Reliance on Registered Professionals[1]

A. INTRODUCTION

> Government regulation is undergoing a change. Modern governments are re-examining their roles as regulators of private sector behaviour. Major industries have been deregulated or re-regulated with significant changes in their regulatory structures. Governments are encouraging the private sector to take the initiative and responsibility for regulatory programs. Some government programs are being privatized and transferred to the private sector; others are being commercialized and being run as if they were private commercial corporations either by government or by private sector "partners." In some cases, the regulatory responsibilities of government, including rulemaking, inspections and enforcement, are being turned over to the private sector.[2]

The past decade has seen a new generation of results-based environmental legislation in B.C. with a particular focus on deregulation in the past five years.[3] Results-based or performance-based standards refer to regulations that specify a desired outcome but give discretion to the regulated entity to choose how to meet that outcome. This is in contrast to means-based regulations, including command and control, that specify how the regulated entity must perform.

A key part of the performance-based reform policy is to give the responsibility for certifying ecological conditions and upholding standards of practice to registered professionals, a role that had been performed by civil service staff who were responsible for following command and control regulations.[4] In a variety of fields, including the remediation of contaminated sites, development in and around some riparian areas, the installation of small scale sewage systems, and forest practices, registered professionals oversee private sector development of plans and onsite activities. These professionals – biologists, foresters, engineers and other "authorized persons" or "qualified environmental professionals" (QEPs)– evaluate the capabilities or condition of specific sites, create plans for activities on the site, and, in some

[1] Thanks to Wally Braul, George Bryce, Mark Haddock, Katie Hamilton and Sarah Sharp for their analysis of this topic.

[2] Priest, Margot. The Privatization of Regulation: Five Models of Self-Regulation (1997-1998) 29 Ottawa L. Rev. 233 at para 1.

[3] For example, the Province of B.C.'s former deregulation web site stated: A key aspect of the provincial government's regulatory reform policy is, where appropriate, to shift away from prescriptive, command and control regulation towards more results based regulation. The intent is to achieve public policy objectives through regulation that sets performance goals or standards rather than prescribes specific rules or behaviour. Last visited November 2008 at http://www.deregulation.gov.bc.ca/regulationworkshop/default.htm

[4] See, for example, the Contaminated Sites Regulation, BC Reg. 375/96 under the *Environmental Management Act*, S.B.C. 2003, c.53; the Riparian Areas Regulation, BC Reg. 376/2004 under the *Fish Protection Act*, S.B.C. 1997, c.21; the Sewerage System Regulation, BC Reg. 326/2004 under the *Public Health Act*, S.B.C. 2008, c.28; and the *Forest and Range Practices Act*, S.B.C. 2002, c.69.

cases, carry out the activities on the site. They can be evaluator (both before and after the activity), planner, and the person or supervisor carrying out the activity on the site, three functions that are generally required by legislation and regulations. All of these functions require the use of professional judgment, the reliability of which is overseen by professional associations and their disciplinary procedures, not the provincial government as regulator.

Some of the benefits of relying on registered professionals include:

- Faster site evaluation and planning by the private sector;
- Faster approvals by the regulator;
- Decreased public cost as the proponent pays for the site evaluation and approvals;
- Benefiting from the professional judgment of highly qualified individuals where the same level of expertise may no longer be found in the civil service;
- Increased expertise to incorporate new technology and greater flexibly for meeting performance standards.

Some of the problems with relying on registered professionals include:

- Increased cost for the private sector;
- Lack of public participation in, and notice of, the permitting process;
- Lack of appeal from decisions of registered professionals;
- Potential for conflict of interest where registered professionals from the same firm undertake all aspects of the regulatory function;
- No monitoring and evaluation of how professional judgment results in compliance with performance-based standards;
- Questionable self-regulation as some professional bodies are unskilled in evaluating member performance and discipline;
- A danger that the ultimate government decision-maker will not adequately understand the specific context of the decision and engage with the decision to be made.

Given the considerable attention paid to deregulation and the reliance on registered professionals to uphold public interest standards when acting for the private sector, especially when dealing with public health and safety and the environment, there is surprisingly little evidence showing that performance-based standards are more effective than historic regulatory approaches:[5]

> Although several participants suggested that performance-based standards are probably preferable to design standards in the vast majority of situations, these and other participants recognized that there is little empirical evidence to support this claim. Indeed, many participants acknowledged that there is a dearth of

[5] Coglianese, Cary, Jennifer Nash and Toff Olmstead. Performance-based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection (2003) 55:4 Administrative Law Review at 749.

empirical studies aimed at measuring the effectiveness of performance-based standards, especially in comparison with the effectiveness of other regulatory instruments.

The purpose of this backgrounder is to discuss some of the issues raised by relying on registered professionals to undertake site assessments and also certify that activities meet provincial environmental regulations. Section B sets out examples of provincial delegation to registered professionals in four sectors (sewage, contaminated sites, forestry and development in some riparian areas), and some of the advantages and disadvantages of using registered professionals. Section C canvases the challenges of relying on registered professionals under environmental legislation as informed by the expertise and experience of the ELC Associates and others. Section D invites the reader to consider questions posed in anticipation of the ELC Associates teleconference on Monday November 29 2010.

B. CHARACTERISTICS OF RELIANCE ON REGISTERED PROFESSIONALS IN ENVIRONMENTAL SECTORS IN B.C.

An evaluation of the spectrum of reliance on registered professionals and how professional organizations self-regulate is beyond the scope of this backgrounder.[6] Instead, four structures of self-regulation from B.C. regulatory regimes that implicate environmental quality are described below to show the range of current practice. These are onsite sewage, contaminated sites, forestry, and riparian areas.

Regulation of Sewerage Systems

The Sewerage System Regulation, which regulates the handling and treatment of sewage not serviced by a larger municipal or regional system (i.e. septic tanks on rural properties) came into force in 2005 and "…shifts the focus of managing on-site sewage systems through the application of an outcome based approach to wastewater management which allows for greater flexibility in terms of how these systems are regulated."[7]

Only an "authorized person," which includes an engineer, may construct and maintain on-site sewage systems. An authorized person must file information about a sewerage system with the responsible Health Authority, which includes assurances that the plans and design specifications are consistent with standard practice as set out in the industry-developed Standard Practice Manual. Practitioners are trained through the BC Onsite Sewage Association and become authorized persons once they have registered with the Applied Science Technologists and Technicians of BC (ASTTBC). While health authorities will undertake site audits of sewerage systems on a complaint driven basis, there is no permit to appeal when site-specific decisions are made.

[6] For a comprehensive review of different models of self-regulation, see Priest, The Privatization of Regulation, *supra* note 2.
[7] Ministry of Health Services, Overview of the Sewerage System Regulation http://www.health.gov.bc.ca/protect/lup_regulation.html.

The Sewerage System Regulation Improvement Coalition,[8] formed specifically to address the ineffectiveness of the sewerage regulation process in protecting public health and the environment, noted the following problems with sewerage deregulation and the reliance on registered professionals:[9]

- Loss of public health protection because there are few minimum standards. The focus is on outcome-based standard practices;
- Increased complexity and confusion as to what is standard practice with the creation of a 300 plus page industry-developed Standard Practice Manual. The Manual is not mandatory (stating that its requirements can be varied) and its application can result in unsafe practices (e.g. it would have allowed the installation of a septic system adjacent to a community drinking water well prior to the recent 2010 amendments to the Regulation – see below);
- Potential professional disagreement between registered practitioners with the ASTTBC (who require use of the Manual) and engineers (who have not developed standard practices);
- Lack of oversight because public health official do not approve plans or system installations. The systems are designed and installed by the "authorized person" who must file plans with the local health authority. Health authority staff have no power to intervene when a plan is filed or during installation;
- No public accountability because there is no meaningful oversight of the industry. The existing Sewage System Leadership Council does not have adequate public health and environmental representation;
- Illegal installation of many sewage systems.

In June 2010 the Government of B.C. amended the Sewerage System Regulation to address some of these concerns.[10] In particular, the amendments mandated minimum setbacks between wells and sewage systems of 30 metres.[11] The amendments also shift most training and certification from the BC Onsite Sewage Association to the larger ASTTBC organization.[12] For outstanding health hazards, the ASTTBC will work with Health Authorities to address concerns and the Health Authorities have authorization to order the abatement of the health hazard to protect public health.[13]

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[8] The Coalition is composed of individuals and professional associations concerned about the new Sewerage System Regulation. Representatives include BC Medical Association, Environment Committee; BC Shellfish Growers Association; Canadian Institute of Public Health Inspectors, BC Branch; Public Health Association of BC. The purpose of the SSRIC is "to identify the major deficiencies with the new Regulation (and its administration), and to propose to government a set of solutions to correct those short-comings before environmental and public health problems result."

[9] Ministerial Briefing Note, *What's That Smell?*: The Effects of Sewerage Deregulation in British Columbia (February 18, 2007).

[10] OIC 476 2010.

[11] Sewerage System Regulation, B.C. Reg. 326/2004, s.3.1.

[12] *Ibid* at s.7.

[13] *Ibid* at s.11.

However, the system of the registered professionals filing sewerage system plans with Health Authorities without any approvals remains in place.[14]

Remediation of Contaminated Sites

A new structure for the administration of the remediation of contaminated sites came into force on July 1 2008. The Ministry of Environment has divested oversight of all non high risk sites to registered professionals.[15] On all sites except those that are high risk, applicants obtain recommendations for approvals to the Ministry through the registered professionals of the Contaminated Sites Approved Professionals of B.C. (the Society). The Society assesses submissions against the legislation (including prescribed "parts per million" quantitative standards for all likely contaminants), Ministry protocols and guidelines, and Society practice guidelines and rules. The Ministry may issue legal instruments such as Certificates of Compliance based on the recommendation of these biologists, geoscientists, agrologists and engineers.

The Society succeeds the Roster Steering Committee (RSC) system, which since 1999 was a multi-stakeholder committee of the Ministry of Environment The RSC managed a "roster" of private sector approved professionals and their recommendations for regulatory approvals. The Society operates in a more independent fashion. For example, of its 9 board members, only one is a designate of the Ministry of Environment. The Society board presumably consults with the Ministry, but retains independence on key decisions such as membership, performance assessments (audits) of its members, and public complaints.

The Society conducts spot audits of five percent of professional reports to ensure that the correct methodology has been used. The Ministry has declined to look behind the professional's signature, meaning it accepts the reports without review. For work on sites, in simple cases the registered professionals assess their own work or have a colleague assess it. For more involved remediation, approved professionals from another firm review the work on site.

When developing this model, registered professionals expressed concern about liability. The compromise is that registered professionals are required to carry insurance of $5 million and the Ministry indemnifies them for additional amounts.

The Society provides limited opportunities for public interaction. There are no notification requirements when approvals are sought. There is no opportunity to appear before the Society to oppose an application because, say, the approved professional wrongly applied relevant standards. No appeal to the Environmental Appeal Board exists. The regime does have a complaint mechanism to the Society to investigate the veracity of the ethics and judgment of an approved professional. Three members of the board are drawn respectively from industry, local government and the general public.

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[14] Sewerage System Regulation at ss.8(2) and 2.1(1)(d).

[15] Ministry of Environment. Contaminated Sites Update: New Responsibilities for Approved Professionals (June 27, 2008) http://www.env.gov.bc.ca/epd/remediation/updates/pdf/new-resp-ap.pdf.

Forestry Permitting

The 2002 *Forest and Range Practices Act* and regulations take an explicitly results-based approach to logging.[16] Forest companies must meet broad government objectives for ecosystem values through the development and Ministry approval of five year forest stewardship plans, or by complying with default standards. The plans specify intended results or strategies for site-specific forest development units and must be consistent with government objectives on, for example, water, wildlife, biodiversity, existing old growth management areas, riparian and wetland areas, and fish habitat. For example, the government objectives for riparian areas is found under the *Forest Planning and Practices Regulation*:

> The objective set by government for water, fish, wildlife and biodiversity within riparian areas is, without unduly reducing the supply of timber from British Columbia's forests, to conserve, at the landscape level, the water quality, fish habitat, wildlife habitat and biodiversity associated with those riparian areas.

The plans provide the framework for managing operations of a company in a forest area, but there are no standards against which success of the practices can be measured. Site level logging and road plans are now prepared by a registered professional forester employed by the company without specific requirements for assessment of slope stability, watershed hydrology or visual impacts.[17] A company's compliance with a plan provides a due diligence defense against charges of harming the environment. Public participation in forestry activities is limited to public review and comment of the forest stewardship plans.

Development Permitting in Riparian Areas

When exercising their powers with respect to development (Part 26 under the *Local Government Act*), certain local governments must now assess whether or not the development may harm riparian areas that provide fish habitat.[18] The purpose of the Riparian Areas Regulation (RAR) is to protect habitat and conditions that support fish and to satisfy federal *Fisheries Act* requirements. Before a local government approves development in a riparian assessment area (30 metres on either side of a watercourse), it must ensure that a QEP has assessed the riparian area and development following the RAR assessment methods and provided a professional opinion that there will be no harmful alteration, disruption, or destruction (HADD) of natural features, functions, and conditions that support fish life processes in the riparian assessment area, or that a HADD will be avoided if the landowner

[16] Forest and Range Practices Act, S.B.C. 2002, c.69.
[17] West Coast Environmental Law Association. Cutting Up the Safety Net: Environmental Deregulation in British Columbia (2005).
[18] Riparian Areas Regulation B.C. Reg. No. 376/2004 pursuant to the *Fish Protection Act*, S.B.C. 1997, c.21. RAR is applicable only to the following regional districts and the municipalities within them: Capital, Central Okanagan, Columbia-Shuswap, Comox-Strathcona, Cowichan Valley, Fraser Valley, Greater Vancouver (other than within the boundaries of the City of Vancouver), Nanaimo, North Okanagan, Okanagan-Similkameen, Powell River, Squamish-Lillooet, Sunshine Coast, and Thompson-Nicola. Riparian Areas Regulation B.C. Reg. No. 376/2004 at s.3(1).

protects certain areas from development and implements the identified mitigation measures. The Ministry of Environment must receive a copy of this assessment and notify Fisheries and Oceans Canada. Ministry of Environment staff review only a selection of assessments. Fisheries and Oceans Canada rely on the QEP assessment of whether or not a HADD, as treated under the federal *Fisheries Act*, will occur without reviewing the assessments.[19] If the QEP finds that there will be a HADD, the development may proceed only with the permission of the Minister of Fisheries and Oceans or pursuant to a regulation under the *Fisheries Act*.

Unlike in other environmental sectors, the RAR is the first time that many local governments, that would not otherwise do so, have been required to take riparian values into account. However, the veracity of the RAR methodology was called into question before it became law,[20] and these issues are still unresolved. Examples of conflicting professional opinions are surfacing. For example, a QEP recommended against development on one site on Salt Spring Island. The landowner sought a second opinion and another QEP recommended development as proposed. The Ministry of Environment received both QEP assessments. There is no formal public participation in the RAR process; interested parties may challenge the decision of the local government by judicial review.

C. ISSUES

The four regulatory structures briefly outlined in Part B raise a number of environmental quality and access to justice issues because their basic structure relies on private organizations and professionals to exercise discretion absent, in many cases, public notice or a formal appeal mechanism. The standards upon which the judgment of the professionals is based is also unclear as industry codes of practice or general performance-based guidelines do not offer measurable environmental quality standards.

1. Lack of Oversight

Several of the new self-regulation models do not provide an opportunity for public or agency intervention that is aimed at preventing harm. Recourse is available only after harm to the environment or public health has occurred. There is no trigger during the approvals process that would alert Ministry officials to cases needing additional review. Unique to the other three systems, in the case of contaminated sites, an aggrieved party may appeal the Ministry issuance of an approval in principle of a remediation (issuance of which is based on a recommendation processed by the Society). In the case of contaminate sites remediation,

[19] The Fisheries Act, R.S.C. 1985 c.F-14 makes it a HADD an offence under s.35(1).
[20] See the 59 page legal opinion on the liability of local governments by Kathryn Stuart of Staples McDannold Stewart at http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/SMSlegalopinion.pdf and the Ministry of Environment's response http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/documents/RARresponsetoSMSopinion.pdf.

the problem is not necessarily that remediation causes harm, but that the professional failed to apply all applicable standards to ensure legislatively determined protection.

2. Little Public Accountability

Correction of professional misconduct relies on complaints to professional organizations and some argue that there is an inherent conflict of interest when practitioners evaluate and discipline their colleague practitioners. There is no independent audit of registered professionals or how well performance-based standards are working, and no ability to appeal site-specific decisions before work has been carried out on the site.

The case of *Sunshine Coast Conservation Association v. Association of British Columbia Forest Professionals* is a recent example of the public challenging a self-regulating organization to uphold professional standards.[21] The petitioner complained to the professional association about the conduct of a registered professional forester (RPF). The RPF was responsible for forest plans submitted for approval to the district manager and for applications to harvest. The complaint was 28 pages, supported by 50 documents, and was based on alleged contraventions of the RPF's Code of Ethics and Standards of Professional Practice. For example, the petitioners alleged that the RPF proposed logging in critical habitats that he was professionally obligated to preserve.

The registrar of the Association rejected the complaint. The petitioners sought judicial review and the court ordered the registrar to reconsider the complaint. Upon reconsideration, the registrar rejected the complaint again (the effect of which was that the complaint failed to be considered by a professional review panel) on the basis that he was not satisfied that the allegations, if proven, involved a breach of the *Foresters Act*, S.B.C. 2003, c. 19 and the applicable bylaws or resolutions of the Association. He also indicated that there was insufficient information before him to prove the allegations made.

In finding that the legislation requires the registrar to assume that the allegations are proven, the court concluded that the registrar erred in considering whether the allegations are "provable", because in doing so he was weighing the strength of the evidence and thereby considered an irrelevant factor. It was also wrong for the registrar to consider whether the burden of proof could be met, because the legislation requires him to assume that the burden of proof is met by assuming that the allegations are proven. Finally, the court found that there is a limited duty to provide reasons why the allegations, if proven, would not involve breaches of the applicable legislation or Association bylaws or resolutions. The court again remitted the decision back to the registrar for reconsideration.

From a public interest perspective, two judicial review hearings resulted in the same registrar reconsidering his decision. There has not been an investigation into the actual professional practices of the RPF.

[21] 2007 CarswellBC 2094, 2007 BCSC 193, [2008] B.C.W.L.D. 1067, 2007 CarswellBC 2094.

3. Lack of Measurable Standards

In the move to deregulation and performance-based standards, standard practices and general objectives in law and regulations no longer provide measurable standards that indicate ecosystem quality. Industry has prepared some sector-specific standard practices documents, often without any public or other agency input.

D. DISCUSSION

Margot Priest concludes her analysis of industry self-regulation regimes by pointing out that certain conditions usually must be present for effective self-regulation. These conditions include:[22]

- relatively few industry players;
- high exit costs;
- a history of cooperation;
- the availability of expertise and resources for regulation in the industry;
- punishment of noncompliant behaviour;
- consumers valuing compliance;
- the availability of fair dispute settlement mechanisms; and
- a role for public participation or oversight.

This paper is a modest attempt to identify some of the issues associated with the increased reliance on registered professionals to uphold public interest environmental standards. To that end, we invite Associates to consider the following questions at our next teleconference on Monday November 29 from 4pm to 6pm:

1. Fettering of Discretion

Some lawyers argue that the practice of some Ministry officials to refuse to "look behind the signature" of a registered professional amounts to a fettering of their discretion based on administrative law principles. They (the Ministry staff) are not making a decision based on the facts of a specific application. What kind of case would be most effective in challenging this practice?

2. Deregulation, Public Health, Environment and Registered Professionals

In this era of deregulation, how can environmental and public health be addressed while increasing the accountability of registered professionals? The Sewerage System Regulation Improvement Coalition has proposed the establishment of a separate inspection, auditing

[22] *The Privatization of Regulation, supra* note 2.

and enforcement agency that is arms-length from the industry associations with members appointed by the Minister of Health.

3. Tort of Negligent Regulation

Courts have recognized the tort of negligent regulation in some non-environmental litigation. The challenge for this type of action is establishing that the government owed a duty of care to the plaintiffs.

A recent example of negligent regulation is the case of *Sauer v. Canada (Attorney General)* where a cattle farmer commenced a class action on behalf of commercial cattle farmers across Canada, alleging the Government of Canada was negligent in its regulation of the cattle industry, specifically by allowing cattle feed to contain ruminants and failing to ban ruminants in the feed before 1997.[23] The court certified the class action and the Ontario Court of Appeal dismissed Canada's application to strike the statement of claim alleging regulatory negligence by Canada. Canada conceded foreseeability and the court concluded that it was not plain and obvious that the plaintiff's claim of prima facie duty of care would fail.

4. Prescription or Professional Judgment – or Both?

The most prescriptive of the four systems is the contaminated sites regime. While providing a relatively high degree of objectivity verifiable by professionals, a common criticism is that the "blunt" standards can be unduly conservative, do not allow for reasonable flexibility, and create extraordinarily high costs (which in some cases can deter remediation and cause brownfields). These critics say that the standards are not supported by science, but the regulators' response is that a conservative approach must be taken because there is not enough science to relax the standards. As a general pattern, U.S. jurisdictions apply the codified and numeric approach now used in B.C. Other Canadian jurisdictions are generally following that pattern, often using the B.C. template. The codified approach in the U.S. has often ushered in reliance on registered professionals (on the assumption that engineers can apply numbers). A further impetus for the prescriptive approach is from developers and banks that have traditionally sought legislative numeric definitions of 'how clean is clean'. Is there an appropriate balance between prescribing environmental quality standards and applying professional judgment to site-specific conditions?

[23] [2007] O.J. No. 2443. Settled before trial.

For More Information:

Legislation and Regulations

Contaminated Sites Regulation, BC Reg. 375/96
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/375_96_00

Environmental Management Act, S.B.C. 2003, c.53
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/03053_00

Fish Protection Act, S.B.C. 1997, c.21.
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_97021_01

Forest and Range Practices Act, S.B.C. 2002, c.69
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02069_01

Public Health Act, S.B.C. 2008 c.28
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_08028_01

Riparian Areas Regulation, BC Reg. 376/2004
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/10_376_2004

Sewerage System Regulation, BC Reg. 326/2004
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/22_326_2004

Articles

Coglianese, Cary, Jennifer Nash and Toff Olmstead. Performance-based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection (2003) 55:4 Administrative Law Review at 749. Report at http://www.hks.harvard.edu/m-rcbg/Events/Papers/RPPREPORT3.pdf

Priest, Margot. The Privatization of Regulation: Five Models of Self-Regulation (1997-1998) 29 Ottawa L. Rev. 233-302

West Coast Environmental Law Association. Cutting Up the Safety Net: Environmental Deregulation in British Columbia (2005)
http://wcel.org/sites/default/files/publications/Cutting%20Up%20the%20Safety%20Net.pdf

Web Sites

Ministry of Health Services, Onsite Sewage Systems
http://www.health.gov.bc.ca/protect/lup_onsite.html

Ministry of Environment, Environmental Stewardship Division, Riparian Areas Regulation
http://www.env.gov.bc.ca/habitat/fish_protection_act/riparian/riparian_areas.html

Ministry of Environment, Land Remediation http://www.env.gov.bc.ca/epd/remediation/

Ministry of Forests and Range, Forest and Range Practices Act http://www.for.gov.bc.ca/code/