. Scopes of practice also assure quality by establishing the boundaries of a profession's practice. In other words, scopes of practice establish areas in which the professional shall not practice because members of the profession are not considered to be competent in those areas. In some cases, exclusive scopes of practice may be established which indicate that no one except a member of a particular profession may engage in certain activities. Even with exclusive scopes of practice, the legislation often includes various exceptions. In many cases the scopes of practice of professions over-lap. Some regulatory regimes have eliminated exclusive scopes of practice in favour of a restricted activities regime in which a narrowly defined list of high risk activities is developed and then only those professions whose members are determined to be competent to perform the restricted activity may do so.

2. Right to Title

Legislation may specify that only members of a particular profession may use a specified title such as “Doctor” or “Registered Nurse” or “Professional Engineer.” Professional titles are intended to act as a “quality signal” to consumers communicating that the individual using the title is a member of the profession which has determined that the individual has the competence and ethical character required to practice the profession safely, effectively and ethically.

3. Registration Processes

Registration processes are a tool enabling professional organizations to serve as the “gatekeeper” to the profession specifying the type of education and experience required to be registered as a member of the profession. The educational and examination requirements are intended to ensure that only those individuals with “entry-level competence” and satisfactory ethical standards are permitted to become members of the professions.

4. Advanced Designations

Some regulatory regimes provide that only professionals with an advanced designation granted by the profession can practice in certain areas. This is often described as an “advanced scope of practice.” This structure is used when it is determined that additional training and education is required before a member of the profession can engage in particular higher-risk activities. For example, a “Designated Structural Engineer” is required to be the structural engineer of record for certain types of buildings identified in the Building Codes. Such engineers can use the title “Struct.Eng” as a “quality signal” to consumers that they possess the required designation. Another example is “Nurse Practitioners” who are registered nurses who have taken the prescribed additional education and passed the nurse practitioner examination. Upon being granted “NP” status, they have a broader scope of practice than Registered Nurses.

5. Renewal of Registration

Most professional regulatory systems require members to renew their registration on an annual basis. During the renewal processes various “quality checks” are often made including: determination of whether the member has been found guilty of criminal or other offenses that may affect the good character assessment; whether the member has maintained currency of practice; and whether the member has completed any mandatory continuing competence requirements.

6. Recertification Requirements

Some jurisdictions (primarily outside of Canada) are exploring establishing “recertification” processes in which a professional at a prescribed number of years in the profession must re-establish that they have the competence and ethical standards required in order to maintain membership in the profession.

7. Guidance on Professional Practice

An important quality assurance mechanism is the professional practice guidance provided by professional organizations. There are a variety of mechanisms used by regulators to provide

professional guidance. “Standards of practice” are mandatory minimum requirements that define the professional expectations on all members of the profession. Regulators may create less prescriptive documents such as practice guidelines or practice advice. A variety of terminology is used to describe the documents that provide professional guidance.

8. Codes of Ethics

Codes of Ethics establish the minimum ethical standards required of members as they engage in the practice of the profession.

9. Professional Discipline Processes

There is wide variation in regulatory processes with respect to the specific design of professional discipline processes. However, they share some common features. Generally such processes are initiated by a complaint and then followed by an investigation. There may be processes designed to allow informal resolution of complaints. If the investigation determines that there is sufficient evidence of unethical or incompetent behavior, then the matter is referred to a formal hearing by a discipline committee. These hearings are typically formal in nature. If the member is found to have engaged in unprofessional conduct, then the discipline committee imposes the sanctions that it considers to be appropriate taking into account protection of the public. The specific sanctions available are set out in the legislation.

10. Continuing Professional Development Programs

A professional has a fundamental obligation to maintain competence throughout his or her career. Many regulators offer continuing professional development courses designed to enhance members’ knowledge and competence. Some regulatory regimes establish mandatory continuing competence programs.

11. Practice Visits/Audits

Some regulatory regimes provide for practice visits/audits. In these cases the regulator reviews the practice of individual practitioners to determine if they are meeting minimum expectations. The practice visit/audit may result in a series of recommendations or requirements designed to enhance professional practice. In cases where a practice visit/audit identifies very serious shortcomings in professional practice, the individual may be referred to the discipline process depending on the statutory provisions. There is wide variation among regulatory regimes with respect to: whether practice visits/audits are permitted; what triggers a practice review/audit; the percentage of members who undergo a practice visit/audits; whether the review results in recommendations or required actions; and options available to the regulator following the practice review/audit.

V. Recommendations

The previous section of the report identified the various types of quality assurance processes used by professional associations. The particular types of quality assurance processes that are available for use by a particular professional association will depend on the specifics of the applicable legislation. This section of the report identifies policy options and “best practices” that would enhance the oversight by the Professional Organizations of their members practicing in the area of professional reliance. Some of the recommendations would require legislative amendments. Most of the recommendations would not require legislative amendments provided the Professional Organizations agreed to cooperate in implementing the recommendations. The recommendations are summarized in Appendix “A” to this report. The specific recommendations are discussed below.

1. Governmental Oversight of Professional Organizations

The legislation governing the Professional Organizations includes very little explicit governmental oversight of regulatory performance. Given the importance of the regulation of professional reliance to the people of British Columbia, I recommend that steps be taken to enhance the governmental oversight of the Professional Organizations’ regulation of Qualified Persons.

There are a variety of ways in which governments provide oversight of professional organizations, both informal and formal. Some of the formal mechanisms established in legislation to provide oversight include:

1. Establishing a “regulator of the regulators” to provide broad-based oversight of the work of a group of regulators. An example would be the Professional Standards Authority in Great Britain which oversees the work of nine health and care regulators.
2. Authorizing independent bodies to review certain aspects of the regulators work. Two examples would be the British Columbia Office of the Ombudsperson and Fairness Commissioners in certain provinces that review the transparency, objectivity, impartiality, and the fairness of professional organizations’ registration practices.⁷
3. Providing for a review by an independent body of individual adjudicative decisions by professional organizations in areas such as registration and discipline. An example in British Columbia is the Health Professions Review Board established to review certain decisions of professions under the *Health Professions Act*.
4. The power to hold formal inquiries into the operations of a professional association. An example is the inquiry power in section 18.1 of the British Columbia *Health Professions Act*.
5. The power to provide directives following an inquiry. An example is the directives power in section 18.2 of the British Columbia *Health Professions Act*.
6. Power to appoint a public administrator to take over management of a professional organization. An example is section 18.3 of the British Columbia *Health Professions Act*.
7. A requirement to file annual reports with the Minister reporting on the activities of the professional organization. An example is section 18(2) and (3) of the BC Health Professions Act

⁷ See the mandate of the Fairness Commissioners in Ontario and generally in Manitoba and Nova Scotia.

that require Colleges to submit an annual report to the Minister in the form and containing the information required by regulation.

8. There is a trend to establish “umbrella legislation” establishing standardized regulatory processes for related professions. An example in British Columbia is the *Health Professions Act*. While there are a number of different advantages and disadvantages to “umbrella legislation”, governments often conclude that it can provide more effective oversight of the professions when the group of professions has standardized regulatory processes.

Given the importance of professional reliance, I recommend that steps be taken to enhance governmental oversight of the Professional Organizations’ regulation of Qualified Persons.

Effective governmental oversight of a profession requires both technical knowledge about the profession in question and expertise in governance of professional organizations. I recommend that government ensure that it has sufficient expertise in the governance of professional organizations. Government should also consider the best structure for reporting by the Professional Organizations to government.

While formal annual reports are not provided for in the legislation governing the Professional Organizations, I do recommend a formal (albeit non-legislated) step to enhance the accountability of the Professional Organizations. It will be well-known to the Professional Organizations that there is a desire to enhance the regulatory oversight that the Professional Organizations provide to QPs. While this report contains various recommendations to enhance that oversight, the Professional Organizations should be asked to demonstrate accountability by developing their own individual plans to enhance the performance of QPs. The plan may contain elements identified through this review of Professional Reliance but should also contain additional elements identified by the Professional Organization. The plans should be submitted to the Minister with the Professional Organization being required to provide regular updates on implementation.

While formal processes are identified above, in my experience, informal processes to provide governmental oversight can be very effective if four elements are present: (1) The responsible department has expertise in the industry and in professional governance; (2) There are strong relationships between departmental staff and the senior leadership of professional organizations; (3) There is a focus of the Department and professional organization on joint problem-solving; and (4) The professional organization has a strong commitment to its mandate of protecting and promoting the public interest.

2. Public Participation in the Regulatory Processes

Public participation in professional regulatory processes positively contributes to transparency and the maintenance of public confidence in those processes. Public participation ensures that the public’s perspective is firmly represented at the “decision-making table.” Some jurisdictions outside Canada have moved away from a self-governance system by requiring that a majority of Council members be members of the public rather than members of the profession. I do not recommend such a step since essentially it eliminates self-governance of the professions. However, given the importance of the professional reliance process to the people of British Columbia, I do recommend changes to enhance the amount of public participation in the regulatory processes of the Professional Organizations. There are a range of public policy options that are available to governments when considering public participation in professional regulatory processes. In some cases appointments of public members are discretionary

and in other cases they are mandatory. In some cases public participation only includes appointments to the governing bodies whereas in other cases the members of the public participate in both the governing bodies and on discipline committees adjudicating cases of unprofessional conduct. In some cases, the percentage of public members on committees is not specified in the legislation. In other cases, the legislation specifies a minimum percentage of public member participation on Councils and discipline committees.

While there is some public participation in the Professional Organizations in governance and regulatory processes, the level of participation is quite modest and is not in step with modern trends in professional regulation. I recommend that Government should take steps to increase the amount of public participation in the regulatory processes of the Professional Organizations.

In my view, current best practice is for legislation to require mandatory public membership on both Councils and discipline committees with a specified percentage of public members required. Given the importance of professional reliance to the people of British Columbia, this is the recommendation that I make in this case. I also recommend that at least 25% of the members of Council and Discipline Committees be members of the public appointed by Government using a merit-based selection process. The rules on quorum should require that the 25% public members must be present before Council meetings or discipline hearings can proceed.⁸

One of the great challenges that face members of Councils of professional regulatory bodies is that they are required to govern complex organizations that impact the public interest and Council members often have no governance training. I recommend that the Government ensure that all public members appointed to Councils be provided appropriate governance training. Similarly, members of a discipline committee face many challenges adjudicating cases in a legal framework. The best way to create high-performing discipline committees is to ensure that they have proper training on how to run discipline hearings. I recommend that the Government ensure that all public members appointed to discipline committees receive appropriate training.

3. Advanced Designations

As discussed in section IV, advanced designations can be used as a quality assurance mechanism by professional regulatory organizations. A very important question from a public policy perspective is this: *Given the complexity of working in professional reliance and the risk to the public that exists if a Qualified Professional does not properly perform their duties, should the work of professional reliance be restricted to those members of the Professional Organizations who have been granted an advanced designation for those who work in professional reliance?*

“Advanced designation” systems would require the Professional Organizations to design a certification system to determine who will be granted the advanced designation authorizing the individual to work in the area of professional reliance. Certification systems vary but may include an assessment to confirm competence, examinations, certain types of experience, additional training etc.

Based on the information I have reviewed, I have insufficient information to determine if an advanced designation such as, for example, “Certified in Professional Reliance”, would usefully protect the public

⁸ As an example of mandatory public participation on Council, s. 4 of the B.C.’s *Chartered Professional Accountant Act* requires that up to 3 public members be appointed by the LGIC to the Board and not less than 9 members elected by the members. Given that the bylaws can provide for more than 9 members, the public members may be less than 25%. Under the British Columbia *Health Professions Act*, the 2 persons appointed by the Minister to the Board for each College must not constitute less than 1/3 of total board membership (s. 17(4))

interest or whether such a system would amount to “over-regulation” that does not advance the public interest. However, I do recommend that the Government explore whether an advanced designation system would be useful. As a first step, I recommend that in the report to the Minister referenced above, the Professional Organizations should be required to address the following two issues:

1. In the view of the Professional Organization, would the public interest be advanced and protected by an “advanced designation” system in which only those members with the “advanced designation” are permitted to practice in the area of professional reliance as defined?
2. Provide an outline of how such a system might work in your profession.

The relevant Departments can then use this information as a starting-point for a more in-depth analysis of whether an Advanced Designation system would be useful.

4. Duty to Report Unprofessional Behaviour or Incompetent Practice

It is in the public interest to ensure that unprofessional behavior or incompetent practice by a member practicing in the area of professional reliance be reported to the relevant Professional Organization so that the matter can be appropriately investigated and addressed. Mandatory reporting is addressed in some of the Professional Organizations’ Code of Ethics. I recommend that the Government require Professional Organizations review and amend their Code of Ethics as necessary to ensure that there is a clear obligation on members of all the Professional Organizations to make these reports.

Another method to ensure that unprofessional or incompetent behavior comes to the attention of professional regulators is to create a statutory obligation on employers to report in certain circumstances.⁹ These types of reporting obligations can dramatically increase the number of instances of unprofessional and unethical conduct coming to the attention of professional organizations. I recommend that the Government consider creating a statutory obligation on companies to report to the pertinent Professional Organization. If the company suspends or dismisses an employee due to conduct the Company considers to be unprofessional behavior in the area of professional reliance or incompetent practice in the area of professional reliance, then the company is required to report the matter to the pertinent Professional Organization which shall treat the matter as a complaint. The same reporting obligation should extend to companies when they terminate the contract of an independent contractor in similar circumstances. A policy alternative would be to require mandatory reporting by employers in all areas and not restrict the reporting to those working in the area of professional reliance.

5. Audits and Practice Reviews

Audits and practice reviews can play a useful role in assuring the quality of professional reliance services. However, there are limitations in the value of this “regulatory tool” since audits/practice reviews are very resource-intensive. Only a very small percentage of the overall membership is typically reviewed in a typical year. In addition, in some cases audits/practice reviews may not be sufficiently comprehensive to be truly useful. Despite these limitations, audits/practice reviews can be one useful part of the overall quality assurance process for professional reliance. The legislative structure for audits/practice reviews for the Professional Organizations is disparate and in some cases quite

⁹ See for example Alberta’s *Health Professions Act* RSA 2000 Chapter H-7 s. 57

restrictive. In order to strengthen the audit/practice review process used by Professional Organizations, I recommend that Government consider amending the legislation to create a standardized audit/practice review process that applies to all the Professional Organizations. The process should provide broad discretion to the Professional Organization in determining whether to implement an audit/practice review and should include broad remedial powers to address issues of concern uncovered in the audit/practice review process.

6. Professional Discipline Process

Material reviewed in the course of my analysis makes it clear that there exists considerable concern about whether the discipline processes of the Professional Organizations are effective in addressing concerns raised about the ethical conduct and competence of members practicing in professional reliance. The concerns about the professional discipline systems are typically anecdotal in nature.

The Professional Organizations post information on their website describing how to make a complaint about their members and describing their discipline process. Some of the Professional Organizations post the decisions of discipline committees on their website or summaries of their decisions.

I am sure that the Professional Organizations are of the view that their discipline processes are effective. The reality of the matter is this- you cannot determine whether a professional discipline process is effective, fair, and protects the public interest unless you conduct an in-depth analysis of the full disciplinary process gathering reliable evidence. If at the end of the Professional Reliance Review project the Government has residual significant concerns about whether the professional discipline processes of the Professional Organizations are functioning appropriately, then I recommend that Government consider whether to organize a “Third Party Review” of those processes. “Third Party Reviews” are described as:

*A “third-party review” is a rigorous, in-depth assessment by an outside body of the regulatory performance of the organization. In essence, a third-party review is a “regulatory check-up” focusing on what is working well in the organization, what is not working well, and where improvements can be made. A third-party review typically culminates in a number of recommendations that can be implemented by the regulatory organization to improve performance.*¹⁰

A strong trend is emerging in Canada to implement more third-party reviews. While third-party reviews can assess an organization’s regulatory performance in a broad range of areas, more focused assessments can be undertaken to address only, for example, the discipline process. In a third party review detailed criteria for assessing the effectiveness of a regulatory process are developed. Then detailed empirical evidence is gathered to assess performance against the agreed upon criteria. In a review of disciplinary processes, it is usual that 10-15 criteria would be established. Evidence about the disciplinary process would be gathered from much methods of:

- Review of statute, regulation and bylaws.
- Review of all policies pertinent to the discipline process.

¹⁰ “Regulatory Performance Review of the Real Estate Council of Alberta”, April 4 2017, Field Law: James Casey, Ayla Akgungor, Greg Sim, and Jason Kully at page 1. For a recent third party review in British Columbia see “A Review of the College of Nurses of British Columbia”, April 2016, Professional Standards Authority. Note that this review was a broad regulatory review and did not focus only on the disciplinary processes. While many third party review reports are not publicly available, see page 1-2 of “Regulatory Performance Review of the Real Estate Council of Alberta”, for reports that are available to the public.

- Review of standard processes and standard forms.
- Audit of randomly selected discipline cases.
- Interviews with key staff.
- Interview with government, industry and public stakeholders.
- Statistical analysis of the discipline process.
- Review of selected number of discipline decisions.
- Review of all Court cases involving discipline process.

After all the information is analyzed, a report is prepared assessing whether the discipline process met or did not meet the established criteria. The report makes a series of recommendations designed to strengthen regulatory performance.

In my view, it is only through this type of thorough and rigorous process that the Government will be able to have a reliable sense of whether the discipline processes of the Professional Organizations are functioning well or not.

With respect to discipline processes, it is important that there be sufficient transparency about the processes to enhance government and public confidence. Some of the Professional Organizations post full discipline decisions on their websites while others post summaries. To enhance transparency, I recommend that the Professional Organizations should be encouraged to post full discipline decisions on their websites (not just summaries) after ensuring that their regulatory regime permits such publication without running afoul of privacy legislation. The name of the member should not be redacted.

To enhance transparency, I also recommend that the Professional Organizations should be required to prepare an annual report on the discipline process that is provided to the relevant Minister and posted on the Professional Organization's website. Some of the information that could be required for each annual report is:

- Number of complaints received
- Source of complaints: member of the public, member of the profession, member of another profession, employer, government official, etc.
- Nature of complaints
 - Did any of the complaints concern members performing in the area of professional reliance?
- Number of complaints investigated
- Number of complaints resolved
- Number of complaints dismissed
- Number of complaints referred to a hearing
- Number of hearings held
- Outcomes of hearings

Such a report could provide a significant "window" into the actual operation of the discipline process by each of the Professional Organizations and enhances the accountability of the Professional

Organizations with respect to their discipline process. My prediction is that such reports would establish that, except for the engineering profession, there are relatively low levels of activity in the discipline processes of the Professional Organizations thereby limiting professional discipline systems as a quality assurance mechanism.

7. Enhancing Professional Organizations' Professional Guidance to QPs

Every professional needs clear guidance with respect to the objectives and expected standards of the work they perform. When a professional regulator determines that a performance problem exists or potentially exists with respect to its members practicing in certain areas, a typical regulatory response is to examine whether the expectations on those members are clear. If not, a regulator will often take steps to clarify expectations for its members practicing in that area. Regulators have a variety of ways in which to clarify expectations. Some will establish formal standards of practice while others will issue policies or other types of professional guidance. Whatever the format of such documents, the objective is the same: attempt to raise performance by the members by clarifying expectations and providing advice to the profession on how to address issues that arise.

Except for the British Columbia Institute of Agrologists,¹¹ the Professional Organizations have developed various types of "professional guidance" documents for their membership in various subject areas. The engineers and the foresters have developed significant guidance documents that will be useful for members practicing in the areas of professional reliance. However, given the complexity of practicing in the professional reliance area and the resultant risk to the public, I recommend that all the Professional Organizations be required to develop comprehensive standards of practice/professional guidance that address the specific issues faced by QPs in their profession. Draft standards of practice/professional guidance should be provided to the relevant Department for input before finalization. Whatever terminology is used to describe the documents, they need to create enforceable standards of professional conduct.

Clarity of expectations and guidance by the Professional Organizations with respect to the challenging aspects of professional reliance practice has the potential to raise the standard of professional practice. Clear, explicit, and mandatory requirements for professional reliance practice will also increase the likelihood of being able to use the discipline process successfully to address sub-standard professional practice.

8. Conflicts of Interest

Some of the Professional Organizations assert that the system of professional reliance does not increase conflict of interest issues. I have a slightly different perspective. While conflicts of interest issues will exist regardless of whether a system of professional reliance is in place, the potential of harm to the public from conflict of interest issues is greatly enhanced in a system of professional reliance because the QP is acting as the decision-maker often without effective government regulatory oversight.

¹¹ In the interview with project staff the BCIA indicated that the organization does not develop professional practice standards since their members only have "right to title" rather than "right to practice." In my view, this is not a compelling reason to not develop practice standards especially given that their legislation provides Council with the explicit authority to develop standards of competence for the profession.

My perspective is that the professional reliance system generates numerous, complex conflict of interest issues.¹² Historically, conflicts of interest in the professions have focused on balancing personal interests, the client's interests, the employer's interests, and competing interests among multiple clients. In the professional reliance regime additional complexity is added by requiring QPs to also consider the public interest in their decision-making role and by the elimination of effective governmental oversight.

All of the Professional Organizations have adopted general ethical principles with respect to conflicts of interest. However, given the importance of the conflicts of interest issue, I recommend that the Professional Organizations be required to develop specific rules/guidelines for conflicts of interest to help guide QPs in the professional reliance area.

9. Continuing Professional Development

Continuing professional development assists professionals in maintaining competence throughout their career, promotes excellence in professional practice, and helps professionals adapt to new challenges. It is considered to be a best practice in professional regulation to require professional organizations to establish mandatory professional development programs. Given the complexity of professional reliance practice, the Government should consider requiring that the Professional Organizations establish a continuing professional development program specifically designed to meet the needs of QPs. Participation in the program by QPs should be mandatory.

10. Inter-Profession Collaboration

It is clear that there has been a degree of collaboration among the Professional Organizations in addressing issues concerning professional reliance. The Government should encourage continuing inter-profession collaboration on professional reliance. A working group could be established with a focus on generating additional ideas to enhance the performance of QPs and how to best address the concerns that arise from the professional reliance system. The Professional Organizations differ widely in size, resources, and overall capacity. The Professional Organizations should be encouraged to collaborate and share resources designed to enhance the regulation of QPs. This type of collaboration would partially mitigate the challenges associated with disparate levels of financial and organizational capacity among the Professional Organizations.

VI. Conclusion

In my view, effectively addressing the issues associated with the system of professional reliance requires a multi-faceted approach. One part of necessary action, in my opinion, is enhancing the oversight by the Professional Organizations of their members practicing in the area of professional reliance. Implementation of the recommendations in this report has the potential to significantly increase the performance of QPs through enhanced oversight by the Professional Organizations.

Appendix "A": Summary of Recommendations

¹² See for example the analysis in the Professional Reliance Report at page 24, 34, and 48.

Governmental Oversight of Professional Organizations

- Recommendation 1: Steps should be taken to enhance governmental oversight of the Professional Organizations' regulation of Qualified Persons.
- Recommendation 2: In order to enhance effective government oversight, government should ensure that it has not only technical expertise with respect to the 5 professions but also expertise with respect to the governance of professional organizations.
- Recommendation 3: Following the conclusion of the "Professional Reliance in the Natural Resources Sector" project, each of the Professional Organizations should be required to develop a plan on how they will enhance the performance of the QPs who are their members. These plans should be submitted to the responsible Minister and follow-up reports on implementation of the plans should be required. These reports would be designed to enhance both accountability and transparency with respect to the regulation of QPs by the Professional Organizations.

Public Participation in the Regulatory Processes

- Recommendation 4: Government should take steps to increase the amount of public participation in the regulatory processes of the Professional Organizations.
- Recommendation 5: With respect to the membership on the Councils of the Professional Organizations, legislation should be amended to:
 - (1) Require that a minimum of 25% of the members on Council be public members appointed by Government.
 - (2) The public members on Council should be appointed through a merit-based selection process focused on governance skills and an understanding of the public interest.
 - (3) Government should ensure that public members appointed to the Councils receive appropriate governance training.
- Recommendation 6: With respect to the membership on the Discipline Committees of the Professional Organizations, legislation should be amended to:
 - (1) Require that a minimum of 25% of the members on each Discipline Committee hearing a case be public members appointed by Government.
 - (2) The public members on Discipline Committees should be appointed through a merit-based selection process focused on adjudicative skills and an understanding of the public interest.

- (3) Government should ensure that public members appointed to the Discipline Committees receive appropriate adjudicative training.

Advanced Designations

- Recommendation 8: Government should explore the advantages and disadvantages of requiring that only those members of the Professional Organizations with an “Advanced Designation” granted by the Professional Organization can practice in the area of professional reliance.
- Recommendation 9: In their report to the Minister referenced in Recommendation 3, the Professional Organizations should be required to address the following two issues:
 1. In the view of the Professional Organization, would the public interest be advanced and protected by an “advanced designation” system in which only those members with the “advanced designation” are permitted to practice in the area of professional reliance as defined ?
 2. Provide an outline of how such a system might work in your profession.

This information would serve as a good starting-point for further analysis and assessment by the affected Departments of the issues concerning Advanced Designations.

Duty to Report Unprofessional Behaviour or Incompetent Practice

- Recommendation 10: The Professional Organizations should be required to review and amend their Codes of Ethics as necessary to ensure that members have a duty to report to the Professional Organization unprofessional behaviour or incompetent practice by other members working in the area of professional reliance.
- Recommendation 11: Government should consider creating a statutory obligation on companies to report to the pertinent Professional Organization. If the company suspends or dismisses an employee due to conduct the Company considers to be unprofessional behavior or incompetent practice in the area of professional reliance, then the company could be required to report the matter to the pertinent Professional Organization which shall treat the matter as a complaint. The same reporting obligation should extend to companies when they terminate the contract of an independent contractor in similar circumstances.

Audits and Practice Reviews

- Recommendation 12: In order to strengthen the audit/practice review process used by Professional Organizations, the Government should consider whether to amend the legislation to create a standardized audit/practice review process for all the Professional Organizations. The process should provide broad discretion to the Professional Organization in determining whether to implement an audit/practice review and should include broad remedial powers to address issues of concern uncovered in the audit/practice review process.

Professional Discipline Process

- Recommendation 13: If at the end of the Professional Reliance Review project the Government has residual significant concerns about whether the professional discipline processes of the Professional Organizations are functioning appropriately, then the Government should consider whether to organize a “Third Party Review” of those processes. This type of review will provide reliable information on the regulatory effectiveness of the discipline processes and will result in recommendations to strengthen the processes.
- Recommendation 14: To enhance transparency, the Professional Organizations should be encouraged to post full discipline decisions on their websites after ensuring that their regulatory regime permits such publication without running afoul of privacy legislation.
- Recommendation 15: To enhance transparency, the Professional Organizations should be required to prepare an annual report on the discipline process that is provided to the relevant Minister and posted on their website.

Enhance Professional Organizations’ Professional Guidance to QPs

- Recommendation 16: Given the complexity of practicing in the professional reliance area and the resultant risk to the public, all the Professional Organizations should be required to develop comprehensive standards of practice/professional guidance that address the specific issues faced by QPs in their profession. Draft standards of practice/professional guidance should be provided to the relevant Department for input before finalization.

Conflicts of Interest

- Recommendation 17: Given the importance of the conflicts of interest issue, the Professional Organizations should be required to develop specific rules/guidelines to help guide QPs with respect to conflicts of interests in the professional reliance area.

Continuing Professional Development

- Recommendation 18: Given the complexity of professional reliance practice, the Government should consider requiring that the Professional Organizations establish a continuing professional development program specifically designed to meet the needs of QPs. Participation in the program by QPs should be mandatory.

Inter-Profession Collaboration

- Recommendation 19: Government should encourage continuing inter-profession collaboration by the Professional Organizations in the area of professional reliance. A working group could be established by the Professional Organizations to focus on how to

best raise the performance of QPs and address the challenging issues inherent in the system of professional reliance.