CITATION: College of Optometrists of Ontario et al v. Essilor Group Canada Inc., 2018 ONSC 206
COURT FILE NO.: CV-16-565917
DATE: 20180111

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
COLLEGE OF OPTOMETRISTS OF ONTARIO and COLLEGE OF OPTICIANS OF ONTARIO Applicants	*Linda R. Rothstein, Jean-Claude Killey, Daniel Rosenbluth*, for the Applicants
– and –	
ESSILOR GROUP CANADA INC. Respondent	*Jonathan C. Lisus, Hilary Book, Valerie E. Quintal*, for the Respondent
	HEARD: October 11, 2017

LEDERER J.

Introduction

[1] In the modern day, not everything is purchased by going to a store. Increasingly, people rely on the internet not just to buy books and household products but also to buy items the sale of which is governed by regulation. This includes medicines and other health-related items, in this case prescription eyeglasses and contact lenses. At its root this case is concerned with who may regulate these sales and how they can do so.

Respondent

[2] Essilor Canada Ltd. is a federally-registered corporation. It is the Canadian subsidiary of Essilor International, Compagnie Generale d'Optique S.A., a French company. The Essilor group

is the largest manufacturer of ophthalmic lenses in the world. Approximately 1 billion people worldwide benefit from its products.[1]

[3] Essilor Group Canada Inc. (the "respondent") has long been a very large supplier of lenses to Ontario. It sells lenses and eyeglasses to optometrists and opticians.[2] The respondent also operates two online eyewear dispensaries: Clearly (clearly.ca) and Coastal (coastal.com). Both operate as divisions of the respondent; management reports directly to Essilor International. Neither are legal entities distinct from the respondent.[3] They began as business units of Coastal Contacts Inc., a federally incorporated company with its head office in Vancouver. Coastal Contacts Inc. was acquired by Essilor International in April 2014. It continues to operate out of British Columbia as divisions of Essilor Group Canada Inc. Clearly and Coastal sell prescription eyeglasses and contact lenses to customers across Canada and the United States.[4] Together they have shipped at least 1 million pairs of contact lenses (since 2005) and 700,000 pairs of eyeglasses (since 2008) to customers in Ontario.[5] It is their conduct, or mode of carrying on business, that is at issue in this application.[6]

The Applicants

[4] Optometry and opticianry are two of the health professions governed by the *Regulated Health Professions Act*.[7] That legislation is the overarching statute through which all self-governing health professions in Ontario are regulated. Each regulated profession is subject to specific legislation. The two health professions statutes relevant to this case are the *Optometry Act* and the *Opticianry Act*.[8] The *Regulated Health Professions Act* identifies "College" as "meaning the College of a health profession or group of health professions established or continued under a health profession Act".[9] The *Optometry Act* and the *Opticianry Act* both identify the college applicable to the health profession they govern: the former the "College of Optometrists of Ontario" and the latter the "College of Opticians of Ontario."[10] The two colleges are the applicants in this proceeding.

---

[1] *Affidavit of Craig Lennox,* sworn May 1, 2017, at paras. 7, 12 and 13.
[2] *Cross-examination of Andrew Craig Lennox* at Q. 235-236 and *Cross-examination of Paula Garshowitz* at Q. 101-103.
[3] *Affidavit of Craig Lennox,* sworn May 1, 2017, at paras. 18-19 and 22 and *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at paras. 36-44.
[4] *Applicant's Factum,* at para. 22. No authority is given for this statement but it appears to be uncontroversial.
[5] *Affidavit of Craig Lennox,* sworn May 1, 2017, at paras. 18-19.
[6] That the conduct of the business is the issue is recognized by the respondent: *Affidavit of Craig Lennox,* sworn May 1, 2017, at para. 1.
[7] S.O. 1991, c. 18 and Schedule 1 thereto.
[8] Respectively S.O. 1991, c. 35 and S.O. 1991, c. 34.
[9] *Regulated Health Professions Act* (fn. 7) at s. 1(1).
[10] Respectively the *Optometry Act* and the *Opticianry Act* (fn. 8) s. 1 and s. 2(2) of both.

[5] The *Health Professions Procedural Code*, attached to the *Regulated Health Professions Act* as Schedule 2, is made part of each health profession statute including both the *Optometry Act* and the *Opticianry Act*.[11] The *Health Professions Procedural Code* lists the objects of the colleges. They are all directed to overseeing and regulating the standards and proper conduct of the profession.[12] Section 87 of the *Health Professions Procedural Code* expressly grants the Colleges the power to apply to the Superior Court of Justice for an order directing persons to comply with any provision of the *Regulated Health Professions Act* or each of the specific Acts governing a regulated health profession.[13] This case is such an application.

---

[11] *Regulated Health Professions Act* (fn. 7) at s. 4:

> The Code shall be deemed to be part of each health profession Act.

[12] *Health Professions Procedural Code* s. 3(1):

> The College has the following objects:
>
> 1. To regulate the practice of the profession and to govern the members in accordance with the health profession Act, this Code and the *Regulated Health Professions Act, 1991* and the regulations and by-laws.
> 2. To develop, establish and maintain standards of qualification for persons to be issued certificates of registration.
> 3. To develop, establish and maintain programs and standards of practice to assure the quality of the practice of the profession.
> 4. To develop, establish and maintain standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members.
> 4.1 To develop, in collaboration and consultation with other Colleges, standards of knowledge, skill and judgment relating to the performance of controlled acts common among health professions to enhance interprofessional collaboration, while respecting the unique character of individual health professions and their members.
> 5. To develop, establish and maintain standards of professional ethics for the members.
> 6. To develop, establish and maintain programs to assist individuals to exercise their rights under this Code and the *Regulated Health Professions Act, 1991*.
> 7. To administer the health profession Act, this Code and the *Regulated Health Professions Act, 1991* as it relates to the profession and to perform the other duties and exercise the other powers that are imposed or conferred on the College.
> 8. To promote and enhance relations between the College and its members, other health profession colleges, key stakeholders, and the public.
> 9. To promote inter-professional collaboration with other health profession colleges.
> 10. To develop, establish, and maintain standards and programs to promote the ability of members to respond to changes in practice environments, advances in technology and other emerging issues.
> 11. Any other objects relating to human health care that the Council considers desirable.

[13] *Health Professions Procedural Code* s. 87:

> The College may apply to the Superior Court of Justice for an order directing a person to comply with a provision of the health profession Act, this Code, the *Regulated Health Professions Act,*

The respondent's business

[6] Clearly and Coastal sell prescription eyeglasses and contact lenses online. Clearly and Coastal provide a variety of custom services, including a choice of lens types,[14] lens coatings customization,[15] glasses assembled at their laboratories[16] and delivery directly to their customers.[17] To inquire into and develop evidence as to the manner and mode by which Clearly and Coastal do business, counsel for the Colleges relied on three associates of another law firm who "investigated" by using the services offered to purchase prescription eyeglasses. One of them, on a separate occasion, purchased contact lenses.

[7] Generally, purchasing eyeglasses follows steps set out on a website that is easily accessible, at will and without limitation; no password or any other key to entry is required. Upon entry to the website, the prospective customer is advised to "make sure you have an up-to-date prescription and that you are purchasing the correct product with the right prescription."[18] At this stage, the process is concerned with the specific requirements of the individual customer. Verification of any prescription is limited. In one case the young lawyer did not have her prescription but "eventually navigated to the 'Glasses' section of the website."[19] A second of the three associates found a link and clicked on an option that read "I don't have an RX." He was advised to "book a visit with [his] eye doctor." Instead, he clicked a link that said: "I have a new refreshed RX".[20] He was allowed to proceed. The third of the three lawyers used her actual prescription, that she had obtained on February 24, 2016, approximately a month and a half before she logged on the website on April 10, 2016.[21]

[8] Apart from the correction imposed by the lenses, the proper fitting of eyeglasses requires the identification of the appropriate "pupillary distance". As I understand it, this is the measure of the distance from the centre of the pupil to mid-point of the bridge of the nose. It may be different for each eye. In the case of the young lawyer who had her prescription available, it did not provide for the applicable pupillary distance. This may or may not be typical. The website preselected one and allowed her to proceed.[22] A second of the three young lawyers, the one who purported to have "a new refreshed RX", took advantage of the offer to contact what was described as a "Vision Ambassador". The website provided a telephone number. The

---

1991, the regulations under those Acts or the by-laws made under clause 94 (1) (l.2), (l.3) (s), (t), (t.1), (t.2), (v), (w) or (y).

[14] *Affidavit of Pamela Hrick*, affirmed December 9, 2016, at para. 8 and *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 21.
[15] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 8.
[16] *Affidavit of Craig Lennox,* sworn May 1, 2017, at para. 82(f).
[17] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 15.
[18] *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at para. 5.
[19] *Ibid* at para. 7.
[20] *Affidavit of Carlo Di Carlo,* sworn December 1, 2016, at para. 5.
[21] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 7.
[22] *Ibid* at para. 7.

"ambassador" the lawyer reached was not an optician. The "ambassador" advised that he had received training to assist with eyewear purchases. Opticians were available to assist with difficult cases.[23] They discussed pupillary distance. The "ambassador" advised that this information is not usually found on a prescription. However, it was necessary for the purchase of eyeglasses. In the absence of this information the associate was told there were two options: go to your eye doctor or take the measurements yourself. The "ambassador" directed the lawyer to a page on the website that provided instruction as to how to do this.[24] The Chief Financial Officer of the respondent confirmed that self-measurement is the company's preferred approach.[25] In response to being asked whether the pupillary distance was important, the "ambassador" said that because the "correction was not particularly severe…it was not as important that [the] measurement be correct."[26] The affidavit of the remaining associate does not refer to pupillary distance.

[9] Before going on, I return to the question of the verification of a prescription. During, or at the end of the conversation with the "vision ambassador", the young lawyer asked to speak to an optician. He was put on hold, and was subsequently advised that no optician was available. The "ambassador" took his name and number with the advice that an optician would call him the next day. The following day, "an in-house optician" called and left a message. He said that he understood that the "customer" had some questions about taking one's own pupillary distance. The optician asked questions about the pupillary distance that was on the order form and asked for a photograph of the prescription. He asked to be contacted either by telephone or email. The following day, by email, the young lawyer confirmed the pupillary distance on the order form but did not forward the prescription. The same day, the optician responded asking further questions about the prescription. He wanted a copy because the order contained "a large imbalance between your two eyes and I wanted to make sure they were properly ordered". This was said even though the eyeglasses were being shipped out that day. The optician observed: "I guess we'll know whether or not they were soon enough! Drop me a line when they arrived to let me know how you're doing with them. I think with a prescription like that, it may take you a week or two to adapt to it."[27]

[10] The optician was identified as Christopher Day. He is a registered member of the College of Opticians of British Columbia. He is not registered in Ontario. He is employed by Coastal and Cleary at a call centre. His role is "to provide information to consumers about [Coastal's and Cleary's] products and to provide customer service." He was careful to depose in the affidavit he swore that he does not "practice opticianry at [Coastal's and Cleary's] call centre nor [does he]

---

[23] *Affidavit of Carlo Di Carlo,* sworn December 1, 2016, at paras. 7 and 8.
[24] *Ibid* at para. 10.
[25] *Affidavit of Craig Lennox,* sworn May 1, 2017, at para. 86: "Where optometrists do not include a pupillary distance as part of a prescription, [Coastal's and Cleary's] website[s] provide information for customers on how they may measure pupillary distance themselves, but [Coastal and Cleary] never measure customers' pupillary distances."
[26] *Ibid* at para. 11.
[27] *Ibid* at paras. 12, 20 to 22.

provide eye health care".[28] The young lawyer's supposed prescription attracted his attention "because of the very large imbalance in his prescription which is very rare." Christopher Day wanted to verify that the prescription had been inputted accurately. He was also concerned with the fit of the frames. The "customer" had provided a large pupillary distance but had chosen a small sized frame. The optician said that the address provided on the order was close to a store operated by the respondent and he suggested that the "customer" go there to get his frames adjusted once he received them.[29]

[11] Each of the three "customers chose first the frames and then the type of lenses they wished to order. This having been done the prescription was entered and the order placed".[30]

[12] Before an order was accepted, the "customer" was required to acknowledge that he or she accepted "The Terms and Conditions of Use". This is a ten page document which addresses the terms upon which a prospective purchaser is permitted to use the site and what he or she can expect from the provider of the eyewear. The terms refer specifically to an obligation to have a valid prescription:

> VALID PRESCRIPTION REQUIRED
>
> You hereby certify that you have a valid prescription for the contact lenses or eyeglasses that you are ordering. You represent and warrant to Cleary by placing an order that your information you enter into the Site is valid and true and matches exactly your prescription as provided by your eye care provider. You further certify that you will renew your prescription in accordance with your eye care providers suggested regime [*sic*]. You understand that we will not fulfil your order unless you have a valid prescription. You hereby consent to our contacting your eye care provider, or providing a copy of your original prescription to us, if necessary, to verify your prescription information and any other necessary information.[31]

---

[28] *Affidavit of Christopher Day,* sworn May 1, 2017, at para. 1.
[29] *Ibid* at paras. 4, 5 and 6.
[30] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 7, 12 and 13; *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at para. 9 and *Affidavit of Carlo Di Carlo,* sworn December 1, 2016, at para. 14.
[31] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at Exhibit B; *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at Exhibit C; and *Affidavit of Carlo Di Carlo,* sworn December 1, 2016, at Exhibit C. The practical implication of this is explained by the Chief Financial Officer of the respondent in the following terms: "...customers do not need to provide *copies* of their prescriptions when ordering online. They are, however, required to provide the *information* that is contained on their prescriptions", and "Customers are not required to provide full copies of their prescriptions when ordering online, but they must accept [Coastal's and Clearly's] Terms and Conditions of Use, which require customers to certify that they have valid prescriptions for the lenses they are ordering." (*Affidavit of Craig Lennox,* sworn May 1, 2017, at paras. 78 and 83).

[13] Each of the three "customers" accepted these "Terms and Conditions of Use"[32] although, for a second purchase made by one of them, the box to be checked was preselected.[33] It is possible to check acceptance of the "Terms and Conditions of Use" without actually accessing them much less reading them.[34]

[14] Once the orders were made the eyeglasses were delivered to the addresses provided. In the case of one of the three "customers", all of the eyeglasses she ordered were delivered with an invoice and a "Thank You" card. The invoice contained contact information for a "Vision Care Team" and provided the following warning:

> No two pairs of eyeglasses are exactly the same, and it is normal for your eyes to take up to two weeks to adapt to your new glasses. Because progressive lenses near, far and intermediate distance prescriptions the adaption process can take longer [*sic*]. Remember, the more you wear your glasses the sooner you will adapt. Please refrain from driving or operating machinery that could compromise your safety until you have fully, and comfortably, adapted to your new progressive lenses.[35]

[15] This would appear to reflect on the particular lenses that were used ("progressive lenses").

[16] Another of the "customers" received the glasses "in a small box with a hard case, a lens cleaning cloth and a small screwdriver. Also enclosed was a packing slip and order detail form, which included information about how to contact "Our Vision Ambassador".[36]

[17] The third customer confirms that the eyeglasses were delivered but says nothing more other than: "There was no information that was delivered with the eyeglasses that required or requested that I attend an optician to ensure the glasses fit."[37] The first of the three made the same observation.[38]

[18] As already noted one of the three "customers" also ordered contact lenses. The only observation of interest related to that order is that she made certain to insert a prescription that was different from the one she had used two months before when ordering eyeglasses. The

---

[32] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 8; *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at para. 11 and *Affidavit of Carlo Di Carlo,* sworn December 1, 2016, at para. 18.
[33] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 13.
[34] *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at para. 11.
[35] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at paras. 15, 16 and 22.
[36] *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at para. 15.
[37] *Affidavit of Carlo Di Carlo,* sworn December 1, 2016, at para. 24.
[38] *Affidavit of Tiffany O'Hearn,* sworn December 1, 2016, at para. 15.

change was not questioned even though her personal profile on the site had registered the difference. The order was processed as made.[39]

[19] This approach to the delivery of eyeglasses and contact lenses is directed to the marketing and selling of a consumer product.[40] It pays little and inconsistent attention to the proposition that the policy concern is the treatment of a common but significant health concern, the ability to see.[41] The in-house optician was candid when he deposed that he was not practicing opticianry and not providing health care. If he isn't, who in this process is? Seemingly, no one. The person left with the responsibility to provide an accurate prescription and, should he or she choose to do so, to measure the pupillary distance is the person who needs corrective eyewear, that is, in what used to be common health parlance the "patient" more recently, in some circles, the "client", and now, apparently, the "consumer".[42]

[20] Does Ontario's regulatory scheme allow for this?

[21] The significance of these changes to the prescribing, production, adjustment and delivery of eyeglasses is not affected by the fact that there are communities that face barriers to what the Chief Financial Officer of the respondent refers to in his affidavit as "vision care".[43] Based on the regulatory scheme, "vision care" remains a subset of health care. Similarly, it does not matter that the online sale of prescription eyewear could reasonably be identified as having significant market potential.[44]

[22] The parameters of the relationship between those who require eyeglasses or contact lenses and those who prescribe and provide them have been and are subject to regulation as put in place by the *Regulated Health Professions Act,* the *Optometry Act*, the *Opticianry Act*, the *Health Professions Procedural Code* and any applicable underlying regulations. The issue at hand is whether they apply to this situation and, if they do, whether the respondent is complying with them.

---

[39] *Affidavit of Pamela Hrick,* affirmed December 9, 2016, at paras. 26-33.
[40] *Affidavit of Craig Lennox,* sworn May 1, 2017, at para. 2: "As I explain below Clearly and Coastal have been selling contact lenses and eyeglasses online since 2000 and 2008, including to customers in Ontario."
[41] *Ibid* at paras. 4 and 94: Where the respondent concedes that it is not providing health care: "Clearly and Coastal do not provide health care through their online business."(para. 4) and Coastal and Clearly do not consider themselves "… to be providing health care services to [their] customers (para. 96).
[42] *Ibid* at para. 54: "The online market is a growing business that I believe is good for consumers." And see paras. 55 and 57.
[43] *Ibid* at paras. 25-28.
[44] *Ibid* at para. 26: "According to the Globe and Mail article attached as Exhibit "F", overall Canadians spent $4.2 billion on spectacles (including frames, lenses, sunglasses and ready-made reading glasses) in 2016."

And para. 33 and Exhibit "K": "[Coastal and Clearly] provide an important source of eyeglasses and contact lenses to customers in rural areas, for whom traditional retailers are difficult or inconvenient to access. For example, in 2015-2016, [Coastal and Clearly] served more than 28,000 unique customers in villages or towns in Ontario with populations of less than 20,000 people."

[23] I pause to say that the evolution of corrective eyewear from health care to treatment as a consumer product is underscored by evidence relied on by the respondent. Both the Chief Financial Officer and counsel in the factum filed on behalf of the respondent are at some pains to explain that opticians and optometrists, despite being identified as health professions, "have traditionally been the primary retailers of corrective lenses in Canada." Since 2014, optometrists have been permitted to charge a profit for the manufacture of lenses. They no longer charge separate dispensing and product fees. Similarly, opticians sell corrective lenses at retail prices. Margins on eyeglasses and contact lenses are much higher than for clinical services such as eye exams. Retail is a substantial revenue line for optometrists and opticians. [45]

[24] Counsel for the respondent submits that with the rise of e-commerce and consumer demand for more choice and competition, the retail business of opticians and optometrists is under pressure. What is really at stake here is competitive advantage:

> This application is the latest in a series of steps taken by colleges or associations of opticians and optometrists in different parts of the country which, had they been successful, would have blocked Clearly and Coastal from competing in the corrective lens retail market.[46]

[25] The implication is that the colleges, mandated as they are to maintain standards of the two professions, are complicit in bringing this application, which is part of the competitive battle that is underway:

> I believe this Application represents an effort by the relevant associations and regulatory colleges to curtail online sales, which compete with traditional retail channels and provide more choice and pricing flexibility for consumers.[47]

[26] I confess that I do not understand this to be particularly relevant or helpful. It may add colour or at least a version of it. It could be right. It could be wrong. It does not respond to the issues at hand. Does the regulatory scheme apply and, if it does, is it being complied with?

The regulatory scheme

[27] The *Regulated Health Professions Act* establishes the framework for regulation of the health professions it identifies. Its purpose is discernable from the direction that it provides to the Minister of Health and Long-Term Care:

---

[45] *Ibid* at para. 28; *Respondent's Factum* at paras. 23-24.
[46] *Ibid* at para. 3.
[47] *Ibid* at para. 57 and see also 68: "As I stated above, my belief was that, in dealing with the Associations, Clearly was also effectively dealing with the Colleges." And paras. 72 and 73 "...it is my belief that there has been some degree of cooperation between the Associations and the Colleges in their approach to [Coastal and Clearly], and that their concern about the competition that [Coastal and Clearly] is providing is what has motivated the Colleges to pursue [Coastal and Clearly] in the Ontario courts...".

> It is the duty of the Minister to ensure that the health professions are regulated and co-ordinated in the public interest, that appropriate standards of practice are developed and maintained and that individuals have access to services provided by the health professions of their choice and that they are treated with sensitivity and respect in their dealings with health professionals, the Colleges and the Board.[48]

[28] The *Health Professions Procedural Code* lists the objectives that govern the Colleges.[49] In carrying out these objects the Colleges have a duty to serve and protect the public interest.[50] The *Optometry Act* and the *Opticianry Act* each provide for the scope of practice of those two professions:

> The practice of optometry is the assessment of the eye and vision system and the diagnosis, treatment and prevention of,
>
> (a) disorders of refraction;
>
> (b) sensory and oculomotor disorders and dysfunctions of the eye and vision system; and
>
> (c) prescribed diseases.[51]

And

> The practice of opticianry is the provision, fitting and adjustment of subnormal vision devices, contact lenses or eyeglasses.[52]

[29] The duty of the Minister, the objectives of the Colleges and the scopes of practice of the two professions are all concerned with the provision of health care. These objectives are not motivated by the desire for competitive advantage but by the desire that proper health care be provided, by those qualified, to the established standards of education and competence set by the regulatory scheme.

[30] The issues in this case revolve around s. 27 of the *Regulated Health Professions Act.* It contains a list of controlled acts which may only be performed by members of a health professions college (or their delegates), and only if that profession's corresponding statute authorizes the member to perform the controlled act. Insofar as it is directly applicable, the section states:

---

[48] *Regulated Health Professions Act, supra* (fn. 7), s. 3.
[49] See fn. 12, above.
[50] *Health Professions Procedural Code* (referred to in the *Regulated Health Professions Act* as Schedule 2) at s. 3(2).
[51] *Optometry Act, supra* (fn. 8), s. 3.
[52] *Opticianry Act, supra* (fn. 8), s. 3.

> (1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,
>
> (a) the person is a member *authorized* by a health profession Act to perform the controlled act; or
>
> (b) the performance of the controlled act has been delegated to the person by a member described in clause (a).
>
> (2) A "controlled act" is any one of the following done with respect to an individual:
>
> ...
>
> 9. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eyeglasses other than simple magnifiers.[53]
>
> [Emphasis added]

[31] Both the *Optometry Act* and the *Opticianry Act* authorize the members of their colleges to dispense eyeglasses:

> In the course of engaging in the practice of optometry, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:
>
> ...
>
> 3. Prescribing or *dispensing*, for vision or eye problems, subnormal vision devices, contact lenses or eyeglasses.[54]
>
> [Emphasis added]

And

> In the course of engaging in the practice of opticianry, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to *dispense* subnormal vision devices, contact lenses or eyeglasses.[55]
>
> [Emphasis added]

---

[53] *Regulated Health Professions Act, supra* (fn. 7), s. 27 (1) and (2), para. 9.
[54] *Optometry Act, supra* (fn. 8), s. 4, paragraph 3.
[55] *Opticianry Act, supra* (fn. 8), s. 4.

Issues

[32] It follows that there are two issues for the court to determine.

[33] The first is whether any of the conduct of the respondent falls within the definition of a controlled act as that term applies to members of College of Optometrists or the College of Opticians. If it does, then the respondent would be acting contrary to the s. 27(1) of the *Regulated Health Professions Act.*

[34] The second issue arises only if the respondent is acting contrary to s. 27(1). If it is the question of whether the respondent falls under the jurisdiction of the Ontario legislation remains. If it does not, the fact that it acted in breach of the section does not matter.

[35] Typically, the jurisdictional question would be dealt with first. Here, however, the question of jurisdiction is informed by the "sufficient connection test." To understand the level of "connection," if any, I must first determine what the respondent did, not where they are.

The purposive approach

[36] I begin with a fundamental premise. We are concerned with a purposive interpretation of statutes:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[56]

[37] The purpose of the *Regulated Health Professions Act* has been considered by the Court of Appeal. In *Wadden v. College of Opticians of Ontario,*[57] two accused (an individual and her employer) were convicted of breaching s. 27(1) and (2) of the *Regulated Health Professions Act.* The individual, Sandra Wadden, had performed "...the controlled act of dispensing eyeglasses for vision or eye problems in the course of providing health care services to an individual without being a member authorized by a health professions act, to perform the controlled act."[58] King Optical was convicted as the employer of Sandra Wadden.[59]

---

[56] Ruth Sullivan, *Sullivan on the Construction of Statutes, Sixth Edition* (LexisNexis Canada Inc., 2014) at p. 7 quoting from Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at p. 67.
[57] Also referred to as *King Optical Group Inc. v. College of Opticians of Ontario*, 2001 CanLII 21166 (Ont. C.A.), 207 D.L.R. (4th) 72.
[58] *Ibid* at para. 2.
[59] *Regulated Health Professions Act, supra* (fn. 7), s. 42(1):

[38] The court looked for the purpose behind the enactment of the *Regulated Health Professions Act.* The legislation finds its provenance in the Health Professions Legislative Review, *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions.*[60] The Executive Summary included the following:

> Through professional regulation *the nature and quality of health care services can be regulated.* Professional regulation is aimed at advancing the public interest, not the interests of the professions. The Review's recommendations are aimed at advancing the public interest in four ways:
>
> - Protecting the public, to the extent possible, from unqualified, incompetent and unfit health care providers.
>
> - Developing mechanisms to encourage the provision of high quality care.
>
> - Permitting the public to exercise freedom of choice of health care provider within a range of safe options.
>
> - Promoting evolution in the roles played by individual professions and flexibility in how individual professionals can be utilized, so that health services are delivered with maximum efficiency.[61]
>
> [Emphasis added]

[39] This confirms that the purpose behind the legislation is to regulate health professions in order to encourage, if not ensure high quality health care. This was underscored by the Court of Appeal in *Wadden v. College of Opticians of Ontario.* In that case it was submitted that "...the sale of eyeglasses to visually mature individuals is a retail function that does not meet a common sense definition of the provision of 'health care services' ".[62] The court rejected this submission and the implication that this idea somehow broadened the purpose of the *Regulated Health Professions Act* particularly as it applies to opticianry:

> As noted in the executive summary of the Schwartz Report the very purpose of the *RHPA* is to regulate the provision of health care services. "Opticianry" is designated as a self-governing *health care* profession by virtue of Schedule 1 to the *RHPA*. The services Ms. Wadden provided to Mr. Barker are clearly within the scope of practice of opticianry, namely the provision, fitting and adjustment of

---

> The employer of a person who contravenes subsection 27 (1) while acting within the scope of his or her employment is guilty of an offence and on conviction is liable to a fine of not more than $25,000 for a first offence, and not more than $50,000 for a second or subsequent offence.

[60] Toronto: Health Professions Legislation Review, 1989 referred to colloquially as the Schwartz Report.
[61] *Ibid* quoted in *Wadden v. College of Opticians of Ontario, supra* (fn. 57), at para. 24 (CarswellOnt).
[62] *Wadden v. College of Opticians of Ontario, supra* (fn. 57), at para. 21 (CarswellOnt).

> eyeglasses. By definition Ms. Wadden was providing health care services to Mr. Barker when she sold him a pair of prescription eyeglasses.[63]

[40] In this ruling the Court of Appeal rejected the fundamental proposition behind the position adopted by the respondent. The legislation (the regulatory scheme) is not directed by the interest of those needing eyeglasses as retail consumers but as individuals requiring health care.

[41] The respondent does not accept that the legislation is directed to the provision of health care. It is intent on importing other intentions into the legislation and by this means to limit the interpretation of its "controlled acts." The respondent insists that the essence of the issue raised in this case is the protection of members of the colleges from competition rather than providing the assurance that those who carry out the controlled acts (dispense eyeglasses) do so to an established standard and are properly qualified. To the respondent the perceived danger is not improper care; it is the negative impact of "professional monopolies":

> Statutes that create professional monopolies that protect approved members from competition must be strictly applied. This principle is especially apt given the intent of the *RHPA* to restrict professional monopolies. This reflects a recognition by the Legislature that professional monopolies serve the interests of professionals, but restrict public choice and access. The public interest is best served by restricting professional monopolies to activities that intrinsically carry a risk of harm such as the sale of prescription drugs.[64]

[42] In taking this approach, the respondent relies on *Ordres des optometristes du Quebec v. Coastal Contacts Inc.* This is the case that established the authority of the respondent to *sell* eyewear over the internet in Quebec. Particular reference is made to the following paragraph:

> Finally, I would note that the Supreme Court teaches us that statutes that create professional monopolies which are permitted by law, where access to these monopolies is controlled and which protect their approved members who meet specific conditions to protect against competition, must be strictly applied. Anything which is not clearly defended may be performed with impunity by those who are not part of these associations.[65]

[43] A review of the case shows that it is distinguishable from this one. The operative word is "sale". It appears in the applicable section of the legislation:

---

[63] *Ibid* at para. 27 (CarswellOnt) and see fn. 60: the "Schwartz Report" refers to the Health Professions Legislative Review, *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions.*
[64] *Respondent's Factum,* at para. 67.
[65] 2016 QCCA 837, at para. 70 referring to *Pauze v. Gauvin,* [1954] S.C.R. 15 at p. 18 and *Laporte v. College des pharmaciens de la province de Quebec,* [1976] 1 S.C.R. 101, at p. 102-103.

> The practice of optometry is an act which, except the use of medication, deals with vision and is related to examination or functional analysis of the eyes and assessment of visual disorders, as well as orthoptics, prescription, fitting, adjustment, *sale* and replacement of ophthalmic lenses.[66]
>
> [Emphasis added]

[44] The decision is driven by consideration of the sale. The law of British Columbia governed because the sales contract was entered into there. That is where the sale took place. It was the finding of the Quebec Court of Appeal that the appellant (the Ordres des Optometristes) had failed to demonstrate that the protection of the public required interpreting the word "sale" in Section 16 of the [*Optometry Act*] as meaning the distribution of a regulated product. The only part of the sale that was performed in Quebec was the delivery and that was not enough to constitute a violation of Section 16....[67]

[45] Counsel for the respondent submits that "controlled acts" should be interpreted narrowly. They are to limit the health care activities that unlicensed persons are prohibited from performing to those associated with a risk of harm. This may be so. *Wadden v. College of Opticians of Ontario* says that it is.[68] But such a limitation is not a means of combatting any restraint in competition through the narrowing of the application of the "controlled acts". The idea that the boundaries of what an unlicensed person can do is set by the presence of a risk of harm does not mean that a court is to conduct an analysis of the level of risk and conclude, based on that evaluation, that an act may be performed by an unlicensed party. The identification of an act as "controlled" in the statute demonstrates the legislature's determination that the act involves risk sufficient to require that it be undertaken by a licensed individual:

> I see nothing in the language of the *RHPA* that indicates that, in interpreting the meaning of a particular controlled act, courts are to engage in a risk analysis. Rather, the plain meaning of the words, and any meaning that may be commonly understood in the respective professions, defines the scope of a controlled act and determines the level of risk to be protected.[69]

[46] The defining of "controlled acts" is directed to limiting risk by ensuring that health care services are carried out by qualified professionals and not, as counsel for the respondent would have it, to restricting professional monopolies to activities that intrinsically carry a risk of harm. Even so, the respondent continues in its refusal to accept that risk is an assessed value attributable to identified acts that the legislature has accepted and, on that basis are required to be

---

[66] *Optometry Act,* CQLR, Chapter O-7, s. 16 quoted in *Ordres des optometristes du Quebec v. Coastal Contacts Inc.,* at para.18.
[67] *Ordres des optometristes du Quebec v. Coastal Contacts Inc., supra* (fn. 65) at paras. 11-13 and 71.
[68] *Wadden v. College of Opticians of Ontario, supra* (fn. 57) at para. 32 (CarswellOnt).
[69] *Ibid* at para. 36 (CarswellOnt).

performed by recognized professionals (the "controlled acts"). The respondent says an actual demonstration of a risk of harm is required:

> Despite the recommendations of two seasoned regulatory law firms, the Colleges have not introduced any evidence of risk of harm from Clearly's conduct.[70]

[47] It goes on:

> Risk of harm is not a matter of argument.[71]

[48] This is true, but it is not because risk has to be proved by evidence. The risk of harm is established by the fact that the legislature has accepted that there is a risk sufficient to require the act in question to be identified as a "controlled act" to be performed only by people who are authorized to do so. To view this as the respondent sees it is to negate the value of the regulation. Anyone could carry out any of the "controlled acts" until the parties responsible for overseeing the legislation (the Minister and the Colleges) could demonstrate that there is a risk of harm. On its own the regulation would stand for nothing.

[49] The proper approach is one which follows from the understanding that the risk of harm is presumed as a result of the act in issue being identified as a "controlled act" under s. 27(2) of the *Regulated Health Professions Act*. In *College of Opticians of Ontario v. John Doe* the court considered an application for contempt against the operators of a group of optical dispensaries.[72] The applicant (the college) sought an interim injunction. As part of its consideration of that issue the court considered the test for an injunction found in the seminal case *RJR-MacDonald v. Canada (Attorney General),* and in particular, the question of the presence or absence of irreparable harm.[73] The court observed:

> The assessment of irreparable harm has a special status in injunction proceedings brought by the Attorney General or other statutory authorities to enforce obligations imposed by statute. In such cases, the need to demonstrate harm is attenuated by the fact that contraventions of the law are inherently contrary to the public interest and are presumed to cause harm or create a risk of harm.[74]

And

---

[70] *Respondent's Factum,* at para. 68.
[71] *Ibid* at para. 68.
[72] 2006 CanLII 42599 (Ont. Sup. Ct.).
[73] [1994] 1 SCR 311.
[74] *College of Opticians of Ontario v. John Doe, supra* (fn. 72) at para. 51 and quoting from *Saskatchewan (Minister of the Environment) v. Redberry Development Corp.,*[1987] 4 W.W.R. 654 (Sask. Q.B.), at para. 18, aff'd [1992] 2 W.W.R. 544 (Sask. C.A.).

> This presumption of harm is particularly strong in the case of legislation regulating health care professions and restricting the practice of the profession to persons lawfully authorized to do so.[75]

The controlled act

[50] I turn to the words that explain the "controlled act" in question. "*Dispensing*" eye wear is identified as a "controlled act" in s. 27(2), paragraph 9 of the *Regulated Health Professions Act* and is "authorized" by both the *Optometry Act* and the *Opticianry Act.* There is no evidence or suggestion that anyone engaged by the respondent in the production and distribution of eye wear through the on-line services offered by Coastal and Clearly is a member of either the College of Optometrists of Ontario or the College of Opticians of Ontario or has acted as a delegate of a member. This being so, the foundational question in this analysis is what is included in the term "dispensing" and whether the activities carried out by the respondent in providing its on-line services fall within its boundaries. If they do the respondent would have carried out a controlled act or acts contrary to s. 27(1) of the *Regulated Health Professions Act.*

[51] What is meant by the word "dispense" as it relates to the legislation being considered?[76] In *Wadden v. College of Opticians of Ontario,* the Court of Appeal referred to a variety of definitions:

> ***The Concise Oxford Dictionary of Current English (1998)***
>
> dispense...make up and give out (medicine etc.) according to a doctor's prescription.
>
> ***The Dictionary of Canadian Law, 2d ed.***
>
> Ophthalmic Dispensing. (i) Supplying, preparing and dispensing ophthalmic appliances; (ii) interpreting prescriptions of legally qualified medical practitioners and optometrists; and (iii) the fitting, adjusting and adapting of ophthalmic appliances to the human face and eyes in accordance with the prescriptions of legally qualified medical practitioners and optometrists.
>
> ....
>
> "Ophthalmic dispensing" was formerly defined in s. 1 of the *Ophthalmic Dispensers Act*, R.S.O. 1990, c. O.43 as the:
>
> (a) supplying, preparing, and dispensing ophthalmic appliances;

---

[75] *College of Opticians of Ontario v. John Doe, supra* (fn. 72) at para. 52 and quoting from *Manitoba Association of Optometrists v. 3437613 Manitoba Ltd.*, [1998] 4 W.W.R. 379 (Man. Q.B.) at paras. 32-35, aff'd (1998), 161 D.L.R. (4th) 638 (Man. C.A.).

[76] See respectively fn. 54 and fn. 55.

> (b) interpreting prescriptions of legally qualified medical practitioners and optometrists, and
>
> (c) the fitting, adjusting and adapting of ophthalmic appliances to the human face and eyes in accordance with the prescriptions of legally qualified medical practitioners and optometrists…[77]

[52] What these definitions show is that "dispensing" is not a singular act but a series of acts that encompass the making, adjustment (fitting) and delivery of any pair of prescription eyeglasses or contact lenses. It may be that in a given circumstance an optometrist or optician may undertake one, any number or all of the acts that encompass "dispensing" and thereby undertake a "controlled act" under the regulatory scheme.[78] If the person doing so is not a member of one of the colleges and is not a delegate of a member[79] he or she would be performing a "controlled act" contrary to s. 27 of the *Regulated Health Professions Act.*

[53] Do Coastal and Clearly "dispense" eye wear?

[54] "Dispensing" is qualitatively different from "selling", the term that was central to the rationale in *Ordres des optometristes du Quebec v. Coastal Contacts Inc.* "Selling" is commerce. "Dispensing", however, refers to acts that respond to problem eye sight ("prescribing", "preparing", "fitting", "adjusting", "adapting"): that is, health care.

[55] The understanding of this distinction in the context of this case requires a closer examination of the provision identifying controlled acts. In undertaking this analysis counsel for the respondent points to the proposition that the applicable provisions of the *Regulated Health Professions Act* "…must be read as a harmonious whole":[80]

> When statutory provisions are grouped together, the legislature is presumed to have drafted each with the others in mind…They tend to illuminate each other's meaning because they share a single idea.[81]

[56] The problem remains the same. Counsel holds the view that the "single idea" is the presumed statutory purpose of "restricting monopolies" which, it is submitted, is to be "[kept] in

---

[77] *Wadden v. College of Opticians of Ontario, supra* (fn. 57), at paras. 39-40 (CarswellOnt).
[78] *Ibid* at para. 43 (CarswellOnt): "I observe, however, that dispensing may be a single act or part of a continuum of activities."
[79] See *Regulated Health Professions Act, supra* (fn. 7), s. 27(1)(b) quoted at para. [30], above, and s. 28.
[80] *Respondent's Factum,* at para. 69.
[81] *Independent Plaza I Associates, L.L.C. v. Figliolini,* 2017 ONCA 44, at para. 55 referring to *Inland Revenue Commissioners v. Hinchy,* [1960] A.C. 748 (H.L.) at p. 766 and to Ruth Sullivan, *Statutory Interpretation,* 3rd ed. (Toronto: Irwin Law, 2016), at p. 175.

mind".[82] As I see it, the purpose to be taken into account is the provision of proper health care. I proceed with this as the underlying statutory direction.

[57] The applicants allege that Coastal and Clearly have breached s. 27(2), paragraph 9 of the *Regulated Health Professions Act.* This is the clause which identifies, as a controlled act "the prescribing or dispensing", of contact lenses or eyeglasses to assist with or treat "vision or eye problems".[83] This clause is immediately preceded by s. 27(2), paragraph 8. It deals with the "controlled act" of: "Prescribing, dispensing, *selling* or compounding a drug as defined in the *Drug and Pharmacies Regulation Act*, or supervising the part of a pharmacy where such drugs are kept" [Emphasis added]. The respondent agrees that "selling" and "dispensing" are not the same. It takes the view that since "selling" drugs is specifically referred to as a "controlled act" separate from prescribing them, and there is no similar reference to a restriction on "selling" eyewear, its "sale" is not a "controlled act". The respondent suggests that this difference reflects a recognition by the legislature that the sale of prescription drugs carries a serious risk of harm, while the sale of corrective lenses does not.[84]

[58] Looked at from the perspective of "restricting monopolies" this seems sensible, but does this apply if health care is the purpose behind the legislation? I return to the idea that when examined from perspective of the business model demonstrated by the affidavits of the three "customers" one has to wonder what professional (optometrist and optician) is responsible for providing the health care associated with obtaining eyeglasses and contact lenses ("prescribing", "preparing", "fitting", "adjusting", "adapting") over the internet from Coastal and Clearly. I repeat, apparently there is not one.

[59] Is there another way of looking at this? The applicants say there is.

[60] It lies in the understanding that there are differences in the nature of the drugs that are available. Some are available only by prescription. These are the drugs referred to in Schedule I of the *Drug and Pharmacies Regulation Act.*[85]

---

[82] *Respondent's Factum,* at para. 69.
[83] Quoted at para. [30], above.
[84] *Respondent's Factum,* at para. 71.
[85] Schedule I is established by Ontario Regulation 264/16, s. 3(1) and (2) as follows:

> The following substances are prescribed as being included in Schedule I for the purposes of the Act:
> 1. The substances listed in Schedule I of the National Drug Schedules.
> 2. The substances listed in the Prescription Drug List established under section 29.1 of the *Food and Drugs Act* (Canada).
> 3. The substances listed in the Schedules to the *Controlled Drugs and Substances Act* (Canada).

> Subject to the regulations, no person shall sell by retail any drug referred to in Schedule I, except on prescription given in such form, in such manner and under such conditions as the regulations prescribe.[86]

[61] Others are "controlled" but can be purchased without a prescription. These are the drugs included in Schedules II and III of the *Drug and Pharmacies Regulation Act.*[87] Finally, there are drugs sold over the counter which are not defined as drugs under, or for the purposes of, the *Drug and Pharmacies Regulation Act.*

[62] The applicants submit that for the purposes of drugs and eyewear provided under prescription "dispensing" includes the selling of the item. One ("selling") is subsumed in the other ("dispensing"). Where the purpose is the delivery of health care, the two cannot be separated. For prescribed drugs a pharmacist not only makes up the drug but reviews with the patient how it is to be administered and what the side effects may be. Eyeglasses are to be fitted and, where necessary adjusted. These acts are part of "dispensing". They take place in the course of "selling". This being so there would be no need to repeat the separate inclusion of "selling" in defining a controlled act where the subject matter is prescribed. It is included in "dispensing". Nor would it be necessary in respect of drugs sold over the counter. They are not covered by the legislation and can be sold without limitation. The same is true for over the counter reading glasses. Section 27(2) paragraph 9 of the *Regulated Health Professions Act* makes the "prescribing and dispensing" of eyeglasses "other than simple magnifiers" a "controlled act". Reading glasses are exempted.

[63] The question remains: how are the drugs listed in Schedules II and III of the *Drug and Pharmacies Regulation Act* to be dealt with? They are included in the "controlled act" found in s. 27(2) paragraph 8 but can be purchased without a prescription. They do not need to be dispensed. They are readily available. Nonetheless, their inclusion within the "controlled act" demonstrates that a regulatory health care concern has been recognized. To give this concern substance the word "selling" is included in s. 27(2) paragraph 8 of the *Regulated Health Professions Act* to ensure the involvement of the appropriate professional when the product is distributed to the patient or client. There is no corresponding eyewear that is not prescribed but has been determined to require the involvement of a professional. Thus, the word "selling" is not required and is not included s. 27(2) paragraph 9 of the *Regulated Health Professions Act.*

---

[86] R.S.O. 1990, c. H. 4, s. 155.

[87] Schedules II and III are established by Ontario Regulation 264/16, s. 3(1) and respectively (3) and (4):

> (3) The substances listed in Schedule II of the National Drug Schedules are prescribed as being included in Schedule II for the purposes of the Act.
> (4) The substances listed in Schedule III of the National Drug Schedules are prescribed as being included in Schedule III for the purposes of the Act.

[64] This represents a reading of the sections that identify "controlled acts" as a harmonious whole, recognizing the "single idea" that the purpose of the legislation is to ensure that health care is provided by qualified and authorized professionals. To allow the commercial element to come to the fore negates this purpose.

[65] This leaves unanswered the question of whether the respondent, in the course of providing eyewear over the internet is performing "controlled acts" and, by doing so, is breaching s. 27(1) of the *Regulated Health Professions Act.* In response to the argument that there is no evidence that the respondent is dispensing eyeglasses and contact lenses, I point out that each of the three "customers" ordered eyeglasses and each had eyeglasses delivered. They came in response to orders placed to either Coastal or Clearly on a website set up for the purpose. They were made somewhere. In 2008 Coastal and Clearly "...expanded into eyeglasses, investing in their own lab in British Columbia in order to focus on cost-effective production and innovation to ensure timely delivery to customers."[88] Obviously, the respondent is making eyeglasses. It is filling prescriptions and delivering eyewear. This is enough to show that the respondent is dispensing eyewear. If it is necessary to go further, it is reasonable to infer, as I do, that the respondent "dispensed" the eyeglasses delivered to the three "customers".

[66] Accordingly, I find that the respondent has acted contrary to the requirements of s. 27 of the *Regulated Health Professions Act.*

Does the Ontario legislation apply?

[67] This takes me to the second issue to be determined by the Court. Did this breach occur in circumstances where the acts of the respondent fall under the authority of the Ontario legislation?

[68] Virtually every action taken by Coastal and Clearly in connection with the preparation and delivery of eyeglasses occurs in British Columbia. Their head office, management team, finance, human resources, marketing and information technology groups are located in Vancouver. Online orders are sent to and processed in a laboratory and distribution centre located there. All order information (apart from credit card information) is stored on servers at the office in Vancouver. Eyeglasses are assembled there or a facility "outside Canada". Contact lenses are purchased from manufacturers in the United States and supplied "mostly" from inventory stored in Vancouver. Product is shipped to customers from the distribution centre located there. The quality assurance team is in Vancouver and there is a call centre there to address questions from customers.[89]

[69] The respondent takes a narrow view, one based on what, to my mind, is an old-world understanding of place and time. As the respondent sees it, the online business is based in Vancouver. It receives its orders there. The contracts of sale are made there. Even the "delivery" occurs there because the transfer of title and ownership happens at the place of shipment.

---

[88] *Affidavit of Craig Lennox,* sworn May 1, 2017, at para. 19.
[89] *Ibid* at para. 82.

Understood in this way, nothing happens in Ontario, so the regulation in place here is of no effect.

[70] Of course, this is all based on the conception of the transaction as a purely commercial one, as a sale. Viewed from the context of health care this argument means that the respondent could avoid the protection offered by the regulation. "Dispensing" includes "fitting" and "adjustment" to be certain the product will properly carry out its corrective function. In the respondent's submission it is not obliged to fulfill these responsibilities.

[71] How does the law deal with this?

[72] The applicants rely on *Celgene Corporation v. Canada (Attorney General).*[90] In that case the issue was whether a regulation that allowed for the inquiry into the price of patented medicine applied to a company that manufactured and shipped such medicines from New Jersey to doctors in Canada, by courier or mail, to the United States with payment being made in U.S. dollars. The regulation authorized orders requiring that the price of a medicine be reduced. The case depended on the understanding of the price at which medicine was being sold "in any market in Canada".[91] The Supreme Court of Canada unanimously held that in the context of a consumer protection statute, that term should be given a liberal interpretation that would give effect to the objects of the statute, as opposed to a strict commercial law interpretation that might frustrate them. The court found that the Patented Medicine Prices Review Board was correct when it asserted jurisdiction. The case was explained by the Court of Appeal of Ontario in *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)*:

> The Supreme Court's decision in *Celgene* instructs us that in a regulatory context, words such as "place of sale", "sold" and "selling" may not necessarily be given their strict commercial law meanings. At para. 21 of *Celgene*, the Court says that "[t]he words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute."
>
> I agree with the application judge that, given the overriding purpose of the relevant legislation in this case, a purposive approach to determining the meaning of sale is appropriate. The College has a mandate to regulate the sale of prescription drugs in the province, and a duty to serve and protect the public interest – it is the substance, and not the form, which is relevant when determining whether the sale of prescription drugs takes place in Ontario.[92]

[73] In substance Coastal and Clearly are dispensing eyewear to those who require corrective lenses to assist with less than perfect vision. The courts have stated that for regulation to apply in a multi-jurisdictional context (in this case, internet commerce) there should be a "sufficient

---

[90] 2011 SCC 1.
[91] *Ibid* at para. 17 quoting s. 80(1)(b) of the *Patent Act,* R.S.C. 1985 c. P.-4.
[92] 2013 ONCA 381, at paras. 60-61.

connection" between the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated by it:

> There is no dispute about the legal principles that apply when determining the applicability of a provincial regulatory scheme to the out-of-province appellants. The question is whether there is a sufficient connection between those appellants and Ontario, such that the College has jurisdiction over them. The first two propositions in para. 56 of *Unifund* provide the starting point for answering that question:
>
> Consideration of constitutional *applicability* can conveniently be organized around the following propositions:
>
> 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
>
> 2. What constitutes a "sufficient connection" depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it; ... [93]

[74] The "sufficient connection test" was applied in *Unifund Assurance Co. v. Insurance Corp. of British Columbia.*[94] The Supreme Court of Canada considered the applicability of a regulatory scheme to an out-of-province defendant:

> The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it: J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 2.1. As will be seen, a "real and substantial connection" sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.[95]

[75] It concluded that "under ordinary constitutional principles" the Ontario Legislation was inapplicable to the out-of-province appellant (Insurance Corporation of British Columbia).[96] The requisite connection was not present:

> ...the decision of the British Columbia legislature to attach legal consequences (the deduction) in that province to an event that occurred in Ontario (the SAB payments) does not bring the appellant (beneficiary under the British Columbia

---

[93] *Ibid* at para. 67 quoting *Unifund Assurance Co. v. Insurance Corp. of British Columbia,* 2003 SCC 40, at para. 56.
[94] *Ibid* (*Unifund*).
[95] *Unifund Assurance Co. v. Insurance Corp. of British Columbia, supra* (fn. 93) at para. 58.
[96] *Ibid* at para. 91.

> legislation) into the orbit of the Ontario legislature for the purpose of taking away the British Columbia benefit in favour of an Ontario insurance company.[97]

[76] In *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)*, the respondent company used the internet to market and sell generic prescription drugs to Americans. Although the seller of the drugs was a Belize company, on its website it was referred to as Global Pharmacy Canada. The website directed customers to contact "friendly customer service agents located in Toronto, Canada". Those agents were located in a call centre in Mississauga, Ontario. They took customer orders, ensured that orders were filled in India, shipped directly to customers and processed payments. Advertising was done through the internet and direct promotional material was distributed in the United States. The customers were American. The drugs were sourced in India and never entered Canada. The corporations and individuals involved were scattered among Belize, United States and Ontario. Like optometry and opticianry, pharmacy is a regulated health profession in Ontario. None of the individuals involved were authorized to sell prescription drugs in Ontario.

[77] From 2007 to 2009 the business had operated through an Ontario Corporation (the respondent 17245665 Ontario Inc.) out of the call centre in Mississauga. In the summer of 2009, the Ontario College of Pharmacists received complaints which precipitated an investigation. It was conceded that until 2009: (1) the College had jurisdiction to regulate the business; (2) generic drugs originating in India were being sold by an Ontario Corporation to Ontario residents; and (3) the business was in breach of the applicable legislative provisions because prescription drugs were being sold in Ontario and none of the employees at the call centre were pharmacists. The business restructured. It was submitted that, as a result, it was removed from the ambit of the College's regulation. The business sold its "tangible assets" to an Ontario Corporation and its "intangible assets" to a corporation in Belize. Steps were taken so that no Canadians could directly buy drugs and the website was changed. Pursuant to an agreement between the two purchasers (a Master Services Agreement) the Ontario Corporation provided call centre services to the company in Belize. It operated through the pre-existing call centre that remained in Mississauga. The only contact that customers had with the business was through the call centre. The application judge found, and the Court of Appeal agreed, that there was a sufficient connection to Ontario and that the College had the jurisdiction to regulate the conduct of the business.

[78] Each of the cases reviewed in these reasons determined the issue of out of province jurisdiction based on different but long-held legal premises. In *Ordres des optometristes du Quebec v. Coastal Contacts Inc.* the decision was founded on contractual principles, which, given the application of the *Quebec Civil Code*, governed: where was the contract made? The offer to sell was accepted and the contract made in British Columbia. In *Celgene Corporation v. Canada (Attorney General)* the case was decided relying on the purposive approach to statutory interpretation. The legislation was to regulate the sale of prescription drugs in the province.

---

[97] *Ibid* at para. 83.

Unifund Assurance Co. v. Insurance Corp. of British Columbia was decided through reliance on the constitutional understanding that each province is obliged to respect the territorial sovereignty of the others. The Ontario *Insurance Act* could not be extended such that it applied in British Columbia. *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)* looked through the form of the restructured operations to the substance. The sales took place through the company that operated the call centre, in Mississauga. It was the agent for the company in Belize. It was clear that the substance of the sale transaction took place through a corporation that was located in, and operated in, Ontario.[98] There was a sufficient connection to Ontario. Its regulatory scheme applied.

[79] These established understandings provide guidance. A purposive analysis of the legislation demonstrates that this situation is best characterized not as a contract for the sale of eyeglasses, but as the delivery of health care. Moreover, the application of the regulation at issue does not extend beyond the boundaries of Ontario, the province in which it was promulgated. The relief sought does not require the extraterritorial application of the *Regulated Health Professions Act* or the subsidiary statutes. The applicants are seeking to enjoin the unlicensed dispensing of eyewear in Ontario alone. Even so, the respondent relies on the facts that establish that orders are received in British Columbia, that the eyeglasses are put together either there or in the state of Washington and that all that happens in Ontario is that the eyeglasses are received here by the individual who needs them. This is reliance on the territorial limitations of regulation.

[80] Each situation in which these issues arise are to be considered in its specific and particular context:

> Furthermore, as the application judge observed, there is no single standard defining what constitutes a sufficient connection: whether there is a sufficient connection depends largely on context.[99]

[81] With this in mind it may be worthwhile to consider the "territorial context" in which internet sales (e-commerce) takes place. For all of its ubiquitous presence in our lives, the internet remains a relatively new and decidedly different place. Perhaps the impact of the internet requires some fresh consideration. The internet does not function in a geographic context. Nonetheless, we go there. Once there, we communicate instantaneously. The delay of distance has disappeared. The path of communication on the world wide web is not necessarily direct. The message may go directly to Vancouver but it may pass through Tokyo, or some other physically distant place, first. The people communicating could just as easily be located in the next room, the next street or the next town.

[82] In *The Four-Dimensional Human (Ways of Being in the Digital World)* Laurence Scott attempts to describe life on the internet by reference to a fourth dimension, a popular allusion of

---

[98] *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)*, *supra* (fn. 92), at para. 62.
[99] *Ibid* at para. 68.

the late nineteenth century: a place of infinite space and unknown boundaries.[100] When we are "on the internet" we are somewhere else, separated from the limitations that govern our physical world. On the internet, territorial limits do not exist. Unlike the telephone, there is no such thing as a long-distance email or text. There is no need to actually be in the presence of the person with whom you are communicating.

[83] The case law has considered the issue of regulating in this context.

[84] In *Torudag v. British Columbia (Securities Commission)*[101] an Alberta resident was charged by the British Columbia Securities Commission with insider trading of shares of a British Columbia company listed on TSX Venture Exchange. He argued that there was no "sufficient connection" between his activities and British Columbia because they were not performed in the province. The British Columbia Court of Appeal rejected this argument finding, that the physical location of the activities was of secondary importance given their online nature:

> ... Securities transactions involve intangible property effected by electronic means through various intermediaries in different physical locations. In the world of electronic commerce, physical locations can become almost incidental and other factors assume greater importance [in assessing the applicability of a statute to an out-of-province entity][102]
>
> ...
>
> The Commission has the responsibility to regulate the activities of the Exchange to provide protection to the investing public. This responsibility includes the duty to ensure "a level playing field" for investors in exchange traded companies. Allowing the misuse of insider information to skew fairness in the trading arena is inimical to the operation of a fair and orderly market in securities.[103]

[85] As proposed in the Applicants' Factum *Torudag v. British Columbia (Securities Commission)* illustrates that where a regulator's ability to protect its public from online activities is at issue, the "sufficient connection" test downplays the physical location of the service provider. Much the same point is made, albeit in a different way, in *SOCAN v. Canadian Ass'n of Internet Providers*:

> Helpful guidance on the jurisdictional point is offered by La Forest J. in *Libman v. The Queen* [1985] 2 S.C.R. 178. That case involved a fraudulent stock scheme.

---

[100] Laurence Scott: *The Four-Dimensional Human: (Ways of Being in the Digital World)* (William Heinemann Random House, 2015) and as published in the United States: *The Four Dimensional Human: (Ways of Being in the Digital World)* (New York: W.W. Norton & Company, 2016).
[101] 2011 BCCA 458.
[102] *Ibid* at para. 22 quoting from *Pacific International Securities v. Drake Capital Securities Inc.*, 2000 BCCA 632, at para. 20.
[103] *Ibid* at para. 27.

> U.S. purchasers were solicited by telephone from Toronto, and their investment monies (which the Toronto accused caused to be routed through Central America) wound up in Canada. The accused contended that the crime, if any, had occurred in the United States, but La Forest J. took the view that "[t]his kind of thinking has, perhaps not altogether fairly, given rise to the reproach that a lawyer is a person who can look at a thing connected with another as not being so connected. For everyone knows that the transaction in the present case is both here and there" (p. 208 (emphasis added in *SOCAN*)). Speaking for the Court, he stated the relevant territorial principle as follows (at pp. 212-13):
>
> > I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country. . . [Emphasis added in *SOCAN*].
>
> So also, in my view, a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, "is both here and there". Receipt may be no less "significant" a connecting factor than the point of origin (not to mention the physical location of the host server, which may be in a third country).[104]

[86] *Google Inc. v. Equustek Solutions Inc.* demonstrates the courts' intention to see that their rulings are effective. Equustek sued another company, alleging that it had relabelled one of Equustek's products and passed it off as its own. Equustek obtained an injunction but the defendant did not change its behaviour. The defendant was found in contempt, moved, and continued its business from an unknown location. Equustek obtained an order that the defendant was to cease operating or carrying on business through any website. As a result Google de-indexed 345 webpages associated with the defendant. Nonetheless, the order was ineffective. Equustek sought an interlocutory injunction to prevent Google from displaying any part of any website of the defendant on any of its search results worldwide. The order was made:

> ...to ensure that Google did not facilitate Datalink's breach of court orders whose purposes were to prevent irreparable harm to Equustek, she concluded that the injunction had to have worldwide effect.
>
> I agree. The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google

---

[104] 2004 SCC 45, at paras. 58-59.

> operates — globally. As Fenlon J. found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent irreparable harm. Purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could easily find Datalink's websites even if those websites were de-indexed on google.ca. Google would still be facilitating Datalink's breach of the court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm.[105]

[87] The intention was that the order be effective in Canada. Given the nature of the internet this could only be accomplished by extending the injunction around the world.

[88] It is not that the concept of territorial limitation should to be jettisoned and set aside. However, as was said in *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)* in respect of the word "sale", in a changing world it can be problematic to blindly rely on established ideas:

> The application judge began her analysis on where a "sale" occurs by referring to the traditional definitions such as the transfer, by mutual assent, of the ownership of a thing from one person to another for a money price. She noted the difficulty of applying traditional legal concepts of sales to contracts made via the internet.[106]

[89] In a world where the purpose or intention of the legislation is central to the interpretation of its words, broader and more flexible meanings may be required. More critical thinking may be needed:

> ...in this case there is conduct over which the College has power to regulate: the sale of prescription drugs in Ontario. The principle that regulators may act to protect persons who are located outside the regulator's territorial jurisdiction, when the conduct targeted by the regulator occurs within the jurisdiction, has been repeatedly affirmed...

---

[105] 2017 SCC 34, at paras. 40-41.
[106] *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)*, *supra* (fn. 92), at para. 44.

> The College is not overreaching – it is fulfilling its legislated duty to serve and protect the public interest in the matters over which it has been given authority, including the sale of prescription drugs in Ontario.[107]

[90] In this case prescription eyewear is ordered by people in Ontario. It is delivered to them in Ontario. Presumably it is to be used by them while resident in Ontario. This represents a sufficient connection to Ontario. To find otherwise would mean the eyeglasses are provided without obligation to adhere to Ontario regulation. Ordering eyeglasses is the catalyst for, and delivery is part of, dispensing the eyewear; indicating that it is at least part of a "controlled act" as defined in s. 27(2) of the *Regulated Health Professions Act.* As the respondent sees it, this should be of no concern. The eyewear it delivers is regulated by British Columbia. But what if the company moved off-shore to a place without regulation and "dispensed" the eye wear there and sent it here? There would be no applicable regulation. As it is, the regulatory scheme in British Columbia is different. As the respondent reports in its factum, the scheme was amended in 2010:

> In May 2010, the B.C. Legislature amended the regulations for optometrists and opticians under the B.C. *Health Professions Act.* The amendments removed most restrictions allowing only opticians or optometrists to dispense corrective lenses and allowed customers to order corrective lenses online without having to provide copies of their prescriptions.[108]

[91] The factum and the affidavit of the Chief Financial Officer on which it relies go on to say:

> These changes were made to give consumers more choice while maintaining public safety.[109]

[92] It is not clear to me how this change maintained "public safety" but it does not matter. What is clear is that the purpose behind the regulatory scheme in British Columbia changed. As noted by the respondent in its factum, British Columbia encourages online selling to enhance competition and consumer choice.[110] That is different from the regulatory approach in Ontario. Here, the central purpose is health care. There is no justification for imposing the purpose of health professions legislation from British Columbia on those who reside in Ontario. To my mind, that would be a questionable breach of the territorial jurisdiction defined by Canada's federal system of government.

---

[107] *Ibid* at paras. 74-75 affirmed in *Gregory & Co. Inc. v. Quebec Securities Commission,* [1961] S.C.R. 584, at p. 588; *Thorpe v. College of Pharmacists of British Columbia* (1992), 97 D.L.R. (4th) 634 (B.C.C.A.), at p. 640 and *Crowe v. Ontario Securities Commission*, 2011 ONSC 6918 (Div. Ct.), at para. 32.
[108] *Respondent's Factum,* at para. 29 referring to *Affidavit of Craig Lennox,* sworn May 1, 2017, at para. 42.
[109] *Ibid* p. 9.
[110] *Respondent's Factum.*

[93] There are two observations which arise from this and are inherent in the decision being made. The first is that in British Columbia, amendments to the legislation changed the purpose of the applicable statutes. If the direction or purpose of the regulation in Ontario is to change it cannot be through the courts, but only through the legislature. There may be reason to enact such a change. There is an obvious advantage gained when, as the respondent notes, 28,000 sets of eyeglasses can be delivered to communities where they might not otherwise have been available. However, this remains a policy decision for the legislature. As to the second observation, I note that the respondent pointed out that there are companies, resident in Ontario, that "dispense" eyeglasses in Ontario that are ordered through the internet and delivered directly. To repeat a well-known cliché: "what is sauce for the goose is sauce for the gander". The fact that a company is resident here (as opposed to British Columbia) does not change the obligation imposed by the *Regulated Health Professions Act* and the subsidiary statutes. Eyeglasses and contact lenses are to be dispensed with the proper involvement of an optometrist or optician licensed in Ontario.

[94] For the reasons above, the application is granted. Insofar as it is providing eyewear in Ontario, the regulatory scheme in place in Ontario applies to the respondent.

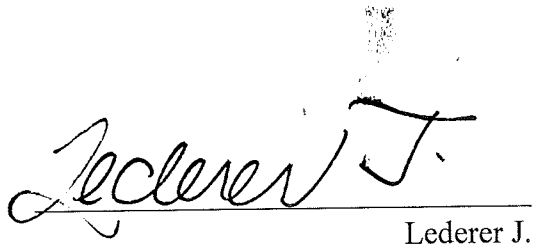
Costs

[95] No submissions were made as to costs. If the parties are unable to agree I will consider written submissions on the following terms:

(1) By the applicants, no later than 15 days after the release of these reasons, such submissions to be no longer than four pages double spaced not including any Bill of Costs, Costs Outline or case law that may be provided.

(2) By the respondent, no later than 10 days thereafter, such submissions to be no longer than five pages double spaced not including any Bill of Costs, Costs Outline or case law that may be provided.

(3) By the applicants, no later than five days thereafter, in reply if necessary, such submissions to be no longer than two pages double spaced.



Lederer J.

Released: January 11, 2018

CITATION: College of Optometrists of Ontario et al v. Essilor Group Canada Inc., 2018 ONSC 206
COURT FILE NO.: CV-16-565917
DATE: 20180111

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

COLLEGE OF OPTOMETRISTS OF ONTARIO and COLLEGE OF OPTICIANS OF ONTARIO

Applicants

– and –

ESSILOR GROUP CANADA INC.

Respondent

REASONS FOR JUDGMENT

Lederer J.

Released: January 11, 2018