Self-Regulation Under Siege

Earlier articles of this newsletter have observed that Canada is one of the few remaining jurisdictions in the world still using the self-regulation model for professions and industries (see: www.sml-law.com, Grey Areas, issue No. 126). However, recent events in Ontario raise questions about the commitment to self-regulation in Ontario.

In recent years a pattern has developed where the media raises concerns about the effectiveness of a particular regulator and the government makes changes or amends legislation to increase the accountability of the regulator (or sometimes many regulators). The nature and extent of the changes have cumulatively resulted in the erosion of the concept of self-regulation to the point that it is, in some circumstances, almost unrecognizable.

One trend has been that the number of public appointees to the governing Council or Board of regulators has increased. Two or three decades ago about 20-25% of the composition of the Council or Board, on average, were public appointees. Today it is just under 50% for most self-regulating bodies.

Another trend has seen the number and authority of independent “watch-dogs” increase significantly. Most regulators now have an independent body that reviews the handling of individual registration and complaints matters. The health professions also have the Health Professions Regulatory Advisory Council that conducts systemic reviews of some of the programs of the various health Colleges and regularly studies and makes recommendations on policy issues affecting them. In addition, the creation of the new Human Rights Tribunal has increased the number of complaints made against regulators. Of course, regulators have always been subject to the scrutiny of the courts.

The Office of the Fairness Commissioner is now heavily involved in all systemic registration matters including amendments to regulations, annual self-reports and regular external audits of registration practices. Bill 175 enacting the Ontario Labour Mobility Act has been introduced into the legislature giving the government the authority to require regulators to take action implementing the Agreement on Internal Trade (AIT), imposing administrative penalties if they do not and authorizing the recovery of any penalties paid by the Ontario government for breaches of the AIT.
Government ministries have always scrutinized regulations proposed by self-regulating bodies. However, until recently this review tended to be at a high level (ensuring there was nothing fundamentally contrary to government policy) and legal in nature. In recent years, there is a perception that the scrutiny has become more intense, down to justifying why a regulation requires 14 days notice for public meetings as opposed to 7 or 30 days.

Many regulatory bodies find the burden of complying with these various requirements to be enormous. Some feel that they spend more resources justifying their regulatory actions than actually regulating.

Earlier this month the government introduced Bill 179 amending the Regulated Health Professions Act. Two of the proposed amendments will further undermine the concept of self-regulation. The first allows the Minister to appoint a Supervisor to take over the administration of a regulatory College. This would be similar to the power of the Minister to take over the administration of a public hospital or a school board. The Supervisor would have the power of the Council, the Registrar and, it appears, the committees of the College.

The second amendment would allow the Minister to appoint auditors to examine the operations of the regulatory Colleges. The audit would not be restricted to financial matters, but of administrative and regulatory matters as well. The report would be made to the Minister and it would be up to the Minister to determine if a copy be given to the College.

These changes would significantly alter the concept of self-regulation. They would permit significant government involvement in regulatory matters without having to first enact legislation or even make a regulation. In addition, the implicit threat of exercising these powers could induce regulators to implement a government directive in order to avoid the alternative.

In March Bill 159, the Transparency in Public Matters Act, was introduced requiring public access to Council and Board meetings and of their committees. If enacted in its present form, the Information and Privacy Commissioner will be given sweeping powers to monitor compliance. The Commissioner will have broad inspection powers and can even obtain a search warrant. The Commissioner will be able to compel people to give evidence under oath. The Commissioner will be able to void a decision made in contravention of the notice and access provisions. The Commissioner will also be able to compel future compliance with the Act.

It is, of course, difficult to argue against enhanced accountability. On the surface it appears popular and sensible. And, sometimes it is. However, regulators also need to defend the principle of self-regulation if they are to remain viable. Otherwise the cost of self-regulation will be too high for the profession or industry to bear and the profession will give up on its regulatory body.

Some strategies for defending self-regulation might include the following:

1. Articulate the benefits of self-regulation to the public. Professional buy-in to its public interest obligations is essential to prevent widespread and even condoned non-compliance as one sometimes sees with government
regulation (viz. income and sales tax). In addition, self-regulation allows the most knowledgeable people to do the regulating.

2. Identify the costs of excessive accountability requirements. Regulatory action is delayed when staff are compiling lengthy and repetitive reports or preparing for extensive audits. Talented members of the profession will not volunteer or work for regulators if they perceive that they are little more than another government department.

3. Do a good job. Being fast, effective and fair removes the incentive for additional government involvement. Ensure that the entire organization accepts and adopts the public interest mandate of the regulator.

4. Engage in public relations. Communicate what the regulator is doing in a manner that might interest the media. When there is a crisis or criticism, respond quickly and appropriately.

5. Maintain good communications with one’s Ministry. Good informal problem solving will remove the need for formal accountability structures.

Self-regulation is a form of participatory democracy. When it works, it is the best option. When it fails everyone, including the public, is left with second-best.