

***Memorandum***

**Robertson Stromberg LLP**

To: Sean M. Sinclair

From: William H.J. Hampton

Date: March 6, 2023

File No: 6130.153

**Subject:** **Botox**

1. You have asked whether a dentist performing the injection of neuromodulators (“Botox”) into the oral-facial complex below the dermis, below the surface of a mucous membrane or in or below the surfaces of the teeth for cosmetic purposes is a “procedure on tissues” under s. 23(1)(b) of *The Dental Disciplines Act* (the “Act”), or in the alternative, whether such an injection would be to administer a substance by injection or inhalation in the provision of dental treatment under s. 23(1)(e) of the Act.
2. Put more simply, can dentists administer Botox injections for cosmetic purposes?
3. My conclusion is that dentists very likely can administer these injections pursuant to their scope of practice permitted under the Act. Any argument to the contrary is unconvincing. The largest risk point is if the College of Physicians and Surgeons can produce evidence to establish that dentists administering Botox injections would be contrary to the purpose of protection of the public (e.g., that dentists administering Botox injections would carry a greater risk of harm than physicians administering such injections).
4. The first thing to note is that if the administration of Botox injections by dentists is allowable under the Act, then the College of Physicians and Surgeons would be unable to prosecute a dentist who has administered such an injection through its disciplinary procedure. Section 83 of *The Medical Profession Act, 1981* provides that:

Nothing in this Act applies to or affects powers given to persons under the authority of any other Act.

1. Turning to the *Dental Disciplines Act*, we can look to the text of s. 23 of that Act, as well as the purpose of the Act.
2. Section 23 has not received sufficient judicial consideration for the purposes of this memo.
3. When considering the text of s. 23, it is assumed that Botox would be injected below the dermis, below the surface of a mucous membrane or in or below the surfaces of the teeth. Without expert medical advice my ability to draw a conclusion on this aspect is limited, but from a lay perspective it appears straightforward that Botox is generally injected under the skin.
4. Second, it appears fairly straightforward that the administration of Botox injections is a “procedure on tissue”.
5. The terms “procedure” and “tissue” are undefined in the Act. Nor have they been definitely examined in case law. That said, the dictionary definitions are not ambiguous, and health authorities in Canada and abroad refer to the administration of Botox injections as a “procedure”.
6. Health Canada’s website includes a general information page on cosmetic injections, including injectable dermal fillers and Botox.[[1]](#footnote-1) The website characterizes Botox as an “injectable cosmetic procedure”.
7. The United Kingdom National Health Service’s website includes a general information page on Botox injections, stating:

Your face will be cleaned and botulinum toxin will be injected into muscles in your face using a very fine needle.[[2]](#footnote-2)

1. The same web page also characterizes a cosmetic Botox injection as a “procedure” in multiple paragraphs, and the web page is indexed under “Non-surgical cosmetic procedures”.
2. Dictionary definitions of “procedure” apparently include the administration of Botox injections.
3. For example, Merriam-Webster defines “procedure” as, *inter alia*:

a series of steps followed in a regular definite order (“legal *procedure*”; “a surgical *procedure*”)[[3]](#footnote-3)

1. Cambridge Dictionary defines “procedure” as, *inter alia*:

a set of actions that is the official or accepted way of doing something[[4]](#footnote-4)

1. Dictionary definitions of “tissue” apparently include musculature.
2. For example, Merriam-Webster defines “tissue” as, *inter alia*:

an aggregate of cells usually of a particular kind together with their intercellular substance that form one of the structural materials of a plant or an animal[[5]](#footnote-5)

1. Cambridge Dictionary defines “tissue” as:

a group of connected cells in an animal or plant that are similar to each other, have the same purpose, and form the stated part of the animal or plant[[6]](#footnote-6)

1. As such, it seems relatively clear that the administration of Botox injections is a “procedure on tissue”. Provided that it is injected below the dermis, it would fall into the allowable scope of practice under s. 23(1)(b) of the Act.
2. However, the College of Physicians and Surgeons takes the position that to allow this position runs counter to the purpose of the Act, that is, to prevent dentists from performing procedures traditionally within the scope of practice of physicians and surgeons.
3. My first impression of this argument is that it is thin, and strikes me as an invitation for dentists to avoid stepping on the hallowed turf of physicians, notwithstanding the text of their governing statute.
4. A response to this question involves two lines of inquiry:
   1. What is the purpose of the Act?
   2. If the purpose of the Act is to prevent dentists from practicing medicine, then would this be sufficient to override the express words of the Act?

***Purpose of The Dental Disciplines Act***

1. In preparing this I reviewed Saskatchewan Hansard from the spring of 1997.
2. My conclusion is that key purposes of the Act as shown in the Hansard were to:
   1. Improve access to dental services to rural communities;
   2. Introduce a flexible model of permitted dental services instead of a rigid list of tasks;
   3. Implement a new disciplinary process.
3. The debates seem to recognize that the effect of the Act will be to broaden the scope of services that dentists are permitted to perform.
4. The Hansard materials contain no discussion or mention of trying to “reign in” the scope of practice enjoyed by dentists. There is no mention of any perceived mischief of dentists practicing medicine within the scope of physicians’ practice, nor any mention of concerns from physicians that this may become the case.
5. On the other hand, there is mention of giving dentists more flexibility in the services they can provide, which is apparently treated by the legislature as a positive. There is some mention about non-dentists performing dental services that had been within the exclusive scope of dentists. I do note that the flexibility aspect seems to be mainly centred on the purpose of providing dental services in rural communities, i.e., geographic considerations, rather than expanding the scope of dental services generally.
6. I note the following purposes of the Act as stated or suggested in the Saskatchewan Hansard, during the Second Reading and Committee of the Whole:
   1. To “include all dental-related professionals under a single Act, streamlining the regulation of these professionals and improving accountability for the Saskatchewan people.”
   2. To “allow dental therapists, hygienists and assistants to work in a variety of new settings, such as nursing homes. This will help improve public access to these important preventative health services.”
   3. To allow each association (dentists, dental therapists, etc.) to regulate its own members.
   4. To ensure public accountability:
      1. Clarified and expanded discipline process;
      2. Requirement for professional associations to file annual reports;
   5. To recognize changing roles of health services providers in our new health system.
   6. Alignment with the “renewed health system”:
      1. Bring services closer to people;
      2. Give people the support they need to maintain or improve their health;
      3. Encourage formation of teams of health service providers who can bring a whole range of health services closer to where people live.
   7. New approach taken to scope of practice:
      1. “Simply put, this new Act is saying that certain dental services can only be performed by the professionals that are trained to do them. Similar models have been used with great success in other provinces. The approach is seen as more flexible than a rigid list of tasks which some of the dental professions are now subject to, and it helps protect members of the public.”
   8. From opposition’s perspective (Liberal Party)
      1. To provide for the registration and admission to the profession;
      2. To provide a mechanism for dealing with complaints and for disciplining inadequate members.
      3. “It allows more flexibility in the types of services different types of dental professionals can provide, instead of the legislation spelling out at great length the types of procedures each discipline can provide. It allows each discipline to provide such services as are part of the generally accepted standards of training for that profession.”
      4. “Likewise, for broadening the definitions of the duties each profession can perform, health districts may be able to get away with hiring, for example, a dental assistant instead of an actual dentist to do fillings, and this is of a concern to many people.”
      5. “On balance the Bill appears to allow dental professionals greater freedom to provide more efficient services to a broader patient base. However, closer examination will be needed to ensure that these changes have the desired effect.”
7. I also note, at a general level, the Supreme Court of Canada stated regarding the regulation of professions generally, in the context of a dispute involving the Royal College of Dental Surgeons, that “the maintenance of professionalism and the protection of the public are at the heart” of professional regulations.

*Rocket v Royal College of Dental Surgeons (Ontario)*, 1990 CarswellOnt 1014 (SCC) at para 39.

1. If the College of Physicians and Surgeons intends to claim that the administration of Botox injections is incongruous with the purpose of the Act, then it will have to produce evidence to establish that dentists administering such procedures would be contrary to the maintenance of professionalism and the protection of the public. This could take the form of showing that dentists are unable to perform these procedures to the same degree of safety as physicians.
2. This may be a risk point, but only if there is a real risk that the College can establish that denying dentists the ability to administer Botox injections would be in the interest of the protection of the public and the maintenance of professionalism. Even then, such evidence may not be dispositive given the competing purposes as evinced in the Hansard.
3. Of course, this also depends on whether legislative purpose even matters in the face of the text of the legislation.

***Can purpose override text?***

1. I have found no suggestion that the purpose of the Act was to curtail the scope of dental practice. To the contrary, there are suggestions that a purpose of the Act was to add flexibility to the services that dentists can provide.
2. I note that the text of the statute does not positively include the administration of Botox injections as permitted under s. 23, even though the text appears relatively clear that such procedures would be included under a plain reading.
3. The starting point is the classic purposive approach to statutory interpretation as formulated by Elmer Driedger:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

1. In *Sullivan on the Construction of Statutes*, Ruth Sullivan states the following:

If the ordinary meaning of a text is clear, if its meaning appears to be “plain”, then a court is justified in attaching significant weight to this apparent meaning. The clearer it is, the greater the weight it receives. The weight accorded to the text is affected by factors such as the following:

* + - How the text is drafted and in particular how detailed it is, how concrete and precise the language is.
    - The audience to which the text is addressed, whether the public in general, a narrow and specialized section of the public or those charged with administering the legislation.
    - The importance of certainty and predictability in the context.

If the text is precise and addressed to a specialized audience that would understand it in a certain way and reasonably rely on that understanding, then the ordinary (or technical) meaning of the text appropriately receives significant weight. However, it does not follow that it should prevail over other considerations – that depends on the weight appropriately afforded to the other considerations.

For example, if the legislature’s intention seems clear and relevant to the problem at hand, a court is justified in assigning it significant weight even if the clear ordinary (or technical) meaning is at odds with that intention. How much weight depends on:

* + - Where the evidence of legislative intent comes from and how cogent and compelling it is; and
    - How directly the intention relates to the circumstances of the dispute to be resolved.

If the evidence of intention comes from a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor appropriately receives considerable weight.

*Sullivan on Construction of Statutes* at 15.

1. In other words, if the College of Physicians and Surgeons can ground a legislative purpose or intention behind the Act to limit or curtail the scope of practice of dentists, then this could be given significant weight by the court. A secondary position that could militate towards the College’s position might be the fact that the Act does not spell out “Botox injections” in positive language.
2. I note that the question of legislative purpose comes down to weight, rather than anything dispositive. In other words, while the Court may give weight to an argument that purpose should override text, this comes down to the clarity of both the purpose and the text. This may introduce some risk into the question.
3. However, in pursing this position, the College of Physicians and Surgeons would have to contend with the following:
   1. The fact that the words of the text, read plainly, include the administration of Botox injections;
   2. The general purposes of maintenance of professionalism and protection of the public not being on their faces at odds with dentists administering Botox injections; and
   3. The competing legislative intent of providing dentists flexibility in the procedures they can administer.
4. I also add that Bryan Salte has not specified from where his interpretation of legislative intent and purposes arises. There is always the risk that he has some additional information in his possession of which I am not aware. However, from my research, I was not able to find anything that would fully square with his interpretation of the purpose. The most I can say is that there is some risk if he can show that physicians are “better” at administering Botox injections than dentists.

1. https://www.canada.ca/en/health-canada/services/medical-procedures/cosmetic-injections.html [↑](#footnote-ref-1)
2. https://www.nhs.uk/conditions/cosmetic-procedures/non-surgical-cosmetic-procedures/botox-injections/#:~:text=Your%20face%20will%20be%20cleaned,best%20place%20for%20the%20injections. [↑](#footnote-ref-2)
3. https://www.merriam-webster.com/dictionary/procedure [↑](#footnote-ref-3)
4. https://dictionary.cambridge.org/dictionary/english/procedure [↑](#footnote-ref-4)
5. https://www.merriam-webster.com/dictionary/tissue [↑](#footnote-ref-5)
6. https://dictionary.cambridge.org/dictionary/english/tissue [↑](#footnote-ref-6)