YOUNG ANDERSON
BARRISTERS & SOLICITORS

PROFESSIONAL RELIANCE: A LOCAL GOVERNMENT PERSPECTIVE

NOVEMBER 23, 2018

Bill Buholzer and Nick Falzon

PROFESSIONAL RELIANCE: A LOCAL GOVERNMENT PERSPECTIVE

I. INTRODUCTION

This paper looks at some of the findings contained in the *Final Report of the Review of Professional Reliance in Natural Resource Decision-Making*,[1] recently prepared by Mark Haddock for the Minister of Environment and Climate Change Strategy, and discusses the implications for local government practices that involve reliance on outside professionals. We also take a look at Bill 49, the *Professional Governance Act*, introduced in the BC Legislative Assembly in October to implement some of Haddock's recommendations.

II. WHAT IS PROFESSIONAL RELIANCE?

The Haddock Report defines professional reliance (in the context of regulation of the natural resources sector) as a regulatory model in which government sets the natural resource management objectives or results to be achieved, and professionals hired by proponents decide how those objectives or results will be met, with government relying on the professionalism and specialized competence of the qualified professional, the professional and ethical codes they are required to follow, and oversight by the professional associations to which they belong. The Report notes that the professional reliance system was a part of a provincial government effort in the first few years of the 21st century to reduce regulations in the natural resource sector, reduce the size of government and shift from prescriptive forms of regulation towards results-based regulation. As is typical with many such government initiatives, no built-in evaluation and review process was provided; it seems to have been simply assumed that a regulatory model based on reliance on outside professionals would work. However, incidents like the breach of the tailings storage facility at the Mount Polley mine and independent analyses conducted by the Ombudsperson, the Forest Practices Board and the Auditor-General during the 2014-2016 period highlighted significant defects in the model, leading to an overall review ordered by the Minister of Environment and Climate Change Strategy in 2017.

A. Reliance on Outside Professionals in Non-Regulatory Matters

Reliance on outside professional advice is so much a part of business as usual in governance at all levels in Canada that it's rarely questioned, or even thought about in any depth. A local government will often engage, and rely on, outside professional expertise when it constructs a fire hall or sewage lift station, or prepares a new official community plan. It might engage a professional headhunter to recruit a new CAO, or a law firm to negotiate a new contract with municipal employees. This type of out-sourcing is usually driven by the need for specialized

[1] https://engage.gov.bc.ca/app/uploads/sites/272/2018/06/Professional_Reliance_Review_Final_Report.pdf

expertise that the local government does not possess in-house. Outside professionals sometimes have access to sources of data and sophisticated computer software that local governments cannot afford to acquire and maintain. Sometimes the day-to-day workload on in-house staff makes out-sourcing necessary for special projects. The overt rationale for relying on outside professionals for these types of services doesn't usually include any deep analysis of whether such reliance is well-founded, because it's generally understood that professions such as engineering, architecture, accounting and law are regulated as regards both entry to the profession and professional conduct once admitted to the profession. It's axiomatic that these out-sourcing arrangements effect a transfer to the outside professional of potential liability for errors and omissions in the performance of the work, though that's not usually the core rationale for the arrangement.

B. Reliance in Local Government Regulatory Matters

Similar factors – access to specialized expertise or data and workload limitations – have made it common for government at all levels to extend the practice of relying on outside professionals to regulatory matters. In the case of building regulation, the practice has been driven by provisions in the BC Building Code, and by initiatives of the Municipal Insurance Association to limit claims against its members for negligence in the administration of the BCBC. The *Community Charter* in s. 56 also allows building officials to require the provision of third-party engineering certifications in relation to construction on lands that may be subject to natural hazards. On the express wording of the *Local Government Act* in relation to flood hazard management and on the common interpretation of the *Riparian Areas Protection Act* and Regulation (which may or may not be correct), the practice of relying on outside professionals is also mandated by provincial law.

The routine use of a professional reliance model in the regulatory matters just mentioned has made many local governments comfortable, at least at a conceptual level, with the use of the same model in other areas of regulation characterized by similar factors – lack of in-house expertise and heavy staff workloads – coupled with a policy of shifting regulatory costs onto the persons whose activities are being regulated. Examples are the use of arborists in tree protection matters and the use of members of the Canadian Association of Heritage Professionals in heritage programs. This paper will examine the use of the professional reliance model in these other areas of local government regulation not addressed in the Haddock Report, as a means of making the recommendations in the report more useful in the local government context.

III. HADDOCK REPORT: KEY RECOMMENDATIONS

The Haddock Report contains some general recommendations regarding the governance of professional persons who provide advice in regulatory matters pertaining to natural resource sectors, as well as specific recommendations resulting from the author's examination of the use of the professional reliance model in 22 specific natural resource regulatory schemes, two of which (on-site sewage disposal and riparian area protection) are of particular interest to local governments. In addressing these regulatory regimes, the Report considers professional practice matters pertaining to five particular professional groups: agrologists, biologists, foresters, applied science technologists and technicians, and engineers and geoscientists. At this point it's worth noting that the government down-sizing initiative of which the use of the professional reliance model is an integral part was a government-wide initiative, and that the Report considers outcomes only in relation to the natural resource sector. There are probably many more arrangements throughout other areas of provincial government jurisdiction such as health, transportation and education where this model is being employed.

In that context it's very important to note that the Report finds no inherent fault with a professional reliance model in regulatory matters. Its recommendations could, to the contrary, be characterized as a doubling-down on the regulatory direction set by the Province 15 to 20 years ago, and even an encouragement to broaden the use of the professional reliance model to include areas of regulation where the government has until now retained a more traditional, prescriptive approach. The Report does, however, identify some problems with the model that were obviously not addressed at the outset and that will arguably need to be addressed if public confidence in provincial government regulatory structures is to be restored and maintained.

A. General Recommendations for Governance of Professionals

Ironically given the original downsizing rationale behind the Province's move towards professional reliance, the Haddock Report recommends the establishment of a provincial Office of Professional Regulation and Oversight to supervise the enactment and amendment of legislation governing professional bodies, develop best practices for the governance of professional associations, and regulate professional bodies. This body would perform functions similar to that of the Health Professions Review Board under which, under the *Health Professions Act*, hears administrative appeals from decisions of the inquiry and registration committees of British Columbia's 22 self-regulated health colleges.[2] The Health Professions

[2] *Health Professions Act,* RSBC 1996, c 183.

Review Board was created to fill an administrative gap. Where a self-regulating college received a complaint that it did not deem serious enough to refer to its discipline committee, complainants had no recourse. Under the current statutory scheme, dissatisfied complainants have access to a process that allows their concerns to be heard in a number of ways, ranging from a formal hearing to an informal resolution through mediation.

The establishment of an Office of Professional Regulation and Oversight would seemingly indicate an inclination on the part of the government to place the health of the province's natural environment on a level comparable to the health of its human population, in addition to putting the professional reliance model of regulation on a firmer footing generally. This higher-level recommendation identifies 10 separate aspects of professional governance that ought to be addressed in legislation establishing provincial oversight of professional bodies:

1. Professional Association Capacity

The Report notes that professional associations can vary greatly in size of membership and, accordingly, ability to provide proper oversight, practice guidance and so on. Pooling of resources among associations is mentioned as a potential strengthening strategy.

2. Composition of Governing Councils Including Members of The Public

The trend in governance of professional associations is to include lay persons on governance boards and committees for the sake of transparency and public confidence; much more than token membership is desirable. For example, under the *Health Professions Act* not more than 2/3 of board members may be members of the profession that is being governed.

3. Authority of Governing Councils Regarding Professional Practice and Corporate Members

Governing councils need authority to make rules about professional practice standards, ethics and continuing professional development, and need to be able to deal with professional services provided by firms as well as individual professional members.

4. Gatekeeper Functions – Who Can Be A Member

The Haddock Report identifies some problems with the control of membership in professional associations that are related to labour mobility and trade agreements. Professionals may obtain certification in another province, move to this province and claim entitlement to membership and practice in BC despite lack of local knowledge or experience. The conclusion: reliance on professional registration alone is risky.

5. Specialist Designations Within the Profession

In professions having a range of practice areas, the Report endorses the use of specialist designations with associated training requirements, to reduce reliance on mere professional registration as an indicator of competence and reliability.

6. Quality Management Functions

Trustworthy professional associations establish practice standards and guidelines, establish and monitor continuing professional development requirements and conduct audits and practice reviews. Examples of practice standards are given later in this paper.

7. Codes of Ethics

Existing codes of ethics for professional associations range from higher-level "aspirational" codes referring to general principles like honesty, to more prescriptive codes that lend themselves to clearer conclusions when breaches are alleged. The Haddock Report recommends the use of prescriptive codes of ethics that include a statement of overarching principles to inform the interpretation and application of the rules. It recommends against allowing codes of ethics to be subjected to a vote by the membership of the association.

8. Public Interest Mandate of Members

This criterion for reliance on outside professionals relates to the "social contract" that exists between self-regulating professions and the general public: the profession has a duty to protect the public from harm. In 2003 an Ombudsman's report on self-governance in the health professions pointed out that those professions "do not appear to have fully accepted or understood what it means to act in the public interest".[3] If that could be said quite recently about the health professions, chances are it applies now to professions whose work engages only the health of the natural environment, the quality of the built environment, or other non-human subjects of government regulation.

However, government has an important role to play in defining the public interest, and the more that government defines it, the easier it would be for professional associations to ensure that their members are achieving it in their work. For example, a local government can greatly assist a geotechnical engineer in performing a "safe use" analysis of lands prone to landslide hazard by specifying in a bylaw or policy the probability of the event that the engineer is

[3] BC Ombudsman (2003), "Acting in the Public Interest? Self-Governance in the Health Professions: The Ombudsman's Perspective" at pg. 3.

required to take into account – for example, "the landslide event that has an annual probability of occurrence of 1/475 (10% probability in 50 years". Establishing meaningful public interest criteria in relation to more complex matters such as tree protection and heritage conservation, discussed later in this paper, would be more difficult.

9. Complaints and Discipline, Including Whistleblower Protection

The Haddock Report notes that submissions to the review indicated wide divergence of opinion between professional associations on the one hand and government employees, other professionals and members of the public as to whether disciplinary processes are actually functioning in the manner that the professional reliance model assumes they are. While the Report characterizes these processes as the cornerstone of professional governance, it concludes that government needs other regulatory tools to address quality assurance shortfalls.

10. Association Mandates and Advocacy On Behalf Of Members

Finally, the Report acknowledges that professional associations typically have mixed mandates that include both the regulation of members and advocacy of members' interests in the larger community, and that in some circumstances these mandates conflict. Generally the recommendation is that professional associations be required to focus on their regulatory role.

The relative strengths of the five specific professional associations considered in the Haddock review are quite variable in dealing with these different aspects of member governance, and including other associations in the review would have increased the variability even more. APEGBC, for example, includes four members of the public on its governing council who cannot be members of the Association, while the smaller organizations considered later in this paper (arborists and heritage professionals) have no place for non-members in their governance.

B. Specific Recommendations Relevant to Local Government Activity in Natural Resources Management

Two of the 22 specific regulatory regimes examined in the Haddock Report happen to be of particular interest to local governments, in one case because the professional reliance model more or less eliminated a local government regulatory function, and in the other case because the provincial regulatory regime is wholly dependent on the exercise of local government regulatory powers to give effect to the opinions and judgments of outside professionals. The Report's findings on these regimes are summarized here.

1. On Site Sewage Disposal

Under the Sewerage System Regulation pursuant to the *Public Health Act*, a property owner or developer can install and operate an on-site sewage disposal system anywhere in the province without obtaining a permit or other approval from either a local government or a local health authority. Rather, they must engage to design and construct the system a "professional", and s, 7 if the Regulation provides that:

> (3) A person is qualified to act as a professional if the person
>
> (a) has, through education or experience, training in soil analysis and sewerage system construction and maintenance, and
>
> (b) is registered as a fully trained and practising member of a professional association that
>
> (i) is statutorily recognized in British Columbia, and
>
> (ii) has, as its mandate, the regulation of persons engaging in matters such as supervision of sewerage system construction and maintenance.

This scheme was put into operation through the establishment of the independent BC OnSite Sewage Association, which is nominally responsible for ensuring that its members are competent to design and install these systems, and the publication by the Ministry of Health of a Sewerage System Standard Practice Manual. The Regulation requires system designers and installers to simply file certain information on their designs and installations with the relevant local health authority; no permit or approval is required. It relies on "professionals" as defined above to inform their clients, in circumstances where soil testing performed in accordance with the Standard Practice Manual indicates that a site is incapable of supporting on-site sewage disposal, to advise their client of that circumstance (and thereby forego the fees associated with designing and installing a system for the client).

The Haddock Report included this regime within its scope on account of past problems including the installation of sewage systems where health authorities would not have approved them, under-design of systems by unqualified persons, and over-design of systems by ethically-challenged BCOSSA members. The Report notes that amendments to the Sewerage System Regulation have made the regulatory regime "more robust" with very few residual concerns, but makes two recommendations for further improvement:

- A central electronic registry for the "filings" that are currently held by the local health authorities, making them accessible to; and

- Coordination among health authorities, local governments and the Ministry of Health regarding owner compliance with the sewerage system maintenance plan that their system installer is supposed to provide.

The latter recommendation was possibly inspired by the authority of local governments under ss. 8(3)(h) and 64(h) of the *Community Charter* to regulate, prohibit and impose requirements in relation to "drains, cesspools, septic tanks and outhouses" or perhaps the authority under s. 64(g) in relation to "unsanitary conditions on property". Unfortunately, attempting to enforce such a bylaw in respect of a system that cannot be properly maintained because it shouldn't have been installed in the first place, or was improperly designed, presents a bleak prospect for the average local government.

2. Riparian Area Protection

The Haddock Report contains a lengthier treatment of the chequered history of the province's riparian area protection regime, mentioning that these arrangements have been the subject of adverse judicial comment in our Court of Appeal[4] and an Ombudsperson's report[5] on the use of the professional reliance model in riparian area protection (but not that the effectiveness of the regime was previously called into question by the Cohen Commission on the Decline of the Fraser River Sockeye Fishery[6]). The Report generally backs the Ombudsperson's 25 recommendations for changes in the riparian area protection regime, noting however that many of them have not yet been implemented.

The riparian area protection scheme set out in the Riparian Areas Regulation, that local governments subject to the Regulation are required by s. 12 of the *Riparian Areas Protection Act* to "meet or beat", involves the engagement by a developer of a "qualified environmental professional" to conduct a riparian area assessment in accordance with a methodology prescribed by the Regulation, and certify either that the proposed development will not harm fish life processes in the riparian area, or that a "streamside protection area" identified on the basis of site characteristics and prescribed criteria will not be harmed if it is protected from the development in the manner indicated in the report. The report is submitted to the Ministry of Environment electronically, and upon the relevant local government being notified by the Ministry that the report has been submitted, prohibitions on a broad range of local government development approvals set out in the Regulation are no longer applicable. MOE receives an average of 725 such reports per year, and according to the Ombudsperson's report performed

[4] *Yanke v Salmon Arm (City)*, 2011 BCCA 309.

[5] https://www.bcombudsperson.ca/documents/striking-balance-challenges-using-professional-reliance-model-environmental-protection

[6] http://publications.gc.ca/site/eng/432516/publication.html

no systematic review of the reports prior to 2014. According to Haddock, MOE audits performed since the Ombudsperson's report "have repeatedly shown that professional discretion is often misused or abused" by qualified environmental professionals. Rejecting the idea that better training of QEPs is a sufficient response, the Haddock Report states that substandard QEP performance is "often driven not by lack of understanding but by advocacy on behalf of their clients", an observation that we think many of our local government clients would echo.

In terms of additional recommendations for continued use of the professional reliance approach in riparian area protection, the Haddock Report offers these:

- Provide MOE authority to reject deficient QEP reports (which implies the establishment of a review function, or at least a systematic audit function);
- Ensure that QEP qualifications specified in the Regulation reflect the knowledge actually required to prepare a riparian area assessment according to the prescribed assessment methods;
- Maintain a provincial roster of eligible QEPs, with authority to remove names for deficient performance; and
- Clarify the objective of riparian area protection and revise the prescribed assessment methods to address cumulative impacts of development.

IV. PROFESSIONAL RELIANCE IN LOCAL GOVERNMENT REGULATORY ACTIVITIES

In this concluding section of the paper we address the "so what" question: what does the Haddock Report suggest local governments ought to be considering where they are relying on outside professionals in the administration of a regulatory function? We address reliance on members of two professional groups not examined in the Haddock Report but frequently engaged in local government regulatory regimes: arborists and heritage professionals who are not members of the Architectural Institute of BC Local governments could use the analytical approach set out here in considering whether to entrust the members of any other professional organization with an exercise of judgment required in the administration of any other local regulatory regime.

A. Tree Cutting Regulation

Many local governments around the province have enacted tree cutting bylaws since detailed powers for urban tree management were conferred on municipalities in the 1990s. (Regional districts have authority to regulate tree cutting only for the purpose of mitigating natural hazards.) Generally speaking, the objective of these bylaws is to preserve as much of the urban tree canopy as possible, for environmental and aesthetic reasons. Inevitably, though, trees may have to be removed or severely pruned for safety reasons: they have been damaged by natural causes such as windstorms, lightning or insect infestation, or they are either dead or diseased.

Not generally having in-house arboricultural expertise, most local governments have managed this aspect of regulation by relying on arborists engaged by property owners to examine specific trees and provide advice on whether removal is warranted. The arborist may also be required to make recommendations on the selection of replacement tree species and a replanting strategy. Most local bylaws describe this outside professional as a member of the International Society of Arboriculture (ISA).

B. Heritage Conservation Programs

Outside professionals also play a significant role in local government heritage conservation initiatives, though a few of the larger municipalities have in-house "heritage planners". The role of outside heritage professionals ranges from preparing statements of heritage significance for properties whose owners are attempting to qualify for development advantages that are available only for significant heritage properties, to the preparation of conservation plans for such properties and oversight of conservation plan implementation. Demolition or significant alteration of a significant heritage building might be permitted only if a heritage professional has inspected it and determined that retention is impractical. In all of these roles, heritage professionals are expected to act impartially even though employed by a property owner who has a particular development objective in mind. In some cases, this role is performed by a member of the Architectural Institute of BC, an organization that is comparable to APEGBC as regards the criteria set out in the Haddock Report for integration into a professional reliance model of regulation. However, the involvement of a registered architect is not warranted for heritage projects that are modest in scope, and local governments have sometimes permitted these functions to be performed by members of the Canadian Association of Heritage Professionals (CAHP).

V. EVALUATING PROFESSIONAL RELIANCE

In the following table we indicate, simplistically of course given the complexity of the criteria, whether each of these professional organizations has in place the key elements that the Haddock Report considers essential for a reliable professional reliance system of regulation. The Report's assessment of APEGBC is provided for comparison purposes.

	Arborists	Heritage Professionals	Engineers
Professional association capacity	√	√	√
Public representation in governance			√
Authority over professional practice standards	√	√	√
Gatekeeper function including exclusion	√	√	√
Specialist designations	√		√
Management of quality of professional practice	√	√	√
Code of ethics	√	√	√
Public interest mandate		√	√
Complaint and discipline process	√	√	√
Clear regulatory mandate	√	√	√

For local governments that may be considering the adoption of a professional reliance model for any particular area of regulation, the Haddock Report suggests very strongly that the status and management of the association on whose members' work the local government would be relying needs to be thoroughly understood. The mere possession of a professional designation of some kind is clearly only a threshold question. If the local government were directly employing an individual to perform the regulatory function, it would have direct control over

selection of the individual, their practice standards and quality of work, and would be accountable for the consequences of their employee's work. As a public official the employee would automatically have a public interest mandate, be subject to employee conflict of interest rules, and be subject to disciplinary measures for misconduct. Out-sourcing the advice is viable only if these mechanisms are actually replaced by analogous mechanisms in the professional status regime that will govern the conduct of the person providing the advice.

A. Rosters of Qualified Professionals

It's sometimes suggested that generic criteria for the appointment of professionals to perform these types of functions are inadequate because the reliability of persons who meet the criteria is so highly variable: rather, the local government should maintain a roster of eligible individuals and require owners seeking local government approvals to engage an individual whose name is on the list. As noted above, this is precisely the approach that the Haddock Report recommends for riparian area protection matters, based on experience in the Ministry of Environment's contaminated sites regime and in the Ministry of Transportation and Infrastructure. At the very least, it has been suggested, the local government ought to be able to maintain a list of professionals on whose advice they are not prepared to rely, despite the person's membership in good standing in a professional organization, because of unsatisfactory performance in the past.

The roster approach can be a can of worms administratively: how bad must individual performance be to warrant removal from the list? Is any local government staff member qualified to pass judgment on the professional conduct of an outside professional? If so, can a member of an association who is employed by a local government recommend the removal of a fellow member from such a list, without violating the association's rules of professional conduct? Can one get back on the list, and if so, how? It can also cause political problems: will a de-listed professional complain to the regional board or municipal council that they are being deprived of their livelihood by unfair administrative decisions? Are there enough professionals in good standing in the local area to make these professional services available to local owners at a reasonable cost?

The fact that the Haddock Report endorses the use of rosters in professional reliance regimes lends weight to the possibility that the practice would be held to be within the jurisdiction of a local government exercising regulatory powers under the *Community Charter* or the *Local Government Act*, either on the basis that the use of a roster of qualified professionals is inherently an aspect of powers to regulate, prohibit and impose requirements, or on the basis that it is, per s. 114(4) of the *Community Charter*, "incidental or conducive to the exercise or performance of any power, duty or function conferred on a council or municipality by this or any other enactment". There is a similar "incidental powers" provision for regional districts in s. 294 of the *Local Government Act*. However, the use of a roster involves significant administrative commitments and we suggest that using peer reviews of reports and certifications that seem questionable is a preferable approach.

B. Peer Reviews

An alternative approach to dealing with poor performance in a professional reliance regime is the use of peer reviews, a practice that is endorsed by some of BC's most highly-regarded professions as an important mechanism for identifying sub-standard practice and thereby protecting the public.

None of the local government enabling legislation that permits or requires professional reliance addresses the role of peer reviews, and some local governments have been reluctant to require them despite misgivings about the advice they are being given by an outside professional in a regulatory context. The BC Supreme Court's 2016 decision in *Compagna v. Nanaimo (City)*[7] should provide some comfort in that regard. In this case a geotechnical report had been obtained in connection with the subdivision of residential building lots on a steep slope, and a lot purchaser had submitted further reports from the same engineering firm as part of a building permit application. Pursuant to an administrative policy, the City had a different engineering firm review these further reports, which were deemed unsatisfactory; hence no building permit was issued. On the lot owner's petition for a declaration that they were entitled to a building permit, the owner argued that s. 56 of the *Community Charter* didn't authorize the City to subject an engineering report to a peer review. The City argued (perhaps overstating the case) that a building inspector cannot properly assess the reliability of a report that is submitted on behalf of a property owner and exercise discretion under s. 56 of the *Community Charter* without a third-party expert review. The following passages indicate the Court's acceptance of the City's rationale:

> I also cannot find any improper expansion of the process under s. 56 of the *Community Charter* in the requirement for a third-party review of the engineer's report pursuant to the North Shore Development Policy. A municipality can create policies that inform the exercise of discretion that is conferred to its employees under a provincial statute. What must be avoided is a policy that exceeds the authority delegated by the empowering legislation (citation omitted) or that prevents the discretion from being exercised on the merits in relation to each individual case (citation omitted).

[7] 2016 BCSC 1045, upheld on appeal 2018 BCCA 396.

> I see no indication of either situation here. This policy's review requirement, which applies to the "high hazard" areas covered by it, seems to be a means of furthering the obvious purpose of s. 56 -- to ensure safe construction in geologically vulnerable areas. The policy advances this purpose by requiring that reports prepared on behalf of the proposed builder are determined to be reliable by an expert who has no interest in the outcome. I read the requirement as a means of ensuring that the inspectors have the necessary information to exercise their statutory discretion in an informed way.

The Court's reference to an "expert who has no interest in the outcome" anticipates one of the key issues addressed in the Haddock Report: the potential conflict of interest of the engineer who is engaged by the owner to help them obtain a building permit. A peer review of the engineer's report can prevent the creation of safety risks that might result from an engineer's sacrifice of professional practice standards to the earning of a fee. We note that here, the City was paying for the peer review and the engineer performing that review could clearly be said to have "no interest in the outcome". More commonly, local governments are interested in having the development applicant cover the cost of the peer review, but requiring the applicant to engage another professional to perform the peer review doesn't address the conflict of interest problem. The solution would be for the local government to engage the third-party engineer directly, obtaining beforehand an estimate of the cost of the review and requiring the permit applicant to pay those costs to the local government before the review proceeds. A third-party engineer should be able to provide a reasonably accurate cost estimate by examining a copy of the report that they will be reviewing. In this regard, it's important to note that APEGBC and other well-regulated professional associations expressly contemplate their members' role in conducting peer reviews, typically requiring that the author of the report being reviewed is made aware that the review is taking place.

C. Practice Standards

As noted earlier, several professional associations have been developing and publishing practice standards for their members to use in performing certain types of work; usually these are available via the association website.[8] These can then provide a benchmark for internal practice review processes and peer reviews. There is no reason that outside parties like local governments cannot also use these standards when specifying, in bylaws or other instruments, the standard to which a particular kind of professional analysis must be performed.

[8] See, for example, APEGBC's guidelines for flood assessments https://www.egbc.ca/getmedia/f5c2d7e9-26ad-4cb3-b528-940b3aaa9069/Legislated-Flood-Assessments-in-BC.pdf.aspx and the guidelines for riparian assessments published jointly by APEGBC, the College of Applied Biology and the Association of BC Forest Professionals https://www.cab-bc.org/file-download/legislated-riparian-assessments-bc-apegbcabcfpcab-professional-practice-guidelines

D. Complaints To Professional Associations

The Haddock Report emphasizes the importance to the integrity of a professional reliance system of regulation, of a complaints and discipline process within the relevant professional association. The possibility of a professional practice complaint and subsequent discipline is presumed to motivate association members to perform their work properly, managing conflicts of interest appropriately and keeping the public interest in mind if that is required under their code of ethics. This presumption is clearly unsound if complaints aren't made when they are warranted.

Some professional rules of conduct go so far as to require that breaches of the rules be reported for investigation and possible disciplinary action. However, these rules can only bind members of the professional association; they don't apply to others. Thus, an in-house engineer may have a duty to APEGBC to report improper conduct by a consultant engineer, but that duty does not extend to a CAO or applied science technician working for the same local government. Those local government employees, however, are entitled to make such a report, and the professional reliance model assumes that they will do so in appropriate circumstances. The statutory immunity of local government officials in s. 738(2) of the *Local Government Act* respecting actions for damages for things said or done in the performance of official duties is not available if the cause of action is libel or slander, and such a complaint could ordinarily be one or the other of these in that it could call into question the fitness of the individual to practice their profession – one of the classic categories of defamation.[9] However, a good faith complaint to a professional association that operates a complaints investigation regime would be covered, in defamation law, by the defence of qualified privilege, and a typical local government indemnification bylaw would cover any defence costs associated with a defamation claim.

VI. PROFESSIONAL GOVERNANCE ACT (BILL 49)

On October 23, 2018, the BC government introduced Bill 49, which creates the *Professional Governance Act* ("*PGA*"). This legislation, when passed, will apply to the BC Institute of Agrologists, the Applied Science Technologists & Technicians of BC, the College of Applied Biology, Engineers and Geoscientists BC, and the Association of BC Forest Professionals. The Province itself notes in a press release that the legislation was introduced in response to the recommendations of the Haddock report, including:

- Increasing public representation and instituting a merit-based nomination process for councils of professional regulators;

[9] Words may be defamatory if they allege a lack of qualification, knowledge, skill, capacity, judgment or efficiency, even though this may not involve moral fault or lack of personal character: *Halsbury's Laws of Canada – Defamation* (2018 Reissue) at §HDE-22.

- Setting common ethical principles
- Requiring competency and conflict of interest declarations from professionals
- Strengthening professionals' duty to report unethical conduct to other professionals;
- Providing whistle blower protections to those who report;
- Enabling practice rights to all five regulated professions; and
- Enabling professional regulators to regulate firms.

The main objective furthered by the *PGA* is that of consistency. To this end, the *PGA* abolishes the former enabling statutes of all five professions within its ambit, bringing them under the same regulatory regime. The *PGA* creates the office of the Superintendent of Professional Governance as well as "regulatory bodies". Each regulatory body is responsible for implementing the requirements in the *PGA* as regards its own registrants.

The *PGA* contains provisions that look much like those of the *Health Professions Act* or *Legal Profession Act*. Each regulatory body is mandated to, among other things, "establish, monitor and enforce standards of practice to enhance the quality of practice so that registrants avoid professional misconduct, conduct unbecoming of a registrant, and incompetent performance of duties…". It is worth noting that this requirement exists under Part 6 of the *PGA,* which is entitled "Protection of the Public Interest with Respect to Professional Governance and Conduct". Part 6 also creates an investigative and discipline process whereby regulatory bodies can protect the public and natural environment from the improper actions of their registrants.

This requirement works in tandem with the adoption of a duty to report under s. 58. Any registrant of one of the regulatory bodies under the *PGA* will be under a duty to report to the registrar of that regulatory body if the registrant has "reasonable and probable grounds to believe" that another registrant has practiced in a way that "may pose a risk of significant harm to the environment or to the health or safety of the public or a group of people". This provision is quite similar to s. 32.2 of the *Health Professions Act,* which mandates that regulated health professionals must report fellow registrants that they believe "might constitute a danger to the public". The express mention of the natural environment here acknowledges the distinct nature of the professions under the *PGA,* whose actions have implications beyond harming individuals.

These measures are all intended to uphold the public interest as well as increase public confidence in the governance of natural resource professions. Public confidence should be further enhanced by s. 23, which mandates that a regulatory body's council must be composed of seven registrants and four lay councilors, who are not registrants. Public representation on councils of self-regulating professions has been a live issue in both the legal and medical professions, with some members of those professions believing it inappropriate that they be regulated by non-professionals, who lack relevant expertise. However, public representation as

a measure to increase public confidence has won the battle in both professions. The *Legal Profession Act* grants the Lieutenant Governor in Council the discretion to appoint up to seven lay benchers and the *Health Professions Act* provides that college boards must be composed partly of certified non-registrants.

NOTES