

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

No Contest

The concept of a “no contest plea” is quite American. It is not a part of the criminal justice system in Canada.

Basically it involves a statement by the defendant authorizing the tribunal to accept the facts as correct for the purpose of the particular proceeding. The defendant is also not objecting to a finding being made against him or her on those facts. However, the defendant is not actually admitting to the allegations.

The purpose of a no contest plea is for the defendant to be able to accept a finding without having to admit the facts for the purpose of other proceedings. For example, a person suing the defendant civilly cannot use the plea as an admission of the conduct. In the United States, the concern of a civil action is pronounced.

In addition, for some individuals, there is extreme reluctance to admit to certain facts even though it is likely that the facts can be proved. That, of course, is one of the criticisms of the no contest plea. In the purist Canadian view, courts and tribunals should not be able to rely upon facts that the individual does not accept as true unless

they are proved at a hearing. A related criticism is that an individual should not be able to plead no contest in a proceeding and then emerge from the hearing room saying “I did nothing wrong, I just wanted to put this matter behind me”. Such scenes are not uncommon in the United States.

A number of disciplinary tribunals have adopted a no contest plea process, including the College of Physicians and Surgeons of Ontario, the Ontario College of Teachers and the Canadian Society of Immigration Consultants. The process is used there even for serious cases (e.g., sexual abuse). This is possible, in Ontario at least, by virtue of the ability of tribunals to make rules of procedure and to waive the requirement for a hearing under the *Statutory Powers Procedure Act*.

In the professional misconduct realm, it is implausible when someone pleads no contest to then suggests that they did nothing wrong. The fact remains that the individual accepted the making of a finding of professional misconduct against them.

Last week, the Ontario Securities Commission (OSC) released a proposal to permit no contest pleas in their proceedings. The consultation is a part of their proposed enforcement initiatives (which include

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enhancements to their voluntary self-reporting program, in return for no enforcement proceedings). The OSC consultation document reads, in part, as follows:

Settlement agreements support a number of important public interest objectives. They include:

- expediting a formal resolution of a matter;
- reducing the expense of conducting a contested enforcement action, which frees resources to work on other enforcement matters;
- obtaining earlier regulatory sanctions in respect of, and commitments from, market participants to prevent ongoing and/or future harm to investors or capital markets; and
- facilitating the cooperation of individuals who may provide ongoing cooperation and assistance to staff in connection with enforcement action taken against others.

Despite the interest on the part of respondents to resolve a matter with staff, some settlements cannot be finalized because respondents will not make admissions due to the potential risk to them of making public statements.

The OSC proposes that the no contest plea would not be available in all circumstances.

Key elements of the No-Contest Settlement program include:

1. The Respondent proposing to enter into a No-Contest Settlement must have cooperated with OSC staff during the

investigation. Examples of such cooperation include:

1. the Respondent self-reported the misconduct in a timely manner;
 2. the Respondent took remedial steps to address the non-compliance – including (as appropriate) providing compensation to affected third parties where applicable and implementing enhanced internal control procedures at the organization, preferably prior to the self-reporting but in any event contemporaneously with providing cooperation to OSC staff; and
 3. the Respondent provided cooperation to OSC staff in connection with enforcement activity directed at other persons; for example, the person may have initially sought a No-Enforcement Action Agreement, and despite not being the first person to contact OSC staff to on the matter but continued to provide ongoing assistance to OSC staff where an Agreement was not available.
2. The No-Contest Settlement must meet the public interest requirements set out in the *Act* in respect of orders made pursuant to section 127.
 3. The Respondent has not previously been the subject of enforcement or regulatory activity by the OSC or any other agency.

The OSC is receiving submissions on the proposal until December 20th, 2011.