CITATION: 2217758 Ontario Inc. v. Ontario (Attorney General), 2015 ONSC 1
COURT FILE NO.: 09-16459 (Hamilton)
DATE: 2015/01/05

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
2217758 Ontario Inc. and **James Wallace Hugh McLean**	)	*Heather C. Devine* and *Alana Penny*, for the Applicants
	)	
Applicants	)	
- and -	)	
	)	
	)	
The Attorney General of Ontario	)	*S. Zachary Green*, for the Respondent
	)	
Respondent	)	
- and -	)	
	)	
	)	
The College of Opticians of Ontario and **the College of Optometrists of Ontario**	)	*Richard Steinecke*, for the College of Opticians of Ontario
	)	
Intervenors	)	*Brian P. F. Moher* and *Avram Joseph*, for the College of Optometrists of Ontario
	)	
	)	HEARD: November 12, 13 and 14, 2014

R. A. Lococo, J.

REASONS FOR JUDGMENT

I. Introduction

[1] James McLean is an Ontario optician who operates Westdale Optical Boutique in Hamilton. 2217758 Ontario Inc., a company he controls, leased an automated refractory device known as the Eyelogic System. An automated refractory device is used to conduct sight tests that automatically measure the refractive error of the eye. Data generated by the device may be used to prepare lenses for eyewear to correct any resulting vision impairment.

[2] Mr. McLean would like to use the Eyelogic System to conduct sight tests for customers of his eyewear boutique. Under his proposed business model, the results of the sight test would be transmitted by fax to an offsite optometrist or ophthalmologist (the latter being a physician who is an eye specialist). The optometrist or ophthalmologist would use the sight test results to write a prescription for any required corrective eyewear. Mr. McLean or another Ontario optician would then dispense the corrective eyewear in accordance the prescription. Mr. McLean anticipates making arrangements with an Alberta ophthalmologist to write the required prescriptions.

[3] In the application before me, Mr. McLean and 2217758 Ontario Inc. seek a declaration that there is no legislation or common law that precludes Ontario opticians from dispensing corrective eyewear to customers in accordance with the proposed business model. According to Applicants, there is no such legal prohibition. In particular, the proposed business model complies with the statutory requirement that Ontario opticians dispense corrective eyewear based on the prescription of an optometrist or a physician. There is no legal authority to otherwise restrict opticians from doing so.

[4] The Attorney General of Ontario opposes the granting of the requested declaration. According to the Attorney General, the proposed business model is prohibited by the combined effect of the legislation and professional standards governing opticians, physicians and optometrists. Those requirements preclude an Ontario optician from dispensing eyewear based on a prescription written by an optometrist or ophthalmologist who has not examined the customer. As well, the court should decline to grant the discretionary remedy of declaratory judgment based on the hypothetical facts set out in the application.

[5] The College of Optometrists of Ontario and the College of Opticians of Ontario are intervenors on this application. These Colleges have regulatory authority over optometrists and opticians, as contemplated by the *Regulated Health Professions Act, 1991*.[1] The College of Optometrists supports the Attorney General's position. The College of Opticians did not take a position on the legality of the business model, but provided input relating to the matters in issue.

[6] The issues to be determined are therefore as follows:

1. Legality of proposed business model – Are the Applicants prohibited by law from dispensing corrective eyewear in accordance with the proposed business model?

2. Hypothetical facts – Should the court decline to grant the discretionary remedy of declaratory judgment based on hypothetical facts?

[7] I will deal with each of these issues in turn.

---

[1] S.O. 1991, c. 18.

II. Legality of proposed business model

(a) Details of the business model

[8] Are the Applicants prohibited by law from dispensing corrective in accordance with the proposed business model?

[9] The elements of the proposed business model are set out in more detail below.

(a) Customers of Mr. McLean's eyewear boutique would be given the option of having (i) a sight test conducted onsite using the Eyelogic System, or (ii) a full eye examination conducted elsewhere by an ophthalmologist or optometrist of the customer's choice.

(b) In order to choose the option of an Eyelogic sight test, the customer would be required to sign a written consent. The consent form would state that (i) the sight test is not a full medical examination, and (ii) the customer should consult a medical professional if concerned about his or her eye health.

(c) If the customer chooses a sight test, the results of the test, in the form of a printout from the Eyelogic machine, would be transmitted by fax to an ophthalmologist or optometrist in Ontario, Alberta or British Columbia. The ophthalmologist or optometrist would not see or examine the customer.

(d) Based on the sight test results, the ophthalmologist or optometrist would write a prescription for any required corrective eyewear.

(e) Mr. McLean or another Ontario optician would then use the prescription to dispense the eyewear to the customer.

[10] In order to implement this business model, Mr. McLean anticipates making arrangements with an Alberta ophthalmologist to write the required prescriptions. According to the Applicants, "telemedicine" is an accepted practice in Alberta in these circumstances.

[11] The Applicants argued that there is no legislation or common law that precludes Ontario opticians from dispensing corrective eyewear to customers in accordance with the above business model. In order to consider this issue, it is helpful to consider in more detail the statutory requirements applicable to the health professionals involved in carrying out the proposed business model, as set out in the next section of these reasons.

(b) Statutory framework

[12] The key statutory requirements that apply to the proposed business model are set out in the *Opticianry Act, 1991*,[2] which governs the practice of opticianry in Ontario. Section 3 of that statute defines an optician's scope of practice as the provision, fitting and adjustment of subnormal vision devices, contact lenses or eye glasses (referred to in these reasons as "corrective eyewear"). Section 4 authorizes opticians to dispense corrective eyewear, but subsection 5(1) prohibits them from doing so "except upon the prescription of an optometrist or physician." Failure to comply with that prohibition is an act of professional misconduct under subsection 5(2) of that statute.

[13] The Applicants argued that the dispensing of corrective eyewear pursuant to the proposed business model would comply with the statutory requirements governing opticians, and in particular section 5 of the *Opticianry Act*. Under the proposed business model, an Ontario optician would be dispensing corrective eyewear upon the prescription of an Alberta ophthalmologist. According to the Applicants, reliance on the prescription of a physician outside Ontario is specifically contemplated by the definition of "optometrist or physician" in section 1 of the *Opticianry Act*, which includes "a legally qualified optometrist or physician from outside of Ontario."

[14] The requirements governing Ontario opticians constitute only part of the statutory scheme governing the supply of corrective eyewear in Ontario, however. The applicable statutory requirements have been previously considered by the Ontario courts in the "Great Glasses" series of decisions, which counsel referred to extensively during submissions. Those cases arose from the sale of corrective eyewear under the banner "Great Glasses" in stores managed by an Ontario optician, Bruce Bergez. Although not identical to the Applicants' proposed business model, the activities of Great Glasses involved the dispensing of corrective eyewear to customers based on the results of sight tests using the Eyelogic System. The decision of Justice Harris of this court in *College of Optometrists of Ontario v. SHS Optical Ltd. (cob Great Glasses)*[3] and the subsequent decision of Justice Crane[4] considered the applicable statutory requirements in some detail, and I do not intend to repeat their analysis. The Court of Appeal, on appeal from Justice Crane's decision, succinctly summarized the statutory framework governing the supply of corrective eyewear as follows:

> The *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, (*RHPA*) regulates the practice of health professions in Ontario. Among other things, the *RHPA* prohibits persons other than members authorized by a health profession Act or their delegates from

[2] S.O. 1991, c. 34.
[3] [2003] O.J. No. 3499 (S.C.).
[4] [2006] O.J. No. 4708 (S.C.); aff'd 2008 ONCA 685, 93 O.R. (3d) 139; leave to appeal to SCC refused 2009 CarswellOnt 3393.

performing any "controlled act" described in s. 27(2) of the *RHPA*. Prescribing or dispensing, for vision or eye problems, corrective lenses, other than simple magnifiers, is a "controlled act".

Two health profession Acts permit members authorized by the *Act* to prescribe or dispense, corrective lenses. Section 4 of the *Medicine Act, 1991*, S.O. 1991, c. 30, allows physicians, and s. 4 of the *Optometry Act, 1991*, S.O. 1991, c. 35, permits optometrists to prescribe or dispense corrective lenses, subject to any terms, conditions and limitations imposed on the practitioner's certificate of registration.

Under the *Opticianry Act, 1991*, S.O. 1991, c. 34, an optician is not authorized to prescribe corrective lenses. After all, opticianry is the provision, fitting and adjustment of corrective lenses. An optician is authorized to *dispense* corrective lenses, however, but only upon the prescription of an optometrist or physician.[5]

(c) Position of the Attorney General

[15] The Attorney General (with the support of the College of Optometrists) argued that the proposed business model is prohibited by the combined effect of the legislation and the professional standards governing opticians, physicians and optometrists. According to the Attorney General, those requirements preclude an Ontario optician from dispensing corrective eyewear based upon a prescription written by an optometrist or physician who has not examined the customer. In particular, the Attorney General relied on the statutory requirements and standards of practice referred to below.

(a) Section 5 of the *Opticianry Act* prohibits an Ontario optician from dispensing corrective eyewear except upon a prescription written by an optometrist or a physician. An Optician's failure to comply with that requirement is an act of professional misconduct. A finding of professional misconduct by a panel of the Discipline Committee of the College of Opticians would expose the offending optician to significant legal penalties, including a fine or a licence suspension or revocation.[6]

(b) Under the standards of practice adopted by the College of Optometrists and the College of Physicians and Surgeons of Ontario, optometrists and physicians are not authorized to prescribe corrective eyewear to a customer solely on the basis of a report of an optician who has administered a refractive test. Optometrists and physicians who prescribe corrective eyewear in accordance with the proposed business model would be in breach

---

[5] *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2008 ONCA 685, 93 O.R. (3d) 139 at paras. 16-18.
[6] Subsection 51(2) of the *Health Professions Procedural Code*, S.O. 1991, c. 18, sch. 2.

of those standards of practice. Optometrists and physicians who fail to maintain the standards of practice of their profession commit an act of professional misconduct.[7]

(c) In particular, the *Optometric Practice Guide* of the College of Optometrists states as follows:

> Refractive assessment alone does not provide sufficient information to allow an optometrist to issue an appropriate prescription for vision correction. The effects of ocular and systemic health conditions, binocular vision status and the occupational and avocational visual environment and demands must also be considered.

The *Optometric Practice Guide* also states that "there must be direct supervision of the subjective refractive assessment when this procedure is assigned."

(d) As well, Policy #2-05 (Prescribing Policies) of the *Practice Guide* of the College of Physicians and Surgeons states the "prescribing physician needs to have a full understanding of the patient's health status. This can only be accomplished through an appropriate medical assessment." The policy gives the following as examples of unacceptable prescribing: "Prescribing for a patient solely on the basis of mailed or faxed information, or an electronic questionnaire" and "Signing a prescription issued by an optician without proper assessment and diagnosis."

(e) The proposed business model would not comply with the requirements of the College of Optician's *Standard of Practice – Refraction.*[8] Under that standard, an optician who wishes to conduct refractive tests is required to complete an approved training program and to receive a "refracting designation" from the College of Opticians.[9] As well, in order to dispense corrective eyewear, the optician must have a prescription from an authorized prescriber who has conducted a full ocular assessment of the customer within the last 365 days.[10] There is nothing in the proposed business model to indicate that these requirements would be met. An optician's failure to comply with the Standard would constitute an act of professional misconduct.

(d) Position of the Applicants

[16] As previously noted, the Applicants argued that the dispensing of corrective eyewear pursuant to the proposed business model complied with the statutory requirements governing opticians, and in particular section 5 of the *Opticianry Act*. Under the proposed business model,

---

[7] Regulation under the *OptometryAct, 1991*, O. Reg. 859/93, s. 1(1), paragraphs 17 and 53; Regulation under the *Medicine Act, 1991*, O. Reg. 856/93, s. 1(1), paragraphs 2 and 33.
[8] College of Opticians of Ontario, May 2008.
[9] *Ibid.* paras. 1 and 2.
[10] *Ibid.* para 7.

an Ontario optician would be dispensing corrective eyewear upon the prescription of an Alberta ophthalmologist, who would fall within the definition of "optometrist or physician" in that Act. According to the Applicants, the practice of telemedicine to dispense corrective eyewear is widely accepted in Alberta. The Applicants conceded that in order to write a prescription for an Ontario patient, an Alberta ophthalmologist would have to become a member of the College of Physicians and Surgeons of Ontario. However, they provided evidence that an Alberta physician would be able to become a member of the College of Physicians and Surgeons of Ontario without requalifying in Ontario.

[17] The Applicants also argued that the Colleges' standards of practice that purport to restrict the activities of opticians, optometrists or physicians are not legal impediments to the proposed business model, as outlined further below.

(a) The performance of sight tests using a refractive device is not a "controlled act" as defined in section 27 of the *Regulated Health Professions Act*. As well, it is not prohibited by the "harm clause" in subsection 30(1) of that statute, which provides as follows:

> No person, other than a member treating or advising within the scope of practice of his or her profession, shall treat or advise a person with respect to his or her health in circumstances in which it is reasonably foreseeable that serious bodily harm may result from the treatment or advice or from an omission from them.

(b) The College of Opticians lacks the statutory authority to prohibit opticians from performing public domain acts, in particular a non-medical procedure that is safe and beneficial to consumers. The Applicants relied on the decision of the Ontario Court of Appeal in *Ainsley Financial Corp. v. Ontario (Securities Commission)*.[11] In that case, the Court considered a draft policy statement of the Ontario Securities Commission that purported to impose mandatory requirements on securities dealers relating to the marketing and sale of penny stocks. While recognizing the Commission's authority to use non-statutory instruments to fulfill its mandate, the Court held that "a non-statutory instrument cannot impose mandatory requirements, enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines."[12]

(c) The evidence relied on by the Attorney General and the College of Optometrists relating to the prescribing policies applicable to optometrists and physicians should be given little weight. For example, the Attorney General cited examples of unacceptable prescribing practices in Policy #2-05 (Prescribing Policies) of the College of Physicians and

[11] (1994), 21 O.R. (3d) 104 (C.A.).
[12] *Ibid.* at para. 14.

Surgeons, but failed to refer to general exceptions from the application of the policies, which permit physicians to prescribe in the following circumstances:

> In consultation with another appropriate regulated health professional who has an ongoing relationship with the patient, and who has agreed to supervise the patient's treatment, including use of any prescribed medications;
>
> During a telemedicine session in which the physician has use of appropriate technology to carry out the necessary examinations and has access to the record of the patient for whom the prescription is issued;

(d) In any case, the prescribing policies applicable to Ontario physicians would not be an impediment to writing prescriptions as contemplated by the proposed business model. The governing College in Alberta also had prescribing policies that were similar to those in effect in Ontario, but the Applicants provided evidence that these policies were not interpreted as restricting physicians from writing prescriptions for corrective eyewear without examining the customer, as contemplated by the proposed business model. As previously noted, the Applicants argued that the practice of telemedicine to dispense corrective eyewear is widely accepted in Alberta, a proposition that was not contested by the Attorney General.

(e) Analysis and conclusion

[18] In order to succeed in its application for declaratory relief in this case, the onus is on the Applicants to establish the legality of the proposed business model. Having considered the evidence before me and the submissions of counsel, I have concluded that the Applicants have failed to meet this onus. In particular, the Applicants have failed to establish that an Ontario optician is permitted to dispense corrective eyewear based upon a prescription written by an optometrist or physician who has not examined the customer and is relying solely on results of a refractive test that have been transmitted from a remote location. In this regard, I am persuaded by the Attorney General's legal submissions in support of this result, as outlined previously.

[19] I have reached that conclusion with some difficulty, given in particular the Court of Appeal's decision in the *Ainsley* case, which is binding on me.

[20] I have no doubt that the College of Opticians has the authority to issue non-statutory instruments relating to the performance of refractive tests by Ontario opticians. As previously noted, section 3 of the *Opticianry Act* defines an optician's scope of practice as the provision, fitting and adjustment of corrective eyewear, and narrowly construed, the performance of refractive tests does not fall within that scope of practice. However, the scheme of the *Opticianry Act* anticipates that another health professional will be involved in the dispensing of corrective eyewear based on an evaluation of the customer's need for that eyewear. If an

optician is to be involved in that process of evaluation, it makes sense that the College of Opticians would have a role in regulating that activity, consistent with the College's role in establishing standards of practice to assure the quality of health care for Ontario residents.[13]

[21] Nevertheless, in light of the *Ainsley* decision, the Applicants argued that the College would not have the authority to make mandatory rules relating to refractive testing by opticians unless it did so by way of regulation, as provided for in section 95 of the *Health Professions Procedural Code*. According to the Applicants, the College of Optician's *Standard of Practice – Refraction* goes beyond advisory guidelines. Rather, the standard constitutes mandatory requirements that cannot be imposed by a non-statutory instrument. A similar argument may also be made with respect to the prescribing policies applicable to optometrists and physicians referred to previously in these reasons (although the Applicants did not specifically make that argument).

[22] While the Applicants' submissions relating to the *Ainsley* decision gave me pause, I am not persuaded that they are determinative in this case. In this regard, the Attorney General referred to previous appellate-level decisions in Ontario relating to the enforcement of standards of practice by professional bodies. These decisions support the view that professional standards, whether written or unwritten, create significant legal obligations that can give rise to legal consequences. In *Re Matthews and Board of Directors of Physiotherapy*,[14] the Ontario Court of Appeal considered whether the absence of a statutory definition of misconduct in the *Drugless Practitioners Act*[15] deprived the disciplinary tribunal of jurisdiction to consider whether misconduct had occurred. The Court of Appeal concluded as follows:

> We agree with the Divisional Court that the absence of a definition of misconduct in the Drugless Practitioners Act, R.S.O. 1980, c. 127, or regulations does not prevent the board from considering whether there has been misconduct in any particular case.... Although these standards are unwritten, they are none the less real and it is within the jurisdiction of the appellant's professional brethren who constitute the board to determine in the particular case if he has fallen below that standard.

[23] In *Sigesmund v. Royal College of Dental Surgeons of Ontario*,[16] the Ontario Divisional Court considered whether the disciplinary panel in that case was entitled to assume that non-compliance with the College's written Guidelines constituted a breach of the standard of practice. The Court decided that the panel was entitled to make that assumption, noting that the guidelines made it clear that they may be used in determining whether appropriate standards of practice and professional responsibilities have been maintained.

---

[13] *Health Professions Procedural Code, supra*, s. 3(1)3.
[14] [1987] O.J. No. 838, 61 O.R. (2d) 475 (C.A.).
[15] R.S.O. 1990, c. D.18.
[16] [2005] O.J. No. 3267 (Div. Ct.).

[24] Counsel for the Attorney General also referred to an number of disciplinary decisions of the College of Opticians that have held that it was professional misconduct for opticians to perform refractive tests contrary to the College's standards of practice. As well, he referred to disciplinary decisions of the College of Physicians and Surgeons that repeatedly held that it is professional misconduct for members to prescribe remotely contrary to the College's prescribing policies.

[25] Having considered these disciplinary decisions and in light of the appellate decisions referred to by counsel for the Attorney General, I agree with him that I am entitled to consider the standards of practice adopted by the Colleges (as well as the disciplinary decisions relating to those standards) when considering whether the Applicants have established the legality of the proposed business model. I do not consider this conclusion to be inconsistent with the *Ainsley* decision. In my view, the non-statutory instruments in question are not comprehensive mandatory codes comparable to the proposed penny stock policy statement in the *Ainsley* decision. The discretion remains with the disciplinary panel to determine whether the member has committed an act of professional misconduct taking into account in all the circumstances, including whether the member has complied with terms of the instrument.

[26] In any case, it is clear from the *Re Matthews* decision that a College's discipline panel would have the authority to find that a member committed professional misconduct by failing to maintain the profession's standard of practice, even if the standard is unwritten. In these circumstances, I find it difficult to accept that the discipline panel would not be entitled to consider written guidelines and policies of the College in making its decision. That would be the consequences of accepting the Applicants' submissions as to the application of the *Ainsley* decision in this case.

[27] In addition, I consider my conclusion about the legality of the proposed business model to be justified from a policy standpoint, and take comfort from that fact. As outlined in the next section, the regulatory issues raised by the proposed business model have been the subject of ongoing debate for a number of years. I do not consider an application of this nature to be the appropriate venue for settling that debate.

(f) Regulation of refractive testing

[28] As outlined in the material before me on this application, the involvement of opticians in refractive testing has been the subject of considerable debate in Ontario over a number of years involving the Minister of Health and Long-Term Care, the Health Professions Regulatory Advisory Council, the various regulatory Colleges and other interested parties. This debate is not surprising. When considering a change in the status quo, the potential effect on the customers' eye health is of significant importance from a policy standpoint. However, altering the status quo inevitably affects the interests of the health professionals involved, which creates

resistance to change. Nevertheless, as noted by the Applicants, there has been a significant change in the regulatory environment relating to the dispensing of corrective eyewear elsewhere in Canada, particularly in British Columbia and Alberta. In the latter case, this evolution has occurred without substantive change to the applicable legislation, which remains substantially similar to the Ontario legislation.

[29] The Applicants argued that there was no evidence to support the public health concerns raised by the Attorney General and the College of Optometrists with respect to the conducting of refractive tests by opticians, and in particular, no evidence that refractive tests may cause "serious bodily harm" within the meaning of subsection 30(1) of the *Regulated Health Professions Act*. According to the Applicants, the evidence is to the contrary, including the experience with refractive testing in Alberta and British Columbia.

[30] In contrast to recent developments in Alberta and British Columbia, the Health Professions Regulatory Advisory Council of Ontario, in 2000, 2006 and 2010 reports, advised the Minister of Health and Long-Term Care to take steps to limit and regulate the performance of refractive tests by opticians. For example, in its 2006 report, the Advisory Council expressed the following concern about dispensing corrective eyewear solely on the basis of a refractive test:

> Relying solely on the results of a refraction test substantially increases risk of harm to patients since opticians would be assessing the vision and eye wear needs of the patient based on limited information. The likelihood of failure to detect disease, failure to refer to a qualified professional, or failure to assess eye conditions correctly would be increased.[17]

[31] In that report, the Advisory Council also recommended that the Minister should "issue a new direction to the College of Opticians of Ontario requiring it to develop a standard of practice limiting the authority of members who perform [refractive tests] to those circumstances were such refracting is undertaken in collaboration with an optometrist or a physician for the purpose of informing a comprehensive ocular assessment."[18]

[32] In 2008, the College of Opticians adopted *Standard of Practice-Refraction* referred to previously. However, by letter dated July 16, 2009, the Minister expressed concern that the College had done so without a consensus with the College of Optometrists and the College of Physicians and Surgeons relating to refractive testing. The Minister accordingly requested that the College of Opticians to stop granting "refracting optician" status to its members, and suggested that the College work closely with the Advisory Council as it developed its advice regarding refracting by eye care professionals in Ontario. To date, the three Colleges have not

---

[17] *Regulation of Health Professions in Ontario: New Directions*, Health Professions Regulatory Advisory Council, April 27, 2006 at 287.
[18] *Ibid.* at 292.

put in place collaborative standards of practice relating to refractive testing, as suggested by the Advisory Council.

[33] On the evidence before me, it is clear that there is unfinished business relating to the appropriate model for regulation of refractive testing by Ontario health care professionals. The Health Professions Regulatory Advisory Council has recommended that the Colleges governing opticians, optometrists and physician develop collaborative standards of practice relating to refractive testing. They have not done so. The Minister of Health and Long-Term Care has suggested that the Advisory Council develop its advice regarding refracting by eye care professionals in Ontario. That process appears to be stalled. It ultimately falls on the Minister as part of the Ontario government to resolve the issues raised by this policy debate in a timely manner, consistent with the attendant public health concerns. In my view, it is not appropriate for the court to become involved in this process in the absence of compelling grounds for doing so. I do not consider such grounds to exist in this case.

III. Hypothetical facts

[34] Should the court decline to grant the discretionary remedy of declaratory judgment based on hypothetical facts?

[35] In this case, I have already concluded that the Applicants have failed to demonstrate the legality of the proposed business model. Their application fails on this basis. However, even if I had reached the opposite conclusion on the legality of the proposed business model, I would still decline to grant the discretionary remedy of declaratory judgment.

[36] As provided for in section 97 of the *Courts of Justice Act*,[19] this Court has the jurisdiction to "make binding declarations of right, whether or not any consequential relief is or could be claimed." However, whether a court does so in a particular case is discretionary. In *Good Country Estates Ltd. v. Quesnel (City)*,[20] the British Columbia Court of Appeal made the following statement about the discretionary nature of declaratory relief:

> When an action is brought by a plaintiff seeking a declaration, the court may deny relief on several discretionary grounds, including standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, *the theoretical or hypothetical nature of the issue*, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility. I do not suggest that this list is exhaustive.[21]

---

[19] R.S.O. 1990, c. C.43.
[20] 2008 BCCA 407, [2008] B.C.J. No. 2188.
[21] *Ibid.* at para. 10 [emphasis added].

[37] In *Operation Dismantle Inc. v. Canada*,[22] the Supreme Court of Canada also recognized that the hypothetical nature of the requested relief is one of the factors that a court is entitled to take into account in deciding whether to exercise its discretion to grant declaratory relief. In that decision, the Court acknowledged the preventative function of the declaratory judgment where some "legal interest or right of [the applicant] has been placed in jeopardy or grave uncertainty", but went on to state as follows:

> Nevertheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in Solosky v. The Queen, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative.[23]

[38] The Applicants cited the *Solosky* decision to support their argument that the discretionary remedy of declaration should be granted in this case. In this regard, the Court noted that two factors that will influence a court in exercising its discretion are (a) the utility of the relief, if granted, and (b) whether it will settle the questions at issue between the parties.[24] The Applicants argued that based on previous experience, particularly in the context of the *Great Glasses* litigation, they would be subject to discipline or censor if they proceeded with the proposed business model without obtaining the declaration they are seeking. According to the Applicants, the requested declaration would prevent these consequences and otherwise settle the matters at issue.

[39] Having considered the Applicants' arguments in light of the evidence before me, I have concluded that I would not exercise my discretion to grant declaratory relief in this case, even if I found that their legal position otherwise justified doing so. The British Columbia Supreme Court faced a similar request for relief in *Vision Avant-Garde Inc. v. Canada (Superintendent of Financial Institutions)*.[25] In that case, the petitioner sought a declaration that a particular financial product it intended to market in the future was not "insurance" and therefore a licence was not required to sell it. The respondent regulator had provided the petitioner with a preliminary opinion that the product was insurance and could only be sold by licensed insurance sales persons. In these circumstances, the Court refused to grant the requested declaration, stating as follows:

> Applications for declarations are frequently dismissed where there is not a true *lis* between the parties [*authorities omitted*].

---

[22] [1985] 1 S.C .R. 441.
[23] *Ibid.* at paras. 32-33.
[24] *Canada v. Solosky*, [1980] 1 S.C.R. 821 at para. 16.
[25] 2000 BCSC 423, [2000] B.C.J. No. 486.

> The petitioner, however, maintains that there is a real dispute in this case and thus, the court should exercise its discretion to hear the application for declaratory relief. Further, the petitioner submits that the court should consider the issue in light of the serious potential penalties that could be imposed. ...
>
> However, I think the authorities show that the question here is really academic and presently there is no actual *lis* between the parties. In such hypothetical circumstances, the court should not entertain the granting of a declaration. The petitioner does not yet sell the product in the marketplace. Moreover, although expressing the preliminary view that the product is "insurance", the Superintendent has not and perhaps even could not take steps to prevent or penalize the petitioner before the product is even marketed. ...
>
> In this particular case, there is no actual *lis* between the parties. Rather, the petitioner is asking this court to act like a law firm and provide advice about possible future business activities.[26]

[40] The rationale against granting the discretionary relief of declaration in these circumstances was expanded on by the Federal Court of Appeal in *Geophysical Service Inc. v. Canada (National Energy Board)*, as follows:[27]

> The public interests in both the conservation of scarce judicial resources and judicial restraint militate against the courts unnecessarily deciding legal questions when legal rights and other protected interests have not been in infringed are not likely to be in peril in the near future. ...
>
> ... Nor is it sufficient that the industry might like to know now whether the present law and policy on disclosure supersede any other legal rights.... Courts do not normally render advisory opinions.[28]

[41] As was the case in the *Vision Avante-Garde*, I do not consider there to be a *lis* between the parties before me that would justify the granting of the discretionary relief of declaration in the application before me. The Applicants are not in any legal jeopardy at the present time. They have not moved forward to execute the proposed business plan, nor is doing so imminent, on the evidence before me. In fact, they have not even put in place arrangements with an Alberta ophthalmologist who would write prescriptions for corrective eyewear as contemplated by the proposed business plan, although that omission in isolation would not be fatal to their application.

---

[26] *Ibid.* at paras. 10-12, 16.
[27] 2011 FCA 360, F.C.J. No.1844.
[28] *Ibid.* at paras. 9, 11.

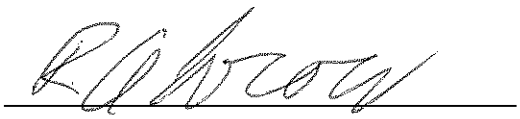
[42] As well, in reaching the conclusion that discretionary relief is not appropriate in this case, I have also taking into account the considerations outlined above under the heading *Regulation of Refractive Testing*. As previously indicated, I do not consider it appropriate in the circumstances of this case for the court to become involved in the public policy process to determine the appropriate model for regulating refractive testing by health professionals in Ontario.

IV. Conclusion

[43] For the foregoing reasons, judgment will issue in the following terms:

1. The application is dismissed; and

2. The Respondent is entitled to its costs of the application, payable by the Applicants within 30 days. On consent, the Respondent's costs are fixed at $23,000, including disbursements and tax. The Intervenors will bear their own costs.



The Honourable Mr. Justice R.A. Lococo

Released: January 5, 2015

CITATION: 2217758 Ontario Inc. v. Ontario (Attorney General), 2015 ONSC 1
COURT FILE NO.: 09-16459 (Hamilton)
DATE: 2015/01/05

SUPERIOR COURT OF JUSTICE - ONTARIO

B E T W E E N:

2217758 Ontario Inc. and **James Wallace Hugh McLean**

Applicants

- and –

The Attorney General of Ontario

Respondent

- and -

The College of Opticians of Ontario and **the College of Optometrists of Ontario**

Intervenors

REASONS FOR JUDGMENT

R. A. Lococo, J.

Released: January 5, 2015