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

Regulators Breathe a Sigh of Relief

by Richard Steinecke
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Last week two of the most anticipated (by professional regulators) court decisions in years came down. In both cases, puzzling rulings about the authority of regulators were set aside and more understandable expectations were confirmed.

Rule Making

In *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, various rules prohibiting incentives from pharmacists to patients on the sale of drugs were set aside because the lower Court thought the regulator's rules went too far to address a largely hypothetical concern. The Court of Appeal reversed the lower Court decision and upheld the impugned by-laws.

First the Court was concerned about the admission of new evidence on judicial review about what the governing Council of the regulator "should have" considered. Permitting those who disagree with a regulator's rule to file new evidence, in the course of the judicial review, as to why the rule is unwise converts the judicial review into a new trial. It is not the function of the reviewing Court to redo the decision initially made by the regulator.

The main issue was whether the lower Court scrutinized the regulator's rules too closely. In a statement that is bound to be quoted extensively by regulators in the future, the Court of Appeal began by acknowledging that the concept of "public interest" is a broad one. The Court said: "There can be no doubt that "public interest" in this context extends to the maintenance of high ethical standards and professionalism on the part of the profession."

The Court of Appeal then went on to give deference to the governing Council's expertise and rule making role:

> I agree that the chambers judge did, with respect, err by failing to ask whether on the whole, the bylaws lay within the range of reasonable measures given the Council's concerns. Although the evidence supporting the need for the bylaws was thin, the Council was not, in the absence of a *Charter* challenge, required to select the least intrusive path, nor to wait until there was empirical evidence demonstrating the harm of customer incentive programs. The question was whether, given the expertise of Council members and their concerns, the bylaws represented a reasonable response. This was a question of policy that would benefit from the particular expertise of pharmacists as opposed to a court of law….
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> Here, the Council, acting *bona fide*, was of the view that customer incentives offered by pharmacies were a matter of concern to the public interest. There was some evidence – anecdotal though it may have been in whole or in part – to support those concerns. The Council was obviously anxious to preserve the professional standards of pharmacists across the province.

While the Court of Appeal ruling is welcome, given the language used in the reasons, regulators would be

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wise to prepare detailed briefing notes to support significant policy decisions.

Assessing International Qualifications

Regulators were also concerned about a 2014 Human Rights Tribunal decision from Alberta. The Tribunal "found that [the Alberta regulator for professional engineers] 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."

In *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61 the Court reversed the Human Rights Tribunal finding and upheld the regulator's registration requirements. The Court found that an applicant's place of education may be so closely linked to his or her place of origin, such that discrimination on that basis would be contrary to the human rights Code.

However, the Court held that having different registration requirements for unaccredited educational programs was not discriminatory in this case:

> The evidence cited by the Tribunal was clear that the distinction between accredited or equivalent programs and other programs is not based on assumptions, but on knowledge about the programs. When APEGA distinguishes between graduates of known and tested engineering programs as compared with graduates of relatively unknown programs, it is not assuming that the latter have inferior academic qualifications. Equally, it is not assuming that they have a substantially equivalent education. It simply does not have the information to know.

In addition, having a universal professionalism examination and a Canadian experience requirement was not discriminatory, for professional engineers at least. There was, however, an adverse impact based on place of origin in the requirement for the applicant to sit various additional examinations.

Nevertheless, that adverse impact was justified in this case. Assigning these examinations was necessary "in order to assess the quality of the undergraduate engineering programs undertaken by them. [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."

Doing so was "consistent with its objective of ensuring the competency of professional engineers". The Court also said: "possession of entry level engineering competence is, obviously, reasonably necessary to safe practice as a professional engineer."

The Court was also concerned with some of the orders of the Tribunal, such as to assess in advance the equivalency of education of hundreds of international schools and to provide extensive individual assistance to 375 international applicants a year. These measures indicated an unreasonable weighing by the Tribunal of undue hardship on the regulator and a fundamental alteration of the regulator's mandate.

These decisions can be found on www.canlii.org.