APPENDIX D
Legal Opinion

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Sandra McCulloch
Executive Secretary
Health Professions Regulatory Advisory Council
Suite 1401, 700 Bay Street
Toronto, Ontario
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Dear Ms. McCulloch,

Re: Optometry and "Prescribed Diseases"

The Minister of Health (the "Minister") has sent a referral to the Advisory Council dated 26 January 1994, concerning the practice of optometry. Specifically, the Minister has referred the following question:

> Considering the protection of the public interest, the statutory language within the *Optometry Act, 1991*, the historical context and current professional practice respecting the diseases that Optometrists now diagnose, treat and prevent, how should a regulation(s) respecting "prescribed diseases" be framed, in form and content.

As a result of the Minister's Referral, you have asked me the following specific questions:

i) What is the significance, if any, of using the word "prescribed" before "diseases"?; and

ii) What is the case law (if any) on this point?

Brief Answer

i. In my view, the use of the word "prescribed" in the *RHPA* regulatory regime is very significant. It signifies a class of regulation which must be expressly enacted by the body empowered to make the regulation.

ii. There are a number of cases dealing with "prescribed" and the associated issue of delegation/subdelegation. The case law supports the proposition that the use of the word "prescribed" is a narrow power, and as a legislative power is not something that can normally be exercised by a subdelegatee.

Discussion

I. General Background

i. College of Optometry's Position

(As taken from College of Optometrists Submission to HPRAC, dated 14 March 1994)

The College has proposed a general regulation as opposed to a regulation that specifies "diseases". Accordingly, they have submitted the following as a proposed regulation:

> For the purposes of this Act "diseases" means disease of the eye and vision system that can be determined by way of an oculo-visual assessment.

ii. Ministry of Health's Position

(As taken from Minister of Health's Referral Letter sent to the Advisory Council, dated 26 January 1994)

> It is the ministry's position that this regulation (or regulations, since it may be possible to consider a regulation related to the scope of practice statement and another related to the authorized act of diagnosis) should specifically set out in some manner, such as a list, which diseases are "prescribed".

iii. Relevant Statutory Provisions

The scope of practice of optometry is outlined in the *Optometry Act, 1991*, S.O. 1991, c. 35 ("*Optometry Act*") in s. 3, as follows:

> **3.** The practice of optometry is 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.

The authorized acts permitted optometrists are contained in s. 4 of the *Optometry Act*:

> **4.** In the course of engaging in the practice of optometry, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:
>
> 1. Communicating a diagnosis identifying, as the cause of a person's symptoms, a disorder of refraction, a sensory or oculomotor disorder of the eye or vision system or a prescribed disease.

2. Applying a prescribed form of energy.

3. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses.

Section 1 of the *Health Professions Procedural Code* ("HPPC") being Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 ("*RHPA*"), defines "prescribed" in the following terms:

> **1.** (1) In this Code,
>
> . . . .
>
> "prescribed" means prescribed in the regulations . . . .

Section 95 of the HPPC contains the following regulatory power with respect to "prescribing":

> **95.** (1) Subject to the approval of the Lieutenant Governor in Council and with the prior review by the Minister, the Council may make regulations,
>
> . . . .
>
> 37. Prescribing anything that is referred to in the health profession Act or this Code as being prescribed . . . .

II. HPRAC Questions

i. What is the significance, if any, of using the word "prescribed" before "diseases"?

By virtue of s. 2(1), of the *Optometry Act* and s. 4 of the *RHPA*, the HPPC is deemed to be part of the *Optometry Act*. Under s. 1 of the HPPC, the word "prescribed" is a defined term which "means prescribed in the regulations".

Under s. 95(1)(37), the College Council may, subject to the approval of the Lieutenant Governor in Council and with prior review of the Minister of Health, make regulations "prescribing anything that is referred to in the health profession Act or this Code as being prescribed."

In my view, the use of the word "prescribed" in the *RHPA* regulatory regime is very significant, as it indicates that a narrow and specific power of legislative description under the *RHPA* is expressly given to the College Council. In other words, the College Council has been given (delegated) a legislative power or authority by the legislature to prescribe certain specific terms or classes, such as diseases.

Generally speaking, the authority to make regulations can be exercised in one of three ways: purposes, subjects and/or description.

Purposes may relate to either general or specified purposes or the specific objectives of the particular Act. Authority to make regulations for specific purposes is introduced in the legislation by the use of such phrases as: for; for the purposes of; in order to; *etc*. The exercise of such regulatory making power is usually of the broadest kind.

In a similar manner, authority may be given to regulate by reference to subject-matter. Such reference may be either specific or general, the rule being that so long as the regulation is in relation to a prescribed subject, then it is a valid regulation. The authority to make a regulation with respect to subject-matter is usually introduced by the use of such wording as: in relation to: respecting; with respect to; *etc*. Although not as expansive as a purposes oriented regulatory power, a subject-matter power can support a broad-based approach to regulation making.

Finally, a regulation making power may be granted by way of description. This authority is usually narrower than either purpose or subject, and as a consequence, must be exercised by the individual or body to whom it is given. Authority to make specific regulations is usually indicated by the use of such words as: prescribing; fixing; determining; prohibiting; requiring; establishing; *etc*.

If one considers the regulatory regime established under the *RHPA* and in particular by the HPPC, one finds in s. 95 of the HPPC a regulatory scheme comprised of a mixture of regulatory classes. The governing participle, preposition or phrase is placed within each enumeration by the use of such words as: "respecting"; "prescribing"; "providing for"; "defining"; "governing or prohibiting"; "requiring and providing for"; "designating"; and "authorizing". Thus, the *RHPA* regulatory regime clearly comprises a mixture of subject-matter and description powers. This means, *inter alia*, that those matters which are based upon a subject-making power may be made the object of a rather broad regulation which would allow some other body or individual to administer the regulation; whereas those subjects which have been specifically defined by way of description must be regulated specifically by the College Council.

In my view, with respect to the question of "prescribed diseases", the *RHPA* grants the College Council a very specific and narrow regulatory power which is of the description variety. The regulatory power contained in s. 95(1)(37) of the HPPC uses the word "prescribing". Furthermore, that power is to be exercised by the College Council and not someone else. For example, authority is given to the College Council to "prescribe diseases". The kind of regulation that may be made has been expressly described, and therefore to be valid, a regulation must come within that description. Thus, a regulation which purports to give someone else the authority to identify (prescribe) a disease does not itself prescribe a disease and is therefore not a regulation of the kind described. To put the matter in the

context of the College of Optometry's suggested regulation: the College's proposal does not prescribe a disease, rather it sets out a circular definition of determining a disease without identifying (prescribing) which diseases optometrists are capable of diagnosing by means of an oculo-visual assessment. That is not, in my view, a power that is given to the College Council to regulate with respect to the issue of "prescribed diseases". In my opinion, a "prescribed disease" is, at the very least, something that is required to be articulated in the regulations by the College Council itself. Failure to do so may lead to an *ultra vires* subdelegation of regulation making authority.

ii. What is the case law (if any) on this point?

There have been a number of important cases over the years which have dealt with the issue of subdelegation and the nature of the regulatory power which is purportedly delegated. When reading these decisions, it is important to keep in mind both the nature of the statutory and regulatory regime under consideration as well as the specific wording of the regulation and regulatory power which is the focus of the litigation. While the facts of each case vary with the regulatory regime, the applicable principles remain the same. Therefore, it matters little whether one is discussing fishing regulations, immigration regulations or regulation of health professionals; the principles remain the same in terms of the regulatory mechanisms and the scope of the regulatory powers provided for by those mechanisms.

In large measure, the cases are concerned with questions of statutory interpretation as the rule against delegation, *delegata potestas non potest delegari* - a delegated power cannot be delegated, is a rule of statutory construction and not a rule of law. As such it is perhaps better understood in terms of being a rebuttable presumption of legislative intent. In any event, the general principle of law is "that a body to which legislative power is delegated by the legislature cannot re-delegate [or subdelegate] that power either to itself or to another body to be exercised in a purely administrative, discretionary fashion", *Florence et al.* v. *Air Transport Committee et al.* (1988), 34 Admin. L.R. 36 (F.C. T.D.) at 47 *per* Strayer, J. Generally speaking, courts have not upheld the delegation of regulatory-making powers, whether it is in the form of a straight delegation, or alternatively, where it confers an unfettered discretion to decide individual cases.

In *A.-G. Canada* v. *Brent*, [1956] S.C.R. 318, 2 D.L.R. (2d) 503, the Supreme Court held that the powers of the Governor in Council to make regulations respecting enumerated matters dealing with immigration restrictions under the *Immigration Act* was not validly exercised by the making of regulations which, in substance, transferred to public officers the effective power to make the necessary rules.

In the case of *Brant Dairies Co.* v. *The Milk Commission of Ontario and the Ontario Milk Market Board*, [1973] S.C.R. 131, 30 D.L.R. (3d) 559, the Court was of the view that a regulation that merely repeated the words of the enabling statute was *ultra vires*, because

it purported to carry out what is delegated to the Board under the statutory provision which was mimicked. In the absence of a standard specified in the regulation, everything was left (illegally) to the sub-delegatee's discretion. Moreover, Laskin, J. (as he then was) makes the point in *Brant Dairies* that the distinction between the classes of regulatory powers, as evidenced by the words used, is an important one as it impacts upon the scope of the regulatory power conferred. In applying the Supreme Court's earlier reasoning in *Brent*, Laskin, J. at [1973] S.C.R. 147, 30 D.L.R. (3d) 582 commented upon the Court's decision in *Brent* in the following terms:

> What the Governor in Council did was to embody the very powers in a regulation which confided their application to a Special Inquiry Officer. This was held to be an invalid subdelegation; it converted the required reflection in a Regulation of the opinion of the Governor in Council into an unregulated exercise from time to time of the opinion of a Special Inquiry Officer.
>
> The principle is the same here. The Board was required to legislate by Regulation. Instead, it has purported to give itself random power to administer as it sees fit without any reference point in standards fixed by Regulation.

In *Dene Nation* v. *The Queen* (1984), 6 Admin. L.R. 268 (F.C. T.D.), Reed, J. restated the principle which had emerged from *Brent* and *Brant Dairy Co.* as follows: when authority is conferred on an entity to regulate by regulation, the power must be so exercised and not exercised by setting up some subdelegate with discretionary powers to make the decision. Unlike *Brent* and *Brant Dairy Co.*, in *Dene* there had not been a wholesale delegation, some legislative guidance was given in the regulatory scheme. However, the regulation was held by the Court to be invalid, because it did not provide a sufficiently complete code of requirement. Instead, it set up parameters within which discretionary judgements were to be made.

In *Re Peralta et al. and the Queen in Right of Ontario et al.* (1985), 16 D.L.R. (4th) 259 (Ont. C.A.), the Court of Appeal for Ontario considered, *inter alia*, the issue of whether the *Ontario Fishery Regulations*, passed by the Governor in Council under the federal *Fisheries Act* and Ont. Reg. 414 passed by the Lieutenant Governor in Council under the provincial *Game and Fish Act* constituted an unauthorized subdelegation to the provincial minister. The Court concluded that there was no unlawful delegation. In doing so, they paid careful attention to the wording of the legislation which contained the regulatory authorization.

> This conclusion does not, of course, answer the fundamental question, is there authority to subdelegate? Section 34(g) of the *Fisheries Act* allows for the Governor in Council to make regulations "*respecting* the terms and conditions under which a lease or licence may be issued" (emphasis added). In dealing with this subsection the Divisional Court judge quoted the wording of the subsection as it stood prior to the amendment by R.S.C. 1970

> c. 17 (1st Supp.). That wording was "*prescribing* the terms and conditions under which a licence or lease is to be issued" (emphasis added). By the amendment it can be seen that the wording of the subsection was brought into line with s. 34(b) to (k). The amendment must have had some purpose and significance and, in my opinion, Parliament was insuring that the Governor in Council was empowered to delegate to others the administration of its regulations . . . .
>
> It is interesting to note that before the amendment changing the word "prescribing" to "respecting" in para. 34(g), when the other paragraphs at that time used the word "respecting", the French language version of both "respecting" and "prescribing" was the single word "concernant". The word "concernant" was also used to introduce the French language version of s. 34(a) which reads in English "for the proper management and control of the seacoast and inland fisheries". In using the same word "concernant" throughout, it reinforces my view that it was always the intention of Parliament that the Governor in Council would have the power to subdelegate under paras. 34(a) to (k), even though the word "prescribing" was originally used in para. 34(g) and had to be changed.
>
> The use of the word "respecting" allows for a delegation of the administration of the regulations.

From these cases emerge a certain judicial methodology with respect to questions of delegation, regulatory validity, and characterizing the nature of the regulatory power and its exercise. At the very least, a court would consider the question of a regulation's validity as: (1) a question of statutory interpretation, which would require, *inter alia*, looking at the statute as a whole and not merely at the words of the regulation in question; (2) the words used in the empowering section in order to ascertain the nature and class of the regulatory power which is being exercised; (3) whether the regulation is consistent with that power and class; and (4) protection of the public would be a key statutory principle of construction in construing the objective underlying the *RHPA* statutory regime. Based upon the foregoing analysis, I am of the opinion that the regulation proposed by the College of Optometry is problematic as it amounts to an unlawful subdelegation of a legislative power by the College Council to either individual practitioners or Committees of the College, *e.g.*, Discipline Committee, to decide what is and is not a "prescribed disease."

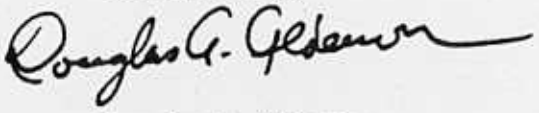
It should be noted again that the presumption against subdelegation is just that, a presumption which is rebuttable. Courts have found that if the statutory intent is to allow for subdelegation then that delegation can be upheld. For example, as Reed, J. stated in *Dene Nation, supra*, a delegate legislator may subdelegate to another body administrative power, if necessary to do so in order to implement the scheme or standards established by a particular Act. Moreover, as the Supreme Court held in *Reference re Chemical Regulations*, [1943] S.C.R. 1 (a wartime case), the power of the Governor in Council to make regulations as he might by reason of the existence of war deem necessary or advisable for the defence of the realm was wide enough to enable him to subdelegate to the Controller of Chemicals power

to make regulations. As there has been no suggestion of either war or administrative expedience involved with the proposed optometry regulation, this line of authority is somewhat moot.

Finally, I should like to draw to the Advisory Council's attention the fact that the preceding opinion is consistent with: (1) the College of Optometry's counsel, Mr. Arthur Stone's opinions, dated 15 February 1993 and 25 March 1993 respectively, in which he, *inter alia*, alerts the College to the significance of the word "prescribed", *i.e.*, "the reader must be able to determine from the words used only, what the law is" and the problem of subdelegation; (2) the views expressed by the Government's counsel, Ms. Bohnen, and by Legislative Counsel, Mr. Spakowski, before the Standing Committee on Social Development concerning the meaning of "prescribed diseases", *see* Standing Committee on Social Development, 5 November 1991, Hansard at pp. S-919 to S-924; and (3) with the legislative intention as evidenced by the adoption and enactment of "prescribed diseases" in the *Optometry Act, 1991*.

I trust that you find the above helpful. If you have additional questions or comments, please do not hesitate to contact my office.

Yours sincerely,



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