



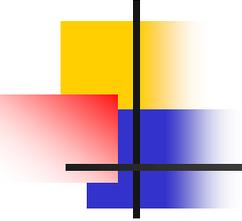
**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*

**Engineers Canada Open Forum  
May 25, 2017**

# **Green v. Law Society of Manitoba**

**Bob McDonald, P.Eng., MBA, LL.B.  
Executive Director & Registrar, APEGS**



# History of CPD

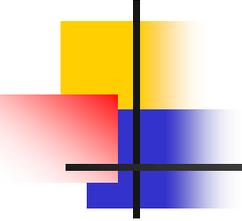
---

- In 2007, the benchers approved rules requiring all members to report CPD hours
- LSM collected and studied CPD hours for two years. Many members had reported completing no CPD hours or less than one hour per month of practice
- LSM's Admissions and Education Committee recommended to the benchers that program become mandatory. The CEO advised benchers that voluntary CPD was not working
- Benchers considered recommendation and consulted with the membership.
- Benchers approved mandatory CPD and amended rules accordingly



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Mr. Green

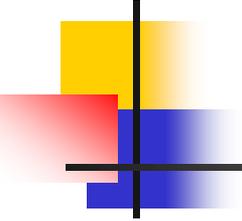
---

- Sidney Green was a member of the Law Society of Manitoba since 1955, and a former bencher. In the past, he instructed CPD workshops
- Green refused to complete the minimum 12 hours of annual CPD activities prescribed by the rules of the Law Society of Manitoba (LSM)
- Green did not respond to a letter outlining possible suspension, providing an opportunity to correct records or advising he could seek an extension. The LSM did not send a letter for over a year before sending Green a letter. Green's practicing certificate was suspended effective July 30, 2014.
- Green challenged the validity of the rules by seeking a statutory declaration that the LSM rules were invalid (as opposed to seeking a judicial review of the suspension (we will see this later)
- Note that the LSM did not enforce the suspension until the litigation was resolved



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Judicial History

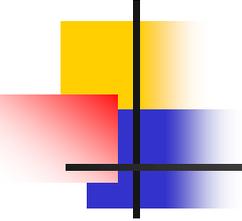
---

- Manitoba Court of QB – judgment dated December 17, 2014
- Manitoba Court of Appeal – judgment pronounced June 17, 2015; written decisions July 2, 2015
- Supreme Court of Canada – judgment dated March 30, 2017
- Two point of interest:
  - It is unusual to see the SCC grant leave to appeal on a matter such as this
  - It is unusual to see a matter work its way through the courts this quickly



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Grounds of Challenge (QB)

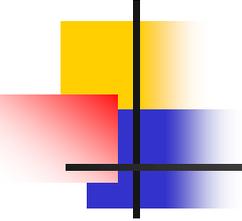
---

- Two grounds for challenging the rules:
  - The Legal Profession Act does not explicitly permit the LSM to enact mandatory CPD rules and enforce suspensions for the violation of these rules; and
  - The Act and rules of the LSM, pursuant to which he was suspended, violate the rules of natural justice because they give the LSM the authority to enact a suspension without a hearing or a right of appeal



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# *The Legal Profession Act*

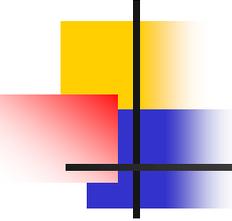
---

- The Act sets out the statutory framework:
  - 3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.
  - 3(2) In pursuing its purpose, the society may . . . establish standards for the education, professional responsibility and competency of persons practicing or seeking the right to practice law in Manitoba



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# *The Legal Profession Act*

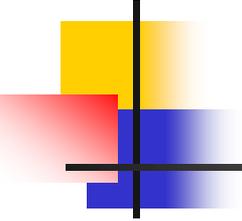
---

- Power to make rules:
  - 4(5) In addition to any specific power or requirement to make rules under this Act, the benchers may make rules to manage the society's affairs, pursue its purpose and carry out its duties.
  - 4(6) The rules are binding on the society, the benchers, the members and everyone who practices or seeks the right to practice law under the authority of this Act . . .



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# *The Legal Profession Act*

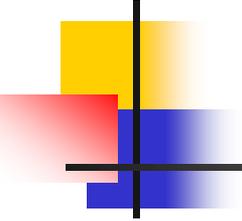
---

- Practice Standards
  - 43 The benchers may
    - . . . .
    - (c) establish and maintain, or otherwise support, a system of legal education, including the following:
      - . . . .
      - (ii) a continuing education program
      - . . . .



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# *The Legal Profession Act*

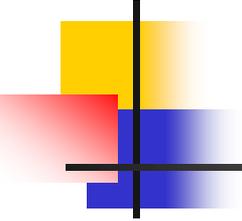
---

- 65 The benchers may make rules
  - (a) to establish consequences for contravening this Act or the rules;
  - (b) to prescribe which contraventions of this Act or the rules may constitute professional misconduct



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Law Society Rules

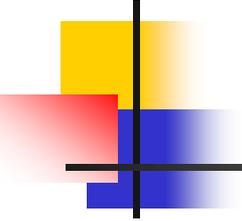
---

- Rules dealing with mandatory CPD:
  - 2-81.1(8) Commencing on January 1, 2012, and subject to subsection (10), a practicing lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practicing status. Where the lawyer maintained active practicing status for three or more months in the calendar year, one and a half hours of the total eligible hours must relate to ethics, professional responsibility or practice management.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Law Society Rules

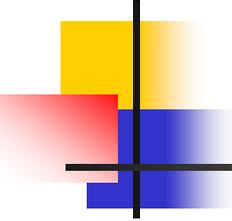
---

- Failure to complete continuing professional development activities:
  - 2-81.1(12) Where a practicing lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practicing law until such time as the requirements have been met and a reinstatement fee paid.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Findings – Judge Rempel (QB)

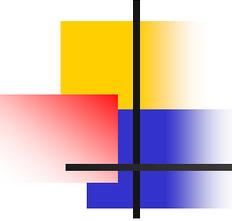
---

- Judge Rempel noted the following:
  - that failure to comply may result in a suspension but does not trigger a complaint to Investigation Committee
  - Failure to comply is not placed on the same scale as unprofessional conduct, conduct unbecoming or incompetence (which provide for a hearing)
  - Only repeat offenders are subject to the possibility of referral to the Investigation Committee (Rule 2-81.1(13))



A P E G S

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Findings – Judge Rempel (QB)

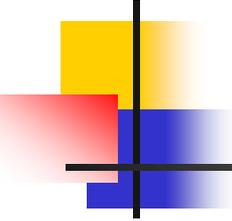
---

- Judge Rempel also noted the following:
  - The rules requiring LSM members with practicing certificates to engage in mandatory CPD programs are in my opinion fully authorized by the Act
  - The omission of the word “mandatory” in the Act when describing continuing legal education is not in my opinion fatal to the creation of mandatory CPD requirements in the rules
  - I am satisfied that the Legislature empowered the LSM to make the CPD rules mandatory on members



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Findings – Judge Rempel (QB)

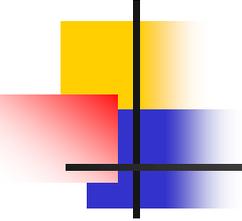
---

- Natural Justice and Procedural Fairness:
  - Mr. Green may have a right to practice law in Manitoba, it is a right under the total control of the LSM as provided in the Act
  - Pearlman v. Manitoba Law Society Judicial Committee (SCC):
    - . . . The Law Society has total control over who can practice law in the province, over the conditions or requirements placed upon those who practice, and, perhaps most importantly, over the means of enforcing respect for those conditions or requirements
  - The LSM is imposing an obligation on its members that the Act entitles it to do



A P E G S

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*

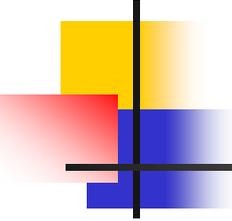


## Standard of Review

# Procedural Fairness

---

- In administrative law decisions, the court will typically examine and instruct itself on whether the standard of review is one of correctness or reasonableness.
- I agree with Mr. Green that the LSM is under a duty to act fairly before imposing sanctions such as a suspension. But the case law is clear that procedural fairness is contextual and varies based on the circumstances of each case and the subject matter under consideration



# Findings – Judge Rempel (QB)

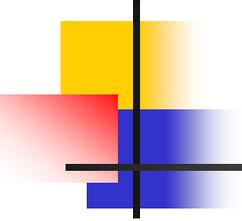
---

- Mr. Green argues that a violation of the CPD requirements does not fit into the category of professional misconduct or conduct unbecoming or incompetence, yet it results in a suspension that runs indefinitely without a right of hearing and without a right of appeal.
- I agree with the LSM that the situation facing Mr. Green is no different than what he would be facing if he had not paid his annual practicing fee on time. The nature of the non-compliance in both cases can be easily established with objective certainty and it is not a matter over which reasonable people might disagree. Non-compliance with the CPD requirements, just like non-payment of fees, does not involve a finding of professional misconduct and the suspension does not in any way call Mr. Green's character, conduct or competence into question.
- The rules as to non-compliance with the CPD rules strike a proper procedural balance, in my view, between the nature or gravity of the offence and the potential penalty.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Parallel Analysis

## What are APEGS' Objects?

---

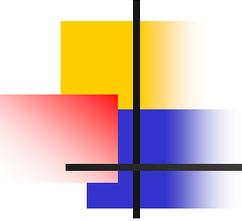
- to ensure the proficiency and competency of members to safeguard the public
- to regulate the practice in accordance with the Act and the bylaws
- to promote and improve the proficiency and competency of members
- to foster the practice in a manner that is in the public interest

Reference: section 5 of *The Engineering and Geoscience Professions Act*



**A P E G S**

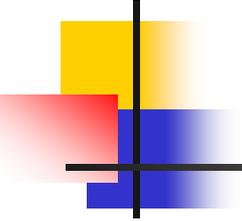
*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# *The Engineering and Geoscience Professions Act*

---

- Subject to this Act, regulatory bylaws may be made pursuant to section 15 for the following purposes:
  - . . . .
  - (c) setting standards of professional conduct, competency and proficiency of licensees
  - . . . .
  - (j) setting standards for continuing education and the participation of members in continuing education



# MB Court of Appeal

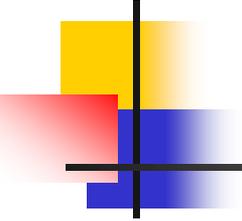
---

- Judge Monin noted Rempel's findings:
  - The necessary statutory authority to enact the rules on the question could be found in a number of provisions of the Act.
  - The Law Society was involved in an administrative suspension akin to what would occur had the applicant failed to pay a prescribed fee. Such non-compliance did not involve a finding of professional misconduct, nor did it call into question the applicant's character, conduct or competency and, therefore, did not fall within the provisions of the Act regarding suspensions for misconduct requiring a formal laying of charges and a hearing.
  - Such an administrative suspension was at the low end in terms of the duty of procedural fairness and was met by way of a written notice that included a warning as to the risks of non-compliance.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# MB Court of Appeal

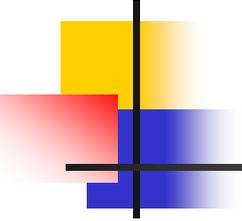
---

- On appeal, Mr. Green advanced similar arguments. The LSM conceded that its position relies upon the general rule making power and the section allowing the benchers to make rules establishing consequences for contravening the rules.
- The appeal was dismissed.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# MB Court of Appeal

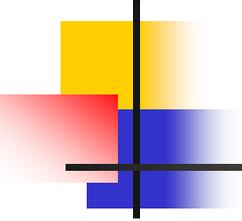
---

- As with all modern self-regulatory constituent statutes, the Act is a public interest statute, not a penal one as submitted by the applicant. The purpose of the statute is not to preserve a monopoly for the members of the Law Society, but to provide protection for the general public that seeks the services of lawyers.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# MB Court of Appeal

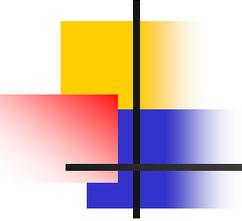
---

- The Court noted the purpose and duties of LSM.
- It is in that context that the rule-making power under s. 4(5) is to be viewed and to be construed. It must be given a broad and liberal interpretation in order to achieve that objective. (*s. 6 of The Interpretation Act*)



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# MB Court of Appeal

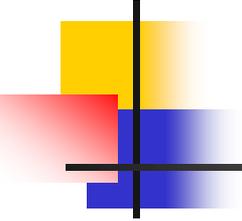
---

- The Law Society has the power to make rules with respect to setting up a continuing professional development program. It specifically says so in s. 43(d) of the Act. We are all of the view that to make such a program mandatory for its members is well within the purview of the benchers of the Law Society. To set such a standard in order to maintain a practicing certificate which, in the benchers' view, serves to protect the public, is in keeping with the duties given to the Law Society under the Act.
- Having the power to make it mandatory, the Law Society clearly has the power under s. 65 to also make rules establishing consequences – a suspension for failing to meet the requirement.
- The suspension is the result of an administrative decision and does not require the implementation of the procedure set out in s. 72 of the Act. It does not warrant an involved type of hearing which the applicant says must be commenced by the Law Society in order to suspend him.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

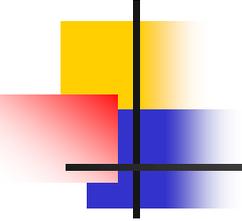
---

- Judge Wagner noted:
  - This appeal concerns a basic component of a lawyer's education: continuing professional development (CPD). At issue is whether the Law Society of Manitoba can impose rules that couple a mandatory CPD program with a possible suspension for failing to meet the program's guidelines.
  - The Law Society is required by statute to protect members of the public who seek to obtain legal services by establishing and enforcing education standards for practicing lawyers.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

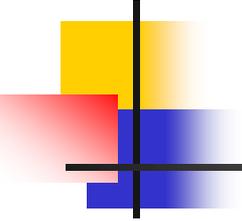
---

- Judge Wagner noted:
  - 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. Most law societies across the country have implemented compulsory CPD programs.
  - If a lawyer fails to complete the required hours of training (CPD hours) even after having been warned, temporarily suspending him or her until those hours are completed is a reasonable way to ensure compliance. This suspension is administrative, not punitive, in nature.
  - The impugned rules with respect to CPD are reasonable in light of the importance of CPD programs and the Law Society's broad rule-making authority over the maintenance of educational standards.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Issues before the Supreme Court of Canada

---

- What standard of review applies to a question regarding the validity of rules made by the law society?
- Having regard to the appropriate standard of review, are the impugned rules valid in light of the Law Society's mandate under the Act.
- Note that Mr. Green did not apply for judicial review of the LSM's decision to suspend him or complain that the LSM treated him unfairly. Mr. Green challenged the rules on procedural grounds.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*

# Supreme Court of Canada

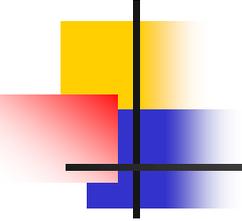
## Standard of Review

- The standard applicable to the review of a law society rule is reasonableness
  - A law society rule will be set aside only if the rule “is one no reasonable body informed by [the relevant] factors could have [enacted]”
  - This means that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature
  - In the case at bar, the legislature specifically gave the Law Society a broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest. The Act empowers the benchers of the Law Society to make rules of general application to the profession, and in doing so, the benchers act in a legislative capacity
  - The Law Society must therefore be afforded considerable latitude in making rules based on its interpretation of the “public interest” in the context of its enabling statute



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Validity of Impugned Rules

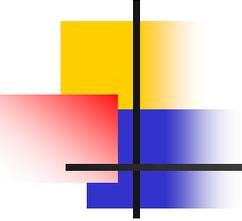
---

- Two-step approach to assessment of whether rules are reasonable:
  - Construe the scope of the Law Society's statutory mandate in accordance with the Court's modern principle of statutory interpretation; and
  - Address whether, in light of the mandate, the impugned rules are unreasonable because they expose a lawyer to a suspension in the event of non-compliance and unreasonable having regard to their procedural protection



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Validity of Impugned Rules

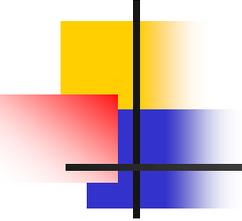
---

- Comments of J. Wagner:
  - It must be borne in mind that the Act does not require the Law Society to set up a CPD program. Rather, it provides that the benchers “may” establish a program and maintain such a program. It would be pointless for the legislature to establish consequences for failing to comply with a program that the Law Society is not even required to set up.
  - . . . since the Law Society has the power to create a CPD program, it necessarily has the power to enforce the scheme’s standards
  - This is consistent with *The Interpretation Act*, which provides that “the power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers” (s. 32(1))



A P E G S

Association of Professional Engineers  
& Geoscientists of Saskatchewan



# Supreme Court of Canada

## Reasonableness of Rules

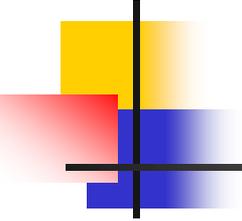
---

- Question: are the impugned rules unreasonable because they permit the imposition of a suspension on a lawyer for failing to comply with the mandatory program?
- Answer: The Act provides clear authority to create a CPD program that can be enforced by the means of a suspension.
- The overall purpose of the Act, the words used in it and the scheme of the Act show that the impugned rules are reasonable in light of the Law Society's statutory mandate.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Reasonableness of Rules

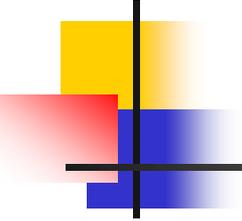
---

- As a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational.
- An education program that one can opt out of by paying a fine is not genuinely universal. I am mindful of the fact that in making these mandatory rules, the Law Society was responding to the reality that many lawyers in Manitoba had not complied with the CPD program when it was voluntary. (para 47)



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Reasonableness of Rules

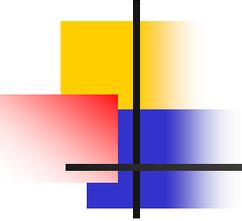
---

- In light of the administrative nature of the suspension and the discretion the CEO has under the Rules when imposing a suspension, I conclude that the fact that the impugned rules do not provide for a hearing or a right of appeal does not make them unreasonable.
- The common law duty of procedural fairness does not reside in a set of enacted rules.
- The duty of fairness is engaged only if the Law Society makes a decision that affects the “rights, privileges or interests of an individual” – Mr. Green did not challenge his suspension but the legislative capacity to make the rules
- In the absence of an application for judicial review, the Court declined to express an opinion on procedures the Law Society might follow



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Administrative Suspension

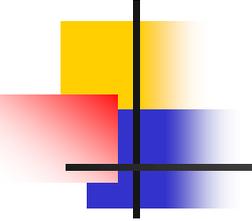
---

- Imposing an administrative suspension on members for failing to comply with the impugned rules without giving such members a right to a hearing or a right of appeal is not unreasonable in light of the Law Society's statutory mandate.
- It must be borne in mind that the suspension at issue in this case is not a disciplinary action.
- While [the Rules] may improve the currency of a lawyer's knowledge, these standards also protect the public interest by enhancing the integrity and professional responsibility lawyers, and promoting public confidence in the profession
- A lawyer's competence in handling a case, to give one example, is not affected by a failure to comply with the CPD requirements. That is why a failure to comply with the impugned rules is on its own not a ground for a finding of misconduct or incompetence.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Administrative Suspension

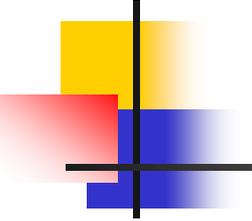
---

- A suspension under the impugned rules is reported and recorded differently than other Law Society suspensions. The Law Society is not required in such a case to give the same notice of a suspension to the public and the profession as it must give where a suspension is imposed by the complaints investigation committee. Nor is a suspension under the impugned rules recorded in a lawyer's discipline record.
- This suspension is similar to the one that may be imposed on a member for failing to pay fees or failing to file an annual trust account report.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada

## Administrative Suspension

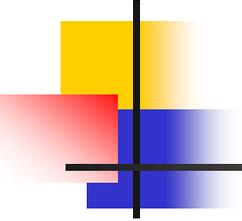
---

- A suspension is not automatically imposed when a lawyer fails to complete the necessary hours. Rather, the CEO “may” send a letter to a member advising that he or she must comply with the CPD requirements. If the letter is sent, the lawyer has 60 days to comply with the Rules. The Rules also do not prevent the CEO from withdrawing a letter during this 60-day period if circumstances justify such a withdrawal.
- Although the impugned rules could have included more extensive procedure, there is no magic formula for making rules with respect to CPD.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# Supreme Court of Canada Dissenting Judgment

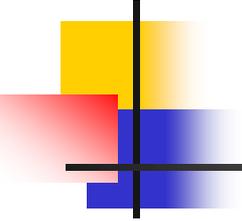
---

- J. Abella wrote a dissenting judgment on behalf of herself and J. Cote. The real issue is the reasonableness of the Law Society's rule that members who do not comply with those requirements are *automatically* suspended.
- A suspension is, in the panoply of a Law Society's disciplinary sanctions, one of the two most serious. The ultimate sanction is disbarment.
- The second most serious sanction [suspension] for one of the least serious professional conduct issues [not reporting CPD] leads to erosion of trust in the professionalism of lawyers.



A P E G S

Association of Professional Engineers  
& Geoscientists of Saskatchewan



# Supreme Court of Canada Dissenting Judgment

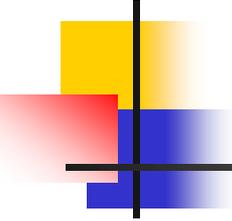
---

- There are no exceptions or exemptions available to any lawyer who, for health or personal reasons for example, is unable to comply with the requirements.
- The discretion of the CEO is limited to permitting a carry over of hours in exceptional circumstances. That means, in reality, an automatic suspension regardless of whether there was a compelling reason for failing to comply.
- This lack of discretion is, in my respectful view, fatal. It is also why judicial review of the CEO's decision is not available.



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*



# For more information or for questions:

---

Contact:

Bob McDonald at APEGS:

300 – 4581 Parliament Ave.

Regina, Saskatchewan S4W 0G3

Phone: 525-9547 (Regina)

1-800-500-9547

email: [rhmcdonald@apegs.ca](mailto:rhmcdonald@apegs.ca)



**A P E G S**

*Association of Professional Engineers  
& Geoscientists of Saskatchewan*