1 Regulators of Professions

There are a variety of players on the regulatory playing field. It is crucial that the reader recognize and identify with whom they are dealing with before an assessment of the situation can begin. This chapter will attempt to break down the varying factors that will be important to understand. Failing to appreciate what type of organization you are dealing with will impede your ability to tackle the issue presented by the organization.

I. Regulator? Association? Dual Role?

First, are you dealing with a regulator? Or an association? Or is it a hybrid of each?

A. Regulator

A "pure" regulator will usually have one primary object—to serve and protect the public. This object will usually be attained by setting clear and fair entry to practise requirements, creating standards so that registrants[1]—and the public—understand what the regulator requires, providing a forum for members of the public to complain about members of the regulator, requiring annual continuing education activities, and disciplining members who fail to comply with minimum requirements. Although the regulator will be charged with regulating the profession and protecting the public from members of the profession, the relationship with the profession need not be purely adversarial. In fact, having confidence and an air of legitimacy among the profession is somewhat crucial for the regulator as it allows the regulator to discharge its duties in a more efficient and efficacious manner.

The format of the regulator will vary greatly. For example, in Ontario the concept of self-regulation (where the profession is trusted with holding the majority of positions on a board or council in order to regulate the profession) is still prevalent.[2] However, this model is disappearing quickly in other jurisdictions. Lack of confidence by the public and the government has resulted in regulators losing their ability to self-regulate and moving toward reducing the number of professionals, and increasing the number of public members, around the board or council table. Other methods of regulation include more government-controlled models (or designated administrative authorities), which do not provide for as much profession involvement.

1 Note that the terms "member" and "registrant" are used interchangeably in this book. Certain regulators in Canada prefer using one term over the other. Where terminology is specific to a regulatory body, we have used the appropriate term.

2 Note that the plates are shifting. As of January 2019 the College of Nurses of Ontario has asked the government to amend its legislation so that there is parity between the professional members and the public members. Further, the Ontario College of Teachers has also asked for statutory amendments that would create parity between the professional members and the public members. This model has also been recommended by the Professional Standards Authority in its review of the British Columbia dental regulators.

Regulators will regularly interface with associations. In this book we will refer to associations as "advocacy organizations," whose primate mandate is to advocate for the profession. In certain situations the regulator and the association may collaborate on matters (disseminating information to members, advertising importance of standards, etc.); however, there will rarely, if ever, be true "cooperation" between a regulator and an association. This is due to the fact that each has a distinct role that should not always overlap with the other. The regulator's "true north" is serving and protecting the public interest. The association's "true north" is advocating for and serving the profession's interest. True cooperation cannot be reconciled with these individual mandates.

If the regulator is created by statute, it will be important to review the legislation to understand the "objects" of the regulator. There will likely be several—however, the public interest mandate will likely be primary. The objects will be set out explicitly in legislation.

Membership in a regulator is usually obtained by meeting the registration requirements and paying the registration fee(s). Regulators are usually self-funded by the members. It is rare for statutory regulators to have any other streams of revenue. As a result, the fees will vary between each regulator—smaller memberships will usually result in higher membership fees as they have a smaller cost base to discharge the necessary regulatory duties. Membership is usually maintained by successfully completing an annual renewal form and paying renewal fees. Some regulators also require evidence of annual continuing education to maintain membership, although several regulators now deal with this issue in another stream as opposed to renewal (see Chapter 5, Quality Assurance/Continual Professional Development Requirements.)

It will also be important to review the website and publications of the regulator to understand how it undertakes its role. Although several "pure" regulators are created by statute, they take various approaches to various matters. For example, some regulators are quite tolerant when their members fail to comply with continuing educational requirements and offer several opportunities to compete this requirement, whereas others take a zero-tolerance approach and will refer the member to discipline on the first breach. Some regulators will permit alternative dispute approaches to resolving complaints, whereas others will outright prohibit such approaches. In reviewing the regulator's website, the reader will understand and better appreciate how and why it undertakes the approach that it does.

It will also be important for the reader to obtain tribunal and court decisions involving the regulator. This will allow the reader to understand how third parties view the regulator and will better prepare the reader to understand what remedies and courses are available.

In addition to providing court and third-party tribunal decisions, the Canadian Legal Information Institute (CanLII) now also houses several disciplinary decisions of various regulators. If a regulator's discipline decisions are not found on CanLII, they should be available on the regulator's website.

Regulators are inconsistently named. For example, the term "college" is often used to indicate a regulator (as opposed to a teaching institution). Other terms that indicate the organization may be a regulator include "board," "society," and "association." However, this can cause confusion. Many, understandably, interpret a "society" or "association" as a group that advocates for the profession (e.g., the Ontario Medical Association is the advocacy association for physicians in Ontario, yet the Ontario Association of Architects is the regulator of architects in Ontario). Therefore, it will be important to not simply rely upon the name in order to understand the role of the organization. Further digging is required.

B. Association

Unlike a regulator, a "pure" association advocates purely for the profession. Its role is to represent the membership by advocating for expansion of scope, increase in salary, heightened prestige, and title protection. Unlike a regulator, an association will rarely be created by statute.

The association may be seen to be in a somewhat adversarial relationship with the regulator (however, as noted above, there are several areas of collaboration between regulators and associations). This is not pure animus but more of a reflection of the distinct role that each organization plays. To be clear, the association will not be advocating *against* the public interest but, rather, *for* the profession and its ideals. This can obviously create areas of friction between a regulator and an association. Ideally, there is a healthy recognition of each organization's importance in the regulatory world, and a collegial (but not cozy) relationship between the two develops.

An example of a "too cozy" relationship was when the College of Registered Nurses of British Columbia (CRNBC) was a jurisdictional member of the Canadian Nurses Association (CNA). At the relevant time, the CRNBC was the regulator for registered nurses in British Columbia.[3] The CNA is the national association for nurses in Canada. There was a concern that as the CRNBC was statutorily mandated to act as a regulator, there was a perceived, if not actual, conflict of interest in its relationship with the national nursing association. This concern resulted in the CRNBC withdrawing its membership in the CNA so that the public, and the nursing members, would have no confusion over the role and purpose of each organization.

Associations rarely discipline or "punish" their members (unless it is a dual role organization—see below) as this is not part of their mandate. Membership is usually guaranteed by simply paying the annual fee. If an association receives a complaint from a member of the public, the association will usually direct the complainant to contact the regulator.

3 Note that the three nursing regulators amalgamated in 2018 to form the British Columbia College of Nursing Professionals.

Associations can be resources for continuing educational opportunities, networking events, professional liability insurance, and annual conferences. Certain professions have numerous associations. Unlike regulators, membership in an association is usually not required to practise the profession or use a protected title.[4] Membership in an association is usually voluntary.

There is sometimes confusion in nomenclature due to the fact that certain "pure" regulators have the name "association" in their title. This is why it is important for the reader to drill down and examine the foundational documents, website, mandate, by-laws, policies, and court/tribunal decisions of the organization to determine its intent.

C. Dual Role

The functions of dual role or hybrid organizations are more difficult to reconcile. Dual role organizations incorporate elements of the pure regulator and the association. These organizations are usually created by statute and will have explicit duality built into their objects.

Dual role organizations are rare in Ontario or British Columbia. However, they are still in existence in Alberta, Saskatchewan, Quebec, New Brunswick, and Manitoba. In New Brunswick, the Paramedic Association of New Brunswick regulates and promotes the profession. These are therefore examples of bodies that both advocate for the profession and discipline members for acts of professional misconduct or incompetence. Contrast this to the Ontario College of Teachers (OCT), which regulates the conduct of the profession. Bargaining efforts are the sole responsibility of the teaching union—not the OCT. The OCT is statutorily mandated to protect the public and is devoid of any dual role.

However, certain dual role organizations are seeking clarity by choosing one role only. The Saskatchewan Association of Licensed Practical Nurses (SALPN) recently abandoned its twin roles as advocate for and regulator of the profession. SALPN "believes a dual mandate is no longer ideal"[5] and has dedicated its resources and energies to clarify its mandate. SALPN now identifies as a regulator of the profession and acts in the interest of the public. It is no longer the advocacy voice of LPNs in Saskatchewan. The approach taken by SALPN may soon become the norm. There have been several independent calls for all dual role organizations to simply pick one role. For

4 There are exceptions. In Ontario, physicians must belong to the College of Physicians and Surgeons of Ontario *and* the Ontario Medical Association. Although not mandatory, several real estate professionals must become a member of an association in order to access the online legal listing service. This creates a de facto requirement to become a member of the regulator *and* the association.

5 Saskatchewan Association of Licensed Practical Nurses, "Strategic Plan, 2017-2021," (September 2018) online (pdf): <https://salpn.com/wp-content/uploads/Strategic-Plan-2017-2021-Pages-1-7-Sept-2018.pdf>.

example, in June 2018 the Professional Standards Authority (PSA) of the UK for the Association of Professional Engineers and Geoscientists of British Columbia (EGBC) was asked to conduct a review. The EGBC is a dual role organization. The PSA recommended that the EGBC essentially pick one role, as its desire to be both a regulator and an association was causing confusion among the public and the members. The PSA noted that the dual role of the EGBC involved an inherent conflict of interest between its public protection role and its professional support functions. An example was the requirement for two-thirds approval by members for by-law changes. This requirement prevented the EGBC from introducing mandatory professional development requirements because the membership rejected the proposal twice.

Another concern of dual role organizations also occurred in British Columbia in 2018. A pan-review of the natural resources regulatory industry resulted in the *Professional Reliance Review: The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making*.[6] The report noted that several players in the natural resources regulatory sphere were dual role organizations. It recommended that this model be abandoned. The report argued against dual mandates for regulators, stating: "Having a venue for advocacy is important for professionals, because they have unique insights into the issues they face daily dealing with laws, codes and industry practices; however, someone other than the professional regulator should play this role."

Although the dual role organisation may not be as prevalent as it once was, they still clearly exist. Therefore, when the reader interacts with such an organization, it will be important to clearly understand the "hat" it is wearing when engaging.

II. Statutory or Voluntary Regulator?

Second, regulators can be organized voluntarily by members of a profession wishing to imbue their occupation with heightened expectations and responsibilities. Alternatively, they can be created formally by accepting the delegation of power by government via a statute. We discuss each below.

A. Statutory Regulator

There are several distinctions between the two models, but of primary importance is the fact that a statutory regulator will usually have powers (title protection, investigatory, etc.) that the voluntary regulator will not. Statutory regulators are regulators that have a mandate from the provincial or territorial legislature to regulate the profession.

6 Mark Haddock, *Professional Reliance Review: The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making* (18 May 2018), online: *Government of British Columbia* <https://engage.gov.bc.ca/app/uploads/sites/272/2018/06/Professional_Reliance_Review_Final_Report.pdf>.

A careful review of the statute will usually identify the following:[7]

- name of the regulator
- objects (or mission) of the regulator
- titles that can be utilized only by members of the regulator
- acts that can be performed only by members of the regulator
- provincial offences that can occur if non-members violate certain portions of the statute
- powers of entry and powers to obtain summons and search warrants of the regulatory investigators
- powers of statutory committees
- ability to appeal statutory decisions and to which body

The significance of these powers is important to understand. If the regulator exceeds its statutory powers, then the act may be improper and invalid. However, recent case law has given great deference to statutory regulators in light of the fact that governments have trusted, and ceded, these powers to organizations that protect the public.[8]

It is also important to understand what type of statute created the regulator. A public statute will provide more powers and authority to the regulator than a private statute. Private statutes codify certain voluntary organizations but rarely provide the powers as exhibited in public statutes.

B. Voluntary Regulator

Statutory regulators can be contrasted to voluntary organizations, which decide among their members to regulate themselves. Many voluntary organizations attempt to mirror the processes that statutory regulators use (i.e., registration, discipline, mandatory continuing education, etc.). However, they will not have the statutory powers to enforce their decisions. As such, they depend on the terms that their members agreed to when joining the organization.

Voluntary regulators may point to a private statute to indicate legitimacy and potency. However, most private statutes are devoid of any true regulatory powers. It will be important to review any private statue to ascertain the proclaimed powers of the voluntary regulator.

7 Note that depending on the organization of the profession, all of these issues may not be found in the act. The act may be arranged in such a way so that this information is set out in regulation or by-laws. It will be important to read the act in full to determine where this information can be found and to ensure that the regulator has sourced the issue in the appropriate forum.

8 *Sobeys West Inc v College of Pharmacists of British Columbia*, 2016 BCCA 41; *Abdul v Ontario College of Pharmacists*, 2018 ONCA 699 at para 21.

Most voluntary regulators maintain a register with the names of their members. The register may also include any disciplinary decisions made by the voluntary regulator. It is important for the reader to understand that this is permissible if such a decision formed part of the agreement between the voluntary regulator and the member upon admission.

Further, in light of the increased trend toward transparency, it will be important to remember that if a member of a voluntary regulator is also a member of a statutory regulator, any disciplinary decisions by the voluntary regulator may also be posted on the public register of the statutory regulator. The terms of the statutory regulator may require that such information be posted on its own individual register.

It is clear that even without formal statutory powers, voluntary regulators can still influence their members and the public's perception of a profession.

III. Legislation and By-Laws

Third, it is important to understand the parameters of the regulator. Regulators are (more often than not) statutory creatures. Even if one is not, it will be important to be aware of the various parts that explain what the regulator can (and cannot) do. We provide below an overview of sources of power that the reader will need to be mindful of when deciding how to proceed:

- **Umbrella Legislation**—Some statutory regulators operate under an all-encompassing piece of legislation. For example, all health colleges in Ontario operate under the *Regulated Health Professions Act, 1991* (RHPA).[9] Schedule 2 to the RHPA is the *Health Professions Procedural Code* (the Code). The Code is automatically included in every profession-specific act (see below), which ensures consistency among the 26 health colleges. The Code sets out the minimum requirements applicable to all colleges for registration, investigation, disciplinary, fitness to practise, quality assurance, and reinstatement processes. In addition, the Code sets out acts of professional misconduct that apply to every regulated health professional in Ontario. A similar approach can be found in British Columbia, where 25 of the 26 regulated health colleges operate under the *Health Professions Act*.[10]

  Even if the profession does not operate under umbrella legislation for all of its purposes, it may do so for individual purposes. For example, the *Fair Access to Regulated Professions and Compulsory Trades Act, 2006*[11] applies to 13 non-health

9 SO 1991, c 18.

10 RSBC 1996, c 183. One profession (emergency medical assisting) is regulated by a government-appointed licensing board under a separate statute.

11 SO 2006, c 31.

professions, 23 compulsory trades, and 27 health professions (and their respective 27 regulators) in Ontario on the issue of registration practices. It will be important for the reader to appreciate and understand the significance of these pieces of legislation when trying to understand the rationale, process, and procedure of any decision made by the regulator.

- **Profession-Specific Act**—Even if a regulator is subject to umbrella legislation, it may still have a profession-specific act that provides further specificity and detail. It will be important to be aware of the existence of this legislation. For example, all health regulators in Ontario are subject to the RHPA *and* have a profession-specific act.[12] Physicians are subject to the RHPA *and* the *Medicine Act*.[13] Opticians are subject to the RHPA *and* the *Opticianry Act*.[14]

  The profession-specific act may set out (1) the protected title authorized to members of the profession, (2) the acts that are authorized to members of the profession, and, sometimes, (3) additional acts of professional misconduct that are applicable only to members of this profession. This latter issue is often overlooked. It will be important for regulators and members to be alive to this additional "source" of possible allegations of professional misconduct.[15] A careful review of the specific act is crucial. If a regulator does not have umbrella legislation, its profession-specific act will contain much of the foundational information to permit the regulator to operate (e.g., see *Ontario College of Teachers Act*[16] or *Early Childhood Educators Act, 2007*[17]).
- **Regulations**—Regulations to the profession-specific act will usually set out the (1) registration requirements, (2) quality assurance requirements, and (3) acts of professional misconduct that will apply to this profession only. Although there are common threads among various regulations, it will be very important to carefully review each regulation in order to appreciate the distinctions among various regulators. Some regulators also have regulations on other issues, such as advertising and the ability to treat spouses (see Chapter 10 on sexual abuse).

  In addition, if the regulator is subject to umbrella legislation, it will be important to see if there are any regulations to the umbrella legislation that deal

12 Note that the *Health Professions Procedural Code* (which is Schedule 2 to the RHPA) is automatically deemed to be part of every profession-specific act. This ensures that all 26 colleges have consistency among their committees and their powers.

13 SO 1991, c 30.

14 SO 1991, c 34.

15 For example, s 4(3) of the *Naturopathy Act, 2006*, SO 2007, c 10, Schedule P, states that if a member does not comply with s 4 of the Act, it is an additional act of professional misconduct.

16 SO 1996, c 12.

17 SO 2007, c 7, Schedule 8.

with specific matters. For example, the RHPA has a dedicated regulation for controlled acts. A review of this individual regulation will explain that certain health professions in Ontario are permitted to perform acupuncture. A simple review of the umbrella legislation and the profession-specific acts would not have indicated this to the reader. This example demonstrates how a cursory overview will result in crucial information being overlooked.

- **By-laws**—The use of by-laws by regulators will vary across the country. Most regulators will have by-laws that will set out administrative issues only. However, some regulators include in their by-laws information that would usually be contained in regulation (e.g., in Ontario see the *Registered Human Resources Professionals Act, 2013*,[18] and in British Columbia see the *Health Professions Act*). It will be important to be familiar with this document (or documents, as some regulators will have individual by-laws for individual issues) as it will usually set out the fees that can be charged to applicants and members, the information that will be posted on the register/directory once the applicant becomes a member, the requirements for professional liability insurance, and the information that must be provided to the regulator on an ongoing basis (e.g., being charged with an offence, being found guilty of an offence, etc.). This latter issue is becoming all the more important, as the public is demanding, and receiving, more relevant information posted to the register. Please see Chapter 3 for further information on what is being posted on public registers.
- **Overriding Legislation**—It is important to remember that regulators are also subject to overriding legislation such as the *Canadian Charter of Rights and Freedoms*[19] and human rights legislation. Regulators must comply with the obligations set out in such legislation. If any provision or act of the regulator violates these pieces of legislation, the provision or act will be struck down. However, in light of the special role regulators play (namely to protect the public), it may be difficult to establish a breach.

  Several applicants and members seek remedies from the provincial human rights tribunals for a perceived breach. However, it will be important to keep abreast of case law on this issue as this may not always be the best course:
  - Certain regulators have been found to have the proper jurisdiction for human rights concerns as opposed to the human rights tribunal. Therefore, it may be necessary to extinguish any rights of appeal within the regulator before filing an application with the human rights tribunal.

18 SO 2013, c 6.

19 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

- Certain legislation prohibits any document or decision created by the regulator to be used in civil proceedings. This may include human rights applications. Therefore, recourse to the human rights tribunal may not be possible in certain situations.[20]

IV. Professional Corporations

Certain regulators are permitted to issue certificates or licences to corporations. These are in addition to the certificates and licences issued to their members.

Professional corporations allow members to practise through the professional corporation as opposed to practising individually. In Ontario this option is available to several professionals, including lawyers, accountants, and regulated health professionals. However, there are variations in the requirements. For example, Ontario doctors and dentists are permitted to include family members as shareholders, whereas the remaining health professionals can include only shareholders that practise the same profession. It will be important to review the specific eligibility requirements before submitting the necessary documentation as this can be a timely and expensive process for the member. The requirements include what is permitted in the corporation name, the objects, and composition of shareholders and directors. In addition to legal assistance, the reader is encouraged to consult with an accountant to ensure compliance.

If the eligibility requirements have been met, a certificate of authorization for the professional corporation will be issued. Similar to a member's own licence or certificate of registration, it will be necessary to renew the certificate and conform with reporting requirements in order to maintain the certificate of authorization.

Note that practising through a professional corporation does not result in immunization from regulatory reach. The terms of the professional corporation will usually explicitly state that any act of the professional corporation will be deemed to have been committed by a member practising through the professional corporation.

Regulators will usually post all relevant information about the professional corporation on the public register.

V. Confidentiality

The issue of confidentiality is a constantly evolving issue. The current understanding is that regulators are statutorily required to keep most information confidential. Most statutory regulators will have a dedicated statutory provision setting out the obligation to maintain confidentiality. The provision will usually state that unless the regulator is authorized to disclose information (and this will likely be set out explicitly), it cannot be disclosed. This model is being questioned as there is concern that it imposes barriers to disclosing relevant information to the public. As the intended beneficiary of the regulator

20 *Maio v College of Nurses of Ontario*, 2018 HRTO 1091.

is the public, it is being queried why more information is not shared with the public. In fact, recent legislative changes in Ontario have indicated that this traditional approach is no longer as rigid as it once was as additional information is now mandatorily posted on the registers of Ontario health regulators. In the past, Ontario health regulators would not post any information that related to a complaint unless it resulted in a referral to discipline. This was deemed to be sufficient as it was considered an appropriate balance between being fair to the member and the public. However, the public's appetite for relevant information has evolved. Now, Ontario health regulators are mandated to not only post referrals to discipline, but to also disclose when the member is brought in for an oral caution and when they are mandated to attend an educational course. Ontario health regulators are also mandated to post any undertaking (that is in effect) that resulted between the regulator and the member as a result of the complaint. The rationale behind this is that these orders indicate that there was sufficient risk to warrant such orders. Therefore, this information would be relevant to the public. It is important to remember that these orders (and resulting postings on the register) are not disciplinary in nature and intended to be only remedial. The orders do not reflect a finding of professional misconduct or incompetence. It will be interesting to note if this triggers a similar trend among the other regulators inside of Ontario and across the country (e.g., the regulators of lawyers, accountants, teachers, architects, etc.). Please see Chapter 3 for further information on what is being posted on public registers.

Reviewing the regulator's statute or by-laws will indicate what information *must* be disclosed and *may* be disclosed by the regulator. The distinction will be important to note. Although a regulator may be permitted to disclose in certain situations, it may determine that it is not prudent to do so in a specific instance.

In light of the public's increasing appetite for relevant information, several regulators are now publicly proclaiming when a high-profile investigation into a member has commenced. Traditionally this would not be disclosed unless a decision to refer the member to the discipline committee had been made by the regulator. Such disclosure can clearly be of severe consequence to the member. However, if it is determined that the disclosure is required for public protection and/or in the public interest, the regulator will likely be justified in doing so even if it causes prejudice for the member (although, the regulator will likely be permitted to disclose only what is necessary in order to advise of the investigation—this restriction will maintain fairness to the member). Another step that some regulators are taking is to post all complaints and their results—albeit in an anonymized fashion—on the regulatory website.[21] This results in disclosing more than what is required (and arguably permitted), but because it is provided in an anonymized fashion there is no prejudice to the member. Technology and public awareness are disrupting the traditional models of information sharing. Regulated members

21 See the College of Naturopaths of Ontario and the Human Resources Professionals Association.

should prepare themselves for more information about their complaint history, and other information that is deemed relevant to the public, to be shared by their regulator with the public.

Certain regulators are subject to freedom of information legislation (see British Columbia),[22] whereas some are not (see health regulators in Ontario).[23] This dynamic can often affect how and what information is disclosed. It will be important to determine if this legislation applies to a regulator as it may provide an avenue to obtain information that is not publicly available.

A. Rise of Transparency

Closely tethered to confidentiality is the demand for increased transparency. The demand for more transparency is likely linked to a concern with the accountability of regulators. Recent trends have indicated that more relevant information about members should be disclosed to the public (likely via the public register). There has been concern that regulators have been withholding information that should in fact be disclosed to the public.

In 2015, the *Toronto Star* commenced an investigation into what information certain Ontario health regulators disclose to the public.[24] The Law Society of Upper Canada (as it was then called—it is now called the Law Society of Ontario) was asked why police were not contacted when lawyers were found to have stolen money from clients.[25] The Ontario College of Teachers was asked what information was being communicated about teachers who were being prosecuted for certain serious allegations. The effect of these inquiries and questions precipitated several health regulators to post additional information about complaints committee decisions directly on their register. However, in 2017 the RHPA was amended to *mandate* Ontario health regulators to post the following additional information on the public registers:

- **When a member has died.**
- **When the complaints committee has ordered a member to complete an educational course or receive an oral caution.** This will remain on the public register indefinitely. The rationale is that when the complaints committee makes such an order, a significant enough level of risk has been identified that warrants

22 See s 3 of *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165.

23 See s 65 (5.5) of *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

24 Theresa Boyle, "'Backroom Deals' Keep Problem MDs out of the Public Eye," *Toronto Star* (18 February 2015), online: <https://www.thestar.com/news/gta/2015/02/28/backroom-deals-keep-problem-mds-out-of-the-public-eye.html>.

25 Kenyon Wallace, "Law Society Seeks Better Communication with Police," *Toronto Star* (14 December 2014), online: <https://www.thestar.com/news/crime/2014/12/14/law_society_seeks_better_communication_with_police.html>.

the posting of this information. It is important to remember that the educational course and oral caution are not disciplinary in nature. They are educational only. However, the Ontario government determined that this is relevant information that Ontarians are entitled to know.

- **When the member has entered into an undertaking with the regulator that reflects concerns about professional misconduct or incompetence.** This information shall remain on the public register until the terms of the undertaking are fulfilled. Again, the rationale is that if a matter is significant enough to warrant an undertaking (or agreement) between a regulator and a member, then the public ought to be aware.

These concerns are not restricted to traditional regulators. In 2017, the *Report of the Independent Police Oversight Review*[26] was released by the Honourable Michael H. Tulloch (the "Tulloch Report"). The Tulloch Report was requested out of a series of concerns, including the apparent absence of transparency between the three Ontario police oversight bodies and the public. The Tulloch Report included several recommendations to rectify this concern, including the following:

- Legislation should provide that Special Investigation Unit (SIU) reports to the public on every investigation.
- For cases that result in a criminal charge, the SIU should release the following information:
  - the officer's name;
  - the offence charged and when charged; and
  - details about the officer's next court appearance.
- For cases that do not result in a criminal charge, the report should include the following elements:
  - an explanation for why the incident falls under the SIU's mandate;
  - a summary of the investigative process, including an investigative timeline;
  - a summary of the relevant evidence considered, including (1) physical evidence, (2) forensic evidence, (3) expert evidence, and (4) witness evidence, which would include any evidence obtained from the subject officer;
  - any relevant video, audio, or photographic evidence of the incident in question, modified to the extent necessary to remove identifying information;
  - an explanation for why any of the evidence listed above was not included in the report;
  - a detailed narrative of the event;

26 Michael H Tulloch, *Report of the Independent Police Oversight Review* (2017), online: *Government of Ontario* <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/police_oversight_review/>.

  - the reasons for the director's decision, including (1) the reasons for preferring some evidence over other contradictory evidence, (2) an explanation of any relevant legal standard, and (3) an explanation for why the conduct did not meet the standard for laying charges; and
  - a statement on whether the matter has been referred to the Office of the Independent Police Review Director as well as whether there were any issues with cooperation relating to the investigation.
- The legislation should be amended to allow the SIU to make public statements during an investigation when the statement is aimed at preserving public confidence, and the benefit of preserving public confidence clearly outweighs any detriment to the integrity of the investigation.

These were radical recommendations. They reflected that in order to maintain public confidence, authorities will be required to share relevant information. In doing so, the authorities could demonstrate that the systems are working and doing what they intend to do—namely serve the public.[27] As of today's date, none of the recommendations from the Tulloch Report have been implemented.[28]

VI. Further Evolution for Regulators

The regulatory world is constantly evolving to remain current. This need is apparent when technology alone is considered. But as noted above, the perception of regulators has also evolved. The decisions they make, and how they make those decisions, are being scrutinized with more vigour. This is fuelling the evolution—and the calls for the evolution—of regulators.

As noted above, there have always been challenges to the accountability of regulators and queries as to whether they have discharged their mandates. For example, in 2016 in British Columbia, the Real Estate Council of British Columbia (the professional regulatory body for real estate agents) was effectively "taken over" by the government after a damning report indicated that the regulator was no longer serving and protecting the public interest. In 2016 in Quebec, the Ordre des Ingenieurs du Quebec (the professional

27 It should also be noted that the Tulloch Report gave serious consideration to creating an independent regulator of police in Ontario:

> A College of Policing would be a valuable addition to the existing oversight regime in the province. … It would complement the civilian oversight system by developing a culture of professionalization through a more regulated body that specializes in enhancing policing standards and service.
>
> For many people, policing is a calling in the same way many doctors are called to medicine and teachers are called to teaching. Policing should be seen as a distinguished profession.

28 Note that in early 2019 the proposed *Comprehensive Ontario Police Services Act* was introduced. Some—but not all—of the Tulloch Report recommendations have been incorporated.

regulatory body for engineers) was placed under trusteeship[29] when it was determined that it was advocating for the profession more than the public—this was evidenced by its decision to keep fees so low that the ability to investigate and discipline was severely hampered. And in 2018 in Ontario, the release of the *Sexual Abuse Task Force Report*[30] resulted in amendments to legislation as there was a concern that Ontario health regulators were not doing enough to prevent or appropriately discipline sexual abuse conduct.

But it is clear that these significant and impactful events have not quelled the concern.

As noted above, in 2018 two major reports on professional regulation were released in British Columbia. The first report was entitled *Professional Reliance Review: The Final Report of the Review of Professional Reliance in Natural Resource Decision-Making*.[31] The report reviewed the "professional reliance" model of regulation, "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." The report specifically reviewed this model with respect to five professions: applied science technologists and technicians, professional foresters, agrologists, applied biologists, and professional engineers and geoscientists. A major section of the report addressed improvements in the regulation of the professions. Observations and recommendations included the following:

- Governing councils and committees should be chosen through a merits-based selection process, receive governance training and have a significant proportion of non-professional members.
- Membership approval should not be required for matters such as setting practice standards, codes of ethics, continuing professional development and annual fees.[32]

29 The regulator's power of self-regulation was revoked and was placed under the trusteeship of the Quebec government.

30 Marilou McPhedran and Sheila Macdonald, *To Zero: Independent Report of the Minister's Task Force on the Prevention of Sexual Abuse of Patients and the Regulated Health Professions Act, 1991* (Toronto: Ministry of Health and Long-Term Care, 2016), online (pdf): <http://www.health.gov.on.ca/en/common/ministry/publications/reports/sexual_health/taskforce_prevention_of_sexual_abuse_independent_report.pdf>. This was the third report written by (now Senator) McPhedran on the issue of sexual abuse by physicians and regulated health professionals.

31 Haddock, *supra* note 6.

32 Note that the Supreme Court of Canada did not interfere with the Law Society of British Columbia's decision to base its decision on whether to accredit Trinity Western University on the results of a members' referendum. It is our opinion that this is likely a reflection that regulators can, in appropriate cases, consult with their members in this manner rather than an endorsement of the general use of a referendum. The issue needs to be considered in the

- The authority of regulators should apply not only to individuals, but to corporations (entities) engaging in regulated activities.
- Labour mobility solely on the basis of registration elsewhere should be reconsidered, at least in the natural resources sector to ensure competence in local issues.
- Standards and guidelines should be proactively developed on the basis of risk rather than reactively developed after a pattern of problems has emerged.
- "Best practices in professional governance are that CPD [continuous professional development] should be mandatory, with explicit requirements for continuing education to ensure that eligible courses and activities align with the objective of maintaining competency."[33]
- While audits and practice reviews have limitations (e.g., over the breadth of the profession covered and the depth of individual reviews), they are an important regulatory tool. There should be flexibility in criteria for triggering them and there should be "broad remedial powers to address issues of concern uncovered."[34]
- While noting the importance of codes of ethics, the report does not come to the conclusion as to whether they should be aspirational or prescriptive in nature.
- On complaints and discipline, the report said: "There are strongly held differences of opinion on whether disciplinary processes are working as expected. [Regulators] are confident that they are fulfilling their responsibilities diligently and proportionally, while many government employees, professionals, and members of the public do not have confidence that the system is working as intended."[35]
- The report identified as a limitation to the complaints and discipline system the reluctance of a number of groups to use the system (e.g., colleagues of practitioners, government agencies who felt little would result from reporting a concern). Regulators are encouraged to review the discussion on the complaints process, substantive decisions, and transparency found in section 6.2.9 of the report. The report concludes, "Effective disciplinary systems are a cornerstone of professional governance, but they also have limitations. They should not be expected to bear the full weight of government's expectations for quality assurance in natural resource management and environmental protection."[36]

context of the nature of the decision (professional and societal values) and the specific statutory scheme and should not be viewed as a general endorsement of regulating professions through referenda.

33 Haddock, *supra* note 5 at 39.

34 *Ibid* at 39.

35 *Ibid* at 44.

36 *Ibid* 48.

- The report argued against dual mandates for regulators, stating: "Having a venue for advocacy is important for professionals, because they have unique insights into the issues they face daily dealing with laws, codes and industry practices; however, someone other than the professional regulator should play this role."[37]
- Natural resources regulators should have one oversight body and should report through one Ministry.

The second report was prepared by the Professional Standards Authority (PSA) of the UK for the Association of Professional Engineers and Geoscientists of British Columbia (EGBC).[38] The PSA had previously conducted a similar review for the College of Registered Nurses of British Columbia. The PSA reviewed legislation and governance documents of the EGBC, interviewed key people, and compared the organization's structure and activity against standards the PSA has used for other regulators. Some of the PSA's observations and recommendations are as follows:

- The dual role of the EGBC involved an inherent conflict of interest between its public protection role and its professional support functions. An example was the requirement for two-thirds approval by members for by-law changes. This requirement prevented the EGBC from introducing mandatory professional development requirements because the membership rejected the proposal twice.
- The proportion of publicly appointed members of the board should be increased from under 25 percent to 50 percent. This suggestion was based not just on policy reasons, but also on the need to assist in providing continuity where professional members had only two-year terms. The selection process should be rigorous, including ensuring a good mix of skills and experience. The PSA also recommended that public members have a larger representation on regulatory committees.
- The size of the council should be reduced from 17 members to a more manageable size. This would require some reassignment of functions as currently committees cannot be effectively composed with a smaller number of board members.
- The code of conduct for board members should be mandatory (e.g., some board members decline to take an oath of office despite its being expected). The PSA commended the EGBC's efforts to obtain a statutory mechanism to remove board members in appropriate cases.

37 *Ibid* at 49.

38 *Professional Standards Authority, A Legislation and Governance Review Conducted for Engineers and Geoscientists British Columbia* (June 2018), online: <https://www.professionalstandards.org.uk/docs/default-source/publications/international-reports/review-of-the-legislation-and-governance-for-engineers-and-geoscientists-in-british-columbia-(june-2018).pdf?sfvrsn=b2d7220_9>.

- The PSA's own experience and research suggests that the context in which a practitioner works is a significant factor in their safe and ethical practice. The PSA commended the EGBC initiative to regulate entities (organizations/corporations) as well as individual practitioners.
- The PSA also commended the EGBC on its introduction of risk management to its regulatory functions through its audit committee. However, the process is still in its early stages, and the PSA identified areas where more work needs to be done (e.g., ensuring that there is a process for identifying emerging risks, having a process for addressing lower-level risks, ensuring the incorporation of the risk register and risk management process into board and committee work).
- The PSA generally commended the EGBC for its transparency but recommended that board minutes include not just the decisions, but also some details of the discussion.
- While the PSA was generally positive about the EGBC's governance choices, there were a number of governance recommendations. For example, it recommended that board members not serve on operational committees. Of particular interest is the comment in paragraph 4.73 of its report, which reads:

> It remains our view that voting on motions is an inappropriate form of organisational governance for a regulator. In our experience, modern practice in governance favours a board-like management structure. Decision-making in such structures usually proceeds by discussion and agreement on a course of action.

Another report from the PSA was released in 2019, this time focusing on the functioning of the dental regulators in British Columbia. Once again, recommendations were made to shake up the status quo and inject more public representatives to the board to ensure public protection. When these recommendations are reviewed, it is clear that the concept of "self-regulation" is undergoing significant change. However, certain regulators are not only retaining experts to provide recommendations but explicitly seeking regulatory amendments to permit structural and governance change. For example, in January 2019[39] the College of Nurses of Ontario wrote to the Ministry of Health and Long-Term Care and asked for amendments to its legislation to permit the following:

- A reduction in their Council (which shall be called as a Board) from 37 (21 nurse members and 16 public members) to 12
- Composition of Board to be changed to 6 nurses and 6 public members
- Abandonment of elections for nurse Board members and an adoption of a competency based process to ensure that members are properly equipped to make decisions based on the public interest as opposed to professional interest.

39 To be clear, the College of Nurses of Ontario commenced its review and analysis in 2014.

- Mandating an external Board audit to occur every three years and to be made public

The concept of self-regulation is evolving to ensure that decisions are informed and include more public voices. In light of the significance of regulators' decisions, and the fact that the intent of a regulator is in fact to serve and protect the public interest, these are positive steps.

TAKEAWAYS

Based on the discussion in this chapter, we provide the following nine "takeaway" points:

TAKEAWAY 1

A regulator's primary object is to serve and protect the public interest by creating standards for members and ensuring that members are complying with those standards.

TAKEAWAY 2

Unlike a regulator, an association's primary mandate is to represent the membership by advocating for the profession. Membership in an association is usually voluntary and not required to practise the profession.

TAKEAWAY 3

Some organizations operate in a dual role as both a regulator and an association. They are typically created by statute and will have the explicit duality built into its objects. Dual role organizations are becoming increasingly rare due to the conflicts of interest inherent in their functions.

TAKEAWAY 4

Regulators are created either voluntarily by their members or formally by accepting the delegation of power by government via a statute. Although both types of regulators will have similar regulatory processes in place, statutory regulators will have certain legal powers (e.g., the protection of professional titles) that voluntary regulators will not.

TAKEAWAY 5

Unlike regulators, associations will rarely be created by statute.

TAKEAWAY 6

It is important to understand a regulator's statutory parameters. The reader should be aware of any legislation, regulations, and by-laws under which a regulator operates.

TAKEAWAY 7

Most regulators are statutorily obligated to maintain a certain level of confidentiality with respect to member information. A regulator's statute or by-laws will likely indicate the information that *must* be disclosed and *may* be disclosed.

TAKEAWAY 8

Given the public's recent call for more openness and transparency, regulators have undertaken to implement measures to enhance transparency and ensure that the public has access to relevant information about their members.

TAKEAWAY 9

Certain regulators have the mechanism to allow their members to practise through professional corporations. It is important to remember that practising through a professional corporation does not result in immunity from regulatory reach.