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Words Matter: Lessons from the Essilor Decision and Other Musings

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By Debra McKenna

The word “patient” appears 96 times in the *Regulated Health Professions Act, 1991* (“*RHPA*”).[1] This is not a coincidence or an accident. The *RHPA* was established by the Ontario government for the very purpose of protecting patients from the potential harms that are inherent in the activities it regulates.[2] This includes setting out the requirements that govern individuals who want to practise in one of Ontario’s twenty-six regulated health professions and engage in those activities. In addition, it is the statutory obligation of Ontario’s health regulators to ensure that those requirements are met and, where they are not, to enforce them for the protection of the public.[3]

Conversely, the word “customer” appears nowhere in the provisions of the *RHPA*. Yet “customer” is mentioned 57 times in the Ontario Court of Appeal’s decision of the *College of Optometrists of Ontario v. Essilor Group*.[4] In that case, the Court was asked to address the question of whether or not an out-of-province supplier of glasses and contact lenses (the prescription and dispensing of which are regulated in Ontario and defined as “controlled acts” under section 27(2) of the *RHPA*) would be permitted to supply its products directly to patients located in Ontario without complying with the requirements of the *RHPA*.

So as not to be guilty of burying the lede, the Ontario Court of Appeal overturned a lower court’s decision and held that Ontario’s regulatory scheme does not apply to restrain the activities of the British Columbia supplier. In the Court’s view, there was not a “sufficient connection” to Ontario to extend the reach of the *RHPA* to the non-resident company and its activities. However, understanding how the Court reached that conclusion requires close examination and careful consideration by Ontario regulators.

As a provincial statute, the *RHPA* is subject to the constitutional limitation that a province cannot legislate “extraterritorially”. In essence, a province only has authority over matters that fall within its jurisdiction. This territorial limitation flows from the language of section 92 of the *Constitution Act, 1867*, which limits territorial reach of provincial legislation and states that, “[in] each Province, the Legislature may exclusively make Laws in relation to” the enumerated heads of power, including, “the Incorporation of Companies with Provincial Objects”[5], “property and civil rights in the Province”[6], and “generally all matters of a merely local or private nature in the Province”.[7]

These constitutional limits are concerned with the legitimate exercise of state power and the exercise of that power rests on finding that there is a sufficient relationship or connection between the province and persons over whom it seeks to assert authority.[8] Consequently, where a health college turns to a court to enforce its regulatory scheme (in this case employing its compliance order power under section 87 of the Code[9]), and there is an issue raised that the college is attempting to exceed its jurisdiction, the courts will apply the “sufficient connection” test to determine whether or not the legislation applies.[10] Courts have stated that what constitutes a “sufficient connection” will depend on the relationship among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated by it.[11] In other words, context will determine whether or not the college has jurisdiction to restrain the conduct at issue.

For example, in a previous case from 2013, the Ontario Court of Appeal held that there was a "sufficient connection" to Ontario where the Ontario College of Pharmacists sought and was granted an order restraining the sale of prescription drugs in Ontario against both resident and non-resident entities and individuals.[12] In that case, the context was as follows: the prescription order was placed online (on a website owned by a Belize corporation), the prescription was filled by a pharmacist in India, and the drugs were then sent to a patient in the United States. Now, I know what you're thinking – so far, none of that sounds like there is any possible connection to Ontario. However, the fact that an Ontario company received the online order, processed payment for it, and then made arrangements for delivery, was sufficient for the Court to find that there was jurisdiction and conduct over which the Ontario College of Pharmacists had authority to regulate.

In the *Essilor* case however, the Court was not persuaded that there was enough to establish a sufficient connection to Ontario, notwithstanding that, among other facts, the patient was located in Ontario, the product was delivered to Ontario, and the company operates a "bricks-and-mortar" store located in Toronto. Instead, the Court concluded that:

[…] the application judge incorrectly held that ss. 27(1) and (1) of the *RHPA* are constitutionally applicable to Essilor's online sales of prescription eyewear to **customers** in Ontario. The **mere delivery in Ontario** of an order for prescription eyewear that has been processed in compliance with the British Columbia regulatory regime, without more, does not establish a sufficient connection between Essilor's online sales and the controlled acts proscribed by the *RHPA* s. 27(1).[13] (**Emphasis added**)

In my view, the Court's reasons raise two issues.

First, it is noteworthy that, in reaching its conclusion, the Court relied on the fact that Essilor was acting in compliance with the regulatory regime in British Columbia. To be clear, the British Columbia framework allows, by way of an exception, for persons who are not registered with the College of Opticians of British Columbia to dispense eyeglasses and contact lenses in certain circumstances.[14] The regulation explicitly states, "nothing in this regulation prevents a person from (a) **dispensing** a corrective eyeglass lens, if the person who **dispenses** it […] (b) **dispensing** a contact lens, if the person who **dispenses** it […]." In other words, there is no doubt that the company was engaged in the act of "dispensing" but, as a non-registrant, it was doing so within this exception in the British Columbia framework.[15]

While such dispensing by non-registrants might meet the requirements of the British Columbia scheme, the question before the Court was whether or not the facts disclosed the company was "dispensing" in Ontario and, if so, did that dispensing meet the requirements of section 27 of the *RHPA*. As aptly demonstrated by the recent case of *Saplys v. Ontario Association of Architects*, different jurisdictions regulating the same profession can have and enforce different requirements – one where certain conduct is compliant and another where it is not.[16]

Second, while the Court agreed that the act of dispensing includes delivery of the product (and you will recall that the product was delivered to Ontario), it held that "mere delivery" was not enough in this case to establish a "sufficient connection" to Ontario, noting:

[…] the discrete act of delivering eyewear to a person primarily has a commercial aspect, not a health care one: delivery completes the order placed by the **customer**. Where the supplier of the prescription eyewear operates in another province and complies with that province's health professions regulatory regime when filling an online order placed by an **Ontario customer**, the final act of delivering that product to the Ontario **purchaser** does not amount to the performance of a "controlled act" by the supplier within the meaning of the *RHPA* s. 27(1).[17]

As with other paragraphs of this decision where the Court's focus appears to be fixated on commercial issues (with references to things like the "market", "monopoly", "customer"), the Court's description here of delivery as having primarily a commercial aspect misses the mark, and in my view is problematic. Among other things, it fails to appreciate the import that both colleges in Ontario required, by their professional standards, that delivery to the patient occur in-person, even in those circumstances where a

prescription order was initiated online.[18] While the Court characterizes this as "mere delivery", there is nothing mere about it in my view – there is no dispensing unless and until the product is provided to the patient. Furthermore, while referred to earlier in the decision (but seemingly forgotten), the Internet Therapy Standard promulgated by the College of Optometrists of Ontario specifically states the following:

In-person fitting and adjusting of spectacles provides a final verification and mitigates **risk of harm** by confirming that **patients** leave the clinic with spectacles that have been properly verified, fit and adjusted. In-person delivery of spectacles establishes a **patient/practitioner relationship** in circumstances where **patients** are new to the clinic and spectacle therapy was initiated through the optometrist's website.[19] (**Emphasis added**)

Similar to the *RHPA*, the focus of this standard is firmly, as it should be, on patients, mitigating a risk of harm, and the patient/practitioner relationship – not "customers" or commercial activity. While some may not agree with their purpose and/or necessity, it is an obligation that is vested with a regulatory college to establish professional norms and standards, and to do so in a manner that protects the public interest.[20] Whether standards address patient care, conflicts of interests, business practices, and so forth, members are required to follow them.

As observed by the Divisional Court and the Ontario Court of Appeal in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, there is no common law, proprietary or constitutional right to practise in a regulated profession and being in a regulated health profession means that you are "subject to requirements that focus on the public interest, rather than [your] interests."[21] It would be an unfortunate outcome and impugn the legitimacy of professional regulation if members and/or the public were left with an impression that commercial interests motivate the regulation of professions or that standards do not matter.

One cannot underestimate the importance of technology in healthcare delivery and the delivery of other professional services, and this includes the internet. The internet has increased the speed and reach of information – from the ability to share electronic health records, to retrieving online test results, to extending services to remote communities, and so much more. As a result of technological advances, many colleges now have (or are examining) regulatory requirements for electronic practice including, where feasible, inter-provincial practice. But such changes require careful consideration, including examining the unique risks that can arise with electronic practice and what resources and steps are necessary for colleges to take to manage and mitigate those risks. To my mind, the steps of healthcare delivery (as well as the delivery of other professional services) where there is an opportunity to ask questions and to obtain answers from regulated professionals about, among other things, the risks of products and treatments are important, and cannot be replaced by FedEx – no matter how convenient.

P.S. After writing this article, the Supreme Court of Canada updated its website to note that the College of Opticians of Ontario and the College of Optometrists of Ontario have now filed for leave to appeal the *Essilor* decision. So stay tuned while we wait for the Supreme Court to weigh in.

[1] *Regulated Health Professions Act, 1991*, SO 1991 c. 18 ("*RHPA*").

[2] *Wadden v. College of Opticians of Ontario*, 2001 CanLII 21166 (ONCA).

[3] *Health Professions Procedural Code*, Schedule 2 of the *Regulated Health Professions Act, 1991,*("*Code*"), ss. 3(1) and (2) and 87.

[4] *College of Optometrists of Ontario v. Essilor Group Inc*, 2019 ONCA 265 ("*Essilor*").

[5] *Constitution Act,* 1867, s. 92(11).

[6] *Ibid.* at s. 92(13).

[7] *Ibid.* at s. 92(16).

[8] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII) at para. 31.

[9] *Code*, *supra* note 3, s. 87.

[10] *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 (CanLII), at para. 56. Also see: *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)*, 2013 ONCA 381 (CanLII) at para. 67 ("*Global Pharmacy*").

[11] *Ibid.*

[12] *Global Pharmacy*, *supra* note 10.

[13] *Essilor*, *supra* note 4, at para. 12.

[14] *Opticians Regulation*, B.C. Reg. 118/2010, s. 5(3) and ss. 6 and 8 of the Schedule ("*BC Opticians Regulation*").

[15] Under the *BC Opticians Regulation*, **"dispense"** is defined to mean "design, prepare, fit, adjust, verify **or** supply" – see s. 1.

[16] *Saplys v. Ontario Association of Architects*, 2019 ONSC 1679 (CanLII), at paras. 65-78.

[17] *Essilor*, *supra* note 4, at para. 126.

[18] *Ibid.* at paras. 62 and 64.

[19] *Essilor*, *supra* note 4, at para. 62.

[20] *Code*, *supra* note 3, ss. 3(1), 3(2) , 95(1) and 95(1.1).

[21] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII), at para. 187.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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