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On June 1, 2006, the provincial government's Bill 78, the *Education Statute Law Amendment Act* (student performance) was given royal assent. The bill contains new measures imposed on the Ontario College of Teachers (OCT) and its 200,000 members, including a "public interest committee" of up to five non-members who may be appointed by the education minister to advise its council on matters related to the college and its council's duty to serve the public interest. The committee's powers will likely be spelled out in the forthcoming regulations this fall.

Since the province already makes government appointments to the OCT council, does the new public interest committee represent a new direction by the provincial government toward a less "arm's-length" approach to self-regulation of professions? And, will the provincial government place similar expectations in future on other Ontario regulators of professions, including PEO? Only time will tell. However, it may be prudent for PEO to begin a proactive exploration of what it means by the "public interest" in the context of the regulation of engineering.

The words "public interest" appear 1222 times in 234 separate pieces of legislation, including the *Professional Engineers Act* (PEA), which provides PEO's principal object [s.2(3)], and all of those related to regulated professions; yet, interestingly, the term is never defined. The ultimate goal of "public interest" is frequently cited in PEO documents and accepted without question. Do we instinctively know which public interest(s) are being served and protected? As a self-regulating body, how can we be certain that we have the "right" public interests in mind, and how can we objectively evaluate whether our Council, committee, and staff decisions measure up to the Act's "public interest" goals? Which publics are concerned? What exactly do the verbs "serve" and "protect" mean for regulators such as PEO?

This two-part article will not attempt to define "public interest," but will instead

Defining the public interest: Part I

Protecting and serving the public interest is at the core of PEO's mandate. But what exactly is the "public interest?"

summarize some recent research on the subject, and raise some fundamental questions to stimulate thought and discussion.

For Ontario's professional engineers, the current understanding of the public interest can be taken from the definition of professional engineering, which involves safeguarding of life, health, property or the public welfare. The term has also been defined as the protection of health, safety, the environment, and the prevention of economic loss. These, however, are the responsibilities of each individual practitioner. If one looks to the governing legislation, the public interest is protected by PEO through the objects of the PEA, which require that the association set academic and experience requirements for licensure of professional engineers, ensure that only licensed professionals practise professional engineering, and discipline those who are guilty of misconduct or incompetence.

Most of the reviewed research agrees the purpose of regulation and, more relevantly, professional self-regulation, is to serve and protect the public interest. How that public interest is to be protected is, in most cases, spelled out in the regulatory body's enabling legislation. And in most cases, the regulatory body is charged with a number of broad responsibilities to further serving and protecting the public interest:

- to develop minimum standards for the education and practical experience required of individuals before being granted the authority to practise;
- to hold practitioners, in most cases, to a code of ethics to ensure that, once licensed, they will continue to govern themselves as professionals in a manner befitting the profession; and
- to hold each practitioner, through the regulatory body, accountable and responsible for his or her judgments and for the work he or she does.

While the above responsibilities suggest the "how" of public interest protection, the "what" of it and for whom is more of a challenge, and the reviewed research does not so much solve the question as provide suggestions for dealing with this paramount duty. *Interpreting the Public's Interests*, a paper published in 2002 by the Association of British Columbia Professional Foresters, identified interpreting the public's interest as a "vexing and elusive problem." The difficulty is in determining who the "publics" are and what their interests are. In the paper, the BC Foresters' code of ethics is stated as holding practitioners responsible for practising "good stewardship of forest land based on sound ecological principles to sustain its ability to provide those values that have been assigned by society."

The BC Foresters, however, found that different people's (e.g. First Nations, forestry companies, the community) relationships with the land cause them to have different interests. In making professional decisions, the foresters must weigh the different interests of the different publics at every stage of planning. The paper concludes that "the aim is not to balance the competing interests, but to consider all the interests and then make an informed decision for which [they] are accountable."

The Canadian Academy of Engineering also released a study report in 2002, the purpose of which was, in part, to "enhance [the profession's] service to the public."¹ One of the premises upon which the study was based was that the reason for the existence of a licensed profession of engineering is to ensure that the "benefits of engineering activity are provided with adequate measures for protecting the health, safety and well-being of the public and the safeguarding of the environment." Recognizing that engineers also have to balance the needs and interests of different publics, the report assumes an

understanding of the public “well-being” without defining it in any concrete way.

Turning to the Ontario context, a 2003 jurisdictional review conducted for the Health Professions Advisory Council in Ontario, the policy foundation for the *Regulated Health Professions Act*, identified the difficulty as being that there is “no clear consensus that the public interest mandate is being fulfilled.”² While the review dealt with issues specific to the health professions, the authors claimed public interest “can be understood and deduced from the legislation read as a whole,” since it is rarely defined in the legislation.

In 2003, lawyer Richard Steinecke wrote in *Grey Areas*, an online newsletter, that the public interest is “a subjective concept. There is no absolutely right response in any situation (although there might be some ‘wrong’ reactions). There will always be room for debate even among thoughtful, right-thinking individuals.” A regulator of professions, then, Steinecke writes, “should start with one’s enabling legislation or articles of incorporation. It is in these documents where the mandate of the organization is stated, as well as a description of a regulator’s ‘expected activities and programs.’ It is then often easier to begin a discussion of the public interest by determining what is not in the public interest.”³

According to the Canadian Government’s External Advisory Committee on Smart Regulation, “broadly speaking, regulation is meant to serve the public interest.”⁴ While this understanding is implicit in most of the reviewed research, it is clearly stated in the report *Striking a New Balance: A Blueprint for the Regulation of Ontario’s Health Professions*: “The important principle underlying each of the criteria [for regulation] is that the sole purpose of professional regulation is to advance and protect the public interest. The public is the intended beneficiary of regulation, not the members of the profession.”⁵

A Public Opinion Perspective in Regulation, a study conducted in 2003 for the same committee by Matthew Mendelsohn, concluded that while there is no one definition of “public interest,” Canadians would “understand it to mean the protection of public goods from the private interest.” The public has been unable, however, to “provide governments with criteria for regulating in

the public interest.” The study concludes that a set of overarching principles should be followed in the decision-making process:

- independence of the regulatory body or process;
- effective and independent enforcement of regulations;
- consequences for non-compliance; and
- timely and transparent application of principles.

Additional principles include an ability to respond to changing circumstances, efficiency and “value for money.” If these criteria are met, the study states, Canadians will accept that a regulatory regime is meeting the “public interest.”

In another paper written for the committee by Leslie Pal and Judith Maxwell, the authors attempt to develop a practical guide for regulatory authorities to think through what the public interest might be on a case-by-case basis.⁶ Its literature review shows there are five distinctive approaches to understanding the public interest:

- fair and transparent decision-making processes;
- majority opinion;
- a balance of different interests;
- a set of pragmatic interests that all have in common; and
- a set of shared values.

While these authors also emphasize the difficulty in defining public interest as “one general principle to apply to all the regulatory policy or decisions,” they do suggest that, in light of mounting pressures to make regulatory processes more transparent and accountable, the issue of public interest will have to be addressed in more concrete terms. Using these five approaches, the authors present a two-stage public interest accountability framework that includes a review of the evidence on the public interest and an assessment of the evidence to balance the interests. This framework, the authors claim, balances the different public interests and allows that balancing to be transparent.

In the committee’s final report, it observes that public views on regulation and regulation reform have evolved since the 1980s.⁴ The report recommends five principles for “smart regulation” in the public interest, including:

- effectiveness: regulation must achieve its purpose;
- cost-efficiency: requirements, measures and enforcement should be commensurate with the risks and the problems involved;
- timeliness: decisions and services must be provided in a manner that reflects the pace of change;
- transparency: accessibility and transparency of the system must be maximized; and
- accountability and performance: regulators must account for their performance; intended results need to be announced and ultimately demonstrated.

In summary, all the reviewed studies first attempt to understand who or what the public is. A consensus that emerges from the reports is that there is no singular public; publics have many different interests that change and compete from one situation to another. It seems that the profession’s enabling legislation is the place to start when attempting to determine the public interest. Consultation, accountability, timeliness, fairness and transparency are also important principles to apply. In Part 2, we will attempt to learn from the research and explore policy approaches to attempting to further define the “public interest.”

References

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