

Pharma in brief - Canada

Pharmacy customer incentive/loyalty programs for drugs and pharmacy services - prohibited in BC, but allowed in Alberta

Case:	<i>Sobeys West Inc et al v College of Pharmacists of British Columbia</i> , 2016 BCCA 41 (Court File No. CA42103), appeal from 2014 BCSC 1414
Nature of case:	Appeal from judicial review application striking down Bylaws adopted by the College of Pharmacists of British Columbia
Successful party:	College of Pharmacists of British Columbia
Date of decision:	27 January 2016
Case:	<i>Sobeys West Inc v Alberta College of Pharmacists</i> , 2016 ABQB 232 (Court File No. 4103 06927),
Nature of case:	Judicial review application of delegated legislation enacted by the Alberta College of Pharmacists
Successful party:	Sobeys West Inc.
Date of decision:	22 April 2016

Summary

The College of Pharmacists of British Columbia (**CPBC**) appeals a judgement of the Supreme Court of British Columbia striking down Bylaws of the CPBC prohibiting pharmacists from providing “customer incentive programs” to patients in connection with the purchase of drug products or pharmacy services. The Court of Appeal allowed the appeal, reversing the decision of the lower court. The CPBC’s Bylaws prohibiting the provision of incentives for prescriptions and pharmacy services are now in force.

Sobeys West Inc. (**Sobeys**), operating as Safeway and Sobeys in Alberta, sought judicial review of amended provisions of the Alberta College of Pharmacists’ (**ACP**) *Code of Ethics and Standards* that prohibit pharmacists from offering, providing or being party to offering an inducement to a patient in connection with the patient obtaining drug product or professional services from the regulated member or licensed pharmacy. The Court found that the ACP went beyond its authorized power to adopt amendments prohibiting pharmacy inducements.

Background

The CPBC and APC are the regulatory colleges responsible for licensing and registering pharmacists, pharmacies and pharmacy technicians in British Columbia and Alberta, respectively. The governing legislation of the colleges grants authority to the CPBC and APC to make bylaws, standards and codes consistent with their duties and objectives under the governing legislation, including to serve and protect the public and exercise its power in the public interest.

In September 2013, the CPBC introduced Bylaws that would prohibit pharmacists from providing incentives (including, rebates, gifts, discounts, money, customer loyalty schemes, coupons, goods or rewards) to patients for the purpose of inducing the patient to fill a prescription or obtain other professional services from the pharmacist or pharmacy (**BC Incentive Prohibition**). The purpose of the prohibition was to protect against the potential harms associated with the

provision of incentives, including encouraging customers to procure more drugs, delay filling prescriptions or transferring prescriptions in order to obtain an incentive reward. The Bylaws came into effect on December 2, 2013.

Sobeys, who operates Safeway and Thrifty Food stores in British Columbia which offer such customer incentive programs, brought an application for judicial review to quash the CPBC's Bylaws. The lower court agreed with Sobeys and ordered that the BC Incentive Prohibition be struck down for being overbroad, falling outside the range of acceptable outcomes, given the competing public interests. The CPBC appealed that decision.

Similarly, the ACP proposed amendments to its *Code of Ethics and Standards* that would prohibit pharmacists from offering, providing or being party to offering an inducement (including a reward, gift, cash, prize, coupon, points or other mechanisms in incentive or loyalty programs) to a patient in connection with the patient obtaining drug product or professional services from the regulated member or licensed pharmacy (**AB Inducement Prohibition**). The amendments were to come into force on June 10, 2014. Sobeys brought an application for judicial review of the AB Inducement Prohibition. The Court delayed the implementation of the AB Inducement Prohibition until the case was decided.

British Columbia: The Incentive Prohibition Bylaws remain in force

The main issue on appeal was whether the lower court erred in its interpretation and application of the reasonableness standard and the degree of deference afforded to bylaws passed by the governing bodies of health professionals.

The CPBC submits that the lower court erred in its decision, applying a high degree of scrutiny to the CPBC's concerns of customer incentive programs and requiring evidence of "actual harm" to the public before the BC Incentive Prohibition could be justified as protecting the public interest. The Court of Appeal agreed with the CPBC and found that the lower court erred by failing to consider, on the whole, whether the BC Incentive Prohibition fell within a range of reasonable possibilities based on the CPBC's public interest concerns.

Given the expertise of the regulatory body and their concerns for public safety, deference should have been afforded to the CPBC. The Court held that the CPBC was *bona fide* in their view that customer incentive programs were a matter of public interest and was free to take measures to prevent actual harm from occurring. The lower court's decision to strike down the impugned Bylaws was overturned. The BC Incentive Prohibition remains in force.

Alberta: The Inducement Prohibitions are *ultra vires*

The main issue before the Court was whether the ACP had the authority under its governing legislation, the *Alberta Health Professions Act (HPA)*, to adopt the AB Inducement Prohibition.

The Court found that "the legislature clearly intended that the *HPA* would require the role of the regulatory colleges to be separate from the economic functions", and that the objective and guiding principles of the *HPA* is to ensure the competency and accountability of pharmacists to the public. The AB Inducement Prohibition relate to the cost of drugs to consumers and amount to controlling the way commercial entities (pharmacies) operate and compete in the marketplace. Justice Ouellette found that the AB Inducement Prohibition are inconsistent with the governing legislation and "have nothing to do with the competency or unethical behavior of its regulated members". Further, with respect to the ACP's role of protecting the public interest, the Court found that there was no evidence of actual or reasonable harm to customers and patients as a result of inducements or other loyalty programs offered by pharmacies.

The Court concluded that by adopting the AB Inducement Prohibitions, the ACP had exercised powers outside the intended scope of its governing legislation. The Court did not state the implications of its decision.

Appeals sought

Sobeys has filed an application for leave to appeal with the Supreme Court of Canada (Docket 36917). The APC has sought appeal of the Court's judgment (Court File No. 1603-0120AC).

Links to decision:

[*Sobeys West Inc v College of Pharmacists of British Columbia, 2016 BCCA 41*](#)

[*Sobeys West Inc v Alberta College of Pharmacists, 2016 ABQB 232*](#)

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