Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Are Rules Subject to a Reasonableness Review?

by Richard Steinecke
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Professional regulators must serve the public interest. That is their mission. However, when it comes to making rules (e.g., a by-law or regulation), courts have traditionally allowed regulators to make the rules the regulator deems best. There were only a few exceptions. For example, a rule could be struck down by the courts where it was unconstitutional (e.g., infringed on the freedom of expression), where it was unauthorized (e.g., the enabling legislation did not permit the regulator to regulate in that area), where it was enacted for an improper purpose (e.g., to limit competition) or where it was void for vagueness. Courts have studiously resisted examining the wisdom or merits of the rule itself. Until now.

In *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2014 BCSC 1414 the Supreme Court of British Columbia has taken the established approach for reviewing administrative decision-making (e.g., by a complaints or discipline committee) and applied it to rule-making as well. The Court indicated that a rule that was authorized by the legislation and otherwise did not violate the Constitution could still be struck down if it were "unreasonable".

The issue in *Sobeys* was a College of Pharmacists' by-law prohibiting incentives to patients in the form of a loyalty program. The College viewed incentives as having the potential to adversely affect both patient and pharmacist behaviour. The pharmacy chain, Sobeys, challenged the by-law on the basis that it did not, in reality, protect the public.

The Court agreed that there was a basis for prohibiting "bonus days" where extra loyalty program points were awarded on certain days as this might cause pharmacies to be too busy to provide the usual fulsome service and might induce patients to delay filling prescriptions in order to receive additional points. However, the Court did not find the loyalty program to be otherwise contrary to the public interest.

While the Court said the onus was on Sobeys to show that the rule was unreasonable and said that the College did not have to offer a justification for its rule, it did examine the College's justifications quite carefully. The College defended its rule on the following grounds:

- Incentive programs could cause customers to transfer their prescriptions from one pharmacy to another, thus undermining their continuity of care;
- Incentive programs could encourage customers to procure more drugs than required in order to obtain the incentive reward; and
- The need for a pharmacist to explain the incentive program reduces the time available for pharmacists to counsel customers on medication therapy.

These concerns were supported by the affidavit of four Council members who voted in favour of the rule. The Court was concerned that there was little empirical evidence to support these concerns. The Court also stated: "As there are affidavits from only

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four of the respondents' twelve Board members, it is unclear whether the views of those four affiants reflect the views of even a majority of the Board members."

The Court also considered the fact that there had been no complaints about incentive programs by members of the public before the rule was enacted.

The Court went on to conclude that the College's concerns could have been addressed by narrower rules that did not prohibit incentive programs entirely. The Court was of the view that the rules were overbroad. The Court said:

> I have thus been persuaded by the petitioners that the respondent's decision to pass the Impugned Bylaws falls outside the range of possible acceptable outcomes, given the competing public interests, and the respondent's ability to pass bylaws that are narrower in scope to address their reasonable concerns.

Most of the Court's analysis was on the reasonableness of the College's justifications for the rules rather than an analysis of the evidence provided by the applicants.

One cannot help but think that the Court's approach in this case involved it balancing the competing policy considerations that the Boards or Councils of regulators are elected or appointed to perform. The Court did appear to be reviewing the merits and wisdom of the rule. And despite the assertion to the contrary, the Court appeared to require the regulator to justify the rule empirically and not rely on the regulator's expert knowledge of the practice of the profession. Having Council and Board members file affidavits as to why they voted for the rule and then to have them cross-examined on that affidavit ushers in an entirely new era of professional regulation. If this decision is upheld and applied by courts across Canada, rule-making by regulators will have to change significantly.

The *Sobeys* case can be found at: www.canlii.org.

This fall *Grey Areas* will begin a series of articles on Risk Management for Regulators. If the *Sobeys* case is any indication, the series will be timely.