

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** The College of Opticians of Ontario (Applicant) AND City Optical Inc., Robert Parr and Joyce Arthur (Respondents)

**BEFORE:** Madam Justice L.B. Roberts

**COUNSEL:** Peter J. Osborne and Naomi Loewith, for the Applicant  
Julia J. Martin, for the Respondents

**HEARD:** January 28, 2009

**ENDORSEMENT**

**Nature of the application:**

[1] The College of Opticians of Ontario ("The College") brings this application for an injunction prohibiting the respondents from performing the controlled act, as defined in the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 ("RHPA"), of dispensing sub-normal vision devices, contact lenses or eyeglasses, and from holding themselves out or employing persons holding themselves out as persons qualified to practice opticianry in Ontario when they are not qualified or registered members of the College, contrary to the provisions of the *Opticianry Act, 1991*, S.O. 1991, Chapter 34 ("the *Opticianry Act*").

[2] The respondents maintain that at all times they have complied with the requirements of the *RHPA* and the *Opticianry Act*. In particular, it is their position that only qualified or registered members of the College, without delegation of their authority, have performed the controlled acts in issue in this application and that at no time did the respondents perform controlled acts or permit any unqualified persons, including Joyce Arthur, to hold themselves out as persons qualified to practice opticianry in Ontario.

**Issues:**

[3] This application gives rise to the following issues:

- i.) Did the respondents perform or did they permit unqualified and unregistered persons to perform controlled acts contrary to the *RHPA*?
- ii.) Did Joyce Arthur and others hold themselves out as persons qualified to practice opticianry in Ontario contrary to the *Opticianry Act*?

Summary Conclusion:

[4] For the reasons set out in this Endorsement, the application is granted.

Factual and Statutory Background:

*Parties:*

[5] The College is the registering and regulatory body for and regulates the profession of opticianry in Ontario. The College was formed in 1991 pursuant to section 6 of the *Opticianry Act*, continuing the Board of Ophthalmic Dispensers.

[6] City Optical Inc. ("City Optical") is a corporation registered in the Province of Ontario and is the holder of the trademark, "City Optical". Robert Parr is the director, president, secretary and treasurer of City Optical. Mr. Parr is also the director and president of The Optical Authority Inc. ("The Optical Authority"), another corporation registered in the Province of Ontario. The Optical Authority operates the City Optical retail stores. Mr. Parr is the sole director of Beach Optical Ltd., a payroll company employing persons at the retail stores operating under the City Optical name. According to the corporate profile report filed by the College, Beach Optical Ltd. has ceased to exist. At the material time, Joyce Arthur was an employec of Beach Optical Ltd. and works at one of the City Optical retail stores. Mr. Parr and Ms. Arthur are not opticians.

[7] The Optical Authority operates five retail stores in the Greater Toronto Area. In addition, The Optical Authority operates a laboratory, where lenses that require only finishing are made for the retail stores. When lenses require surfacing, they are sent to an external laboratory and then returned to the City Optical laboratory for finishing. During the time of the events giving rise to the issues in this application, The Optical Authority also operated a second laboratory and three other City Optical retail locations.

[8] The respondents dispute that this application is properly brought against City Optical, contending that City Optical is not the operating company of the City Optical stores, and have agreed that any order that I may make shall bind The Optical Authority and Beach Optical Ltd., although those corporations are not named as parties to this application.

[9] Given the apparent demise of Beach Optical Ltd., the description of the respondents' operations as "City Optical", and its involvement in the operation of the respondents' operations by use of the trade mark which it holds, I am of the view that City Optical should also be bound by my order.

*Statutory Framework:*

[10] In Ontario, all health care professionals are governed by the *RHPA*. They are also governed by statutes specific to each health care profession. The *RHPA* and the acts specific to each health care profession operate in a co-dependent and co-ordinated manner: *College of Optometrists of Ontario v. SHS Optical Ltd. (c.o.b. Great Glasses)*, [2006] O.J. No. 4708 (S.C.J.), at para. 21.

[11] The College has a duty to serve and protect the public interest in carrying out its objects. Its jurisdiction to consider the allegations at issue and the underlying conduct is found in the *Opticianry Act* and the *Health Professions Procedural Code* (the "Code"), which, by virtue of section 2 of the *Opticianry Act*, is deemed to be part of the *Opticianry Act*. The Code is Schedule 2 of the *RHPA* which stipulates that the objects of the College include the following:

- (a) to regulate the practice of the profession and to govern the members in accordance with the health professions Act, the *Code*, the *RHPA* and the Regulations and By-Laws;
- (b) to develop, establish and maintain programs and Standards of Practice of the profession;
- (c) to develop, establish and maintain Standards of Professional Ethics for the members;
- (d) to administer the health professions Act, the *Code* and *RHPA* as it relates to the profession and to perform the other duties and exercise the other powers that are imposed or conferred upon the College; and
- (e) any other objects relating to human health that the Council considers desirable.

[12] The *RHPA* sets out 13 controlled acts, including the act of dispensing in issue in this application, which the legislature has determined may only be performed by a member or delegated to a person by a member of a health profession as authorized under the applicable statute or regulation. Section 27(2) of the *RHPA* lists those controlled acts, and the profession-specific statutes to outline who is authorized to perform and to delegate a controlled act.

[13] In particular, the *RHPA* states:

27(1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,

- (a) the person is a member authorized by a health profession Act to perform the controlled Act; or
  - (b) the performance of the controlled act has been delegated to the person by a member described in clause (a).
- (2) A "controlled act" is any of one of the following done with respect to an individual:
- 9. Prescribing or dispensing, for vision or eye problems, sub-normal vision devices, contact lenses or eye glasses other than simple magnifiers.

30(1) No person, other than a member treating or advising within the scope of practice of his or her profession, shall treat or advise a person with respect to his or her health in circumstances in which it is reasonably foreseeable that serious physical harm may result from the treatment or advice or from an omission from them.

[14] The legislature has determined that the acts listed in 27(2) are inherently dangerous. The court does not have discretion to engage in a risk analysis in each separate case. As a result, with respect to the controlled act of prescribing or dispensing for vision or eye problems, only opticians and optometrists can perform those tasks:

Section 27(2) does not delegate identification of the level of risk to be protected to the court. Rather, the Legislature signaled its intent as to the level of risk to be protected by listed the prohibited activities that constitute controlled acts.

*(King Optical Group Inc. v. College of Opticians of Ontario, [2001] O.J. No. 4779 (C.A.)).*

[15] The relevant provisions of the *Opticianry Act*, which *Act* governs all members of the College of Opticians, provide:

*Scope of practice*

3. The practice of opticianry is the provision, fitting and adjustment of sub-normal vision devices, contact lenses or eye glasses.

*Authorized acts*

4. In the course of engaging in the practice of opticianry, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to dispense sub-normal vision devices, contact lenses or eye glasses.

*Representations of qualification, etc.*

- 9(3) No person other than a member shall hold himself or herself out as a person who is qualified to practice in Ontario as an optician or in a specialty of opticianry.

*Relevant facts:*

[16] There is a dispute between the parties concerning the relevant facts on this application, which requires me to set out in some detail the respective versions of the relevant facts put forward by the parties.

[17] The fact that there are disputed material facts does not preclude a summary hearing because the College is *prima facie* entitled to proceed by way of application: *College of*

*Opticians of Ontario v. John Doe 1 (c.o.b. Great Glasses)* [2006] O.J. No. 5113 (Sup.Ct.J.), at para. 21. I have indicated where the facts are in dispute.

[18] In 2005, it came to the attention of the College that City Optical and its staff may have been holding themselves out as opticians, and dispensing sub-normal vision devices although they were not members of the College.

[19] On December 29, 2005, the College sent a letter by registered mail to Mr. Parr indicating the possible unlawful practices that had come to its attention. The December 29th letter warned City Optical to cease any conduct in violation of the *Opticianry Act* or *RHPA*, and indicated that the College would commence legal proceedings if it obtained evidence of violations of the statute. Mr. Parr did not respond to the College's letter.

[20] On March 17, 2006, the College wrote again to Mr. Parr, indicating that it had received no response to its December 2005 letter and reminding Mr. Parr of the regulations regarding the practice of opticianry. The College again asked Mr. Parr to deliver a confirmation of his intent to comply with the provisions of the *Opticianry Act* and the *RHPA*.

[21] The College has never received a response from Mr. Parr, nor has he signed the requested confirmation that he agrees to comply with the provisions of the *Opticianry Act* and *RHPA*.

[22] On Wednesday, April 25, 2007, Mr. Wayne Moore, as the College's investigator, attended the 2900 Steeles Avenue East City Optical location. The only employee in the City Optical store at that time was the respondent, Joyce Arthur.

[23] Mr. Moore gave a May 2005 eyeglass prescription to Ms. Arthur. Ms. Arthur asked if he wanted to have an eye examination but Mr. Moore declined the offer.

[24] According to Mr. Moore's affidavit, sworn on March 31, 2008, and filed by the College in support of this application, Ms. Arthur selected a pair of frames, which she stated, "fit behind [Mr. Moore's] ears well" and "looked good" on him. Ms. Arthur advised Mr. Moore that there was a "buy one, get one free" promotion. As a result, Mr. Moore selected a second pair of frames which Arthur indicated could be tinted for an extra \$35 to be used as sunglasses for driving.

[25] Ms. Arthur transferred the information from Mr. Moore's prescription to the invoice she prepared. According to Mr. Moore, during their discussion, Ms. Arthur asked Mr. Moore if he could read an advertisement posted on the front windows of the store. The printing on the advertisement was large and Mr. Moore stated that he had no particular difficulty reading it with or without glasses.

[26] Mr. Moore subsequently received a message on his voicemail indicating that the glasses were ready for pick-up.

[27] Mr. Moore attended at City Optical to pick up his glasses on Friday, May 4, 2007. Ms. Arthur was the only employee working at City Optical when he returned. Mr. Moore tried on both pairs of glasses.

[28] Mr. Moore's evidence is that Ms. Arthur said the following to him:

- i.) She remarked that, "the arms look right behind your ears".
- ii.) She asked if Mr. Moore could "read okay", directing him to the same advertisement posted on the store window that he had read when he attended to purchase the glasses.
- iii.) Mr. Moore indicated to Ms. Arthur that the glasses seemed fine for distance reading, but commented that the nosepieces on the tinted pair seemed a little tight. Ms. Arthur stated, "No, they look fine to me". Mr. Moore commented again a few moments later that the nosepieces felt a little uncomfortable, and Mr. Arthur repeated, "No, they look good to me".

[29] While the respondents admit that glasses were purchased by Mr. Moore and that Ms. Arthur would have been the City Optical employee at the store on the days of Mr. Moore's visits, they deny that Ms. Arthur made the comments attributed to her by Mr. Moore.

[30] Ms. Arthur admitted on her cross-examination in these proceedings that she had no independent recollection of Mr. Moore's visits. Ms. Arthur's evidence was that she followed her usual practice and denied that she comments on a customer's vision or prescription, takes measurements of a customer, places glasses on a customer's face, or makes adjustments to a customer's glasses. At the time that a customer picks up his or her glasses, if any adjustments are necessary, she asks the City Optical optician on duty or Dr. Dickson Liu, an optometrist who shares space with City Optical, to perform the adjustments as required. According to Ms. Arthur, she only comments on the aesthetic appearance of the glasses, namely, whether or not the style and/or colour suits a customer's face or colouring.

[31] In the same way, Mr. Parr admitted on his cross-examination that he had no personal knowledge of nor did he produce any documentation concerning Mr. Moore's visits to the City Optical store. Nevertheless, Mr. Parr deposed in his affidavit that Ms. Arthur would not have made the comments attributed to her.

[32] At the time that Mr. Moore visited City Optical, and continuing to today, the 2900 Steeles Avenue East City Optical store is open from Monday to Saturday, from 10:00 a.m. to 6:00 p.m., as are all other City Optical locations. At the time of Mr. Moore's visit, and as noted above, City Optical in fact had eight retail locations, all of which were open on a full time basis.

[33] The evidence of the respondents is that some of the City Optical stores have full time regulated health professionals on staff and some do not. At the time of Mr. Moore's attendances in 2007, an optician, Chris Dempster, worked at the 2900 Steeles Avenue East City Optical retail store on Mondays from 10:00 a.m. to 6:00 p.m., and no other days. It is undisputed that he had no direct interaction with Mr. Moore. Mr. Dempster no longer works at City Optical; Jie Zhao is the optician who now works Mondays at the 2900 Steeles Avenue East retail store.

[34] Dr. Dickson Liu, an optometrist, practices next door to City Optical at 2900 Steeles Avenue East. Dr. Liu's evidence is that, at the time of Mr. Moore's attendances, he worked at

2900 Steeles Avenue East on Tuesdays from 1:00 p.m. to 6:00 p.m., Thursdays from 10:00 a.m. to 6 p.m., and Saturdays from 9:30 a.m. to 2:00 p.m., and that his routine is still the same to-day. It is undisputed that Dr. Liu had no direct interaction with Mr. Moore.

[35] The undisputed evidence is that the sole City Optical employee authorized to dispense eye glasses at the 2900 Steeles Avenue East location works only on Mondays. At all other times, there is no City Optical employee authorized to dispense eye glasses at that location. Ms. Arthur is the sole City Optical employee present at all other times that the retail store at 2900 Steeles Avenue East is open. Further, there is no issue that there is no optician available on Tuesdays before 1:00 p.m., Wednesdays and Fridays. This practice was the same at the time of Mr. Moore's attendances.

[36] The respondents' evidence is that, when a customer attends the 2900 Steeles Avenue East City Optical store to purchase eye glasses, a customer will only interact with a registered optician if he or she happens to attend on a Monday or during the days and times that Dr. Liu is in his office on Tuesdays, Thursdays and Saturdays and is available to leave his office to attend at the City Optical store. Ms. Arthur will offer customers a free eye examination. If that offer is declined, Ms. Arthur will complete an order for eye glasses by copying the information from the prescription on to the invoice form. The prescription is sent to the City Optical laboratory for the order to be filled.

[37] No record is kept of which individual at the laboratory manufactures the glasses or of which optician supervises the manufacturing. Mr. Dempster, who worked at the City Optical laboratory on certain days, was not able to discern from the records who manufactured Mr. Moore's glasses. Mr. Parr stated that it would be impossible to review the record and determine where Mr. Moore's glasses were made, or by whom. No such records have been produced in these proceedings.

[38] The respondents' evidence of their general practice is that, when glasses are returned to the 2900 Steeles Avenue East store, the following steps are taken by the optician on duty or Dr. Liu before the glasses are given to a customer:

- (i) the glasses are cleaned;
- (ii) they are bench aligned (straightened or balanced); and
- (iii) they are checked using the lensometer to ensure that the prescription matches the lenses.

[39] On cross-examination, however, Dr. Liu stated that he only very occasionally verifies lenses after they have returned from the laboratory.

[40] The respondents' evidence is that, after glasses have been verified, a customer is called and advised that the glasses are ready to be picked up. Although Ms. Arthur and Mr. Parr deposed that customers are encouraged to return to pick up their glasses when Dr. Liu or another optician is present, the respondents' evidence establishes that customers do not always adhere to

the request to attend at the times when a City Optical optician or Dr. Liu is present in the store, and that customers can pick up their glasses without seeing an optician.

[41] Contrary to her affidavit and to the evidence given by Mr. Parr, Ms. Arthur stated on her cross-examination that, if a customer attends during a time when a City Optical optician or Dr. Liu is not present, she will refuse to let them try on or pick up their glasses.

[42] In my view, Ms. Arthur's evidence on cross-examination about her practice does not serve to contradict Mr. Moore's evidence about his visit to the store to pick up his glasses. As noted above, Ms. Arthur admitted on her cross-examination that she has no independent recollection about Mr. Moore's visits to the 2900 Steeles Avenue East store. Mr. Moore's evidence that he picked up his glasses without any interaction with an optician is supported by the respondents' affidavit evidence, including Ms. Arthur's affidavit. Mr. Parr stated on cross-examination that some customers do take their glasses when no regulated health care professional is present. Mr. Parr initially said on his cross-examination that such incidents are "very rare", but then later admitted that he had "no idea" how often they happened. The respondents' evidence is also that no optician is present at the store on Fridays. Mr. Moore's unchallenged evidence is that he picked up his glasses from the store on a Friday.

[43] In response to an undertaking given during Mr. Parr's cross-examination concerning any City Optical policies, procedures or protocols for dispensing that are used, the respondents produced a document entitled, "Guidelines for Professional Standards of Practice" of the College of Opticians of Ontario. Appendix B of the Guidelines sets out the contents of the Patient Health Record that the Guidelines stipulate must be kept for each patient, including dispensing details.

[44] No records of verification or of any of the other steps in the dispensing of Mr. Moore's glasses or of the glasses of any other customer by Dr. Liu, Mr. Dempster or any other health care professional have been produced.

[45] Based on the unchallenged evidence and the evidence that is not in dispute, I find that the usual procedure followed by the respondents in dispensing glasses at the 2900 Steeles Avenue East City Optical store and, in particular, in dispensing glasses to Mr. Moore, is as follows:

1. At least five days out of six, the customer may give his prescription to an unregistered employee who simply copies the details onto a form without verification of the accuracy or currency of the prescription.
2. The form is sent to a laboratory, where the glasses are manufactured. There is no means of verifying which regulated health professional (or indeed, if any) at the laboratory was responsible for their fabrication.
3. The glasses are returned to the store. If the glasses arrive on a Monday, they may be verified by the optician on duty. If they arrive on a Tuesday, Thursday or Saturday, Dr. Liu may very occasionally verify them. Otherwise, no one is present to verify that the glasses were manufactured to the appropriate specifications.



4. The customer is notified that his glasses are ready to be picked up. The customer can pick these glasses up at a time when neither the City Optical optician nor Dr. Liu is present. If there are no problems or concerns, the customer takes the glasses and leaves. If there are problems or concerns, the customer can still take the glasses and leave without being required to see an optician.
5. There are no records to confirm that any glasses are verified at any time or to document the other steps in the dispensing process.

Analysis:

*Controlled Acts:*

[46] It is the controlled act of dispensing eye glasses that is in issue in this application. It is admitted by the respondents that there has been no delegation of the responsibilities of the only two regulated health professionals who are on occasion available to assist customers at the 2900 Steeles Avenue East City Optical store, Dr. Liu and Mr. Dempster.

[47] The *RHPA* and the *Opticianry Act* do not define the act of dispensing. In *King Optical Group Inc. v. College of Opticians of Ontario, supra*, the Ontario Court of Appeal confirmed that dispensing eye glasses means the preparation, adaptation and delivery of eye glasses to a person, and that the preparation of eye glasses means all actions necessary to be performed prior to adaptation and delivery (paras. 6 and 28-32).

[48] This definition has been agreed upon and endorsed by the College of Opticians and the College of Optometrists, the two colleges with the responsibility for governing the controlled act of dispensing. The College of Opticians and the College of Optometrists have also agreed on the following standards of practice in dispensing:

In dispensing, a member shall

1. establish a professional relationship with a person prior to dispensing to that person;
2. identify himself or herself to any patient to whom the member dispenses, and within the record of care made and maintained by the member about that patient;
3. determine and record the specifications of the eyeglasses, contact lenses, or subnormal vision devices to be provided to a patient;
4. confirm and record that the eyeglasses, contact lenses, or subnormal vision devices to be provided or delivered to the patient are appropriate;  
and

5. provide and record the necessary advice, counseling, and associated care to the patient about the use of the eyeglasses, contact lenses, or subnormal vision devices.

*(Report of the College of Opticians of Ontario and the College of Optometrists of Ontario in response to the Recommendations 97 and 98 of the Red Tape Review Commission, May 20, 1998)*

[49] The College of Opticians' Guidelines produced by the respondents set out the following dispensing functions which the Guidelines stipulate must be performed by a registered optician: evaluation of patient needs; interpretation of the prescription; determination of frame suitability based on the prescription; all measurements; preparation of final design of eye glasses, contact lenses and sub-normal vision devices; verification of completed and/or repaired eye glasses, contact lenses, and sub-normal vision devices; fitting; adjusting; and follow up care.

[50] Applying the above criteria, I am of the view that the respondents are not in compliance with the applicable statutory and regulatory framework of the *RHPA* and the *Opticianry Act* or the relevant standards of practice enunciated by the College of Opticians of Ontario and the College of Optometrists. The respondents have not met the requirement that a registered optician carry out the act of dispensing. Mr. Parr admitted on his cross-examination that dispensing occurs every day at his stores. The evidence establishes that no optician is guaranteed to be present on five of the six days of the week when the act of dispensing is performed at the 2900 Steeles Avenue East retail store. Ms. Arthur is frequently the only person at the 2900 Steeles Avenue East City Optical store. As a result, an optician is not always present to intervene or to ensure that the appropriate standards are being met.

[51] The respondents submit that the Court ought not to consider the College's evidence of one visit that occurred over two years ago and that, even if true, it is not representative of the practice of the respondents. In my view, the College has produced evidence of actual infringement which is representative of the respondents' practices and procedures.

[52] In the present case, there is no question that the respondents do not have an optician available on site every day and during all hours that the 2900 Steeles Avenue East City Optical store is open. The undisputed evidence noted above is that a City Optical optician is available only on Monday, and Dr. Liu may be available for consultation on Tuesday, Thursday and Friday of the six days the stores are open. The respondents' evidence is that a customer's prescription is handed to an unregistered person who cannot verify the accuracy or currency of the prescription five out of the six days that the 2900 Steeles Avenue East City Optical store is open. The respondents have not produced any records to demonstrate that any of the steps required to be followed in the dispensing process have been completed by a registered optician.

[53] In my view, there is no question that the respondents' present practice of not ensuring that opticians are present or available for consultation at all times in the 2900 Steeles Avenue East City Optical store creates a substantial risk that the dispensing of eye glasses by non authorized persons in breach of the *RHPA* and the *Opticianry Act* will repeatedly occur.

[54] The respondents argue that there is no risk to the public as there is no evidence that the glasses manufactured by the respondents are defective. The respondents filed evidence of glasses

ordered through an internet company where there was no contact with an optician, in support of their argument that the presence of an on-site optician is not necessary and that the respondents' system and practices do not pose any danger to the public.

[55] Even though I have held that the College has done so, it is not necessary that the College show proof of actual harm to the public, as it is no defence to the College's application that a person who is not lawfully authorized to perform a controlled act is as equally competent or as capable as a member of a College who is lawfully authorized to do so: *College of Opticians of Ontario v. John Doe 1 (c.o.b. Great Glasses)*, *supra*, at para. 23. Further, as noted in the excerpt from "A Complete Guide to the RHPA", 1996, Canada Law Book, submitted by the respondents, the legislative scheme suggests that unregistered persons performing controlled acts or improperly holding themselves out constitute a danger to the public.

[56] In essence, the respondents ask that this Court ignore the clear provisions of the *RHPA* and the *Opticianry Act* and decline to enforce them. The respondents do not recognize that their practices and procedures are not in compliance with the statutory framework. This creates exactly the kind of serious risk of harm to the public envisaged by the *RHPA* and the *Opticianry Act*, which ought to be enjoined.

*Holding out:*

[57] I turn next to the issue of whether or not Ms. Arthur was holding herself out to be an optician contrary to section 9(3) of the *Opticianry Act*.

[58] The parties provided case law with their written submissions that were delivered to me following the hearing of the application. According to the relevant case law, the basic test is whether, on a balance of probabilities, a reasonable member of the public would infer from the conduct of Ms. Arthur that she was recognized by law or otherwise as an optician: *College of Physicians and Surgeons of Ontario v. Larsen*, [1987] O.J. No. 1106 (H.C.J.), at para. 37.

[59] The respondents argue that, even if I were to hold that Ms. Arthur was performing the controlled act of dispensing, the fact that, as Ms. Arthur testified on her cross-examination, she recognized that glasses should only be delivered to customers when an optician is present, so that the glasses can be properly dispensed, means that she did not intend to hold herself out as an optician. As this is an objective test, whether or not Ms. Arthur had the subjective intention to hold herself out as an optician is irrelevant to the determination of this issue: *College of Dental Hygienists of Ontario v. Tota*, [2008] O.J. No. 694 (Sup.C.J.), at para. 6.

[60] The respondents submit that an important criterion to be considered in determining whether or not a person is holding himself or herself out as a practitioner, which is missing from this case, is whether or not he or she uses a title. In my view, that criterion alone is not determinative of the issue of holding out. It is clear from the cases submitted by the parties that, if a person is performing unauthorized controlled acts without supervision, it can create a context in which a reasonable person would believe that the person who was carrying out the controlled acts is holding himself or herself out as a practitioner: *College of Dental Hygienists of Ontario v. Tota*, *supra*.

[61] Applying the above criteria to the circumstances of this application, based on the undisputed evidence, I am satisfied that a reasonable member of the public would infer from the conduct of Ms. Arthur that she was recognized by law or otherwise as an optician or a person otherwise authorized to carry out the act of dispensing. The evidence establishes that Ms. Arthur was alone in the store at least five days per week and that, on those days, she could accept customers' prescriptions and orders for glasses, and deliver glasses to them without the requirement that they see an optician. Those acts were part of the continuum of the controlled act of dispensing and were sufficient to lead a reasonable member of the public to infer that Ms. Arthur was authorized to perform them and any of the other required steps in dispensing glasses: *King Optical Group Inc. v. College of Opticians of Ontario, supra*, at para. 34.

[62] Although the fact that Ms. Arthur may not have understood that she was not permitted to carry out the acts in question is not a defence to this application, I do not find that Ms. Arthur's conduct was highhanded or indifferent to the patients' interests. The real responsibility here is with Mr. Parr and the other respondents who permitted Ms. Arthur to carry out the controlled acts without delegation and without proper supervision. The respondents failed to ensure that opticians or persons to whom authority was properly delegated were present at all relevant times to dispense eye glasses to customers.

[63] The respondents' contention that Ms. Arthur may not have carried out all of the necessary steps in dispensing glasses further highlights the danger to the public in allowing an unauthorized and unsupervised person to interact with customers and leave the impression that she was performing whatever steps were required to carry out properly the act of dispensing. As is evident from the language of section 30(1) of the *RHPA*, one of the reasons that only a member of a College or other authorized person may treat a patient is because serious physical harm may result from an omission in the proper treatment or advice that should be given.

[64] As a result, I find that Ms. Arthur held herself out as an optician or as a person authorized to perform the controlled act of dispensing and that the other respondents permitted Ms. Arthur to hold herself out as such, contrary to the provisions of section 9(3) of the *Opticianry Act*.

Order:

[65] For the reasons set out above, order to go granting the relief requested by the College in subparagraphs 1(a) to (f) of its notice of application.

Costs:

[66] If the parties cannot agree on the issue of costs, they may make brief written submissions to me as follows: the College shall deliver its submissions by May 13, 2009; and the respondents shall deliver their submissions by May 27, 2009. I shall then decide whether or not, in the circumstances of this case, it is appropriate to award costs.



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L.B. Roberts, J.