

Ontario College of Teachers
2013 Annual Meeting of Members

Thursday June 6, 2013

**Accountability, Transparency and
Professional Ethics: Today's Challenges
for the Ontario College of Teachers**

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Introduction

I would like to thank the College for inviting me to speak to you at your AGM. When I first spoke to Alyssa Brierly three months ago she gave me fair warning of the large shoes I would have to fill, given the speakers you had invited the last three years: Andre Marin, Kathy English and Jean Augustine. We discussed what I could try to bring to your members, and settled on issues of accountability, transparency, and professional ethics.

I felt comfortable doing so for several reasons. I come from a family of teachers. My wife taught elementary school for about 20 years, and then, while obtaining her graduate degree in education, began teaching teachers. Her three siblings have been teachers. Two of their spouses are teachers. My niece, the daughter of one of these teachers, is a teacher who has worked in Australia and Taiwan due to the shortage of teaching jobs here. My two siblings have been teachers. My mother taught elementary school after we immigrated to Canada. Nous étions la deuxième famille d'origine Sud-Asienne à Montréal. Après avoir enseigné pendant deux années, ma mère a dû remplir un formulaire, constatant sa religion. This was the late 1950's, and there were two options on the provincial government's form that was required for continuing status as a teacher— Christian or Jewish. She was unable to tick off either of those boxes, and so she lost her job. Instead she applied for and obtained a position at Sir George Williams, later Concordia University, as one of the first female mathematicians in Canada, and she taught there for 35 years until her retirement.

As a teacher, I too just finished a term at Osgoode Hall Law School as a visiting fellow, teaching legal ethics and professionalism. Like you I am a professional—I have practised law since 1980, and I have often acted for professional regulators, or for members of those professions. I have also acted for trade unions, including those representing teachers and professors.

Like many of you I have decided to devote time and effort to serving my profession and the public—I have had the privilege of being elected by Ontario lawyers in 2007 and 2011 as a bencher of the Law Society of Upper Canada, a position that is much like that of the elected teacher-members of the OCT Council. Like the members of the Council I am involved in:

- Issues relating to accreditation and registration—seven months ago, I presented the reforms to our articling process, the transitional training that takes place between university education and practice;
- Issues relating to continuing education;
- Adjudication of complaints against members—as Chair of the Tribunals Committee of the Law Society, a year ago, we put forward significant reforms to our Law Society discipline hearing process, including the appointment of a full time non bencher chair of our Tribunal, and previous to that, I met with the Hon. Patrick LeSage while he was preparing his report regarding your hearings process.
- Challenges faced by an increasingly diverse profession, for example, in terms of gender and race. I head a group that is looking into the particular difficulties encountered by racialized lawyers and paralegals, and what the Law Society can appropriately do about that.
- Policy oversight of the administration of the regulator.

Like quality public education, the rule of law is an essential cornerstone of a democratic society. Both the legal profession and the teaching profession have faced continuing changes in what is expected from regulators:

- The development of an access to information culture and the internet has changed expectations about what the public should and can access about the professions.
- Our society, and as a consequence, the provincial governments which play a key role in the oversight of all professional regulation, are increasingly less deferential towards the professions. As a result there is growing pressure for transparency and accountability.
- In particular, there are periodic demands for more aggressive regulatory responses to lapses and perceived lapses in professional ethics.
- Globalization and fiscal restraint impose new challenges on the way professional services are delivered, the manner services are delivered, and the makeup of the professions.
- Each profession is facing challenges in absorbing and integrating new members.

However, the core challenges faced by our professions, and all self-regulating professions are not these new challenges. Indeed, the most difficult tasks the self-regulating professions face are perennial ones:

- How to serve” the public interest” when the concept of the “public interest” is necessarily malleable and contested.

- How to retain the public’s trust that the public interest is served by self-regulation, so that self-regulation is sustained and sustainable—because where self-regulation fails, or is perceived to fail, there is a risk that the government will step in, strip away the privilege of self-regulation, and simply impose its own regulatory regime, and this as you know has occurred elsewhere, for example in BC.
- The profession of teaching then, does not face a unique challenge—lawyers, nurses, dentists, doctors, all professions, face the same challenge, but the challenge faced by teachers is perhaps especially delicate:
 - Teaching is a highly visible and pervasive profession, one with a particularly broad array of stakeholders
 - Teaching is politically visible, particularly given current fiscal realities
 - Even more than the public sector generally, teachers are highly unionized.

This brings me back to accountability, transparency, and professional ethics—taking these concepts seriously, as a regulator and as a profession are key elements in ensuring that the public recognizes and perceives a profession and a regulator that serves the public interest and retains the public trust, and plays a central role in addressing the challenges that the teaching profession shares with the other self-regulated professions, as well as the unique challenges faced by the teaching profession and the College.

The Challenge in Defining the Public Interest

Let me turn to this vexing issue of the “public interest.” The importance of the “public interest” is evident from the language of your College’s governing legislation:

- Section 3(2) of the *Act* requires that in carrying out its objects the College has a duty to “serve and protect the public interest”
- Section 4.2 expressly requires that every member of the Council shall in carrying out his or her duties “serve and protect the public interest”
- A council member’s prescribed oath (set out in the regulations to the OCT Act) states: “I will ensure that the guiding principle in the performance of my duties is the duty to serve and protect the public interest, which is my duty as a Council member and a duty of the College.”
- O. Reg 83/03 regarding public appointees states that such appointees must be those who are able to represent the public interest

But nowhere in the Act or its regulations is there a definition of the term “public interest”. This may be because the public interest—as a recent OCT report prepared by its Public Interest Committee notes—is simply hard to pin down. One apt definition of the public interest, crafted by the journalist and social critic Walter Lippman is: “what [people] would choose if they saw clearly, thought rationally, and acted disinterestedly and benevolently.”

But the reality of professional regulation, particularly with respect to teaching, is that there is an array of stakeholders—the state, parents, students, teachers, teachers unions, administrators, the regulator itself, taxpayers, the business community, other professions, other employees, other unions, the post-secondary education sector, all with their own interests and conception of what constitutes the public interest.

There is also an inherent tension in how the profession sees itself and is seen. Some would assert that a profession is a profession because the inherent nature of its work serves the public interest. The 1966 International Labour Organization Recommendation concerning the status of teachers defined teaching as a profession, saying

“teaching should be regarded as a profession: it is a form of public service which requires of teachers expert knowledge and specialized skills, acquired and maintained through rigorous and continuing study; it calls also for a sense of personal and corporate responsibility for the education and welfare of the pupils in their charge.”

In short, teaching is a learned occupation that serves a social ideal. It is both an instrument and a reflection of the public interest.

But others reject this “functionalist approach” or “service model” and assert that the professions operate within a “Competitive/Incentive Model”-- the authority of self-regulation and monopoly is provided to them by society in return for the responsibility to use their specialized expertise to maintain high ethical standards. Under this theory, there is a tension within self-regulation between self-interest and the broader public interest: self-regulation is premised on the proposition that only the profession has sufficient knowledge to properly govern itself, but such knowledge may be used to privilege the interest of the profession, or the interest of a particular group, over the public interest.

However, despite this inescapable tension the functionalist approach towards the professions should not simply be rejected as mere window dressing—what makes a profession is the public interest inherent in its operation, and many of the challenges inherent in self-regulation, such as

protecting member privacy, limiting access, and crafting standards that may differ from public expectations, stem from the reality that securing the public interest requires hard choices to be made:

- Limiting access does not secure a monopoly but ensures quality control
- Protecting privacy helps ensure that professionals can take certain risks and make unpopular decisions necessary for meeting their professional obligations and serving the public interest
- Standards that are not black and white reflect the reality that some ethical questions truly involve “shades of grey” that cannot be solved through zero tolerance measures or absolute and inflexible rules

Even if a profession were able to make all of its decisions solely based on public interest considerations, the amorphous and evolving nature of the public interest, combined with the difficulty non-specialists have in overseeing and assessing the decisions that need to be made, create an inherent hesitancy in the public regarding self-regulation. A suspicion of self-interest will linger because there is a built in asymmetry of knowledge among the involved stakeholders. This asymmetry makes accountability, transparency, and the ethical principles that underlie accountability and transparency so important—for members of all professions and particularly for the professionals, like benchers and council members, who participate most directly in self-regulation. Ultimately the public will retain its confidence in self-regulation only if the elements of self-regulation, including discipline, regulation, and registration, are transparent, accountable, and reflective of the ethical principles that are at the foundation of the concepts of professionalism and professional service.

The Unique Challenges Faced by the Teaching Profession—Addressing the Tension Between Collective Bargaining and Professionalism

This challenge of maintaining public confidence in self-regulation is faced by every profession, in Ontario, throughout Canada, and around the world. But the teaching profession faces a particularly delicate balance, in part because of the position of teachers compared to the position of most professionals:

- While teachers are not the only profession in Ontario whose livelihoods are tied closely to fiscal constraints and the public budget and whose economic welfare is therefore primarily dependent on tax dollars, they are certainly more visible than most.
- High union density and a unique province-wide collective bargaining structure involving provincial discussion tables accentuates the visibility of teachers' economic welfare demands.

The result of this dynamic is for some a concern that the profession of teaching may be subsumed by the self-interested occupational and economic welfare concerns of teachers' unions, combined with a concern that teachers' unions have used their influence to control the agenda and direction of self-regulation to favour the self-interest of union members over the public interest. Indeed, this perception of capture or undue influence has led to the end of self-regulation in British Columbia and was raised in the recent LeSage report. He noted that in *For the Love of Learning*, the Royal Commission wrote as part of its recommendation for

the creation of this College, “Whatever mechanisms are adopted, it is critical that no one interest group have undue influence in the College.”

At the extreme, Lieberman wrote in Education Policy Institute that there is an inherent conflict of interest between unions and ethical standards; unions exist for the protection of teachers, not students, and for this reason, teachers have an interest in weak ethical standards. Yet, as another author wrote in “An inquiry into the background of Education International’s Declaration on Professional Ethics”,

“Lieberman’s assertion that unions will always defend their members above professional standards is specious...it is ludicrous to assume that teachers have an interest in weak ethical standards....Lieberman moreover oversimplifies the relationship between unions and professionalism. Can unions participate in collective bargaining as representatives of teachers and at the same time represent teaching as a whole? I think this at least poses a problem for the status of teachers; collective bargaining by any group is in some cases seen by a part of the public as greedy. But it is not irreconcilable with the interest of the students.

Indeed, what detractors say of unions could be said of any group of professionals, self-regulated or not, unionized or not: they clearly have a self-interest in their economic well-being and status. In fact, teacher unions are necessarily self-interested. Indeed, they are themselves statutorily regulated, and they have onerous obligations of fair representation of their teacher members, which requires them to act in the collective best interests of their members. Put differently, they are properly self-interested—just as are parents, and

administrators, and students, and the state. In this array of constituents, who represents the public interest? The short answer is that they all represent different aspects of the public interest, and they all have an overriding interest in an ethical profession.

The self-interest of every professional group interest can complement and indeed promote a concern for the public interest. Executive Staff Officer Anne Rodrigue of the Nova Scotia Teachers Union, after acknowledging that polls reflect a public perception that teacher unions are self-serving (as opposed to teachers, who are well liked and respected by the parents of the children they teach), went on to write that the challenge for teacher unions is to identify converging issues of self-interest and public interest and establish mechanisms for internal quality control including criteria for licensing, codes of ethics disciplinary procedures, and standards of practice.

In order to be associated with the promotion of educational quality and recognized as professionals and experts, unions must recognize the legitimate demands of accountability and engage their membership in examining ways to protect and enhance teacher autonomy while at the same time integrating community needs and aspirations. They should work collaboratively with education partners to collectively address standards of professionalism.

Indeed, teacher unions, through their demands for improvements in the working and teaching environment, can serve the interests of students, parents and the state as a whole. They can also play an important role in helping to build a vital profession. They

- shape teachers' perceptions of themselves, including their perception as professionals;
- initiate educational innovations and provide feedback on conditions for teaching and learning that is vital in developing a growing and vital profession
- provide leadership roles for teachers;
- providing a voice for teaching (and not merely teachers)
- explore the real interrelationship that does exist between working conditions and professionalism.

But while the union movement can certainly play a role as a particularly well-informed and well-equipped stakeholder in the process and practice of self-regulation, it remains one of many stakeholders—and the view of any one stakeholder cannot define the public interest.

Accountability, Transparency and Ethics

For a regulator, accountability, transparency, and ethics are bound together:

- Thorough and timely public reporting reflects a recognition that the regulator is accountable to a broad community, an acknowledgement that its activities are overseen by and in the interests of the broader community, and is part and parcel of the ethos of honesty, reliability, and integrity
- Open and fair adjudicative processes indicate that the regulator respects rule of law and the concern with the public interest inherent in the rule of law, protects the public, and protects the dignity of all parties involved in its processes

- Transparent and accountable registration processes reflect the public interest in having access to competent and ethical professional services

Accountability, transparency, and ethical conduct are the responsibility of all professionals, but are especially important for Council and those involved in the workings of the regulator-- perception is important—if the public perceives the regulator as concerned with something other than the public interest the privilege of self-regulation may be withdrawn.

In short, the position and role of the regulator must be carefully distinguished from the position and role of interested stakeholders—a regulator must be very careful in taking sides, or even be seen as taking sides, between stakeholders; it must and must be seen as striking the balance in the public interest. Given the nature of the public interest, determining the balance to be struck will always be difficult.

Fortunately your College has done some admirable work in providing its members with guidance in these areas. The College has established a set of ethical standards for its members, standards that stress the importance of transparency and accountability, and reflect the importance of adhering to ethical standards. The standards are:

- Care: the ethical standard of Care includes compassion, acceptance, interest and insight for developing students' potential. Members express their commitment to students' well-being and learning through positive influence, professional judgment and empathy in practice.

- Trust: the ethical standard of Trust embodies fairness, openness and honesty. Members' professional relationships with students, colleagues, parents, guardians and the public are based on trust.
- Respect: intrinsic to the ethical standard of Respect are trust and fair-mindedness. Members honour human dignity, emotional wellness and cognitive development. In their professional practice, they model respect for spiritual and cultural values, social justice, confidentiality, freedom, democracy and the environment.
- Integrity: honesty, reliability and moral action are embodied in the ethical standard of Integrity. Continual reflection assists members in exercising integrity in their professional commitments and responsibilities.

If the Council, the College, and the profession are to serve the public interest then they also must fully meet these standards:

- A Caring Council is one that considers and balances all relevant issues and considerations—both short and long-term in striving to develop students' well-being and learning
- A Trusted Council is one that is fair, open, and honest in dealing with members of the College, members of the public, and those who appear before the Council, its committees, and its proceedings
- A Respectful Council is fair, open, and inclusive towards all stakeholders
- A Council that acts with integrity is honest, reliable, and reflective
- A Regulator and Profession that lives up to these standards will obtain and retain the confidence of the public, and with this confidence, the privilege of self-regulation.

The Supreme Court of Canada has made the privileged position of a self-governing professions clear. In *Pharmascience v. Binet* (see paras. 36-37):

This Court has on many occasions noted the crucial role that professional orders play in protecting the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them....

The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public...

From my experience as a benchler, I agree with the court that the obligation faced by regulators is indeed onerous, and the challenges we face is difficult. Given the pressures of fiscal restraint and globalization the professions are perhaps under more pressure now than they have been ever before. I would also admit that developing and maintaining a transparent, accountable and ethical regulatory body is challenging, given the role of the teaching profession, the stakeholders involved in the profession, and the role of the profession in society, But from my experience, both in acting for regulators and in serving my profession, I believe that if a regulator, and this starts with the members of the governing body, consciously focus on accountability for their actions, transparency in their activities, and an ethical foundation for their actions, the tension and uncertainty inherent in serving the public interest can be overcome, and the results will not

only be a stronger profession, but a brighter future for this province. An educated and involved citizenry can exist only through your continued hard work, and the work of your members, which is greatly appreciated by Ontarians.