

NOTEBOOK ON ETHICS, LEGAL ISSUES AND STANDARDS FOR COUNSELLORS AND PSYCHOTHERAPISTS

Three Recent Decisions of Interest to Regulators and Those who Aspire to Further Statutory Regulation of the Counselling and Psychotherapy Profession in Canada

Dr. Glenn Sheppard

In Canada, as in many other societies, the professions are given by the government both the privilege and the responsibility to regulate its members and the conditions under which they should ethically and competently provide their services. This regulatory responsibility is typically granted by provisions in a legislative statute and is further supplemented with administrative guidelines and criteria developed by a regulatory college or board with the duty and authority to execute its legislative mandate.

Since the counselling and psychotherapy profession has already had some success in efforts to achieve this type of statutory regulation, I thought it would be informative to report on three recent decisions directly involving the conduct and responsibilities of regulators.

Case 1 - A Regulator's Primary Duty: A View from the Court

The position that a regulator's primary duty is to serve and protect the public was highlighted and affirmed in a decision by the Ontario Supreme Court of Justice in the case of *Salehi v. Association of Professional Engineers of Ontario (PEO)*, 2015 ONSC, 7271. Mr. Salehi immigrated to Canada from Iran where he had worked as a gas engineer. Initially, he was told by a Canadian non-statutory engineering body that he was approved as an engineer but the PEO later informed him that Canada did not have a gas engineering professional category. When he applied in 2006 to be registered as an engineer the registration process took a long time with many challenges both for Mr. Salehi and the PEO. He had to provide additional documents, deficiencies were identified in his training and his engineering experience, and he had difficulty demonstrating equivalency with Canadian engineering qualifications. The PEO accepted his completion of a bridging program instead of the usual professional examination and after five attempts to successfully complete the PEO local knowledge and jurisprudence examination he was granted his engineering registration in 2013.

After his registration Mr. Salehi complained that the PEO failed to recognize his prior qualifications and that it imposed unnecessary requirements for him. He also sued the PEO for negligence and claimed that it owed him a duty of care. The Court in its decision drew attention to a number of court cases that concluded that a duty of care by a regulator is incompatible with a regulator's primary duty to protect the public. The Court dismissed both the duty of care and the negligence

claims. Of course, this decision did not negate the regulator's duty to treat Mr. Salehi, and all applicants, with fairness, impartiality and to impose only those requirements necessary to have confidence that the requirements for entry to the profession are met.

This case highlights the potential challenges for both regulatory bodies and for immigrants who seek registration or a license from a regulated profession in Canada. Despite those challenges this Court's decision reiterates that efforts to determine that professional entry requirements have been met are grounded in the regulator's primary duty of public protection. Also, that the regulator's duty to registrants, members, complainants and others must always be subordinate to this fundamental duty.

Case 2 – Assessing International Qualifications

In another case involving the regulatory body for professional engineers in Alberta (APEGA) a Court in its judgement once again affirmed the regulator's primary duty is to protect the public by ensuring that applicants for registration have the competency to work as a professional engineer. In this case of the *Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* 2016 – the Alberta Court of Queens Bench reversed an early judgement by a Human Rights Tribunal.

The Tribunal had concluded that APEGA "*discriminated against Mr. Mihaly on the grounds of his place of origin, by refusing to recognize his education as the equivalent of an engineering degree from an accredited Canadian University, and by requiring him to write certain examinations to confirm his academic credentials.*"

The Court found that even through the requirement imposed by the regulator to have Mr. Mihaly complete additional professional examinations may have had an adverse impact on him it was justified in this instance. It stated that these examinations were required to assess the quality of the undergraduate programs taken by applicants. This view was expressed as follows:

The regulator lacks reliable evidence about the engineering programs, and therefore has to assess competence of the graduates in other ways, whether through completion of post-graduate studies, suitable experience or confirmatory examinations."

It also stated that such requirements were:

"Consistent with its objective of ensuring the competency of professional engineers" and that "possession of entry level engineering competence is, obviously, reasonably necessary to safe practice as a professional engineer."

The Court also held the view that the earlier order of the Tribunal that the regulatory body complete in advance an evaluation of the equivalency of the professional education program at hundreds of international schools was an undue burden to place on the regulator and was incompatible with its regulatory mandate.

This decision clearly reiterates the public protection mandate of regulators and it highlights the importance of ensuring that requirements for entry to a profession are such as to ensure competent professional practice (**note both cases and can be seen at www.canlii.org**).

Case 3 – The government can give it and the government can take it away

A recent decision by the Government of British Columbia (BC) clearly indicates that the right of a profession to statutory self regulation can be withdrawn. This became the circumstance for the real estate profession in BC when Premier Christy Clarke announced that the Government was ending the profession's capacity for self regulation. Its regulatory board has been replaced with a government appointed regulatory agency.

This decision resulted from the crisis in the real estate industry in BC and because of the Government's view that the profession's self-regulatory activities were failing to serve the public interest. Prior to this decision the Government had established an Independent Advisory Group to examine all aspects of real estate activity in the Province. Its Report drew attention to a list of serious deficiencies within the real estate industry. The following appeared to be the primary concerns:

- *A practice of embedded compensation and undisclosed conflicts of interest by practitioners.*
- *Reliance by the regulator on external complaints (rather the mandatory reporting by practitioners or comprehensive inspections by regulators).*
- *Lenient sanctions for disciplinary matters and inadequate communication by the regulator of those decisions.*
- *The handling of many complaints by well-resourced self-interest bodies within the industry (rather than referring the complaints to the regulator).*
- *Brokers had insufficient authority to supervise the conduct of real estate agents partly because of the rule changes made by the regulator.*
- *The governance structure of the regulator fostered the possibility of the industry's views dominating over the public interest. For example, the ratio of elected to appointed public members on the Board/Council was 14:3.*

- *The regulator was not sufficiently proactive in educating the public about real estate issues and risks posed by unethical practitioners.*
- *The low bar of entry to practise in terms of education, particularly in the areas of conduct and ethics.*
- *The lack of proficiency testing in continuing professional development.*

The authors of the Report made a number of recommendations that will be of interest to all Canadian regulators. Some of these are as follows:

- The regulator should publish information about its complaints and discipline decisions in a manner that is accessible and easy for consumers to use and to understand.
- There should be a mandatory reporting requirement on practitioners whenever they become aware of apparent misconduct that places the public at risk.
- Half of the members of the regulatory council should be publicly appointed, non-industry individuals.
- The regulator should increase educational requirements for entering to practise including in the areas of ethics and proficiency in the English language.
- The regulator should implement mandatory continuing education with content and testing that reinforces a practitioner's ethical obligations, conduct requirements and duties to consumers.
- The government should establish an independent body such as the UK Professional Standards Suitability with oversight over the decisions of regulators within the province.

This Report can be found at [http: www.recbc.ca/wp-content/uploads/IAGReport_june2016.pdf](http://www.recbc.ca/wp-content/uploads/IAGReport_june2016.pdf)