

BC Association of Clinical Counsellors

*Legal Commentary**

College of Psychologists of B.C. v. Utendale: A Long and Winding Road

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* This legal commentary (and other related commentaries) are intended to help clinical counsellors gain a better understanding of legal issues relevant to their practice. It is not intended to be a substitute for legal advice. If a counsellor has a particular concern about an issue that he or she is facing in practice, the counsellor should seek independent legal advice from a lawyer. Neither Mr. Bryce nor the BCACC can provide individual counsellors with legal advice.

EXECUTIVE SUMMARY

In 2007, legal proceedings were initiated by the College of Psychologists of BC against BCACC member, Dr. Kent Utendale. In its petition, the College asked the Court to order Dr. Utendale to stop using the title Psychologist or any abbreviations or variations of that title or the words “psychology” or “psychological”, to stop holding himself out as qualified to practice psychology, and to stop using the title Dr. In response, the BCACC mounted a vigorous defence to support Dr. Utendale’s right to use these titles, etc.

At the end of the resulting Hearing, the Court rejected all of the College’s requested Orders. Unfortunately, and by incorrectly interpreting the then wording of section 3(1) of the Psychologists Regulation, the Court ordered that Dr. Utendale stop using the title Psychotherapist.

In response to the only order issued against Dr. Utendale, the BCACC pursued a Reconsideration Hearing so that the Court could receive new evidence and hear arguments on the issue that it had prematurely decided. However, it was clear that the government had also been monitoring developments in this case.

In 2008, the government made changes to the *Health Professions Act* and the Psychologists Regulation. These changes effectively removed the legal foundation for the Court’s questionable Order regarding the use of the title Psychotherapist.

As a result of the 2007 decision and the later legislative changes, it is now clear that (a) anyone can practice psychology, (b) anyone with a PhD can use the title “Dr” to denote they hold a doctorate degree, and (c) anyone can use the title Psychotherapist if they have the appropriate training and do not suggest they are also Psychologists.

INTRODUCTION

This is a report to the BCACC on the resolution of a dispute between the College of Psychologists of B.C. (“the College”) and a senior member of the B.C. Association of Clinical Counsellors, Dr. Kent Utendale.

Since designation in 1996 under the *Health Professions Act*,¹ by way of the Psychologists Regulation,² the College regulates the practice of psychology by its registrants, most of whom hold post-baccalaureate degrees in psychology. The extent of the College’s jurisdiction over the practice of psychology by persons who are not registrants of the College, such as Dr. Utendale, was the central issue in this dispute.

Dr. Utendale’s resume stated that he held a B.A. (Hons), M.A., M.S.W., and a Ph.D. in social psychology. In addition to being a member of the BCACC, he was also a Registered Social Worker. During his many years of clinical practice, Dr. Utendale had described himself as a psychotherapist, engaged in the delivery of psychological services. At no time did he refer to himself as a “psychologist”, and he never held himself out as a Registered Psychologist or as someone who is eligible to become a Registrant of the College.

As a result of a 2005 complaint to the College filed by a psychologist, the College’s lawyer sent Dr. Utendale a letter demanding that he cease using the words “psychological” or “psychology” to describe his qualifications and clinical practice. Dr. Utendale immediately brought that demand letter to the attention of BCACC Executive Director, Dr. Jim Browne.

As the BCACC’s general counsel and at Dr. Browne’s direction, I responded to the College’s demand on behalf of Dr. Utendale and the BCACC, disputing the College’s interpretation of the legislation then governing the practice of psychology as set out in both the HPA and the Regulation. That response did not have the desired result.

¹ R.S.B.C. 1996, c. 183.

² B.C. Reg. 442/99, replaced by B.C. Reg. 289/2008.

On January 3, 2007, the College's lawyer served Dr. Utendale with a petition initiating legal proceedings against him in B.C. Supreme Court, to seek various court declarations and injunctions. At my recommendation, the BCACC then retained barrister John Ankenman to act for Dr. Utendale as the Respondent in the resulting legal proceedings.

The first Hearing of the College's petition was held before B.C. Supreme Court Justice Stephen Kelleher on April 26, 2007. The Reasons for Judgment were handed down six weeks later on, June 8, 2007; see College of Psychologists of BC v. Utendale.³

SUMMARY OF THE 2007 DECISION

On the basis of the wording of both the *Health Professions Act* and the Psychologists Regulation, as then in force, the College has sought certain Orders against Dr. Utendale, to prohibit him from:

- using the title “psychologist” or any abbreviations or variations thereof;
- holding himself out as a person qualified to practice as a psychologist or any specialty area of psychology;
- using the word “psychology” or any abbreviation or variation thereof in any title or description of his clinical services;
- using title, description or words incorporating the word “psychology”, “psychological” or “psychologist” or other term implying training, experience or expertise as a psychologist in any title or description of his services;
- using the title “Dr.” in the course of providing or offering to provide his professional services.

Mr. Justice Kelleher summarized the three legal issues arising from the College's petition that he determined he had to address in these terms (para. 39).

³ 2007 BCSC 824, [2008] B.C.W.L.D. 831, 2007 CarswellBC 1336, 2007 BCSC 824 (CanLII) (BCSC); posted at <http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc824/2007bcsc824.html>

1. Is Dr. Utendale in breach of the Act or the Regulation by engaging in the practice of psychology?
2. Is it contrary to the Act or the Regulation to use the title "Dr." in the course of providing or offering to provide professional services to the public in British Columbia?
3. Is Dr. Utendale in breach of the prohibition in the Act against using the term "psychologist", a title, description or words incorporating the word "psychology", "psychological", or "psychologist" or other terms implying treatment, experience or expertise as a psychologist in any title or description offered in British Columbia?

It is useful to summarize the evidence and argument on these issues under separate headings.

(a) Engaging in the practice of psychology

At the Hearing, the College argued that the Psychologists Regulation had the effect of granting exclusively to registrants of the College the right to practice psychology, and to provide any psychological services to the public in B.C. The definition of “psychology” in the Regulation was broadly framed, and included references to counselling and psychotherapy.

It is useful to quote those sections in full (emphasis added):

1. ... "practice of psychology" includes, for a fee or reward, monetary or otherwise,
 - (a) the provision to individuals, groups, organizations or the public, of any service involving the application of principles, methods and procedures of understanding, predicting and influencing behaviour, including the principles of learning, perception, motivation, thinking, emotion and interpersonal relationships;
 - (b) the application of methods and procedures of interviewing, counselling, psychotherapy, behaviour therapy, behaviour modification, hypnosis or research; or
 - (c) the construction, administration and interpretation of tests of mental abilities, aptitudes, interests, opinions, attitudes, emotions,

personality characteristics, motivations and psycho-physiological characteristics, and the assessment or diagnosis of behavioural, emotional and mental disorder.

...

4. A registrant may practise psychology.

Dr. Utendale's argument in response was that, although the Psychologists Regulation broadly defined the practice of psychology, and although the provincial government had the power under the *Health Professions Act* to grant the College exclusivity over some or all of the practice of psychology as defined, the provincial government had clearly elected not to do so.

The Court agreed and found that section 4 of the Psychologists Regulation simply provided that registrants may practice psychology. The Court also found that the College had not been granted a "restricted activity"⁴ over psychology or any aspect of psychological services.

In finding for Dr. Utendale on this issue, the Court noted that the provincial government had granted exclusivity to two other health professions regulated under the *Health Professions Act*, namely massage therapists and naturopathic physicians, and by necessary implication had elected not to grant the same exclusivity to the College.

As a result, this aspect of the College's Petition was dismissed.

⁴ A restricted activity is the term used under the HPA to describe that aspect of a health professions practice which, because of the high risk of serious harm that could result if it was performed by someone who was not sufficiently competent, the government has determined should be performed only by certain qualified registrants of health professions. The recently released draft Restricted Activity Regulation, contains the latest list of these reserved actions. Psychotherapy is not one of those proposed reserved actions. For more information see: www.health.gov.bc.ca/leg/scopeofpracticereform.html.

(b) Use of the title “Dr.”

The Court determined that there was no prohibition within the *Health Professions Act* or the Psychologists Regulation against persons such as Dr. Utendale, who holds a Ph.D. in social psychology, from referring to or using the abbreviation “Dr.” in reference to their academic qualifications. This aspect of the College’s petition was also dismissed.⁵

(c) Use of words incorporating “psychology”

Justice Kelleher found on the evidence that Dr. Utendale had never used the title “Psychologist”, contrary to the College’s claim. It was apparent on the evidence that some judges had referred to Dr. Utendale as a “Psychologist” in earlier cases where he had appeared as an expert witness. Justice Kelleher found that Dr. Utendale did not have a legal duty to correct persons who called him a Psychologist in error. This aspect of the College’s petition was also dismissed.

The Court also found that there was no evidence that Dr. Utendale had ever described himself using titles, descriptions or words that incorporate any of the three terms that were and remain expressly controlled under section 3(1) of the Psychologists Regulation, being: "psychologist", "psychological" or "psychology", and dismissed this aspect of the College’s Petition.

(d) Use of the title “Psychotherapist”

The College did not seek in written or oral submissions any specific relief in relation to the title “Psychotherapist” used by Dr. Utendale. However, the materials before the Court included the 2005 letter from the College’s counsel to Dr. Utendale demanding that he refrain from using this title. The title protection provisions of the Regulation stated at section 3(1) (emphasis added):

3(1) No person other than a registrant may use the title “registered psychological associate”, “psychological associate”, “registered psychologist”, “psychologist”, a title, description or words incorporating the

⁵ It should be understood that, however, that legislation does prohibit a person who does not have a doctorate degree from using the abbreviation “Dr.”

word “psychology”, “psychological” or “psychologist”, or other terms implying training, experience or expertise as a psychologist.

In the Reasons for Judgment issued several weeks after the Hearing, the Court found that the tail words of section 3(1) of the Psychologists Regulation (underlined above) had the effect of prohibiting Dr. Utendale from using the title “Psychotherapist.” Those tail words state that non-registrants of the College cannot use “other terms implying training, experience or expertise as a psychologist.”

As a result, although the College had not asked for this Order, the Court ordered Dr. Utendale to cease referring to himself as a “Psychotherapist.”

THE APPLICATION FOR RECONSIDERATION

The immediate effect of Kelleher J.’s 2007 ruling on the title issue was that the College was then in a position to claim that only psychologists registered with the College were able to use the title “Psychotherapist.” Thus, many other health professionals, including medical doctors, clinical social workers, marriage and family therapists, and clinical counsellors, were then also effectively prohibited from using this title.

The Decision had wider implications for the regulation of psychologists and counselling therapists. The Decision effectively negated the provincial government’s deliberately worded Psychologists Regulation, which specifically omitted the title “Psychotherapist” from the titles granted exclusively to registrants of the College.

The Health Professions Council had recommended in 2001 that the College of Psychologists not be granted the practice of psychotherapy as a reserved action.⁶ The Decision also conflicted with the Council’s 1999 recommendation to government that the College be granted exclusivity only over the title “Psychologist.” Indeed, the Council had

⁶ Health Professions Council, *Post-Hearing Update on Preliminary Report: Psychologists*, II. Reserved Acts, A. Psychotherapy: Proposed Reserved Act, March 2001; see: <http://www.health.gov.bc.ca/leg/hpc/review/part-i/update-psychologists.html>

rejected the request of the profession for exclusive use of the title Psychotherapist under the *Health Professions Act*.⁷

As neither party to the Hearing had raised the issue of Dr. Utendale's use the title "Psychotherapist", the Court did not have the benefit of evidence or argument on this question. The Court was unaware of the use of the title by a wide range of health care practitioners who practice psychotherapy in B.C.

An application on behalf of Dr. Utendale to hold a further Hearing with evidence and argument on the "Psychotherapist" title issue was granted, with the consent of the College. The College acknowledged that control over this title had not been one of the grounds for relief it had claimed in its original application. New evidence was then filed with the Court including various affidavits evidencing the widespread use of the title "Psychotherapist" by persons not registered with the College, and setting out the recommendations of the Health Professions Council on this issue. The B.C. Association of Registered Social Workers joined with the BCACC in the application to set aside the Order relating to the title Psychotherapist.

Before the second Hearing was held, however, the provincial government made two significant changes to the legislation governing the College.

CHANGES TO THE ACT

While this case was proceeding through the courts, the Ministry of Health was continuing its work to bring all health professions under the regulatory umbrella of the *Health Professions Act*.⁸

On April 10, 2008, the Minister introduced Bill #25 (2008), the *Health Professions (Regulatory Reform) Amendment Act, 2008*, which set out substantial changes to the Act. The 2008 Amendment Act received Royal Assent on May 29, 2008,

⁷ Health Professions Council, *Psychologists Scope of Practice Preliminary report*, III. Discussion of Issues, D. Reserved Titles, August 1999; see: <http://www.health.gov.bc.ca/leg/hpc/review/part-i/scope-psychologists.html#IIID>

⁸ For more details on this objective, reference: www.health.gov.bc.ca/leg/legislativereform.html.

although not all of its provisions came into force on that date. Some of the changes that did come into force had a direct positive effect on Dr. Utendale's application to have Kelleher J.'s Order of prohibition reversed.

Under the earlier version of the *Health Professions Act*, section 12(2) provided the government with authority to grant a profession one or more occupational titles within its designation regulation, but there was no subsequent provision that linked the granted title to a specific prohibition. Instead, section 13(4) created a broad prohibition against using titles, abbreviations and descriptions that might suggest membership in a college. Two new sections were introduced in the 2008 amendments to correct these legislative deficiencies.

New section 12.1 created for the first time in the *Health Professions Act* clear control over the use of "reserved titles." (Such titles are granted under the designation regulations that are now approved by the Minister pursuant to other revisions that were made to section 12.)

Under new section 12.1, once the Minister prescribes the title (or titles) that only the registrants of a particular college may use, all non-registrants are then prohibited from using that title or any abbreviation (or an equivalent title or abbreviation in another language) where either is used to describe that non-registrant's work, is used in association with or part of another title, or can be associated with a description of that non-registrant's work.⁹

The older version of section 13(4) was also repealed and became the basis for a new section 12.1(3). Importantly, a new phrase was added (my emphasis):

(3) A person other than a registrant of a college must not use a name, title, description or abbreviation of a name or title, or an equivalent of a name or title in another language, in any manner that expresses or implies that he or she is a registrant or associated with the college.

⁹ Exceptions to the expanded prohibition on the use of a reserved title are now set out in new section 12.2, and they include circumstances when a non-registrant uses a title that was granted to that non-registrant by another regulatory body in another province or jurisdiction. Such persons would be allowed to use that title, at least so long as it is clear that the title refers to the other authority.

These sections continue and arguably expand a college's ability to control the use of various occupational titles and descriptions beyond those that are specifically granted to a profession within their designation regulation. Making the new prohibition in section 12.1 dependent on a regulation to first grant a specific title under section 12(2) is a positive step.

Of greater significance to Dr. Utendale, however, the revisions to the title protection provisions of the *Health Professions Act* provided the foundation for the Ministry to then make a critical amendment to the Psychologists Regulation.

CHANGES TO THE REGULATION

Having clarified the statutory basis for regulating occupational titles granted to health professions under the *Health Professions Act*, the Ministry then proceeded to roll over all of the then existing designation regulations for consistency. The Ministry essentially repeated the original wording of all of the earlier designation regulations, but with one notable exception.

As noted above, Kelleher J.'s 2007 Order prohibiting Dr. Utendale from using the title "Psychotherapist" was based on what can be described as the tail wording of section 3(1) of the Psychologists Regulation, as it then existed.

Ministry of Health officials had been closely tracking developments in the Utendale case. In the new Psychologists Regulation that effectively re-designated psychologists under the *Act*, the Ministry removed the tail wording in section 3(1) of the old regulation and replaced it with new wording. The new section now reads:

- 3(1) The following titles are reserved for exclusive use by registrants:
- (a) registered psychological associate;
 - (b) psychological associate;
 - (c) registered psychologist;
 - (d) psychologist.

The new Psychologists Regulation came into force on October 17, 2008. The elimination of the tail wording in the older version of section 3(1) effectively removed

the legislative foundation for Kelleher J's 2007 decision on the title "Psychotherapist." In other words, the new Regulation¹⁰ left the Court's earlier Order prohibiting Dr. Utendale's use of the title Psychotherapist of no further application; it is now a nullity.

As result of these legislative changes, counsel for the College and Dr. Utendale advised the Court of the changes in the legislation, and the parties then agreed to rescind that Order by consent, with no further Hearing required.

As a further result, Dr. Utendale was then immediately entitled to refer to himself as a Psychotherapist, as he had done for many years.

COMMENTS

The final result of this case is fairly straightforward, although Dr. Utendale is still seeking a formal, entered Order from the College. That aside, the legal implications of the 2007 decision and the later changes to the legislation can be summarized as follows:

(a) Anyone can practice psychology

As noted above, the 2008 change to the Psychologists Regulation effectively removed the legislative basis for the questionable Order that would have prevented Dr. Utendale from using the title Psychotherapist. The balance of the 2007 Decision of Justice Kelleher in favour of Dr. Utendale remains intact.

By finding that section 3(1) of the Psychologists Regulation regulates only the use of occupational titles, and does not give Psychologists the exclusive right to practice psychology, Kelleher J. also effectively determined that the provincial government intends that anyone in B.C. can practice psychology, and may offer psychological services to the public. The only restriction is that no one but College registrants can use the titles "Psychologist" or "Registered Psychologist" or otherwise hold out that they are registrants of the College.

¹⁰ BC Reg. 289/2008.

The Decision of Justice Kelleher is consistent with the Health Professions Council's 1999 and 2001 reports on the scope of practice for Psychologists, and the Ministry has not given any indication to date that it will depart from those recommendations.

(b) Anyone with a PhD can use the title “Dr.”

As noted, above, Kelleher J. also determined that there is no prohibition in any legislation that prevents persons who hold doctoral degrees from using the title “Doctor” or the abbreviation “Dr.” in reference to their academic qualifications, irrespective of the source of the degree.

In the past, the College has asserted that BCACC members were prohibited from referring to their academic degree using abbreviations like “M.A. (Psych.)” or “M.Sc. (Clin. Psych.)” The BCACC has consistently taken the position that its members are allowed to refer to their university degrees using these abbreviations. The Decision in this case provides clear legal support for this position.

So long as counsellors do not also call themselves Psychologists or hold out or suggest that they are registrants of the College, they are free to identify their academic speciality in psychology or clinical psychology. In doing so, counsellors should include the full name of their graduate degree; e.g. M.A. (Psychology) or M.Sc. (Clinical Psychology). This should avoid any complaints by the College that counsellors are not complying with the new Psychologists Regulation.

(c) Anyone can use the title “Psychotherapist”

As a result of the 2008 changes to the Psychologists Regulation and the rescission by consent of the Order of Justice Kelleher prohibiting him from using the title, Dr. Utendale is now entitled to resume his use of the title Psychotherapist.

As noted above, new section 12.1 of the *Health Professions Act* prohibits those who are not registrants of a college from using a name, title, description or abbreviation of a name or title, or an equivalent of a name or title in another language, in any manner

that expresses or implies that the person is a registrant of or is associated with a college. Therefore, even though anyone is now entitled to use the title Psychotherapist, counsellors should still avoid any representations that might suggest they are registrants of the College of Psychologists. When appropriate, such as when compiling an expert report or testifying in Court, counsellors (and other psychotherapists) should clarify that they are not Psychologists, Registered or otherwise, and that they do not wish to be confused as Psychologists.

BCACC members who are uncertain about whether the description of their practice or the use of their titles might breach the recent amendments to the *Health Professions Act* and the Psychologists Regulation should consult with their lawyer for further advice.

POST SCRIPT AND ACKNOWLEDGEMENT

For the past few years, John Ankenman has been trying to obtain a formal, entered Order from counsel for the College to set out the earlier agreement between the College and Dr. Utendale that the original Order was rescinded by consent. He has not been able to obtain such an entered Order. Nonetheless, there exists an Order by consent between the parties, which has the same legal effect as an entered Order. If an entered Order can be obtained, that will then set out in writing what the College and Dr. Utendale have already agreed to by consent. The entered Order will then provide Dr. Utendale with documented proof that his long ordeal is over.

I would like to acknowledge the perseverance and determination of Dr. Utendale in seeing this landmark case through to its conclusion. All counsellors should be grateful for his calm and thoughtful participation in this protracted legal proceeding.

I would also like to thank John Ankenman for his sage counsel and advocacy on behalf of Dr. Utendale and the BCACC along this long and winding (legal) road.