March 30, 2016

Does the Standard of Review Analysis Apply to a Vires Determination of Subordinate Legislation?

By: Shaun Fluker

Case Commented On: *Sobeys West Inc v Alberta College of Pharmacists*, 2016 ABQB 138

The substance of the dispute in this decision is whether a prohibition enacted by the Alberta College of Pharmacists is lawful. Specifically, in April 2014 the College voted to amend its Code of Ethics to prohibit pharmacists from providing inducements – such as loyalty program points or other forms of consumer purchase rewards – to a patient for the acquisition of a drug or a service from them. The College provides a description of the inducement issue and its rationale for the prohibition here. Sobeys challenges the lawfulness of this prohibition, and thus seeks judicial review. It seems that the standard of review to be applied in this case became a significant issue in the hearing, and this decision by the Honourable Mr. Justice V.O. Ouellette is the Court's reasons for selecting correctness – notwithstanding that both Sobeys and the College had agreed the standard should be reasonableness. The decision illustrates, or perhaps exposes, some uncertainty in the application of administrative law principles to legislative acts by delegates of the Legislature, and unfortunately I am not sure the reasoning provided by Justice Ouellette is helpful in resolving this uncertainty.

The authority of the College to enact a Code of Ethics governing pharmacists is provided by section 133(1) of the *Health Professions Act*, RSA 2000, c H-7. The text in this section suggests the Legislature contemplated that this Code, or at least some provisions of it, would constitute subordinate legislation – in other words that these provisions constitute law as opposed to internal guidance to pharmacists. Hallmarks of this intention include the requirement on the College to allow pharmacists and the Minister to review and comment on proposed provisions, as well to as publish the Code. These process provisions largely replicate the substance of the *Regulations Act*, RSA 2000, c R-14, which section 133(4) of the *Health Professions Act* states is not applicable to the Code enactments.

So we should start this analysis from the premise that the enactment of inducement prohibitions in the Code is a legislative act by a delegate of the Legislature. This starting point is crucial because, as such, it brings this judicial review on the lawfulness of the inducement prohibitions under the principles enunciated by the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24 – 28. These principles guide the review on the *vires* of subordinate legislation, and involve the following considerations: (1) is the impugned regulation consistent with the objective of its parent statute – in order to demonstrate invalidity a person must establish that the regulation is not consistent with such objective or that it addresses a matter which is not set out in the regulation-making provision of the parent statute; (2) there is a presumption of validity such that the onus or burden is on the challenger to demonstrate that the regulation is *ultra vires* – so where possible a regulation will be read in a 'broad and purposive' manner to be consistent with its parent statute; (3) the inquiry

into the *vires* of a regulation does not involve assessing the policy merits of the regulation, nor does the reviewing court assess whether the regulation will successfully meet its objective.

The College no doubt argued that the *Katz* principles should be followed in this review. However Justice Ouellette distinguishes *Katz*. This exchange is captured in paragraph 32 of the decision as follows:

> It is therefore the College's position that the actions of the College in adopting the Inducement Prohibitions should be subjected to the analysis under the *Katz* principles. In that regard, it is important to determine exactly what *Katz* stands for. In my view, *Katz* stands for the principle that where the review is one of vires, then a guide has been provided as to how the application of the correctness review standard should proceed. *Katz* is not a case dealing with the selection of the applicable standard of review for vires challenges. Rather, it outlined the analytical framework for application when conducting substantive or merit inquiry in relation to vires challenges of administrative legislation. (emphasis is mine)

Since Justice Ouellette is focused here on the issue of selecting the standard of review, he distinguishes *Katz*.

But there must have been some confusion on this point during the hearing – it isn't entirely clear why the selection of a standard of review is directly at issue in this case and deserving of such a lengthy dissertation. And moreover, it seems to me that *Katz* is directly applicable to this case, as the substantive dispute is the *vires* of subordinate legislation – the inducement prohibition in the Code – which is very much the issue addressed in *Katz*. How this Court ended up focusing entirely on the *Dunsmuir* principles to select the standard of review is a mystery to me. Indeed it is noteworthy that the Supreme Court of Canada makes no reference to *Dunsmuir* in its 2013 *Katz* decision. Moreover, while we might read *Katz* as applying a 'correctness' standard on a *vires* determination, such a reading does need to grapple with the presumption of validity cited in *Katz* which seems to incorporate some aspects of deference as well. Justice Ouellette makes no reference to this in his distinguishing of *Katz*.

I think the application of the *Dunsmuir* principles to the issue concerning the *vires* of subordinate legislation has produced something of a jurisprudential mess here – a mess perhaps foreshadowed by the need for Justice Ouellette to coin the term 'administrative legislation'. I'm not sure exactly what that phrase refers to. I think what is meant is 'subordinate legislation' – being legislation enacted by a delegate of the Legislature, with the delegate here being the College under authority given by the *Health Professions Act*.

Justice Ouellette goes on to apply the *Dunsmuir* principles on standard of review and concludes the standard to apply here is correctness on the basis that (1) the question of whether the inducement prohibitions in the Code are *ultra vires* the College is a jurisdictional question (at paras 37 - 40) as per *Dunsmuir*, and (2) the question of what constitutes the 'public interest' under the *Health Professions Act* is a question of law that is both central to the legal system as a whole and outside the College's area of specialization (at paras 41 – 57) and thus also attracts correctness under *Dunsmuir*. With respect, I don't think either of these grounds are proper applications of the *Dunsmuir* principles on selecting the standard of review.

Briefly put, a true question of jurisdiction is one which requires the College to ask whether it has the legal authority to embark on the line of inquiry posed by the question. It is difficult to see why the College needs to ask itself this sort of question in relation to inducement prohibitions that seek to ensure licensed pharmacists make healthcare decisions based on the medical needs of the patient. The *Health Professions Act* seems full of provisions that give the College power to make these sorts of determinations.

But the reasoning in ground (2) is probably the more difficult aspect of this decision. To begin with, the reference to 'public interest' in the *Health Professions Act* considered by Justice Ouellette is set out in the overall purpose section which states the College must carry out its activities in a manner that protects and serves the public interest (section 3(1)(a)). This is the statutory hook used by Justice Ouellette to conclude that this case raises a question of law that is of general importance to the legal system as a whole and outside the specialization of the College. Justice Ouellette provides an explanation for this in paragraphs 41 to 57, and I will let readers view it for themselves. I will simply state that this reasoning does not accord comfortably with the principles of judicial deference espoused in *Dunsmuir*.

I remember being disappointed in 2013 that the Supreme Court of Canada did not more carefully situate its reasoning in *Katz* within the broader context of administrative law. *Katz* deals with the *vires* of a regulation enacted by the Ontario legislature, and it would have been nice for clarity had the Supreme Court confirmed whether its *Katz* principles applied likewise to subordinate legislation enacted by delegates of the legislation – possibly adding another exception to the presumption of deference in judicial review. Such guidance may have proven useful in this case.