Let’s talk about…
The public interest
October 20, 2016
Agenda

• Why are we talking about the public interest?
• What is the public interest?
• Protection of the public
• Public interest vs. member interest
• What does this mean for HRPA?
• What does this mean for members?
Housekeeping

- Webinar will be recorded and posted online
- CPD code will be given at end of webinar
- Will post answers to questions that we could not answer in the webinar
Questions involving specific individual circumstances

- This webinar is not the appropriate place and time to address specific individual circumstances
- Sometimes the correct answer depends on some details that are not provided with the question
- Please contact the Office of the Registrar with questions involving specific individual circumstances
The point

The points of this presentation are:

1. The public interest is not always easy to define,
2. Nonetheless, the public interest needs to become a topic of discussion amongst HR professionals
B.C. puts end to real-estate self-regulation

The reason for change: The real-estate sector has had 10 years to get it right on self-regulation, and they haven’t,” Premier says in announcing government oversight of industry.

The catalyst for change: Move follows Globe investigation that revealed some realtors and brokerage firms were profiting from shadow flipping and other questionable practices.

B.C. Premier Christy Clark has put the province’s real-estate industry under government oversight, declaring the industry’s self-regulating body has failed to protect the public from cut-throat and illegal practices and has lost the public’s confidence in its ability to police itself.
Why is this important?

• The essential mandate of professional regulatory bodies is to protect the public interest
• It is not a good thing when professional regulatory bodies are seen to have failed to protect the public interest (as illustrated by the real estate brokers and agents in BC)
• But what is this public interest?
Pursuant to the heavy criticism of the accounting profession in the wake of the financial scandals of Enron, Tyco, and others, the accounting profession has thought hard about the public interest
Professional regulatory bodies

- All professional regulatory bodies have a paramount duty to protect the public interest
HRPA’s statutory objects

4. The objects of the Association are,

   (a) to promote and protect the public interest by governing and regulating the practice of members of the Association and firms in accordance with this Act and the by-laws
<table>
<thead>
<tr>
<th>HRPA</th>
<th>Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>has a statutory duty to promote and protect the public interest by establishing, maintaining, developing and enforcing standards of practice and standards of ethics</td>
<td>Have a duty to practice their profession in a manner that is consistent with the public interest and to obey the professional guidance issued by the Association</td>
</tr>
</tbody>
</table>
Duty to society

- Professionals have a fiduciary duty to their employers and clients but they also have a duty to society
- At the very least professionals must obey the law, but most would say that the duties of professionals go beyond just obeying the letter of the law
So what is the public interest?

• For all its importance, the public interest is a slippery concept
• In fact, the public interest is a concept that is seen with some degree of skepticism or even cynicism
• Some bodies like the Institute of Chartered Accountants for England and Wales (ICAEW) and others have given it some thought
'The public interest' is used by many to justify a wide range of actions and proposals. However, it is often unclear (even to those using the term) what they mean by this, and there can be a natural suspicion that the phrase may be used as a smokescreen to garner support for something that is actually in the advocate's own interests.

ICAEW, Acting in the public interest: a framework for analysis, 2012
From a broad perspective, ICAEW does not believe that a detailed general definition would serve a useful purpose: individual circumstances are too variable and such a definition would inevitably result in unintended consequences. What we propose in our paper is a framework of matters to consider when justifying an action as being in the public interest. Using such a framework will allow those advocating an action in the public interest to understand what they mean, and, if explained, will allow those assessing the action or proposal to determine whether they can support the measure as being in the public interest.
Public interest as justification

A. The given action, decision, or policy is genuinely in the public interest.

B. The individual or agency making the claim that a given action, decision, or policy is in the public interest believes the claim to be true but upon closer analysis it can be shown that it is not (the individual or agency making the claim is self-deceived or is making the claim without much thought).

C. The individual or agency making the claim that a given action, decision, or policy is aware that it is not in the public interest but makes the claim to deliberately disguise self-interest.
The ICAEW public interest framework

The point here is that just claiming to be in the public interest is just not good enough.
Protection of the public

• Although there is more to the public interest than public protection, public protection is a big part of the public interest

• In the context of professional regulation, public protection means minimizing and mitigating the risks to the public stemming from the practice of a profession

• Professional regulatory bodies are in the harm avoidance business
Classic model

• Professionals are in a position of trust
  ▪ Information asymmetry
  ▪ Lack of consumer choice
  ▪ Power differential

• Professional regulation is a way of balancing the inequality
The triangle model

- The professional
- The client
- The public
The triangle model

• The reason Human Resources was regulated was not to protect employers from incompetent or unethical HR professionals but to protect employees and to bring about workplaces with productive employee-employer relations

• Like auditors--auditors (public accounting) are regulated not to protect clients but to protect investors and prospective investors
Risk of harm and the HPRAC test

• HPRAC refers to the Health Professions Regulatory Advisory Council
• It was established under the *Regulated Health Professions Act, 1991* (RHPA), with a statutory duty to advise the Minister on health professions regulatory matters in Ontario. This includes providing advice to the Minister on whether unregulated health professions should be regulated
• To this end, HPRAC has developed a two part assessment to decide whether it will recommend that a health profession be regulated or not
The HPRAC test

Primary criterion
• Risk of harm

Secondary criteria
• Professional autonomy
• Educational requirements for entry to practice
• Body of knowledge and scope of practice
• Economic impact of regulation
• Regulatory mechanisms
• Leadership’s ability to favour the public interest and membership support and willingness of the profession to be regulated
• Systemic impact of regulation
The HPRAC test

• The primary reason to regulate a profession is to manage risks of harm to the public (public protection)

• Other criteria don’t even come into play until it has been demonstrated that there are significant risks of harm to the public which need to be managed

• Note that status of the profession and legitimacy of the profession are not of concern to the Legislature—they are not legitimate reasons to regulate a profession
Public interest vs. member interest

- The public interest and the member interest are not always in conflict
- However, it would be Pollyannaish to assume that these interests are the same
Intent and impact

• Professional regulatory bodies do what they believe is necessary or prudent to do in order to protect the public interest (intent)
• Sometimes these actions, decisions, and policies will also be of benefit to the members (impact)
• Nonetheless, one should not confuse intent with impact
• Professional regulatory bodies do these things because they are necessary or prudent to do in order to protect the public interest
Enlightened self-interest

• Self-regulation is based on the concept of enlightened self-interest
• It is in the ultimate interest of the members of HRPA to put the interest of the public first
• But for the deal to work, we need to be true to our commitment (fully dedicated, genuine, steadfast) to put the public interest first even though, in the short run, this may not appear to be in the best interest of our members
A perennial conflict

• One conflict that does not go away is in relation to costs
• Protection of the public will inevitably impose some costs and obligations on the members of a regulated profession
• There is no ‘free ride’
• Members of a profession must be willing to accept the obligations and costs that come from being a regulated profession (actually one of the HPRAC secondary criteria)
When push comes to shove

• But let’s make no mistake about this—when push come to shove, the mandate of professional regulatory bodies is **not** to balance the interests of the public with the interests of the members

• Professional regulatory bodies exist to serve the public interest
So what are those harms that we are protecting the public from?

• We have just begun to do this work
• In the debate on the Legislature that led up to the passage of the *Regulated Human Resources Professionals Act, 2013*, some of these harms were alluded to
• But the work of systematically mapping out the harms which may stem from the practice of the Human Resources profession is yet to be done
Public interest outcomes and risks of harm

Public interest outcomes
- Fair and equitable workplaces
- Safe workplaces
- Productive workplaces
- Good employer-employee relations
- Well-managed supply of talent
- Accessible workplaces
- Workplaces that are free of discrimination and provide opportunities for all
- Competent and ethical Human Resources professionals

Risks of harm
- Unfair and inequitable workplaces
- Unsafe workplaces
- Unproductive workplaces
- Acrimonious employer-employee relations
- Underemployment and wasted human resources
- Inaccessible workplaces
- Underutilized talent
- Incompetent and/or unethical Human Resources professionals
Role of HRPA

• The role of HRPA is to ensure that the Human Resources professionals it regulates practice their profession in such a way that maximizes the public interest outcomes and minimizes or mitigates the public harms.
What does this mean for HRPA?

• HRPA must work at gaining the trust of the public in its role as professional regulator
• As a professional regulator, HRPA needs to be self-aware of its motivations and put in place and follow processes that ensure that actions, decisions, and policies are in the public interest
• The understanding and analysis of the public interest needs to be sophisticated
What does this mean for HRPA?

- Regulatory actions, decisions, and policies should reference the whole public and not only a subset of this public. This is not incompatible with the fact that some subsets of the public will be impacted more directly than others.

- It is not enough just to assert that a given regulatory action, decision, or policy is in the public interest. HRPA must assume that the default is not trust--the link to the public interest and the process followed in arriving at the action, decision, or policy needs to be made explicit.
What about the members?

• Professional regulatory body has an obligation to protect and promote the public interest, members do not have the same obligation

• Members have two core obligations:
  1. To practice their profession in a manner that respects the public interests
  2. To practice their profession in accordance with the guidance and standards set out by the Association (which would have been established to protect the public interest)
An ideology of service

• Sociologists have noted that ‘an ideology of service’ is a defining characteristic of professions

• One of Freidson’s (2001) five criteria of professionalism
  
  “an ideology that asserts greater commitment to doing good work than to economic gain and to the quality rather than the economic efficiency of work”

• In other words, serving the public interest is part of it means to be a professional
Key ideas

• Although it can be difficult to define, the public interest is a concept that is at the heart of the work of HRPA and other professional regulatory bodies

• Unfortunately, the public interest is concept that has been treated with a fair degree of skepticism or even cynicism in the media

• It is important not to take the public interest for granted, or to assume that the public will see that we are acting in the public interest just because we claim this to be the case
Key ideas

• The only reason the Legislature has to create a regulated profession is that doing so is in the public interest

• HRPA’s *raison d’être* is to promote and protect the public interest by governing and regulating its members

• Members have a duty to practice their profession in a manner that respects the public interest
For those who are interested in finding out more

Articles posted on the HRPA web site:

- *What does it mean to be a regulated profession?*
- *The rationale for regulating HR professionals in Ontario*
- *The public interest: What it means for HR professionals in Ontario*
- *Would the Human Resources profession have met the HPRAC test?*
For those who are interested in finding out more

Other sources of information that may also be of interest:

- The Health Professions Regulatory Advisory Council (HPRAC) http://www.hprac.org/en//
Questions