

APPENDIX: CC

Citation	College of Opticians of B.C. v. Moss et al 2001 BCSC 408	Date:	10010319
		Docket:	L000780
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

COLLEGE OF OPTICIANS OF BRITISH COLUMBIA

PETITIONER

AND:

ROBERT BROWN MOSS, JR.,
JOHN MELVIN MOSS
AND
CLEARBROOK OPTICAL LTD. DOING BUSINESS AS
UNITED OPTICAL

RESPONDENTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE OPPAL

Counsel for the Petitioner:	Harley Harris
Counsel for the Respondents:	Kathryn Denhoff and Kenneth Ihas, Articling Student
Date and Place of Hearing:	March 5, 6 and 7, 2001 Vancouver, BC

INTRODUCTION

[1] The College of Opticians of British Columbia seeks a permanent injunction against the respondent opticians prohibiting them from using a technology known as the Eyelogic System. The College's position is that the use of this system or technology is contrary to the *Health Professions Act*, R.S.B.C. 1996, c. 183, the *Opticians Regulation*, B.C. Reg. 487/94, and also on the grounds that the technology has not been approved by the College.

[2] Under s. 52 of the *Act*, the College may apply to the Supreme Court for a permanent injunction in order to restrain an optician from contravening the *Act*, *Regulation* or the College Bylaws.

[3] The respondents' position may be summarized as follows:

1. That by use of the Eyelogic System they are not conducting eye examinations or refractions and therefore are not in violation of the *Regulation*;
2. That the respondents were not acting as opticians when operating the Eyelogic System;
3. That the Inquiry Committee of the College has conducted itself improperly and comes to this Court without clean hands;
4. In the alternative, if the respondents are conducting eye examinations or refractions, they are exempt under s. 14 of the *Health Professions Act*.

[4] The central issue is whether the respondent opticians, by using the Eyelogic System, are conducting eye examinations or refractions.

BACKGROUND

[5] In view of the lengthy submissions by counsel, I will review the history of this matter in some detail.

[6] The College is the governing body for opticians within the province. As the governing body, the College has the statutory authority to prescribe standards and also to discipline its members. It is essentially a self-governing body.

[7] The respondents, Robert Brown Moss, Jr. and John Melvin Moss, are the owners of Clearbrook Optical Ltd., a clinic in Abbotsford that operates under the name of United Optical. The respondent Robert Moss, Jr. is a registered optician, while the respondent John Moss is a lens fitter.

[8] This dispute involves the use of a system or technology known as the Eyelogic System. In March 1998 the respondents purchased the system for their practice. The College has alleged that by using the system they are performing eye examinations and refractions contrary to s. 6(1) of the *Regulation*. That section reads as follows:

6(1) No registrant may conduct eye examinations or refractions.

(2) Subsection (1) does not apply to the examination required for the proper fitting of eyeglasses, low vision aids and contact lenses.

[9] Thus, opticians are not permitted to conduct eye examinations or refractions. Rather, they are permitted to dispense glasses and fit lenses.

[10] The Eyelogic System has been described as an interactive software program, which conducts certain measurements and performs certain functions. According to an affidavit filed by Robert Moss, the system is designed to enable ophthalmologists to provide a prescription for corrective lenses to a patient without the necessity of the patient attending at the ophthalmologist's office. In describing the process, he has deposed that:

... Instead, the patient attends at a location where the Eyelogic System is located to have measurements taken and

necessary medical background information gathered, which is then communicated to the ophthalmologist. The ophthalmologist interprets the data, assesses the patient's refractive error, determines the degree of correction required and issues any required prescription.

The Eyelogic System is an interactive software program linked to certain automated measurement tools. The operation of those tools is controlled primarily by the software, which determines the power of lenses to present to a patient based upon the patient's indication whether they see "better" or "worse" with a particular lens,

[11] The system is made up of four components. They are:

1. An autolensometer which measures prescriptions on current eyeglasses.
2. An autorefractor which purports to measure uncorrected refraction.
3. Autophoropter which essentially is a device that is used to determine the suitability of lens for a client.
4. A computer terminal that stores and prints out the data.

[12] Under this system, an optician records information from a patient through the use of a computer and then conveys the information by facsimile to the ophthalmologist, who interprets the data provided by the computer printout and issues a prescription for the appropriate lens. The prescription is then sent by facsimile to the optician who fills the prescription. The concern raised by the College is that by operating the system the optician is conducting eye examinations and refractions. A further concern is that there is no direct contact between the patient and the ophthalmologist and the optician may be left to perform duties for which he or she is unqualified.

[13] The Eyelogic technology has become a matter of some concern to the College. There was and still is not any specific prohibition against the use of the Eyelogic System. As early as September 1997 the Board of the College expressed a view that the System contravened the *Regulation*. The College's concern was that the system permitted examinations and refractions.

[14] In early 1998 the British Columbia Association of Optometrists lodged a complaint with the College alleging that the use of the technology by opticians contravened the *Regulation*. The College, without specifically disclosing to the respondents the fact that a complaint had been lodged, contacted the respondents. The Inquiry Committee of the College then commenced an investigation. Ms. Denhoff, counsel for the respondents, has suggested that the optometrists are motivated more by economics than by any concern for patient care.

[15] On June 23, 1998 the Association of Optometrists started an action against the respondents in the Supreme Court seeking an injunction. The action was dismissed on the grounds that the Association had no standing.

[16] In July 1998 the Inquiry Committee passed a resolution which directed the Registrar to issue a letter to the respondents asking them to voluntarily cease and desist using the system and to remove the equipment from their premises. In the meantime, the College sought the advice on the appropriateness of the use of the technology from the College of Physicians and Surgeons. The respondents agreed to

voluntarily cease using the technology pending a report from the College.

[17] On December 2, 1998 the Ethical Standards and Conduct Review Committee of the College of Physicians and Surgeons replied to the request, however, the Committee did not deal directly with the issue. Rather, it concerned itself with whether there was a conflict of interest in an ophthalmologist basing a prescription upon a read-out from an Eyelogic System operated by an optician. The letter to the College of Opticians, in part, reads as follows:

The Committee is satisfied that this doctor [an ophthalmologist] screens out the patients who need a fully eye examination, that the clients are aware that this is not a complete examination and that there was no complete examination and that there is no conflict of interest in providing this service. The Committee is of the opinion that it is similar to the service provided by a cardiologist who reads electrocardiograms that have been taken by a technologist.

[18] At the same time, the College of Physicians and Surgeons' Committee sought an independent opinion from an ophthalmologist, Dr. Daitz, who essentially supported the respondents' position by stating that, in his opinion, an optician who operates an Eyelogic System is not performing a refraction. His letter dated January 13, 1999, in part, reads as follows:

The Eyelogic System is essentially an interactive software program linked to an autolensometer, autorefractor and an autophoropter. ... The operator of the Eyelogic System provides only rudimentary keyboarding skills, entering the patient's preference of lenses as selected by the software, when presented through the phoropter. In addition, the software calculates refractive error and provides statistical confidence limits; features which are not available in traditional refractions. The operator has no influence whatsoever in the actual determination of the patient's refractive error.

The result, a measure of the refractive status of the eye, is printed out in a form in which the physician is able to assess the reliability of the responses and therefore the reliability of the refraction. It is thus, the physician who is responsible for the refraction.

In many Ophthalmologists offices, refraction is a "delegated procedure". Delegation is usually to a trained Ophthalmic Technician or office assistant. In the case of Eyelogic System, the refraction is carried out by computer software controlling the presentation of trial lenses. In both instances, the physician assumes the ultimate responsibility of the accuracy of the refraction. The operator of the Eyelogic System is not performing a refraction, but only inputting the patient's responses to the computer.

In my opinion, the provider of the refraction in the Eyelogic System is not the Optician but the Physician who assumes the responsibility by signing the prescription.

[emphasis added]

[19] Ms. Denhoff has made much of the fact that the College did not disclose this opinion to the respondents. The respondents only learned of Dr. Daitz's opinion as a result of the latter conveying a copy to them. It is suggested that the non-disclosure of Dr. Daitz's opinion represents bad faith on the part of the College.

[20] In spite of Dr. Daitz's opinion, the College did not sanction the use of the Eyelologic System by opticians. Rather, it continued its investigation.

[21] On July 22, 1999 the College sought the advice from the Ministry of Health regarding the use of autorefractors and "similar automated systems by opticians". However, the Ministry suggested to the College that it contact the Health Professions Council, an advisory body appointed by the Lieutenant Governor in Council, whose objectives include the establishing, monitoring and enforcing of standards of education and practice and, further, to establish and maintain competency programs in the health professions. On October 18, 1999 the College did just that. In a letter to that body, Emmett McRobie, the Chair of the Board of the College of Opticians, expressed concern about whether the public was being protected by the use of such an automated system by unqualified people. At p. 2 of his letter, he fairly set out the competing positions:

... Further, the proponents of the use of automated systems deny that operators of such systems are conducting a refraction. The argument raised is that the machine conducts the refraction, the results of which are subsequently reviewed by a qualified medical practitioner or optometrist. The opposite view is that the operator of the system, who must input the information into the system, such as which projected letters the individual being tested views the most clearly, is a critical element within the "automated" process, and is inextricably linked to the refraction assessment.

[22] The Health Professions Council was of no assistance to the College. The reply to Mr. McRobie's letter reads, in part, as follows:

At the present time the H.P.C. is not considering any aspects of the practice of opticianry raised in your letter and has no intention of doing so. ...

[23] The College then sought the advice of the Honourable Penny Priddy, who was the Minister of Health. The Minister suggested that the College obtain a legal opinion on the use of the system, and then went on to state:

At this time, the Ministry of Health is unable to offer any direction with respect to the use of autorefractors or similar equipment. Subject to the results of your legal opinion, it may be necessary for the Minister to refer this matter to the Health Professions Council for advice and recommendations.

[24] On January 19, 2000 the Assistant Deputy Minister, Ms. Janet McGregor, clarified the Ministry's position by stating that:

... To the extent that opticians are essentially acting as agents or technicians under the direction of a medical

practitioner, the scope of practice issue then is restricted to assessing simply whether the role of agent or technician assisting the medical practitioner is contemplated within the scope of practice.

.....

... the use of this equipment is more accurately described as a procedure performed under the supervision or direction of a medical practitioner or optometrist. The role of the optician seems limited to that of an agent or technician. ...

.....

While it might be argued that this role of assisting a medical practitioner is outside the scope of practice for an optician, such a position would seem difficult to support. Indeed, the view of the College of the Physicians and Surgeons is essentially that they are indifferent to what qualifications, if any, the assistant at the remote location might have.

Thus, the Ministry's position also appeared to support the respondents.

[25] On January 11, 2000 Ms. Jane Lepinski, the registrar of the College and Ms. Annika Redford, an inspector, attended at the respondents' clinic. They underwent examinations using the Eyelogic System. Both parties are of the opinion that the Eyelogic System is beyond the scope of opticians and lens fitters because the education and training programmes do not provide training "for conducting refractions or eye examinations".

[26] Ms. Lepinski has deposed that the Quality Assurance Committee of the College and the Board "clearly believe" that the use of the system by opticians is in violation of the *Health Professions Act, Opticians Regulation* and the Bylaws. She has further stated that the system has not been approved by the Board of the College. She has also stated that the issue has been considered in Ontario and that that province supports the position of the College. However, it appears that the questions that were put to the Advisory Council in that province for consideration were quite different, in that the Council was asked to consider whether it was appropriate for opticians to test for refractive error of the eye and to alter prescriptions. Not surprisingly, the Council recommended to the Ontario Minister of Health that opticians be prevented from altering prescriptions and from issuing a prescription for corrective lenses without having personally assessing the patient.

[27] The College's position is further supported by Dr. Mary Lou Riederer, an optometrist, who states:

In my opinion, the eye test done by the Eyelogic system and the data generated were what I consider to be a refraction. Specifically, I consider the term "refraction" to mean the gathering of data with respect to the refractive error of the eye. The prescription appropriate to correct refractive error involves professional judgment based on the data. In my practice I would never issue a prescription without (a) subjective refractive testing; and (b) an eye examination.

[28] The ophthalmologists' opinions on this subject are also contradictory. Drs. Goldberg and Maerov support the College's position that, "It is our professional opinion that it is not proper professional care to prescribe corrective lenses based solely on the delivery of a computer printout...." However, they have based their opinions on affidavits that have been filed in these proceedings. It does not appear that they have had any actual experience with the technology.

[29] Dr. Bear, an ophthalmologist, on the other hand, strongly disagrees with the opinions of Drs. Goldberg and Maerov. He supports Dr. Daitz's opinion. He has deposed that:

The Eyelogic System takes measurements and provides a printout of data, including a suggestion of the refractive error and the degree of correction required. However, it is only when Dr. Wyzinski or I bring our expertise in interpreting the data, that the refractive error is determined. It is not the Eyelogic System which determines the refractive error.

By analogy, an x-ray film may suggest a bone fracture. The technician who took the x-ray may perceive that the x-ray shows a bone fracture. However, it is only when the x-ray film is interpreted by a medical expert with specialized knowledge and training, that the patient's condition is known. The expert, by applying medical knowledge and experience, may determine that there is no bone fracture at all but only evidence of an old injury.

Similarly, Dr. Wyzinski, who is also an ophthalmologist, has likened the use of the Eyelogic System to the use of an electrocardiogram, wherein, he states, physicians make determinations by interpreting test results gathered by technicians.

[30] More recently, on March 2, 2001, the College received a letter from the present Minister of Health, the Honourable Corky Evans. In his letter, he stated:

... I believe that it would be inappropriate for members of your College to this equipment under any circumstances. Until such time as this matter has been carefully examined and a determination made by government about the terms and conditions - if any - under which it would be appropriate for opticians to be involved in the use of that type of equipment, I would ask for your assistance in having the use of this equipment discontinued.

ANALYSIS

[31] The College seeks an injunction under s. 52 of the *Health Professions Act*, which reads as follows:

A board may apply to the Supreme Court for an interim or permanent injunction to restrain a person from contravening any provision of this Act, the regulations or its bylaws.

[32] The injunction is sought on the grounds that the respondents have breached s. 6 of the *Opticians Regulation*, which provides:

No registrant may conduct eye examinations or refractions.

Thus, the onus is on the College to prove that the respondents are conducting eye examinations or refractions by using the system.

[33] The College has fallen far short in proving its case. It is important to note that there is no restriction in the *Act*, *Regulation* or *Bylaws* that prohibits the use of the EyeLogic System. The real issue is whether by using the system the respondents are conducting eye examinations or refractions. On that point there is a significant conflict in the evidence. The College's experts, optometrists Drs. Mary Lou Riederer, John Jantzi, and ophthalmologists, Drs. Goldberg and Maerov, support the view that by using the EyeLogic System the respondents are contravening the *Regulation*. However, Drs. Daitz, Wyzinski and Bear, all ophthalmologists, disagree.

[34] I find Dr. Daitz's evidence to be more comprehensive and compelling. He has stated that the role of a person operating the system is limited to entering the patient's responses to questions provided by the system. It is his opinion that an operator of a system does not require any medical knowledge and, furthermore, has no influence on any diagnosis or prescription. Those findings and determinations are made by the ophthalmologist. According to Dr. Daitz, the presence of the operator is essentially a data-gathering process. He goes on to state that in the field of eye care, visual field tests are commonly conducted by a device known as "an automated perimeter or field analyzer". These tests are commonly administered by office assistants who are trained by an ophthalmologist in the use of the machine. He disagrees with Ms. Redford's suggestion that the use of the EyeLogic system creates health risks. It is Dr. Daitz's opinion that it is the physician who is responsible for the refraction. The operator of the system is not performing a refraction by only inputting the patient's responses to the computer. Drs. Bear and Wyzinski offer similar views that the EyeLogic System simply takes measurements and provides a printout of data. It is the ophthalmologist who ultimately determines whether there is a refractive error. Dr. Wyzinski's analogy of the use of an electrocardiogram by a technician is both sound and valid.

[35] Moreover, it is not in dispute that opticians and their assistants frequently use such devices as autolensometers, autorefractors and autophoroptors, all devices that make up the EyeLogic technology.

[36] The most that can be said about the position of the College is that officials and inspectors associated with the College and some optometrists are of the view that the respondents are in violation of the *Regulation*. Regrettably the evidence offered by the College is of little assistance. Much of it is in the form of opinions expressed from various persons who have concluded that the use of the system contravenes the *Regulation* without any real evidentiary basis. It really is of no assistance to this Court that Ms. Lepinski and the Board "clearly believe that the use of the system is in violation of the *Act* or *Regulation*". That much is clear. Similarly, Ms. Heather Odermatt, the Vice-Chair of the Board of the College, has deposed that her view, and the view of the majority of the Board, is that the use by opticians of autorefractors and similar automated systems, including the EyeLogic System is in violation of the *Act* and the *Regulation*, has little value when contrasted with the evidence of Drs. Daitz, Wyzinski and Bear. The fact is there is no prohibition in the *Act* or *Regulation* against the use of the system by opticians. The prohibition only relates to eye examinations and refractions.

[37] I am not at all satisfied that the respondents, by using the system, are conducting eye examinations. According to the material filed in this application, *Stedman's Medical Dictionary*, 25th ed. Defines "examination" and "diagnosis" as follows:

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"examination"

Any investigation or inspection made for the purpose of diagnosis; usually qualified by the method used.

"diagnosis"

The determination of the nature of a disease.

[38] It is also apparent that there is no real consensus on the extent to which opticians ought to use the Eyelogic System. That much is obvious from the continued efforts of the College in seeking the advice of such bodies as the College of Physicians and Surgeons, the Health Professions Council and the Ministry of Health. Those bodies have been completely indifferent to the issue raised by the College. It should be noted that the Health Professions Council is entrusted to investigate this type of issue. The Ministry of Health, on the other hand, has contradicted itself from Ms. McGregor's opinion that the College's position "would seem to be difficult to support" to Minister Evans' suggestion that "it is inappropriate" for opticians to use the system.

[39] Counsel for the College, Mr. Harris, has relied on the following authorities: *Alberta College of Optometrists v. Hoeft et al.*, [2001] A.J. No. 149 (Q.B.); *Alberta College of Optometrists v. Eye Contact Inc. et al.*, [1998] A.J. No. 1084 (Q.B.); and *Alberta College of Optometrists v. Eye Contact Inc. et al.*, [1998] A.J. No. 1209 (Q.B.). With great respect, those cases are not of much assistance. In *Eye Contact Inc.*, the issue was whether the appellant was practising optometry. The defence was that he was exempt by the provisions of the *Optometry Profession Act* because he was working for two ophthalmologists. The optometrist in question was also engaged in sight-testing and eye examinations. Similarly, in *Hoeft*, the issues were whether Hoeft was authorized to perform refractive eye testing and whether an ophthalmologist could delegate refractive eye testing to an assistant. The fact that in each of the cases the person in question was using the Eyelogic System is only incidental to the decisions. However, in this case, the factual basis for granting an injunction prohibiting the use of the Eyelogic System by the respondents is clearly insufficient.

[40] It is not in dispute that the College, as a self-governing body, has a mandate to ensure that its members conduct themselves in the public interest and with the highest credentials. If it is in the best interests of the public that opticians not use this technology, the solution is obvious. Then the College has both a mandate and an obligation to seek legislative change so as to clearly prohibit the use of the technology by opticians.

[41] In conclusion, I am not at all satisfied that the respondents, by using the Eyelogic System, are conducting eye examinations or refractions. For these reasons the application must be dismissed.

COSTS

[42] The College's investigation and subsequent proceedings have been lengthy and protracted. I find it somewhat disturbing that the College, having sought the advice of Dr. Daitz, chose not to accept it and carry on with the investigation because it did not support their position. Moreover, in light of the significant conflict in the evidence, there was no real merit in this application. Accordingly, the respondents will be entitled to their costs.

"W.T. Oppal, J."

The Honourable Mr. Justice W.T. Oppal