Defining the public interest: Part II

By Jordan Max and Monique Taylor

The Ontario College of Teachers will soon face the provincial government's imposition of a "public interest" committee on its Council. While it's too early to speculate on its possible outcomes, would clarifying the definition of the public interest prevent the government from imposing a similar committee on other Ontario regulators, such as PEO? If so, who should do this, and how might they do it? What is the "right" public interest, and how will we objectively evaluate it?

The goal of serving and protecting the public interest typically stands at the apex of a regulator's legislation. The principal object of the *Professional Engineers Act* [s. 2(3)] defines this for PEO. Using applicable case law, *Black's Law Dictionary* (eighth edition) defines "public interest" as "the general welfare of the public that warrants recognition and protection" or "something in which the public as a whole has a stake, esp. an interest that justifies governmental regulation."

In Part I of "Defining the public interest" (*Engineering Dimensions*, September/October 2006, p. 50), we reviewed some of the recent literature on the public interest as it relates to regulatory bodies. In Part II, we'll set out some of the challenges and opportunities for defining, or at least clarifying, the public interest from a regulator's perspective.

Challenges

Our first question should be, whose duty is it to define public interest? Since the authority for professional regulation is provided by the legislature through specific legislation, it could be assumed the provincial government or the legislature should play this role. In an ideal world, each regulator's role would then be to apply and interpret the public interest, as defined by the provincial government, within the scope of each profession and its authorizing legislation. Yet, while the provincial government has not explicitly defined the public interest, regulators are nonetheless intuitively interpreting public interest for their professions through their daily decisions and deliberations.

So why hasn't either the provincial government or regulators previously attempted to explicitly define the term "public interest?" Is it because they intuitively know what it is, and therefore definition is unnecessary? Is it because the concept is too vague, or definition is impossible, like defining love? Is it because public interest is always shifting? Or is it because public interest is situational and cannot be contained by generalized positions?

In the absence of any absolute definition, regulators are left to interpret public interest through other means. Our literature review concluded that a profession's enabling legislation is the logical place to start when attempting to determine the public interest for that profession, based on, for example, which powers and/or discretion have or have not been given to the professional regulating body.

One might also look for commonalities among the professions' enabling legislation, keeping in mind they were developed at different times and may reflect the prevailing values of that era or government. Of the 37 or so regulators in Ontario (depending on whom you count in or out), 21 are governed by the *Regulated Health Professions Act*, which was passed in 1991. More recent additions are the *Ontario College of Teachers Act* (1996), the *Professional Geoscientists Act* and the *Professional Foresters Act* (both in 2000). These acts provide a good snapshot of the provincial government's most recent thinking, as expressed in the delegated powers and mandated governance processes. Other pieces of provincial legislation, such as the *Statutory Powers Procedure Act* (SPPA) apply broadly to regulators, by establishing principles of administrative law and natural justice that may override a particular regulator's powers, unless alternatives are specified in the regulator's legislation.

Although space does not permit a more detailed exploration of these more recent acts or the SPPA, we can distill some public expectations of the public interest from the commonalities among regulators' enabling legislation. As a starting point, Ontario has adopted and maintained the professional self-regulation model, with exclusive rights to practise, similarly to other Canadian jurisdictions but in contrast to American and overseas models. This, in itself, is an expression of the public interest, by recognizing the need for these autonomous professions, governed and regulated exclusively by their licence holders or members, and by attaching some priority to peer-based review due to specialized knowledge.

While Ontario regulators and their licence holders may take this privilege for granted, arguably it sets the highest standard of public expectation, unparalleled elsewhere in the world. South of the bor-

der, for example, at least in the realm of professional engineering, the licensing and discipline functions are handled directly by government (although peers sit on these state licensing boards), whereas standards development is left to the professions themselves. When we consider that Canada typically has a more interventionist, state-run approach to the economy than the US, the extent of Ontario's professional autonomy is even more striking.

On a similar macro level, we generally see common regimes among regulators of professions in Ontario, such as licensing/admissions, professional practice/standards/competence and disciplinary processes as the core functions (and therefore reflecting government expectations of regulators). Although there are exceptions to every rule, regulators of professions in Ontario generally operate within the same regulatory context. The particular powers given to their regulatory bodies may differ somewhat, but they generally follow administrative law and principles of natural justice, which reflect government expectations of fairness, evidence-based assessments, transparency and due process.

Athough the provincial government's approach to professions has generally been laissez faire, allowing regulators of professions to do their work without government intervention (other than oversight by the government-appointed members of each profession's governing body), this golden age may be coming to an end. While PEO (along with the Ontario Association of Architects) has experienced some encroachment on its legislative autonomy through recently enacted amendments to the *Ontario Building Code* and the qualified person regulation under the *Brownfields Statute Law Amendment Act*, this could be the proverbial tip of the iceberg.

For example, the purported preeminence of these pieces of legislation over each profession's enabling legislation is, in itself, a statement of provincial policy. With the changes to the building code, it can be argued the provincial government has determined the public interest lies in improving the turnaround times for acquiring a building permit, even though this interest intrudes on PEO's self-regulatory role for engineers as designers. The forthcoming judicial review of the building code amendments might provide some clarity (albeit from the courts, not the government) on which or whose public interests are paramount.

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A less direct method of determining the public interest is to look at particular principles, decisions, choices, or priorities of each regulator as examples of the public interest, often expressed through financial means. For example, OHIP funds certain medical services and excludes cosmetic or elective surgery. This reflects an inherent priority or preference for funding medically necessary services from the public purse, while allowing individuals to pay for elective services.

As discussed in "Stepping up to meet the test," *Engineering Dimensions*, September/October 2006, p. 52, the *Fair Access to Regulated Professions Act* (FARPA) might impose requirements on the registration practices of all regulators of professions in Ontario. As an expression of provincial policy, FARPA deems it acceptable to give government the power to assess the transparency, fairness, objectivity and inclusiveness of individual regulators' registration practices, through reports and audits, and to recommend necessary improvements. Under FARPA, it would appear the Ontario government's concerns for internationally trained applicants (as a particular public) and its desire for standardization outweigh both the autonomy and uniqueness of the regulators of professions in Ontario.

The second major challenge to defining the public interest is in determining which public(s) are meant. This is not simply a matter of legal hair-splitting. Our literature review (see Part I) indicated there are many publics, each with a different perspective and interests that may change over time. Publics can include end users/patients/clients, purchasers of professional services, applicants, licence and certificate holders, university faculty, the government itself (as general public proxy), students, employers of professionals, and other advocacy groups and external stakeholders. Regulators such as PEO may even have their own interests, such as upholding their particular acts.

Since not all of the above listed publics will be interested in every issue, the array of publics may also vary from issue to issue. Our literature review suggests regulators may want to select the policy goals that satisfy the interests of as many relevant publics as possible. However, when interests conflict, the regulator must decide whose interests should prevail in the public interest, perhaps by choosing the option that meets a higher value. The provincial government (for example, the Ministry of Training, Colleges and Universities) may want a quick determination of a foreign applicant's eligibility for a professional licence, whereas the larger public interest may indicate a need for a thorough evaluation to ensure the applicant is suitably qualified, regardless of the time it takes. Often, regulators must try to balance the interests of different publics in its

solutions. If this is not possible, a regulator's governing body might have to make hard decisions.

To complicate matters further, the values reflected as public interests are not eternal, tending to reflect prevailing political, cultural or economic ideologies in such areas as, for example, the role of the state in the economy or in family life. So it is that in the political realm, public interest will shift with the needs, desires and expectations of the concerned publics, and is often captured in public opinion polls or stakeholder consultations. One has only to look at the changes in legislation on same-sex marriage to see how public values have shifted in a relatively short time period, likely making the best we can hope for a series of snapshots of public interests. Although the public interest as it relates to the practice of a particular profession might be less volatile, most Ontario regulators have adapted to new public priorities, as seen by changes to admissions processes to deal with an increased number of applications from those educated and trained outside the country.

Opportunities

The challenges in pinning down the public interest, or in reconciling different publics' interests, should not deter us from trying to move the yardsticks forward. While regulators could wait for the province to define the terms or values of the public interest for their professions, they may choose to assert their autonomy by articulating their understanding of the public interest delegated to them by the provincial government, as demonstrating good public stewardship of their professions. Regulators could see the challenge as an opportunity to clarify and perhaps publish their values. In the long run, this could improve consistency between a regulator's particular policies and other, broader public expectations of a regulator, such as fairness, transparency and consistency. Outputs could include a regulator's code of ethics, interpretive guidelines, committee handbooks, or advice to councils from committees and staff, indicating which public interests are being addressed and how they are being served or protected. There are several approaches that could be tried to define or clarify a regulator's public interests:

1. **The top-down or imposed approach**
   This approach assumes all of the relevant public interests for each regulator were deliberately determined when their current legislation and regulations were drafted and passed, since they received the approval of the government and the legislature of the day, representing the will of the broadest public. In this regard, the answers can be found by carefully examining the powers and limitations of each regulator in upholding its act, and from there attempting to determine the implied values. These values could be augmented by the values implied in recent legislation (e.g. the *Fair Access to Regulated Professions Act* or the *Ontario Building Code* amendments), prior government reports and their recommendations, such as those written by former Ontario Premier Frank Miller, P.Eng., Attorney General Roy McMurtry, etc., or major reports or studies endorsed by councils or similar governing bodies, as well as court decisions.

   The primary downside to this approach is that it assumes both purposeful design in each act's creation, and consistency from one piece of legislation, government report or council to the next. It also forces reliance on present assumptions of what was intended or implied in the past. As mentioned, public policy is often transient, including shifts in administrative law or other approaches to self-regulation.
2. **The inside-out (or bottom-up) approach**
   This approach starts with a fundamental assumption that each regulator operates within a value system of public interest criteria or values which have never been made explicit. Like turning a coat inside out, considerable effort would have to be made to work with committees and staff to review the whys of previous decisions, as an exercise in values clarification. This type of forensic work could be done committee by committee, or incrementally in the course of new policy or proposal development and review by the regulator's council.
3. **The multi-tiered approach**
   A third approach attempts to address the situational challenge, by separating the more static, eternal values from the more dynamic ones, and determining which capture the multitude of potential public interests. This approach would try to array each regulator's public interests in a hierarchical fashion, starting with broad cross-regulator interests and moving downward to more parochial ones. This has the advantage of reconciling different interests and illustrating priorities, while recognizing that certain values (such as consultation, accountability, timeliness, fairness and transparency) are fairly static and others more fluid. This type of exercise lends itself better to a seminar or workshop format. It could be done by itself or as a followup to the second or fourth approach.
4. **The negative-positive approach**
   This approach recognizes that it's sometimes easier to clarify values by stating what they are not, in other words, by stating what is not in the public interest and then defining the opposite value as the public interest. This would work best in a seminar or workshop setting as well.

Conclusion

Despite the expected difficulty, the benefits of clarifying the public interest should outweigh its costs, by enabling regulators to articulate better and defend their public interests to the government, members and all of their publics. However, further discussion and debate are necessary, as they might be the best ways to clarify the values we generally refer to as the public interest.