

## Finally, some Guidance on Telepractice

by Richard Steinecke  
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It is difficult to believe that it has taken until 2013 for the Canadian courts to provide its first major decision on the telepractice of a profession (excluding some interesting securities cases). It has taken so long that even the term, telepractice, is now obsolete, since what we are really talking about now is practising a profession over the internet. And the guidance only addresses the easier side of the equation: the jurisdiction of regulators where the provider is in one jurisdiction and the client is in another jurisdiction.

In *Ontario College of Pharmacists v. 1724665 Ontario Inc.*, 2013 CanLII 13655 (ON SC) (Global Pharmacy) the regulatory College sought an injunction against a call centre (which was also the processing centre) in Ontario that organized the shipment of drugs from India to the United States and elsewhere. None of the staff in the Ontario call and processing centre were registered pharmacists and the call centre was not a regulated pharmacy. None of the drugs were, in the company's recent operating history, sent to Canadians.

The actual company operating the business was located in Belize and the Canadian call centre notionally only acted as a contractual clerical service provider to the Belize corporation. However, the website for the operation emphasized its Canadian character (complete with the Canadian maple leaf), used an Ontario address for receiving orders and operated an Ontario bank account to receive funds. The Court found that the enterprise was exploiting the trust that consumers placed in the highly regulated pharmacy sector in Canada (particularly in Ontario) to promote its business. Yet, the enterprise had avoided any accountability to the Ontario regulatory College.

Two of the regulatory requirements that the enterprise did not comply with were a requirement for a physician's prescription (a photograph of a pill bottle was sufficient) to support the sale and the fact that the enterprise provided automatic refills every three months without further authority for dispensing. The regulatory College viewed these as examples of the safety risks associated with the enterprise.

The Court first dealt with the issue of whether the regulatory College had jurisdiction over the activities of the Ontario call centre. Not every entity with a glancing connection to Ontario is subject to the requirements of an Ontario regulator. The Court found that there were two ways in which the Ontario regulator could have jurisdiction:

1. Where the entity had a sufficient connection to Ontario in terms of its operation of the regulated profession or industry. This requires an analysis of both the enabling legislation (as to what it is intending to protect) and the substance of the activities of the entity.
2. Where the entity was an agent of another entity that was, in fact, practising the profession or operating the industry in Ontario.

The Court found that both tests were met in this case. In substance the call (and processing) centre was not simply providing clerical services; it was operating a pharmacy in Ontario in conjunction with the Belize company. In addition, the call centre was acting as an agent for the Belize company in its attempt to remotely operate a pharmacy in Ontario. In making those findings the court was quite prepared to look behind the official contractual documentation between the two corporate legal entities (in Belize and in Ontario) to view the substance of the relationship between them. It did not help the respondents that they undertook a series of restructurings that appeared to be obvious attempts to avoid regulatory accountability, although the Court did not place heavy emphasis on this aspect of the evidence.

The Court also had to examine whether the regulatory body had any business protecting consumers outside of

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# Grey Areas

Ontario (and, indeed, Canada) since the enterprise had taken steps to ensure that Canadian consumers did not receive any of their drugs. The Court concluded that public protection legislation can and often is intended to protect the public outside of Ontario as well as Ontario residents. A number of arguments were referenced including the inappropriateness of failing to regulate misleading, fraudulent or unsafe practices that occur within the province, the hope for reciprocal enforcement elsewhere for Ontario consumers, and the disrepute that comes to the profession in Ontario if such conduct is not regulated.

The Court then looked at the “core” issue of whether the sale of drugs occurred in Ontario. The Court concluded, after a very detailed review of the law and evidence, that the sales did occur in Ontario. The Court found this both on the traditional contract law notions of “offer and acceptance”, and under a purposeful, intent-of-the-legislation understanding of transactions. It is not clear if only one of those approaches would be sufficient to establish accountability for the telepractitioners, although the answer is probably yes.

Having reached this conclusion, the Court had no difficulty finding that the Ontario call and processing centre was selling and dispensing drugs and operating a pharmacy illegally. It granted the injunction and declarations sought.

The Court did not deal with the mirror image of Global Pharmacy, that being the jurisdiction of regulators over out-of-province / territory practitioners providing goods and services to clients in the province / territory. It did cite a recent patent case in the Supreme Court of Canada that suggested that courts would take a liberal view of Canadian regulators in those circumstances: *Celgene Corp v. Canada (Attorney General)*, 2011 SCC 1. Of course there are significant practical challenges in regulating such providers even if the Canadian regulator has jurisdiction. However, one can expect clarification of those issues as well in the coming years.

The Global Pharmacy decision is being appealed to the Ontario Court of Appeal which is expected to hear the case soon.

The Global Pharmacy case can be found at [www.canlii.org](http://www.canlii.org).

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