

1

Introduction

The purpose of this book is to review the law with respect to the regulation of professions in Canada. The power of self-government granted to the professions has two essential aspects — the authority to license and the ability to discipline licensees. The licensing power is essentially the authority to decide who shall be permitted to earn their living by the pursuit of a particular calling.¹ This means that professional organizations act as the gatekeepers to the professions in their assessment of the qualifications of prospective members. Once an individual becomes a member of a profession, the professional organization has the power to regulate the conduct of the licensee by establishing rules of practice and standards of conduct enforceable through the discipline process.

Self-governing professions have a long history in Canada. In the pre-Confederation era, only the legal and medical professions were established to any significant extent. Other modern professions were in their infancy with individual practitioners forming small informal groups to provide professional support. As these groups became better organized, they began to lobby the Legislatures for the extension of self-governance to their particular professions. In the post-World War II era, there was a tremendous growth of all types of administrative tribunals, including professional tribunals, as the Federal Parliament and the Provincial Legislatures recognized the advantages of delegating powers to specialized tribunals staffed by experts in the area. Initially, the debate focused on the advantages of self-governance to the professions. However, in the late 1960's and the 1970's, the public's focus began to change and fundamental questions were asked. Is a self-governing model for the professions in the best interest of the public? Are the rights of the individual adequately protected in a self-governing model? A number of provinces conducted investigations into the self-governing status of various professional organizations. For example, the *McRuer*

¹ Ontario, Royal Commission Inquiry into Civil Rights *McRuer Report*, (Report No. 1, Vol. 3) Commissioner: James Chalmer McRuer (Toronto: Queen's Printer, 1968-1971) 1163.

REGULATION OF PROFESSIONS IN CANADA

*Report*² in the Province of Ontario, provided recommendations which formed the basis for the future legislative framework of many self-governing professions. The various studies carried out during this period generally affirmed the desirability of the self-governing model, but recommended greater emphasis on public accountability and on the protection of the rights of the individual.

During the first part of the century, the principles of natural justice which provide protection to individuals had been steadily eroding in Canada, largely due to the artificial distinctions among judicial, *quasi*-judicial and administrative actions.³ The supervisory function of the Court of administrative tribunals was extremely restricted because the requirements of natural justice were found to apply only to judicial and *quasi*-judicial acts. The landmark decision of the Supreme Court of Canada in 1979 in *Nicholson*,⁴ led to the establishment of the doctrine of procedural fairness and largely reduced the need to make artificial distinctions based on the characterization of the type of power being exercised. The Court held that the requirements of procedural fairness could apply even where no *quasi*-judicial function was involved. As a result, there was a tremendous expansion of the type and number of decisions made by administrative tribunals to which administrative law remedies applied. Professional disciplinary tribunals had long been considered in Canada to be *quasi*-judicial, and thus subject to a greater degree of review by the Courts. Therefore, while the distinction between *quasi*-judicial and administrative actions was somewhat less important in this area of the law, the post-*Nicholson* era saw a greater general awareness of the rights of the individual in administrative law. There was a great explosion of case law with respect to professional tribunals, as individuals increasingly challenged the decisions of their professional bodies.

The enactment of the Canadian Charter of Rights and Freedoms in 1982 led to a further increase in the case law of professional tribunals. The Charter's focus on individual rights provided a natural remedy for an individual in conflict with the collectivity represented by his or her professional organization. Charter challenges regarding the regulation of the professions presented Courts with the difficult task of attempting to balance the legitimate and often competing interests of the stakeholders in professions. There are three groups with an interest in the effectiveness and the fairness of the self-governance of professions: the public, the profession itself, and mem-

² *Ibid.*

³ See the history of the development of the principles of natural justice in D.P. Jones & A.S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1985) at 147 and following.

⁴ *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311.

bers of the profession who are subject to regulation and potentially, discipline.⁵

Firstly, the public's interest is clear. The Supreme Court of Canada has concluded that it is difficult to overstate the importance in our society of the proper regulation of our learned professions.⁶ The primary purpose of the establishment of self-governing professions is the protection of the public. This is achieved by ensuring that only the qualified and the competent are permitted to practise and that members of the profession conform to appropriate standards of professional conduct. The Supreme Court has on many occasions noted the crucial role that regulatory organizations play in protecting the public interest. The Court notes: "The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of power by the state confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so."^{6,1}

Secondly, the members of established professions have an interest in the proper functioning of their organization. The downfall of one individual is said to diminish all members of the profession. Clearly, there is an interest in ridding the profession of the incompetent and the unethical. Further, if the public perceives that a profession is not properly functioning in the public's interest, then there will be pressure on the government to either re-examine or revoke a profession's self-governing status. Members of a profession have an interest in ensuring that their profession is operating in the public interest and that the public perceives this to be the case.

Finally, members of the profession who may be subject to discipline have a crucial interest in the proper functioning of the self-governing process. Disciplinary sanctions can lead to the loss of one's profession, the loss of one's work. The Supreme Court of Canada describes the importance of work as follows:⁷

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in Society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Disciplinary tribunals have been described as both an anachronism and an anomaly, since they allow professional tribunals to establish private

⁵ *McRuer Report, supra*, note 1 at 1183.

⁶ *Rocket v. Royal College of Dental Surgeons (Ontario)* (1990), 71 D.L.R. (4th) 68 at 80 (S.C.C.).

^{6,1} *Pharmascience inc. c. Binet*, 2006 SCC 48, 2006 CarswellQue 8953, 2006 CarswellQue 8954 at paragraph 36 [SCC]

⁷ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 368.

courts like the feudal courts of old.⁸ Members of a disciplinary tribunal are not elected by the general public and are often not appointed by the government, but have the authority to impose disciplinary sanctions of the most serious kind and until recently, most disciplinary tribunals carried out their work behind closed doors as required by statute.

The tremendous powers of a disciplinary tribunal have been described as having the capability of destroying a man's or woman's professional life,⁹ affecting in a grave and sometimes irretrievable way, not only the member being disciplined, but also his colleagues, the members of his family and his patients or clients.¹⁰ As stated by the British Columbia Court of Appeal:¹¹

Disciplinary proceedings expose a member of the Society to a range of punishments which include suspension of the right to practise and even disbarment. In addition, irrespective of their outcome, the very nature of the proceedings can have a devastating effect on a members reputation, the single most valuable asset which any professional can possess.

The far-reaching effect of professional sanctions lead the *McRuer Report* to conclude the following with respect to the importance of procedural safeguards in the disciplinary process:¹²

The most obvious feature of the power of a self-governing body to discipline its members is that it is clearly a judicial power within the meaning we have given to that term, i.e., its consists of the independent and impartial application of predetermined rules and standards; no element of policy should be present in the exercise of this power. It is a power whose exercise may have the most far-reaching effects upon the individual who is disciplined. The sanction imposed upon one who has been found guilty of professional misconduct may be anything from a reprimand to expulsion from the profession. Where a conviction may result in what has aptly and justifiably been termed "economic death", it is vital that procedural safeguards to ensure fairness be clearly established and rigorously observed.

The tension generated from the balancing of the legitimate and at times competing interests of the public, the profession, and the individual, has resulted in the creation of an unique body of law concerning the regulation of professions in Canada.

⁸ *Branigan v. Yukon Medical Council (No. 1)* (1986), 21 Admin. L.R. 127 at 143 (Y.T. S.C.).

⁹ *Bernstein v. College of Physicians & Surgeons (Ontario)* (1977), 15 O.R. (2d) 447 at 470 (Div. Ct.).

¹⁰ *Brand v. College of Physicians & Surgeons (Saskatchewan)* (1989), 58 D.L.R. (4th) 178 at 184 (Sask. C.A.).

¹¹ *Cameron v. Law Society (British Columbia)* (1991), 81 D.L.R. (4th) 484 at 492 (B.C. C.A.).

¹² *McRuer Report, supra*, note 1 at 1181.