Big Picture Thinking – The Future of Self-Regulation

Canada is one of the few remaining jurisdictions in the world still using the self-regulation model for professions. In Canada, self-regulation of the engineering profession began in 1920. As we approach the 100th anniversary, we need to contemplate the future of self-regulation. This Big Picture discussion will kick-off the discussions.

Attached are four articles that explore the future of self-regulation.

The first is a policy paper drafted by the White House entitled *Occupational Licensing: A Framework for Policymakers*. It recognizes that:

1. When designed and implemented carefully, licensing offers important health and safety protections to consumers, as well as benefits to workers.
2. Licensing regimes create substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job.
3. Licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills to other jurisdictions.
4. Policymakers may not carefully weigh these costs and benefits when making decisions about whether, or how, to regulate a profession through licensing.

The second paper is a summary of *A Futurist Looks at Professional Regulation*. It suggests five trends:

1. Entry-to-practice credentials will matter less and demonstrated career-long competency will matter more. In fact, the tide of increasing credentials should probably be turned back as it is proving unhelpful to quality and a barrier to accessing reasonably priced services. View competence as an ongoing process rather than an event.
2. The emphasis on core standards for practitioners and even quality assurance will have to give way to continuous quality improvement. Greater trust will be put in real-time performance data (e.g. outcome statistics) than formal stamps of approval.
3. Regulators will be expected to anticipate more and react less. While Lewis did not get into specifics, perhaps this means that regulators will need to anticipate trends by evaluating the information that is already in their files or that is readily available to them. Or perhaps it will mean that regulators will have to engage in a more deliberate and intense risk-management analysis of their activities and the practice trends within the profession they regulate.
4. Siloed and distinct regulation of individual professions must transition into integrated and fluid regulatory activities. If practitioners work in teams, why can regulators not do so?

5. The culture of professional autonomy will almost certainly be replaced with a culture of collaborative and joint accountability.

The third paper *Self-Regulation under Siege* provides a number of examples of the erosion of self-regulation. The engineering profession has a number of specific government actions to add to the list. It suggests five strategies for defending self-regulation:

1. Articulate the benefits of self-regulation to the public. Professional buy-in to its public interest mandate 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. The Big Picture discussion at the Board meeting is expected to raise concepts for self-regulation of engineering to flourish for the next 100 years and jurisdictions around the world will see the self-regulation model as the best model to ensure that engineers safeguard the economy, the environment and the citizens.

The final paper discusses *The End of Self-Regulation of the Legal Profession in England*. It suggests that regulators wishing to avoid a similar fate should ensure that they have two independent organizations, one for self-regulation and one for advocacy. And the regulatory organization should be careful to avoid even a perception of becoming influenced by professional advocacy interests. It also highlights that the poor handling of consumer concerns resulting in regulatory scandals, fanned by the media, that prompted significant government intervention.

Constantly enhancing its ability to effectively and transparently handle consumer concerns is essential to the long term viability of the self-regulatory model. Of course this is easier said than done.
OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS

Executive Summary

Over the past several decades, the share of U.S. workers holding an occupational license has grown sharply. When designed and implemented carefully, licensing can offer important health and safety protections to consumers, as well as benefits to workers. However, the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job. There is evidence that licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines. Too often, policymakers do not carefully weigh these costs and benefits when making decisions about whether or how to regulate a profession through licensing. In some cases, alternative forms of occupational regulation, such as State certification, may offer a better balance between consumer protections and flexibility for workers.

This report outlines the growth of licensing over the past several decades, its costs and benefits, and its impacts on workers and work arrangements. The report recommends several best practices to ensure that licensing protects consumers without placing unnecessary restrictions on employment, innovation, or access to important goods and services.

Occupational licensing has grown rapidly over the past few decades.

- More than one-quarter of U.S. workers now require a license to do their jobs, with most of these workers licensed by the States. The share of workers licensed at the State level has risen five-fold since the 1950s.
- About two-thirds of this change stems from an increase in the number of professions that require a license, with the remaining growth coming from changing composition of the workforce.

When designed and implemented carefully, licensing can benefit consumers through higher-quality services and improved health and safety standards.

- In some cases, licensing helps to ensure high-quality services, safeguard against serious harms, and offer workers clear guidelines around professional development and training.
- However, to realize these benefits licensing requirements must closely match the qualifications needed to perform the job, a goal that is not always achieved or may not be maintained when licensing expands and jobs change.
- Licensing may also help practitioners to professionalize, encouraging individuals to invest in occupational skills and creating career paths for licensed workers. For example, accountants in States requiring more experience (three or more years) are 26 to 36 percent more likely to have acquired training since starting their current job.

But by making it harder to enter a profession, licensing can also reduce employment opportunities and lower wages for excluded workers, and increase costs for consumers.

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1 This White House report was prepared by the Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor in July 2015.
• Research shows that by imposing additional requirements on people seeking to enter licensed professions, licensing can reduce total employment in the licensed professions.

• Estimates find that unlicensed workers earn 10 to 15 percent lower wages than licensed workers with similar levels of education, training, and experience.

• Licensing laws also lead to higher prices for goods and services, with research showing effects on prices of between 3 and 16 percent. Moreover, in a number of other studies, licensing did not increase the quality of goods and services, suggesting that consumers are sometimes paying higher prices without getting improved goods or services.

Licensing requirements vary substantially by State, creating barriers to workers moving across State lines and inefficiencies for businesses and the economy as a whole.

• Estimates suggest that over 1,100 occupations are regulated in at least one State, but fewer than 60 are regulated in all 50 States, showing substantial differences in which occupations States choose to regulate. For example, funeral attendants are licensed in nine States and florists are licensed in only one State.

• The share of licensed workers varies widely State-by-State, ranging from a low of 12 percent in South Carolina to a high of 33 percent in Iowa. Most of these State differences are due to State policies, not differences in occupation mix across States.

• States also have very different requirements for obtaining a license. For example, Michigan requires three years of education and training to become a licensed security guard, while most other States require only 11 days or less. South Dakota, Iowa, and Nebraska require 16 months of education to become a licensed cosmetologist, while New York and Massachusetts require less than 8 months.

• Licensed workers are sometimes unable to use distance or online education to fulfill continuing education requirements, as some States do not automatically accept accreditation from good schools based in other States. Similarly, State licensing requirements can prevent workers from teleworking or taking advantage of new technologies, thereby inhibiting innovation.

The costs of licensing fall disproportionately on certain populations.

• About 35 percent of military spouses in the labor force work in professions that require State licenses or certification, and they are ten times more likely to have moved across State lines in the last year than their civilian counterparts. These military spouses may have difficulty acquiring a new license each time they move or meeting different license requirements in their new State.

• Licensing requirements often make it difficult for immigrants to work in fields where they have valuable experience and training. This deprives the U.S. market of a large share of their skills, and makes it difficult for these workers to make their full contribution to the workforce.

• In half the States, applicants can be denied a license due to any kind of criminal conviction, regardless of whether it is relevant to the license sought or how long ago it occurred. It often takes six months to a year for some States to simply review an applicant’s criminal history and make an initial determination about whether she qualifies for a license.

Best practices in licensing can allow States, working together or individually, to safeguard the well-being of consumers while maintaining a modernized regulatory system that meets the needs of workers and businesses. Licensing best practices include:

• Limiting licensing requirements to those that address legitimate public health and safety concerns to ease the burden of licensing on workers.
Applying the results of comprehensive cost-benefit assessments of licensing laws to reduce the number of unnecessary or overly-restrictive licenses.

Within groups of States, harmonizing regulatory requirements as much as possible, and where appropriate entering into inter-State compacts that recognize licenses from other States to increase the mobility of skilled workers.

Allowing practitioners to offer services to the full extent of their current competency, to ensure that all qualified workers are able to offer services.

In order for the economy to successfully continue to innovate and grow, we must ensure that we are able to take full advantage of all of America’s talented labor. By one estimate, licensing restrictions cost millions of jobs nationwide and raise consumer expenses by over one hundred billion dollars. The stakes involved are high, and to help our economy grow to its full potential we need to create a 21st century regulatory system—one that protects public health and welfare while promoting economic growth, innovation, competition, and job creation.

A Futurist Looks at Professional Regulation

by Richard Steinecke

October 2013 - No. 180

Earlier this month Steven Lewis, a popular health policy consultant, made a presentation at an international conference of regulators on the future of professional regulation.

Lewis identified a number of challenges to the traditional model of credentialing and regulating individual practitioners. For example, in the health care sector, nurses are successfully performing services previously only done by highly trained physicians such as anaesthesia, endoscopy and primary care. Offshore interpretations of radiographs are often of a high quality. Skilled technicians with a few months’ training are doing high quality cataract surgery in places such as India and Africa. Personal support workers are multi-tasking in community care with good results. The concept of requiring highly trained certified professionals as the exclusive providers of highly skilled services needs to be re-examined.

At the same time there are challenges to the traditional approaches of educating professionals. There are examples of self-taught people successfully passing entry-to-practice examinations in traditional occupations such as law. On-line courses compete with traditional forms of classroom learning. In the teaching profession vastly different certification requirements internationally produce similar student outcomes.

The reality is that a lot of bad stuff happens in spite of regulation. Increased educational requirements are not producing breakthroughs in quality. In many professions the structure in which the service is provided (e.g., how the provision of services is organized, workplace culture, policies and procedures) and team dynamics have at least as much of an influence on performance
as does individual competence. Regulators focusing on individual performance may become largely irrelevant.

Also, in the borderless world, mobility makes traditional local-jurisdiction regulatory requirements and standards impractical. Economic unions and labour mobility agreements require a broader perspective for regulation. For example, these pressures are resulting in a decoupling of competencies from credentials when registering or licensing professionals.

Added to these developments is a decline in public trust in public institutions including professional regulators. Examples are frequently in the headlines including the investment banking debacle and economic collapse of 2008, various accounting scandals and repeated health care failures in accredited institutions by certified practitioners (e.g., radiology misinterpretations). Ironically, however, the response to these events is usually to call for increased regulation with greater accountability and stronger sanctions.

So, Lewis asks, is the solution more, less or different regulation? He posits five trends in professional regulation that seem to be inevitable:

1. Entry-to-practice credentials will matter less and demonstrated career-long competency will matter more. In fact, the tide of increasing credentials should probably be turned back as it is proving unhelpful to quality and a barrier to accessing reasonably priced services. View competence as an ongoing process rather than an event.

2. The emphasis on core standards for practitioners and even quality assurance will have to give way to continuous quality improvement. Greater trust will be put in real-time performance data (e.g. outcome statistics) than formal stamps of approval.

3. Regulators will be expected to anticipate more and react less. While Lewis did not get into specifics, perhaps this means that regulators will need to anticipate trends by evaluating the information that is already in their files or that is readily available to them. Or perhaps it will mean that regulators will have to engage in a more deliberate and intense risk-management analysis of their activities and the practice trends within the profession they regulate.

4. Siloed and distinct regulation of individual professions must transition into integrated and fluid regulatory activities. If practitioners work in teams, why cannot regulators do so?

5. The culture of professional autonomy will almost certainly be replaced with a culture of collaborative and joint accountability.

Obviously this will mean that regulators will have to learn new ways of regulating professional activity. In one of his illustrations, Lewis indicated that while it is much more difficult to assess the quality of work of a team and to design methods of enhancing its performance, the benefits of such
quality improvement activities would probably far outweigh individual quality assurance of the team’s individual members.

Lewis concluded with a challenge to regulators to “own the future”. Openness, transparency and candour are keys to maintaining public trust. Put one’s assumptions (e.g., that more education means higher quality services) to the test of research and evaluation. Regulators should design alternatives to the exclusive self-regulation model before others design them independent of regulators. Finally, regulators need to adapt structures and processes to a world of rapid knowledge turnover and team-based practice.

Self-Regulation Under Siege
by Richard Steinecke
May 2009 - No. 135

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.

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3 Reprint of the Grey Area newsletter is published by Steinecke Maciura LeBlanc
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 much more intense, down to justifying why a regulation requires 14 days notice of 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.

It is, of course, difficult to argue against enhanced accountability. On the surface it appears popular and sensible. And, sometimes it is. However, regulators 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 mandate 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.

**The End of Self-Regulation of the Legal Profession in England**

by Richard Steinecke

August 2008 - No. 126

As of September 1, 2008, the Legal Services Board will be appointed for England and Wales. The Board will be the single independent oversight regulator of legal services in England. What is unique about the Board is that it is not wholly or even substantially selected by the legal profession. It is entirely appointed by the government.

While some of the appointees are barristers or solicitors, most are not. They were chosen for their experience in consumer issues, regulatory experience, the legal sector and public service. Some are consumer advocates and many have worked with government or public regulatory organizations in the past.

The Board will have three years to establish its infrastructure and fully assume its regulatory role. It will act as an “oversight regulator” for all bodies involved in the regulation of legal services.

The Board is part of a comprehensive package of reform (Legal Services Act 2007) to the regulation of the legal profession in England. The purpose of the reforms is described by the English government as follows:

*The current regulatory framework is complex and fragmented, with regulatory anomalies and gaps, which make it confusing for consumers. The new system will put an end to this confusion and will establish a clear, flexible and transparent system, which is responsive to consumer needs, with a single set of regulatory objectives.*

A second component of the reforms is the establishment of the Office of Legal Complaints (OLC). The OLC will be established and monitored by the Board. The OLC will be completely independent of the legal profession. The OLC “will administer an ombudsman scheme that will deal with all consumer complaints about legal services... Legal service providers would be required to maintain ‘in-house’ complaints handling procedures, which will have to satisfy any requirements set by the [Board], to deal with complaints made by consumers in the first instance. The OLC will then handle all complaints made against providers that cannot be resolved at the local level. This will remove the current uncertainty amongst consumers as to where, or to whom, they should address their complaint.”

The third component of the reforms is to permit alternative business structures (ABS). “Different types of lawyers, and non-lawyers will be able to work together in innovative practices, including 'one-stop shops', which can deliver packages of legal and other services in more consumer focussed and convenient ways.”

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*4 Reprint of the Grey Area newsletter is published by Steinecke Maciura LeBlanc*
“The [Board] will supervise all licensing authorities (i.e. those bodies that regulate ABS) and will make rules governing how it carries out this supervision. It will also have powers to decide which bodies may become licensing authorities and it can in certain circumstances become one itself.”

This alternative business structures reform is not dissimilar to some of the recommendations made by Canada’s own Competition Bureau over the past year.

These reforms are similar to some of the recent measures taken with respect to the medical profession in England, which has also lost a significant measure of its authority to regulate itself. While it is difficult to determine with certainty the causes of the loss of self-regulation in England in the two professions most associated with the concept over the past few centuries, two factors emerge as significant.

First, there appeared to be an inability of professional bodies to separate their regulatory and self-interest roles. This became obvious in the submission of the General Council of the Bar (the group for barristers) on the Legal Services Act 2007. It began its submission as follows:

The Bar Council is the professional body that represents the interests of 14,000 barristers in England and Wales. As the governing body for the Bar it has a dual role in representing the interests of barristers and of regulating their work in the public interest.

Regulators wishing to avoid a similar fate should ensure that they have two independent organizations, one for self-regulation and one for advocacy. And, the regulatory organization should be careful to avoid even a perception of becoming influenced by professional advocacy interests.

The second factor was the poor handling of consumer concerns. It would be fair to say that there were regulatory scandals, fanned by the media, that prompted significant government intervention. Constantly enhancing its ability to effectively and transparently handle consumer concerns is essential to the long term viability of the self-regulatory model. Of course this is easier said than done.