COURT FILE NO.: 06-CV-322962PD2
DATE: 20061227

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: COLLEGE OF OPTICIANS OF ONTARIO, Applicant

- and -

JOHN DOE 1, carrying on business in Ontario under the name GREAT GLASSES, located at 2180 Itabashi Way, Burlington, et al., Respondents

BEFORE: SPIES J.

COUNSEL: Robert W. Cosman and Melisse L. Willems, for the Applicant

Kevin Aalto, for the Respondents

HEARD: December 19, 2006

E N D O R S E M E N T

Overview

[1] The College of Opticians of Ontario is the governing body for opticians in Ontario,

established pursuant to the *Opticianry Act*, S.O. 1991, c. 34 and the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 (the "RHPA"). The fifteen Respondents carry on business in some capacity as optical dispensaries called "Great Glasses" at different locations in Ontario.

[2] The College has brought this application pursuant to s. 87 of the *Health Professions Procedural Code* (the "Code"), which is Schedule 2 to the RHPA. The College seeks an order on an interim and permanent basis requiring the Respondents to comply with the provisions of the RHPA, the Code and the Regulations.

[3] There were three motions before me. The Respondents move for an order converting this application into an action. The Applicant requests costs thrown away as a result of the failure of persons it alleges are representatives of the Respondents to attend to be examined as witnesses on the pending application and also seeks interim relief pending the determination of the application on the merits.

Judgment of Harris J.

[4] On June 24, 2003, Mr. Justice Harris of the Ontario Superior Court released his Judgment in an application brought by the College of Optometrists, supported by the College of Opticians as intervener, and ordered, among other things, that Bruce Bergez and Joanne Marie Bergez (the principals of Great Glasses), and companies they controlled, all carrying on business as Great Glasses, comply with the RHPA and the Code.

[5] Mr. Justice Harris found that *employees* of Great Glasses were prescribing in contravention of the RHPA and that "employees of Great Glasses, whether opticians or non-opticians, wrote their own prescriptions and 'dispensed' without a prescription of a physician or optometrist" (at para. 80).

Judgment of Crane J.

[6] In June 2005, the College of Optometrists commenced a contempt application, supported by the College of Opticians as an intervener, against Bruce Bergez, his wife Joanne Bergez and certain companies controlled by them, for failing to comply with the Judgment of Justice Harris. It was alleged in the contempt application that they and their employees had prescribed without being optometrists or physicians, dispensed without the prescription of an optometrist or physician and allowed Great Glasses employees who were not opticians, physicians or optometrists, to dispense.

[7] On November 24, 2006, Justice Crane released his Judgment on the contempt application. In addition to finding the respondents, Bruce Bergez, Joanne Bergez, and

companies controlled by them, in contempt of the Judgment of Harris J., Justice Crane made the following findings of fact:

> a) "I find that the respondents, Bergez, have been in contempt of the Judgment and Orders of this Court since the issuance of that Judgment on 24 June, 2003 continuously to the hearing of this Application. *I find that those persons engaged in prescribing and/or dispensing at each Great Glasses store – 17 or more stores – are doing so unlawfully, in breach of the Regulated Health Professions Act.*…Where, as here, there is no person authorized to perform the controlled act of prescribing and thereby no person authorized to delegate, the persons engaged at Great Glasses that are prescribing eyewear are in direct breach of the Regulated Health Professions Act, s. 27(1) and (2, the performance of a controlled act" (para. 19) [emphasis mine];
> b) "I have found the breaches of the Order of this Court to be egregious." (para. 20);
> c) "On the basis of the very extensive Record before me I have no hesitation in concluding that the respondent, Mr. Bergez, created and operates the three optical stores named as respondents in this Application, receiving through payments on behalf of his family, the proceeds of these businesses. *I also find that Mr. Bergez has, through a sham structure, franchised a further 14 Great Glasses stores under a "Franchise Agreement" that provides the franchisor with the right to determine the manner and mode of business by each of the franchisees*. I also find that the Great Glasses mode of operation has not changed from that found by Mr. Justice Harris to what has now been presented in this Application Record." (para. 8) [emphasis mine];
> d) "The respondents, by their mode of business of offering what they advertise as free "eye examinations" and only calculating refractory error in a customer's eyes, takes from the public the very important safeguard of early diagnosis, or any diagnosis, of eye disease and has, in its mode of practice, distorted the integrated healthcare system in Ontario as it applies to eyes and related sight functions…" (para. 79);
> e) "…[I]t is seriously irresponsible conduct to advertise a "free eye examination" and then to by-pass an eye examination by an optometrist or ophthalmologist" (para. 80);
> f) "The Great Glasses blanket advertising of "Free Eye Examinations" is in fact and, to the certain knowledge of Mr. Bergez, a gross deception on the public, *putting his customers at risk of their health, done solely for the commercial profit of the respondents*" (para. 84) [emphasis mine];
> g) "The evidence on this Record is that the dispensing of subnormal

eyewear is done at Great Glasses without any direct involvement of an optician. *Should a customer be wrongly dispensed and suffer personal injury due to a sight failure, there is seemingly, on Mr. Bergez's mode of business, no optician to be held accountable in law*. I find that Mr. Bergez intends this situation" (para 85) [emphasis mine];

h) "…[A]ll those customers of Great Glasses that have been deprived of an eye examination as performed by an ophthalmologist or optometrist have been *put at risk of continuing undiagnosed eye disease*" (para. 87) [emphasis mine];

i) "In the sphere of business activity I find the conduct of Mr. Bergez to be highly provocative, arrogant and egregious. It is economically harmful to those professionals who are providing health care services in accordance with the law in the fields of optometry and opticianry. It is predatory practice on the health of the public and on the legitimate and economic interests of professional competitors" (para. 88); and

j) "Mr. Bergez and his business operations must be compelled to desist from the present manner and mode of business and must, as a matter of deterrence, be subject to punishment that disgorges the profits that have been made pursuant to the illegal activities originally enjoined by Order of this Court in 2003. *The Great Glasses business, both through the respondent stores and through all of the "franchised" stores has been structured as a sham for the purpose of evading the law to create an unjust competitive advantage for monetary gain*." (para. 89) [emphasis mine].

[8] It is the position of the College of Opticians that many of these findings relate to all of the Great Glasses stores, including those locations operated by the Respondents. It is the position of the Respondents that they were not parties to the application before Harris J. or the motion for contempt before Crane J. and that there is no direct evidence that their stores are caught by the findings of Crane J.

This application

[9] The Respondents were served with the application record on November 25, 2006. The application was returnable on a date to be set at triage court on December 1st, 2006. None of the Respondents attended at triage court and at that time Justice Campbell determined that the matter was urgent and ordered that the application be scheduled to be heard the week of December 18, 2006.

[10] Counsel for the College served summonses on 11 witnesses requiring them to attend for

examination in various locations in the first half of December 2006. It is alleged that the summonses were served on persons who are mangers or comptrollers of the Respondents. Counsel for the Respondents requested an adjournment of the examinations scheduled by the College, but this was refused on the grounds that the application is urgent. None of the persons summonsed appeared on their examination as scheduled.

[11] On December 6, 2006, counsel for the Respondents served a notice of appearance on behalf of "John Doe 1, carrying on business as Great Glasses", and other Respondents. Counsel for the College took the position that the notice of appearance was defective because it did not identify the legal entities that were represented by Gowlings named in the notice of application. Although Mr. Aalto conceded that his firm has the identity of all of the Respondents, as they have been retained by all of the Respondents, he advised that his clients were objecting to disclosure of that information to the Applicant and to the court.

The Issues

[12] There are three issues before me:

1. Should the application be converted into an action because it raises triable issues of fact and credibility?

2. Is the Applicant entitled to costs thrown away as a result of the failure of persons it alleges are representatives of the Respondents to attend to be examined as witnesses on the pending application and should an order issue directing that those persons attend on a fixed date for cross-examination?

3. Is the Applicant entitled to interim relief pending the hearing of the application on the merits, including an order requiring the respondents to identify themselves and an order for an interim injunction?

Analysis

The motion to convert

[13] The only evidence filed in response to the application, is the affidavit of counsel to the Respondents, Mr. Louis Frapporti. Mr. Frapporti deposes that he anticipates that evidence will be required responding to the "voluminous materials" served by the Applicant and that cross-examinations will be required. He deposes that such evidence will relate to:

(i) The Respondents' position as to the risk of harm presented by their businesses, both in the form of evidence of their conduct as well as expert

evidence;

(ii) Evidence with respect to the circumstances surrounding the prescribing and dispensing at the various stores prior to and following the judgment of Harris J.;

(iii) Evidence relating to the relationship between the Respondents in this proceeding and those in the prior proceeding; and

(iv) Evidence from current and former customers of the Respondents as to the foregoing.

[14] In his factum Mr. Frapporti adds that whether the practices of the Respondents accord with standards of the medical profession will also be in issue. He also takes the position that that much of the evidence proffered by the Applicant, which consists of transcript excerpts from witnesses in the prior proceedings, is hearsay, which, when tested, will require the testimony of those witnesses.

[15] It is the position of the Applicant that these matters are either not relevant to the application relief sought, are not contested between the parties, or if relevant and contested can adequately be determined on the basis of evidence admissible in the application.

[16] Section 87 of the Code provides that:

> The College *may apply* to the Superior Court of Justice for an order directing a person to comply with a provision of the *Health Profession Act*, this Code, the *Regulated Health Professions Act, 1991*, the Regulations under those Acts…

[17] The RHPA defines "college" as a college of a health profession or a group of health professions established under a *Health Profession Act*.

[18] Mr. Aalto argues that the words "may apply" are permissive and if there are material facts in dispute, the matter should proceed by way of action. He relies upon the decision of the Court of Appeal in *Chilian v. Augdome* reflex, (1991), 2 O.R. (3d) 696. That case, however, does not stand for the proposition advanced by Mr. Aalto. It establishes that where a statute enables a person to "apply" to a court for specified relief, the law does not mandate one particular form of proceeding, namely application or action. In that case the court went on to find that while both an action or an application might be permissible, this

> should not obscure the commonly held understanding that when the legislature uses this term, ["may apply"] particularly in modern statutes, it contemplates, generally, the use of the more summary form of proceeding, the application. (at page 15)

[19] The RHPA is a modern statute and in my view the choice of wording by the legislature was deliberate, particularly given the nature and purpose of a section 87 application. The Code imposes on every College the obligation to regulate the practice of the profession and govern its members, to develop and maintain standards of qualification, standards of practice and to administer the particular *Health Profession Act* applicable to each College, the Code and the RHPA (section 3(1) of the Code). In carrying out its objectives each College has a duty to serve and protect the public interest (section 3(2) of the Code).

[20] In my view, given the overriding public duty imposed on the Colleges, and given that applications are typically more expeditious in terms of deciding issues in a timely and efficient manner, there can be no doubt that the legislature intended that Colleges be entitled to proceed by way of application when seeking relief pursuant to section 87 of the Code. As such this application is properly brought pursuant to Rule 14.05(2).

[21] As the College is *prima facie* entitled to proceed by way of application, the existence of disputed material facts would not necessarily preclude a summary hearing (see for example *McKay Estate v. Love* reflex, (1991), 6 O.R. (3d) 511 at 514 (Gen. Div.), affirmed reflex, (1991), 6 O.R. (3d) 519 (C.A.). For this reason, the cases relied upon by the Respondents are not relevant.

[22] Furthermore, Mr. Aalto has not persuaded me that the concerns raised by Mr. Frapporti in his affidavit are real. First of all, the nature of the regulatory scheme itself is largely a matter of statutory interpretation. There may be an interpretation issue concerning the right of the Respondents to "delegate" a controlled act, given that the College does not have Regulations in that regard, but the term "delegate" is a term capable of interpretation by the court.

[23] Furthermore, as Mr. Cosman argues, the question of actual harm to persons as a result of the alleged breach of the RHPA and the standards of the profession, would not be an issue that must be decided on the application. It clearly is not a defence to a s. 87 application to show that a person who is not lawfully authorized to perform a controlled act is equally competent or capable of doing so as a member of a College who is lawfully authorized to do so.

[24] In my view, as submitted by Mr. Frapporti in his factum, the most important issue is the relationship between the Respondents in this proceeding and those in the prior proceeding. Mr. Cosman takes the position that the "17 or more stores" referred to by Justice Crane include the stores of the Respondents. He submits that Justice Crane heard evidence about all of the Great Glasses stores. In issue in this application will be whether the Respondents are employees or under the direction and control of Bruce Bergez as franchisees. Mr. Frapporti submits that each of the Respondents "should be granted his or her right to give *viva voce* evidence". Given the *prima facie* right of the Applicants to proceed by way of application, however, the Respondents do not have any "right" to give *viva voce* evidence.

[25] At this stage of the application, I am not in a position to determine whether by the time

the application is heard there will be any material facts in dispute as to the relationship between the Respondents in this proceeding and those in the prior proceedings.

[26] The other central issue in this matter is whether or not the manner in which the Respondents dispense eyewear is in breach of the RHPA and the Code. What the standards of the profession are in these circumstances will not be relevant as the allegation is that there has been a breach of sections 27 and 28 of the Code which regulates who may perform a "controlled act".

[27] There has already been a great deal of evidence given on this issue in the application heard by Justice Harris and the contempt proceedings heard by Justice Crane. The Respondents raise various arguments about the admissibility of that evidence which Mr. Aalto conceded will be for the judge hearing the application to determine. Subject to admissibility, at this stage I have approached the motion on the basis that the College will be able to rely upon the transcripts of that evidence, provided the witnesses are available for cross-examination. In any event, it appears that neither Justice Harris nor Justice Crane had any difficulty in proceeding with the matter before them on affidavit evidence.

[28] It is also a relevant consideration that it is conceded that the Respondents operate franchised outlets. Notwithstanding the finding of Justice Crane that the franchises are a "sham", it may be that to the extent they operate as franchises, there will be standards of operation that apply to all of the Respondents. Certainly at this stage I cannot presume that the manner in which glasses are dispensed will vary from store to store. Nor will it necessarily be the case that the Applicant will contest factually the manner in which glasses are dispensed. Furthermore, the parties will be entitled to cross-examine the affiants and other persons, which may reduce or eliminate any contradictory evidence.

[29] Based on what I have heard, I agree with the submission of Mr. Cosman that the dispute is more likely to focus upon whether the acts of the Respondents are lawful on the grounds of the delegation power in paragraph 27 (1) (b) of the RHPA or on some other basis. This would likely largely involve an interpretation of the Act rather than findings on any factual dispute.

[30] For these reasons, I find that certainly at this stage, I am not satisfied that it is inevitable that this matter must proceed by way of action rather than application. To the contrary, I am of the view that the judge hearing the application will be in a position to decide many if not all of the issues. If the judge hearing the application determines that some *viva voce* evidence is required, that would not be fatal as a trial of a particular issue that could be directed. The applications judge could consider a mix of affidavit and *viva voce* evidence to determine credibility issues.

[31] In my view any prejudice as a result of this order to the Respondents, should their position ultimately prove to be correct, is minimal whereas the prejudice to the Applicant, if I prematurely deny the College an opportunity to have some or all of this application heard

summarily is significant.

[32] There is no prejudice to the parties in proceeding with the usual steps needed to ready the application for hearing. If ultimately the judge hearing the application decides to convert the application to an action or to direct that one or more issues be tried, there is no doubt that the cross-examination transcripts can be treated as discovery transcripts subject to any further discovery that is necessary. The cost of those cross-examinations would not be wasted. As for the affidavits, it would be open to the judge hearing the application, as a term of the order directing a trial of an issue pursuant to Rule 38.10(1)(b), to direct that the matter proceed by way of a summary trial so that the affidavits be used as part or all of the examinations-in-chief at trial. All of this would of course be up to the judge hearing the application, but there would be ways to ensure that any prejudice in terms of unnecessary costs would be minimized. As for the cost of arguing the application, the Applicant will risk an adverse costs finding if the College proceeds with the application following the cross-examinations, and is unsuccessful in having the matter dealt with by way of application.

Disposition of the motion to convert

[33] For these reasons, the motion brought by the Respondents to convert the application to an action is dismissed, without prejudice to the Respondents' right to renew this motion before the judge who hears the application on the merits.

[34] The hearing of the application is adjourned to a date to be agreed upon by counsel and fixed by the Scheduling Office. If counsel cannot agree on a schedule to ready this matter for hearing, a 9:15 case conference can be arranged before me through my assistant.

Motion concerning aborted cross-examinations

[35] The next issue is whether or not I should order that the persons who were served with summonses requiring them to attend as witnesses on this application be ordered to attend such examination and order that the respondents pay the costs thrown away for the examinations that did not proceed. Mr. Aalto argues that those persons have not been given notice of this aspect of the motion and that I have no jurisdiction to make the order sought on an ex *parte* basis.

[36] It is the position of Mr. Cosman, that the persons in question are managers or comptrollers of the Respondents. If they are employees of the Respondents, as the Respondents have been given notice of these proceedings and have control over their employees, they presumably have control over producing these witnesses. This is consistent with the fact that counsel for the Respondents requested that these examinations be adjourned.

[37] Although I am sympathetic to the position of Mr. Cosman, Rule 39.03(5) provides that persons to be examined before the hearing of the application may be compelled in the same

manner as provided in Rule 53 for a witness at a trial. Rule 53.04 requires that the summons be served personally on the witness. Since there is no power to serve an employer, I find that since the persons in question were not served with this motion, that I do not have any power to make an order for costs thrown away or order that they attend on a certain date.

[38] In any event, I would be reluctant to make a costs order as the application was brought on short notice and the Respondents needed time to retain and instruct counsel. The fact counsel for the Respondents requested that the examinations be adjourned was not unreasonable.

[39] However to the extent that the persons summoned are in fact employed by the respondents, I expect Mr. Aalto or Mr. Frapporti to advise Mr. Cosman of this so that the cross-examination of these individuals can be timetabled along with the rest of the steps required to get this application ready for hearing on the merits. I would expect as a matter of professional courtesy that in those circumstances service of a new summons, which would serve only to add to the expense of this application, would not be necessary. To the extent that any of the persons in question are not employees of the Respondents, Mr. Cosman will either have to move on notice to them or serve them again with a Notice of Examination. This should also be part of the timetable.

The request for interim relief

Identity of the Respondents

[40] First of all, the Applicant seeks identification of the Respondents who have delivered an appearance through counsel on their behalf. It is submitted that the notice of appearance is deficient in that it did not name the Respondents. Mr. Cosman advises me that he has not found any Rule or case to this effect but submits that it is axiomatic that parties coming to court for relief must be prepared to identify themselves. Mr. Aalto on the other hand argues that I do not have even inherent discretion to order the relief sought and that the identity of his clients is a matter of solicitor-client privilege.

[41] I do not accept Mr. Aalto's submission. The identity of his clients in these circumstances could not possibly be a matter subject to solicitor-client privilege. Even if it were, once the Respondents chose to defend the application and bring a motion for relief, they waived any privilege they had in not disclosing their identities. A party cannot come into this court, seek relief and/or defend a matter and yet refuse to identify itself. The court must be in a position to know who is subject to any order it may make. I find that the respondents must identify themselves if they wish to defend the application.

[42] My conclusion in this regard is consistent with the fact that by virtue of section 135 of the *Courts of Justice Act*, except in the most exceptional circumstances, proceedings before the courts must be open to the public. This has been extended to prevent the publication of the name

of a party in exceptional circumstances, although even in that case the name of the party is disclosed to the court[1].

[43] Furthermore, the only reasonable inference to be drawn from the position taken by the Respondents, and in particular their failure to advise the College of their identity in response to repeated requests from Mr. Cosman, is to delay Mr. Cosman in his efforts to link the Respondents to the other stores referred to in the decision of Mr. Justice Crane.

Disposition

[44] Accordingly, if the Respondents intend to maintain the notice of appearance in this matter and defend the application, they shall forthwith disclose to the Applicant and the court the proper legal name for each of the Respondents described as “John Doe 1” etc. That information shall be provided to Mr. Cosman on or before Wednesday, January 3, 2007.

Interim injunction

[45] Mr. Cosman also seeks an interim injunction requiring the Respondents to comply with the provisions of the RHPA, the Code and the Regulations pending a final hearing and determination of the application. The position of the Respondents is that they should be permitted a “meaningful” opportunity to respond to this request. They point out that the interim relief sought is in fact the same as the relief sought in the application itself.

[46] There is an issue as to what law I should apply in determining whether or not to grant the interim relief sought. In my view I have the power to grant the relief as a term of what was in effect a request by the Respondents for an adjournment of the hearing of the application. I also accept the submission of Mr. Cosman that I can consider the usual three part test for injunctive relief as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* 1994 CanLII 117 (S.C.C.), (1994), 111 D.L.R. (4th) 385 (S.C.C.) at para. 43.

[47] Applying the *RJR-MacDonald* test, there is no doubt that there is a serious issue to be tried. The reasons of Harris J. and Crane J. make this clear. The findings of fact of Crane J. in particular are very broadly worded and on their face appear to apply to all Great Glasses stores. In my view on those findings alone, there is a serious issue as to whether or not the respondents are caught by the order of Harris J. or whether they should be subject to a new order for the same reasons that caused Harris J. and Crane J. to make their findings of fact that the RHPA and the Code has been breached by those operating Great Glasses stores.

[48] With respect to the question of irreparable harm, Mr. Aalto argues that there is no evidence of any actual harm to any person and as such the College has not established it will suffer irreparable harm if the interim relief sought is not granted.

[49] Mr. Cosman responds that there is a real risk of harm and that is sufficient. I agree.

Again there have already been findings of fact, particularly as set out above by Crane J. on the issue of the serious risk of harm. The kind of harm that may be suffered if persons not authorized to do so dispense eyewear, could be serious and not remedied by an award of damages.

[50] Furthermore as submitted by counsel for the College, contraventions of the law, and in particular an Act established to protect persons from unauthorized healthcare practitioners, are inherently contrary to public interest and that presume to create harm or create a risk of harm

[51] The assessment of irreparable harm has a special status in injunction proceedings brought by the Attorney General or other statutory authorities to enforce obligations imposed by statute. In such cases, the need to demonstrate harm is attenuated by the fact that contraventions of the law are inherently contrary to the public interest and are presumed to cause harm or create a risk of harm:

> The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds. Saskatchewan (Minister of the Environment) v. Redberry Development Corp., reflex, [1987] 4 W.W.R. 654 (Sask. Q.B.) at para. 18, aff'd reflex, [1992] 2 W.W.R. 544 (Sask. C.A.)

[52] This presumption of harm is particularly strong in the case of legislation regulating health care professions and restricting the practice of the profession to persons lawfully authorized to do so. This issue was addressed in *Manitoba Association of Optometrists v. 3437613 Manitoba Ltd.* reflex, [1998] 4 W.W.R. 379 (Man. Q.B.) at paras. 32-35, aff'd reflex, (1998), 161 D.L.R. (4th) 638 (Man. C.A.),

> "The applicant is charged by statute with the responsibility of ensuring that those who provide optometric services to the public are qualified to do so.
>
> Where, as here, the court finds that the respondents are in breach of the Act by performing activities and/or providing services; which they are not licenced to do, it seems to me that is the end of the matter. The court should not then, despite that finding, effectively usurp the licencing role of the Association by deciding on a case by case basis whether an individual(s) should be entitled to perform or provide a given service because there has not been proof of damage or harm to the public.
> …
> The legislature has decided what services can be performed by those licenced under the Act and has given the applicant the responsibility for certifying the

skill levels of those permitted to provide such service and for ensuring that such services are provided only by those sufficiently skilled, all in the interest of public safety. It is my view, therefore, that when the court finds that an individual is providing a service(s) for which he/she is not licenced or not qualified to provide, the result ought not to be a case by case analysis by the court with a view to determining whether public safety is met. Rather, the individual in breach should be enjoined from continuing to provide the service, leaving him/her to satisfy either the licencing body or the legislature as to requisite skill level and the legitimacy of the service and/or equipment in question, in the public interest."

[53] I conclude therefore that the Applicant meets the second part of the *RJR-MacDonald* test.

[54] I turn then to the balance of convenience. There has been no challenge to the validity of the provisions of the RHPA and the Code. The only potential for harm to the Respondents, since they have an obligation to comply with the law in any event, is that if I grant the order sought, and if there is a breach, the Respondents may be found in contempt of court when the College's application is heard on the merits.

[55] Mr. Aalto argues that the Respondents have done what they believe is sufficient to comply with the decision of Mr. Justice Harris, but if the court determines that they have not properly done so, on the hearing of this application on the merits, they ought not to be exposed to a possible finding of contempt.

[56] Having considered this submission further, I conclude that it does not outweigh the balance of convenience in favour of the College in enforcing the provisions of the RHPA. The Respondents have an obligation to comply with the law. If they have a genuine and reasonable view of the law, which is ultimately determined to be incorrect by the court, that could not reasonably expose them to a finding of contempt. If, however, they are in flagrant breach of the law, and their professed intentions to comply with the order of Justice Harris are not genuine, then I see no reason why a finding of contempt based on an interim order I might grant, might not be appropriate. In other words, the granting of the interim order will ensure that the Respondents seriously consider their legal obligations pursuant to the RHPA, in light of the findings of Harris J. and Crane J. and that they ensure that they are reasonably in compliance, recognizing that a court may ultimately disagree with their interpretation of the law.

Disposition of the motion for an interim injunction

[57] For these reasons, I order that until this application is disposed of or the Court orders otherwise, the respondents, their employees, agents, independent contractors and other persons carrying on business in association with or on their behalf, shall comply with the RHPA, the Code and the Regulations thereunder.

[58] The draft order provided by the Applicant added a further paragraph directing that the Respondents refrain from certain conduct, which may not be consistent with their obligations under the RHPA. I am not prepared to attempt to summarize the Respondents' specific obligations further so that relief is not granted.

Costs

[59] Counsel submitted Costs Outlines following the hearing but in the interests of releasing this decision, I have not had an opportunity to consider those submissions in detail. As all of the motions were argued together, the College is entitled to its costs of the motion to convert and the motion for other interim relief. I will consider the Costs Outlines and fix those costs and deduct the costs of the motion dealing with the aborted examinations, which the College did not succeed on. Supplementary reasons fixing the costs of the College will be provided to counsel as soon as possible.

SPIES J.

DATE: December 27, 2006

[1] See for eg. *Q.(P) v. Bederman* (1998), 31 C.P.C. (4th) 313