



COLLEGE OF
OPTICIANS
Ontario

Discipline Committee of the College of Opticians of Ontario

July 26, 2005

AT THE COLLEGE OF OPTICIANS OF ONTARIO

Between:

COLLEGE OF OPTICIANS OF ONTARIO

-and-

MR. BALBIR KUMAR GHAI, C-894

REASONS FOR DECISION & PENALTY

ORIGIN OF THE CASE

THE EXECUTIVE COMMITTEE OF THE COLLEGE OF OPTICIANS OF ONTARIO referred specific allegations of professional misconduct against Mr. Balbir Kumar Ghai, registration C-894, to the Discipline Committee of the College. The allegations were referred in accordance with section 36 of the *Regulated Health Professions Procedural Code*, Schedule 2 (the "Code") to the *Regulated Health Professions Act, S.O. 1991 c.18* (the *RHPA*). The allegations in the Notice of Hearing were that Mr. Balbir Kumar Ghai, registration C-894, committed acts of professional misconduct under,

1. Section 51(1)(a), 51(1)(b.1) and 51(1)(c) of the Code and section 1, paragraphs 6, 27 and 28 of Regulation 828/93, as amended, promulgated pursuant to the *Opticianry Act, S.O 1991, c.34* (the "Act") between March 1 and 15, 2001.

The Specific allegations were that between March 1 and 15, 2001, Mr. Ghai:

- (a) Contravened section 266 of the *Criminal Code, R.S.C. 1985, C-46, s. 745* (the "*Criminal Code*") by committing the offence of assault, which contravention is relevant to his suitability to practice;
- (b) Sexually abused a patient;
- (c) Physically abused a patient; and
- (d) Engaged in conduct in the course of practicing opticianry, that having regard to all the circumstances would reasonably be regarded by

members of the College of Opticians as disgraceful, dishonourable or unprofessional.

The Notice of Hearing was summarized for the Panel by the College's Prosecutor Mr. D. Rosenbaum.

PLEA

The Panel asked for Mr. Ghai's plea. Mr. Ghai pleaded not guilty.

Summary of the Evidence

Mr. Rosenbaum introduced as evidence a copy of a Guilty Plea Proceeding that occurred April 15, 2003. This hearing was held at the Ontario Court of Justice in the Matter of *Her Majesty the Queen v. Balbir Ghai*. Mr. Ghai pleaded not guilty to sexual assault, but pled guilty to *assault simpliciter*. The panel was given a copy of the transcript. At the criminal hearing Mr. Ghai acknowledged the following facts as correct.

Between March 1 and 15, 2001, the Patient attended Mr. Ghai's business premise for the purpose of getting her eye glasses fixed.

She had simply dropped in to see if her eye glasses could be fixed. She approached the counter, and the only employee who appeared to be present was Mr. Ghai, the owner of the store. Mr. Ghai began to do some work for the purpose of repairing her eye glasses. Other customers came in and Mr. Ghai served those customers while the Patient waited at the front of the store. When the other customers left, Mr. Ghai then provided the Patient with her eye glasses and asked her if she could wait a minute.

She was then taken to some seats that are in the front of the store by a window, and she and Mr. Ghai began to have a discussion. Mr. Ghai advised the Patient that one of his favourite aunts had recently died in Kenya. He also advised her that his daughter was getting married. It appeared to the Patient that Mr. Ghai was becoming emotional, and she wondered whether or not he was about to cry.

There had been a discussion earlier, when he was fixing her eye glasses, where he had grimaced, apparently in pain, and had put his hand on his back, and had made a comment to the effect of "*Ah, to be young...*" The Patient, who was 30 years of age and was undergoing physiotherapy three times a week in respect of some neck problems, indicated to Mr. Ghai that she was only 30 years of age, and notwithstanding her youth, she was experiencing significant difficulties with her neck. Mr. Ghai made a comment to her that it was all in her head.

They were now sitting in the front area, after he had shared with her that his aunt had died and that his daughter was getting married. He then leaned forward and asked the

Patient whether or not she trusted him. Having no reason not to trust him, she indicated "yes".

She was escorted to the back area within the store. She was placed in a chair, and then Mr. Ghai put his legs in between the Patient's. He undid the straps from her overalls, took the bib down and undid the buttons at the front of the sweater. At this point, he began to place his hands on the Patient's back and rub in a circular motion. The Patient was extremely uncomfortable with what had occurred and indicated, essentially, that at this juncture she simply froze, finding herself unable to move or speak. Mr. Ghai then began to move his hands from her back towards the front. At this time he was either mumbling or perhaps praying, but the Patient did not understand what exactly was being said.

Slowly, in this circular messaging motion, Mr. Ghai brought his fingers towards the Patient's front, and then was touching her stomach. All of a sudden, he stopped, got up and proceeded to the partition area. It appeared as if he was looking to see if anyone else was in the store. At this point the Patient attempted to close the sweater that had been unbuttoned earlier, as it exposed both her bra and her breasts. Mr. Ghai then proceeded to tell the Patient that she was to touch her nipples, and asked her specifically, which nipple was bigger. The Patient indicated that both of her nipples were the same size, and at that point Mr. Ghai accused her of lying. He then walked over to the Patient, opened her sweater and placed his hand on her breast stroking a nipple. The Patient was again asked as to which nipple was bigger, and she indicated that her right one was. She was becoming increasingly upset as this incident was unfolding.

At this point Mr. Ghai grabbed the Patient on either side of her forehead with both hands and pulled her head towards him kissing her on the forehead. He then instructed her to say a prayer in her own language. The Patient's background is Dutch. Although not making a prayer, the Patient indicated in Dutch "*I don't like this and I want to go home.*"

Mr. Ghai then asked the Patient to wait, he went over to another area at the back of the store where there were a number of small appliances. He took a small cup from a water cooler and filled it with water. He then came back and sprinkled the water over the Patient's head and between her breast with his hand. When he finished, he indicated that there was one more step in "*the healing process*". Mr. Ghai had earlier indicated to the Patient that at various times he believed he possessed healing powers.

He then proceeded into a kitchen area, and essentially made himself a cup of coffee, and offered the Patient one as well. When she came into the kitchen area she had closed up the buttons on her sweater, and he told her that she was "*not to do that again*". Again she sat in the chair, and complained that she was cold. She refused the cup of coffee that was offered and, again Mr. Ghai sat down in front of her placing his legs in between hers. He continued the process of placing his hands under her overalls and rubbing her stomach. He then stuck his finger into her bellybutton. During this time he was either moaning or chanting or praying, but what exactly was being said could not and was not understood by the Patient. Abruptly, he stood up and advised the Patient that she was to get dressed.

At this juncture, some other patrons came into the store and the Patient quickly gathered herself together and immediately fled the store.

PRELIMINARY ISSUE

During the hearing, the College objected to Mr. Ghai giving evidence inconsistent with the facts he acknowledged as being correct in pleading guilty to the criminal charge. The Panel found the facts outlined in the prior criminal conviction to be admissible to show professional misconduct under the Act. The Panel did not believe that Mr. Ghai should be able to introduce evidence that was inconsistent with his admission to the criminal court because the evidence of a prior criminal conviction is admissible in subsequent civil proceedings. A convicted person cannot attempt to prove the conviction was wrong in circumstances where it would constitute an abuse of process to do so. He had admitted this conduct in open court. He was represented by a lawyer at the time. The Panel permitted Mr. Ghai to give new information as long as it did not conflict with his original testimony. An optician is expected to be honest at all times and should not admit to anything in court that is not factual.

THE DECISION

The Panel found that these facts did constitute acts of professional misconduct contrary to section 51(1)(a), 51(1)(b.1) and 51(1)(c) of the Code and section 1 , paragraphs 6, 27 and 28 of Regulation 828/93 , as amended, promulgated pursuant to the *Opticianry Act, S.O 1991, c.3. (b)*

Exhibit 3 was a certified copy of the finding of guilty for breach of section 266 of the *Criminal Code, R.S.C. 1985, C-46, s 745* by committing the offence of assault. On the admitted facts, the findings constitute a contravention relevant to Mr. Ghai's suitability to practice because she was a patient. Mr Ghai abused the Patient over a period of time and moved her to the back of the store. This touching was unrelated to the practicing of opticianry. The touching was upsetting at the time and appeared to become more disturbing with the passage of time. This behaviour would be conceived as reprehensible by fellow opticians.

Sexual abuse is defined in section 1 of the Code as follows:

Sexual abuse of a patient

(3) In this Code,

“sexual abuse” of a patient by a member means,

- (a) sexual intercourse or other forms of physical sexual relations between the member and the patient,
- (b) touching, of a sexual nature, of the patient by the member, or

(c) behaviour or remarks of a sexual nature by the member towards the patient.

Exception

(4) For the purposes of subsection (3),
"sexual nature" does not include touching, behavior or remarks of a clinical nature appropriate to the service provided.

These admitted facts also constitute sexual abuse, because touching of a woman's breasts by an optician is of a sexual nature and is completely unrelated the practice of opticianry. Some of the comments relating to the size of the patients nipples also were of a sexual nature. The admitted facts also constitute verbal / physical abuse because the comments were unrelated to the practice of opticianry and would be disturbing and would be upsetting to most people. The admitted facts also constitute a breach of a federal law, the *Criminal Code*, and a breach of human rights law, that are relevant to Mr. Ghai's suitability to practice opticianry, because it was unwanted touching of a vulnerable patient. In cases under human rights legislation across Canada, tribunals have had little difficulty including unwanted breast-touching as constituting sexual harassment. These admitted facts would also be reasonably regarded by members as disgraceful, dishonourable and unprofessional. Cornering a patient in your store and making unacceptable verbal comments, disrobing, and touching is completely inappropriate.

PENALTY

The Panel imposes the following sanctions on Mr. Balbir Kumar Ghai:

- 1) Mr. Ghai will attend before the Panel to be reprimanded, with said reprimand recorded in the public portion of the Register of the College of Opticians of Ontario.
- 2) The Panel directs the Registrar to suspend the certificate of registration of Mr. Ghai and Mr. Ghai will not be permitted to apply for reinstatement of his certificate of registration until January 1, 2008 at the earliest, and only thereafter if he has, at his own expense, successfully completed a course on ethics and boundaries designed or approved by the Registrar.
- 3) Pursuant to section 53.1 of the Code, Mr. Ghai shall pay \$10,000.00 towards the costs of the College of Opticians of Ontario, payable on the 15th day of each month, and each debit payment to be in the amount of \$500.00. Payments shall commence one month from today's date and shall conclude only when the final payment has been rendered (the "Payment Period").
- 4) If Mr. Ghai fails for two consecutive months to effect the required payment by the 15th day of the month, regardless of when such failure occurs during the payment period, the total of the amount outstanding shall be due and payable forthwith.
- 5) Since the Panel determines that the Patient was sexually abused by Mr. Ghai and is therefore eligible for funding under a program required under

section 85.7 of the Code, pursuant to section 51(2)5.1 of the Code, Mr. Ghai shall reimburse the College for any funding provided to the Patient or on her behalf, for therapy or counselling.

- 6) Upon re-instatement of Mr. Ghai's certificate of registration he shall not see female patients except in the presence of another adult female. This condition will be in effect until Mr. Ghai provides the Registrar with a report from a psychiatrist that there is little likelihood he will repeat the behaviour that gave rise to the findings of professional misconduct against him.

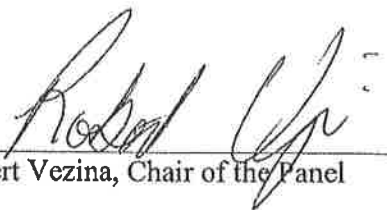
The Panel believes that this Order is appropriate on the facts of this case because:

- 1) By attending before the Panel for a reprimand Mr. Ghai will hear from his peers.
- 2) Mr. Ghai is not currently practicing and most likely will not be doing so in the near future. Sexual abuse is a very serious matter, and the Panel felt that a shorter suspension would not act as a sufficient deterrent to prevent this from happening again. This order was different than either party had asked for. *The College of Opticians vs. Sethi* case was much less serious than this one and the Panel felt that a much longer suspension in this matter was needed to deter this from happening again. The prosecution had asked for a 6-month suspension upon the reinstatement of Mr. Ghai's certificate of registration as an optician (Mr. Ghai's certificate of registration is currently suspended). The Panel felt that this may in fact be a much longer suspension and that the ordered time period is more definitive. The Panel felt this penalty should not be hanging over Mr. Ghai forever; he should be able to get it over with, but at the same time it should not be too short.
- 3) The Panel is certain the College of Opticians' actual costs in this matter were well over \$10,000.00. These expenses would include the investigation, the executive committee reviewing, the costs of the College's lawyers, the pre-hearing conference that was held, the travel costs and honoraria of the Panel members, many of whom traveled from outside the city, and also the Panel's Independent Legal Counsel. Mr. Ghai's ability to pay was considered, however on principal in a case such as this a member should be held accountable to pay a significant amount of the costs rather than the profession as a whole having to bear the costs. The Panel feels that this is an important principal which outweighs concerns about Mr. Ghai's ability to pay in a case of this nature, that involves a breach of trust. Failure to pay these costs to the College will not prevent the suspension from ending.
- 4) If two (2) consecutive months' payments are missed, this will enable the College to deal with the full amount all at once.
- 5) If the Patient asks the College for funding from this program Mr. Ghai will be responsible to re-reimburse the fund. This will not be something the members of the College would have to bear.
- 6) When Mr. Ghai does receive his certificate of registration as an optician back, there was some concern over his likelihood to re-offend. By asking for the report from a psychiatrist, the Panel feels that the public is better protected. Mr. Ghai did

not seem to take responsibility for his actions, and did not seem to show remorse for his actions. He did not want to admit that he had done anything wrong.

The Order set out in paragraph 2, above, applies to automatic reinstatement (upon fulfilling the criteria set out in the Order) without having to undergo a hearing before the Discipline Committee. It does not affect Mr. Ghai's rights under section 72 of the Code.

Dated this 30th day of September 2005.



Robert Vezina, Chair of the Panel



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October 6, 2005

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- and -

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Dear Mr. Ghai and Ms. Willems:

Re: Discipline Hearing

Please find enclosed the Decision and Reasons of the Panel of the Discipline Committee of the College of Opticians of Ontario in this matter, further to the Discipline hearing held on July 26, 2005.

In accordance with section 70 (1) (2) of the *Regulated Health Professions Procedural Code*, Schedule 2 ("the Code") to the *Regulated Health Professions Act, S.O. 1991 C.18*, please note that should you wish to do so, you may appeal from the decision of the Panel to the Divisional Court within 30 days. An appeal may be made on questions of law or fact or both.

If you have any questions, please contact me at extension 205.

Sincerely,

Mina Vidakovic
Director of Professional Practice
Encl.

Cc: Mr. David Rosenbaum
Mr. Richard Steinecke, Independent Legal Counsel