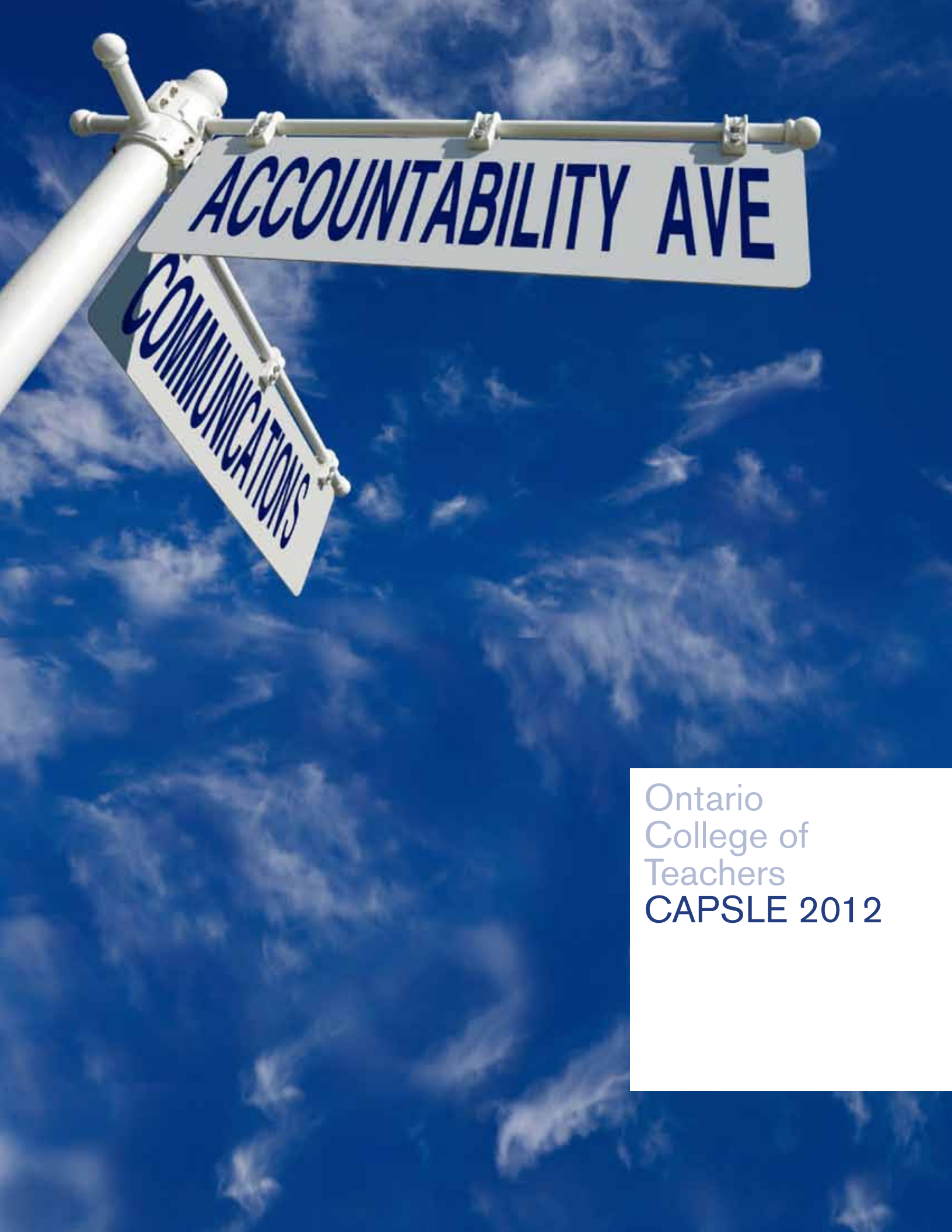

Ontario
College of
Teachers

CAPSLE 2012

The public interest and interested publics:
How media can assist regulators in governing for the common good

CAPSLE 2012

"I'd rather have newspapers and no government than government and no newspapers"

~ Thomas Jefferson

"The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent"

~ Malcolm X

"I fear three newspapers more than a hundred thousand bayonets."

~Napoleon

Introduction

It is the media's role in a democratic society to provide information to the public so that citizens can make informed political decisions.

This role of the media has grown throughout recent history with the expansion of the state throughout the 20th century into previously unregulated areas, resulting in the growth of the bureaucracy and increased distance between the public and its elected representatives. By the late 20th century, mass media outlets had become the primary avenue through which individuals receive information about the work of their government; the main challenge to this being the widespread use of social media, the recent growth of which has challenged the monopoly on information previously held by traditional media sources.

Initially the role of the media in facilitating transparency in public administration applied to the institutions of government. However, with the expansion of the administrative state throughout the latter half of the 20th century, this role has been expanded to apply to quasi-public and quasi-governmental bodies, including the 40 self-regulatory organizations that govern professions in Ontario.[1]

In tandem with the development of the administrative state and the expansion of the role of the media in providing information to the public, there has been increased pressure for public institutions themselves to be transparent organizations.

The reasons for this are similar to the reasons underlying the rationale for an independent media: transparency is a prerequisite for genuine accountability and reinforces predictability in the behavior of institutions in the public eye. Transparency in public administration means that relevant information is made available to the public in a usable form, and that government regulations and decisions are clear and adequately disseminated.

Transparency also means that public pressure can be placed on institutions as an impetus to reform practices that are dysfunctional, outdated or not responsive enough to the needs of the public, and to resolve situations that might otherwise have gone unnoticed.

Self-regulation as a model in Ontario is predicated on the notion of regulating professions in the public interest. Maintaining public trust in the governing bodies and their processes is a necessary pre-condition for professions to retain their delegated legislative authority to govern themselves. The Ontario Royal Commission Inquiry into Civil Rights, convened in 1968, recognized this responsibility explicitly and stated:

> The granting of self-government is a delegation of legislative and judicial functions and can only be justified as a safeguard to public interest. The power is not conferred to give or reinforce a professional or occupational status.[2]

The Law Society of Upper Canada has gone a step further, describing the relationship between the society and members of the public as a fiduciary relationship, characterized by ethical behaviour, competence and professional values.[3]

A fiduciary duty is a heightened duty or responsibility that one has to others, based on the position of trust that one holds vis-à-vis another. In a fiduciary relationship, the fiduciary is expected to act in good faith and for the sole benefit and interest of the principal(s). It is a relationship characterized by trust and confidence and carries with it the highest standard of care in both law and equity.[4]

Additionally, early and recent decisions of the Supreme Court of Canada confirm that one of the most significant hallmarks of a democratic society is that justice not only be done, but that it be seen to be done; this is referred to as the "open court principle." This principle – which predates the 1982 *Canadian Charter of Rights and Freedoms* as a principle of common law, is now enshrined in it. Given the important responsibilities of regulators, the same or similar levels of transparency expected of courts and governments are often expected of self-regulatory organizations.

The ways in which the media interact with public regulators and bring transparency to their practices is varied. Sometimes existing problems that may not previously have been known or understood by the regulator in a particular way are brought into public view. This can inspire the public to demand that action be taken to address problematic practices or circumstances.

At other times, a review process may be underway and the media ensures it is conducted in an open and transparent manner by reporting on it as it unfolds. This can in turn provide a feedback mechanism for the public to understand and contribute to the work of such reviews.

Finally, the media can also track the progress of outcomes arising from a review and hold institutions publicly accountable for their implementation of recommendations or their failure in not implementing them.

However, it is important to also keep in mind that self-regulatory professions are mandated by their legislation to serve the public interest, which, depending on the situation, may or may not be served by shining the bright light of transparency on every situation. Transparency often runs directly into issues of individual privacy. This is particularly problematic in the case of those who have been wrongfully accused, or vulnerable victims and witnesses who may not wish to experience re-victimization by reliving their experiences in the public eye.

Additionally, the existence of a media spotlight on an issue may prompt an organization to mobilize resources to address that issue when, in reality, those resources may be put to better use if deployed in another manner. In sum, there are many competing pressures between transparency and accountability on one hand and ensuring privacy on the other.

Some high profile media coverage of late has put the spotlight on the regulatory practices of professional regulators, prompting a nuanced discussion of this issue; what follows in this paper is a review of five case studies of recent media coverage of regulators and actions taken by the regulators following such coverage.

Following the case studies is an analysis of the broader trends that characterize this relationship, as well as a discussion of the role of both traditional and emerging forms of media. This paper then turns to privacy concerns that arise as a corollary to the increased transparency afforded by the media and ends with a discussion of the contributions and limitations of the media vis-à-vis the work of regulators.

What emerges from the discussion that follows is a complex and nuanced relationship between media and regulators, both of which serve and protect the public interest and can be very successful in doing so when they work together.

Rose McKenzie (College of Nurses of Ontario)

Spencer Sullivan, once a practising nurse in California, underwent routine surgery in 2001. He was rendered a quadriplegic after a nurse, Rose Anne McKenzie, failed to notice that he had been prescribed a duplicate dose of medication, and then failed to check on him as required. His family sued the hospital and settled for $6 million, 40 per cent of which was attributed to the negligence of McKenzie.[5]

The case was reported to the state Board of Registered Nursing in 2005, and in 2008, the board revoked her credentials, 6 ½ years after the initial injury.[6] McKenzie, initially registered with the College of Nurses of Ontario (CNO) in 1995, according to CNO's public register, returned to Ontario to practise in Oakville in 2002.

Like all other membership applicants, she was required to report any issues with her credentials arising in other jurisdictions. However, no report was made to CNO; in fact, little attention was paid to her until news reports surfaced in 2009 detailing the fact that she was now practising nursing in Ontario with headlines such as:

> "Spencer Sullivan: His body a prison"[7]
>
> "Nurse working in Halton had her licence revoked in U.S."[8]
>
> "Nurse disgraced in U.S. working in Canada"[9]
>
> "Negligent Nurse who lost licence still working in Canada"[10]

The case demonstrates the lack of a formal mechanism through which regulators in other jurisdictions could alert another regulator of disciplinary issues – which is troubling given how mobile professionals are today.[11] It also demonstrates the power of the press, which served as the initial whistleblower to the public about this issue. It was only after this issue was brought to national attention that the regulator took action, as it was not even known to them until this time that McKenzie had her licence revoked in another jurisdiction.[12]

McKenzie faced disciplinary proceedings at CNO in May 2011, and was found to have committed professional misconduct. She was reprimanded and the college imposed terms, conditions and limitations on her certificate including requirements that she complete specific remedial activities, inform CNO of all nursing employer(s) for a period of time, inform employer(s) of the results of her discipline hearing, and a requirement that her employer(s) were to provide specified reports to the college for a period of time.[13] However, notwithstanding the fact she was found to have been grossly negligent in another jurisdiction, McKenzie was permitted to keep her licence and continue the practice of nursing.

Additional reports by CBC News following the discipline hearing of McKenzie focused on the structural problem identified by the college, with headlines noting that: "Nurse background checks show 'significant' gap."[14]

In a statement released on June 22, 2011 addressed directly to CBC's, *The National*, CNO highlighted the important role played by the media in cases such as this. CNO clarified the nature of the charges against McKenzie and the rationale for the decision reached, highlighting that this issue initially came to the attention of the college not because McKenzie reported the fact she was found guilty of gross negligence in California, nor because the college's counterpart in California notified it of the finding – neither of which happened – but rather, because of a media article published in June 2009.

CNO went on to note the failings of the current system, writing that "there is no comprehensive international mechanism in place to ensure regulators report findings of professional misconduct to regulators in other jurisdictions," which the college identified as a "gap in the safety net."[15]

Perhaps most concerning is the revelation in the same statement that the CNO discipline panel found that McKenzie may not have informed the college of the finding of gross negligence against her as she herself may not have been aware of it; the regulator in California was unable to contact McKenzie, as she had moved back to Ontario following the incident and they did not have her current address.

CNO concluded its statement by outlining steps that it had taken to address the structural problems, which included:

- leading discussions with nursing regulators around the world about information-sharing mechanisms
- proposing regulatory changes to expand the reporting requirements of members
- working with organizations at the national and provincial level to develop a unique national identifier for nurses throughout Canada.

CBC News followed up with a report on the decision and the press release, commenting on the structural failures of a system incapable of tracking the consequences of disciplinary proceedings in different jurisdictions and noting that, while the college was working to "plug the loophole," it "hasn't accomplished that yet."[16]

Charles Smith (College of Physicians and Surgeons of Ontario)

Charles Smith was considered one of the top paediatric forensic pathologists in Canada. During his 24-year career at the Hospital for Sick Children in Toronto, he carried out more than 1,000 autopsies.[17] He now no longer practises medicine.

A 2005 coroner's review of 45 child autopsies conducted by Smith between 1991 and 2002, all of which concluded that the death of the child was not accidental, disclosed that Smith had made mistakes in 20 such cases. In 13 of the cases in which Charles Smith was involved as the paediatric forensic pathologist and expert witness, the criminal convictions based on his opinion were questionable, leading to devastating results.

One man spent 12 years in prison, wrongfully convicted for the rape and murder of his four-year-old niece who was found to have died of natural causes following the results of the inquiry.[18] Another woman spent two years in jail awaiting trial after being accused by Smith of stabbing her seven-year-old daughter to death with scissors, when she had in fact been mauled by a pitbull.[19]

As of August 25, 2011, the Court of Appeal overturned seven convictions in which Smith provided expert testimony, and $5.5 million had been paid out by the province of Ontario in the form of compensation to those who had been falsely charged or convicted.[20]

Given the nature of the issue, both the practices of the College of Physicians and Surgeons of Ontario (CPSO) and the *Rules of Civil Procedure* governing the use of expert witnesses were implicated. Both the college and the government sought to take action on these issues following a public inquiry led by Justice Stephen Goudge was struck to provide some much-needed answers to the public about how something like this could happen.

Goudge Inquiry into Paediatric Forensic Pathology and the Rules of Civil Procedure

Smith's role in the conviction of several innocent individuals was that of an expert witness. Expert witnesses are frequently used in legal proceedings in Canada, and the role of the expert is to use his or her specialized knowledge to assist the court in its fact-finding function.[21] The use of experts by courts has increased over the years, as a result of the expansion of human knowledge, particularly in technical areas such as medicine and finance.[22]

This expansion of knowledge has resulted in a gap between the expertise of the average person and the knowledge that is often necessary to reach appropriate factual conclusions in the context of legal proceedings involving technical issues.

It is this knowledge gap that the expert witness seeks to fill.

Experts are the only witnesses in the Westminster adversarial-style court system permitted to provide testimony based on their opinion. Witnesses are generally permitted to testify only to facts – such as what they saw, what they heard and what they observed – while it is the role of the trier of fact to reach an opinion as to what actually happened.

Experts are permitted to provide their opinion to the court as to what correct inferences may be reached, given the facts provided. However, with this unique position comes a responsibility: a responsibility that had been found wanting in recent decades, with the increasing use of "hired gun" experts who advocate for the side that retains them, rather than fulfilling their role as an assistant to the Court.
Justice Goudge found that Smith had made false and misleading statements in court and had misled his superiors. He was also found to have misunderstood the role of the expert witness, claiming that he did not realize that his role was in fact to provide impartial testimony to the court, rather than act as an advocate for the prosecution. He overstated the confidence he held in his opinion and did not give credence to alternative theories where they existed.

Many criminal convictions were lifted as a result of the inquiry's findings. Justice Goudge observed that, while Smith bore the "primary responsibility" for the outcomes, "those charged with overseeing his performance cannot evade responsibility."[23] He added that other participants in the criminal justice system also shared responsibility for the wrongful convictions, including the Crown, defence counsel and even the court, as each has "an important role to play in ensuring so far as possible, that results in the criminal justice system were not affected by flawed expert testimony, including that of forensic pathologists."[24]

Opposing counsel are also often ill equipped to cross-examine experts and in many cases, may lack the financial resources necessary to hire an expert of their own who is capable of analyzing and refuting the evidence of the expert.[25]

Media coverage of the Goudge Inquiry was substantial. An article appearing in the *Globe and Mail* covering witnesses testimony highlighted how even the most respected members of the Bar and Bench show perhaps too much deference to witnesses who fall into the broad category of "expert".[26] Other media outlets provided coverage of the issue, focusing on the damage done to innocent individuals as a result of expert testimony provided by Smith during criminal trials. Headlines included:

> "Murder charge withdrawn for mom in disgraced pathologist case"[27]
>
> "Ruining lives from the witness stand"[28]
>
> "Pathologist's findings probed"[29]
>
> "Criminal cases involving pathologist face review"[30]
>
> "Child killer cases first under review"[31]

Largely as a result of the public fallout from the Goudge Inquiry, the *Rules of Civil Procedure* in Ontario were amended to require that an expert be obliged to assist the court by providing evidence that is "fair, objective and non-partisan."[32] Perhaps most importantly, and in direct recognition of the problems that arose with the testimony of Charles Smith, the expert's duty to assist the court prevails over any obligation owed by the expert to the party by whom he or she is retained.[33] Moreover, the expert must now certify that he or she understands that this duty requires that they be fair, objective and non-partisan.

Disciplinary action in Ontario and Saskatchewan

Smith currently lives in Victoria, British Columbia,[34] after attempting to relocate in Saskatchewan and practise pathology (albeit not paediatric or forensic pathology) in that province. After serving in a temporary position with the Saskatoon Regional Health Authority (SRHA) for four months, his application for a permanent position was rejected when his employer found that he had not been forthright regarding the details of his professional discipline history. SRHA was specifically concerned about two complaints that were filed against him at CPSO prior to the Goudge Inquiry that they had previously been unaware of, as well as the inquiry itself.[35]

Smith's application for a permanent position with SRHA and his subsequent application for reconsideration were both rejected by the Board of SRHA shortly after this information came to light. In rejecting his application, the Board cited concerns it had with the "potential for negative public perception" of the appointment of Charles Smith, given the media coverage of the public inquiry that was underway in Ontario, notwithstanding there did not appear to be any concerns with Smith's ability to carry out his duties in surgical pathology.[36]

These decisions of the Board were then appealed by Smith to the Practitioner Staff Appeals Tribunal on the basis that the Board was not correct in considering the negative media coverage of Smith in Ontario in their decision not to hire him.

In quashing the decision of the SRHA Board, the tribunal concluded that, while "negative public perception" could be a proper basis for the denial of an application for employment and that negative media attention could certainly contribute to such a negative public perception, there was no evidence to support the position that the public was indeed concerned about the appointment of Smith. Since the rejection letter from the Board simply referred to "potential" for negative public perception, this, in the absence of actual evidence of negative public perception, was not sufficient.

The tribunal concluded that the decision of the Board was unfair, unreasonable and wrong.[37] As such, this case highlights the legitimate role played by the media in sustaining or eroding the public interest in professionals and professional organizations and set a precedent authorizing hiring committees to consider such factors where evidence is available.

While the decision of the board was quashed, the tribunal was unable to grant Smith any of the other remedies that he had requested, namely that he be reappointed to the SRHA in the same capacity, since his licence to practise medicine had expired by the time the decision of the tribunal was rendered. However, the tribunal did state that if Smith had a licence, it would have ruled that he be appointed to the position.[38]

Notwithstanding the favourable treatment of his case by the SRHA, Smith subsequently pled guilty to a charge of professional misconduct laid by the College of Physicians and Surgeons of Saskatchewan for failing to disclose that he was under investigation in Ontario.[39]

Back in Ontario, on February 1, 2011 the Discipline Committee of CPSO found Smith guilty of professional misconduct and ordered a public reprimand and a revocation of his licence. The content of the reprimand was harsh; panel chairman Marc Gabel stated:

> Your transgressions were egregious in nature, repulsive in result, and caused irreparable harm to many innocent victims…You had a duty to the public, to the administration of justice and to your profession. Your failure in all of these respects is abominable to this panel, to your fellow physicians and, as importantly, to the public... By your actions you abysmally failed to do so in these areas and have subsequently disgraced our profession… We publicly deplore and denounce your behaviour.[40]

However, Charles Smith chose not to attend to receive the reprimand in person. CPSO ordered him to appear but it did not have the power to compel his attendance. This fact was not lost on the media, which noted:

> "Disgraced pathologist Charles Smith doesn't show up for harsh reprimand"[41]
>
> "Disgraced pathologist passes on his own disciplinary hearing"[42]
>
> "Disgraced pathologist reprimanded for failures"[43]

Behnaz Yazdanfar and Bruce Liberman (College of Physicians and Surgeons)

Krista Stryland, a 32-year-old realtor and the mother of a young boy, went to Behnaz Yazdanfar for liposuction surgery and died as a result of the procedure. She was pronounced dead in hospital after being transported there by paramedics.

The *Toronto Star* published the fact that Stryland lay in the clinic's recovery room in serious condition for 30 minutes before 911 was called.[44] Other sources reported that she remained "lying in a recovery room for 30 minutes without vital signs."[45] Her sister claimed that she was a size 6 and should have been told that she was not a candidate for the surgery but instead, Yazdanfar removed 6.6 litres of fat from Strykland, when the standard for such a procedure was 5 litres.[46]

Bruce Liberman, the anesthesiologist who was responsible for Stryland's post-operative care, didn't call 911 when she went into shock, nor did he do so when she did not respond to his first treatment, or when she fell unconscious. Instead, he tried to cover his tracks by replacing the original notes he wrote for her file with another note written the next day.

This tragic story of medical negligence rocked the Ontario medical community and, unsurprisingly, the media was present throughout the incident to highlight the failures of the individuals involved and the system regulating them. Scathing headlines that ran in newspapers shortly after the death of Stryland included:

> "Deadly pursuit of perfection"[47]
>
> "As patient lay dying, doctor had a cookie"[48]
>
> "Botched liposuction victim's son cried for dead mom"[49]
>
> "Child of botched plastic surgery victim cries 'Where's my mummy' panel hears."[50]
>
> "Doctor dined while patient died"[51]

The final story reported that, as doctors in North York General Hospital worked desperately to resuscitate Stryland, Yazdanfar and Liberman went out for dinner. As the media continued to uncover additional details about the circumstances of Stryland's surgery, it became increasingly clear that there was a serious regulatory gap that contributed to her death.

Yasdanfar, a family doctor working at Toronto Cosmetic Clinic, was never accredited as a plastic surgeon; in fact, she held no designation as a surgeon of any kind and did not have hospital privileges. Instead, she had taken a liposuction course in Colorado and was approved to perform such surgeries by an independent expert hired by CPSO.

After news stories were published highlighting that CPSO had "dithered for years on whether to crack down on what officials quietly recognized is a growing public health risk: unqualified cosmetic surgeons,"[52] the college took action and put in place rules to regulate cosmetic procedures.[53]

It began by putting into place a four-point plan to improve oversight of cosmetic surgery procedures in April 2007. In June 2007, a mandatory reporting policy was put in place for physicians who wished to change their scope of practice and in October 2007, a letter and questionnaire was mailed out to all members of the profession to gather information about those who perform cosmetic surgery procedures.[54]

At the November 19 – 20, 2007 CPSO Council meeting, a number of additional measures were approved to ensure adequate oversight of cosmetic surgery, including:

- targeted assessments of physicians who have been found to require immediate attention because of their training, as confirmed by the mandatory survey mailed out in October to college members who performed these procedures
- better regulation of out-of-hospital facilities, given that an increasing number of cosmetic procedures are happening outside of hospitals
- changes to the regulation regarding the use of titles to indicate specialties or certifications such as cosmetic surgery
- increased public education on the risks of cosmetic surgery
- requirements that physicians report to the college when they propose to change their scope of practice to an area in which they do not have appropriate qualifications or recent experience
- creation of a panel of experts who would identify high risk cosmetic procedures
- a review of the questions asked of physicians on an annual basis and requiring that additional information be provided
- a review of the regulations pertaining to physician advertising[55]

CPSO also published fact sheets for members of the public, and additional regulatory changes were proposed to the government regarding the use of titles and the credentials that doctors performing cosmetic surgery procedures could use to advertise their services.[56]

In December 2008, the Ontario government introduced Bill 141, an Act to amend the *Regulated Health Professions Act, 1991* so that CPSO would have jurisdiction to make regulations to inspect non-hospital facilities where members were performing cosmetic surgery procedures under anesthetic. This bill was passed in April 2009 and CPSO established a committee to oversee the out-of-hospital premise inspections program, which itself was put into Regulation 114/94 under the *Medicine Act*.[57]

Since this time, the CPSO has continued to address the issues surrounding scope of practice for their members.

The feature story in the most recent issue of *Dialogue*, CPSO's official publication, addresses this issue of "practice drift" and outlines the organization's consideration of issuing "defined scope" certificates that would squarely tackle this problem.[58]

Such a certificate would ensure that a physician's scope of practice is reflected on their certificate and allow the physician to practise only in that area. While the current certificates held by members do restrict the practice of members to the area in which they were educated and have experience, the certificates themselves do not identify what that area of practice is. As such, CPSO would be making clear a condition that already exists so as to continue to protect members of the public.[59]

In addition to these efforts, CPSO is continuing to implement their policy for physicians who wish to change their scope of practice that was introduced in 2000. This includes an obligation to report their intentions to do so to CPSO and participate in a process that includes train-

ing, supervision and assessment, the training component of which is developed in consultation with peer experts in the field.[60]

As for Yazdanfar, she was found incompetent by CPSO in December 2011 in this and several other cases in which she performed liposuction and other cosmetic surgeries between 2005 and 2008. Her licence was suspended for two years and she was ordered to pay CPSO $200,000 in costs.

The Avison Report on the British Columbia College of Teachers

The British Columbia College of Teachers (BCCT) was, until January of 2012, the professional self-regulatory body for the province's 75,000 teachers. In May 2010, the BC Minister of Education appointed Don Avison, a lawyer and former senior public servant with considerable experience in the field of education, to conduct a review of the BCCT. The inquiry was to focus on, among other areas, the question of whether or not the organization was fulfilling its mandate as a professional regulatory body.

This review was prompted by a much publicized letter[61] from the then-Registrar and Chair of Council to the Minister of Education on behalf of several Council members who claimed the college was unable to meet its legislative mandate because of the undue influence exercised by the British Columbia Teachers' Federation (BCTF) over the work of the members on the governing council.[62]

The subsequent Avison report brought the independence and governance of the college into question and found that the BCTF had in fact compromised the college's ability to operate independently as a professional self-regulator of the teaching profession. This had resulted in the interest of members dominating over the public interest. The college had not taken responsibility for the competence and continuing professional development of its members where other self-regulators have done this as part of their obligation to act in the public interest and, overall, Avison found that the council of the college had "lost the confidence of many within the broader educational community."[63]

On October 26, 2011, the government of British Columbia introduced legislation to overhaul the current system and set up a new system to certify, regulate and discipline teachers through shared responsibility between government and the education sector.

As of January 2012, the British Columbia Ministry of Education has resumed some of the duties of regulating the teaching profession in that province through the newly-established Teacher Regulation Branch. This branch is responsible for assessing applicants for certification, issuing certificates of qualification for qualified members, enforcing standards of behaviour of members of the profession, and both approving and evaluating teacher education programs.[64]

A new body, the BC Teachers Council, is responsible for setting standards in the areas of teacher conduct, certification, teacher education and competence.

This certainly would not have happened in the absence of the Avison report and is a good example of how transparent reporting practices can result in changes to the policy-making process by ensuring that public attention remains focused on an issue while it is the in process of being resolved.[65] Importantly, the media was present throughout, reporting such headlines prior to the announcement of action taken by the government and also as additional information became known about the work of the college:

> "Factfinder to Examine BC College of Teachers"[66]
>
> "Report slams BC College of Teachers"[67]
>
> "BC College of Teachers keeps some bad records spotless"[68]

The media also continued to monitor the progress taken towards implementation of the recommendations within the report by the BC government, with headlines such as:

> "Liberals plan to overhaul BC College of Teachers in fall"[69]
>
> "Legislation introduced to reform BC College of Teachers"[70]
>
> "BC College of Teachers is no more"[71]

The story of teacher regulation in British Colombia is far from over and, given the presence of the media throughout, one can expect to see further coverage of teacher regulation in that province.

The Ontario College of Teachers independent review

Given the intense media scrutiny in British Columbia and the fact that Ontario is the only other province that has delegated the regulatory power over teachers to an independent self-regulatory organization, the Ontario College of Teachers took the news coming out of British Columbia as a sign that it too should continue to examine the manner in which it conducts its affairs. The report was particularly relevant to the College, given the comparable structures of the organizations that could prompt similar concerns of the public.

The College was not unfamiliar with such initiatives, as it had previously conducted a review of its registration practices in 2006 and a review of the public's access to Discipline Committee panel decisions in 2007. As such, the College retained former Chief Justice of Ontario Patrick LeSage in the summer of 2011 to conduct an independent external review of the College's investigation and discipline processes. In so doing, the College was, in part, responding directly to media scrutiny in another part of the country by seeking advice on how it could avoid some of the same pitfalls that befell their British Columbian counterparts.

LeSage began his review in the Fall of 2011. However, like many of the regulators discussed in this paper, the Ontario College of Teachers found itself the subject of media scrutiny. This coverage was largely focused on its long-standing practice to make discipline decisions publicly available through Quicklaw and in its library, but to post only the summaries of these decisions on the College's website and in *Professionally Speaking*, the College's official publication. This appeared less than transparent in an age in which many people get their information online, and the headlines were not forgiving:

> "Bad Teachers: Ontario's secret list"[72]
>
> "Ontario's College of Teachers Fails Students"[73]
>
> "Teacher watchdog shields bad apples"[74]

Following the reports, the College met with the Ontario Minister of Education to advise her of action that the College would be taking to address some of the concerns raised by the media in the fall of 2011 while it was awaiting the report by LeSage. One of these initiatives was to ensure that disciplinary decisions are posted to the College's website.

This was announced on the Ontario government's website,[75] and was reported by the same *Toronto Star* reporter who wrote many of the articles originally condemning the College's practice of not posting these decisions online.[76] The College's decisions were posted on the website as of January 4, 2012 and are now accessible online.[77]

At the time of writing this paper, the College is still awaiting the report from LeSage, which will be delivered to the Registrar at the end of May 2012. However, this has not stopped media speculation as to what the outcome of this report might be. One of the reporters in Vancouver who covered the stories of the BC College of Teachers took note of the events in Ontario, noting: "Another College of Teachers headed for an overhaul."[78]

Moreover, a very interesting and perhaps long overdue public debate has ensued in light of this media attention. The four teacher federations in Ontario wrote a collective open letter discussing the need for due process in College disciplinary processes,[79] given the severity of a finding of professional misconduct against a member of a profession.

Summary: The role of the media

These five cases demonstrate the various ways in which the media interacts with regulators to assist them in regulating in the public interest.

In the case of nurse Rose McKenzie, the media played the role of fact-finder / investigator / whistleblower, bringing important and relevant information to the attention of the regulator that was previously unavailable so that appropriate action could be taken to ensure that a member of the profession was appropriately dealt with. This case illustrates the important role played by the media in bringing new information to the attention of regulators that may not have been aware of it.

It also highlights important issues with respect to the jurisdiction and mandate of regulators as they are creatures of statute and, while they are required to do what is in their governing legislation and regulation, they may do no more than what they are empowered to do by the same legislation. Therefore, regulators are not able to conduct investigations into the background of individuals beyond what is provided for in their legislation or regulations. However, this does not prevent regulators from conducting investigations when relevant information is brought to their attention, as was seen again in the case of Charles Smith when he applied to SRHA.

Moreover, the ensuing dialogue between CBC News and the College of Nurses of Ontario demonstrates that the role of the media is not simply limited to finding information and providing it to the regulator to be dealt with behind closed doors. CBC News brought forward an issue of great concern to the public, and ensured that this information was widely available to the public through its print and broadcast avenues. It requested information from the college and, when this information was not publicly available because of the upcoming disciplinary proceeding pertaining to the member in question, CNO issued a news release to the attention of CBC News immediately following the discipline proceeding to summarize the reasons of the decision, highlight the structural problems the college faced in dealing with these issues, and outlining the steps it was taking to address these structural problems.

In the case of Behnaz Yazdanfar and Bruce Liberman, the media played the role of advocate, highlighting dangerous, and in the case of Krista Stryland, fatal, gaps in regulation that necessitated swift action on the part of the College of Physicians and Surgeons of Ontario to address. This is a good example of how media attention can provide the impetus for regulators to change their policies or regimes of regulation after it comes to the public's attention that there is a regulatory gap; it is also analogous to the way in which the media dealt with the structural failures of the nursing profession in providing for intra-jurisdictional information sharing in the case of Rose McKenzie.

The media was also present throughout the case of Charles Smith, highlighting the injustices caused by his negligence, the work done during the course of the inquiry and media attention was even cited as a reason for which the Saskatoon Regional Health Authority did not want to hire him.

Moreover, while the Practitioner Staff Appeals Tribunal found that there was no basis for Smith's employer to consider negative media coverage in refusing to hire an otherwise qualified professional in his case, they did not rule out the idea that this could be the basis for such a decision had actual evidence that negative media coverage was a concern to the public been considered. Therefore, a precedent appears to have been set for hiring committees to consider evidence of the impact of media attention on the ability of the regulator to maintain public confidence; how firm this precedent is remains to be seen. However, it speaks to the important role played by the media in strengthening or diminishing public confidence in the work of regulators.

In the case of the British Columbia College of Teachers, the media shone a spotlight on a regulatory system that was seen to be broken in its entirety, structurally incapable of fulfilling its legislative mandate. Many of the issues explored in the Avison report are still in the process of being resolved as policy and structural change often takes a great deal of time. One could reasonably expect that the media will continue in their coverage of these issues to ensure they do not drop off the public agenda.

And finally, the case of the Ontario College of Teachers, which is also still in the process of unfolding, demonstrates the power of media attention in one geographic region to transcend borders and issues, prompting other organizations to action upon reflection of their own circumstances.

However, notwithstanding all of the positive outcomes that can arise from a public dialogue between the media and regulators, it is important to keep in mind that this interaction is not universally positive in all cases. The relationship between the media and regulators can vary depending on the situation and the media group involved; these relationships are complex and can also be forced and inconvenient at times.

In interviewing 50 American regulators for one of the few available studies conducted into the relationship between the media and the work of regulators for her study *Media dependent regulators: Media's reported impact in the regulatory environment and related implications for agency practices and policymaking*, Kelli Ann D'Apice found that the resource constraints of regulatory organizations coupled with the way in which media select issues for coverage meant that the dependence of regulators on the media could actually "undermine their ability to recognize the needs of some overlooked constituencies and to address 'real world' concerns. This could in turn potentially compromise the general public's interest in subtle but significant ways."[80]

D'Apice also observed that federal regulators in her study "tend to be sophisticated consumers and observers of media, and often respond to media not because they necessarily believe what they see reported, but rather because they believe that other people will be influenced by and somehow act upon information conveyed."[81] This can be problematic from the standpoint of protecting the public interest, since resources may be deployed to handle situations that become the subject of intense media scrutiny and public concern, but that are less concerning than other issues that may not receive the same amount of media attention.

Therefore, while the media may play a very important role in pushing regulators to be more transparent and accountable, it is possible that in their rush to respond to media attention viewed as undesirable, professional regulators may be focusing on some issues to the detriment of others in the interest of appearing responsive to media concerns.

Regulators – whether public or self-regulating – necessarily operate at arm's length from the government precisely to avoid this dynamic. Governments are inherently reactionary to public opinion given the near constant threat of elections, but regulators need to operate independent from that threat and regulate in the long-term interest of the public. This often results in decisions being made that may not be popular with certain constituencies and, in particular, their members over whom they exercise jurisdiction.

The College of Physicians and Surgeons of Ontario undoubtedly made the lives of their members who perform cosmetic surgery more complicated by imposing a new regulatory regime on them. Similarly, CNO may also complicate the lives of their members when it finds a way to share intra-jurisdictional disciplinary information with its counterparts outside of Ontario. However, there is no doubt that governing the profession in the public interest requires that regulators address these very important issues.

Finally, there are issues of accuracy, responsibility and balance that must be considered in assessing media coverage of any issue. In an era in which media corporations compete against one another for a finite number of readers and viewers, there can be a tendency to sensationalize an issue for the purpose of attracting more viewers or readers, or, in the case of online news sources, an increased number of visits to the website. Such sensationalism can lead to incomplete coverage of an issue that can lack the nuance necessary for someone unfamiliar with the subject to fully comprehend it.

The explosion of social media

As alluded to above, it is appropriate to also consider the profound impact that new and social media has had on the work of regulators, given the explosion in its popularity as a communications medium and its ensuing ability to affect public opinion generally and as it relates to the work of regulators.

New media and social media in particular allow information to travel very quickly, which in turn affords the public the opportunity to access information that may not previously have been available to them. There are countless examples of individuals using social media to disseminate messages that ultimately result in calls for increased accountability.

For example, social media users played a strong role in bringing attention to the actions of various police officers implicated in violence against protesters during the June 2010 meeting of G8 and G20 world leaders. While the number of police officers identified was ultimately minimal, it is doubtful that the hearing against Constable Babak Andalib-Goortani, for example, would have proceeded in the absence of several photos taken by members of the public who circulated them using Facebook, blogs and other forms of social media, which contributed to substantial public outrage.

Additionally, the relatively few numbers of police officers disciplined for actions during the protest despite widespread allegations of improper use of force and wrongful arrest was also something that came to light as a result of information that was made publicly available through various social media platforms; this in turn resulted in calls to reform the oversight mechanisms for police in Ontario.

In the context of professional regulators, social media can be used in ways similar to those outlined above, such as providing evidence of wrongdoing that can be used against professionals in the context of disciplinary proceedings. Much of this information can be obtained by camera phone-wielding members of the public, who often do not hesitate to publish such content to the general public through various social media forums.

Given the frequency of use of social media and digital devices generally, evidence submitted as part of legal proceedings is increasingly found in the form of photos, video and recorded conversations. Private investigators have long been employed by insurance companies to determine the veracity of a claim by secretly following the claimant to see that their behaviour is consistent with the injuries reported to the insurer. However, social media sites are making their job, as well as the jobs of law enforcement officers, lawyers and regulators much easier.

Ontario courts had to contemplate the use of digital technology in the murder case of Stephanie Rengel, in which the girlfriend of the murderer was also convicted of murder based on text messages put into evidence, proving that she had counselled and pressured her boyfriend to kill the victim.[82] More recently, in the case of the murders of the Shafia girls and their father's first wife, prosecution counsel put a host of digital information into evidence, including computers that indicated family members who were subsequently convicted of their murders had conducted Google searches on "where to commit a murder."[83]

Increasingly individuals are implicating themselves through the use of social media. There are countless stories of individuals who have committed crimes and then posted information online about them – some even with pictures – such as the three teenagers who stole thousands of dollars from a market in Pittsburgh and then posed with the money and other stolen goods in photos that were posted on their Facebook pages. Sgt. Gasiorowski, a Pittsburgh police officer stated in response: "It makes our job a lot easier when basically they post what amounts to be a confession on the internet for everyone to see."[84]

Members of professional organizations are often no different, as content posted online by professionals can reveal behaviour that is not in keeping with the standards of practice of the profession. In what is perhaps the most horrific example of this type of inappropriate use of social media, a nurse in Los Angeles posted photos that she and her colleagues had taken of

a dying 60-year old man admitted to the hospital after being stabbed over a dozen times by another resident in the nursing home in which he lived.[85] When all was said and done, four staff members were fired and three were disciplined.

While there have been no high profile examples of members of the public posting photos and stories of misbehaving professionals to social media forums in the same manner in which G-20 police officers have been highlighted, it is likely only a matter of time before this happens, given the current climate and constant demands for transparency and accountability made on all professionals. For this reason, it is imperative to understand some important differences between social media and traditional media.

Social media vs. traditional media

Social media differs from traditional journalism in a number of ways. Allegations that are made through social media have the power to be disseminated as widely as traditional media sources. These allegations can often require regulators to investigate and act on them. Where they are well-founded, social media proves to be an effective tool in ensuring accountability. Where they are not, it can serve as a tool for defamation of the individual and the potential destruction of one's career.

One of the main differences between traditional and social media is that in traditional journalism, sources of information must be verified and media outlets often have complaints mechanisms for individuals who feel that stories have not been told accurately. The *Toronto Star*, for example, has an office of the public editor, who is responsible for liaising between the newspaper and the public and serves as the reader advocate and guarantor of accuracy.[86] The *Globe and Mail* also announced on January 22, 2012 that it was creating the office of a public editor.[87] CBC has an ombudsman, who is "completely independent of CBC program staff and management, reporting directly to the president of CBC and, through the president, the corporation's board of directors."[88]

This does not mean that mistakes are not made in reporting; however, it means that when such mistakes are spotted, members of the public have an avenue for recourse or at the very least inquiry, which is often public. And of course, there is always recourse available for aggrieved individuals through the courts where there may be a cause of action in tort against a media source for defamation.

Media outlets are no strangers to lawsuits. Their legal departments and external counsel are substantial in numbers as they frequently find themselves defending defamation lawsuits.

The economics of lawsuits are such that plaintiffs bring forward disputes when there is a reasonable chance of success and an opportunity to recover financially in the form of a damages award; this substantial threat of costly litigation serves to hold the media to account. In other words, operational risk management considerations of media outlets which, by and large, are for-profit corporations accountable to their boards of directors and shareholders, dictate that such an organization ought to be certain that the information they are putting into the public domain is accurate lest they be held financially accountable in court for their careless mistakes.

Those considerations simply don't exist to the same extent in social media.

One can be anonymous on social media or reside in another jurisdiction, nullifying the threat of any lawsuit for committing the tort of defamation or related criminal charges. Moreover, since social media users are typically individuals who tend to have far shallower pockets than do large media corporations, the same fear of being sued for a significant sum of money should a published article or report be defamatory may not serve as significant a deterrent for an individual as it does for large media corporations.

Finally, flurries of activity on social media can themselves become news stories, which may circumvent the need for traditional news outlets to verify the veracity of the facts if the story is not the content itself but rather the mere fact that a social media firestorm has erupted over a particular issue.

Issues of accuracy, responsibility and balance are also affected profoundly by the rapid growth of new and social media. The move away from these important values discussed in the previous section has been exacerbated by the proliferation of the use of social media as a means to disseminate news. Social media by its very nature does not necessarily allow for a nuanced discussion of complicated issues.

For example, Twitter often serves as a main source of breaking news for many people, yet any content put forth in this medium is limited to only 140 characters. Many Twitter posts link to a full news story; however, it is unclear the extent to which users read the original story as opposed to simply reading the interpretation that appears on their Twitter feed.

The speed of the spread of news is also implicated by social media, which allows for instantaneous dissemination of messages and in turn, encourages immediate responses. This 'rapid response' nature of public dialogue in the social media age has contributed not only to careless fact-finding at times, but also to the phenomenon of news stories permeating headline news and captivating the minds of a nation, only to disappear into obscurity almost as quickly as they appear.

In sum, while there are certainly benefits to social media, its broader impact on the public interest given its profound influence on public discourse remains unclear. However, regardless of this uncertainty, regulators should not underestimate the power of social media as a communications tool and would be wise to understand both its utility and its risks.

The right to privacy vs. public interest in transparency and accountability

No discussion of the role of the media would be complete without touching on the inherent tension between providing necessary transparency and accountability on one hand, and the respect for an individual's privacy on the other.

There is little doubt that the allegiance of regulators is to the public interest and, as such, providing information to the public helps them to meet this objective. Information provided to the public pertains not only to the general policies and procedures of the organization, but also how they are interpreted vis-à-vis the individuals over whom regulators exercise jurisdiction. However, this broad mandate to put information into the public domain is not without ethical complications.

One man's plight of being wrongfully charged with a crime and the ensuing difficulties associated with press coverage of the event was documented in a recent article in the *Toronto Star*.[89] For this individual, a wrongful criminal charge for sexual assault that was subsequently dropped 14 months later is something that will not go away, given that the charge was reported by the *Toronto Star* and remains available indefinitely on the internet.

The *Toronto Star*'s policy is not to take down articles that report criminal charges in the event that such charges are dropped, but rather to update the information to reflect the fact that the charges have been dropped.

However, the experience of this man may suggest that this may not be enough. As he claimed in an email to *Toronto Star* public editor, Kathy English, "I am an innocent man… I should not have to endure the grief and humiliation of that article now that the charges were dropped." He went on to say: "Anytime I apply for a new job, an employer can look up my name and there's that damn article. The mere accusation alone is enough to convince many that an innocent man is guilty."[90]

In responding to this individual, English highlighted the importance of the open court principle, discussed above: "The fact that police laid charges of sexual assault against this man is a matter of public record — it is what happened. Erasing news of those charges won't alter that truth."[91] She also highlights the consideration of "newsworthiness" when a media outlet selects stories that it publishes. This is often why stories of criminal charges are easily found but follow up stories outlining how the charges were subsequently dropped are not.

So where does one draw the line between the public interest and the rights of the individual to privacy or, as is the case of the subject of the *Toronto Star* story, to have one's name cleared?

The answer to this may be more complicated now than it was a few short months ago given a recent Ontario Court of Appeal decision. In *Jones vs. Tsige*, the Court of Appeal broke with 120 years of common law jurisprudence to establish a tort of invasion of privacy, or "intrusion upon seclusion" as it was described by William Prosser in 1960.[92]

The Court of Appeal adopted the definition of intrusion upon seclusion as found in the *Restatement (Second) of Torts (2010)*, which provides the following definition:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.[93]

And while the Ontario Court of Appeal continued by explaining all the factors that serve to limit recovery for what would ultimately be only a "modest" amount of damages – that the conduct must be intentional, without lawful justification, pertaining to the plaintiff's private affairs, and of a nature that a reasonable person would regard such an invasion as highly offensive causing distress – the symbolic value of the decision is of great import, particularly at a time when social media has so profoundly impacted traditional understandings of privacy.

So what does this mean for media outlets?

It appears the jury may still be out on this issue. Recent Supreme Court jurisprudence established the defence of responsible communication on matters of public interest, which can defeat a libel claim even where the reputation of an individual has been damaged by reporting on facts or allegations that ultimately prove to be false.[94]

When invoking this defence, journalists will be judged not on their ability to report the facts accurately, but in their efforts made to ensure that the information that was being reported was accurate. In other words, where a reporter has done his or her due diligence to uncover the facts about an issue, he or she can use the defence of responsible communication, even where those facts later are known to be false or damage was done to the reputation of the individual to whom they pertained.

Moreover, this defence is available not only to members of traditional media outlets but also to new media. However, given the newly recognized tort of "intrusion upon seclusion" it is not clear how the courts will weigh the need for transparency against privacy and whether the public interest will be found to lie on the side of openness and transparency at all costs or provide recognition that the public interest can also be met by recognizing an individual's right to privacy where allegations have not risen to the level of charges.

This will most certainly impact the work of regulators as they try to reconcile such new legal principles with the nuanced balancing of these concerns that they are already doing in the public interest; given that these legal principles are also evolving normative concepts, particularly in the context of the transparency/privacy dichotomy, it will continue to be a delicate balance to achieve.

Conclusion

It is challenging to provide a succinct conclusion about the relationship between the media and regulators and the role that media can play in assisting regulators in protecting the public interest.

In reality, the relationship between the two is nuanced and constantly evolving given the environment in which they operate and the new challenges that arise in the work that they do, including the emergence of new forms of media, the discovery of regulatory gaps, and the evolution of societal norms that inform the way in which such areas should be regulated, in turn implicating issues such as privacy and transparency.

Suffice it to say that the media – in both D'Apice's study and in the experience of the Ontario regulators discussed above – plays an integral role in "highlighting salient aspects of the operative, political reality to which agency officials must respond"[95] and therefore does have a tremendous impact on policymaking and regulatory practice.

While on the surface it may appear that the media and regulators are at odds with one another, they both ultimately work to serve the public interest. Tension can naturally arise given that, while the media and regulators both aim to serve the broader public interest, they do not always agree on how best to serve it in any particular scenario. However, broadly speaking, when they work together towards accomplishing those ends, they can be very successful partners in this endeavour.

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[1] The Fairness Commissioner lists the following professions on its website: Architects, Audiologists and Speech Language Pathologists, Chartered Accountants, Chiropodists, Chiropractors, Dental Hygienists, Dental Surgeons, Dental Technologists, Denturists, Dietitians, Early Childhood Educators, Engineering Technicians and Technologists, Engineers, Foresters, General Accountants, Geoscientists, Homeopaths, Kinesiologists, Land Surveyors, Lawyers, Management Accountants, Massage Therapists, Medical Laboratory Technologists, Medical Radiation Technologists, Midwives, Naturopaths, Nurses, Occupational Therapists, Opticians, Optometrists, Pharmacists, Physicians and Surgeons, Physiotherapists, Psychologists, Psychotherapists, Respiratory Therapists, Social Workers and Social Service Workers, Teachers, Traditional Chinese Medicine Practitioners and Acupuncturists, and Veterinarians.

[2] Royal Commission Inquiry into Civil Rights (1968), Vol. 3, online: <http://archive.org/details/royalcommissioni04onta>, pp. 1162, 1181.

[3] From a brochure advertising an upcoming LSUC conference: **"**Professionalism: Ideals, Challenges, Myths and Realities", online: http://ecom.lsuc.on.ca/cle/colloquia.jsp?id=FINCOL08-9990302-A-REG

[4] *Bristol & West Building Society v Mothew,* [1998] Ch 1 at 18; *Meinhard v Salmon* (1928), 164 NE 545 at 546; *ASIC v Citigroup,* [2007] 62 ACSR 427 at 289.

[5] CBC, "Nurse disgraced in U.S. working in Canada" (9 March 2011), online: <http://www.cbc.ca/news/canada/toronto/story/2011/03/09/nurse-negligence-ontario-california-mckenzie.html>.

[6] *Ibid*. See also: Default Decision and Order of the Board of Registered Nursing Department of Consumer Affairs State of California Case No. 2008-274; Gov. Code §11520; available online: <http://www.cbc.ca/news/pdf/california-nursing-board-decision.pdf>.

[7] Tracy Weber, "Spencer Sullivan: His body a prison" (11 July 2009), online: <http://www.propublica.org/article/spencer-sullivan-nurses>.

[8] Kate Allen, "Nurse working in Halton had her license revoked in U.S." (10 March 2011) *Toronto Star,* online: <http://www.thestar.com/news/article/951797--nurse-working-in-halton-had-licence-revoked-in-u-s>.

[9] *Supra* note 5.

[10] John McKiggan, "Negligent Nurse who lost license still working in Canada" (18 March 2011) *John McKiggan's Halifax Medical Malpractice Lawyer Blog,* online: <http://www.halifaxmedicalmalpracticelawyerblog.com/2011/03/negligent_nurse_who_lost_licen.html>.

[11] While this case highlights intra-jurisdictional challenges between Canada and the U.S., the same challenges exist in Canada given that professionals have the right to practice in all jurisdictions if they are

qualified in one, due to the Agreement on Internal Trade. However, many professions, including the teaching profession, do not have the authority to alert other provincial regulators of discipline action taken against members. Rather, many professions continue to rely on self-reporting system similar in principal to the one implicated in the discussion of the College of Nurses.

[12] College of Nurses of Ontario, "Statement from the College of Nurses of Ontario" (22 June 2011), online: <http://www.cno.org/Global/new/releases/pdf/2011-06-22_RoseMcKenzie_HearingReporting.pdf>.

[13] College of Nurses of Ontario, "Find a Nurse": <https://flo.cno.org/Register/Details.aspx?id=9602954&tab=3#restrictions>, accessed February 15, 2012.

[14] CBC, "Nurse background checks show 'significant' gap" (22 June 2011), online: <http://www.cbc.ca/news/canada/story/2011/06/22/college-nurses-hearing.html>.

[15] *Supra* note 12.

[16] *Supra* note 14.

[17] CBC, "Dr. Charles Smith: The Man Behind the Public Inquiry" (10 August 2010), online: <http://www.cbc.ca/news/canada/story/2009/12/07/f-charles-smith-goudge-inquiry.html>.

[18] Canadian Press "Ontario to adopt changes from the Goudge inquiry" (23 October 2008) *Toronto Star*, online: http://www.thestar.com/News/Ontario/article/523193>.

[19] Barbara Kay, "Ruining lives from the witness stand" (16 March 2011) *National Post,* online: <http://fullcomment.nationalpost.com/2011/03/16/barbara-kay-ruining-lives-from-the-witness-stand/>.

[20] Linda Nguyen, "Murder charge withdrawn for mom in disgraced pathologist case" (7 June 2011) *National Post,* online: <http://news.nationalpost.com/2011/06/07/murder-charge-withdrawn-for-mom-in-disgraced-pathologist-case/>.

[21] Hamish Stewart et al. *Evidence: A Canadian Casebook* (Toronto: Emond Montgomery, 2006) at p. 271.

[22] Hon. Frank Iacobucci and Graeme Hamilton, "The Goudge Inquiry and the role of medical expert witnesses" (12 January 2010) *Canadian Medical Association Journal*. online: <http://www.ecmaj.ca/content/182/1/53>. [*Iacobucci and Hamilton*]

[23] Hon. Stephen T. Goudge, *Inquiry Into Paediatric Forensic Pathology in Ontario* (1 October 2008), online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en_pdf/Vol_1_Eng_ES.pdf> at p. 19.

[24] *Ibid.*

[25] "Consultation Memorandum 12.3: Expert evidence and independent medical examinations" In: *Alberta Rules of Court Project* (Edmonton (AB): Alberta Law Reform Institute, 2003), online: <www.law.ualberta.ca/alri/Publications/Consultation-Memoranda.php> (accessed 24 April 2009), cited in: *Iacobucci and Hamilton, supra* note 22.

[26] Kirk Makin, "Judges allow expert witnesses too much latitude, inquiry told" (23 February 2008) *The Globe & Mail*, A11.

[27] *Supra* note 20.

[28] *Supra* note 19.

[29] *Smith v. Saskatoon Regional Health Authority*, Practitioner Staff Appeals Tribunal (27 November 2006), online: <http://www.health.gov.sk.ca/smith-v-srha> at p. 23.

[30] *Ibid.*

[31] *Ibid.*

[32] RRO 1990, Reg. 194, s. 4.1.01.

[33] O. Reg. 438/08, s. 48.

[34] *Supra* note 29 at p. 20.

[35] *Ibid.* at p. 14.

[36] *Ibid.* at pp. 27 and 28.

[37] *Ibid.* at p. 36.

[38] *Ibid.* at p. 37.

[39] CBC, "20 child autopsies by pathologist questionable: review" (19 April 2007), online: <http://www.cbc.ca/news/canada/story/2007/04/19/smith-autopsies.html>.

[40] Allison Jones, "Disgraced pathologist Charles Smith doesn't show up for harsh reprimand" (25 March 2011) *Canadian Press*, online: CityNews Toronto <http://www.citytv.com/toronto/citynews/news/local/article/121082--pathologist-dr-charles-smith-gets-harsh-reprimand-over-repulsive-failures>.

[41] *Ibid*.

[42] Allison Jones, "Disgraced pathologist passes on his own disciplinary hearing" (25 March 2011) *Canadian Press,* online: Globe and Mail <http://www.theglobeandmail.com/news/national/toronto/pathologist-charles-smith-disgraced-profession-college-says/article1956759/>.

[43] CTV Toronto, "Disgraced pathologist reprimanded for failures" (25 March 2011), online: <http://m.ctv.ca/topstories/20110325/charles-smith-reprimand-110325.html>.

[44] Michael Woods, "Child of botched plastic surgery victim cries 'Where's my mummy' panel hears" (29 August 2011) *Toronto Star*, online: <http://www.thestar.com/news/article/1046638--child-of-botched-plastic-surgery-victim-cries-where-s-my-mummy-panel-hears>.
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[46] The Calgary Herald, "Deadly Pursuit of Perfection" (28 July 2008), online: <http://www.canada.com/calgaryherald/news/theeditorialpage/story.html?id=c8dc0a2c-61c4-4d85-825f-a92f1d64c850>.
[47] *Ibid*.
[48] Kevin Connor, "As patient lay dying, doctor had a cookie" (23 July 2009) *Toronto Sun,* online: <http://cnews.canoe.ca/CNEWS/Canada/2009/07/23/10230931-sun.html>.
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[50] *Supra* note 44.
[51] Michele Mandel, "Doctor dined while patient died" (1 September 2011) *Toronto Sun,* online: <http://www.torontosun.com/2011/09/01/doctor-dined-while-woman-died>.
[52] Rob Cribb, "Surgical Watchdog dithered" (27 September 2007) *Toronto Star,* online: <http://www.thestar.com/News/Ontario/article/261099>.
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[56] *Supra* note 54.
[57] *Ibid*.
[58] College of Physicians and Surgeons of Ontario, "Defining scope of practice: College explores possible solution to 'practice drift'" (2012) 8:1 *Dialogue*, online: <http://www.cpso.on.ca/uploadedFiles/policies/publications/dialoguearchives/dialogueissues/Dialogue_Iss1_12.pdf> at p. 9.
[59] *Ibid*. at p. 10.
[60] *Ibid*. at p. 11.
[61] Janet Steffenhagen, "College of Teachers calls for independent investigation" (6 April 2010) *Vancouver Sun,* online: <http://blogs.vancouversun.com/2010/04/06/college-of-teachers-calls-for-independent-investigation/>.
[62] Donald Avison, A *College Divided: Report of the Fact Finder on the BC College of Teachers* (October 2010), online: <http://www.bced.gov.bc.ca/pubs/2010_factfinder_report_bcct.pdf> at p. 4.
[63] *Ibid*. at p. 32.
[64] *Teachers Act*, S.B.C. 2011 ch. 19.
[65] As a result of the report by Don Avison, the Ontario College of Teachers has commissioned the Honourable Patrick J. LeSage to review our investigation and disciplinary procedures and outcomes as well as our dispute resolution program. The terms of reference of his appointment include, among other things, a review of the Act, regulations, bylaws and policies pertaining to the investigation and hearing function of the College to determine whether they provide fair, impartial and timely adjudication of complaints against members and whether the public interest is adequately protected.
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[67] CBC, "Report slams B.C. College of Teachers" (8 December 2010), online: <http://www.cbc.ca/news/canada/british-columbia/story/2010/12/08/bc-teachers-college-report.html>.
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