

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

Can a Regulator Compel a Professional Registrant to Complete Continuing Professional Development Requirements? An Answer from the Supreme Court of Canada

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For this Notebook I decided to review a recent decision of the Supreme Court of Canada because it has significant implications for the regulatory bodies in Canada that now regulate, with statutory legislative authority, the professional practices of registered counsellors and psychotherapists. It is particularly relevant to what regulators can do to protect the public interest through quality assurance policies to ensure the continuing and improved competence of their members. One quality assurance practice typical of self-governing professional bodies is to expect registrants to complete a number of continuing professional development requirements. It was this type of provision that was at issue in this court case *Green v. Law Society of Manitoba, 2017 SCC 20*.

The Issues in this Case:

Prior to 2012, the *Law Society of Manitoba* took a voluntary approach to the continuing professional development (CPD) activities of its members. However, a study in 2007 revealed that many lawyers reported no CPD activities or only minimal engagement. So, in 2012 the benchers made their CPD requirement mandatory requiring all practising lawyers to complete 12 hours of CPD per year, the equivalent of one hour per month. This change was stated in the following Rules of the Law Society:

2-81.1(8) Commencing January 1, 2012, and subject to subsection (10), a practising lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practising status...

2-81.1(12) Where a practising lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid.

Mr. Green, the appellant in this case, was a practising lawyer for more than 60 years. There had been no disciplinary action against him and he had been a bencher of the Law Society and had helped to deliver some CPD activities. Despite the mandatory CPD rules of the Law Society, Mr. Green had not reported any CPD credits for 2012 or 2013. Consequently, in 2014, he was sent a letter by the Society in which he was informed that his failure to comply with the CPD Rules within 60 days would result in his suspension from practising law. He was also provided with an opportunity to request an extension of the 60 days if needed to complete his CPD hours. Mr. Green did not reply to the letter. However, he decided to legally challenge the validity of

the CPD Rules and the pending suspension of his practising certificate. In light of this action his suspension was postponed until the outcome of the litigation.

The Manitoba Court of Queen's Bench first heard his legal challenge. The judge concluded that the Rules in question were within the Law Society's legislative mandate under *The Legal Profession Act*. It states that the Law Society is required to "establish standards for the education, professional responsibility and competence" of lawyers. He also dismissed Mr. Green's natural justice and procedural fairness arguments regarding the suspension process. *The Manitoba Court of Appeal* dismissed his appeal to it for similar reasons. Mr. Green then appealed this decision to the *Supreme Court of Canada (SCC)*.

The Supreme Court Decision:

In reaching a decision to uphold the appeal decision of the *Manitoba Court of Appeal* the Justices of the SCC were informed by their following observations:

- *The standard applicable to the review of a Law Society Rule is reasonablenessthis means that the substances of the Rule must conform to the rationale of the statutory regime set up by the legislature.*
- *The standard of review must reflect the Law Society's broad discretion to regulate the legal profession on the basis of policy considerations related to the public interest.*
- *A Law Society must be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute.*
- *The right to practice law is not a common law right or a properly right but a statutory right and depends on the principles set out in the Act and the Rules.*

The majority position of the Supreme Court Justices, written by Justice J. Wagner, is expressed in the following decision:

In this case, the impugned Rules are reasonable in light of the Law Society's statutory mandate. It is reasonable for the Rules to expose a lawyer to a suspension as a consequence for non-compliance with the CPD program. The Act provides clear authority for the Law Society to create a CPD program that can be enforced by means of a suspension, and the overall purpose of the Act, the words used in it and the scheme of the Act show that the impugned rules are reasonable in light of the Law Society's statutory mandate. A suspension, the purpose of which related to compliance, not to punishment or professional competence, is a reasonable and effective way to ensure consistency of legal service across the Province and to guarantee that even lawyers who are not interested in meeting the educational standards will comply.

There were two dissenting Justices to this decision. They had procedural fairness and natural justice concerns because the Society did not provide for an appeal of the suspension. They also saw the suspension for non-compliance as disciplinary in nature. However, the Court of Appeal found the suspension as administrative and therefore it did not require the procedural provision typically available when there is a charge of professional misconduct or incompetence. The majority SCC Justices also held this point of view. They also elaborated on their decision as follows:

A lawyer's professional education is a lifelong process. Legislation is amended, the common law evolves, and practice standards change as a result of technological advances and other developments. Lawyers must be vigilant in order to update their knowledge, strengthen their skills, and ensure that they adhere to accepted ethical and professional standards in their practices....

CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism. CPD programs have in fact become an essential aspect of professional education in Canada.

To ensure that those standards have an effect, the Law Society must establish consequences for those who fail to adhere to them. As a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational.

A suspension is a reasonable way to ensure that lawyers comply with the CPD program's educational requirements. Its purpose relates to compliance, not to punishment or professional competence. Other consequences, such as fines, may not ensure that the Law Society members comply with these requirements. An educational program that one can opt out of by paying a fine is not genuinely universal.

I have quoted extensively from this SCC court case to give readers access to the thoroughness of the decision and to the thoughtful reasoning that informed it. Also, it is reasonable to conclude that: the views expressed about the significance of the legislative statutory authority granted to regulatory bodies to protect the public interest, the considerable discretion given to regulators to pursue this mandate, and the importance of continuing professional development as a contemporary quality assurance requirement, can be applied to all professional regulatory bodies including those that regulate counsellors and psychotherapists. Information about this case can be found at **<http://canlii/t/h2wxl>**.