COURT OF APPEAL FOR ONTARIO

CITATION: College of Optometrists of Ontario v. Essilor Group Inc., 2019 ONCA 265
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Juriansz, Brown and Huscroft JJ.A.

BETWEEN

College of Optometrists of Ontario and College of Opticians of Ontario

Applicants (Respondents in Appeal)

and

Essilor Group Canada Inc.

Respondent (Appellant)

Jonathan Lisus, Hilary Book and Philip Underwood, for the appellant

Linda Rothstein, Jean-Claude Killey, and Daniel Rosenbluth, for the respondents

Heard: September 21, 2018

On appeal from the order of Justice Thomas R. Lederer of the Superior Court of Justice, dated January 11, 2018, with reasons reported at 2018 ONSC 206.

Brown J.A.:

I. OVERVIEW

[1] The explosion in the volume and variety of online consumer transactions over the past decade has included the emergence of an online market for the purchase and sale of prescription eye glasses and contact lenses (“prescription eyewear”). In some jurisdictions, friction has emerged between the online vendors

of such products and the professional health care bodies that historically have regulated the sale of eye glasses and contact lenses. This case involves one instance of that friction.

[2] The appellant, Essilor Group Canada Inc. (“Essilor”), a federally incorporated company, is a subsidiary of Essilor International Compagnie Générale d’Optique S.A., one of the largest manufacturers of ophthalmic lenses in the world. Essilor operates at both the wholesale and retail levels. As a wholesaler, Essilor supplies lenses to Ontario optometrists and opticians. Since 2014, Essilor has carried on business as an online retailer of contact lenses and eye glasses, a result of its acquisition of Clearly Contacts Ltd. and Coastal Contacts Inc. Those two companies now operate as divisions of Essilor.

[3] Essilor’s head office is located in Quebec. However, the online business of Essilor’s Clearly and Coastal divisions is conducted in British Columbia through their websites clearly.ca and coastal.com (the “Websites”).

[4] The respondents, the College of Optometrists of Ontario and the College of Opticians of Ontario, are self-governing professional regulatory bodies pursuant to the *Regulated Health Professions Act*, *1991*, S.O. 1991, c. 18 (“*RHPA*”). The regulatory scheme in which they operate will be described in detail later in these reasons. Briefly, under their respective statutes – the *Optometry Act, 1991*, S.O. 1991, c. 35 and the *Opticianry Act, 1991*, S.O. 1991, c. 34 – the Colleges regulate

the practices of optometry and opticianry. The scope of each regulated practice includes the dispensing of subnormal vision devices, contact lenses, and eye glasses.

[5] Prior to its acquisition in April 2014 by Essilor, Clearly had sold contact lenses online to Ontario customers since 2000 and eye glasses since 2008.

[6] On September 3, 2014, the Registrars of both Colleges wrote a joint letter to Essilor alleging that the company was engaged in unlawful behaviour "by dispensing prescription eyewear through the Internet to Ontario consumers without involving an Ontario-licensed health care provider."

[7] Discussions then ensued amongst Essilor, the Colleges, and the Ontario associations of optometrists and opticians. No agreement was reached.

[8] On December 13, 2016, the Colleges commenced this application against Essilor. The Colleges allege that Essilor is in breach of the *RHPA* s. 27 by accepting orders for prescription eyewear through the Websites and shipping the eyewear to patients in Ontario. In the application, the Colleges seek: (i) a declaration that the company had breached s. 27 of the *RHPA* "by dispensing, for vision or eye problems, subnormal vision devices, contact lenses and/or eye glasses, in Ontario"; and (ii) an injunction prohibiting Essilor from engaging in such dispensing "except where the dispensing is performed by a Member [of the Colleges] or a Member's delegate".

[9] By order dated January 11, 2018, the application judge granted the requested declaration and injunction. He made two key findings.

[10] First, he held that "[i]n substance Coastal and Clearly are dispensing eyewear to those who require corrective lenses to assist with less than perfect vision": at para. 73.

[11] Second, the application judge considered the constitutional principles set out in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, regarding the applicability of provincial legislation to an out-of-province defendant, such as Essilor. He concluded, at para. 90, that a sufficient connection exists between Ontario and Essilor's conduct to fall within the prohibition contained in s. 27 of the *RHPA*:

> In this case prescription eyewear is ordered by people in Ontario. It is delivered to them in Ontario. Presumably it is to be used by them while resident in Ontario. This represents a sufficient connection to Ontario.

[12] Essilor appeals. For the reasons set out below, I would allow the appeal. I conclude that the application judge incorrectly held that ss. 27(1) and (2) of the *RHPA* are constitutionally applicable to Essilor's online sales of prescription eyewear to customers in Ontario. The mere delivery in Ontario of an order for prescription eyewear that has been processed in compliance with the British Columbia regulatory regime, without more, does not establish a sufficient

connection between Essilor's online sales and the controlled acts proscribed by the *RHPA* s. 27(1).

II. THE BUSINESS OF ESSILOR

[13] The Canadian market for prescription eyewear is large. Estimates in 2016 pegged contact lens sales at $324 million and the sale of spectacles – frames, lenses, sunglasses and ready-made reading glasses – at $4.2 billion. In 2014, it was estimated that 4% of retail spectacle and contact lens sales occur online in Canada. According to Essilor's evidence, other vendors sell eyewear online in Ontario: eleven sell contact lenses online; four sell eye glasses.

[14] Essilor describes online sales as "only a small fraction of the retail market for corrective lenses, but a growing one"; opticians and optometrists "operating out of traditional physical offices and stores still dominate the market for corrective lenses in Canada."

[15] Essilor, through Clearly, operates a few bricks-and-mortar stores: two in Vancouver and one in Toronto. An optician and a contract optometrist work at the Toronto store; both are members of their respective Colleges.

[16] Clearly's online retail business is based in British Columbia and operates in accordance with British Columbia laws and regulations. Located in British Columbia are: Clearly's head office and management team, its lab, distribution centre, and warehouse.

[17] Clearly accepts and fills online orders in the following fashion:

(i) A customer makes an online purchase of eye glasses or contact lenses from Clearly through the Websites, which are hosted by a service in Texas. Once a customer places an order, all order information, apart from credit card information and customer data is stored on servers at Clearly's Vancouver office;

(ii) To order eye glasses or contact lenses online through Clearly's Websites, customers must enter their prescription information and, in the case of eye glasses, their pupillary distance. Clearly does not conduct eye exams or issue prescriptions. Although customers are not required to provide copies of their prescriptions when ordering online, they must accept Clearly's Terms and Conditions of Use, which require customers to certify that they have valid prescriptions for the lenses they are ordering;

(iii) Sometimes optometrists do not include pupillary distance as part of a prescription. Clearly does not measure customers' pupillary distances, but its Websites contain information about how customers can measure the distance themselves;

(iv) Clearly's Vancouver office issues an electronic invoice to the customer; online payments are processed through a third party in Montreal;

(v) When an online order is received and accepted in British Columbia, it is sent by Clearly's Vancouver administrative office to its Vancouver lab and distribution centre for processing. In the case of eye glasses, Clearly orders the components for frames and lenses from outside Canada. The eye glasses are assembled either in Clearly's Vancouver lab or at an Essilor partner lab outside of Canada. In the case of contact lenses, Clearly sources them from manufacturers in the United States and maintains an inventory of lenses at its Vancouver warehouse. About 80% of contact lens customers are supplied from product in inventory;

(vi) Clearly ships finished eye glasses and contact lenses to customers from its British Columbia distribution centre;

(vii) Clearly operates a call centre in Vancouver to address customer questions. An optician who is a member of the British Columbia College of Opticians is on staff;

(viii) The Vancouver office processes all returns.

[18] Where a customer in Ontario buys prescription eyewear online from Clearly, only two steps in the transaction touch upon Ontario: (i) the customer enters the order online from a device in Ontario; and (ii) Clearly arranges for the delivery of the eyewear to the customer at a location in Ontario.

III. THE REGULATORY SCHEME IN BRITISH COLUMBIA

[19] As the description of Essilor's mode of online business discloses, British Columbia is the company's principal place of business. As well, the terms and conditions posted on Clearly's Websites state that services provided through the sites are governed by the laws of British Columbia and applicable federal laws.

[20] There is no dispute that Essilor's method for selling prescription eyewear is authorized by the law of British Columbia.

The situation prior to 2010

[21] That was not always the case. In 2008, the College of Opticians of British Columbia sought a court order to prohibit Clearly from selling or dispensing contact lenses online to individuals in British Columbia. Clearly successfully resisted the application in the court of first instance: *College of Opticians of British Columbia v. Coastal Contacts Inc.*, 2008 BCSC 617. However, in 2009 the British Columbia Court of Appeal reversed. It held that merely requesting an online customer to certify that he or she had a prescription did not comply with the regulations then in force, which required Clearly to obtain a written prescription from a customer:

College of Opticians of British Columbia v. Coastal Contacts Inc., 2009 BCCA 459, 98 B.C.L.R. (4th) 53, at para. 21.

The 2010 regulatory changes

[22] About half a year later, on May 14, 2010, the British Columbia government amended the *Opticians Regulation* under the *Health Professions Act*, R.S.B.C. 1996, c. 183. That act, like its Ontario counterpart, authorizes regulations requiring that prescribed services may only be provided by registrants of a designated health profession college: s. 12(2)(e).

[23] The British Columbia *Optometrists Regulation*, B.C. Reg. 33/2009 and *Opticians Regulation*, B.C. Reg. 118/2010, define the practices of optometry and opticianry as including “dispensing vision appliances”. Both contain the same definition of “dispense” with respect to vision appliances: "dispense" means to “design, prepare, fit, adjust, verify or supply”: s. 1 of *Optometrists Regulation* and *Opticians Regulation*. Both regulations limit the practice of optometry and opticianry to registrants of the Colleges, with an important exception.

[24] That exception was enacted by a May 2010 amendment to the *Opticians Regulation*, which introduced two major changes to the British Columbia regulatory regime governing the dispensing of corrective lenses.

[25] First, the amendments permit persons who are not registered optometrists and opticians to dispense corrective eye glass lenses and contact lenses as long as two main conditions are met:

(i) the person possesses either: (a) a copy of an "authorizing document" in the case of a corrective eyeglass lens, or a "contact lens record"[1] in the case of a contact lens, in respect of the customer; or (b) the information in an "authorizing document" or "contact lens record" accompanied by a statement from the customer certifying the existence of the relevant "authorizing document" or "contact lens record" and the accuracy of the information; and

(ii) in the case of dispensing using an assessment record, the change in correction between the lenses ordered by a person and his or her prior prescribed lenses does not fall within certain ranges or the nature of the requested lenses does not indicate the presence of certain medical conditions, as set out in ss. 6 and 8 of the Schedule to the *Opticians Regulation*.

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[1] The B.C. *Opticians Regulation* defines an "authorizing document" as either of a "prescription for a corrective eyeglass lens" or an "assessment record…produced by an independent automated refraction conducted by a person who is authorized under the Act to conduct independent automated refractions." A "contact lens record" means "the record, prepared by a person authorized under the Act to fit a contact lens, of the contact lens specifications derived from fitting a contact lens using information contained in an authorizing document".

[26] Second, the person dispensing the prescription can rely on a prescription written by an optometrist or qualified medical practitioner outside of British Columbia. The relevant portions of the *Opticians Regulation* are reproduced in Appendix “A” to these reasons.

IV. THE ONTARIO REGULATORY SCHEME

[27] The regulatory scheme in Ontario for prescription eyewear exhibits a similar structure to that in British Columbia. Two statutes define the scope of the practices of optometry and opticianry: The *Optometry Act* and the *Opticianry Act*.

[28] The *Optometry Act* defines the practice of optometry as “the assessment of the eye and vision system and the diagnosis, treatment and prevention of (a) disorders of refraction; (b) sensory and oculomotor disorders and dysfunctions of the eye and vision system; and (c) prescribed diseases”: s. 3. In the course of engaging in the practice of optometry, a member of the College is authorized to prescribe or dispense for vision or eye problems, subnormal vision devices, contact lenses or eye glasses: s. 4.

[29] The *Opticianry Act* defines the scope of the practice of opticianry as “the provision, fitting and adjustment of subnormal vision devices, contact lenses or eye glasses”: s. 3. A member of that College may “dispense subnormal vision devices, contact lenses or eye glasses”, but only “upon the prescription of an optometrist or physician”: ss. 4 and 5(1).

[30] Under the *RHPA*, the concept of a “controlled act” operates to restrict the performance of specific health care acts to members of recognized professional health care bodies or their delegates. The proscription against persons who are not members of the Colleges from performing a “controlled act” is found in s. 27(1) of the *RHPA*, which states:

> 27 (1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,
>
> (a) the person is a member authorized by a health profession Act to perform the controlled act; or
>
> (b) the performance of the controlled act has been delegated to the person by a member described in clause (a).

[31] Section 27(2) of the *RHPA* lists the “controlled acts”. It states, in part:

> (2) A “controlled act” is any one of the following done with respect to an individual:
>
> …
>
> 9. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers.

[32] In contrast to the British Columbia legislative scheme, the key Ontario statutes – the *RHPA, Optometry Act* and *Opticianry Act* – and their regulations do not define the term “dispensing”.

V. THE COLLEGES' ALLEGATIONS OF REGULATORY VIOLATIONS BY ESSILOR

[33] While the Colleges agree that Essilor's online sale of prescription eyewear is authorized by the British Columbia regulatory regime, they take the position that its online sale of such eyewear to customers in Ontario violates the Ontario regulatory scheme. The Colleges first took that position following Essilor's 2014 acquisition of Clearly's online retail eyewear business.

[34] By letter dated September 3, 2014, the Registrars of both Colleges wrote to Essilor stating that it was "violating Ontario's laws by providing prescription eyewear to Ontario residents without the direct involvement of an optician, optometrist or physician in the dispensing process." The Colleges took the position that the controlled act of dispensing included the "preparation, adaptation and delivery of prescription eyewear." In the Colleges' view, "[r]egardless of the business model used and the technology employed, authorized professionals must be directly involved with all aspects of dispensing eyewear." The Colleges asked Essilor to confirm that it would comply with Ontario's laws.

[35] The letter enclosed a copy of the College of Optometrists policy on "Spectacle Therapy Using the Internet" (the "Internet Therapy Standard"), which can be found at Appendix B to these reasons. The Registrar of the College of

Opticians deposed that the document was sent to Essilor to assist it "in revising its practices to conform with Ontario law and standards."

[36] Essilor responded to the letter, disagreeing with the legal positions advanced by the Colleges, but proposing a meeting to discuss the issue. A meeting was held in April 2015 without the parties reaching a resolution. As well, Essilor held talks with the Ontario associations of optometrists and opticians.

[37] According to Essilor, two points of contention emerged in those discussions. First, the associations wanted Clearly to require consumers to provide copies of their prescriptions with the prescribing clinician identified, not just the information contained in the prescription. Second, the associations wanted Clearly to deliver orders to an optometrist's or optician's office or retail store, not directly to the consumers' homes. An impasse was reached on the issue of mandatory prescription verification, at which point the discussions ended in early 2016.

[38] In 2015, the Canadian Association of Optometrists expressed concern to Clearly about its role in managed care plans, stating that "[o]ptometrists object to this activity as it cuts them out of the retail activity with the patient and effectively competes directly with them."

[39] In early 2016, the Colleges retained a law firm to conduct an investigation into Essilor's business to obtain evidence of prohibited conduct.

[40] This application ensued. In it, the Colleges allege that Essilor is in breach of the *RHPA* s. 27 by accepting, through its Clearly and Coastal online stores, orders for prescription eyewear and shipping that product to patients in Ontario.

[41] The Colleges have not filed any evidence of specific harm to a member of the public caused by Essilor's conduct. The Colleges rely on the presumption that if a person performs a controlled act in contravention of *RHPA* s. 27, harm to the public is presumed: *Wadden v. College of Opticians of Ontario*, (2001) 207 D.L.R. (4th) 72, (Ont. C.A.), at para. 32.

VI. THE GOVERNING LEGAL TEST: SUFFICIENT CONNECTION

[42] This case raises the constitutional issue of whether the connection between Ontario and Essilor is sufficient to support the application of Ontario's regulatory scheme for prescription eyewear to an out-of-province entity, such as Essilor. While initial formulations of the principle of territorial legislative restriction focused on physical presence in a territory, as the Supreme Court of Canada observed in *Unifund*, at para. 63:

> Later formulations of the extraterritoriality rule put the focus less on the idea of actual physical presence and more on the relationships among the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation. The potential application of provincial law to relationships with out-of-province defendants became more nuanced.

[43] In *Unifund*, the Supreme Court recognized that this more flexible view of extraterritorial application likely would increase the potential amongst the provinces for conflict. Nevertheless, the collective interests of the federation as a whole required the adoption of principles of order and fairness that ensure the security of transactions with justice: at paras. 68 and 74. In a federal system, that includes avoiding competing exercises of regulatory regimes, the cost of which undermines economic efficiency: at para. 71. Those considerations led the court to formulate the following principles at para. 56:

> Consideration of constitutional *applicability* can conveniently be organized around the following propositions:
>
> > 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
> >
> > 2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
> >
> > 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
> >
> > 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

[44] The required strength of the relationship varies with the type of jurisdiction asserted. A relationship that is inadequate to support the application of regulatory legislation nevertheless may provide a sufficient “real and substantial connection” to permit the courts of the forum to take jurisdiction over a dispute: *Unifund*, at para. 80.

[45] There is no single standard defining what constitutes a sufficient connection; whether a sufficient connection exists depends largely on context: *Ontario College of Pharmacists v. 1724665 Ontario Inc. (Global Pharmacy Canada)*, 2013 ONCA 381, 308 O.A.C. 200, at paras. 67 and 68 (“*Global Pharmacy*”).

[46] The territorial limits on the scope of the provincial legislative authority relate to the conduct that the provincial regulator can regulate, in this case the “controlled acts” under the *RHPA*: *Global Pharmacy*, at para. 73.

[47] The interpretation of a statute’s language must be guided by the general rule of statutory interpretation that the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[48] Some statutes may use words that have established commercial law meanings. Although those meanings may apply in some statutory contexts, the

interpretative process must be guided by the purpose of the statute: *Celgene Corp. v. Canada (A.G.)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 24 and 25. While clear statutory words will dominate, unclear words must yield to an interpretation that best meets the overriding purpose of the statute: *Celgene*, at para. 21; *Global Pharmacy*, at para. 60.

[49] As well, the "both here and there" nature of online, Internet-based transactions poses additional challenges for the interpretative exercise: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at para. 59. Traditional contract law principles may assist in determining whether certain conduct falls within the jurisdiction of a regulator; in other circumstances they may not, necessitating resort to a consideration of other factors, particularly the substance and not the form of the conduct: *Global Pharmacy*, at paras. 46, 61-62 and 71.

VII. FRAMING THE ISSUE ON APPEAL

[50] There are two main issues on this appeal.

[51] First, Essilor submits that the application judge erred in finding that it performs the "controlled act" of "dispensing" in Ontario within the meaning of ss. 27(1) and (2)9 of the *RHPA*. Essilor argues that its sale of prescription eyewear into Ontario by delivering ordered product to an Ontario customer does not amount to the controlled act of "dispensing".

[52] Second, Essilor submits that the application judge incorrectly decided the constitutional issue by concluding that a sufficient connection exists between its online provision of prescription eyewear and Ontario so as to bring its activities within the ambit of s. 27 of the *RHPA*.

[53] These two issues are intertwined. I shall consider them in the following order. First, I will review the case law and evidence about regulatory standards concerning the content of the controlled act of "dispensing" prescription eyewear. Second, I will examine Essilor's contention that the application judge erred in finding that it performed a controlled act in Ontario. I will then move to the constitutional issue of sufficient connection and the application judge's treatment of the *Unifund* test.

VIII. "CONTROLLED ACT": THE CASE LAW AND EVIDENCE OF REGULATORY STANDARDS

[54] Because the sufficient connection test directs an inquiry into the relationship among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated by it, consideration must be given to the meaning and application of the concept of "controlled act" contained in the *RHPA* s. 27. The "controlled act" at issue in this case is the "dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers": *RHPA*, s. 27(2)9. [emphasis added]

The case law

[55] Almost two decades ago, this court, in *Wadden*, interpreted the term "dispensing" in the *Opticianry Act* as meaning the preparation (but not fabrication), adaptation, and delivery of eye glasses: at paras. 6 and 41. In that case, the trial judge had held that each of the following acts constituted dispensing: "greeting the customer, showing him frames, commenting on their appearance, discussing bifocals, determining whether the customer wanted bifocals with lines, discussing lens materials and coatings, taking facial measurements, including the distance between his cornea and the centre of his nose, asking the customer to read with the glasses, and adjusting the arm piece and fit": at para. 7.

[56] This court found that the trial judge had "overstated his conclusion" holding, instead, that "dispensing may be a single act or part of a continuum of activities. Carried out in isolation, activities such as commenting on the appearance of frames, and receiving payment would not in and of themselves constitute dispensing": at para. 43.

[57] *Wadden* remains the leading case on what the "dispensing" of prescription eyewear means. But, *Wadden* was decided in 2001, before the emergence of a robust market in online commerce. The decision's language indicates that the movement from in-person to online purchases of prescription eyewear was not foreseen at that time.

[58] However, both Colleges have issued Standards of Practice in which they describe the “continuum of activities” involved in dispensing prescription eyewear, including providing prescription eyewear by means of online transactions. While the Standards are not determinative of the meaning of the statutory term “dispensing”, they do afford insight into how both professions view adapting the traditional in-person provision of prescription eyewear to the new mode of online commerce.

Optometrists’ Standards of Practice

[59] The *Optometric Practice Reference Standards of Practice* published by the College of Optometrists address in some detail the process of dispensing prescription eyewear online. Standard 6.4, concerning “Spectacle Therapy”, contains the College’s Internet Therapy Standard, reproduced as Appendix B to these reasons.

[60] The Internet Therapy Standard defines dispensing as “the preparation, adaptation and delivery” of vision correction. It identifies eight steps or stages in the process of providing prescription eyewear online. The standard provides that an optometrist should: (i) review with the patient factors affecting spectacle wear; (ii) review the details of the prescription; (iii) advise the patient regarding appropriate ophthalmic materials; (iv) take appropriate measurements; (v) arrange for the fabrication of the spectacles; (vi) verify the accuracy of the completed

spectacles; (vii) fit or adjust the spectacles to the patient; and (viii) counsel the patient regarding spectacle wear.

[61] Of the eight steps described, two concern dealings with the manufacturer of the eyewear. The other six involve communications with the patient. Of those six, the Internet Therapy Standard states that five can be performed without requiring the personal attendance of the patient. For those stages of the process, the optometrist may use various forms of electronic or online communication. For example, an optometrist may take appropriate measurements in-person or by in-office or remote computer applications. The specifics of other online means of communication can be found in the Internet Therapy Standard at Appendix B to these reasons.

[62] The only step for which the Internet Therapy Standard requires a personal attendance by the patient is the penultimate one: the “fitting or adjusting the spectacles to the patient”. The standard offers the following rationale for this requirement:

> In-person fitting and adjusting of spectacles provides a final verification and mitigates risk of harm by confirming that patients leave the clinic with spectacles that have been properly verified, fit and adjusted. In-person delivery of spectacles establishes a patient/practitioner relationship in circumstances where patients are new to the clinic and spectacle therapy was initiated through the optometrist’s website.

Opticians' Standards of Practice

[63] The *Professional Standards of Practice for Opticians in the Province of Ontario* contain a definition of "dispensing" similar to that used by the Optometrists Standard. The Opticians Standards contain separate sections for the dispensing of eye glasses and contact lenses. While expressed in somewhat different terms than in the Optometrists Standards, the "continuum of activities" is functionally similar.

[64] The Opticians Standards do not contain guidelines for the online dispensing of prescription eyewear similar to those used by the optometrists. The College of Opticians' *Practice Guidelines* only briefly address the use of technology. Nonetheless, they share common ground with the Optometrists Standards in that the final step on the continuum of activities – the delivery of the prescription eyewear – must be done in person. And therein lies the point of conflict between the parties in this proceeding.

Comparing Essilor's "acts" with the steps described in the Internet Therapy Standard

[65] Essilor does not perform all the steps described in the Internet Therapy Standards in order to fill an online order for prescription eyewear.

[66] First, Essilor does not take measurements. Instead, it relies on the information contained in the prescription and provided by the customer. It should

be noted that the British Columbia regulatory regime sets a higher health care standard for the content of prescriptions for eye glasses than does Ontario. In British Columbia, an optometrist must include in a prescription the person's interpupillary distance: *Optometrists Regulation*, s. 6(4)(e). No similar standard applies to prescriptions written by Ontario optometrists.

[67] Second, Essilor does not fit or adjust eye glasses ordered online; it delivers the finished eye glasses to the location specified by the customer. By contrast, the Standards for Ontario optometrists and opticians require them to deliver the eyewear by means of an in-person fitting or adjustment.

IX. CONTROLLED ACT: ANALYSIS OF THE APPLICATION JUDGE'S FINDINGS

[68] No factual dispute exists about what Essilor does when it makes online sales of prescription eyewear or where Essilor performs the various steps it undertakes to fill an online order. As the application judge recognized, "[v]irtually every action taken by Coastal and Clearly in connection with the preparation and delivery of eyeglasses occurs in British Columbia": para. 68.

[69] That being the case, on what basis did the application judge find that Essilor's online sales amounted to performing in Ontario the controlled act of "dispensing" in the course of providing health care services to an individual, as required to grant a restraining order under the *RHPA* s. 27(1)?

[70] The application judge explained the basis for his finding at two places in his reasons. First, at paras. 65 and 66 he stated, in part:

> Obviously, the respondent is making eyeglasses. It is filling prescriptions and delivering eyewear. This is enough to show that the respondent is dispensing eyewear. If it is necessary to go further, it is reasonable to infer, as I do, that the respondent "dispensed" the eyeglasses delivered to the three [investigatory] "customers".
>
> Accordingly, I find that the respondent has acted contrary to the requirements of s. 27 of the *Regulated Health Professions Act*.

[71] Yet, the evidence clearly shows that Essilor makes eye glasses – in the sense of assembling or preparing them for shipment – at its British Columbia facilities. As well, Essilor fills the prescriptions at and ships the finished eyewear from its British Columbia facilities. None of that activity constitutes the performance of a controlled act in Ontario.

[72] However, the application judge returned to the issue of the violation of the *RHPA* s. 27(1) later in his reasons where, at para. 90, he stated:

> In this case prescription eyewear is ordered by people in Ontario. It is delivered to them in Ontario. Presumably it is to be used by them while resident in Ontario. This represents a sufficient connection to Ontario. To find otherwise would mean the eyeglasses are provided without obligation to adhere to Ontario regulation. Ordering eyeglasses is the catalyst for, and delivery is part of, dispensing the eyewear; indicating that it is at least part of a "controlled act" as defined in s. 27(2) of the *Regulated Health Professions Act.* [emphasis added]

[73] In the application judge's view, the online ordering of prescription eyewear from a device located in Ontario and its delivery to a person in Ontario amount to the performance by Essilor of controlled acts contrary to s. 27(1) of the *RHPA*: at para. 66. I shall examine each finding in turn.

A. Placing an order

[74] There is no dispute that in most cases a customer in Ontario uses a device located in Ontario to access Essilor's Websites and place an online order. However, the customer's inputting of information into the Websites and transmission of that order information to Essilor is not part of a "controlled act" within the meaning of the *RHPA* ss. 27 for the simple reason that the act is performed by the customer, not by the person – Essilor – who provides the health care service to the individual. I accept Essilor's submission that the proscription contained in the *RHPA* s. 27(1) is directed at the supplier of a health care service or product, not at the consumer patient. Section 27(1) of the *RHPA* and the *RHPA Code* do not vest the Colleges with the authority to seek to restrain acts taken by the consumer of health care services: see also *Ordre des optométrists du Québec c. Coastal Contacts Inc.*, 2016 QCCA 837, leave to appeal to S.C.C. refused, 2017 CanLII 442 (SCC), at para. 25. Accordingly, the fact that a customer places an order from an Ontario-located device cannot support a finding that Essilor performs the controlled act of dispensing in Ontario.

B. Selling is not dispensing

[75] Before considering the next act relied upon by the application judge – delivery – at this point it would be appropriate to consider a related submission forcefully advanced by Essilor, both below and on appeal: by "selling" prescription eyewear to individuals in Ontario, Essilor is not engaged in the act of "dispensing". Considering the submission at this stage will shed some light on the nature of prescription eyewear transactions which, in turn, will assist in assessing whether "delivery" falls on the "continuum of activities" making up "dispensing" within the meaning of the *RHPA* s. 27.

The decision of the application judge

[76] At para. 54 of his reasons, the application judge distinguished dispensing from selling:

> "Dispensing" is qualitatively different from "selling", the term that was central to the rationale in *Ordres des optometristes du Quebec v. Coastal Contacts Inc*. "Selling" is commerce. "Dispensing", however, refers to acts that respond to problem eye sight ("prescribing", "preparing", "fitting", "adjusting", "adapting"): that is, health care.

[77] Nonetheless, in the result the application judge appeared to favour the Colleges' argument that the act of "selling" was subsumed within "dispensing", although he did not definitively decide that issue.

[78] Essilor stresses that “selling” is not “dispensing” within the meaning of the *RHPA* s. 27(2)9. It bases its argument on the maxim of statutory interpretation that the express mention of one thing means the implied exclusion of another: specifically, that because s. 27(2)8 of the *RHPA* refers to both “dispensing” and “selling” in describing the controlled act for drugs, while s. 27(2)9 only speaks of “dispensing” in the case of prescription eyewear, it must follow that the term “dispensing” when used in respect of eyewear does not include the “selling” of eyewear.

[79] The application judge rejected that argument, noting that there was a need for the inclusion of the additional term “selling” in respect of the drugs covered by 27(2)8 because some drugs do not require a prescription yet still are subject to professional supervision when sold. But, that is not the case for prescription eyewear: at para. 63. The application judge appropriately explained how the implied exclusion maxim was rebutted in those circumstances: *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, 140 O.R. (3d) 82, at para. 57, leave to appeal to S.C.C. refused, 2019 CanLII 7956 (SCC).

[80] Essilor’s submission misses the mark for a more fundamental reason. Optometrists and opticians do not provide prescription eyewear for free. A patient must pay a price for the eyewear before walking out of the office with the product. As a matter of common experience, the dispensing of prescription eyewear involves the commercial sale of a product, albeit a health care product. Indeed, the

core dispute in this case revolves around the comparative prices at which Essilor and members of the Colleges provide prescription eyewear to the public.

[81] While that disposes of Essilor's "selling is not dispensing" argument, its submission does highlight that the provision of prescription eyewear is a transaction with both health care and commercial aspects. This has been recognized by prescription eyewear professionals themselves, as well as by the Quebec courts in litigation brought against Essilor's Coastal division in that province by the Quebec professional regulator.

[82] The 2014 discussion paper prepared by an expert panel struck by the Canadian Association of Optometrists – *Pathways to the Future* – recognized the commercial dimension of providing prescription eyewear, and the attendant market pressures that dimension exerts on the traditional channels of selling eyewear through regulated health care professionals. At p. 12, the paper states:

> In reality, many of the services provided today are loss leaders that support the retail business. Thus, the product aspect of the business – which historically has helped shape the profession – should be retained as part of the business model, even in the light of ongoing competition from big box retailers and mass merchandisers offering discounted eyewear and a limited eye exam.
>
> The opportunity in retail for [optometrists] is to differentiate by offering the aging population a more sophisticated array of tools and supports (for example, eSight). In addition, [optometrists] will retain their current patient-centred approach, offering a range of retail products to suit the priorities and interests of their patient

> base and target audience, with varying price ranges and strategic marketing messages. However, the expected increased competition in prescription eyewear and contact lens sales highlights the need for [optometrists] to adopt more proficient business practices.

[83] The Quebec Court of Appeal also recognized the commercial dimension in their decision in *Ordre des optométrists du Québec*. In that case, the Ordre des optométrists du Québec (the "Quebec College") sought a declaration that Coastal was violating the Quebec *Optometry Act*, C.Q.L.R. c. 0-7 (*Loi sur l'optométrie* ("*LSO*")) by engaging in the "sale" of ophthalmic lenses in Quebec through its website without being registered with the College, contrary to the provisions of the *LSO* analogous to Ontario's "controlled acts" proscriptions.

[84] At first instance, the motion judge dismissed the College's application: 2014 QCCS 5886. He concluded that the online contract for the "sale" of ophthalmic lenses to a Quebec resident was made in British Columbia and governed by the law of that province. While the motion judge acknowledged, at para. 52, that the contract between an optometrist and his customer contains a professional health services aspect, he continued, at paras. 53 and 54, by writing:

> [Translation] The law also reserves "*an act which […] deals with […] sale* [of ophthalmic lenses]" to members of the College. The connection between this reservation and the protection of the public seems less clear than the service portion and instead seems to confer an economic monopoly on professionals.
>
> The Court is of the opinion that these economic objectives and the objectives concerning the protection

> of the public are distinct and severable. [emphasis in original][2]

[85] The Quebec Court of Appeal dismissed the Quebec College's appeal, rejecting its primary argument that the word "sale" in the relevant provision of the *LSO* also covered the "distribution" of ophthalmic lenses in Quebec. In the course of its reasons, the Quebec Court of Appeal stated, at paras. 70 and 71:

> [Translation] Finally, I would note that the Supreme Court teaches us that statutes that create professional monopolies which are permitted by law, where access to these monopolies is controlled and which protect their approved members who meet specific conditions to protect against competition, must be strictly applied. Anything which is not clearly defended may be performed with impunity by those who are not part of these associations.
>
> As a result, it is my opinion that the appellant has not demonstrated that protection of the public requires interpreting the word "sale" in Section 16 of the *LSO* as meaning the distribution of a regulated product. The [College's] second argument must therefore be rejected. Consequently delivery alone of ophthalmic lenses in Quebec, as is the case herein, cannot constitute a violation of Section 16 or of the first Section of Article 25, nor can it constitute illegal practice of optometry in Quebec.[3] [Emphasis added]

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[2] [53] Le législateur réserve aussi aux membres de l'Ordre tout acte « *ayant pour objet* […] *la vente* [de lentilles ophtalmiques] ». Cette réserve semble avoir un lien moins clair avec la protection du public que la portion service et semble plutôt viser à conférer un monopole économique aux professionnels.

[54] Le Tribunal est d'avis que ces objectifs économiques et de protection du public sont distincts et dissociables.

[3] [70] Je rappelle enfin que la Cour suprême enseigne que les lois qui créent des monopoles professionnels sanctionnés par la loi, dont l'accès est contrôlé, et qui protègent leurs membres agréés qui remplissent des conditions déterminées contre toute concurrence, doivent être strictement appliquées. Tout ce qui n'est

[86] While the specific language of the Quebec legislation differs from that in Ontario, I find persuasive the insight of the Quebec courts that the provision of prescription eyewear to a person involves a transaction combining the elements of a commercial sale with the provision of professional health care services. Prescription eyewear is not dispensed free of charge, and one component of eye glasses – the frames – quite often simply possesses an aesthetic or fashion aspect, not a health care one.

C. Delivery

[87] The final activity that the application judge characterized as a part of the controlled act of dispensing by Essilor is the delivery of a filled online order for prescription eyewear to a customer located in Ontario.

[88] Essilor submits that the mere delivery of a package in Ontario does not amount to a "controlled act" in the course of providing health care services within the meaning of the *RHPA* s. 27. The Colleges advance a different position, contending that whatever steps Essilor performs in British Columbia, an Ontario

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pas clairement défendu peut être fait impunément par tous ceux qui ne font pas partie de ces associations[70].

[71] En conséquence, j'estime que l'appelant n'a pas démontré que la protection du public requiert d'interpréter le mot « vente » dans l'article 16 *LSO* comme signifiant la distribution d'un produit réglementé. Son second moyen doit donc être rejeté. Il en résulte que la seule délivrance de lentilles ophtalmiques au Québec, comme c'est le cas en l'espèce, ne peut constituer une contravention à l'article 16 et au premier alinéa de l'article 25 ni l'exercice illégal au Québec de l'optométrie.

customer does not obtain the health care service involving prescription eyewear until the product comes into his or her hands. Therefore, the Colleges argue, the delivery of a package containing prescription eyewear is more than the simple delivery of a thing; it is an integral activity in the provision of a health care service. As such, the act of delivery constitutes an element of the "continuum of activity" that makes up the "controlled act" of dispensing prescription eyewear.

[89] Unfortunately, the decision of this court in *Wadden* offers little practical assistance in determining whether the mere delivery of prescription eyewear in Ontario in fulfilment of an online order is a "controlled act". While this court found that dispensing may be "a single act or part of a continuum of activities" and pointed out that some activities, "[c]arried out in isolation", might not "in and of themselves constitute dispensing," all the acts at issue in *Wadden* were performed by the supplier in Ontario. The constitutional jurisdictional issue did not arise on the facts of that case.

[90] I am persuaded by the Colleges' submission that the delivery of prescription eyewear falls within the continuum of activities that make up the "dispensing" of such eyewear. It is difficult to see how a person can dispense prescription eyewear without delivering it. The transaction would remain incomplete until delivery was made, and the customer/patient would not obtain the benefit of the prescription eyewear until received.

[91] However, that, in itself, would not lead me to conclude, as did the application judge at para. 66 of his reasons, that by delivering prescription eyewear to an Ontario customer in fulfilment of an online order Essilor acts contrary to the requirements of s. 27 of the *RHPA*. If all the acts along the "continuum of activities", including delivery, were performed by a person situated in Ontario, whether the order was placed in-person or online, then a violation of s. 27(1) of the *RHPA* would be made out. But here, all the acts performed to fill an online order but one – delivery – are performed out-of-province. To find a violation of the *RHPA* s. 27(1), a sufficient connection with Ontario must be demonstrated. I turn now to that key issue.

X. SUFFICIENT CONNECTION

A. The positions of the parties

[92] The parties differ about the degree of connection required to establish a "sufficient connection" with Ontario under the *Unifund* test. Essilor submits that for a sufficient connection to exist, all aspects of the controlled act must take place in Ontario, whereas the Colleges contend that as long as some part of a controlled act occurs in Ontario, a sufficient connection exists.

[93] I am not persuaded by either submission. Ascertaining whether a sufficient connection exists does not involve a numeric comparison of the acts Essilor performs in British Columbia with those in Ontario to provide prescription eyewear

to an Ontario customer. A single act, such as delivery, may establish a sufficient connection, or it may not. The *Unifund* test requires a more qualitative inquiry into the relationship among the enacting jurisdiction, the subject matter of the legislation, and the individual or entity sought to be regulated.

B. The *Unifund* analysis

[94] With the greatest of respect to the application judge, I conclude that he incorrectly decided the constitutional issue of sufficient connection that lies at the heart of this case.

[95] First, in finding the existence of a sufficient connection, the application judge erred in concluding that the placement of an online order by a customer in Ontario constitutes part of a controlled act performed by Essilor. It does not; it is an act of the customer, not an act of Essilor. As a result, it cannot form part of the controlled act of dispensing by Essilor.

[96] Further, while the application judge correctly identified the purpose of the *RHPA* as regulating the nature and quality of health care services in order to protect the public, he did not acknowledge that some aspects of the "continuum of activities" constituting "dispensing" possess a commercial aspect involving no application of professional health care skills. 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.

[97] As well, the application judge erred in his characterization of the purpose of the British Columbia regulatory regime, leading him to discount the fact that Essilor operates in compliance with the health care standards set by another Canadian province. The application judge concluded that the 2010 amendments to the British Columbia regulatory scheme changed its purpose from protecting health care to enhancing competition and consumer choice stating, at para. 92.

> It is not clear to me how this change maintained "public safety" but it does not matter. What is clear is that the purpose behind the regulatory scheme in British Columbia changed. As noted by the respondent in its factum, British Columbia encourages online selling to enhance competition and consumer choice. That is different from the regulatory approach in Ontario. Here, the central purpose is health care. There is no justification for imposing the purpose of health professions legislation from British Columbia on those who reside in Ontario. To my mind, that would be a questionable breach of the territorial jurisdiction defined by Canada's federal system of government.

[98] The evidentiary record did not disclose any shift in legislative purpose resulting from the 2010 amendments. Those amendments did not alter the statutory duties set out in s. 16(1) of the British Columbia *Health Professions Act.* It remains the duty of a college, such as the College of Optometrists and the College of Opticians, "at all times (a) to serve and protect the public, and (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest."

[99] 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. Given those circumstances, I would not regard the commercial act of the physical delivery of product ordered online to the customer in Ontario, without more, as establishing a "sufficient connection" with Ontario upon which to apply the controlled health care act proscriptions of the *RHPA* s. 27(1) to Essilor's online transactions.

[100] However, two other arguments must be addressed.

Essilor's Toronto bricks-and-mortar store

[101] First, the Colleges point to the presence of Essilor's bricks-and-mortar store in Toronto as an indicia of a sufficient connection with Ontario. In their application, the Colleges do not allege that the store operates in contravention of the *RHPA*. However, they submit that the store "funnels customers into the online store to complete purchases via in-store computers," thereby using staff on the ground in Ontario to solicit business for Essilor's Websites. That activity, the Colleges argue,

demonstrates a sufficient connection with Ontario to apply the *RHPA* s. 27(1) to Essilor's online prescription eyewear business.

[102] On the record before the court, I am not persuaded by that argument. I acknowledge that in *Unifund* the absence of certain factors played a large role in leading the Supreme Court to conclude that no sufficient connection existed between Ontario and the Insurance Corporation of British Columbia ("ICBC"). At paras. 82 and 84, the court stated, in part:

> The respondent, Unifund, points to the fact that the payments for which reimbursement is claimed were paid in Ontario by an Ontario insurer to an Ontario resident. This is true, but it leaves out of consideration the relationship between Ontario and the party sought to be made to pay, the out-of-province [ICBC]. Not only is the [ICBC] not authorized to sell insurance in Ontario, it does not in fact do so…
>
> Here, unlike [*R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529], the [ICBC] had not hired anyone in Ontario to promote its products. It was not in the Ontario marketplace and, in my view, it was not required to "comply with the rules of the [Ontario] game". The decision of the Ontario legislature to impose no-fault benefits on Unifund could not be bootstrapped into legislative jurisdiction to impose a corresponding debt on the [ICBC], which (leaving aside the PAU argument) was beyond the territorial jurisdiction of the province. [emphasis added]

[103] In one respect, Essilor stands in a different relationship with Ontario than did the ICBC in the *Unifund* case because it operates a bricks-and-mortar store in

Toronto. However, the only evidence adduced by the Colleges of an online purchase of prescription eyewear through Essilor's bricks-and-mortar Toronto store came from one of the investigators retained by the Colleges, Ms. Tiffany O'Hearn Davies. She deposed that: she attended the store where a clerk assisted her in placing an online order; the clerk asked to see a copy of her prescription; the clerk referred her to a registered optician, who measured her pupillary distance; she asked to pick up the glasses at the store; and, when she did, a clerk directed her to the registered optician for a fitting.

[104] The Colleges do not allege that the evidence of the investigator's in-store placement of an online order discloses a contravention of the *RHPA* s. 27(1). A registered optician was involved in the in-store transaction described by the investigator. Essilor's in-store regulatory-compliant transactions cannot establish the sufficient connection required to apply the *RHPA* s. 27(1) to Essilor's general online prescription eyewear business through its Websites, which is the focus of the Colleges' allegations in this application.

The "sufficient connection by omission" argument

[105] The second argument is what I would describe as an attempt to apply the constitutional principle of sufficient connection to omissions, or acts not performed, by the out-of-province entity – what I would term a "sufficient connection by omission" argument.

[106] The context for this argument is the fact that when Essilor delivers prescription eyewear into Ontario in fulfilment of an online order placed through its Websites, it does not conduct any fitting or adjustment of the delivered product. That is a result of the British Columbia health professions regulatory regime that authorizes the online supply of prescription eyewear without the need for an in-person fitting or adjustment upon delivery provided two conditions are met. The first condition is a positive one: in the case of eyeglasses, the supplier must have the individual's authorizing document – either a prescription from an optometrist or qualified medical practitioner or an assessment record produced by an independent automated refraction conducted by an authorized person; or, in the case of a contact lens, the contact lens record prepared by a person authorized to fit a contact lens. The second condition is a negative one: the supplier cannot dispense if an assessment record indicates refractive errors or changes in refractive errors of a prescribed magnitude. Provided it meets those conditions, Essilor complies with the British Columbia regulatory regime by shipping prescription eyewear to a customer in fulfilment of an online order without providing the service of fitting or adjusting the delivered product.

[107] However, the application judge observed that under the Ontario regulatory regime, dispensing includes the fitting and adjustment of prescription eyewear to ensure the products carry out their corrective function. Because Essilor does not fit or adjust the delivered product, the application judge queried, at paras. 70 and

71 of his reasons, how the law dealt with Essilor's submission that it is not obliged to fulfil the responsibilities of fitting and adjusting. At para. 90 of his reasons, the application judge offered a partial answer to his question by holding that the delivery of prescription eyewear to a person in Ontario represented a sufficient connection to Ontario.

[108] The Colleges also hint at a "sufficient connection by omission" argument. They contend that by delivering prescription eyewear in Ontario without providing an in-person fitting or adjustment to the customer, Essilor somehow establishes a sufficient connection with Ontario for purposes of the *RHPA*. In their factum, the Colleges submit that a wide view must be taken of the concept of sufficient connection. Such a view goes beyond simply asking whether there is a connection between Ontario and the steps Essilor actually performs. The Colleges argue that the sufficient connection analysis must take into account the broader health protection purposes of the *RHPA* in assessing whether it applies to Essilor's provision of health care devices to Ontario residents. This would include the need for a registered optometrist or optician to fit or adjust ordered prescription eyewear before a customer could leave with the product. Essilor's failure to do so, the Colleges contend, is one factor that supports the existence of a sufficient connection to apply the *RHPA* s. 27 to Essilor's online provision of prescription eyewear through its Websites.

[109] I am not persuaded by the “sufficient connection by omission” argument. 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.

[110] Indeed, that is how the College of Optometrists has drafted its Internet Therapy Standard. Under that Standard, all steps in the purchase of prescription eyewear, but one, can be done online. The one step that requires an in-person attendance by the customer is the delivery of the prescription eyewear. The Standard effectively funnels the delivery of all prescription eyewear through the businesses of Ontario optometrists and opticians.

[111] I am not prepared to apply the sufficient connection principle to work such a result in the absence of clear language in Ontario legislation requiring it. Put another way, if the Ontario Legislature wishes to compel Ontario consumers to attend the office of an Ontario optometrist or optician in order to pick up prescription eyewear that the consumer has ordered online from a regulatory-compliant

supplier in another Canadian province, then the Ontario Legislature must use clear statutory language imposing such a restriction on Ontario consumers.

C. The other jurisprudence relied upon by the Colleges and the application judge

[112] In my view, that conclusion is not altered by the other cases upon which the application judge drew to support his conclusion that a sufficient connection to Ontario existed to support the application of the *RHPA* s. 27 to Essilor's online sales through its Websites: *Celgene*; *Global Pharmacy*; *Torudag v. British Columbia (Securities Commission)*, 2011 BCCA 458, 343 D.L.R. (4th) 743, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 21; *SOCAN*; and *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34, [2017] 1 S.C.R. 824.

[113] The Colleges agree with the application judge's use of these cases; Essilor either distinguishes them or draws from them other principles in support of its position. While each case illustrates, in a different way, the challenges posed by online transactions to various kinds of regulatory or judicial activity, they provide little in the way of concrete guidance for the present case. Nevertheless, since the parties and the application judge rely on them, let me consider each briefly.

Celgene

[114] *Celgene* considered the supportability of a decision of the Patented Medicine Prices Review Board under the *Patent Act*, R.S.C. 1985, c. P-4. Under

the Act, a “patentee” was required to provide the Board with prescribed information respecting “the price at which the medicine is being or has been sold in any market in Canada and elsewhere”. Celgene distributed the drug Thalomid. The company was located in New Jersey. However, it obtained a Canadian patent for the drug, thereby becoming a “patentee”. At that point, the Board requested pricing information about Celgene’s sale of the drug from New Jersey into Canada. Celgene refused, taking the position that under commercial law principles its sales to Canadian customers were made in New Jersey.

[115] The Board held that because its mandate included protecting Canadians from excessive drug prices, sales “in any market in Canada” included sales of medicine regulated by Canadian law that would be delivered and used in Canada. The Supreme Court acknowledged that while the language of selling “in any market in Canada” could lend itself to different interpretations, it accepted the Board’s interpretation of the phrase. Critical to the court’s conclusion was its view that the Board was justified in taking into account “its responsibility for ensuring that the monopoly that accompanies the granting of a [Canadian] patent is not abused to the financial detriment of Canadian patients and their insurers”: at paras. 29 and 30.

[116] The Quebec Court of Appeal, at para. 33 of *Ordre des optométrists du Québec*, noted the significance of the fact that Celgene was the holder of a Canadian patent to the finding that the Board had jurisdiction over it.

Global Pharmacy

[117] *Global Pharmacy* involved a complaint by the Ontario College of Pharmacists that certain companies were operating a pharmacy in Ontario without accreditation and committing related regulatory breaches. In general terms, the companies: accepted online orders for prescription drugs from customers in the United States; processed the orders, including payments, at an Ontario office; sub-contracted the filling of the orders to companies in India; and directed the Indian companies to ship the filled orders to the customers in the United States. At the time of the complaint, the companies did not sell drugs to consumers in Ontario.

[118] This court applied the *Unifund* principles; its reasons disclose that the case turned on the clear findings of fact made by the application judge. Those findings showed that the substance of the sale transactions took place through an Ontario corporation that was located and operated in Ontario: at para. 62. A sufficient connection with Ontario existed because the companies' Ontario office was "home to the only staff that deal with Global Pharamacy Canada customers": at para. 71. In those circumstances, the Ontario College of Pharmacists had jurisdiction to regulate the sale of drugs by the companies to American customers. Those are quite different facts from those found in the present case.

Torudag

[119] *Torudag* was an insider trading case. At issue was the jurisdiction of the British Columbia Securities Commission to conduct an administrative hearing into a series of stock purchases made by Torudag, which were alleged to violate provincial insider trading prohibitions. Torudag did not reside in British Columbia. He bought his shares through an online account with a brokerage based outside of British Columbia. Torudag argued that the Commission had no jurisdiction to proceed against him. The Commission held that it did, a decision upheld by the British Columbia Court of Appeal.

[120] While that court engaged in a discussion about how, in the world of electronic commerce, physical location can become almost incidental, with other factors assuming greater importance in a jurisdictional analysis, its decision did not turn on the nuances of online commerce: at paras. 20-22. The court identified two key factors that established a sufficient connection between the regulator and the transactions: (i) Torudag purchased shares of a company that was a reporting issuer in British Columbia; and (ii) his purchases were performed through the facilities of the TSX Venture Exchange which, under an agreement amongst Canadian securities administrators, was regulated by the British Columbia Securities Commission in order to protect the investing public: at para. 26. The case stands for the proposition that a securities commission has the jurisdiction to initiate administrative insider trader proceedings in respect of trades in the

securities of a reporting issuer in its home jurisdiction, facilitated through its “home” exchange. Again, this case involves significantly different facts from those in the present case.

SOCAN

[121] The *SOCAN* case involved the issue of who should compensate musical composers and artists for their Canadian copyright in music downloaded in Canada from a foreign country via the Internet. The Copyright Board had rejected the effort by the Society of Composers, Authors and Music Publishers of Canada to impose liability for royalties on the various Internet Service Providers located in Canada irrespective of where the transaction originated.

[122] Although the Supreme Court engaged in a review of policy options available to regulate online transactions in music, it upheld the Board’s decision based on the interpretation of the applicable legislation. It stated, at para. 5, that:

> Parliament has spoken on this issue. In a 1988 amendment to the *Copyright Act*, R.S.C. 1985, c. C-42, it made it clear that Internet intermediaries, as such, are not to be considered parties to the infringing communication. They are service providers, not participants in the *content* of the communication. In light of Parliament’s legislative policy, when applied to the findings of fact by the Copyright Board, I agree with the Board’s conclusion that as a matter of law the appellants did not, in general, “communicate” or “authorize” the communication of musical works in Canada in violation of the respondent’s copyright within the meaning of the *Copyright Act*.

Google

[123] Finally, the issue in the *Google* case was whether a British Columbia court had the jurisdiction to issue an interlocutory injunction enjoining Google from displaying any part of a defendant's websites on any of its search results worldwide in order to give effect to an earlier court order directing the defendant to cease carrying on business through any website. Google contested the jurisdiction of the court to make such an order on two grounds: (i) the order affected a non-party to the litigation; and (ii) the court could not issue an injunction that had extraterritorial effect. The Supreme Court upheld the injunction. Although its decision commented on the new reality of online commerce and advertising, the court upheld the injunction based on the existing jurisprudence that interlocutory injunctions could bind non-parties and have extraterritorial effect where the issuing court had *in personam* jurisdiction over the defendant: at paras. 28 and 36-38.

[124] While all these cases discuss aspects of the challenges to regulating various kinds of online commercial transactions, none address circumstances analogous to those of the present case: i.e., whether a supplier of prescription eyewear that complies with the regulated health care regime of its "home" province performs a "controlled act" under Ontario legislation by delivering online-ordered eyewear to the residents of Ontario. Consequently, the cases provide little guidance to the specific circumstances of this case.

D. Conclusion

[125] The key issue on this appeal concerns the territorial restrictions on the legislative competence of Ontario regarding the dispensing of prescription eyewear, specifically the constitutional application of the controlled act provisions of the *RHPA* to Essilor's online sales of prescription eyewear through its Websites: *Unifund*, at paras. 50-56. For the reasons set out above, I conclude that the application judge incorrectly held that ss. 27(1) and (2) of the *RHPA* are constitutionally applicable to Essilor's online sales of prescription eyewear to customers in Ontario: a customer's placement of an order from an Ontario-located device does not amount to the performance by Essilor of part of the controlled act of dispensing; and, the mere delivery in Ontario of an order for prescription eyewear that has been processed in compliance with the British Columbia regulatory regime, without more, does not establish a sufficient connection between Essilor's online sales and the controlled acts proscribed by the *RHPA* s. 27.

[126] 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).

[127] That is because a sufficient connection, within the meaning of the *Unifund* analysis, does not exist between the acts of the supplier – Essilor – and the Ontario health professions regulatory regime to support the application of the *RHPA* to the supplier’s online sales. As explained, a finding that a sufficient connection exists between Essilor’s online sales through its Websites and the *RHPA*, on the record before this court, would amount to using Ontario’s health professions regulatory legislation to grant Ontario optometrists and opticians a monopoly over the commercial importation of prescription eyewear into Ontario. If the Ontario Legislature wishes to grant a commercial monopoly to Ontario’s optometrists and opticians over the distribution of orders for prescription eyewear placed online with regulatory-compliant suppliers in other provinces, then the Legislature must adopt language that clearly allows such a monopoly in order to comply with the constitutional principle of territorial legislative restriction. The present language of the *RHPA* ss. 27(1) and (2) is insufficient to do so.

XI. DISPOSITION

[128] Accordingly, I would allow the appeal, set aside the order of the application judge, and dismiss the application.

[129] Based on the agreement of the parties, I would award Essilor its partial indemnity costs of the appeal fixed at $53,029.34, inclusive of disbursements and applicable taxes.

Released: “RGJ” APR 4 2019

“David Brown J.A.”
“I agree. R.G. Juriansz J.A.”
“I agree. Grant Huscroft J.A.”

APPENDIX "A": THE BRITISH COLUMBIA REGULATORY REGIME

Opticians Regulation, s. 5(3):

> 5 (3) Subject to sections 6 and 8 of the Schedule to this regulation, nothing in this regulation prevents a person from
>
> (a) dispensing a corrective eyeglass lens, if the person who dispenses it has possession of
>
> (i) an electronic or a written copy of an authorizing document in respect of the individual for whose use the corrective eyeglass lens is to be dispensed, or
>
> (ii) information contained in an authorizing document and provided to the person, in written or electronic form, by or on behalf of the individual for whose use the corrective eyeglass lens is to be dispensed, accompanied by a statement from that individual certifying the existence and validity of the authorizing document and the accuracy of the information provided,
>
> and if the person dispenses the corrective eyeglass lens in accordance with the authorizing document described in subparagraph (i) or the information described in subparagraph (ii), as applicable;
>
> (b) dispensing a contact lens, if the person who dispenses it has possession of
>
> (i) an electronic or a written copy of a contact lens record in respect of the individual for whose use the contact lens is to be dispensed, or
>
> (ii) information contained in a contact lens record and provided to the person, in written or electronic form, by or on behalf of the individual for whose use the contact lens is to be dispensed, accompanied by a statement from that individual certifying the existence and validity of the contact lens record and the accuracy of the information provided,

and if the person dispenses the contact lens in accordance with the contact lens record described in subparagraph (i), or the information described in subparagraph (ii), as applicable;

(c) dispensing a duplicate of a corrective eyeglass lens, with no change in refractive value, using a lensometer or similar device.

Sections 6 and 8 to the Schedule to the *Opticians Regulation*:

6. Corrective eyeglass lenses must not be dispensed, and a contact lens must not be fitted or dispensed, on the basis of an assessment record, in any of the following circumstances:

(a) the assessment record indicates that there has been a change in refractive error exceeding

(i) plus or minus 1.00 dioptre in either eye within the previous 6 months, or

(ii) plus or minus 2.00 dioptres in either eye since the date of the most recent prescription or assessment record, if any, provided by the client to the registrant;

(b) the assessment record indicates that

(i) there is refractive error exceeding plus or minus 6.00 dioptres in either eye, or

(ii) prisms might be required;

(c) the best corrected visual acuity will be less than 20/25 in either eye;

(d) the client is not satisfied with the client's best corrected vision after 2 contemporaneous independent automated refractions have been conducted.

8. Sections 1 to 5 and 6 (a) to (c) of this Schedule do not apply if a prescriber who has performed an eye health examination of the client has requested a registrant to conduct an independent automated refraction on the client.

APPENDIX "B": ONTARIO COLLEGE OF OPTOMETRIST'S SPECTACLE THERAPY POLICY

Reviewing factors affecting spectacle wear: Optometrists must review, with patients, factors affecting spectacle wear. This can be done either in-person, or by telephone, video conference, or **online questionnaire**. If this review is not performed in-person, optometrists should include a precaution for patients that in-person reviews are recommended for individuals with special needs or atypical facial and/or postural features. If optometrists choose specific patient factors by which to limit their internet dispensing services, including, but not limited to, a specific age range, this should be disclosed on the website where patients can easily find it.

Reviewing the details of the prescription: Optometrists must review prescription details. This can be done in-person or **using the internet**. Optometrists are responsible for confirming the validity and/or veracity of prescriptions and must have a mechanism in place to do so. Prescriptions provided using the internet must be provided in a secure manner and collected in an unaltered form (pdf/image). All prescriptions must contain information that clearly identifies the prescriber (including name, address, telephone number and signature), and specifies the identity of the patient and the date prescribed (OPR 5.2 The Prescription). All prescriptions must include an expiry date.

Advising the patient regarding appropriate ophthalmic materials: Optometrists must advise patients regarding appropriate ophthalmic materials. This may be done in-person or by an **online algorithm**. In the latter scenario, patients must be given clear directions on how to contact the office/optometrist with any questions they may have.

Taking appropriate measurements: Optometrists must take appropriate measurements when providing spectacle therapy. These can be done in-person or **by computer application**. **If computer applications are used (in-office or remotely**) to determine dispensing measurements, optometrists must be satisfied that the application determines these measurements with equal accuracy to traditional in-person measurements, including the production of supportable evidence should this matter come to the attention of the College.

Arranging for the fabrication of the spectacles: Optometrists must review the suitability of patient orders before arranging for the fabrication of spectacles.

Verifying the accuracy of the completed spectacles: Optometrists must verify the accuracy of completed spectacles.

Fitting or adjusting the spectacles to the patient: Fitting or adjusting the spectacles to patients must be performed in-office and **cannot be performed virtually**, by tutorial and/or video conferencing. Optometrists providing spectacle therapy will possess the equipment required to fit and adjust spectacles. In-person fitting and adjusting of spectacles provides a final verification and mitigates risk of harm by confirming that patients leave the clinic with spectacles that have been properly verified, fit and adjusted. In-person delivery of spectacles establishes a patient/practitioner relationship in circumstances where patients are new to the clinic and spectacle therapy was initiated through the optometrist's website.

Counseling the patient regarding spectacle wear: Counseling regarding spectacle wear is ongoing and involves in-office, telephone, and/or electronic communications.