To: Sean M. Sinclair  
From: Travis K. Kusch  
Date: December 20, 2017  
File No: 6130.136  
Subject: College of Dental Surgeons - Advertising Bylaws

Summary

You have asked me to provide a memo discussing how the Canadian Charter of Rights and Freedoms (the “Charter”) applies to The College of Dental Surgeons of Saskatchewan’s (the “College”) bylaws and standards on advertising. Specifically, you would like me to look at which provisions of the regulation may be contrary to the Charter.

The format of this memo will be as follows:

1) An overview of the bylaws will be provided;  
2) Some of the more pertinent case law in the area will be discussed; and  
3) An analysis of how the case law applies to the regulations will be provided.

After conducting my review, I am of the opinion that some of the current standards are unlikely to survive Charter scrutiny. These include limiting the ability to advertise the hours of operation and other objectively verifiable information. For a full list, please see the discussion section of this memo.

Synopsis of the Bylaws

The examples referenced below are from the CDSS Advertising Standards, approved by Council on November 10, 2017. The standards appear to be simply an expansion (often in the form of examples) on the permitted and non-permitted forms of advertising found in section 10.2 of the bylaws. The standards that I have identified as possibly contrary to the Charter are:

- 6. Advertising must: be objectively verifiable and not include personal feelings, beliefs, interpretation, opinions and testimonials.
- 7. Advertising and other external marketing activities should not include uniqueness, comparisons to other providers, undignified statements; promises of better results or unjustified expectations; reference to materials, techniques or equipment; and coercion, duress, and harassment to take advantage of physical, emotional or financial duress.
- 17. External advertising definition which includes: sponsorships, donations, yellow pages, phone books, on-line, infomercials, new articles, advertorials, signage, billboards, social media promoted posts, first 140 characters of your website and online searches.
33. Examples of non-permitted advertising.

34. Punctuation that plays on the client’s emotion is non-compliant. “Call, Visit, Contact, Please Call, Find Us On” are considered non-compliant.

For added context, examples of advertising the college has deemed non-permissible include:

- At Neesh (dental clinic) we are a friendly team of Saskatoon dental professionals;
- We strive to provide the best possible atmosphere and patient experience;
- Dr. Parviz Yazdani is originally from Iran and is a former refugee;
- As a father of four, he appreciated the anxieties of other parents and of the children themselves when it comes to dental care; and
- Contact the Neesh Dental team today.

Both the bylaws and the standards have been appended to this memo. I have highlighted in pink the various standards and bylaws that I believe are susceptible to a Charter argument in their current form. Not all of them are likely to be struck down, but nonetheless deserve further consideration and discussion.

**Synopsis of the Case Law**

If the bylaws and standards are in violation of the Charter, they will be in violation of section 2(b) of the Charter which reads:

> Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

However, even if the bylaws limit expression contrary to section 2(b), they may be saved under section 1 of the Charter which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

While case law on the subject is somewhat limited, an overview of the most helpful jurisprudence can be found below in order to provide an overview of the relevant considerations.

The seminal case on the issue is *Rocket v Royal College of Dental Surgeons*, [1990] 2 SCR 232 [*Rocket*]. In *Rocket*, a three-step test was put forward to determine if the advertising regulations are limiting expression contrary to the Charter (at p 245):

1) Does activity constitute expressive activity? (must be answered yes)
2) Is the expressive activity excluded from 2(b) because it takes prohibited form (i.e. threats of violence)? (must be answered no) And
3) Does the regulation restrict the content of the expression, not just the medium? (must be answered yes)
If all questions are answered correctly, then the regulation is in violation of section 2(b) of the Charter. In the case of bylaws that regulate advertising, the bylaws will almost always limit expression (*Rocket, supra* at page 245). Therefore, the determination turns to whether or not the regulation is justified under section 1 of the Charter.

To determine whether the regulation is justified under section 1 of the Charter, the *Oakes* test should be used. The test is as follows:

1) The objective which the limit is designed to achieve must be of sufficient importance to warrant overriding a constitutionally protected right; and
2) If such objective is established, the limit must be reasonably and demonstrably justified based on these three considerations:
   (i) The measures designed to meet the legislative objective must be rationally connected to the objective;
   (ii) The means used should impair as little as possible the right or freedom in question; and
   (iii) There must be proportionality between the effect of the measures which are responsible for limiting the Charter right and the legislative objective of the limit of those rights [page 246] (rephrased in *Dagenais v CBC*, [1994] 3 SCR 835 to mean “there must be a proportionality between the deleterious and the salutary effects of the measures.”)

Justice McLachlin (as she then was) in *Rocket, supra* points out at page 247 that it may be easier to justify the restriction of advertising expression as the interest being limited by the regulations is an economic one, not a right to political process or spiritual self-fulfillment. She also recognizes that the consumer’s right to have the relevant information to make an informed decision on a health care professional cannot be lightly dismissed and the two competing interests need to be balanced on a case by case basis.

Justice McLachlin provides a helpful quote stating that there is usually an important purpose for part one of the *Oakes* test when she states:

It is difficult to overstate the importance in our society of proper regulation of our learned professions. Indeed, it is not disputed that the provinces have a legitimate interest in regulating professional advertising (page 249).

When speaking to proportionality, Justice McLachlin found that the legislation in question failed the *Oakes* test in that it prevented the public from determining information such as practice hours, languages spoken by the dentists and other relevant facts regarding the practice, things in which the public has a genuine interest in knowing in order to make an informed decision (page 251). Therefore, the regulations governing advertising did not minimally impair.

In *Bratt v Veterinary Medical Association (British Columbia)*, 1999 CarswellBC 2380 (QB) the British Columbia Court of Queen’s Bench determined that a prohibition on quoting fixed fees cannot be saved under section 1 of the Charter. The Court found that a prohibition on all fixed fee advertising was not minimally impairing as fixed fee advertising in of itself was not inherently misleading to the public.
Furthermore, the Court found that regulating comparative statements could be saved under section one of the Charter. This is because comparative statements are not objectively verifiable, and therefore regulating them produced more salutary and deleterious benefits.

In a more recent decision regarding advertising and the Charter, the Ontario Superior Court upheld provisions of the *Medicine Act, 1991* Regulations in *Yazdanfar v The College of Physicians and Surgeons*, 2013 ONSC 6420. The challenged bylaws prevented a medical professional from any advertising that was ‘false, misleading or deceptive,’ as well as prohibiting advertising that contained ‘superlatives and testimonials’ (at para 92).

The Court made the following observations in upholding the legislation:

- The ban on testimonials furthers the pressing and substantial objective of the maintenance of a high degree of professionalism (paragraph 123);
- An overbroad provision will not necessarily fail to be rationally connected (paragraph 124);
- The regulations do not prevent the physician from communicating useful, non-biased information, but rather only unverifiable testimonials. As such, this is a minimal impairment. While testimonials may contain only objective information, the inevitably is that because the public cannot evaluate them, they serve some form of positive bias (paragraph 131-132, 134); and
- Balanced against the salutary effects of protecting the public, avoiding biased advertising and preserving the trust of the public, it is proportional to limit only the minimal economic interests of [the dentist] (paragraph 139).

**Application**

Given that the College is subject to the Charter, we need to look first at section 2 and then section 1 of the Charter.

**Section 2(b) – Freedom of Expression**

Following the decisions of *Bratt* and *Rocket* it is clear that the regulation of advertising is in fact a restriction on freedom of expression. Advertising expresses meaning and the College is controlling the message, not just the medium. As such, the regulations are contrary to section 2(b). Therefore, the question is, was it justified pursuant to the *Oakes* test.

**Section 1 – Minimal Impairment**

Before providing an in-depth *Oakes* analysis, it is helpful to go over the purpose behind the College’s standards and bylaws in relation to advertising. Section 1 of the College’s advertising standards provides these purposes:

(i) To protect the public from advertising that is inaccurate; misleading; untruthful; fraudulent; non-objectively verifiable; personal opinion; an interpretation; a testimonial; and
(ii) To protect the public from advertising that includes uniqueness; comparisons; statements that are unprofessional, undignified, deprecating, or could be perceived to take advantage of physical, emotional, or financial duress; promises of better results or unjustified expectations; references to materials, techniques, or equipment; references to coupons or giveaways; names of staff; retired members (after 1 year), former associates, and partners.

Additionally, in *Rocket, supra* (page 249) the Court noted that an additional purpose of the regulation of professional advertising was to promote a high standard of professionalism in the industry.

**Sufficient Importance**

In order for a bylaw or standard to be saved under section 1 of the *Oakes* test, the purpose of the bylaw must be sufficiently important to receive Charter protection.

As stated by Justice McLachlin in *Rocket, supra*

> it is essential to accord professional societies the power to regulate the methods by which their members advertise, even though this may infringe the freedom of expression guaranteed by s. 2(b) of the *Charter*. The only question is whether the regulation here in question meets the second branch of the test under s. 1…[page 250]

The protection of the public and the regulation of the advertising of professional bodies is a sufficiently important purpose. As such, the bylaws as a whole pass through part 1 of the *Oakes* test.

**Reasonably and Demonstrably Justified**

The following analysis will be specific to each bylaw and/or standard. On a preliminary note, the Court has already held the following bylaws will meet the section one test and be saved from Charter scrutiny:

- Testimonials (*Yazdanfar*);
- Comparative Statements that are non-objective and non-verifiable (*Bratt*); and
- Makes reference to facts that cannot be proven accurate (*Bratt*).

However, with that in mind the following restrictions should be further analyzed:

- 7(a) – Uniqueness, comparisons to other providers;
- 7(h) – Reference materials, techniques, equipment;
- 33(xi) – Latex Free Environment;
- 33(xii) – Children’s Activity Center, Televisions, Tablets, Headphones, and Free Wi-Fi;
- 33(xiii) – Free Parking;
- 33(xvi) – All Insurance Accepted, Direct Billing;
- 33(xvii) – Evenings, Extended Hours, Weekends;
- 33(xxvi) – One Appointment Crowns;
- 33(xxxvii) – Sleep Apnea and Snoring Appliances;
• 34(iii) – If any specific hours are listed, all hours must be listed;
• 34(v) – Call, Visit, Contact, etc. are non-compliant;
• Bylaw 10.2(i) – Makes reference in any advertising or promotional activity to equipment, products or materials used in the practice of dentistry.

(i) Rational Connection

The rational connection argument is rarely contested, as in Rocket, supra Justice McLachlin provided one sentence discussing the rational connection of the impugned regulations. The link required for a rational connection can be found on logic alone and the Court rarely struggles to find some sort of rational connection (Bratt, supra at paras 38 and 39).

While some of the above restrictions have a tentative connection, the arguments for invalidating such provisions are better discussed below where the minimal salutary effects may be outweighed by the overall impairment on Charter rights.

(ii) Minimal Impairment and Proportionality

As in the decided cases on this issue, the crux of the argument is usually whether the regulations impair as little as possible, and whether or not the deleterious effects are proportional to the salutary effects. The two issues are generally discussed in tandem, I will follow the format. This is also the correct time in the analysis to consider whether the provisions are overbroad (Yazdanfar, supra para 123).

Upheld Provisions

The following provisions I believe will survive Charter scrutiny, but are contentious enough to warrant further discussion:

• One appointment Crowns;
• References materials, techniques and equipment’s (both the standard and the bylaw).

Again, as see in Rocket, supra this is a balancing of the rights of the public to make an informed decision and protection of the public/upholding the reputation of the professional body.

The issue with using these two forms of advertisements is similar to issues that arise from testimonials, that while in some cases they may be objectively verifiable, they will be used in a misleading way that creates bias (Yazdanfar, supra para 134). One appointment is left essentially undefined, and the public cannot determine for themselves what constitutes an appointment. Therefore, it is misleading as to what ‘one appointment’ really is.

Furthermore, referring techniques and equipment raises the same issues. Individuals with no background in the field of dentistry are unable to determine for themselves when a piece of equipment is ‘better’ or when a technique is ‘more effective’ and are left susceptible to the bias created by the advertisement.
The negative economic impact (the deleterious effect) of these prohibitions is outweighed by the protection of the public and thus these provisions are saved under the *Oakes* test.

**Provisions Likely to be Struck Down**

The following provisions and standards are unlikely to be saved by section 1 of the Charter:

- 7(a) – Uniqueness, comparisons to other providers;
- 33(xi) – Latex Free Environment;
- 33(xii) – Children’s Activity Center, Televisions, Tablets, Headphones, and Free Wi-Fi;
- 33(xiii) – Free Parking;
- 33(xvi) – All Insurance Accepted, Direct Billing;
- 33(xvii) – Evenings, Extended Hours, Weekends;
- 33(xxxvii) – Sleep Apnea and Snoring Appliances;
- 34(iii) – If any specific hours are listed, all hours must be listed;
- 34(v) – Call, Visit, Contact, etc. are non-compliant;

Conversely, while equipment references can be misleading, the above mentioned prohibited forms of advertising are not misleading. They are objectively verifiable and aid in allowing the public to make an informed decision in choosing a health care professional. None of the above standards require any special training to understand the message conveyed or their effects.

Furthermore, in *Rocket*, the Court found that “the public has an interest in obtaining information as to dentists’ office hours, the languages they speak, and other objective facts relevant to their practice” (page 251).

Many of the aforementioned standards are likely to be caught by the above *Rocket* quote. Aspects that make a dentist unique (languages spoken) are useful as the city becomes more diverse. Statements of uniqueness that amount to subjective comparisons can be rationally caught elsewhere in the standards in order to serve a purpose, while objective statements of uniqueness can be permitted in the spirit of promoting an informed consumer.

Individuals have a right to know which dentists are open Saturdays and providing statements that advertise offices have a “kid’s centre” are objectively verifiable. Statements such as “kid friendly” are caught elsewhere under the regulations, to prevent the use of subjective advertisement that is misleading and non-verifiable.

Many, if not all, of the aforementioned regulations have minimal salutary effects. There is very little to be gained or protected in the instances of prohibiting ‘free parking.’ Furthermore, advertisements such as ‘latex free environment’ can be extremely beneficial to those basing their decision on a health care provider in part due to allergies they may suffer from.

While I could attempt to discuss the pros and cons of each of the regulations individually, they all are painted with the same brush for the Charter analysis. None of them present any real danger to undercutting professionalism or misleading the public, and therefore it is difficult to justify that they minimally impair (*Rocket* page 250).
All of the above-mentioned prohibitions are still subject to the bylaws that require advertisements to not be misleading and to not misrepresent the facts. However, as they stand, many are overbroad and are therefore no longer proportional in their effects.

As such, those provisions neither minimally impair, nor are the deleterious effects proportional to the salutary effects. They are more than likely to be struck down.

**Remedy**

Should any of the aforementioned provisions be in violation of section 2(b) of the Charter and not saved under the *Oakes* test, they will likely be deemed to be of no force and effect (see e.g. *Bratt, supra* at para 81).