Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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Telepractice Rules Become More Complicated

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A decision released by the Ontario Court of Appeal yesterday makes it more difficult to determine when electronic, cross-border professional services can be restricted.

In *College of Optometrists of Ontario v Essilor Group Inc.*, 2019 ONCA 265 the issue was whether practitioners based in British Columbia could provide eyeglasses and contact lenses to Ontario residents. Ontario residents would order the lenses from a company in British Columbia that would manufacture the lenses outside of Ontario and then deliver them to the Ontario resident. The primary issue was whether the ordering and receipt of the lenses in Ontario was sufficient to cause the company to breach the prohibition against "dispensing" lenses in Ontario without being registered in Ontario.

The Ontario Superior Court of Justice had found that there was a breach of the provision and proposed to issue a restraining order.

The Ontario Court of Appeal took the usual interpretive approach that has emerged from the recent case law in analogous cases. The legislation must be interpreted in light of its goals and purpose. Words that have a particular meaning in commercial transactions may not necessarily have the same meaning in a regulatory context. "The 'both here and there' nature of online, Internet-based transactions" has to be considered when interpreting the provisions. Courts need to look at the entire context to determine whether there is a "sufficient connection" to Ontario for the regulator to have jurisdiction over practitioners based elsewhere.

However, in applying those principles to the facts of the case, the Court of Appeal reached a different decision than the lower court Judge. The key considerations persuading the Court of Appeal that there was an insufficient connection to Ontario to grant a restraining order against the company, Essilor, included the following:

1. Essilor complied with the laws of British Columbia that allow online dispensing of lenses without a personal interaction with the patient. The Court said:

   > The distinctive feature of this case is that Essilor, as the online provider of prescription eyewear, operates out of a Canadian province that maintains a regulated health professions regime which closely resembles that in Ontario, save for the manner of selling prescription eyewear online. Essilor complies with the health care standards set by the British Columbia regulatory regime for the provision of prescription eyewear. The steps Essilor performs to meet those regulatory health care standards take place in British Columbia prior to the delivery of the product out-of-province.

2. The ordering of the lenses should not be considered a connection with Ontario because the conduct in Ontario is by the patient (who did the ordering) and not Essilor.

3. The transaction involves both a health care service (providing lenses) and a commercial transaction (the sale). That the commercial transaction occurred in Ontario is less significant to the "sufficient connection" to Ontario issue than if the health care service was provided in Ontario. On this point the Court said:

> The simple act of delivery of finished prescription eyewear, without more, is one such commercial aspect. And that is Essilor's sole connection with Ontario in the case of its online sales.

4. The Court concluded that the omission to comply with the health-based Ontario requirement that a practitioner fit the lenses was not determinative. The Court said:

> In the circumstances of this case, acceding to such an argument would effectively prohibit Ontario consumers from purchasing prescription eyewear online from a supplier in another province, where the supplier has complied with that province's health professions regulatory regime, unless delivery of the product is channelled through the office of an Ontario optometrist or optician. Applying the constitutional principle of territorial limits on the scope of provincial legislative authority in that way would in effect sanction the creation of a monopoly over the importation of prescription eyewear into Ontario from other provinces.

The Court concluded, in part, as follows:

> In other words, the "dispensing" of prescription eyewear, as that term is used in the *RHPA* s. 27(2), includes the "delivery" of the product to the patient or customer. However, the discrete act of delivering eyewear to a person primarily has a commercial aspect, not a health care one: delivery completes the order placed by the customer. Where the supplier of the prescription eyewear operates in another province and complies with that province's health professions regulatory regime when filling an online order placed by an Ontario customer, the final act of delivering that product to the Ontario purchaser does not amount to the performance of a "controlled act" by the supplier within the meaning of the *RHPA* s. 27(1).

The decision did not discuss the evidence of the risk of patient harm that could result by the patient using lenses that have not been fitted.

This decision is dependent on the specific facts of this case, which are probably unique. The legality of process, if the patient had resided in British Columbia, appears to have been important to the Court.

However, the case does suggest that where the activity involves the delivery of a product, and where the only activity in Ontario is the delivery of the product to the client, there may need to be additional circumstances or considerations to give the Ontario regulator jurisdiction over the out-of-province supplier. However, the discussion does also suggest that to the extent that a service was provided (e.g.,

providing advice or counselling to an Ontario resident), the outcome might well have been different.

The *Essilor* decision can be found at: http://www.ontariocourts.ca/decisions/2019/2019ONCA0265.htm. It is too early to know whether leave to appeal to the Supreme Court of Canada will be sought.