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Court of Queen's Bench Strikes Prohibition on Pharmacy Inducements in Alberta

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Case Commented On:
Sobeys West Inc v Alberta College of Pharmacists, 2016 ABQB 232

In late March I wrote a post commenting on the difficult application of a standard of review analysis to a *vires* determination of subordinate legislation – see Does the Standard of Review Analysis Apply to a Vires Determination of Subordinate Legislation? The decision before me then was *Sobeys West Inc v Alberta College of Pharmacists*, 2016 ABQB 138, wherein Mr. Justice V.O. Ouellette selected the standard of correctness to assess the *vires* of a prohibition enacted as subordinate legislation by the Alberta College of Pharmacists ("College"). This comment now looks at the substantive decision issued April 22 by Justice Ouellette ruling that the prohibition is *ultra vires* the College. I think there are some doctrinal problems with the reasoning in this judgment which I explain below, and I conclude this comment by shining some light on the fact that the successful party – Sobeys – is a large and powerful national grocery retailer in Canada who appears to convince the Court that this matter is more about consumers than patients.

The Inducement Prohibition

In April 2014 the College voted to amend its Code of Ethics and Standards of Practice for Pharmacists and Pharmacy Technicians to prohibit pharmacists from providing inducements – such as loyalty program points or other forms of consumer purchase rewards like Air Miles – to a patient for the acquisition of a prescription drug or a service from them. The College provides a description of the inducement issue and its rationale for the prohibition here. My previous comment did not explore the details of this issue because the decision under review was simply on standard of review, but given we are now into the substance of the dispute between the parties I am going to dig into this a bit more.

The College regulates pharmacists in Alberta through a registration requirement set out in Part 2 of the *Health Professions Act*, RSA 2000, c H-7. Like many other regulated professions, the registration requirement facilitates the ability of the College to oversee and monitor the provision of pharmacy services as well as establish and enforce competency and conduct requirements on pharmacists. These requirements include having post-secondary education in pharmacy, passing the national qualifying exams and a provincial jurisprudence exam, continued professional development, and adhering to conduct rules, patient care and confidentiality laws, standards of practice, and a code of ethics. While at one time the role of the pharmacist was primarily the dispensing of prescription drugs, in recent years that role has expanded to include patient care services such as the development of medication plans and providing information on how to take prescribed drugs.

The matter of inducements at pharmacies in Alberta has been an issue for the College for some time now, and the expanding role of pharmacists in patient care led the College to enact the prohibition into the Code of Ethics and Standards of Practice. The College published its rationale for the prohibition in a document entitled *Inducements for Drugs and Professional Services: A Basis for a Prohibition* (see here). My reading of this document suggests the primary reason for the prohibition is the ability of inducements to influence decisions made by patients on prescription drugs. The economic benefits provided by inducements – the desire to accumulate points or air miles for example – is thought to be improperly influencing decisions made by patients on their drug therapy and systemically interfering with and/or disrupting the pharmacist-patient relationship. The College provides more detail and many examples of these problems in the published rationale, but perhaps the summary statement is sufficient:

> The patient-pharmacist relationship needs to be rooted in integrity and trust. Patients should select their pharmacist based on the pharmacist's knowledge and quality of care, not based on inducements. Patients and pharmacists should be able to make health decisions free from competing economic and psychological influences. (*Inducements for Drugs and Professional Services: A Basis for a Prohibition* at 13)

The College thus added the following provisions to the Code of Ethics and the Standards of Practice to implement the inducement prohibition:

> Code of Ethics
>
> 13 Do not enter into any arrangement with a patient where I provide an inducement to the patient that is conditional on the patient obtaining a drug or professional service from me.
>
> Standards of Practice
>
> 1.18 A regulated member must not offer or provide or be party to the offering or provision of an inducement to a patient where the inducement is offered or provided on the condition that the patient obtains: (a) a drug product, or (b) a professional service from the regulated member or licensed pharmacy.

Are the Inducement Prohibitions lawful?

The authority of the College to enact the Code of Ethics and Standards of Practice 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 these enactments would constitute subordinate legislation – in other words that these provisions constitute enforceable rules with penal consequences if not followed, as opposed to merely 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 as to publish the Code and Standards of Practice. These process provisions largely replicate the substance of the *Regulations Act*, RSA 2000, c R-14. The text of section 133 is as follows:

> 133(1) A council may, in accordance with procedures set out in the bylaws, develop and propose the adoption of a code of ethics and standards of practice for a regulated profession and may develop and propose amendments to an adopted code of ethics or standards of practice.

(2) The college must provide, for review and comment, a copy of a proposed code of ethics and proposed standards of practice and proposed amendments to

(a) its regulated members,
(b) the Minister, and
(c) any other persons the council considers necessary.

(3) A council may adopt a code of ethics and standards of practice and may adopt amendments to a code of ethics or standards of practice after it has reviewed and considered the comments received from a review described in subsection (2).

(4) The Regulations Act does not apply to a code of ethics or to standards of practice adopted or amended under this section.

(5) The college must ensure that copies of the code of ethics and standards of practice adopted under subsection (3) are readily available to the public and regulated members, and the copies may be distributed in the manner directed by the council.

The test for determining the *vires* or lawfulness of subordinate legislation was recently consolidated and set out 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. The test is largely about assessing whether the subordinate legislation is consistent with the objective or purpose of its enabling statute. Consistency is important because the entity that enacts subordinate legislation is doing so with delegated legal authority provided by the Legislature. The guiding principle is that a delegate – such as the College in this case – only has the legal authority granted to it by the Legislature, and so the test for *vires* examines whether the delegate stayed within the grant of authority in its enabling statute. If not, the enactment must be struck as unlawful.

The steps or considerations set out by *Katz* which guide the review on the *vires* of subordinate legislation are as follows: (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) if there are conditions to be met in the enactment of subordinate legislation – for example a notice and comment process – have these conditions been met; (3) 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; (4) 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 (*Katz* at paras 24-27).

Justice Ouellette sets out the *Katz* test at paragraphs 9-14 of this decision. The reason for this lengthy dissertation of the test is that Justice Ouellette distinguishes *Katz* somewhat from this case. In particular, Justice Ouellette observes that in *Katz* the Supreme Court assessed the vires of regulations enacted by the Ontario Legislature itself under a statute with a targeted policy direction. For Justice Ouellette, this case is distinct from *Katz* in that the delegate here is the College and it is purporting to exercise delegated authority under a statute – the *Health Professions Act* – with a general or broader purpose.

This distinguishing of *Katz* is the first doctrinal problem with this judgment. While it is true that the form of subordinate legislation and the enacting body in *Katz* is different, I don't see how this difference necessarily means that the *Katz* principles don't apply just the same. As I see it, Justice Ouellette goes down this distinguishing path in order to depart somewhat from the deference called for in *Katz*. But I think what he really wants to say is that the principles governing a *vires* review of subordinate legislation should be different depending on what entity purports to enact the legislation. Where it is a legislature – such as in *Katz* – the review is very deferential, but where it is a statutory entity such as a tribunal or the College, the review is less deferential. The problem for Justice Ouellette is that *Katz* does not expressly support this. As I noted in my previous post on this case, it would have been nice had the Supreme Court of Canada more carefully situated its reasoning in *Katz* within the broader context of administrative law and confirmed whether the *Katz* principles applied likewise to subordinate legislation enacted by delegates of the Legislature.

The second doctrinal problem with this judgment is the manner in which Justice Ouellette goes about deciphering the purpose or objective of the *Health Professions Act*. Justice Ouellette remarks that it is unfortunate there is no preamble or recital to the legislation that provides its objective (at para 17), however my understanding is that the legislative drafting policy of the Alberta Legislature is to avoid using such preambles in order to ensure the objective or purpose of a statute is gleaned from the enactment as a whole. So in the absence of a provision that expressly states an objective, Justice Ouellette cites extensively from the *Hansard* record of the debate in the Legislature when the *Health Professions Act* was in the legislative process in 1998 and 1999 (at paras 18-25).

It wasn't too long ago when Canadian courts balked at admitting evidence of legislative debates and speeches as an aid to interpreting the purpose of legislation. In its 1993 *R v Morgentaler*, [1993] 3 SCR 463 decision the Supreme Court of Canada acknowledged that this exclusionary rule had been relaxed, and in its leading authority on statutory interpretation – *Rizzo v Rizzo Shoes*, [1998] 1 SCR 27 – the Supreme Court confirmed that such debates have a limited role in the interpretation of legislation: "Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation." (*Rizzo Shoes* at para 35).

The concern with using legislative debate as an aide to interpreting legislation is that individual members of the legislature do not speak for the legislature as a whole and often their speech is heavily laden with a partisan slant. The demise of the exclusionary rule does not mean these concerns are no longer present, but rather such concerns are still given effect by limiting the weight attached to these debates in the interpretation process. As Ruth Sullivan summarizes in *Sullivan on the Construction of Statutes*, 6th ed (Lexis Nexis, 2014) at 681:

> It appears to be now well-established that legislative history materials are admissible if they are relevant and reliable and these materials may be relied on for any purpose. However, they must not be given inappropriate weight. The current focus has thus shifted from admissibility to identifying the factors that make these materials more or less reliable and determine the weight they should receive. Although the exclusionary rule is no longer relevant, the concerns which led the courts initially to exclude legislative history and later to admit it first as external context, then as direct evidence of purpose and finally as direct evidence of legislative intent remain relevant in determining reliability and weight.

Justice Ouellette's review of the legislative discussion in Hansard culminates with the following articulation of the purpose of the *Health Professions Act*:

> Therefore, the legislature clearly intended the HPA to provide the framework necessary to ensure that all health professionals be competent and accountable to the public. Further, the legislature clearly intended that the HPA would require the role of the regulatory colleges to be separate from economic functions. Section 3(2) of the HPA, which deals with the issue of professional fees, is clearly indicative of the fact that economic related issues are not one of the contemplated roles of the colleges under the HPA. This is in the sense that HPA, s 3(2) specifically excluded professional fees (an economic function) from their roles. This is further supported by the parallel, stated purpose of the *Pharmacy and Drug Act*, which is directed at the economic control of costs. (at para 26, emphasis added)

I find it curious that Justice Ouellette comes to this conclusion that the statute so clearly separates economic issues from all others, without even mentioning section 3(1) of the Act, which expressly provides for the role of the College to govern and regulate the conduct of pharmacists.

The essence of Justice Ouellette's ruling is that the College enacted economic regulation with its inducement prohibitions because such prohibitions are directed, solely it seems, at the issue of pricing and the commercial operation of business. Given the aforementioned conclusion on the purpose of the *Health Professions Act* and the exclusion of economic regulation, Justice Ouellette seems to have little if any trouble ruling that the inducement prohibitions are *ultra vires* the College based on a *Katz* analysis (at paras 27-42).

Justice Ouellette uses the word 'clearly' in 10 instances when describing either the purpose of the *Health Professions Act* or the inducement prohibitions (at paras 18, 22, 24, 26, 27, 28, 30, 56), as if there could hardly be any doubt as to the *vires* question here. But how clear is this case really? Granted there is no doubt the inducement prohibition would have some economic impact on certain pharmacies (more on that below), but is the prohibition really targeted at price competition? The one document which significantly differs with Justice Ouellette's economic reading is the College's own rationale for the prohibition, entitled *Inducements for Drugs and Professional Services: A Basis for a Prohibition*, summarized above. It is very noteworthy to me that there is just a single reference to this document in Justice Ouellette's ruling (at para 6), and no substantive discussion of its content. I find it hard to understand how the purpose of the inducement prohibitions can be deciphered without any reference to the College's own articulation of its rationale.

Patient or Consumer?

There is a dualism at work in this case, specifically whether the person who approaches the pharmacy counter is a patient or a consumer. The College views the inducement prohibitions as a measure that governs the conduct of a pharmacist to help ensure the decisions made at the counter by the patient are based on healthcare alone. Justice Ouellette's reasoning views the inducement prohibitions as a measure that restricts the liberty of a pharmacist to compete for the consumer's purchases at the counter. As Justice Ouellette states at para 40: "The College's legislative action amounts to controlling the way commercial entities operate and compete amongst themselves in terms of prices offered to consumers and costs." The consumer trumps the patient in this case.

I can't help but conclude by noting that the successful party here is Sobeys - a large and powerful national grocery retailer in Canada who is quoted as being delighted with Justice Ouellette's ruling. That same media release quotes a Sobeys spokesperson as stating: "Encouraging competition and making prescriptions and pharmacy services more affordable has been at the core of our challenge of the Alberta College of Pharmacists." One can read this as an assertion of consumer interests over the regulatory functions of the College. The law sides with the powerful in this case. And while the ruling is based on some statutory interpretation, with respect it seems to me that that interpretation is only a partial job. In any case, it has long been a knock against statutory interpretation that it can be a results-orientated exercise. This decision seems very susceptible to the critical legal studies adage that law is politics, and doctrinal analysis simply serves to mask the politics in legal reasoning.

My ultimate point is that this case could just as easily have been decided in favour of the College had the dualism been flipped and the patient trumped the consumer. Indeed on very similar law and facts, the British Columbia Court of Appeal recently upheld as lawful inducement prohibitions enacted by the College of Pharmacists in British Columbia, deciding against Sobeys in *Sobeys West v College of Pharmacists of British Columbia*, 2016 BCCA 41.