

92%

by Julie Maciura
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This same question was asked at two major regulatory conferences held in the last month: Should professional members of regulatory Boards / Councils be elected by the membership or should they be selected by a merit-based process? In both cases the vast majority of people in the room supported merit-based selection. One of the votes was conducted electronically and gave a precise figure: 92% of respondents supported merit-based election.

The majority of those in the room were senior staff and consultants for professional regulators. Only a few were actual Board / Council members. Even so, the number of respondents supporting merit-based selection is staggering and would almost certainly not have occurred just ten years ago.

The traditional rationale in support of self-regulation has been persuasive. To be an effective regulator, the entity must have the support of the profession, otherwise standards and guidelines will not be accepted by the membership as relevant and participation in regulatory activities (e.g., commenting on proposals, engaging in continuous professional development) will decline. The cooperation required for effective regulation (e.g., complying with mandatory report obligations, providing information in investigations, serving as committee members, inspectors, investigators and expert witnesses) will evaporate.

In addition, self-regulation helps regulators obtain ready access to the expertise necessary for them to

function. Since the whole rationale for professional regulation is that clients do not have sufficient information to “stand up to” the professional, expertise on the part of the regulator is viewed as essential. Peers have the ability to understand the context of any complaint or investigation and to evaluate whether the complained-about practitioner’s explanation is factual or fanciful. Who better than fellow practitioners to identify the competencies required for effective and safe service? Members of the profession are often in the best position to assess the risks of harm that can flow from various types of conduct.

There is also a concern that any other system will be worse than self-regulation. Governments have not been famous for making timely appointments based solely, or even primarily, on merit.

However, it is clear that these arguments for self-regulation are no longer convincing the majority of people who are closest to the regulatory world. What has changed?

First of all, there have been a number of high profile regulatory failures and negative media stories in recent years. Some of the media stories have been fair and others not. However, the resulting image created by these events has been that existing regulators may not be attuned to current societal values. Governments have responded by conducting studies and inquiries which, more often than not, have recommended merit-based selection of Board / Council members. The perception that elected members of the Board / Council are influenced by self-interest has been impossible to dispel.

But it is likely more than negative media reports and a general distrust of self-elected regulators which is at

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play. As regulatory activities have become more complex (e.g., competency-based rather than credential-based registration, remediation rather than penalties at discipline, quality assurance, human rights, the need to recognize the realities of all demographic groups), the need for skilled leadership in regulatory organizations has become increasingly evident. Board / Council members must have a sophisticated understanding of the complex public interest objective expected of the regulator, policy development experience, ability to reason and write well, a solid comprehension of governance principles and an appreciation of the concept of risk-based regulation, to name just a few skills. An election process often does not sufficiently emphasize (or screen for) those qualities.

Many regulatory staff members have also had their fair share of unfortunate experiences. Sometimes that experience has been direct (e.g., a Board / Council rushing to make an important determination with insufficient information or reluctance to make an obviously needed decision because of its impact on the profession (often in relation to fees)). Sometimes that experience has been indirect (e.g., a colleague who has quit or been let go). Those experiences have undoubtedly shaped some staff views about the recruitment process of Board / Council members.

The Canadian system of electing the majority of Board / Council members is now uncommon in the rest of the world. Clearly changing the system will require legislative amendments and will involve significant political implications. And if the reforms are not done carefully, the resulting system could indeed be worse than the current one.

However, the fact that 92% of regulatory leaders in a recent poll think merit-based selection is preferable

shows that there should be more discussion of the advantages and disadvantages of that option. Just as importantly, there must be discussion about how such a system would work so that legislatures can make an informed choice before going down this path.