

CITATION: College of Optometrists of Ontario v. SHS Optical Ltd., 2008 ONCA 685
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COURT OF APPEAL FOR ONTARIO

Feldman, MacFarland and Watt J.J.A.

BETWEEN:

The College of Optometrists of Ontario

Applicant (Respondent in Appeal)

And

SHS Optical Ltd., Dundurn Optical Ltd., and John Doe, all carrying on business under
the name Great Glasses, Joanne Marie Bergez and Bruce Bergez

Respondents (Appellants in Appeal)

Louis Frapporti and Heather C. Devine for the appellants SHS Optical

Roy E. Stephenson and Brian P.F. Moher for the respondents, College of Optometrists

Robert Cosman and Charles A. Toth for the intervener and respondent in appeal, the
College of Opticians of Ontario

Heard: February 5, 2008

On appeal from the judgment of Justice David S. Crane of the Superior Court of Justice
dated November 24, 2006 finding the appellants in contempt of an order of Mr. Justice
Harris of the Superior Court of Justice on June 24, 2003.

Watt J.A.:

INTRODUCTION

[1] In Ontario, licensed opticians may only dispense eyeglasses and contact lenses (corrective lenses) under a prescription from an optometrist or physician licensed to practise in the province.

[2] Bruce Bergez (Bergez) is an optician licensed to practise in Ontario who manages several stores that sell corrective lenses under the banner “Great Glasses”. A customer at Great Glasses can purchase three pairs of glasses for the price of a single pair.

[3] Great Glasses also offers free “eye tests” to its customers. These “eye tests” are not administered by provincially licensed optometrists or physicians, rather by a machine, the Eyelogic System, operated by a store employee.

[4] The Eyelogic System measures the refractive error in the customer’s vision and produces data that an employee then uses to identify the lenses necessary to correct the error. The Eyelogic System does *not* detect any diseases of the eye that might impair the customer’s vision. Nor does an optometrist or a physician examine the customer, much less provide a prescription for corrective lenses.

[5] A judge of the Superior Court of Justice ordered Bergez, his wife Joanne, and two companies connected with Great Glasses to comply with provincial law governing the prescription and dispensation of corrective lenses. More specifically, the judge barred the appellants from prescribing and dispensing corrective lenses without a prescription from

an optometrist or physician. Included in the prohibition was a ban on the individual appellants preventing them from permitting any employees who were not opticians, physicians or optometrists from dispensing corrective lenses absent proper delegated authority.

[6] About three and one-half years later, another judge of the Superior Court of Justice found the appellants in contempt of the prior order, imposed a substantial fine, and made several consequential and ancillary orders.

[7] The appellants seek to set aside the finding of contempt and, along with it, the penalties imposed.

THE FACTS

[8] To provide context essential to an understanding of the grounds of appeal raised, it is necessary to briefly sketch in some background about the circumstances giving rise to the prior proceedings, the proceedings themselves, and the statutory framework that must be navigated by those who make it their business to provide corrective lenses to Ontarians.

The Principals

[9] Bruce Bergez is an optician, licensed by the College of Opticianry of Ontario to practise opticianry in this province. He is not an optometrist or a physician. Bergez manages several optical outlets under the banner “Great Glasses”. Over the past few

years, business has flourished. From a genesis of three stores, Great Glasses now operates from about two dozen locations in Ontario.

[10] Joanne Bergez is Bruce Bergez' spouse. She is the sole shareholder, officer and director of SHS Optical Ltd., a company registered with the Ministry of Consumer and Business Services as the owner of the original three Great Glasses locations. Ms. Bergez is not an optician, or an optometrist, or a physician.

[11] Leo Bertuzzi is Joanne Bergez' brother. He is also the sole shareholder, officer and director of Ontario Optical Development Corp. (OODC), a company incorporated in 2002. As the owner of the right to license the name "Great Glasses", OODC is its franchisor. For all practical purposes, Bertuzzi has nothing to do with any of the activities of OODC: Bruce Bergez runs the company.

[12] The College of Optometrists of Ontario is the governing body for optometrists in the province. Under ss. 3 and 4 of the *Optometry Act*, 1991, S.O. 1991, c. 35, a member of the College of Optometrists of Ontario may assess the eye and vision system, diagnose and treat refractive, sensory and oculomotor diseases and dysfunctions of the eye and prescribe or dispense for vision or eye problems, corrective lenses.

[13] The College of Opticians of Ontario is the governing body for opticians in Ontario. Under ss. 4 and 5(1) of the *Opticianry Act*, 1991, S.O. 1991, c. 34, opticians

may dispense corrective lenses, but only upon the prescription of an optometrist or physician.

The “Great Glasses” Business Model

[14] Great Glasses sells corrective lenses to members of the public at various retail outlets. To attract customers, “Great Glasses” offers three pairs of glasses for the price of a single pair, free “eye tests” and same day service.

[15] Most customers of “Great Glasses” do not have a prescription for corrective lenses, thus take advantage of the free “eye tests”. These tests, administered by a store employee using the Eyelogic System and nothing else, measure refractive error only. The data generated by the machine, rather than tests performed by a licensed optometrist or physician, defines the composition of any corrective lenses that will be provided to the customer. Those who enter a Great Glasses store without a prescription for corrective lenses from either an optometrist or an ophthalmologist may well leave the store with corrective lenses, but they leave as prescriptionless as they entered.

The Statutory Requirements for Supply of Corrective Lenses

[16] The *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, (*RHPA*) regulates the practice of health professions in Ontario. Among other things, the *RHPA* prohibits persons other than members authorized by a health profession Act or their delegates from performing any “controlled act” described in s. 27(2) of the *RHPA*. Prescribing or dispensing, for vision or eye problems, corrective lenses, other than simple magnifiers, is a “controlled act”.

[17] Two health profession Acts permit members authorized by the *Act* to prescribe or dispense, corrective lenses. Section 4 of the *Medicine Act*, 1991, S.O. 1991, c. 30, allows physicians, and s. 4 of the *Optometry Act*, 1991, S.O. 1991, c. 35, permits optometrists to prescribe or dispense corrective lenses, subject to any terms, conditions and limitations imposed on the practitioner's certificate of registration.

[18] Under the *Opticianry Act*, 1991, S.O. 1991, c. 34, an optician is *not* authorized to prescribe corrective lenses. After all, opticianry is the provision, fitting and adjustment of corrective lenses. An optician is authorized to *dispense* corrective lenses, however, but only upon the prescription of an optometrist or physician.

The Compliance Application

[19] Section 87 of the *Health Professions Procedure Code*, S.O. 1991, c. 18, Sch. 1, (*HPPC*), deemed by s. 4 of the *RHPA* to be part of each health profession *Act* entitles "the College" to apply to the Superior Court of Justice for an order directing a person to comply with a provision of the health profession *Act* and the *RHPA* and other subordinate legislation.

[20] In early 2003, the College of Optometrists of Ontario (*COM*) invoked s. 87 of the *HPPC*. The College sought an order directing that the respondents and a named physician comply with sections 27 and 30 of the *RHPA*, as well as ss. 3, 4, and 5(1) of the *Opticianry Act*, and refrain from several specific Acts.

[21] On June 24, 2003, Harris J. of the Superior Court of Justice, concluded:

[95] This Court orders that the respondents SHS Optical Ltd., Dundurn Optical Ltd. and John Doe, all carrying on business as Great Glasses; Joanne Marie Bergez; and Bruce Bergez shall comply with all the requirements of the RHPA, as currently worded or subsequently amended, and shall ensure that all employees under their respective control and direction so comply, and in particular that the above respondents and their employees shall refrain:

(i) From prescribing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers, unless the person prescribing is an optometrist or physician.

(ii) From dispensing subnormal vision devices, contact lenses or eye glasses other than simple magnifiers without the prescription of an optometrist or physician.

(iii) From allowing any Great Glasses employees who are not opticians, physicians, or optometrists, to dispense subnormal vision devices, contact lenses or eyeglasses other than simple magnifiers unless the controlled act of dispensing has been delegated to that person in accordance with ss. 27 and 28 of the RHPA.

[22] Bruce Bergez, who represented himself, appeared at the hearing. Joanne Bergez, and the corporate appellants neither appeared nor were represented by counsel. Mr. Bergez received a copy of the application judge's reasons as well as the formal judgment of the court.

[23] No appeal was taken from the decision of Harris J.

The Contempt Proceedings

[24] In late June, 2005, about two years after it had obtained the compliance order *COM* invoked rules 60.05 and 60.11 before Crane J. of the Superior Court of Justice.

The principal order *COM* sought was a finding that the several appellants, individual and corporate, were in contempt for failure to adhere to the compliance order made two years earlier by Harris J. *COM* sought a substantial fine as the penalty to be imposed, the amount of which was to be determined on the basis of information acquired from Bruce Bergez by production of documents and examination under oath, *after* a finding of contempt had been made. Typically, *COM* also proposed several means by which the appellants could purge their contempt.

[25] At the end of a two-day hearing, Crane J. found the several appellants in contempt of the earlier compliance order of Harris J. and imposed a fine of \$1,000,000.00 to be paid by Bruce Bergez, with specific enforcement provisions in default of payment. The corporate appellants were made jointly and severally liable for payment of the fine. The individual appellants were required to do or refrain from doing several things in order to purge their contempt.

[26] As he had done at the compliance hearing, Bruce Bergez appeared and represented himself in the contempt proceedings. No other appellant appeared either personally or by counsel.

THE GROUNDS OF APPEAL

[27] The appellants seek to impeach both the findings of liability and the penalty imposed as a consequence.

[28] The appellants say that the finding of contempt is fatally flawed both procedurally and substantively. The procedural errors begin with the failure of the Notice of Application to specify the precise conduct, whether act or omission, that constitutes the contempt. Thereafter, the hearing itself was flawed: it failed to keep separate the liability and penalty phases. As a result, evidence relevant and admissible on penalty only was received and improperly used to establish liability. Between the finding of liability and the imposition of penalty, the appellants were never offered the chance to purge their contempt, a matter which, had they done so, was relevant to the nature and extent of punishment imposed. And the application judge failed to provide adequate assistance to the only appellant who appeared there, self-represented, Bruce Bergez.

[29] The appellants also contend that the finding of contempt is unsupportable substantively, even if the hearing itself was conducted properly. The prosecutor failed to prove the essential elements of contempt with the necessary degree of certainty, at the very least against Joanne Bergez. The findings of liability were grounded upon evidence obtained by constitutional infringement and, in at least one instance, otherwise inadmissible. The application judge failed to make findings of credibility critical to his determination of liability and applied the wrong standard of proof.

[30] On penalty, the appellants argue that they should at first have been given the chance to purge their contempt before the hearing on penalty began. At all events, the

penalty was grossly excessive and determined without affording them the opportunity to make submissions.

[31] It is appropriate to turn first to the grounds of appeal that impugn the finding of liability, thereafter the issue of penalty.

ANALYSIS

ALLEGED DEFICIENCIES IN THE NOTICE OF APPLICATION AND FINDINGS OF FACT

[32] To set this claim of error in its proper context, it is necessary to add a few strokes of background to the canvas.

The Original Application

[33] In March, 2003, *COM* applied to Harris J. under s. 87 of the *HPPC* for an order directing the several appellants and others to comply with the requirements of ss. 27 and 30 of the *RHPA* in sections 3, 4 and 5(1) of the *Opticianry Act*. To be more precise, *COM* sought an order that the appellants and others refrain from:

- Communicating a diagnosis, contrary to s. 27(2)1 of the RHPA
- Prescribing for vision or eye problems, contrary to s. 27(2)9 of the RHPA
- Dispensing for vision or eye problems, without the proper prescription of an optometrist or physician, contrary to s. 27(2)9 of the RHPA and s. 5 of the *Opticianry Act*

- Dispensing for vision or eye problems upon the prescription of an optometrist or physician where the respondents know the prescription has been issued in the absence of a proper doctor-patient relationship

[34] On June 24, 2003, Harris J. directed the appellants and their employees refrain:

(i) From prescribing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers, unless the person prescribing is an optometrist or physician.

(ii) From dispensing subnormal vision devices, contact lenses or eye glasses other than simple magnifiers without the prescription of an optometrist or physician.

(iii) From allowing any Great Glasses employees who are not opticians, physicians, or optometrists, to dispense subnormal vision devices, contact lenses or eyeglasses other than simple magnifiers unless the controlled act of dispensing has been delegated to that person in accordance with ss. 27 and 28 of the RHPA.

[35] The reasons for judgment of Harris J., as well as the formal judgment, directed the appellants to comply with *all* the requirements of the *RHPA* and, in particular, to refrain from the specific acts of prescribing and dispensing corrective lenses without prescribed authority from an optometrist or physician. The prohibition against dispensing required the appellants to refrain from allowing their employees to dispense without the essential authority.

[36] Bruce Bergez received copies of the reasons for judgment and formal judgment.

The Contempt Application

[37] About two years after the compliance order had been granted under s. 87 of the *RHPC, COM* brought contempt proceedings against the appellants under rules 60.05 and 60.11. The conduct alleged to have been contemptuous was described in these terms in the Notice of Application:

- (c) The respondents have, since June 25, 2003, deliberately, systematically and continually carried on their optical business known as Great Glasses in a manner which is directly contrary to the Judgment. They have not operated their business in a manner which complies with the requirements of the Regulated Health Professions Act (hereinafter “the RHPA”) and have not ensured that all employees under their respective control and direction have also complied with the requirements of the RHPA. In particular, they and their employees have:
 - (i) prescribed for vision or eye problems, subnormal vision devices, contact lenses and eyeglasses when the person prescribing is neither an optometrist or a physician;
 - (ii) dispensed subnormal vision devices, contact lenses and eyeglasses without the prescription of an optometrist or physician; and
 - (iii) allowed Great Glasses employees who are not opticians, physicians or optometrists to dispense subnormal vision devices, contact lenses and eyeglasses when that controlled act of dispensing has not been delegated to those employees in accordance with ss. 27 and 28 of the RHPA.

[38] The conduct alleged to constitute contempt was neither more nor less than more of the same conduct in which the appellants had engaged that had founded *COM*'s application for the compliance order in 2003.

The Findings in the Contempt Hearing

[39] Crane J. found that the appellants had continued in breach of the compliance order from the time it was made. It was business as usual. Nothing had changed. Crane J. considered and rejected various "defences" advanced by Bruce Bergez on his own behalf.

Inadequate Particularization of the Contempt

[40] The claim of inadequate particularization of the allegedly contemptuous conduct, likewise the corresponding deficiency in the findings of fact in the contempt hearing, requires an appreciation of context.

[41] The proceedings *COM* took against the appellants began with a s. 87 application to compel the appellants to comply with the provisions of the *RHPA* and to refrain from certain conduct not permitted under applicable healthcare legislation. The offensive conduct included:

- i. communicating a diagnosis, identifying a disease or disorder as the cause of vision problems;
- ii. prescribing corrective lenses for vision problems without being qualified to do so.;

iii. dispensing corrective lenses without a prescription from an optometrist or physician; and

iv. dispensing corrective lenses knowing that the lenses had not been prescribed by an optometrist or physician.

[42] The appellants made no complaint about inadequate particularization of the conduct that the *COM* sought to prohibit by its application. The judgment of Harris J. described the specific conduct in which the appellants were not to engage.

[43] The *COM* initiated the contempt proceedings because the appellants continued to operate Great Glasses as if the prohibitions put in place by Harris J. did not exist. On the instructions of Bruce Bergez, it was business as usual. No optometrists. No physicians. No prescriptions. Eye tests that measured refractive error only. Machine dispensed data as the basis for dispensing corrective lenses.

[44] The Notice of Application that began the contempt proceedings differed little in its allegations from the notice that initiated the s. 87 application. It included a reference to continuation of the specific acts of prescribing and dispensing without appropriate authority that had been prohibited by the order of June 24, 2003. Again, the appellants did not complain that they did not know the specific conduct to be brought against them.

[45] There are cases in which findings of contempt have not been made or if made, quashed, because of ambiguity or lack of detail in the underlying order. See, for

example, *Berge v. Hughes Properties Ltd.*, [1988] B.C.J. No. 353 (C.A.); *Distillery, Brewery, Soft Drink and Allied Worker's Union 604 v. British Columbia Distillery Co. Ltd.* (1975), 57 D.L.R. (3d) 752 (B.C.S.C.); *United Steelworkers of America, Local 663 v. Anaconda Co. (Canada) Ltd.* (1969), D.L.R. (3d) 577 (B.C.S.C.); and *Dare Foods (Biscuit Division) Ltd. et al. v. Gilles et al.*, [1973] 1 O.R. 637 (H.C.J.).

[46] Sometimes, contempt proceedings fail because the underlying order is capable of encompassing a broad range of conduct, as for example, the injunction in *Dare Foods*. But that is simply not this case. The Notice of Application in the contempt proceeding tracks the language of the order made on s. 87 application. The appellants, in particular Bruce Bergez, could not fail to have been aware of the substance of the contempt alleged against him. *Re Sheppard and Sheppard* (1976), 12 O.R. (2d) 4 (C.A.) at p. 12.

[47] The appellants did not apply for particulars or complain of any insufficiency of detail in the notice. The defences advanced by Bergez belie any complaint of insufficient notice. The findings of the application judge track the allegations of non-compliance.

[48] I would not give effect to this ground of appeal.

THE FAILURE TO PROVIDE ADEQUATE ASSISTANCE TO THE APPELLANT BRUCE BERGEZ

[49] As a person who self-represented by choice, Bruce Bergez argues that the application judge failed to provide the assistance to which Bergez was entitled in the conduct of the proceedings. The judge failed to tell Bergez, for example, that he had the

right to cross-examine any deponent on his or her affidavit, to introduce evidence and to give evidence on his own behalf.

(i) The History of Self-Representation

[50] Bruce Bergez represented himself before Harris J. on the original application. His self-representation was by his choice. Bruce Bergez is *not* a person who sought, but was denied, state-funded legal assistance.

[51] For similar reasons, Bruce Bergez represented himself in the contempt proceedings before Crane J.

[52] Bruce Bergez is a mature adult with no articulated language deficiencies. He is an experienced businessman who has reaped substantial financial rewards from his burgeoning empire of Great Glasses stores. He continues to operate his business as he sees fit, in open contravention of governing legislation and in plain defiance of a court order.

(ii) The Nature of the Proceedings

[53] The proceedings taken against the appellants related to Bruce Bergez' business as an optician, a dispenser of corrective lenses. While the consequences of adverse findings at the conclusion of each application differed, the subject-matter was the same. In general terms, performing controlled acts without the required authority. Diagnosing and prescribing, controlled acts restricted to optometrists and physicians. Dispensing without a prescription from an optometrist or a physician.

[54] The subject-matter of the proceedings was Bruce Bergez' home turf: what he could and could not do as a member of a regulated health profession. He was not a criminal defendant, with language difficulties or cognitive impairment, defending himself in a jury trial where his liability fell to be determined in accordance with various accessoryship and substantive provisions of the *Criminal Code*.

(iii) The Assistance Provided

[55] During the contempt hearing, Crane J. advised Bruce Bergez that the central issue at the hearing was whether Bergez had contravened the order of Harris J. The contempt hearing judge imposed no time limits upon Bergez' oral submissions and scheduled them to minimize the likelihood of interruption. The judge confirmed his understanding of Bergez' submissions and allowed him to advance a defence not previously put forward. Crane J. explained to Bergez the difference between submissions and evidence, but never curtailed Bergez' right to adduce evidence or to make submissions.

(iv) Discussion

[56] This is a case of self-representation by choice, not by press of circumstances. Bruce Bergez represented himself because that is what he wanted to do. He wanted to plead his own case, to make his own submissions, to do battle with the prosecutor. Not once did he seek representation. And not once, when he asked for help, did he not receive it.

[57] This ground reduces to a complaint that the failure of Crane J. to provide assistance to the self-represented appellant rendered the proceedings unfair. In

circumstances like these, it is helpful to recall what this Court said several years ago about the standard by which we should determine whether proceedings involving the self-represented were unfair. In *Davids v. Davids*, [1999] O.J. No. 3930, this Court said at para. 36:

[36] ... The fairness of this trial is not measured by comparing the appellant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, trial judges could only require persons to proceed to trial without counsel in those rare cases where an unrepresented person could present his or her case as effectively as counsel. Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party.

[58] The presiding judge must not appear to assume (or in fact assume) the role of counsel for the self-represented litigant. *Manitoba (Director of Child and Family Services) v. A.(J.)*, [2004] M.J. No. 451 (C.A.) at paras. 38-40.

[59] In many, if not most cases in which a similar argument is advanced, it can be said that the presiding judge could have done more to assist the self-represented litigant. So too here. But that is not the test. At bottom, what falls to be decided is whether the

proceedings were fairly conducted. Did the self-represented litigant get a fair hearing?

Bruce Bergez got a fair hearing, as was his right.

[60] I would not give effect to this ground of appeal.

THE FORM OF THE HEARING AND THE BASIS FOR THE CONTEMPT FINDINGS

[61] The principal complaint about the conduct of the contempt hearing is that the presiding judge conflated the issues of liability and penalty, and omitted an intermediate step that would have permitted the appellants, if found in contempt, to purge their contempt prior to sentence. The procedure followed intermingled evidence relevant only to penalty with that offered to establish liability in a way that was prejudicial to the appellants' defence and vitiated the finding of liability.

The Contemplated Procedure

[62] The Notice of Application filed by the *COM* appears to have contemplated a bifurcated hearing: liability first, then penalty. The notice is unrevealing about the timing of any purging of the appellants' contempt, although the means suggested for the appellants to do so were included in the notice.

The Hearing

[63] Whatever may have been intended about the form or procedure to be followed on the hearing, it seems clear that no bifurcated hearing took place. Liability and penalty were combined into a single hearing with no pause for the appellants to purge their contempt in the *interregnum* between any finding of liability that may have been made and the imposition of penalty.

[64] Several features of the consolidated hearing warrant brief mention. Evidence was adduced about the harm a patient may suffer as a result of an eye examination that tests only for refractive error. Disease processes are not identified, because the machine cannot detect them, and the operator is not qualified to examine for them. While this evidence may be relevant to penalty, it has no bearing on liability, which is established on proof of non-compliance with the earlier order.

[65] At the contempt hearing, evidence was adduced about the income of Great Glasses, as well as the manner in which Bruce and Joanne Bergez received compensation from the corporate appellants. Reference was also made to a finding of misconduct made by the Discipline Committee of the College of Opticians against Bruce Bergez. In advance of any finding of liability, Bruce Bergez was cross-examined about the relationship among the corporate appellants and required to produce financial documents.

Discussion

The Nature of Contempt

[66] Contempt involves a breach or disobedience of a lawful order of a court of competent jurisdiction. We recognize two different kinds or species of contempt: civil contempt and criminal contempt.

[67] Disobedience of a prohibitory order is civil contempt. *Poje v. British Columbia (Attorney General)*, [1953] 1 S.C.R. 516. Depending on the nature and quality of conduct, however, disobedience of a prohibitory order may also constitute criminal

contempt. *Poje* at p. 519; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at pp. 931-2.

[68] The principal distinguishing feature between civil and criminal contempt, in other words what converts civil to criminal contempt, is the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts. *United Nurses* at pp. 931-2 ; *Poje* at p. 527.

[69] In *United Nurses*, McLachlin J. as she then was, explained what had to be proven in order to establish criminal contempt:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused

knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

United Nurses at p. 933.

[70] The circumstances of *United Nurses* illustrate the type of conduct that will amount to criminal contempt. There, directives from the provincial Labour Relations Board forbade the union from threatening to strike or causing a strike that was prohibited by provincial statute. The union went on strike, its president proclaiming that the strike would continue until a satisfactory settlement was reached. Criminal contempt was established.

[71] Contempt, whether civil or criminal, requires proof that the alleged contemnor had actual knowledge of the order that was the subject of the contempt proceedings *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1992] S.C.R. 217 at para. 17. The standard of proof required in contempt proceedings, again regardless of whether the contempt is civil or criminal, is proof beyond a reasonable doubt. *Bhatnager* at para. 14; *Re Sheppard v. Sheppard* (1976), 12 O.R. (2d) 4 (C.A.) at pp. 6-7.

The Form of Hearing

[72] In the absence of any formal procedural code for proceedings for contempt of prohibitory orders, the procedure followed may vary. That said, some common features emerge.

[73] As a general rule, the procedure followed on contempt hearings reflects the burden of proof imposed and the essential elements of contempt. The prosecutor's case on liability proceeds first, thereafter any defence offered. Where liability is established, the contemnor is usually offered an opportunity to purge his or her contempt before the penalty or punishment phase of proceedings begins.

[74] The form of the hearing, to some extent at least, lies within the discretion of the judge presiding. While form should not be permitted to triumph over substance, a consolidated hearing, in other words, a proceeding that considers both liability and penalty in the same hearing, may cause unfairness or be infected with legal error to such an extent to require a new hearing.

[75] In contempt proceedings, as in criminal prosecutions, liability and penalty are discrete issues. Each falls to be decided on the basis of evidence that is relevant, material and admissible on the issue being considered. Evidence that is relevant, material and admissible on one issue may be irrelevant, immaterial or inadmissible on the other. In a single hearing, there is always the risk that evidence relevant, material and admissible on one issue will be misapplied to the other, for example to liability instead of penalty. To permit the introduction of evidence that bears on penalty only in a hearing in which liability has not yet been determined also lends an appearance of pre-judgment to the proceedings and forces the alleged contemnor to defend on inconsistent grounds.

[76] In *R. v. B.E.S.T. Plating Shoppe Ltd. and Siapas*, [1987] O.J. No. 165 (C.A.) this court concluded that the judge presiding at the contempt hearing had erred in requiring the alleged contemnors to make submissions on penalty when they had not yet been found in contempt of the prohibitory order. The extent to which the fairness of the proceeding is compromised by a consolidated hearing may vary from one case to the next.

The Principles Applied

[77] Despite the Notice of Application, which presaged a two-step hearing with liability first and penalty second, the hearing before Crane J. considered both liability and penalty in a single proceeding. While it may not be wrong *per se* to conduct a single hearing involving both liability and penalty, it is essential that the procedure followed be free of error and fair to the parties, especially the alleged contemnor.

[78] At the hearing, the prosecutor adduced some evidence relevant only to penalty and plainly irrelevant to a determination of liability. Evidence that the “eye tests” performed at Great Glasses measured refractive error only, leaving untreated disease processes or other impairments of vision, and in the result, providing corrective lenses inappropriate for the client and potentially harmful was relevant only to penalty. Evidence of the profitability of the Great Glasses model, like the evidence of harm, was relevant only to penalty, not to liability. Likewise, a finding of professional misconduct against Bruce Bergez by the College of Opticians if admissible, may have been relevant to penalty, but was clearly irrelevant to liability.

[79] The manner in which the hearing was conducted did not provide the appellants with any opportunity to purge their contempt, however remote was the possibility that Bruce Bergez at least would do so, prior to the imposition of penalty. A contemnor's conduct in purging his or her contempt is relevant to penalty, but not to liability.

[80] As in *B.E.S.T. Plating*, the procedure followed here required the appellant Bergez to make submissions on penalty prior to any determination of the liability of any appellant being made.

[81] Any assessment of the effect of conflating the issues of liability and penalty in a single hearing on the finding of liability must begin with an acknowledgement that the form of hearing is left largely to the discretion of the presiding judge. There is no *per se* rule that a hearing must proceed in two steps, liability first, then penalty if liability has been established. That a two-step procedure is preferable in most cases where liability is in issue can scarcely be disputed. Likewise, most would agree that the two-step procedure ensures that evidence or other material irrelevant to liability, but relevant to penalty, does not contaminate the determination of liability. In our imperfect world, we are left to assess the effect of a flawed procedure on the decision about liability.

[82] In practical terms, the corporate appellants and Bruce Bergez had no defence on the issue of liability. Diagnosis of vision problems and supply of corrective lenses requires qualified diagnosticians and prescribers: optometrists or physicians. Bruce Bergez and the corporate appellants were neither. Their repeated and public disobedience

of the prohibitory order made by Harris J. was proven repeatedly and conclusively by evidence from former employees. The manner in which they operated attracted the s. 87 order. And they continued to operate in the precisely the same manner thereafter. Their liability could not have been clearer.

[83] Despite the introduction of some evidence relevant only to penalty at a hearing that included the issue of liability, I am satisfied that the evidence was not used in the determination of liability and did not compromise the appellant's position on liability. Further, unlike in *B.E.S.T. Plating*, the requirement that Bruce Bergez make submissions on penalty while liability remained at large did not render the hearing on liability unfair.

[84] I would not give effect to the appellants' claim that the conflated or consolidated hearing vitiated the finding of liability.

SUBSTANTIVE FLAWS IN THE FINDINGS

[85] The appellants say that the findings on liability are flawed in several substantive respects. There was no case established against Joanne Bergez. The liability findings are flawed because the presiding judge relied upon evidence obtained by constitutional infringement or introduced in contravention of a specific statutory provision. And the hearing judge made no critical findings of credibility and applied the wrong standard of proof.

The Liability of Joanne Bergez

[86] Joanne Bergez is the spouse of Bruce Bergez. She is the sole shareholder, officer and director of the corporate appellants. She is not an optician, nor an optometrist, nor a physician.

[87] The basis upon which the liability of a shareholder of a corporate contemnor may be founded is described in *B.E.S.T. Plating* at para. 21 in these terms:

21 It is the position of Siapas that although he was the sole shareholder of the various corporations which were directly or indirectly involved in the operation of the business which caused the pollution, and although he was aware of the prohibition order, he was not in control of plant operations and did not know that the plant was continuing to offend against the provisions of the by-law.

[88] A director may also be found liable for the conduct of a corporate contemnor. As O'Leary J. explained in *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp.*(No. 2) (1974), 4 O.R. (2d) 585 (H.C.J.) affirmed 1975 11 O.R. (2d) 167 (C.A.) at pp. 604-5.

The applicants have submitted that where a corporation violates an injunction, the directors and officers of the corporation can be held in contempt of Court and can be attached or otherwise punished for the contempt, without any proof that the particular directors or officers proceeded against did or failed to do anything that was responsible for the said violation. I am unable to agree with that submission. I am not saying that before an officer or director can be committed for a contempt committed by the corporation that it must be shown that the officer aided or abetted the contempt. It may well be that the director or officer could be held in contempt, even though his role in the matter was purely passive: see *Biba Ltd. v. Stratford Investments Ltd.*, [1972] 3 All E.R. 1041, and *Glazer v. Union Contractors Ltd.*

and Thornton (1961), 129 C.C.C. 150, 26 D.L.R. (2d) 349. Further, the violation of the injunction may give rise in some cases to a presumption that the director or officer did or failed to do something that caused the breach, and may put that officer or director on his defence. Where, however, it is clear on the evidence that the director or officer did all he could to ensure that the injunction would be abided by and, where the breach occurred without fault on the part of the director or officer, then I am unable to see how that director or officer can be punished for contempt of Court.

The Nature of the Proscutor's Proof

[89] Preliminary to a brief canvass of the principles that govern determination of the specific claims of constitutional infringement advanced by the appellant, it is helpful to recall the circumstances in which an appellant may raise on appeal an issue not advanced in the proceedings from which the appeal is taken.

[90] In *R. v. Brown*, [1993] 2 S.C.R. 918 L'Heureux-Dubé, whose views on this issue evoked no disapproval from the majority despite her dissent on other grounds, proposed this standard at p. 923:

Courts have long frowned on the practice of raising new arguments on appeal. The concerns are twofold: first, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue: see *Brown v. Dean*, [1910] A.C. 373 (H.L.), and *Perka v. The Queen*, [1984] 2 S.C.R. 232.

A.A. v. B.B., [2007] O.J. No. 2 (C.A.) at para. 9 is to the same effect.

[91] It is also worth reminder that the *Charter* constrains government activity, not, at least as a general rule, the conduct of private persons or entities not implementing a specific government policy or program. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Retail, Wholesale and Department Store Union v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at p. 597.

[92] To attract protection under s. 8 of the *Charter*, which the appellants invoke here, requires state conduct that violates a reasonable expectation of privacy. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances in each case. *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 45. The state activity of which complaint is made must also constitute a search or a seizure to fall within the protective sweep of s. 8. Activity that is neither falls beyond s. 8, not within its borders.

The Principles Applied

[93] I would not give effect to any grounds asserting a constitutional flaw in the collection or introduction of the evidence on liability, or on the nature of the evidence on which the finding of liability was made.

[94] The complaints of constitutional infringement are raised for the first time on appeal. While the failure to raise these issues at first instance may not be tallied against the self-represented to the same extent as against a litigant who appeared with counsel, the principles underlying the general rule retain their vitality. Irrespective of the nature of the representation at first instance, the prejudice to the respondent from the lack of

opportunity to complete the record remains a constant, likewise the insufficiency of the record upon which to make findings of fact essential to an informed ruling on the issue on appeal.

[95] The complaints of constitutional infringement in the collection of the prosecutor's evidence does not reach the information provided by former employees of the corporate appellants. The evidence they offer, on its own, fully establishes' the liability of the corporate appellants and Bruce Bergez.

[96] What is more is that the evidence gathered by investigators posing as Great Glasses customers displays no constitutional taint. Each engaged in a commercial transaction on business premises open to the public for commerce in corrective lenses. Even assuming that the investigators were state agents and that their activities amounted to a search or seizure, the reasonable expectation of privacy indispensable to a claim of constitutional violation is nowhere to be found. *R. v. Fitt*, [1995] N.S.J. No. 83 (C.A.) at para. 12, affirmed [1996] 1 S.C.R. 70.

[97] This is not a case in which the resolution of factual controversies was essential in order to reach a conclusion that the liability of the corporate appellants and Bruce Bergez was established to the appropriate standard of proof. Said in a different way, there were no controverted facts relating to matters essential to a finding of liability on the part of any appellant, corporate or individual. The failure of the application judge to expressly articulate the precise standard of proof he applied, does not vitiate the finding, so long as

the evidence proves contempt beyond a reasonable doubt. It does so here. *Clarfield v. Kopyto*, [1999] O.J. No. 672 (C.A.) at para. 19; *Ali v. Triple 3 Holdings Inc.*, [2002] O.J. No. 4405 (C.A.) at paras. 4-5.

[98] Joanne Bergez is the sole shareholder, director and officer of SHS Optical Ltd., the owner of the original three Great Glasses franchises. She is thus responsible for any all corporate filings required of SHS Optical. She was a party to the s. 87 application before Harris J., although she neither appeared personally nor otherwise participated in those proceedings. She received notice of the result of those proceedings and the reasons and order of Harris J. While not an active participant in the day-to-day operation of any franchise, she was (and remains) married to Bruce Bergez, the optician/principal in Great Glasses, and plainly benefits from the financial rewards associated with the business. And she was aware of the expansion of the business after the s. 87 application before Harris J. More stores under the same banner carrying on the same business in the same way found to be non-compliant by Harris J.

[99] I would not give effect to any ground of appeal that challenges the liability findings against any appellant.

THE APPEAL FROM PENALTY

[100] The appellants also appeal the penalty imposed by Crane J., a fine of \$1 million dollars to be paid by Bruce Bergez, with specific enforcement provisions in default of payment. The corporate appellants were made jointly and severally liable for payment of the fine. The individual appellants were required to do or refrain from doing several things in order to purge their contempt.

[101] Despite some imperfections caused by the conduct of a consolidated hearing, one in which evidence and submissions about liability and penalty were commingled, rather than a bifurcated hearing, I would not interfere with the penalty imposed.

[102] In the usual course in cases of contempt *ex facie*, a bifurcated hearing is conducted. Liability is decided first, thereafter penalty as may be required. In the *inter regum* between a finding of liability and the hearing about penalty, the contemnor is afforded the opportunity to purge his or her contempt. Nothing of the sort occurred here.

[103] The determination of penalty is notoriously fact-specific. Penalties, like sentences in criminal proceedings, are not imposed in the abstract, rather by the application of governing objectives, principles and factors to established misconduct by a specific malfeasant. Submissions are made on facts found or admitted, not on the basis of facts to be determined later. Conflating liability and penalty phases may create an appearance of unfairness. On the other hand, it is not unusual in criminal proceedings where there has

been a plea of guilty but a contest about aggravating or mitigating circumstances, to conduct a single hearing with submissions made on both factual and sentencing issues.

[104] In penalty hearings, the presiding judge has a broad discretion about what she or he will receive as evidence. The controlling principles, as always, include relevance, materiality and admissibility. Here, the application judge was advised of a finding of professional misconduct made against Bruce Bregez by the Discipline Committee of the College of Opticians. That finding is an order made in a proceedings under the *RHPA* for the purposes of s. 36(3) of the *Act*, thus not admissible in a proceeding for contempt under rules 60.05 and 60.11. *Forget v. Sutherland* (2000), 188 D.L.R. (4th) 296 (Ont. C.A.) at para. 25.

[105] Despite some procedural flaws in the conduct of the penalty hearing, I am not satisfied that the penalty imposed reflects any error in principle either in relation to the quantum of the fine or in the manner in which it may be enforced.

[106] The underlying purpose of contempt orders is to compel obedience and punish disobedience. In this case, there is a singular need for punishment. It is essential that any monetary penalty imposed not be or appear to be a licence fee for further disobedience of a public health care statute.

[107] Despite an order to comply with a statute enacted to ensure Ontarians receive health care from health care professionals within the boundaries of the providers' accredited expertise, the principal contemnor, Bruce Bergez, ignored the restrictions imposed upon his own competence in the public interest and redrew the boundaries to suit his own crass commercial purposes. Disagreement with restrictions imposed on regulated activity by a statute enacted in the public interest does not entitle the dissenter to break the law. Likewise, the perceived ineptitude of the licensee's governing body to enforce its mandate and govern its members.

[108] This is a case of flagrant, protracted and deliberate disobedience of a court order to comply with a statute regulating the conduct of a health profession. It seems obvious that the appellants, especially Bruce Bergez, have no intention of complying with the statute or the s. 87 order. This is not a case in which the conduct of the contemnors arose from some mistake or misunderstanding about the application of the underlying order. There is no mistake, no lack of understanding here. The penalty imposed here, including the manner in which it may be enforced, justifiably emphasized not only specific and general deterrence, but also denunciation of the appellants' intransigent and unremitting refusal to obey the law. We cannot suffer the sacrifice of the rule of law to the lure of lucre.

DISPOSITION

[109] In the result, for these reasons, I would dismiss the appeals of all appellants from the findings of contempt and the penalty imposed. The respondent College of Optometrists is entitled to its costs from the appellants, which the parties have agreed should be fixed in the amount \$40,000.00 inclusive of GST and disbursements.

RELEASED:

K2.

OCT 10 2008

David M. H.

I agree K. Fella J.A.

I agree MacFarland JA

