Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

An Unusual Case

by Bernie LeBlanc
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Last Thursday the Supreme Court of Canada did something unusual. It decided a case dealing with professional regulation. Even more unusual, the case dealt with something other than complaints and discipline. In fact, the case dealt with continuing professional development (CPD), a topic that has reached any court only a handful of times.

But beyond these superficial observations, *Green v. Law Society of Manitoba*, 2017 SCC 20 provided important guidance to regulators on a number of topics that are rarely touched upon.

Mr. Green, a senior lawyer, was simply not interested in doing twelve hours of continuing professional development each year. He challenged the validity of that requirement and the fact that he faced suspension if he refused to comply with it.

Reviewing Rule-Making

The first issue considered by the Court was on what basis Courts should review "rules" made by professional regulators. Rules include regulations, by-laws, formal rules and standards of practice. This issue gained prominence in the last few years because in the western provinces some lower courts have looked quite closely at the authority of pharmacy regulators to prohibit the offering of inducements (e.g., points cards) to patients buying drugs. The lower courts in the *Sobeys West* line of cases had demanded empirical evidence to support the public interest merits of such a rule.

The majority in *Green* concluded that courts needed to give significant deference to the regulator for a number of reasons, including:

1. The regulator was acting in a legislative capacity balancing myriad interests and considerations. The legislation gave that exercise of discretion to the regulator, not the courts.
2. The enabling statute deliberately provided the regulator with a high degree of independence.
3. The regulator was interpreting its home statute and thus had expertise in the public interest intent and goals of the legislation.
4. In addition, the professional members of the regulator's Board were elected by the profession and thus had some accountability to the profession as well.
5. In this case, the language of the enabling statute provided broad and general powers to the regulator.

As a result courts should uphold any reasonable choice of rules made by the regulator.

Mr. Green argued that in the enabling legislation, suspensions were explicitly provided for in four specific circumstances, none of which related to CPD. He argued that this created an implied exclusion preventing the regulator from imposing suspensions in other circumstances. The majority of the Court rejected this argument not only because it diminished the degree of deference required by the courts, but because it prioritized a technical textual argument over the overall purpose of the legislation. This observation is important because regulators frequently face the argument that because the Act otherwise

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provides for a remedy (e.g., remediation), they cannot impose it in other contexts. Most recently this argument was made in *Zaki v Ontario College of Physicians and Surgeons*, 2017 ONSC 1613.

This is not to say that a court will never examine the reasonableness of a rule enacted by a regulator. Where the rule was enacted for an improper purpose unrelated to protecting the public or it is discriminatory in the human rights sense of that word, the rule will be disregarded: *Brar and others v. B.C. Veterinary Medical Association and Osborne*, 2015 BCHRT 151. In the *Green* case there was no doubt that the rule had a valid public interest reason.

Judicial Perspectives on Quality Assurance

Sometimes courts look at CPD and other quality assurance programs with a "disciplinary" lens imposing procedural and other fairness requirements on those programs because of their intrusive nature: *Chong v. College of Physicians & Surgeons of Ontario*, 2004 CanLII 14842 (ON SCDC). In fact the reasons of the two dissenting Justices in *Green* could be viewed from that perspective. They characterized the suspension for non-compliance as disciplinary in nature and were concerned that no express procedural protections accompanied the imposition of the suspension. The dissenting justices also minimized the importance of CPD, viewing non-compliance "… as close to a victimless breach as it is possible to imagine ...".

However, the five majority Justices took a more nuanced approach to CPD. They began their judgment by saying:

> 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.

The majority noted that, prior to CPD becoming mandatory, many lawyers did not participate in any. The majority saw mandatory compliance as important:

> 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's members comply with those requirements. An educational program that

> one can opt out of by paying a fine is not genuinely universal….
>
> To ensure consistency of legal service across the province, the possibility of a suspension effectively guarantees that even lawyers who are not interested in meeting the educational standards will comply. Mr. Green submits that, in his opinion, the CPD activities that were made available to him would not have been helpful to him in his practice. But it is not up to Mr. Green to decide whether CPD activities are valuable or adequate….
>
> The right to practise law is not a common law right or a property right, but a statutory right that depends on the principles set out in the Act and the rules made by the Law Society.

It is significant that the majority affirmed the importance of quality assurance and that mandatory compliance with the program should not be viewed as disciplinary or punitive.

Administrative Suspensions

Another rare aspect of the *Green* case is the extensive discussion given to the concept of administrative suspensions. Most regulators use administrative suspensions for failing to pay fees or provide annual renewal information. Many regulators also use them to compel compliance with quality assurance requirements including CPD.

The dissenting Justices in this case were concerned that the automatic nature of the suspension in this legislative scheme was unfair because of the absence of procedural safeguards (like an appeal) and because suspensions were second only to revocation in seriousness.

The majority, however, viewed the suspension as administrative, not disciplinary, with the intent to compel compliance and not to punish. The fact that the suspension ended as soon as the practitioner completed the missing education showed that it was not punitive but was instead being used as a tool to achieve compliance.

Even more interesting, the majority said that even though the legislation suggested that the suspension was automatic, it was not. While the legislation appeared to state that the suspension occurred once the 60-day notice period had elapsed, the majority said there was discretion in the CEO of the regulator to make exceptions. The majority said that the CEO had the implied authority to delay issuing the notice letter, unilaterally extend the time for compliance beyond the 60-days, and consider requests for special consideration that might be made by the practitioner. In fact, the majority stated that additional procedural safeguards might be legally required (e.g., receiving and considering submissions) in some circumstances.

This procedural duty might become significant where the criteria for suspension are not entirely objective (e.g., where it is disputed as to whether the CPD requirements were met).

The discussion by the Court on this topic will provide guidance to regulators in any administrative suspension context.

To read the full text of this unusual case go to: http://canlii.ca/t/h2wx1.