



HRPA Series on Governance for Professional Regulatory Bodies What does it mean to be a regulated profession?

The present article reviews the fundamentals of professional regulation as it applies to Human Resources management in Canada. In many professions, knowledge of the workings of professional regulation is expected or even required of all members of the profession. And yet, it would appear that many Human Resources professionals in Canada do not understand what professional regulation is and how it works. This purpose of this article is to give an overview of professional regulation as it applies to the regulation of the Human Resources profession in Canada.

There are many occupations whose members claim to be professionals. In fact, it is difficult to imagine an occupation whose members do not claim to be professionals. In this context, an important distinction is whether the profession is a 'regulated profession' or not. The most common definition of 'regulated profession' is that the profession has a governing or regulatory body that is sanctioned by law to govern or regulate a profession. Being recognized by the state as a regulated profession is seen by many as the demarcation line between being just another self-declared profession and a 'real' profession. For established professions, professional regulation is taken for granted; for emerging professions, however, becoming a regulated profession is often an important objective—but what does it mean to be a regulated profession?

Let's take this as our starting point.

An overview of professional self-regulation

Governments regulate a great deal of commercial activity in order to ensure that the public interest is served. One such area is the transactions between professionals and consumers. Professional regulation can be thought of as a form of consumer protection.

The most common approach to the regulation of professions in Canada is *self-regulation*. Self-regulation is based on the concept of an occupational group entering into an agreement with government to formally regulate the activities of its members. As a condition of delegation of such regulatory powers, the governing or regulatory body is required to apply such powers in a manner that is guided by the public interest.

Professional self-regulation is a regulatory model which enables government to have some control over the practice of a profession and the services provided by its members but without having to maintain

the special in-depth expertise required to regulate a profession that would be required under direct regulation.

Self-regulation is an exceptional privilege. The reason why professions are accorded this privilege is that governments trust professionals to be able to put aside their self-interest in favour of promoting and promoting the public interest. This follows from the ethos of professionalism which has as an important aspect a commitment to an ideology of service. This ideology of service is an integral aspect of self-regulation.

The trust that governments put in the ability of professional governing or regulatory bodies to put the public interest first is not absolute, however. There are a number of mechanisms that governments have introduced to keep the professional governing or regulatory bodies honest—ministerial accountability, increasing the number of government appointed members on councils and boards, and introducing agencies that have oversight over some aspects of the operations of the professional governing or regulatory bodies. Indeed, in some cases, the proportion of government appointees sitting on councils or boards of professional governing or regulatory bodies can approach half. Indeed, some have referred to this as more ‘co-regulation’ than ‘self-regulation.’

Provincial jurisdiction

In Canada, the regulation of trades and professions falls under *provincial* authority for the most part. The only professions that are federally regulated are those which practitioners operate within federally regulated industries—airline pilots and air traffic controllers, for example.

Section 92 of the *Canadian Constitution Act, 1867*, assigns to the provinces the authority to make laws in relation to property and civil rights in the province. The Supreme Court of Canada and other courts have interpreted property and civil rights under s. 92 of the *Canadian Constitution Act, 1867* to include regulation of professions. The Supreme Court of Canada and other courts have on many occasions upheld the authority of the provinces to regulate professions.

The essential point here is that there simply cannot be a national regulatory body for Human Resources. For this to happen, there would need to be fundamental changes to the Canadian Constitution.

The fact that professional regulation falls under provincial jurisdiction is fundamental and shapes just about every aspect of the regulation of professions in Canada. Although the general idea is the same in all provinces, there are real differences across provinces. For instance, in Quebec, the regulation of professions follows from the *Civil Code*. Here, there is one umbrella statute—the *Professional Code*—which sets out which occupations are deemed professions and the basic regulatory framework for all professions. In common law provinces, professional regulation tends to fall under oversight of relevant ministries, although there are exceptions to this. Some of the differences across provinces are a matter of tradition rather than the fundamental legal framework.

Also, professions which are regulated in one province are not necessarily regulated in another. In fact, there are relatively few professions that are regulated in all ten provinces.

The point is that professional regulation is done somewhat differently in all provinces.

Although the regulation of trades and professions falls under provincial authority, in many professions there is a fair degree of interprovincial coordination especially in matters of registration.

Some of this interprovincial coordination is driven by the Agreement on Internal Trade (AIT) of which the federal government, the provinces, and territories are signatories. The AIT aims to promote labour mobility through mutual recognition processes. The AIT applies to departments, ministries or similar agencies of government, and non-governmental bodies that exercise authority delegated by law. Professional regulatory bodies are 'non-governmental bodies that exercise authority delegated by law.' In other words, when an occupation becomes a regulated profession, it becomes subject to the AIT. Occupations which are not regulated do not fall under the AIT and their professional bodies are not required to recognize credentials granted by professional bodies in other provinces but it is also the case that the professional bodies in other provinces are not under any legal obligation to recognize their credentials either.

Nonetheless, labour mobility agreements do not alter the basic fact that professional regulation is virtually always a provincial matter.

Delegation of regulatory authority

Although one could say that the provinces are the ultimate regulators of the trades and professions in Canada, the term 'regulator' is most often used to refer to those bodies that have been delegated the authority to regulate a profession or trade on behalf of their respective provincial governments.

There are a number of mechanisms by which a government can delegate regulatory powers to a professional regulatory body. The most common mechanism for delegating regulatory authority to a professional regulatory body is to do so by means of a *statute* or *act* (these terms are interchangeable). These statutes provide a framework for the regulation of a specified profession, and identify the extent of the legal authority that has been delegated to the profession's regulatory body. But there are other mechanisms as well.

For instance, in Alberta, under certain conditions, professional regulation may be achieved through regulations¹ made under the *Professional and Occupational Associations Registration Act (Alberta), 2000*.

A relatively newer mechanism is the Delegated Administrative Organization (DAO) or Delegated Administrative Authority (DAA). These are corporations which through an administrative agreement between a ministry and the corporation are responsible for administering an act and associated regulations on behalf of the provincial government. For instance, the Real Estate Council of Ontario (RECO) is Delegated Administrative Authority which regulates Real Estate Brokers in Ontario.

To further complicate matters, statutes which delegate regulatory powers can be either private statutes or public statutes. The essential difference is that a private act is brought forth at the behest of a private interest whereas a public act is introduced at the behest of a member of the legislature. Private and public statutes also differ in the manner they are introduced in the legislature.

¹ The difference is that statutes are passed by the legislature whereas regulations are made under an act but are enacted by an order of the Lieutenant Governor in Council upon recommendation of the Minister.

Although the legal authorities transferred from government to the professional regulatory bodies will often cover some of the same themes, the specifics of such authorities can vary substantially from one profession to the next and from one province to the next. In matters of professional regulation statutes or regulations, the devil is in the detail.

One would think that there would be a clear definition of what is or is not a regulated profession in any given provincial jurisdiction—but, unfortunately, that is just not the case except perhaps in Quebec where the *Professional Code* does provide a clear demarcation between regulated and non-regulated professions and occupations. In other provincial jurisdictions, the definition of what is a self-regulated profession can depend on the context.

For instance, in Ontario, one definition of *regulated professions* would be those professions which fall under the oversight of the Office of the Fairness Commissioner, another definition would be those regulatory bodies which would be considered to fall under the AIT. These lists are not the same. The AIT list refers to ‘regulatory authorities’ as opposed to ‘regulated professions.’ There are a number of regulatory authorities as defined by the AIT which would not generally be considered as regulated professions by the government.

The various lists do not always seem to apply consistent criteria either. For example, the list of regulated professions on the Government of Alberta website includes some but not all of the professions governed under the *Professional and Occupational Associations Registration Act*.

This all appears somewhat chaotic and it is. What are we to make of it?

In all jurisdictions, there are some professions that will make it to all the lists of regulated professions—these could be called the Tier 1 regulated professions. These are the professions that the public has in mind when they think ‘regulated profession.’ Then there are other professions that are ‘regulated professions’ by some criteria but do not make it to the list of Tier 1 regulated professions. These could be called Tier 2 professional regulators. These are also professions that the public does not always think of as true professions.

Although there are exceptions to the rule, in general, Tier 1 regulated professions are comprised of professions governed by public statute whereas the Tier 2 regulated professions are comprised of professions governed by private statute, regulation, or administrative agreements.

For emerging professions, becoming a regulatory authority may be necessary but not sufficient to achieve legitimacy as a true profession. It is also the case that making it to the Tier 1 list is better in terms of achieving legitimacy as a true profession.

Protecting the public interest

In all professional self-regulatory models, however, in exchange for regulatory powers, the regulatory body is expected to operate in the public interest, whether this is stated explicitly in the enabling legislation or not.

Whether stated explicitly in the enabling legislation or not the fundamental principle is that professional self-regulation must be in the interest of the public. Although professional regulation has some benefits

for the profession, its essential *raison d'être* is to protect the public not to enhance the status of the profession. It is required that all of a regulatory body's decisions and activities will be done in the 'public interest.' In other words, the primary purpose behind all regulatory body activity should be to protect the public from incompetent or unethical practitioners and to ensure the effective provision and access to professional services not to forward the interests of the profession and its members.

Being a profession does not mean that the government will move to regulate the profession or to create a regulatory body to which it will delegate regulatory authorities. There are 'regulated professions' and 'unregulated professions.' An unregulated profession is one where there is no legislation that grants regulatory powers to the professional association or regulatory body. Governments are more likely to regulate professions when:

- The public does not have the capacity to evaluate the competence of the professional (before it may be too late to do so)
- The public does not have the choice of practitioner
- There is an imbalance in the power of the service provider and that of those who receive services
- When the consequences of the actions of incompetent or unethical practitioners are serious

Also, governments are less likely to regulate a profession when the clients or users of the professional service are mainly businesses. That is because there is an assumption that businesses have the wherewithal to look after their own interests.

The reason why a legislature has, or would, consider the regulation of HR professionals is to protect the public (employees) from unfair employment practices, not to protect employers from the actions of their HR professionals.

Again it is not whether the profession 'deserves' to be a recognized as a profession that concerns government; rather, it is whether the public needs protection that will motivate a government to regulate a profession.

This creates a paradox of sorts for many emerging professions. Many emerging professions are interested in becoming regulated professions because of the enhanced legitimacy and status this would bring to the profession; and yet, these are not legitimate reasons for regulating a profession.

Regulation and licensure

It is a mistake to equate *regulation* with *licensure*. The fact that a profession is not licensed does not mean that the profession is not regulated. *Regulation* and *licensure* are two different concepts.

Approaches to professional self-regulation range from minimal to extensive control over a profession. Which approach is chosen will depend on the nature of the activities performed by a profession's members, and the extent to which the public might be harmed if an incompetent member of a profession provided services.

Broadly, there are three levels of regulation: registration, certification, and licensure.

Registration is the least involved form of regulation. Here the requirement is for professionals to be listed on a sanctioned register.

Certification is essentially the stamp of approval given to an individual for meeting pre-determined requirements. Certification is often associated with monopoly use of a specific title or professional designation (“protection of title”). This model protects the public by providing information about the qualifications of designation holders so that the public can make an informed decision about who they want to receive services from.

Licensure is one of the most restrictive forms of professional regulation. Specifically, licensure provides an occupational group with monopoly control over who can practice a profession. Only those individuals who have met specific requirements to enter a profession are issued a “license” to practice the profession or to perform certain “controlled acts.” Entry requirements are generally quite detailed and often include attaining specified educational requirements and completion of some form of licensing examination.

Professions in which there is no licensure are sometimes called *voluntary* professions in that individuals can choose not to be members of the professional body and still practice the profession. Although, in some voluntary professions the consequences of losing one’s designation are such that the designation becomes licensure-like.

In professions that are not licensed, the professional regulatory body still has the authority and obligation to protect and promote the public interest by governing and regulating its members. In relation to the regulation and governance of its members, professional regulation is very similar in licensed and non-licensed professions.

The differences between professional associations and professional regulatory bodies

The distinction between a professional association and a regulatory body is one that is not always well understood but which is important to understand.

The essential difference between professional associations and professional regulatory bodies is that the former serve the interests of their members whereas the latter serve the interests of the public. This is a fundamental difference that goes right to the *raison d’être* of the organizations.

Professional regulatory bodies are required in law to protect and promote the public interest by regulating the practice of the profession. The fundamental mission of professional regulatory bodies is to minimize and mitigate the risks to the public that may arise from the practice of the profession.

Regulatory bodies:

- define criteria for registration with and certification by the professional regulatory body,
- provide guidance to members in the form of codes of ethics, rules of professional conduct and standards of practice,
- maintain a public register which contains information about individuals registered with the professional, and
- investigate complaints about members and discipline members as required.

Professional associations, on the other hand, have no statutory requirements other than those which apply to all like corporations. Professional associations are constituted to serve the interests of their members:

- provide networking opportunities,
- publish information of interest to its members,
- conduct research,
- stage conferences, seminars, and workshops,
- maintain job boards,
- negotiate preferential rates for their members for various products and services, and
- lobby governments to influence policy in furtherance of the interests of their members.

There are some overlaps and these are quite instructive. For instance, both professional regulatory bodies and professional associations will offer professional development activities. The difference, however, is that they will do so for very different reasons. Professional associations will offer professional development activities to help members advance their careers; professional regulatory bodies will offer professional development activities because they remedy a specific knowledge or skills gap which poses some risk to the public. The activity may be similar, but the reasons for engaging in the activity are very different.

It is recognized that there is a conflict of interest in serving two masters. Because of the potential conflicts of interest between making decisions in the interest of the public versus that of the profession, governments often force a separation between professional association and regulatory body. In such case, there is a professional regulatory body whose sole mandate is to protect and promote the public interest by regulating its members; and there is a professional association whose sole mandate is to serve the interests of its members.

Professional organizations that are both the professional association and the professional regulatory body

Although professional associations and professional regulatory bodies are often separate, this is not always the case. Despite the potential conflicts of interest, in some circumstances, such as when profession is newly regulated, fairly small, or the risk of harm to the public is relatively low, the provincial legislature may allow both the professional association and regulatory body to co-exist under the same roof. More accurately, the professional regulatory body is given somewhat more latitude in representing the interests of the profession. An example of this kind of professional organization would be the one that represents and regulates nurses in Alberta. This organization is interesting in that it alludes to both mandates in its title—the College and Association of Registered Nurses of Alberta (CARNA).

But there are limits. In all situations where the government has allowed professional regulatory bodies to also serve the interest of the profession, it is clear that the protection of the public is the paramount object, and when there is any conflict between serving the interests of the public and serving the interests of the profession, the public interest must win out.

It is not that the interest of the public and the interests of the profession are always in conflict, they are not; but there are a number of situations where those interests are different. For instance, in regards to setting standards for entry into the profession; professional regulators in their concern for the safe practice of the profession may set requirements which limit the number of individuals who may qualify

whereas professional associations are usually interested in attracting as many members as they can. Professional regulators may set all sorts of limits on the behaviour of professionals and introduce mechanisms to assure continued competence; these measures may be seen as burdensome by members. Professional regulators have investigatory and disciplinary powers that some members may find intrusive.

However, there is a fine line between promoting the interest of the profession and promoting the interests of the members of profession. Even when the government allows a professional regulatory body to promote the interests of the profession it regulates, it takes it that this will be done in a way that benefits the public interest. This would not include activities that are driven by the intention of benefitting the members of a profession. This is the realm of advocacy. Although some advocacy on behalf of the profession may be permissible, it is easy to slide into advocacy of the interests of members of a profession. This latter kind of advocacy interferes with the ability of the professional regulatory body to fulfill its regulatory mandate as it erodes the public confidence in the regulator to be able to put the public interest first where it matters.

The issue is not a matter of balancing the interests of members and the interests of the public. But this is not the right way to think about it. As noted by William Lahey², in an article on the unification of the accounting professions in Canada 'member interests must yield to public interest whenever the two conflict.' Regulatory capture is a term that refers to the situation where regulators identify with and advance the interests of the regulated over the interests of those who were intended to be protected by regulation. The risk of regulatory capture is more acute with self-regulation.

When professional organizations which have no authorities delegated by law seem to carry out the same activities as professional regulatory bodies

It was noted above that the key defining characteristic of professional regulatory bodies is a public protection mandate which comes with the delegation of state regulatory powers.

However, some professional organizations which have no authorities delegated by law, conduct many of the same activities as professional regulatory bodies. For instance, there are a number of professional organizations which offer designations, have codes of ethics, and have complaint mechanisms without any delegated powers. These organizations seem to do everything that professional regulatory bodies do but without specific enabling legislation.

The difference between these organizations and professional regulatory bodies is at the same time subtle and profound. It was noted above how professional regulatory bodies and professional associations could both offer professional development activities but that the motive for doing so was quite different. The same is true for other activities as well. Professional regulatory bodies must justify everything they do in terms of protecting and promoting the public interest. Professional associations will do many of the same things but the motivation is to further the interests and careers of their members.

² *Self-Regulation and Unification Discussions in Canada's Accounting Profession*, available from www.cpacanada.ca

For instance, one of the first steps that associations will take along the path of professionalization is to offer a designation. In the case of professional regulators, the enabling legislation will make it an offence to use the title (designation) or initials without authorization of the professional regulatory body. Associations without delegated authorities can protect a title through trade-mark legislation. The biggest difference, again, is in the motive. Professional regulatory bodies offer designations to ensure that the public can identify those who have met a standard competence necessary for the safe and effective practice of the profession. Professional associations offer designations so that their members can have a competitive advantage in the marketplace.

Even member discipline can be seen from a member benefit perspective as 'getting rid of bad apples whose behaviour is tarnishing the reputation of the profession.'

At the surface, these may appear the same but digging a bit deeper some differences become apparent. Here are some of the ways that statutory professional regulatory bodies tend to differ from non-statutory professional associations that, on the surface of it, do a number of the same things that professional regulators do.

1. Professional regulatory bodies are more likely to impose obligations on their members—obligations such as mandatory professional liability insurance requirements, whereas professional associations are leery of imposing any burdens on their members.
2. Professional regulatory bodies are more likely to issue binding professional guidance—establishing standards of practice that all members must comply with whereas professional associations are more likely to describe best practices that members are not required to adhere to.
3. Professional regulatory bodies maintain public registers that contain information that is in the public interest for the public to know. Professional associations will sometimes maintain member directories. The purpose of these directories is to assist networking. These directories are often only accessible by members and are seen as a member benefit. By way of contrast, public registers maintained by professional regulatory bodies will contain information that some members would rather not have published such as disciplinary history.
4. Professional regulatory bodies have detailed rules that govern the conduct and practice of members. Professional associations will often have codes of ethics as professional regulatory bodies do. The difference is that these often express laudable principles but are not always enforceable statements. Professional regulatory bodies consider codes of ethics as legally binding covenants which are to be vigorously enforced.
5. Professional regulatory bodies will implement quality assurance programs such as professional inspection regimes and peer review, whereas professional associations are reluctant to introduce programs which would be seen as intrusive on the part of the membership.
6. Professional regulatory bodies have sophisticated investigatory and disciplinary processes. Professional associations will often have discipline mechanisms 'on the books' but they are rarely if ever used, also these discipline processes tend to be rudimentary. The discipline processes of professional regulatory bodies are often subject to procedural standards set by law and the

decisions of statutory committees are subject to review by the courts--this brings about greater rigour and sophistication.

7. All decisions made by regulatory bodies are subject to judicial review by the courts, and in many cases, regulatory statutes will grant specific rights of appeal to the courts to individuals who are the subject of regulatory decisions. As a result, the policies and procedures of professional regulatory bodies are much more sophisticated than those of professional associations.

Professional regulation and the process of professionalization

A framework that may be useful in making sense of the discussion is the process of professionalization. What may be seen here is a set of steps or stages in the process of professionalization.

Professionalization has been described as the process by which the members of an occupation collectively strive to achieve the recognition and status that is accorded to the established professions by emulating or adopting the defining characteristics of these established professions.

As a first step towards professionalization, a professional association will emulate established professions by offering a designation, establishing a code of ethics, and, at least on paper, put in place a complaints and discipline process. At this point, the 'regulatory mindset' with its emphasis on public protection is still embryonic.

The next logical step is for the professional association to seek some form of recognition by the state. Depending on the circumstances and the jurisdiction, this step may become a Tier 2 regulator by means of a private statute or regulation. Tier 2 professional regulators are not subject to the same scrutiny as Tier 1 professional regulators. Tier 2 professional regulators tend not to be active members of the regulatory community.

Finally, some Tier 2 professional regulators will seek to take the next step and pursue self-regulation by public statute. This step comes with an explicit mandate to protect and promote the public interest. Also, with public act self-regulation comes increased oversight from government and accountability as a professional regulator. The sequence of steps is shown in Figure 1.³

³ This is not the only way that occupations become regulated, but it is the sequence for profession-led professionalization efforts. Sometimes the state acts to regulate an occupation on its own initiative out of concern for protecting the public. This can happen as a response to abuses that have occurred. For instance, in Ontario, private investigators and security guards are licensed under the *Private Security and Investigation Services Act, 2005*. This is direct regulation by the state, however, as no self-regulatory body was created.

Figure 1



What we see with each subsequent step is not only increased regulatory authority but also a parallel increase in the ‘regulatory mindset.’ The journey from association to full-fledged regulatory body is not only a matter of increasing regulatory authority, it also requires, or brings about, a fundamental change in perspective.

What does it mean to be a member of a regulated profession?

There is a difference between being professional and being a professional. Many individuals who are not members of a regulated profession would say that they ascribe to professional attitudes and values. The key difference is the existence of a professional regulatory body and the acceptance on the part of the professional of the authority of the professional regulatory body.

Regulated professionals accept that their regulatory body that can establish standards of qualification, ethics, competence, and professional practice; that their regulatory body can take action to ensure that such standards are maintained; and that their regulatory body can hold its members accountable for upholding these professional standards.

In short, the relationship that a professional has to his or her regulatory body is not the same relationship that a professional has to his or her association.

Claude Balthazard, C.Psych., Ph.D., CHRL
Vice-President Regulatory Affairs
Human Resources Professionals Association
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