

January 15, 2018

Submitted by email to: CitizenEngagement@gov.bc.ca

Laird Creek Water Users

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

Dear Minister Heyman:

Re: Professional Reliance Review

Re: "Professional Reliance" in forest development

Laird Creek water users have had direct and negative experience with the policy of professional reliance over the years, culminating in the Laird Creek landslide/debris flow April 12, 2011 and its aftermath.

There was a landslide and debris flow in a domestic watershed, Laird Creek near Balfour BC, on April 12, 2011, that resulted from logging operations carried out in previous years on a southwest facing slope above the creek. The water supply for 150-200 water users became non-potable, and bottled water had to be provided for more than a month. There was also damage to water systems and household appliances. Many further details of the actions and events that lead to the landslide can be found in two Forest Practices Board investigation reports, a landslide assessment done by Sitkum Consulting Ltd, and various assessments done for BCTS in preparation for road construction and cut blocks. (see references in FPB investigation report linked below)

More than a half-dozen Qualified Professionals (QPs) were involved, in various capacities, during the planning process for the logging, and all agreed that the residual risks—including landslide risk—were low. Local water users watched the entire planning process closely, and raised continual objections to the block and road layouts, and the harvest prescriptions. During meetings with QPs, and also in written comments, water users repeatedly disputed the rationale for the conclusion that there was minimal residual risk in this development.

As construction began on the logging road, water users felt it necessary to file a complaint with the Forest Practices Board, listing their concerns. The ensuing FPB investigation found that the licensee had met or exceeded all requirements, and that QPs had been properly consulted, but did encourage the licensee to do a drainage plan, which they finally did.

A second complaint was filed with the Forest Practices Board after the landslide. This second investigation also found that all required procedures had been followed, and thus, by definition, due diligence performed. A remarkable finding of this second investigation was that the logging operation had maintained the natural drainage pattern—**even though diverted surface and subsurface water had traversed a slope along the road and thus become concentrated at the land slide initiation point.** (<https://www.bcfpb.ca/wp-content/uploads/2016/04/IRC186-Laird-Creek-WEB.pdf>)

It should be noted that Laird Creek water users filed critical responses to both FPB reports, and received no satisfactory response.

Three points can be made based on the experience in Laird Creek.

First: the use of Qualified Professionals in the planning process has been justified on the basis that they, ideally, will make informed decisions that will reduce the risks resulting from forestry operations to as low a level as possible. But of course *low* risk does not mean *no* risk. This is the basis of the central problem: licensees stand to gain at the possible expense of water users, and the only assurance of safe operations offered—a professional risk assessment—rests fundamentally on chance.

Second: In domestic watershed operations, professional reliance puts QPs in a difficult position, as the designated arbiters of the nature of operations. They are being asked to make judgements based on training and experience, but they have to function economically within a broader system. In the case of slope failure, for example, their ultimate defense will resolve to the *low-risk-does-not-mean-no-risk* truism. This is no basis for establishing trust. Of course, the current legislative framework for forest practices in BC also protects everyone involved in forestry operations, except water users that experience a landslide in their watershed. The due diligence exemption shows this. In the case of Laird Creek, perception of bias and lack of any real enforcement has significantly reduced public trust.

Third: Whatever the risk from operations determined by QPs, the licensees will have a far different tolerance level than local water users because the two parties face far different consequences. The BC Forest Practices Board called attention to this back in 2014 (<https://www.bcfpb.ca/wp-content/uploads/2016/04/Volume-16-Balancing-Risk-across-Resource-Values-in-Forest-Operations-1.pdf>), but nothing has been done to address this imbalance. If the licensees were to face the threat of significantly *more* real pain from failure than water users—after all, they make significantly more profit—operations in domestic watersheds would likely change from current practices.

Water users have formed some opinions of the real-world effects of professional reliance in the planning of forest operations as a result of the 2011 landslide and debris flow in Laird Creek. Here are some implicit/explicit justifications for professional reliance, followed by comments (listed a.-d.) on those points:

1. Qualified Professional involvement could help reduce operational risks to the lowest possible level

However:

a. For any particular case, it is not possible to prove this one way or the other

- b. There is no evidence for this assertion
- c. A landslide happened in Laird Creek despite professional reliance
- d. low risk can never mean no risk—and profit and risk are not shared equally

2. Qualified Professional (QPs) involvement might reassure water users

However:

- a. water users suspect a pro-industry bias in QPs contracted by industry
- b. water users wonder how economic dependence might influence assessments
- c. water users wonder why QPs appear to understate hazard and consequences of operations

3. Qualified Professional involvement might help compensate for reduction of former FPC constraints on the forest industry

However:

- a. public does not see Professional Reliance as an improvement over FPC regulatory structure
- b. Professional Reliance may be seen as indirect regulatory capture by industry
- c. Professional Reliance may be seen as a method to legitimise self-regulation by industry

4. Furthermore: Qualified Professional involvement diffuses any potential accountability/liability for negative operational results

The consequences of this have been:

- a. With multiple professionals involved, it is more difficult to apportion responsibility for negative results.
- b. “Professional Reliance” somehow vaguely implies accountability but not in any way actually seen by water users.
- c. In the case of Laird Creek, Professional Reliance actually helped to prevent any determination of accountability/liability for the landslide.

A few quotes from the Board Commentary of the second FPB report are relevant to this issue, and are interspersed with comments here.

*...The legal framework for forestry in BC permits forest licensees to exercise discretion in their forestry practices **as long as they achieve the required results**. In order to do this—and to protect public interest on Crown land—licensees rely on qualified professionals to plan and oversee their practices and on strong government enforcement. (emphasis added)*

*However, the law also recognizes that timber development can create risks to other values, such as water, and that sound forestry practices can reduce but not eliminate this. Should a situation occur whereby a forest licensee causes an unintended impact on a resource value, the forest licensee **may be deemed not to have contravened the law if it can demonstrate to the government that it exercised due diligence (i.e. demonstrates that he or she exercised due care to avoid contravening legislation)**. (emphasis added)*

In Laird Creek, the required results were not achieved—after repeated detailed prior concerns were expressed by water users—but by including the involvement of Qualified Professionals, “due

dilligence” was seen to be exercised. This does not seem to be “strong government enforcement”.

*...The Board investigation found that BCTS’s operational and technical practices were sound. Overall the Board finds that BCTS acted in a responsible manner after the slide event, **though there was no legislated requirement for it to do so.** (emphasis added)*

Further evidence that water users face much greater risk than licensees.

...In a system based on discretion, professional reliance and strong enforcement, there needs to be a high level of transparency—not only must the public interest be kept, it must be seen to be kept. The Board encourages the government and professionals to ensure this occurs.

The Laird Creek experience demonstrated lack of transparency—by any meaningful definition. It should be noted that “discretion” (on the part of licensees) and “professional reliance” are likely to result in structural conflicts unless very specific rules are put in place to avoid them. Again, there was no evidence whatsoever of “strong government enforcement”.

Ironically, the Forest Practices Board has made a submission to this review of professional reliance, and has cited their Laird Creek landslide investigation (2013) as a source of suggestions for increasing transparency. Laird Creek water users found that the Board had an unwillingness to address liability, and that the Board’s suggestions simply talk around the real issues. When the issue of liability is taboo, transparency becomes meaningless. What the licensee in Laird Creek was doing was plenty transparent, it was just far too risky—and they were perfectly enabled to proceed anyway.

Given the current economic framework, it is unclear what could replace professional reliance as a basis for forest operations in domestic watersheds. Given this framework, professional reliance cannot be “fixed” in any way to truly protect water users. Without any significant disincentives, it does seem clear that forest companies will continue to place domestic water quality at significant risk.