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Sale of Ophthalmic Lenses Online: the Québec Court of Appeal Decides

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In a unanimous decision rendered on May 16, 2016,[1] the Québec Court of Appeal confirmed that the delivery of ophthalmic lenses purchased online from suppliers who are not members of the Ordre des optométristes (Order of Optometrists) ("Order"), or the Ordre des opticiens d'ordonnances (Order of Dispensing Opticians), does not violate the *Optometry Act*[2] ("OA") or, by necessary extension, the *Dispensing Opticians Act*.[3]

This decision was the result of an appeal from a judgment issued on December 3, 2014[4] by the Superior Court, in which the Superior Court reached the same conclusion as the Court of Appeal.

The facts in this case were as follows: Coastal Contacts Inc. ("Coastal"), now carrying on business as Clearly, is a company based in Vancouver with no establishment in Quebec, which sells ophthalmic lenses through its websites to purchasers in many Canadian provinces, including Quebec. Its operations are subject to and compliant with the legislation in force in British Columbia.[5] Quebec purchasers can either deal directly with Coastal or instead with website operators who redirect potential customer requests directly to Coastal. Gestion Progex ("Progex"), one of the respondents in the litigation, was one such website operator.

In this case, the Order contended that Coastal and Progex violated the OA by claiming they had the right to perform a professional activity that is reserved for the members of the Order of Optometrists of Quebec, or by acting in a manner that gave the impression they were authorized to do so. Essentially, the Order alleged that the sale of ophthalmic lenses in Quebec was an act reserved for optometrists under sections 16 and 25 of the OA, and for dispensing opticians under section 8 of the *Dispensing Opticians Act*. The Order put forward two main arguments in support of its claims.

First, it claimed that section 16 of the OA should be read as follows: [translation] *"The practice of optometry is an act which [...] deals with [...] the sale of ophthalmic lenses."* Based on this interpretation, and despite the fact that, according to the general rules of law, the contract was concluded in British Columbia, section 16 had been infringed because Coastal's actions, including the placing of orders, payment, confirmation of the order, and delivery of the ophthalmic lenses, were performed in Quebec. On this point, the Court found that section 16 does not allow the sale of ophthalmic lenses to be broken down into various separate tangible or intangible acts so as to include them in the exclusive area of practice of optometrists.

Secondly, the Order argued that the term "sale" used in section 16 of the OA should be interpreted more broadly than when it is used in the *Civil Code of Québec*. It contended that this broadening of the concept of "sale" was justified on the basis of the primary mission of the Order, which is to ensure the protection of the public. Therefore, according to the Order, the term "sale" must allow for the regulation of any conduct [translation] *"[...] consisting of controlling the distribution of a regulated product to the public [...]"*.[6]

After reviewing the decisions in *Eaton*[7], *Celgene Corp*[8] and *Meditrust*[9], the Court held that it could not accept the interpretation put forward by

1 *Ordre des optométristes du Québec* c. *Coastal Contacts Inc.*, 2016 QCCA 837.

2 *Optometry Act*, CQLR, c. O-7.

3 *Dispensing Opticians Act*, CQLR, c. O-6.

4 *Ordre des optométristes du Québec* c. *Coastal Contacts Inc.*, 2014 QCCS 5886.

5 *Health Professions Act*, [RSBC 1996] Chapter 183; *Optometrists Regulation*, B.C. Reg. 200/2012; *Opticians Regulation*, B.C. Reg. 118/2010.

6 Excerpt from the factum of the Order, cited in para. [28] of the decision.

7 *Association pharmaceutique de la province de Québec* c. *T. Eaton Co. Ltd.*, (1931) 50 B.R. 482.

8 *Celgene Corp* c. *Canada (Attorney General)*, [2011] 1 S.C.R. 3.

9 *Ordre des pharmaciens du Québec* c. *Meditrust Pharmacy Services Inc.*, [1994] R.J.Q. 2833 (C.A.) (authorization for leave to appeal dismissed by the Supreme Court, [1995] 2 S.C.R. ix).

the Order. The Court observed that the only act attributable to Coastal and which took place in Quebec was the delivery of the ophthalmic lenses, since the other acts identified by the Order related more to the freedom of action of the purchaser, over which the Order has no jurisdiction.

As the Superior Court had also noted in a case between the Order of Optometrists and the Order of Dispensing Opticians,[10] the Court of Appeal stated that the simple delivery of ophthalmic lenses is only incidental to, and not an inherent component of, the sale. In addition, the Court found that lenses are not a product whose manufacture, supply or sale are so regulated that this would justify a broad interpretation of the monopoly on sales claimed by the Order for the benefit of its members. Moreover, such an interpretation would be inconsistent with the principle that statutes which create professional monopolies should be interpreted narrowly. Following its analysis, the Court therefore held that [translation] *"the mere delivery of ophthalmic lenses in Quebec [...] cannot constitute either a violation of section 16 or the first paragraph of section 25, or the illegal exercise of optometry in Quebec."* [11]

In light of this conclusion, the Court found that it was not necessary for it to rule on the territorial scope of section 16 of the OA. However, it reiterated the recognized legal principle that, in the absence of a contrary provision, whether express or implied, one must assume that the author of the OA intended it to apply only to individuals, places, actions and events located within the territory of Quebec.

Coastal was represented in this file by members of Lavery's Health law group.

Lavery will keep you informed of any new developments in this case.

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[10] *Ordre des opticiens d'ordonnances du Québec* c. *Ordre des optométristes du Québec*, 2013 QCCS 1532.

[11] *Ordre des optométristes du Québec* c. *Coastal Contacts Inc.*, supra, note 1, cited in para. [71] of the decision.

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