

Accountability of Examination Bodies

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Many professions have entry-to-practice examinations administered by external bodies (often national associations). Since successfully passing the examination is a legislative requirement for registration, are the associations subject to the judicial scrutiny afforded regulators? In *Fawcett v. CCEB*, 2010 ONSC 4903, the court said no.

The only thing preventing Jennifer Fawcett from becoming a chiropractor was passing the national clinical exam. She missed the published deadline for applying to sit the exam because of financial difficulties in paying the fee (she had student debts of more than \$80,000 and the exam fee was \$1,350). She asked to be permitted to apply late but was refused. The missed deadline created a four month delay in her ability to enter the profession. In fact, she had a job offer that would be withdrawn if she did not pass the upcoming sitting of the exam.

The Canadian Chiropractic Examining Board (CCEB) is a federal not-for-profit corporation. While its members are statutory regulatory bodies, the CCEB itself is not. The CCEB administers the national entry-to-practice examination for the chiropractic profession.

The first issue was whether the CCEB was a public body subject to judicial review. The Court said no:

[47] The fact that the provincial regulatory bodies have chosen to rely on successful completion of the CCEB's examinations as evidence of a candidate's knowledge and skill in the field of chiropractic medicine, prior to the college itself considering the candidate for licencing, does not imbue the CCEB with any statutory or regulatory power. The CCEB is not a licencing entity. The power to license chiropractors in Ontario remains at all times with the

College of Chiropractors of Ontario which is obliged by the *Regulated Health Professions Act*, above, to "[r]equire... the successful completion of examinations as set and approved, from time to time, by the college, other persons or associations of persons."

However, the Court held that the CCEB was bound by the rules of natural justice and procedural fairness:

[58] Nevertheless, as noted above, there are public aspects to the functions of the CCEB that demand that it show procedural fairness and respect the principles of natural justice in the manner in which it discharges its examination administration responsibilities and exercises its decision making authority and discretion. Further, it is plain that discretionary authority must be exercised in good faith and not for improper purposes, and decision makers must not decide in advance how they will exercise their discretion.

The difference of scope of the judicial review is that it examines the fairness of the procedure, not of the substantive requirements themselves: "[R]eviewing courts remain unwilling to interfere with policies established by such non-statutory entities or the procedural decisions they reach in the absence of manifest unfairness."

Examination bodies will be particularly interested in the Court's discussion about the challenges to the examination procedure. The Court found that the CCEB's website was clear about the application and fees deadline and that there was no late period available for the clinical exam. The Court also found that there were logistical reasons for the deadline. The Court was impressed with the three levels of internal appeals within the CCEB and that Ms. Fawcett was fairly heard and given adequate reasons for their decision.

Also of interest is that the CCEB's policies permitted exceptions to be made in "extraordinary circumstances". The court held that the CCEB was reasonable in concluding that personal hardship to Ms. Fawcett did not constitute extraordinary circumstances in her case,

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particularly since the missed deadline had not been the fault of the CCEB.

Regulators and examination bodies should take the following points from this case:

1. Examination bodies are not treated as if they are regulators simply because they offer an exam that is required for registration in the profession.
2. Examination bodies still have a duty to follow a fair process.
3. Clearly wording the exam rules on the examination body's website can help defend against later challenges.

The *Fawcett* case can be found at: www.canlii.org.

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