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Justice for Some

By: Alice Woolley

Case Commented On: *Green v Law Society of Manitoba*, 2017 SCC 20 (CanLII)

On March 30, 2017 the Supreme Court issued its judgment in *Green v. Law Society of Manitoba*, 2017 SCC 20 (CanLII).

Rarely have so many judicial resources been spent on a case worthy of so little.

Sidney Green was called to the bar of Manitoba in 1955. In 2011, the Law Society of Manitoba introduced a requirement that all lawyers complete 12 hours of professional development a year. Mr. Green refused to participate. He said that "the CPD activities available to him would not have been helpful to him in his practice" (at para 48). The CEO of the Law Society of Manitoba sent Mr. Green a letter "notifying him that if he did not comply with the Rules within 60 days, he would be suspended from practising law" (at para 10). The CEO also told him, however, that Mr. Green should let the Law Society know if it had made a mistake, and if he needed more than 60 days that period could be extended (at para 10). Mr. Green still did not complete his professional development. Instead he sought judicial review and retained Charles Huband, formerly of the Manitoba Court of Appeal (1979-2007), to assist him.

Mr. Green's application was unsuccessful at the Manitoba Court of Queen's Bench (2014 MBQB 249 (CanLII)). It was unsuccessful at the Manitoba Court of Appeal (2015 MBCA 67 (CanLII)). The Supreme Court nonetheless granted leave.

The only issue at the Supreme Court was whether the Law Society could impose an automatic suspension on Mr. Green. A majority of the Court agreed that it could, distinguishing an administrative suspension (such as those imposed on lawyers who forget to pay their fees) from a disciplinary suspension. It noted that the suspension for non-compliance with CPD is not treated by the Law Society as providing "grounds for a finding of misconduct or incompetence" (at para 60). The public is not given any notice of the suspension, and the suspension is not included on the lawyer's disciplinary record (at para 61). Two judges disagreed, holding that the Law Society could not impose an automatic suspension, because "A suspension is a suspension is a suspension" (at para 94), and because the Manitoba rule permitted no exceptions for health or personal reasons.

Although, as I discuss below, some aspects of the Supreme Court's judgments merit discussion, the case itself hardly seems to satisfy the standard of "public importance" that the Court ostensibly uses when deciding whether to grant leave (Supreme Court Rules, Rule 25(c)). A law society imposed an extraordinarily modest requirement that a lawyer make some effort to remain current in the law, a requirement surprising only insofar as it was not imposed until 2011. A lawyer – who was called to the bar when Louis St. Laurent was Prime Minister – refused to comply, providing no reason for that failure beyond his own disinterest and self-confidence in his abilities. The Law Society took action against him only after two years of non-compliance (at

para 10), and even then only threatened suspension, it did not impose it. Suspension could be avoided by the lawyer enduring – at worst –12 hours of boredom (hours which, the lawyer acknowledged, the Law Society was legally entitled to require him to spend on continuing professional development). And even if it had been imposed, the suspension would not be in the public record, and would not increase the lawyer's risk of discipline for misconduct.

Further, and most importantly, the lawyer had his day in court. His case was heard by a trial judge, and then by the Manitoba Court of Appeal. Not one judge at those courts viewed it as having any merit.

Given that context, I struggle to understand the Supreme Court's decision to hear the case. The Court in 2014 granted leave in 50 cases, and refused it in 430 (10.4%). In 2015 it granted leave in 43 cases, and refused it in 424 (9.2%). In 2016 it granted leave in 48 cases, and refused it in 447 (9.7%) (see 2002-2016 statistics, here). It seems strange to think that Mr. Green's claim to injustice, the legal merits of his argument, or the inadequacies in the reasoning of the courts below, were capable of putting his case in the top 10%.

Normally this would only mildly bother me, if at all. If the Supreme Court gets excited about an issue that seems so manifestly unimportant, it might even be endearing – a nerdy enthusiasm for things not of general interest.

But also in March an Ontario judge, Justice Pazaratz, was celebrated and called "magnificent" for excoriating poor people who asked him to adjudicate their dispute over a protection order. And so this is the legal system that I saw last month: a disgruntled octogenarian who refuses for no reason to comply with a reasonable regulatory requirement gets the respectful time and attention of the Supreme Court of Canada. Poor immigrants are pressured by a trial judge to settle a legitimate legal dispute *and* abused for wasting taxpayer resources. Could any clearer example exist of the difference between being a poor racialized immigrant and being a white wealthy professional in Canada's legal system? Perhaps we can think on that next time we look smugly at our American neighbours.

Other Comments

In rejecting Mr. Green's appeal, the Court considered the appropriate standard of review to be applied to the Law Society's decision to impose mandatory continuing professional development, and to impose an automatic suspension on lawyers who failed to comply with that requirement. Not surprisingly given recent case law, the Court imposed a reasonableness standard of review. A few aspects of its decision to do so are of note, however.

First, the Court employed the standard that it had used to review municipal by-laws in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII). It held that the Law Society's rule would only be set aside if "the rule 'is one no reasonable body informed by [the relevant] factors could have [enacted]'" (at para 20, citing *Catalyst* at para 24).

Its use of this especially deferential standard supports the claim that the Court varies in its application of reasonableness depending on the context, and that some decisions will *de facto* receive more deference than others. The Court has of course consistently rejected the proposition that reasonableness review varies in intensity (most recently in *Wilson v. Atomic Energy Canada,* 2016 SCC 29 (CanLII) (at para 18 per Abella J. and para 73 per Cromwell J.), while just as consistently acknowledging that reasonableness review "takes its colour from the context"

(*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII) at para 59). The *Green* case suggests, as *Catalyst* did before it, that whatever caveats and phrases the Court employs to describe its approach, what is sufficient to make one decision reasonable will be different from what is sufficient to make another decision reasonable. Or, to put it differently, the Court will be more reluctant to interfere in some administrative decisions than in others.

Second, in applying the presumption of reasonableness, the Court does not rely on the administrative decision-maker's *interpretation* of its home statute (the phrasing usually employed by the Court – see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 (CanLII) at para 41). Rather, it says that the presumption applies because the Law Society "acted *pursuant to* its home statute" (at para 24, emphasis added). This change in phrasing is significant, and may suggest wider application of the reasonableness presumption. Since administrative decision-makers are creatures of statute, *every* decision they make must be made pursuant to a statute, and if the statute enables the administrative decision-maker's actions, then it is by definition a home statute ("the administrator's enabling statute (the 'home statute')" – *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII) at para 124). As such, if the presumption applies to actions taken "pursuant" to a home statute, then it will apply to every action taken by an administrative decision-maker. Even if a party claims that the administrative decision-maker did *not* act pursuant to its home statute, the issue before the court will be whether or not it did so, and that question will, presumptively at least, be reviewed on a reasonableness basis.

Third, in relying on *Catalyst*, the Court observes that "benchers of the Law Society are elected by and accountable to members of the legal profession" and identifies as "apt" *Catalyst's* observation that "courts must respect the responsibility of elected representatives to serve the people who elected them" (at para 23). I have some qualms with the Court's analysis on this point. While benchers are elected, their statutory duty is to regulate in the public interest (as the Court itself notes at para 29). To the extent that the public interest diverges from the interests of the profession, benchers may have a legal duty *not* to serve the people who elected them. That is not to say that the election of benchers has no relevance to the Court's approach to deference, but just that this analogy may obscure an important point about the nature and purpose of professional regulation.

As noted at the outset, the division between the majority and the dissent in this case was primarily with respect to the propriety of the Law Society's imposition of an automatic suspension on lawyers who fail to fulfill their continuing professional development requirements. In my view, the majority's reasons are overwhelmingly more persuasive. The dissent does fairly observe that the Manitoba rule, unlike other provinces, does not explicitly include exemptions or exceptions for lawyers with health or personal barriers to completing their professional development (at para 86). As the majority notes, however, the Law Society in practice did offer Mr. Green the opportunity to seek an extension, and Mr. Green offered no reason for his non-compliance beyond his disinterest in complying. In addition, while this point is not noted by the majority, it is not obvious that a lawyer whose personal and health issues are so significant that he or she cannot complete 12 hours of professional development a year should be licensed to offer services to the public.

Further, the dissent's judgment reflects a dated model of lawyer regulation. The major premise of the dissent is, as noted, that "A suspension is a suspension is a suspension" (at para 94). It emphasizes that "Public confidence in a lawyer's professionalism is inevitably undermined when it learns that a lawyer has been suspended. The reason for the suspension does not magically

transform a punitive consequence into an administrative one" (at para 95). Yet the dissent does not note that the statute clearly does permit automatic suspension for administrative matters – most notably the non-payment of fees (at para 39). As a lawyer who was once suspended because I forgot to mail my cheque to the Law Society on time, I cannot accept the dissent's premise that any suspension, no matter the reason, undermines the lawyer's professionalism or would be seen to do so by the public. In addition, while the "economic costs" of a suspension might be "manifest" (at para 95) if it were difficult to have a suspension lifted, all a lawyer has to do with an administrative suspension is remedy the error and pay a reinstatement fee (in my case, an extra $99). The costs of such a suspension are minor, both reputationally and economically.

Most importantly, however, the dissent's approach would push law societies to emphasize a punitive and reactive approach to regulation, rather than moving toward a proactive and compliance based approach. Compliance-based regulation asks lawyers and law firms to implement procedures and protocols likely to improve practice management, to create ethical infrastructure, and to generally increase the likelihood that they will satisfy their legal and ethical obligations (see, e.g., the Nova Scotia Barrister's Society's innovations, links here). Compliance-based regulation moves away from punishing lawyers for misconduct, and toward helping them to avoid legal or ethical problems. But compliance-based regulation does require mechanisms to ensure that lawyers undertake the steps necessary to achieve the desired outcomes. That includes deadlines for implementing requirements and sanctions for not doing so. If the dissent's approach was followed, and the law society could not impose automatic consequences for not meeting deadlines, the compliance model would revert to a discipline model. A failure to create an ethical infrastructure, for example, would be viewed as a disciplinary matter, instead of being what it should be, which is an administrative one. It encourages a hostile and conflictual relationship between lawyers and law societies, which many of these regulatory innovations are designed to avoid.

Finally, the most unfortunate presence of Mr. Huband as counsel for Mr. Green must be mentioned. Mr. Huband was, as noted earlier – and as he boasts on his website – a judge on the Manitoba Court of Appeal for 28 years. In that role, and as part of the small community of Canadian judges, he had the opportunity to know many Canadian judges, and in particular those working in Manitoba. He also gained intimate knowledge of how Canadian courts work, knowledge literally inaccessible to the vast majority of other lawyers. And he especially had knowledge about the court on which he sat, and on the court over which that court had oversight, two of the courts in which he appeared as Mr. Green's counsel. In my view, having a retired judge appear before the courts, and most especially the court on which he sat, and the court over which that court had jurisdiction, brings the administration of justice into disrepute. A retired judge such as Mr. Huband enjoys a gold-plated pension from his years as a judge, and simultaneously uses the years he spent in that office for commercial advantage. His work as counsel provides one party to the proceeding with information and connections the other party cannot obtain, and reinforces the troubling advantages to the wealthy and the privileged that already inhere in our legal system. I wholeheartedly support the Federation of Law Societies' proposal to introduce a rule into its Model Code to "prohibit all former judges from appearing before or communicating with any court" (Federation of Law Societies of Canada, Model Code of Professional Conduct Consultation Report, January 31, 2017, at para 18). Mr. Huband's appearance on this case, and particularly in the Manitoba courts, was an embarrassment to our legal system. It ought not to happen again.

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