

# Key Trends in Professional Regulation

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I was recently the key-note speaker at a conference in Vancouver on professional regulation organized by the Continuing Legal Education Society of B.C.. The topic of “key trends” will also be of interest to our Alberta readers so a summary of the presentation is set out below.



### I. Introduction

- I will address ten key trends from across Canada affecting professional regulation.
- My perspective is Canada-wide and is informed by international developments. If the “trend” is not yet present in B.C., it soon will be.
- This presentation is intended to provide the “big picture” as an introduction with later presentations focusing on more detailed professional regulatory issues.
- Identifying and managing the key trends is essential to effective self-governance during a time of rapid change.

### II. Increased skepticism of the societal value of professional self-regulation

- The perceived societal value of professional regulation tends to ebb and flow.
- Currently, skepticism about the societal value of self-regulation is very strong.
- Professional organizations are under increased scrutiny by government, the public, media, and consumer groups.
- There is a potential duality to all professional regulatory activities:
  - (1) Exclusive scopes of practice
    - (a) Serve to protect the public
    - (b) Or do they simply create a monopoly to further the interests of the profession?
  - (2) Entrance standards
    - (a) Ensure that practitioners are competent and ethical
    - (b) Or do they create artificial barriers to entry, keep the number of practitioners low, and thereby reducing competition?
  - (3) Discipline process
    - (a) Protects the public from incompetent and unethical practitioners

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(b) Or is it a secretive “old-boys” and “old-girls” club judging and protecting one’s own?

Manitoba’s Fair Registration Practices in Regulated Professions Act, 2007”.

- It is no longer a self-evident truth to those outside of the professions that self-regulation of the professions is in the public interest.
- Recommendation: regulatory organizations need to get their message out. “We protect and promote the public interest in all of our regulatory activities.” Who is your organization accountable to? How do you demonstrate that accountability? How can you increase accountability?

- Some international jurisdictions have adopted a structure of “oversight regulation” in which an independent body is created to oversee the professional organization’s regulatory activities.
- Recommendation: be prepared to articulate and defend why the current structure best serves the public interest. Focus on how your organization can enhance its accountability.

**III. Meta-Regulation**

- “Meta-Regulation” is a trend in many western democracies arising from the increased skepticism of the societal value of self-regulation.
- Meta-regulation is “regulating the regulators”
- Meta-regulation focuses on controlling the process of regulation itself rather than regulating social and individual actions directly.
- The justification for meta-regulation is often couched in the language of “accountability”.
- Examples of meta-regulation in Canada:
  - (1) Agreement on Internal Trade
  - (2) Bill 41- Alberta.
  - (3) Fair Access to Regulated Professions Act, 2006 - Ontario.
    - (a) Establishes the Fairness Commissioner. See [www.fairnesscommissioner.ca](http://www.fairnesscommissioner.ca).
    - (b) Objective is to ensure that professions’ registration processes are transparent, objective, impartial and fair.
    - (c) The goal of the Commissioner is to bring about “systemic change”.
    - (d) Implicit assumption is that regulators are the problem.
  - (4) See also Nova Scotia’s “Access to Regulated Professions Act” and

**IV. Internationally Educated Graduates (“IEG’s”)**

- Governments are placing extreme pressure on regulatory bodies to facilitate the registration of IEG’s.
- In some cases the pressure arises from concerns about perceived fairness. In many cases the pressure arises from governments’ desperation to address acute shortages of health care professionals in Canada.
- Some governments perceive regulatory organizations as the “problem” or the “roadblock” to making progress.
- Recommendation: does your organization have an accessible, cost-effective and vigorous process to assess the competence of IEG’s? If not, start work on developing such a process.

**V. Mobility**

- Mutual Recognition Agreements are now seen as merely a “first-generation” mobility tool.
- Focus has shifted from accommodation of registration differences to standardization of entrance standards.
- Eg. TILMA.
- Regulators should expect continued focus by governments on mobility issues given its importance to the economy and given that TILMA is being held out by the B.C. and Alberta governments as a model others should follow.
- Note the January 28, 2008 commitment from Council

of the Federation to strengthen domestic trade between the provinces and territories by, in part, enhancing labour mobility. Note also that the Forum of Labour Market Ministers has set a deadline of April 1, 2009 for full compliance with existing obligations of the AIT as a “first step”. The Premiers directed ministers to report to the Council with a plan and timelines to strengthen the AIT.

- Recommendation: regulators need to “get on board” and address mobility issues or governments will make the decisions for them.

**VI. Movement Away From Exclusive Scopes of Practice**

- Governments view exclusive scopes of practice as being too restrictive and in some cases anti-competitive.
- Restricted acts and controlled acts models are becoming more common.
- Recommendation: if you currently have an exclusive scope of practice, be prepared to demonstrate why this structure is sufficiently flexible and does not create unreasonable barriers to innovation and competition.

**VII. Continuing Competence**

- Mandatory continuing competence programs are becoming increasingly common.
- In an era of rapid change, we can no longer assume that a professional continues to be competent simply because he or she once graduated from a recognized educational institution.
- A life-long focus on continuing competence is a fundamental obligation of every professional.
- The policy debate is whether professional regulators should merely encourage continuing competence activities or mandate such activities. How much structure is necessary or desirable?
- Recommendation: regulators need to consider whether their current continuing competence program is working effectively. How do you know? How do you measure whether it is working effectively?

**VIII. Complementary and Alternative Health Care**

- Consumers are driving the phenomenal growth of complementary and alternative health care (“CAHC”).
- Many professional regulators are being caught “flat-footed”.
- Do you regulate your members who chose to practice CAHC?
- For an overview see “The Regulation of Complementary and Alternative Health Care Practitioners: Policy Considerations” by James Casey and Frances Picherack, published by Health Canada in “Perspectives on Complementary and Alternative Health Care”.
- Recommendation: consider whether there is any policy work your organization needs to do in this area.

**IX. Tension Between Transparency and Privacy**

- Over the last few decades governments and the public have demanded greater transparency from professional regulators.
- One major reason for legislative reform has been to enhance transparency and accountability.
- At the same time governments have adopted major legislative initiatives to protect privacy.
- Competing policy interests of privacy and transparency may come into conflict.
- Regulators need to understand that some members are becoming “hyper-sensitive” to privacy issues.
- Examples where competing policy interests of privacy and transparency may collide:
  - (1) Disclosure of information to professional regulators during professional discipline investigations.
  - (2) Disclosure to the public of professional discipline investigations.
  - (3) Disclosure to the public of criminal charges against members.
  - (4) Disclosure to accused member of information from investigations.

- (5) Publication of professional discipline decisions. Should the investigated member's name be disclosed?
- (6) Inter-jurisdictional sharing of information.

- All of these situations are potentially resolvable under the legislation and by adopting appropriate privacy administration practices.
- Recommendation: conduct privacy audit to ensure you are properly balancing transparency and privacy. Consider that this is an area where legislation codifying the amount and type of disclosure could be useful.

#### **X. A Focus on the Effect of Professional Regulation on Competition**

- Is this the rise of the economists in professional regulation?
- See the Competition Bureau study: Self-regulated professions: Balancing Competition and Regulation. (<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02598e.html>)
- The Competition Bureau expressed concerns about over-regulation of the professions and the negative impact on competition.
- Required reading for all professional regulators and even the lawyers who advise regulators.
- Competition Bureau launches study into regulation and competition in the dentistry profession.
- Recommendation: Economic and competition analysis needs to be the "new literacy" for professional regulators.

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