

B.C. COURT OF APPEAL UPHOLDS REGULATORY COLLEGE'S BY-LAWS — CLIENT ALERT

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Lessons from *Sobeys West Inc. v. College of Pharmacists of British Columbia*

Background

The British Columbia Court of Appeal's recent decision in *Sobeys West Inc. v. College of Pharmacists of British Columbia*¹ is an important decision for regulators in two respects. First, it recognizes the latitude regulators ought to be given when enacting by-laws. Second, it clarifies the nature of the evidence that regulators will need to provide when their by-laws are challenged on judicial review. On the whole, the decision comes as a welcome confirmation of the deference that courts will show to regulators when they enact by-laws in the *bona fide* exercise of their authority.

Summary

In *Sobeys*, the companies that owned a group of pharmacies (the "petitioners") challenged by-laws enacted by the College of Pharmacists of British Columbia. The impugned by-laws prohibited pharmacists from making customer incentive programs available to patients and, in doing so, adopted a wide definition of "incentive" according to which any "money, gifts, discounts, rebates, refunds, customer loyalty schemes, coupons, goods or rewards" could not be provided as inducements to pharmacy customers.² The petitioners owned grocery stores that offered customer benefits and loyalty programs to their customers, including patients of their pharmacies.

On their initial judicial review application to the British Columbia Supreme Court, the petitioners argued that the by-laws should be struck down because there was no objective evidence that a broad prohibition on incentives was needed to prevent harm to patients.³ They therefore argued that the by-laws were overly broad and that they undermined the public interest by preventing customers from choosing a pharmacy based on price and by reducing competition between pharmacies on the basis of price.⁴

The British Columbia Supreme Court accepted these arguments and struck down the by-laws. It reasoned that the College's concerns about incentive programs were either speculative or could be addressed through a prohibition that was narrower in scope.⁵ In coming to this conclusion, the judge gave little weight to the affidavits provided by four of the College's Council members attesting to various concerns raised by incentive programs.

The College successfully appealed the decision to the British Columbia Court of Appeal. In overturning the lower court's decision, the Court of Appeal concluded that the court below had not shown the College's by-laws sufficient deference. In particular, the lower court had required empirical evidence of harm and had improperly found fault with the by-laws because they were not drafted as narrowly as possible.⁶

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¹ *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 ("Sobeys C.A.").
² *Sobeys C.A.*, at para. 11.
³ *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2014 BCSC 1414, ("Sobeys S.C.") at para. 10.
⁴ *Sobeys C.A.*, at para. 13; *Sobeys S.C.* at para. 10.
⁵ *Sobeys S.C.*, at paras. 45-59.
⁶ *Sobeys C.A.*, at para. 67.

The Court of Appeal concluded that the College was not required to prove that its concerns were “justified by facts established” before it or to demonstrate actual harm to customers.⁷ Rather, the court emphasized that “a body such as the College must be free to take preventative measures before actual harm occurs.”⁸ In addition, the court concluded that absent a *Charter* challenge, the College was not required to adopt the least intrusive approach to address its concerns about incentive programs.⁹

The Court of Appeal ultimately concluded that the adoption of the impugned by-laws was a reasonable response in light of the expertise of Council members and their concerns, and set aside the order of the court below.

Lessons for Regulators

Deference to a Regulator’s By-laws

The first important aspect of the *Sobeys* decision is its affirmation that a regulator’s exercise of its by-law-making power will be shown deference. In particular, the court confirmed the well-established proposition that the expertise of regulators often makes them better placed than courts to decide how to respond to concerns within the profession. The court emphasized that the decision to enact the by-laws in this case was “a question of policy that would benefit from the particular expertise of pharmacists as opposed to a court of law.”¹⁰

The court also noted that the governing bodies of self-regulated professions have a duty to exercise their powers in the public interest and that “[t]here can be no doubt that ‘public interest’ in this context extends to the maintenance of high ethical standards and professionalism on the part of the profession.”¹¹ Taken together with the court’s explicit recognition of regulators’ expertise, these statements indicate that a regulator’s decision about what is in the public interest – and how best to promote it – will be shown deference.

In sum, the decision confirms that as long as a by-law is reasonable when considered in light of the regulator’s expertise and the concerns the by-law is intended to address, courts will be reluctant to interfere. A by-law will not be struck down as unreasonable simply because a particular judge might think that it goes further than is prudent or lacks an exception that the judge might think ought to be there.¹²

The Evidence Needed to Justify a By-law

The second notable aspect of the decision is its guidance about the evidence that will be needed to successfully defend a by-law on judicial review. The Court of Appeal’s decision indicates that empirical evidence is not necessarily required to support a regulator’s exercise of its by-law making power. To the contrary, less evidence may suffice: the court characterized the College’s evidence as “thin” and “anecdotal”, but nonetheless found that it was adequate to justify the Council’s concerns.¹³

That said, the sufficiency of evidence will be assessed on the facts of each individual case. Regulators would be prudent to document their concerns, as well as any supporting evidence, before enacting significant changes to their rules and by-laws. This approach will ensure that, should there be a court challenge, regulators are well positioned to demonstrate that their rules and by-laws fall within the range of reasonable outcomes, given the concerns being addressed.

7. *Sobeys C.A.*, at paras. 65, 68.
8. *Sobeys C.A.*, at para. 63.
9. *Sobeys C.A.*, at para. 68.
10. *Sobeys C.A.*, at para. 68.
11. *Sobeys C.A.*, at para. 56.
12. *Sobeys C.A.*, at para. 68.
13. *Sobeys C.A.*, at paras. 68, 70.

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