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Professional Discipline Newsletter

— Winter 2018 —

Clearly Caught: Court finds BC Retailer Selling Prescription Eyewear Over the Internet Subject to Ontario Regulation

In the recent decision of College of Optometrists of Ontario et al v. Essilor Group Canada Inc. (2018 ONSC 206), Justice Lederer of the Ontario Superior Court of Justice found that a BC company needed to comply with Ontario law when selling prescription eyeglasses and contact lenses to Ontario residents over the internet.

Background

Essilor, the parent company of two online retailers that sell prescription eyeglasses and contact lenses to customers across Canada and the United States has its staff, manufacturing facilities, and distribution centres all located in BC. The College of Optometrists of Ontario and the College of Opticians of Ontario, the professional regulatory bodies of optometrists and opticians in Ontario, brought an application for an injunction prohibiting Essilor from selling prescription eyewear in Ontario unless they complied with the *Ontario Regulated Health Professionals Act* ("the Act"). While Essilor employed an in-house optician licensed in BC to assist customers with ordering their glasses over the internet, this individual certified that his role with the company did not involve practicing opticianry or providing healthcare. The court noted that Essilor did not employ any Ontario-licensed practitioners and that some customers were able to purchase prescription eyewear by taking their own measurements without the assistance of a licensed professional.

The court began by considering whether Essilor "dispensed" prescription eyewear, which is a controlled act that only Ontario-licensed practitioners can perform in the province. Essilor argued that the applicants were only seeking an injunction to protect their market interest and restrict consumer choice by limiting outside competition. The court found that this argument was irrelevant to the issue of whether Essilor breached the Act. The purpose of the Act and the regulatory scheme "is not directed by the interest of those needing eyeglasses as retail consumers but as individuals requiring healthcare."

Decision

The court showed deference to the legislature by stating that because "dispensing" prescription eyewear was included in the legislation as a controlled act, it was not the court's place to undergo a risk analysis to determine whether the act was actually harmful and should be

controlled. The court relied on the plain meaning of the term as well as prior case law to establish "that 'dispensing' is not a singular act but a series of acts that encompass the making, adjustment (fitting) and delivery" of prescription eyewear. Essilor manufactured prescription eyewear, filled prescriptions, and delivered orders. The court concluded that this constituted "dispensing" prescription eyewear in breach of the Act.

The final part of the analysis was to determine whether the Act and the Ontario regulatory scheme even applied to a BC company such as Essilor. The test for answering this question required a determination as to whether there was a "sufficient connection" between Essilor's conduct and Ontario. While the court accepted that "Virtually every action taken by [Essilor] in connection with the preparation and delivery of eyeglasses occurs in British Columbia", the multi-jurisdictional context of internet commerce required a broader understanding. The court concluded that where prescription eyewear was ordered by Ontario residents, delivered to them in Ontario, and presumably used by them in Ontario, this represented a sufficient connection to the province. Applying a purposive analysis of the Act and the regulatory scheme demonstrated that Essilor's conduct was not a simple contract of sale, but the delivery of healthcare in Ontario. It did not matter that this manner of dispensing prescription eyewear was permitted in BC, as it was up to the legislature to determine whether to change the more restrictive regulatory scheme in Ontario. The court allowed the application for an injunction, ordering Essilor to comply with the Act and the Ontario regulatory scheme in order to be able to continue dispensing prescription eyewear in Ontario. Essilor has appealed this decision to the Court of Appeal.

Takeaways

This case provides much needed clarification regarding the growing world of internet commerce, demonstrating that a company selling products to customers over the internet may be subject to another jurisdiction's regulation of those products. ■

Christopher Wirth
Alex Smith

— KC —

Public Interest Trumps Physicians' Religious Rights

Can a physician refuse to provide a patient with a referral to care which the physician opposes on religious or moral grounds? According to the recent decision of the Divisional Court in *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, the answer is no**.**

Background

Individual physicians along with three national associations of medical professionals who were Catholic, Christian or pro-life brought an application challenging two policies of the College of Physicians and Surgeons of Ontario ("CPSO") – the Professional Obligations and Human Rights Policy and the Physician-Assisted Death Policy (the "Policies"), which require that physicians provide an effective referral to a patient seeking a physician-assisted death. They alleged that the Policies infringed their section 2(a) and 15 *Charter* rights and could not be saved by section 1, as they required physicians who were unwilling to provide certain elements of care to patients for reasons of conscience or religion, to provide such patients with an

effective referral to another health care provider.

A document published by the CPSO provided physicians with guidance as to what qualified as an "effective referral" noting that a referral could be made to a physician, another health-care professional or an agency.

Decision

The Court rejected the applicants' argument that the Policies were *ultra vires* the authority of the CPSO and instead found that the *Charter* applied to them but that they were Policies prescribed by law under section 1 of the *Charter* as they fell within the CPSO's statutory mandate and were consistent with its duty to serve and protect the public interest. The CPSO was found to have the authority to enact the Policies under the *Regulated Health Professions Act, 1991 ("RHPA")* as addressing the professional obligations of physicians. The Court found that the CPSO was obligated to provide guidance to its members regarding the manner of compliance with *Charter* values in the practice of medicine. Further, the Policies were not adopted under the CPSO's powers to make regulations under the *RHPA* and the Policies did not provide for a penalty for non-compliance.

However, while non-compliance with the Policies would not constitute a specific act of professional misconduct under the professional misconduct regulation, a breach of the provisions could be used as evidence in support of in support of an allegation of professional misconduct.

The individual applicants believed that certain kinds of care, including the provision of abortions, medical assistance in dying, prenatal screening and transgender treatments, were sinful and immoral, and that God required them to refrain from engaging in such acts. The Court found that their beliefs were sincere and that the Policies did in fact infringe the applicants' rights of religious freedom under section 2(a) of the *Charter* as the Policies resulted in the individual applicants not being free to practice medicine in accordance with their religious beliefs or conscience.

However, the Court understood the objective of the Policies to be the facilitation of equitable patient access to health care services. It recognized that physicians act as gatekeepers to health care services and are subject to the obligation of non-abandonment. Without the effective referral requirements, there would be a real risk of deprivation of equitable patient access to health care, particularly to vulnerable members of society. The effective referral requirements were thus rationally connected to the goal of ensuring equitable patient access to health care services. The requirements were also found to be minimally impairing. Although the applicants proposed alternatives to the requirements, there was evidence that they would not be effective and the Court found that the alternatives were not directed to preserving the patients' *Charter* rights of equitable access to healthcare.

Further, the requirements did not deprive objecting physicians of carrying on their practice of medicine in accordance with their beliefs. Physicians had other options available to them, such as specializing their practice to avoid circumstances in which they would have to provide such referrals. The goals of access to equitable healthcare are important social goals which would be compromised if the Policies were not complied with. The Court ultimately found that the requirements in the Policies were proportionate in terms of effect. As a result, while the applicants were able to

demonstrate that the requirements in the Policies infringed section 2(a) of the *Charter*, this limitation was reasonable and justifiable.

Takeaways

Policies of regulators of professionals may legally infringe the rights of religious freedom or conscience of some individuals, where such infringement is reasonable and justifiable. An infringement will likely be reasonable and justifiable where access to health care is at issue. All patients in Ontario have the right to equitable access to health care. Physicians do not have a legal right to refuse to provide patients with meaningful access to care on the basis that providing such health services does not align with their personal or religious beliefs as licenses to practice medicine are granted by statute and physicians are subject to regulation which focuses on the public interest rather than the interests of the professionals themselves. This decision will also likely apply to other regulated professionals, however, it may not be the last word on this subject as the applicants are currently seeking leave to appeal to the Court of Appeal. ■

Christopher Wirth
Renata Antoniuk

— KC —

Public Interest Overrides a Patient's Confidentiality

In *Ontario (College of Physicians and Surgeons of Ontario) v. Kayilasanathan* (not yet reported), the Discipline Committee of the College of Physicians and Surgeons of Ontario (the "Committee"), in the context of whether to compel a patient to testify before it, was faced with the difficult task of balancing two seemingly conflicting principles, a patient's choice to maintain confidentiality in reporting sexual abuse and the public's interest in the eradication of sexual abuse of patients by physicians. In this case, the public interest outweighed a patient's confidentiality.

Background

Patient A had sexual intercourse with Dr. Kayilasanathan in a hotel, after attending his walk-in-clinic for the purpose of obtaining a note to excuse her from upcoming examinations. It was the preceding weekend partying activities of Patient A and Dr. Kayilasanathan that led Patient A to seek the medical note from him.

A few months later, due to concerns about her personal risk, Patient A disclosed the sexual encounter to another physician, Dr. X. In compliance with the *Health Professions Procedural Code* (the "Code"), Dr. X reported Patient A's allegations to the College of Physicians and Surgeons of Ontario (the "College"). As per section 85.3(4) of the Code, Dr. X did not disclose Patient A's name in her mandatory report to the College as she did not have Patient A's consent to do so. The College compelled Dr. X to provide the name of Patient A under the authority of a section 75 investigation.

In March 2017, Patient A was contacted by the College. She was notified that she would be required to testify before the Committee at a hearing into Dr. Kayilasanathan's conduct on November 6, 2017. Patient A was the key witness in the matter. On October 25, 2017, Patient A met with counsel for the College. She advised them that she did not want to be involved in the legal proceeding. Patient A was then served with a Summons to Witness (the "summons"). Patient A did not attend the hearing scheduled on November 6, 2017 due to an injury. The College sought an order for a bench warrant so that Patient A could be

compelled to testify. Counsel for Patient A brought a motion to quash the summons.

Counsel for Patient A submitted that she should not be compelled to testify as she did not consent to her name being disclosed to the College under section 85.3(4) of the Code. Counsel further submitted that "compelling an unwilling witness to testify would have a chilling effect on the public in reporting sexual abuse in the future." Counsel for the College submitted that Patient A's name was obtained properly pursuant to the College's investigative powers under section 75 and 76 of the Code. The College further submitted that compelling Patient A to testify would serve the public interest as the complaint against Dr. Kayilasanathan could be pursued.

Decision

After reviewing the Code and relevant case law, the Committee denied the motion to quash or set aside the summons.

The Committee acknowledged that in some instances, the College has withdrawn cases against physicians due to the unwillingness of witnesses to testify. However in this case, the circumstances did not call for withdrawal.

Concerns about the reaction of her family, community and workplace, if the facts of the matter were to become public, were not sufficient reason to override the public interest that would be served if Patient A testified. Furthermore, Patient A did not give any evidence that testifying at the hearing would re-traumatize her.

The Committee further noted that there was no conflict between section 76 and 85 of the Code. While section 85.3(4) allows for confidentiality, section 76(4) states that despite any provision in any act, the confidentiality of health records does not exclude them from being summoned.

The Committee expressed concern that permitting sexual abuse victims to remain unidentified would hinder the College from eradicating sexual abuse by physicians. If the College received anonymous allegations and victims were permitted to always remain unidentified, the College would not have the ability to do anything other than note that a pattern of allegations was developing. This would not serve the public interest at stake. The Committee further confirmed that "a regulatory college's statutory duty to protect the public interest is supported with the broad investigate powers required to fulfill that duty" and that "the public interest is held to be paramount to the interest of an individual witness who is reluctant to assist the profession's regulator."

Takeaways

The decision to compel the testimony of an unwilling witness, particularly a patient, is a difficult one for a Discipline Committee to make and requires the balancing of a number of factors. However, a regulator's primary rule is to ensure the protection of the public and as a result, will likely lead to the public's interest prevailing over that of any individual witness.

The hearing is scheduled to recommence on February 28, 2018. ■

Christopher Wirth
Maneet Sadhra

— KC —

Divisional Court Upholds Penalty for Teacher's Anti-Vaccine Outbursts

In *Sullivan v. Ontario College of Teachers* (2018 ONSC 942), the Divisional Court of the Ontario Superior Court of Justice upheld a finding of professional misconduct, as well as the penalty imposed by the Discipline Committee of the Ontario College of Teachers.

Background

At the time of the events in question, the appellant, Sullivan, was a teacher at the Waterford District High School in Waterford, Ontario. On March 9, 2015, there was an immunization clinic being held in the school cafeteria, operated by Ontario public health nurses under the *Immunization of School Pupils Act*. The appellant visited the clinic three times throughout the day, leaving his grade 11 classroom unattended on the first two occasions. During these visits, the appellant demanded information about the vaccines being administered and allegedly shouted at nurses and students, claiming that one of the vaccine's side effects was death.

Decision

The Discipline Committee found that the appellant committed acts of professional misconduct, and issued a penalty that included a one month suspension, a reprimand, a requirement to complete remedial course work, and a two year ban from attending school health clinics. The appellant appealed both the finding of professional misconduct and the penalty to the Divisional Court.

The court found that the Discipline Committee's finding of professional misconduct was reasonable. While the appellant disputed the allegation that he shouted at students, the court found that his behaviour could nevertheless be considered aggressive and intimidating. The appellant argued that he was only trying to protect the students' right to give informed consent before receiving vaccinations however, the court noted that the appellant is not a health practitioner and his professional duties as a teacher do not include providing students with his opinions about vaccines or interfering with a school immunization clinic.

The court found that the Discipline Committee's penalty decision was also reasonable. The court noted that determining an appropriate penalty is within the expertise of the Discipline Committee and deserving of substantial deference and stated that where the Discipline Committee "has applied the relevant penalty principles to the facts… a variation in the penalty or sentence should only be made where the penalty imposed at first instance is clearly unreasonable."

In this case, the Discipline Committee had determined that the penalty would satisfy the principles of specific and general deterrence, rehabilitation and protection of the public. The appellant did not make any submissions demonstrating that the penalty was unreasonable. Given the substantial deference afforded to the Discipline Committee due to its expertise in determining professional misconduct and the appropriate penalty, the court found that it had no reason to intervene. The appeal was therefore dismissed.

Takeaways

Provided that a Discipline Committee in its reasons for decision, clearly considers the appropriate principles in arriving at its penalty decision, the courts will defer to its determination as to the appropriate penalty except where the penalty imposed is clearly unreasonable. ■

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