

JURISPRUDENCE REVIEW

Relevant to Interprofessional Collaboration within the Eye Care Sector

Introduction

This jurisprudence review explores legal cases that are relevant to interprofessional collaboration within the eye care sector and related topics such as conflict of interest, business practices, freedom of association, delegation, dispensing, eye examinations, health record ownership, advertising and freedom of expression. Statutes and regulations are not included in this review; however, jurisdictional reviews, highlighting the statutory and regulatory frameworks in other jurisdictions, may be found at www.hprac.org.

This review is arranged by topic but some cases relate to more than one topic. Where they were available, Ontario cases and cases considered by the Supreme Court of Canada are listed first under that topic. Some cases decided in Canadian jurisdictions other than Ontario and in the United States are also included in the review, as such cases may be persuasive (although not binding) on Ontario courts.

Some cases are decided at more than one level of court. For the most part, this review includes only the decision of the highest level court at which the relevant substantive issues were decided.

HPRAC searched the Quicklaw, CanLII and WestLaw legal databases using a variety of search terms. A description of these databases is included in Appendix 1. Several cases are included that were cited within cases found using one of the databases. In some instances, primarily for college discipline decisions^[1], the search was made directly within the websites of the regulatory colleges.

Several cases may be accessed directly by clicking on the Internet web link provided; others may be downloaded from the website address indicated; still others may not be available on line, and are accessible only through paid subscription or through files of the court.

This review was conducted between September 1, 2009 and November 24, 2009.

HPRAC has attempted to retrieve the relevant citations for case law but this review does not purport to be an exhaustive list of all cases. HPRAC is pleased to hear about other relevant cases.

^[1] Some decisions made by college discipline committees are included.

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Conflict of Interest, Freedom of Association and Business Practices

Title	<i>Cox v. College of Optometrists of Ontario</i> (Ontario Divisional Court 1988)
Citation	[1988] O.J. No. 1347 (Ont. Div. Ct.)
Noted up	Followed – 1; Explained – 1; Mentioned – 5; Dissention – 1
Database	Quicklaw
Search terms	optometrist /p misconduct
Accessed	October 21, 2009
Relevance	Business Practices, Conflict of Interest
Summary	<p>Dr. Cox, an optometrist, rented office space from Imperial Optical, a large vendor of ophthalmic appliances and an ophthalmic dispenser. The office space was physically separated from the company's store but Imperial Optical provided all the equipment, staff and facilities necessary for Dr. Cox to carry on his practice. Dr. Cox paid rent only for the days he used the office.</p> <p>Dr. Cox appealed the decision of the Discipline Committee which found him guilty of professional misconduct on the basis of conflict of interest. Specifically, the Committee found Dr. Cox guilty of renting the premise from a vendor of ophthalmic appliances at a rent which is not normal for the area and guilty of engaging in the practice of optometry in association, partnership or otherwise with Imperial Optical.</p> <p>The Divisional Court established the test for conflict of interest as:</p> <p>"can it be said that no reasonable person could conclude that the prohibited private interest could influence the optometrist's professional conduct?"</p> <p>The Court explained that "conflict of interest does not require proof of actual influence by the personal interest upon the professional duty any more than it requires proof of actual receipt of a benefit. So long as the college identifies a personal interest connected with the professional duties, it is for the college and not the court to say whether that connection of private interest and professional duty gives rise to a reasonable apprehension of actual influence. That is the issue on which they are required by statute to bring their expertise to bear. The question of reasonableness is one for them to decide."</p> <p>The court upheld the decision of the Committee and dismissed the appeal.</p>

Title	<i>Re Feingold and Discipline Committee of College of Optometrists of Ontario</i> (Ontario High Court of Justice Divisional Court, 1981)
Citation	[1981] 33 O.R. (2d) 169
	Followed – 1; Mentioned – 10
Source	Quicklaw
Search terms	Optometrist p/ “Conflict of Interest”
Accessed	October 21, 2009
Relevance	Business Practices, Conflict of Interest
Summary	<p>Section 25(4)(e) of O. Reg. 585/75, made under the authority of s. 96 of the <i>Health Disciplines Act, 1974</i> prohibited optometrists from engaging in the practice of optometry with any person or corporation other than those individuals and institutions specified.</p> <p>Dr. Feingold appealed the decision of the Discipline Committee which found him guilty of professional misconduct on the basis of, among other allegations, engaging in the practice of optometry with an ophthalmic dispenser who, while working in his office, dispensed an ophthalmic appliance to one of his patients.</p> <p>The Court allowed the appeal on this allegation.</p> <p>An optometrist who employs an ophthalmic dispenser, who is not one of the persons specified in the Regulation, is not in violation of s. 25(4)(e) since the ophthalmic dispenser is not qualified to practise optometry and could not properly be described, when acting within the province of ophthalmic dispensing, as practising optometry.</p> <p><i>See paragraph 58 of the Cox case for an explanation of the regulation amendments resulting from this decision:</i></p> <p>“The words “in association, partnership or otherwise” were obviously enacted in response to the decision of this court in <i>Re Feingold and Discipline Committee of the College of Optometrists of Ontario</i>, supra, per Reid J., at pp. 175-8 O.R., pp. 673-6 D.L.R. The previous regulation did not include those words. The court gave the original words their ordinary meaning and held that for “A” to engage in the practice of optometry with “B” it was logically necessary for “B” also to engage in the practice of optometry. The additional words were obviously added to make it clear that the mischief was “A’s” association in the practice of optometry with “B”, a member of a prohibited class of people, whether or not “B” was engaged in the practice of optometry.” [58]¹</p>

¹ Numbers in square brackets refer to paragraph numbers in the case, unless noted otherwise.

Title	<i>Costco Wholesale Canada Ltd. v. Board of Examiners in Optometry</i> (British Columbia Supreme Court 1998)
Citation	[1998] B.C.J. No. 646; 157 D.L.R. (4 th) 725 (British Columbia Supreme Court Judgement filed March 20,1998)
Noted up	Mentioned – 3
Source	CanLII
Search terms	Full text CanLII search: (Legislation “None”; Courts “All”; Boards & Tribunals “Discipline”) 1) Optometrist /p misconduct 2) Optometrist /p delegate 3) Optometrist /p business 4) Optometrist /p “freedom of association”
Link	http://www.canlii.org/en/bc/bcsc/doc/1998/1998canlii2479/1998canlii2479.html
Accessed	October 21, 2009
Relevance	Freedom of Association, Business Practices, Conflict of Interest
Summary	<p>Application for judicial review by Costco and two individual optometrists regarding the Rules of the Board of Examiners in Optometry in BC which prohibited optometrists from having business associations with non-optometrists selling optical services or products.</p> <p>It was held that the Rules were invalid. The Charter of Rights and Freedoms (the “Charter”) did apply to the Rules and the Rules violated the freedom of association guaranteed by the Charter [34 and 90]. The violation was not reasonable nor demonstrably justified in a free and democratic society [89]. The restriction on commercial associations was not proportional to the objective of curtailing possible conflicts of interest which could jeopardize public safety. The Rules were found to be invalid and of no force or effect.</p> <p>The court noted, at paragraph 90, that its decision was confined to the blanket prohibition against optometrists associating with any group other than physicians and stated “It does not follow, and I emphasize that it would be wrong to treat this as a determination, that there are no reasonable restrictions on the association of optometrists with non-optometrists that could be demonstrably justified in this province. That is obviously not the case, but, to the extent the Board sees fit to prohibit associations, it must promulgate rules that can, if necessary, be properly proven to be both rationally based and proportionally implemented[90]”.</p>

Title	<i>Ebert Howe and Associates v. B.C. Optometric Association</i> (British Columbia Court of Appeal 1985)
Citation	1985 CanLII 576 (BC C.A.)
Noted up	Followed – 1; Mentioned – 5; Distinguished – 1
Source	CanLII
Search terms	Optometrist /p premise
Link	http://www.canlii.org/en/bc/bcca/doc/1985/1985canlii576/1985canlii576.html
Accessed	October 29, 2009
Relevance	Business Practices
Summary	<p>Ebert Howe and Associates were two optometrists who, in partnership, had practised within a department store for decades. The Optometric Association passed new rules in 1979 requiring the separation of the premises of optometrists. All premises had to consist of a self-contained office, exclusively used for the practice of optometry, and have separate and distinct entrances from the street or, if in a building, from a common lobby, hallway or mall. In addition, such premises could not be located within, or form part of, a commercial retail store [3].</p> <p>Ebert Howe challenged the rules on the ground that they were discriminatory and therefore <i>ultra vires</i> (beyond the authority of) the powers conferred upon the Association by the <i>Optometrists Act</i>, R.S.B.C. 1979, c. 307 and were thereby invalid and of no force or effect [1]. The trial court agreed and found the regulation was a restraint of trade, discriminatory and deprived a selected small group of practitioners of long-possessed property rights of goodwill [26].</p> <p>The Court of Appeal, however, disagreed with the trial court and found that the regulation prohibiting optometrists from operating out of department stores was not a restraint of trade or <i>ultra vires</i> the authorizing legislation and was lawfully made.</p>

Title	<i>Grier v. Alberta Association of Optometrists</i> (Alberta Court of Queen’s Bench 1991)
Citation	[1991] A.J. No. 1043
Noted up	Mentioned – 3
Source	Quicklaw
Search terms	Optometrist p/ “Freedom of Association”

Accessed	October 21, 2009
Relevance	Business Practices
Summary	Mr. Grier brought an application for a declaration that certain sections of the Optometry Profession Standards of Practice Regulations, Alberta Regulation 389/85 (“the Regulations”) contravened the Canadian Charter of Rights and Freedoms’ (“Charter”) guarantee of freedom of association. The application for leave was dismissed since there was no factual foundation upon which to determine the constitutional issue. In order for a Court to assess whether or not these regulations could violate the Charter, the Court would have to determine, first, the kind of relationships which are afforded freedom of association protection and, second, the nature of the relationships which are restricted by the regulations. A Court cannot undertake to do this without factual information.

Title	<i>Sugarman v. Saskatchewan Association of Optometrists</i> (Saskatchewan Court of Queen’s Bench 1990)
Citation	[1990] S.J. No. 705
Noted up	Followed – 1; Mentioned - 4
Source	QuickLaw
Search terms	optometrist p/ misconduct
Accessed	October 21, 2009
Relevance	Business Practices, Conflict of Interest
Summary	<p>Appeal of a decision by the Disciplinary Committee finding that Dr. Sugarman engaged in the practice of optometry while in a conflict of interest.</p> <p>The evidence established that, during the time periods in question, Dr. Sugarman received a substantial sum of money in rental rebates and consulting fees from a dispenser of ophthalmic appliances. In addition, other benefits were received, such as free secretarial services and payment of business taxes, utilities and telephone expenses. [17]</p> <p>The evidence demonstrated that Dr. Sugarman engaged in a conflict of interest and therefore contravened the Optometric Professional Bylaws. The Court upheld the original sentence imposed by the Discipline Committee but reduced the fines [34].</p>

Title	<i>Dr. Daryan Angle et al v. College of Optometrists of Ontario</i>
Citation	Court File No. 07-CV-342502PD1
Source	Affidavit Materials and Press Release re Settlement from IRIS and the

	College of Optometrists on May 26, 2008
Link	http://iris.ca/newsattach/SettlementPressReleaseMay26.pdf (Press Release re Settlement)
Relevance	Conflict of Interest, Business Practices, Freedom of Expression, Freedom of Association
Summary	<p>The College first filed disciplinary and court proceedings against IRIS the Visual Group in July 2007 over concerns that the company's business practice violated College regulations as they relate to signage, advertising and alliances with non-optometrists.</p> <p>In response, IRIS, which actively uses trade names across Canada and encourages an open model of collaboration between optometrists, opticians and ophthalmologists, filed a legal challenge against the College under the <i>Charter of Rights and Freedoms</i> over issues of freedom of expression and association (sections 2(b) and 2(d) of the <i>Charter</i>). IRIS also alleged that the regulations may be <i>ultra vires</i> (outside the authority of) the College, that the regulations are vague and uncertain, and that the College was discriminatory in its decisions as to whom to refer to disciplinary proceedings.</p> <p>On May 26, 2008, IRIS and the College agreed to withdraw their respective legal and disciplinary actions regarding professional misconduct and restrictions on rights to freedom of association and expression. The parties announced their desire to work collaboratively to modernize the conflict of interest regulations.</p> <p>Specifically, the College agreed to ask a panel of the Discipline Committee to dismiss allegations of professional misconduct against four IRIS doctors and to withdraw a court action that it had initiated against IRIS. IRIS agreed to withdraw its legal challenge to certain regulations under the <i>Optometry Act, 1991</i> that the College was attempting to enforce.</p>

Title	<i>National Association of Optometrists & Opticians Lenscrafters, Inc.; Eyecare Centers of America, Inc. v. Edmund G. Brown and Charlene Zettel</i> (California - 2009)
Citation	567 F.3d 521, 09 Cal. Daily Op. Serv. 6455, 2009 Daily Journal D.A.R. 7675 (9th Cir.(Cal.) May 28, 2009) (NO. 07-15050)
Noted up	Cited – 1
Source	Westlaw
Link	http://caselaw.lp.findlaw.com/data2/circs/9th/0715050p.pdf
Accessed	October 22, 2009

Relevance	Business Practices
Summary	<p>The Court considered whether portions of certain California statutes and regulations violate the dormant Commerce Clause (i.e. a prohibition on state actions limiting interstate commerce). The challenged laws prevent licensed opticians from having specified business relationships with or offering services in the same locations as licensed optometrists and ophthalmologists.</p> <p>The Court concluded that the California laws are not discriminatory. Dispensing optometrists and optical stores are not similarly situated. Unlike retail optical stores, licensed optometrists are healthcare providers and, as such, have unique responsibilities and obligations to their patients that are not shared by optometric stores.</p>

Title	<i>People v. Cole</i> (California 2006)
Citation	38 Cal.4th 964, 135 P.3d 669, 44 Cal.Rptr.3d 261, 06 Cal. Daily Op. Serv. 4989, 2006 Daily Journal D.A.R. 7325 (Cal. Jun 12, 2006) (NO. S121724)
Noted up	Examined – 1; Discussed – 2, Cited – 18, Mentioned – 3
Source	Westlaw
Link	http://caselaw.lp.findlaw.com/data2/californiastatecases/s121724.doc
Accessed	October 22, 2009
Relevance	Business Practices
Summary	<p>Sections of the Business and Professions Code prohibited certain business and financial relationships between registered dispensing opticians and licensed optometrists. The issue was whether the Knox-Keene Health Care Service Plan Act of 1975 (“Knox-Keene Act”) created an exemption to these prohibitions when a licensed specialized health care service plan sublets space within the retail stores of a registered dispensing optician and employs optometrists to provide professional optometric services to plan subscribers at those locations.</p> <p>The Court of Appeal held that although the provisions of the Knox-Keene Act establish an exemption to the rule against the corporate practice of optometry, they do not affect the statutory prohibitions on the relationships between registered dispensing opticians and licensed optometrists. The Supreme Court of California upheld this decision.</p>

Title	<i>Lenscrafters, Inc.; U.S. Vision; Cole Vision Corporation; National Association of Optometrists and Opticians v. Robinson; Richt; Spivey; Hendrickson; Browder; Foster; Abernathy</i> (Tennessee)
Citation	403 F.3d 798, 2005 Fed.App. 0174P (6th Cir.(Tenn.) Apr 14, 2005) (NO. 03-5512)
Noted up	Disagreed with – 1, Discussed – 2, Cited – 13
Source	Westlaw
Link	http://caselaw.lp.findlaw.com/data2/circs/6th/035512p.pdf
Accessed	October 22, 2009
Relevance	Business Practices
Summary	<p>Lenscrafters, along with several other optical companies, appealed the district court’s summary judgment upholding the constitutionality of a Tennessee state statute, Tenn. Code Ann. § 63-8-113(c)(6), which, as interpreted by the Tennessee Supreme Court, prohibited optical companies from leasing space to optometrists to perform eye exams in their retail eyewear stores. The appellants claimed that the provision violated the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution. The United States Court of Appeal upheld the decision of the district court.</p> <p>The appellants claimed that the challenged provision discriminated against interstate commerce by giving Tennessee optometrists a competitive advantage over their out-of-state competitors in the retail eyewear market. The Court found that the challenged provision was neither discriminatory nor were the burdens on interstate commerce “clearly excessive”.</p>

Title	<i>Wyoming State Bd. of Examiners of Optometry v. Pearle Vision Center Inc.</i>
Citation	767 P.2d 969, 82 A.L.R.4th 781 (Wyo. Jan 04, 1989) (NO. 86-323)
Noted up	Declined to follow – 1, Distinguished – 2, Cited - 3
Source	Westlaw
Accessed	October 22, 2009
Relevance	Business Associations Advertising
Summary	The issue was whether a franchise agreement entered into between Pearle, a corporation that owned and operated retail optical stores, and an optometrist, resulted in fee splitting or the employment of a “steerer” [1]. At issue was also whether the franchiser was engaged in the practice of optometry without a valid certificate of registration[1].

The Court upheld the decision of the district court and denied the injunction sought by the Wyoming State Board of Examiners of Optometry (the “Board”) against Pearle, and the optometrist [1].

The Board sought the injunction on the grounds that Pearle and the optometrist were in violation of the statute which restricted corporations from practicing optometry indirectly through the services of an optometrist. Since a franchise agreement between a corporation and an optometrist gives the franchiser a certain amount of control over the optometrist, the Board claimed that this form of corporate control is also prohibited by the statute [3].

Evidence showed that Pearle and the optometrist entered into a sublease of office space and a separate franchise agreement [5]. Pursuant to the sublease, the optometrist paid Pearle a base rent and a percentage of his total sales. Part of the office space was used for dispensing optical goods and the optometrist used the remaining space to treat his patients. A wall divided the two areas and there were separate entrances for each but a common doorway provided internal access [6].

The Court found that there was no genuine issue of material fact with respect to any practice of splitting or dividing a fee because there was no evidence that Pearle was referring patients to the optometrist for remuneration [13]. With respect to the fact that the two offices were adjacent to one another, the Court stated that: “the mere placement of an office in a clearly desirable business location, without more, could not lead to a conclusion that the statute was violated” [13].

The Court also found that the parties’ advertising practices were not in violation of the statute and that there was no evidence that the optometrist employed Pearle as a “steerer” [17-18].

The Court found that the district court did not err by determining that Pearle was not guilty of practicing optometry by employing the optometrist or by virtue of the franchise agreement due to the fact that Pearle had no control over any function specifically involved with the practice of optometry [25].

“A finding that Pearle is engaged in the practice of optometry because of a contractual relationship or employment of a licensed optometrist could only be premised upon facts demonstrating that Pearle exercised control over the optometrist in his practice of optometry” [27].

The Court upheld the decision of the district court in granting a summary judgment in favour of Pearle and the optometrist [31].

Delegation and Eye Examinations

Title	<p><i>College of Optometrists of Ontario</i> (applicant, respondent in appeal) v. <i>SHS Optical Ltd., Dundurn Optical Ltd., and John Doe</i>, all carrying on business under the name <i>Great Glasses</i>, <i>Joanne Marie Bergez and Bruce Bergez</i> (respondents, appellants in appeal)</p> <p>[Often referred to as “the Great Glasses Case”.]</p> <p>(Ontario Court of Appeal, 2008)</p>
Citation	<i>College of Optometrists of Ontario v. SHS Optical Ltd.</i> 2008 ONCA 685, Leave to appeal to the Supreme Court of Canada dismissed June 11, 2009.
Noted up	Mentioned – 3
Source	CanLII
Search terms	<p>Full text CanLII search: (Legislation “None”; Courts “All”; Boards & Tribunals “Discipline”)</p> <ol style="list-style-type: none"> 1) Optometrist /p misconduct 2) Optometrist /p delegate 3) Optometrist /p business 4) Optometrist /p “freedom of association”
Link	http://www.canlii.org/en/on/onca/doc/2008/2008onca685/2008onca685.html
Accessed	October 21, 2009
Relevance	Delegation, Dispensing
Summary	<p>SHS Optical Ltd. and Dundurn Optical (carrying on business as Great Glasses), Bruce Bergez and Joanne Marie Bergez (the “Respondents”) appealed from the judgment 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.</p> <p>In 2003, the College of Optometrists of Ontario invoked section 87 of the <i>Health Professions Procedure Code</i>, S.O 1991, c. 18, Sch. 2 to seek an order directing that the respondents and a named physician comply with sections 27 and 30 of the <i>Regulated Health Professions Act, 1991</i>, S.O. 1991, c. 18 (“<i>RHPA</i>”), as well as ss. 3, 4, and 5(1) of the <i>Opticianry Act, 1991</i>, S.O. 1991, c. 35, and refrain from performing certain acts [20].</p> <p>The court described the business model at issue. “Great Glasses ... 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 [3]. The EyeLogic</p>

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 [4]".

In 2003, the judge ordered the respondents to refrain from prescribing and dispensing corrective lenses without a prescription from an optometrist or physician. The order also prohibited Great Glasses employees, who were not opticians, physicians or optometrists from dispensing corrective lenses absent proper delegated authority [21]. This order (made by Mr. Justice Harris) was not appealed and is a final order.

In 2006, the Superior Court of Justice found the appellants in contempt of the 2003 order, imposed a substantial fine, and made several consequential and ancillary orders [24]. The judgment was delivered by Mr. Justice Crane.

Mr. Justice Crane made several substantive findings in the 2006 decision:

Re Dispensing: In analysing the definition of "dispensing", the Court relied on *Wadden and King Optical Group Inc. v. College of Opticians of Ontario* (2001, Ont. C.A.) where the Court upheld the trial judge's definition of dispensing as "the preparation, adaptation and delivery of eye glasses, ... to a person"[35].

Re Prescribing: In analysing the definition of "prescribing", the Court found that the printout generated by the Eyelogic machine was not a prescription within the meaning of the legislation. The Court explained that "a computer printout that has not been reviewed by an optometrist or physician who in turn can engage their training by turning their mind to the patient at hand would not constitute a prescription under s.5(1) of the *Opticianry Act*. To hold otherwise would be antithetical to the congruency of the legislative scheme and permit those who the legislation intended not to prescribe to do exactly that." [49]

Re Delegation: The Court stated that "here the refractory portion of an eye examination may be delegated to an optician with an Eyelogic system – if the optometrist or physician in his or her professional judgment decides it is in the interest of his or her patient to do so. The decision is not the optician's." [74] "A "doctor"-patient relationship is required for valid delegation. (*Manitoba Association of Optometrists v. 3437613 Manitoba Ltd.* [1997] M.J. No. 584.)" [76]

Justice Crane referred with approval to Steinecke's explanation of

delegation (from his textbook, *A Complete Guide to the Regulated Health Professions Act*²) which explains that the legal bounds of delegation are determined by regulation [52]. The court further indicated that in the absence of regulations, the general principles of delegation that are clear from the legislation apply. The court found that in making a delegation, the delegator continues to hold ultimate responsibility for the proper performance of the delegated act [55]. Also, the court found that there must be a relationship between the delegator and delegatee (i.e. the person to whom the delegated act is delegated; or the person who performs the delegated act) which allows the delegator to have confidence in the competence of the delegatee to safely perform the delegated act. The Court indicated further that in the absence of this relationship, the delegator could rely on the delegatee's professional qualifications [55].

In 2008, the appellants sought to set aside the finding of contempt and, along with it, the substantial monetary and other penalties imposed.

The Court of Appeal dismissed the appeals from the findings of contempt and penalty imposed and stated the following: "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....[107]". Further, the court found that Bruce Bergez opened 14 more franchises since the court order of 2003 and this was a case of "flagrant, protracted and deliberate disobedience of a court order[108]".

The appellants filed with the Supreme Court of Canada an application for leave to appeal from the judgement of the Court of Appeal of Ontario, but the application for leave was dismissed with costs ordered to the College of Optometrists of Ontario³. The College of Opticians of Ontario intervened in the appeal to the Supreme Court of Canada.

In a related application, commenced on the same day as Justice Crane's 2006 decision in this case (*SHS Optical*) was made, the College of Opticians sought an order requiring the 15 franchisees of Great Glasses,

² Steinecke, R. *A Complete Guide to the Regulated Health Professions Act*. Canada Law Book, Release No. 14. October 2008.

³ *SHS Optical Ltd., Dundurn Optical Ltd. and John Doe, all carrying on business under the name Great Glasses, Joanne Marie Bergez and Bruce Bergez v. College of Optometrists of Ontario - and - College of Opticians of Ontario*, 2009 CanLII 30406 (S.C.C.).

	<p>operating under the same business model as that in issue in <i>SHS Optical</i>, to comply with the RHPA. Pending the hearing of that application, the College asked the court for an interim injunction to prevent the franchisees from operating (in a manner that Mr. Justice Harris and Mr. Justice Crane had ruled was contrary to the RHPA). The court (through Madam Justice Spies) granted the injunction⁴.</p> <p>In 2007, the College went back to court asking it to find the franchisees in contempt of Madam Justice Spies' order⁵. The franchisees asked the court to stay the college's original proceedings against them and the college's application to find the franchisees in contempt. The franchisees argued that the legal doctrines of abuse of process and <i>res judicata</i> (the matter had already been litigated) barred the application by the College. The court (through Mr. Justice Perell) found that neither <i>res judicata</i> nor abuse of process barred the proceedings because the earlier actions (i.e. <i>SHS Optical</i>) were not taken against them, but against parties connected to them. Therefore, the court denied the franchisees' request to stay the College's initial application against them and the subsequent request to find them in contempt. (The contempt order was not heard at the time the issues of <i>res judicata</i> and abuse of process were before the court.) The court enforced Justice Spies 2006 order requiring the franchisees to comply with the provisions of the <i>Regulated Health Professions Act, 1991</i>.</p>
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Title	<i>College of Opticians of British Columbia (Petitioner) v. Robert Brown Moss, Jr., John Melvin Moss and Clearbrook Optical Ltd. doing business as United Optical (Respondents) and Eyelogic Systems Inc. (intervenor)</i> (British Columbia Supreme Court, 2001)
Citation	<i>College of Opticians of British Columbia v. Moss et al</i> 2001 BCSC 408.
Noted up	Cited only in same case in Court of Appeal.
Source	CanLII
Search terms	Full text CanLII search: (Legislation "None"; Courts "All") Optician /p "Conflict of Interest"

⁴ *College of Opticians of Ontario v. John Doe* 2006 CanLII 42599 (ON S.C.) [decided December 27, 2006 by Madam Justice Spies] available at <http://www.canlii.org/en/on/onsc/doc/2006/2006canlii42599/2006canlii42599.html>. On this motion, the College also asked the franchisees to identify themselves before the court because they had been named only as John Doe. Justice Spies held that the respondents must identify themselves if they wished to seek relief from the Court [41].

⁵ *College of Opticians of Ontario (Applicant) v. John Doe* 1 2007 CanLII 20097 (ON S.C.) [decided May 31, 2007 by Mr. Justice Perell] available at <http://www.canlii.org/en/on/onsc/doc/2007/2007canlii20097/2007canlii20097.html>.

Link	http://www.canlii.org/en/bc/bcsc/doc/2001/2001bcsc408/2001bcsc408.html
Accessed	October 21, 2009
Relevance	Business Practices
Summary	<p>The College of Opticians of British Columbia sought an injunction against the respondents prohibiting them from using the Eyelogic System, on the grounds that they breached s. 6 of the <i>Opticians Regulations</i>, B.C. Reg. 487/94 which prevents opticians from performing “eye examinations or refractions.” [1].</p> <p>To use the Eyelogic System, the optician uses the computer to record information from a patient, conveys the information by facsimile to an ophthalmologist who then interprets the data and issues a prescription for the appropriate lenses [12].</p> <p>The issue was whether the respondents were conducting eye examinations or refractions [33]. The judge was not satisfied that the respondents, by using the Eyelogic System, were conducting eye examinations. He accepted the opinion of an ophthalmologist who stated that “the operator of the system is not performing a refraction by only inputting the patient’s responses to the computer... 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” [34]. The judge therefore dismissed the application [41].</p> <p>The judge distinguished this case from <i>Alberta College of Optometrists v. Hoeft et al.</i>, [2001] A.J. No. 149 (Q.B.) on the grounds that in <i>Alberta College of Optometrists v. Hoeft et al.</i> the issues were whether Hoeft was authorized to perform refractive eye testing and whether an ophthalmologist could delegate refractive eye testing to an assistant [39].</p>

Title	<p><i>Alberta College of Optometrists (Applicant) v. Brian Hoeft, Brian Hoeft and Castledowns Optical Ltd.</i> carrying on business as <i>Castledowns Optical</i> and <i>Eyelogic Systems Inc.</i> (Respondents)</p> <p>(Alberta Court of Queen’s Bench 2001)</p>
Citation	<i>Alberta College of Optometrists v. Hoeft</i> 2001 ABQB 125 (CanLII)
Noted up	Mentioned – 1; Distinguished -1
Source	CanLII
Search terms	Full text CanLII advanced search: “refract” and “ontario”. Jurisdictions. All.

	Legislation. None. Courts All. Boards and Tribunals. Discipline.
Link	http://www.canlii.org/en/ab/abqb/doc/2001/2001abqb125/2001abqb125.html
Accessed	October 30, 2009
Relevance	Delegation, Dispensing, Eye Examinations
Summary	<p>The Court held that the practice of using a computerized sight testing system called the Eyelogic System to administer “eye tests” breached s.2(1) of the <i>Optometry Profession Act</i>.</p> <p>Mr. Hoeft, a registered optician under the <i>Alberta Opticians Act</i>, was using the Eyelogic System to test his clients’ eyesight [4]. Mr. Heoft had an agreement an Ophthalmologist whereby Mr. Hoeft operated the Eyelogic system to perform an eye test, the computer created a report of the test results, Mr. Heoft faxed the report to the ophthalmologist, the ophthalmologist wrote a prescription for corrective glasses, faxed it back to Mr. Hoeft and Mr. Hoeft filled the prescription [9]. The Court found that Hoeft was practicing optometry within the meaning of the <i>Optometry Profession Act</i> by using the computer system to test vision [15].</p> <p>Hoeft’s qualification as a registered optician under the <i>Alberta Opticians Act</i> did not authorize him to undertake eye testing in this manner [18].</p> <p>An ophthalmologist can delegate aspects of ophthalmic practice to an assistant who is an employee of the ophthalmologist [29]. However, in this case, Mr. Hoeft was not the ophthalmologist’s employee and so the delegation to Mr. Hoeft was not legally authorized. [41]</p> <p>The Court granted the injunction enjoining Mr. Hoeft from using the Eyelogic System to perform eye tests and from otherwise practising optometry contrary to s.2 of the <i>Optometry Profession Act</i> [50].</p>

Title	<p><i>Alberta College of Optometrists (Applicant) v. Eye Contact Inc. Michael Patterson, Derrick Ross And Alberta Eye Group Inc.</i> (Respondents)</p> <p>(Alberta Court of Queen’s Bench, 1998)</p>
Citation	<i>Alberta College of Optometrists v. Eye Contact Inc.</i> 1998 ABQB 829 (CanLII)
Noted up	Distinguished - 1

Source	CanLII
Search terms	Full text CanLII search: (Legislation “None”; Courts “All”; Boards & Tribunals “Discipline”) 1) Optometrist /p misconduct 2) Optometrist /p delegate 3) Optometrist /p business 4) Optometrist /p “freedom of association”
Link	http://www.canlii.org/en/ab/abqb/doc/1998/1998abqb829/1998abqb829.html
Accessed	October 21, 2009
Relevance	Dispensing, Eye Examinations, Delegation
Summary	<p>The Alberta College of Optometrists (“ACO”) alleged that the Respondents were practicing optometry in violation of the <i>Optometry Profession Act</i>, S.A. 1983, c.O-10, and sought an injunction prohibiting the Respondents from practicing optometry. Two ophthalmologists created a “prescription issuing system” whereby the public would have a means to obtain adjustments to their glasses without incurring the expense of an eye examination by an optometrist or an ophthalmologist.</p> <p>The system functioned in the following manner: a customer who had glasses and whose eyes had been examined by an optometrist or an ophthalmologist within the previous five years would go to Eye Contact Inc., located in a shopping mall, to have his or her prescription changed. A technician employed by Eye Contact Inc. would determine the specifications of the existing prescription and would perform a vision test on the customer. The results were sent by fax to an ophthalmologist, possibly located in a different city, for review, and unless something appeared unusual, he or she would approve the test and it would be treated as a new prescription for eye glasses [5].⁶</p> <p>The respondents argued that “the relationship between the ophthalmologist and the optician in the prescription issuing system is the same as the relationship between an ophthalmologist and an ophthalmic assistant employed in the ophthalmologist's office. The Respondents submit it makes no relevant difference that the assistant under the prescription issuing system is in another city and communicates with the ophthalmologist by fax [49].</p> <p>The court found significant differences between an ophthalmologist’s use of an ophthalmic assistant employed by him or her and the prescription issuing system. First, there are differences in the legal relationship between the person doing the sight testing and the ophthalmologist. An ophthalmic assistant is usually employed by the ophthalmologist. In this case, the court found that there was no legal relationship between the</p>

⁶ Number in square brackets refers to paragraph number in case.

optician (Michael Patterson) and the ophthalmologist (the Alberta Eye Group). Rather, the court found that the legal relationship was between two corporations (AEG and ECI). ECI is not authorized to practice opticianry. And AEG is not entitled to practise medicine because it is not a professional corporation. Therefore, neither corporation is legally entitled to perform sight tests. In the ophthalmologist-assistant relationship, the ophthalmologist is legally entitled to perform sight tests.

“The prescription issuing system contemplates very little if any supervision, control or responsibility. The optician is an independent contractor. He is solely responsible for the accuracy of the information he provides to the ophthalmologist. He must obtain and maintain his own professional liability insurance. He indemnifies the ophthalmologist against liability and is solely responsible for his own errors or omissions [60].”

“ I expect the degree of supervision and control of and responsibility for the actions of the in-office ophthalmic assistant as an employee operating within the office of the ophthalmologist would be very much greater.[61]”

The Court held that the absence of supervision and control of, and responsibility for, vision testing by a medical practitioner prevented the relationship between Eye Contact Inc. or any ophthalmologist employed by it from being characterized as a doctor/assistant relationship [63]. The injunction was granted.

The Court noted: “An optician can use a phoropter as a verification device -- that is, to confirm that the prescription issued by an optometrist or an ophthalmologist improves the patient's vision as much as possible. However an optician cannot use a phoropter as a measurement device. If the verification determines the lenses are not optimal, the optician cannot use the device to determine the prescription that would be optimal. I am not certain that it is possible to use the device for verification without also using it for measurement.”[paragraph 38 CanLII].

Note the court was asked to issue an injunction in two circumstances – one regarding the investigator who obtained glasses from Eye Contact Inc. and one against the respondents generally, for operating the prescription issuing system. The court did not grant the injunction re the investigator because no prescription was issued; ECI simply prepared a new set of glasses based on the existing prescription. The court granted the injunction enjoining the respondents from: 1. practising optometry contrary to s. 2 of the Optometry Profession Act, R.S.A. 1983, c. O-10; 2. advertising sight testing or eye examinations; 3. using any device to measure the ocular refractive error of an individual through refraction; or

	<p>4.providing a prescription in respect of any person.</p> <p>The Court cited <i>Manitoba Association of Optometrist v. 3437613 Manitoba Ltd.</i> [1998] 4 W.W.R. 379, affirming [1998] M.J. No. 313 as support for its decision. “In a recent Manitoba case the Court granted an injunction against two licensed ophthalmic dispensers restraining them from operating a prescription issuing system almost identical to the one before me. The motions judge based his decision on the fact that there was no doctor/patient relationship between the customers of the "assistant" and the doctor. The Court of Appeal maintained the injunction. Its reasons focused on the lack of involvement of and direction by the doctor in the testing procedure. It noted that it would be more accurate to describe the doctor as the assistant of the ophthalmic dispensers and not the reverse. The same can be said here [62]”.</p>
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Title	<i>Manitoba Association of Optometrists v. 3437613 Manitoba Ltd., carrying on business as Eye-Deal Eyewear, William T.Boyko and Mary Anne Hartley, and Eyelogic Systems Inc., (intervenor)</i>
Citation	[1998] M.J. No. 313, 161 D.L.R. (4th) 638, [1998] 9 W.W.R. 662, 129 Man.R. (2d) 105, 26 C.P.C. (4th) 200, 80 A.C.W.S. (3d) 669
Source	Quicklaw
Search terms	Manitoba /10 Optometrists
Accessed	October 30, 2009
Relevance	Delegation. Eye examinations.
Summary	<p>Boyko and Hartley are opticians registered in Manitoba. A private investigator entered Eye-Deal Eyewear to determine if they were practising optometry without a license by conducting sight tests using the Eyelogic system. Boyko examined the investigator and performed a sight test using the Eyelogic system. Boyko informed the investigator that he was not performing an eye health examination. Boyko then advised the investigator that the test results from the sight test would be faxed to a medical doctor, Dr. Ramsay, who would then fax back a prescription, which would be provided to the client only if he purchased glasses. Boyko included in his affidavit a letter of delegation from Dr. Ramsay authorizing Boyko to perform the sight tests.</p> <p>The respondents argued that Dr. Ramsay delegated his authority to perform sight tests to Boyko. The court found there was no true delegation because Dr. Ramsay did not have a patient-physician relationship with the investigator. The court cited <i>Narynski v. Dow Corning Canada Inc. et al.</i> (1997), 115 Man.R. (2d) 309 (C.A.) in support of this proposition [16].</p>

	<p>The respondents then argued that “in the same way that a nurse or lab technician or x-ray technician assists a physician without being in contravention of <i>The Medical Act</i>, so too can the appellants assist a physician, in this case, Dr. Ramsay, in respect of sight examinations and not be in contravention of the Act. Dr. Ramsay's request to Boyko and Hartley to conduct sight testing (i.e. the letter of delegation) renders the appellants Dr. Ramsay's assistants.”[17]</p> <p>The court did not accept the respondents’ argument “Under s. 2(1)(e) of <i>The Medical Act</i>, a medical assistant is intended to be a person working under and upon the direction of the physician who ultimately remains responsible to the patient. The appellants operated their business separate and apart from Dr. Ramsay. The tests they conducted on Brown were done on their own initiative, not upon the direction of Dr. Ramsay, who had no contact whatever with Brown. Section 2(1)(e) of <i>The Medical Act</i> is very precise in its language. It deems a person to be practising medicine within the meaning of that Act as one who "acts as the assistant or associate of any person who practises medicine as herein set out." It is impossible on the facts of this case to deem the appellants the assistants or associates of Dr. Ramsay by reason of his letter of delegation. Dr. Ramsay does not identify the appellants as his associates or his assistants, nor would he have the authority to do so within the meaning of <i>The Medical Act</i>. Brown did not approach Dr. Ramsay for an eye examination. He did not have Dr. Ramsay refer him to the appellants for sight testing as part of his eye examination, and he never received his prescription from him. He received his prescription, written by Dr. Ramsay, from the appellants, persons who were not licensed to provide prescriptions. The appellants involved Dr. Ramsay in the process of providing Brown with prescription eyeglasses. If anything, on the facts of this case, Dr. Ramsay can be described as the appellants' assistant, and not the reverse.[19]”</p>
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Title	<i>Jolanda Witvliet v. Sheldon Herzig, Toronto Laservision Centre (1992) Inc. operating under the name and style Toronto Laser Sight Centre and VISX Incorporated</i>
Citation	<i>Witvliet v. Herzig</i> 2003 CanLII 5609 (ON S.C.)
Noted up	Not cited.
Source	CanLII
Search terms	Full text CanLII advanced search: “refract” and “ontario”. Jurisdictions. All. Legislation. None.

	Courts All. Boards and Tribunals. Discipline.
Link	http://www.canlii.org/en/on/onsc/doc/2003/2003canlii5609/2003canlii5609.html
Accessed	October 30, 2009
Relevance	Eye Examinations
Summary	<p>In this case the plaintiff sought damages for loss of future income from the defendant ophthalmologist, laser eye clinic and equipment manufacturer, all of whom admitted liability. The plaintiff's right cornea was damaged when the defendant ophthalmologist performed laser surgery to correct the plaintiff's extreme myopia and astigmatism. The physician repaired the cornea. Several months later the plaintiff underwent an intraocular lens transplant to correct secondary complications that arose from the laser eye surgery.</p> <p>The court awarded the plaintiff general damages but refused to award damages for loss of future income on the grounds that the claim was speculative and not grounded in any evidence. The court noted that the plaintiff's medical history actually showed reasonable visual acuity in the seven years post-surgery. The court further noted that the plaintiff, a commercial airline pilot, did not at any time in those seven years (other than the five months immediately subsequent to the initial surgery) lose her ability to fly as a pilot, her first class medical certification, her job or her salary. In those 5 months post-surgery the court noted that the plaintiff was able to continue working as a flight instructor. The court also noted that if she was to develop some minor problems with her right eye in the future, she may still be able to obtain authorization to fly.</p> <p>There was a considerable amount of medical evidence reviewed by the court, including information provided by the plaintiff's optometrist, several treating ophthalmologists and the family physician employed by the Federal Aviation Agency to conduct medical examinations on pilots.</p> <p>Although the issues in the case did not turn on the meaning of refraction, in the course of considering the medical evidence the court noted that refraction is a subjective test.</p> <p>"Visual acuity is measured using a Snellen Chart. If a patient reports being able to read all of the letters in line 8, the patient has 20/20 vision. The difference between 20/20 visual acuity and 20/30 visual acuity is the ability to read line 8 versus line 6 on the Snellen Chart. The Snellen Chart test is a subjective test. The subjective element is associated with both the patient and the examiner. In this regard, Dr. Kolecki [an optometrist] agreed with Dr. Jackson's statement in a September 20, 1999 email regarding refraction being a subjective test: "... since a refraction is a subjective test, certain small amounts of difference are accepted as</p>

	<p>normal, i.e., if you had a refraction every day for a week we'd expect some differences ...” [65].</p> <p>The court found, notwithstanding the notion that refraction is a subjective test, the plaintiff’s medical history between Nov 1996 and 2003 [during which time the plaintiff lost no income] could not support a claim for future loss of income [85].</p>
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Title	<i>Association des optometristes du Quebec</i> (plaintiff) v. <i>Ordre des opticiens d’ordonnances du Quebec</i> (defendant) and <i>Ordre des optometristes du Quebec</i> (intervenor)
Citation	(2007), C.S.M. 500-05-068720-018 April 3, 2007. The plaintiffs appealed this decision of the Quebec Superior Court. The Quebec Court of Appeal upheld the Superior Court’s decision [2008 QCCA 1193 (CanLII)]. The plaintiffs then sought leave to appeal to the Supreme of Canada but leave was not granted [2009 CanLII 6006 (C.S.C.) - 2009-02-12].
Noted Up	Mentioned -1
Link	Available in French only at: http://www.canlii.org/fr/qc/qccs/doc/2007/2007qccs1417/2007qccs1417.html
Accessed	November 23, 2009
Relevance	Eye Examinations
Summary	<p>The College of Opticians of Quebec (the <i>Ordre des Opticiens</i> or the “Order”) enacted a <i>Guide de pratique en lentilles corneennes</i>, (the “Guide”) encouraging its members to meticulously examine the eye and its adnexae, assess visual acuity and eye health and to use a slit lamp microscope when fitting, adjusting, selling and replacing contact lenses.</p> <p>The Quebec Association of Optometrists asked the court to order the College to cease encouraging its members, through its Guide, to perform acts that amount to optometry practice [p.1, para 1]. The Association argued that the acts in the offending passages encourage opticians to practice optometry (or medical practice) “causing confusion that is prejudicial to the economic and professional interests of optometrists” [p.4, para 14].</p> <p>The College of Optometrists intervened on the ground that the Guide was inconsistent with the legislation governing Opticians.</p> <p>The Court found that the legislation (s. 8 of the <i>Opticians Act</i>) did not</p>

	<p>include actions pertaining to examination of the eyes [page 11, para 62] and Parliament excluded from the authorizing legislation any actions of a nature similar to examination of the eye [page 11, para 63].</p> <p>The court cited <i>Grenon v. Ordre des optometristes du Quebec</i>, [1986] R.J.Q. 1016 (C.A. leave to appeal to S.C.C. rejected Oct. 23, 1986) for the proposition that the phrase “lens adjustment” does not include examination of vision [page 11, para 66].</p> <p>The court noted that “The Ordre des opticiens cannot claim to be able to adopt any standard whatsoever, simply by virtue of having the mission to protect the public, and the objectives they pursue must not conflict with the provisions in other legislation” [page 12, para 73].</p> <p>The court found that the suggestion to perform eye examinations either during the fitting process or during the follow-up subsequent to a lens purchase amounted to the practice of optometry and was inconsistent with the <i>Optometry Act</i>.</p> <p>The court noted that its decision protected the economic interests of optometrists but that in this particular case those interests aligned with the public interest, similar to the case of <i>l'Association professionnelle des optometrists du Quebec v. Cossette</i> [1988] C.S.M. 500-05-003693-882, June 29, 1988 [page 12, para 75].</p> <p>The court found that the passages of the Guide that referred to “observation of the outer tissues of the eye” and to “assessing visual acuity” were beyond the authority of the <i>Opticianry Act</i>, contrary to the <i>Optometry Act</i> and contrary to the <i>Professional Code</i>. The court declared the offending passages null and void and ordered the defendant to withdraw the offending passages, amend them so that they are consistent with the legislation and to inform its members that those passages are contrary to the law.</p> <p>The College of Opticians of Quebec appealed this decision but was unsuccessful.</p>
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Title	College of Opticians of Ontario and Mr. John Ross Eikland C-409 June 19, 2009
Link	http://www.coptont.org/docs/Eikland-D-R-June19-09.pdf
Accessed	October 21, 2009
Relevance	Dispensing
Summary	The College found that the optician engaged in professional misconduct, contrary to the <i>Opticianry Act</i> , by conducting an eye examination and dispensing eye glasses to a customer without the prescription of an

	optometrist or a physician.
Title	College of Opticians of Ontario and Mr. Josef Hammerl C-525 October 2, 2008
Link	http://www.coptont.org/DISCIPLINE/discipline.asp
Relevance	Dispensing
Summary	College alleged that the optician dispensed eyeglasses for vision or eye problems that were not simple magnifiers without a prescription from a physician or optometrist and prescribed eyeglasses without authorization. Mr. Hammerl was found to be guilty.

Delegation and Dispensing

Title	<i>College of Opticians of Ontario (Applicant) and City Optical Inc., Robert Parr and Joyce Arthur (Respondents)</i> (Ontario Superior Court of Justice 2009)
Citation	Superior Court of Justice-Ontario Court File No.: 08-CV-350272, April 29, 2009 (Endorsement)
Noted Up	Not cited
Source	Provided
Link	http://www.canlii.org/en/on/onsc/doc/2009/2009canlii26920/2009canlii26920.html
Accessed	October 21, 2009
Relevance	Business Practices, Dispensing
Summary	<p>The College of Opticians of Ontario ("The College") brought an application for an injunction prohibiting the respondents from performing the controlled act [as defined in the RHPA] of dispensing sub-normal vision devices, contact lenses or eyeglasses, and from holding themselves out or employing persons holding themselves out as persons qualified to practice opticianry in Ontario when they are not qualified or registered members of the College, contrary to the provisions of the <i>Opticianry Act, 1991</i>, S.O. 1991.</p> <p>The court granted the injunctions. The court found that the respondent lay employee held herself out as an optician or as a person authorized to perform the controlled act of dispensing and that the other respondents permitted Ms. Arthur to hold herself out as such, contrary to the provisions of section 9(3) of the <i>Opticianry Act</i> [64]. The court found that Ms. Arthur was neither delegated to nor supervised by the registered opticians who practised at that optical establishment [62].</p> <p>The court held that the practice of not ensuring that opticians are available for consultation at all times creates a substantial risk that the dispensing of eye glasses by non-authorized persons (contrary to the <i>Regulated Health Professions Act, 1991</i>, S.O. 1991, c.18 ("<i>RHPA</i>") and <i>Opticianry Act, 1991</i>, S.O. 1991, Chapter 34 ("<i>Opticianry Act</i>") will repeatedly occur and did occur.</p> <p>The court further held that the test to determine whether a non-registered health professional is "holding out" as a registered member is an objective one. The court found one must ask whether, on a balance of probabilities, a reasonable member of the public would infer from behaviour that the person was recognized by law or otherwise as an optician. [58]</p>

In making its decision, the court noted [47,48,49] that although the legislation does not define dispensing, the court referred to the definition adopted by the court in *King Optical Group Inc. v. College of Opticians of Ontario*, [2001] O.J. No. 4779 (C.A.), the College of Opticians' own "Guidelines for Professional Standards of Practice" and to the definition of dispensing that the Colleges of Opticians and Optometrists agreed to in the *Report of the College of Opticians of Ontario and the College of Optometrists of Ontario in response to the Recommendations 97 and 98 of the Red Tape Review Commission*, May 20, 1998:

In dispensing, a member shall

1. establish a professional relationship with a person prior to dispensing to that person;
2. identify him/herself to any patient to whom the member dispenses, and within the record of care made and maintained by the member about that patient;
3. determine and record specifications of the eyeglasses, contact lenses, or subnormal vision devices to be provided to a patient;
4. confirm and record that the eyeglasses, contact lenses, or subnormal vision devices to be provided or delivered to the patient are appropriate; and
5. provide and record the necessary advice, counselling, and associated care to the patient about the use of the eyeglasses, contact lenses, or subnormal vision devices. [48, *from the Colleges' Report in response to the Red Tape Commission Recommendations*]

The court found that "Ms. Arthur was alone in the store at least five days per week and that, on those days, she could accept customers' prescriptions and orders for glasses, and deliver glasses to them without the requirement that they see an optician. Those acts were part of the continuum of the controlled act of dispensing and were sufficient to lead a reasonable member of the public to infer that Ms. Arthur was authorized to perform them and any of the other required steps in dispensing glasses [61]. The court found the other respondents responsible on the grounds that they did not ensure that a licensed optician provided the necessary delegation to or supervision of Ms. Arthur [62].

Title	<i>College of Opticians of Ontario v. Sandra Wadden and King Optical Group Inc.</i> (Ontario Court of Appeal 2001)
Citation	2001 CanLII 2166 (O.N.C.A.)
Noted up	Mentioned – 1
Source	CanLII
Search terms	Full text CanLII search: (Legislation “None”; Courts “All”; Boards & Tribunals “Discipline”) 1) Optometrist /p misconduct 2) Optometrist /p delegate 3) Optometrist /p business 4) Optometrist /p “freedom of association”
Link	http://www.canlii.org/en/on/onca/doc/2001/2001canlii21166/2001canlii21166.html
Accessed	October 21, 2009
Relevance	Dispensing
Summary	<p>The appellants appealed a conviction based on dispensing eye glasses without being a member authorized to do so, contrary to the <i>Regulated Health Professions Act, 1991</i>, S.O. 1991, c. 18 (“<i>RHPA</i>”) and the <i>Provincial Offences Act</i>, R.S.O. 1990, c.P.33. Ms. Wadden was an employee of an optical store but was not a registered optician in Ontario.</p> <p>On appeal, the court considered “whether the retail sale of prescription eye glasses falls within the scope of “providing health care services to an individual”, and what constitutes the proper definition of “dispensing” prescription eye glasses under the <i>RHPA</i>. The court also considered whether “risk of harm” plays any role in the definition of these concepts. [3]</p> <p>The court found that a primary purpose of the <i>RHPA</i> is “to protect the public from risk” and that “the legislature intended for the level of risk of harm to be protected by listing the prohibited activities that constitute controlled acts [43[25]]”.</p> <p>The trial judge found that dispensing means “the preparation, adaptation and delivery of eye glasses, ... to a person[7[6]]”. The court of appeal agreed with that definition of dispensing. The court also found that dispensing “may be a single act or part of a continuum of activities” [55[34]] and that prescribing and dispensing are distinct parts the activity set out in s. 27(2)9 of the <i>Health Professions Procedural Code</i> [56[35]].</p> <p>The court dismissed the appeal.</p>

Title	<i>The College of Opticians of Ontario v. Karreman</i>
Citation	August 30, 1995 Court File No: RE 5560/95
Source	Provided
Relevance	Dispensing
Summary	<p>The Court ordered that the respondent:</p> <ol style="list-style-type: none"> 1. comply with s. 27 of <i>Regulated Health Professions Act, 1991, S.O. 1991, c. 18 (“RHPA”)</i>; 2. refrain from dispensing subnormal vision devices, contact lenses or eyeglasses [2]; and 3. refrain from operating a retail store for the purpose of dispensing subnormal vision devices, contact lenses or eyeglasses unless such retail store has a registered optician available to serve the customers [3]. <p>The court explained that dispensing includes:</p> <ol style="list-style-type: none"> 1. interpretation of a prescription of a physician or optometrist; 2. advice to a person regarding frame suitability with or without reference to a prescription; 3. advice to a person regarding lens and lens coating suitability with or without a prescription; 4. evaluation of a person’s needs with reference to the provision of subnormal vision devices, contact lenses or eye glasses; 5. taking of all measurements necessary in providing subnormal vision devices, contact lenses or eye glasses; 6. preparation of the final design or subnormal vision devices, contact lenses or eye glasses; 7. verification of completed and/or repaired subnormal vision devices, contact lenses or eye glasses; 8. fitting of subnormal vision devices, contact lenses or eyeglasses; 9. the adapting of subnormal vision devices, contact lenses or eye glasses; 10. adjusting of subnormal vision devices, contact lenses or eye glasses; and <p>follow up care relating to subnormal vision devices, contact lenses or eye glasses.</p>

Title	<i>College of Opticians of British Columbia v. Coastal Contacts Inc.</i> (British Columbia Court of Appeal 2009)
Citation	2009 BCCA 459; reversing 2008 BCSC 617 (Appeal decision dated October 26, 2009)
Noted up	Appeal decision not cited. Trial decision cited by appeal decision.
Source	CanLII
Search terms	Full text CanLII advanced search ⁷ : “refract” and “ontario”. Jurisdictions. All. Legislation. None. Courts All. Boards and Tribunals. Discipline.
Link	http://www.canlii.com/en/bc/bcca/doc/2009/2009bccca459/2009bccca459.html
Accessed	November 23, 2009
Relevance	Business Practices, Dispensing, Prescription
Summary	<p>The College of Opticians of British Columbia (the “College”) sought an injunction enjoining Coastal Contacts Inc. and its affiliates (the “Respondents”) from selling or dispensing prescription contact lenses. The College alleged that the respondents contravened the <i>Opticians Regulation</i>, B.C. Reg. 487/94 (the “Regulation”).</p> <p>The issue was whether the Respondents could refill a prescription for contact lenses without seeing the actual prescription.</p> <p>The Respondents were selling contact lenses through an Internet website. Their clients would order using information from their current contact lenses [5] after confirming that they had a valid prescription from the proper prescriber however they did not have to provide the Respondents with the actual prescription.</p> <p>The trial court refused to grant the injunction on the basis that the respondents were not fitting contact lenses within the meaning of the regulation and therefore were not violating it. The trial judge also rejected the College’s argument that the regulation required that opticians verify the customers’ prescriptions prior to filling them and refused to grant the injunction.</p> <p>The trial court cited the definition of “dispense” established in <i>Wadden and King Optical Group Inc. v. College of Opticians of Ontario</i>, (2001)</p>

⁷ This search revealed the trial level decision. The appeal decision was accessed in CanLII by entering the term “coastal contacts” in the “full text” section.

	<p>207 D.L.R. (4th) 72 (Ont. C.A.) and concluded that the respondents' conduct did amount to dispensing contact lenses [41-42].</p> <p>The Court of Appeal reversed the trial judge's decision. In its majority decision, the Court of Appeal granted the injunction against Coastal Contacts and its affiliates enjoining them from refilling contact lens prescriptions until they are in receipt of actual prescriptions from their customers. The court read into the regulation a prescription verification requirement. The Court suspended the application of the injunction for six months in order to give the Respondents time to create a new business model or to seek legislative change.</p> <p>One judge of the three appeal judges dissented, preferring the decision of the trial judge and found that any requirement that the supplier see the prescription in order to refill it could not be read into the wording of the Regulation and concluded that the appeal should be dismissed [39]. The dissenting judge repeated the chambers judge's comments [from paragraph 57 of 2008 BCSC 617(CanLII)]:</p> <p style="padding-left: 40px;">[57] If the petitioner believes that a prescription verification requirement is necessary in the public interest, then it is free to work towards legislative change. Opponents might argue that such a change would create an unnecessary burden for consumers of contact lenses, drive up costs and assist members of the College in extending a monopoly over the sale of contact lenses. This debate would be up to the legislators to resolve.</p>
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Title	<i>R. v. Smith</i> (Nova Scotia Court of Appeal 1997)
Citation	1997 CanLII 1365 (N.S.C.A.)
Noted up	Not cited
Source	CanLII
Search terms	Full text CanLII search: (Legislation "None"; Courts "All"; Boards & Tribunals "Discipline") 1) Optometrist /p misconduct 2) Optometrist /p delegate 3) Optometrist /p business 4) Optometrist /p "freedom of association"
Link	http://www.canlii.org/en/ns/nsca/doc/1997/1997canlii1365/1997canlii1365.html
Accessed	October 21, 2009
Relevance	Dispensing

	Delegation
Summary	<p>Ms. Smith was an employee of a registered optometrist, but was not herself a registered optometrist or optician. Ms. Smith was charged with “practicing optical dispensing” contrary to s.12 of the <i>Dispensing Opticians Act</i>, R.S.N.S. 1989, c.131.</p> <p>The issue on appeal was whether the Court erred in finding that the appellant was entitled to the benefit of an exemption under the <i>Dispensing Opticians Act</i> in favour of registered optometrists [4].</p> <p>The trial judge concluded that the <i>Dispensing Opticians Act</i> does not preclude reasonable delegation by the optometrist, subject to proper supervision and control. [10]</p> <p>The Court held that it is up to the statutory regulatory body and not the optometrist to determine who is sufficiently qualified to dispense optical services. The fact that an unlicensed person may assist a registered person does not mean that they can act in the absence or independent of the registered person [17]. The matter was remitted back for a new trial.</p> <p>Ms. Smith appealed to the Nova Scotia Court of Appeal and the appeal was dismissed.</p>

Title	<i>Alberta Opticians Association v. London Drugs Ltd.</i>
Citation	2003 ABCA 59 (CanLII), 320 A.R. 371.
Noted up	Mentioned -1
Source	CanLII
Link	http://www.canlii.org/en/ab/abca/doc/2003/2003abca59/2003abca59.html
Accessed	October 30, 2009
Relevance	Dispensing
Summary	<p>The Alberta Opticians Association (the “Association”) appealed the decision of the chambers judge to dismiss the application for an injunction enjoining London Drugs from selling cosmetic contact lenses contrary to s. 58 of the <i>Opticians Act</i>, R.S.A. 2000, c. O-9 (the “Act”) [1].</p> <p>Employees of London Drugs, who were not registered contact lens practitioners, were selling cosmetic contact lenses. The issue before the Court was whether or not a cosmetic contact lens is a “contact lens” under the <i>Act</i> [2-3].</p> <p>The Court found that cosmetic contact lenses are included in the meaning of contact lenses under the <i>Act</i> and granted the injunction. [6,10]</p>

Health Records

Title	<i>McInerney v. MacDonald</i>
Citation	[1992] 2 S.C.R. 138; 1992 CanLII 57 (S.C.C.); 126 N.B.R. (2d) 271; 93 D.L.R. (4th) 415
Source	CanLII
Search terms	Medical record /10 ownership
Link	http://www.canlii.com/en/ca/scc/doc/1992/1992canlii57/1992canlii57.html
Accessed	November 9, 2009
Relevance	Ownership of Health Records
Summary	<p>A patient made a request to her doctor for copies of the contents of her complete medical file. The patient's doctor refused and the patient applied to the court.</p> <p>The court stated, through Justice LaForest: "I am prepared to accept that the physician, institution or clinic compiling the medical records owns the physical records". The court then held that in this particular case the physical records belong to the physician. However, the court found that physicians have a fiduciary duty toward their patients; that duty is to act with the utmost loyalty and good faith and includes preserving confidentiality of patient's sensitive and personal health information. The court found that physicians hold their patient's health information in a manner "akin to a trust" for the patient and therefore that the information in those medical records "belongs" to the patient. On this basis, the court held, therefore, that patients should have access to the information in their records. The court found that the patient could have photocopies of her records (but not the original records themselves) unless there was a significant likelihood of a substantial adverse effect on the patient's physical, mental or emotional health or if harm to a third party could result.</p>

Advertising and Freedom of Expression

Title	<i>Rocket v. Royal College of Dental Surgeons of Ontario</i>
Citation	[1990] 2 S.C.R. 232, 1990 CanLII 121 (S.C.C.)
Noted up	Followed-13 Distinguished – 2 Explained – 2 Mentioned – 100 Cited in dissenting opinion – 9
Source	CanLII, direct search
Search Terms	Full text CanLII advanced search: "advertising" and "professional" and "regulation" Jurisdictions. None. Legislation. None. Courts. All. Boards and Tribunals. Discipline.
Link	http://www.canlii.com/en/ca/scc/doc/1990/1990canlii121/1990canlii121.html
Accessed	November 23, 2009
Relevance	Advertising, Freedom of Expression
Summary	<p>Two dentists, Drs. Rocket and Price, were featured in an advertising campaign that ran in several Canadian newspapers and magazines. The ads described their mall-based dental centres, named them as “faces of the establishment” and identified them as customers of Holiday Inn. As a result, the regulator charged them with violating ss. 37(39) and (40) of Regulation 447, R.R.O. 1980, under the <i>Health Disciplines Act</i> (the “Regulation”). Drs. Rocket and Price challenged the constitutionality of the regulator’s advertising restrictions.</p> <p>The court found that the regulator’s rules, which classified as professional misconduct all advertising not expressly permitted by them, violated their right to freedom of expression (contrary to s. 2(b) of the <i>Charter</i>) in a manner that was not reasonably justified in a free and democratic society.</p> <p>The court noted that the regulator’s rules restricted the means and manner of advertising and the content. (The content was limited to the name, address and telephone number of the dentist [s. 37(39) of the Regulation, page 7 of the decision]). Section 37(40) of the Regulation prohibited all conduct that would reasonably be regarded as disgraceful, dishonourable or unprofessional [page 7].</p> <p>The SCC agreed with the Court of Appeal that the objectives of the regulation were to maintain a high standard of professionalism and to protect the public from irresponsible and misleading advertising [page 20]. However, it found that the effect of s. 37(39) of the regulation was disproportionate to those objectives [pages 21-22].</p> <p>The SCC noted that “the public has an interest in obtaining information as</p>

	<p>to dentists' office hours, the languages they speak, and other objective facts relevant to their practice -- information which s. 37(39) prohibits dentists from conveying by advertising. The court found that the regulations restricted the advertising of useful information without justification [page 22].</p> <p>The court recognized that it is a challenge for regulators to adopt rules that promote professionalism (i.e. preventing advertising that is unverifiable, misleading or unprofessional) while permitting legitimate advertising (i.e. allowing professionals to provide relevant information to the public).</p>
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Title	<i>Grier v. Alberta (Alberta Optometric Assn.) (Alta. C.A.)</i>
Citation	[1987] A.J. No. 650
Noted up	Mentioned – 3
Source	Quicklaw
Accessed	November 23, 2009
Relevance	Advertising, Freedom of Expression
Summary	<p>The issues before the Court were whether a statutory prohibition on the mention of prices in an optometrist's advertisements limited his freedom of expression, and whether this limit was justifiable.</p> <p>The appellant argued that s. 50(a) of the Alberta Optometric Association (the "Association") by-laws, being Alberta Regulation 94/73 enacted pursuant to the <i>Optometry Act</i>, contravened his freedoms guaranteed by the <i>Canadian Charter of Rights and Freedoms</i>. He argued that the unconditional prohibition against price advertising was unnecessarily intrusive of his free speech.</p> <p>The Court found that "the dissemination of product information is a valued activity in our society, and is protected expression. Thus, the optometrist has a Charter-protected right to offer that information" [page 6].</p> <p>The Association asserted that the public interest requires that the integrity of the profession be maintained and that this integrity would be lost if optometrists were permitted to mislead the public in advertisements. However, the Court concluded that "the prohibition of all price quotation is an unnecessarily blunt instrument for regulation of potentially misleading advertising." [page 6]</p>

Title	<i>Carmichael v. Provincial Dental Board of Nova Scotia</i>
Citation	1998 CanLII 1773 (NS S.C.)
Noted up	Not cited.
Source	CanLII
Search Terms	<p>Full text CanLII advanced search: "advertising" and "professional" and "regulation" Jurisdictions. None. Legislation. None. Courts. All. Boards and Tribunals. Discipline.</p>
Link	http://www.canlii.com/en/ns/nssc/doc/1998/1998canlii1773/1998canlii1773.html
Accessed	November 23, 2009
Relevance	Advertising, Freedom of Expression
Summary	<p>Dr. Carmichael placed an ad in the newspaper regarding the relocation of his practice. The newspaper made an error and to compensate the dentist, published an interview with him describing his facilities and equipment. The provincial dental board initiated a hearing against Dr. Carmichael on the grounds that he breached the advertising standards of the board. The dentist sought a declaration that the board's advertising standards were unconstitutional because they violated his freedom of expression.</p> <p>The rules prevented members from displaying any sign containing anything except the dentist's name or clinic name, address, telephone number(s), degrees, profession, hours, languages spoken or specialty. The rules also prevented members from displaying any sign outside of the property line of the building, shopping centre, or office complex in which the practice was located. Another rule prohibited interviews with members of the press for the purpose of attracting patients, expanding services or aggrandizing the member's professional reputation.</p> <p>The Court found that the Board's rules violated their members' freedom of expression [7] in a manner that was not minimally restrictive and was disproportionate to "the alleged objective of maintaining professional integrity and protecting the public [8].</p> <p>The Court found that advertising which includes waiting time before appointments and information about physical facilities and equipment do nothing to mislead, are capable of verification and only add to the information upon which a consumer can make an informed choice. The court also found that an announcement of an opening night reception for patients cannot be construed as something that the public needs to be protected from. Similarly, the court found that the blanket prohibition of signage outside the property line of the area in which the practice was located prohibited any expression.</p>

	The Court granted the remedy sought, an order preventing the Dental Board from proceeding with the hearing against Dr. Carmichael [9].
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Title	<i>Bratt v. British Columbia Veterinary Medical Association</i>
Citation	1999 CanLII 2522 (BC S.C.)
Noted up	Explained – 1
Source	CanLII
Search Terms	Full text CanLII advanced search: "advertising" and "professional" and "regulation" Jurisdictions. None. Legislation. None. Courts. All. Boards and Tribunals. Discipline.
Link	http://www.canlii.com/en/bc/bcsc/doc/1999/1999canlii2522/1999canlii2522.html
Accessed	November 23, 2009
Relevance	Advertising, Freedom of Expression
Summary	<p>The British Columbia Veterinary Medical Association (BCVMA) alleged that Dr. Bratt breached its by-laws by advertising fixed fees for his services, using comparative statements in his advertising and using more than one name for his veterinary facility [1].</p> <p>Sections 15(a) and (b) of the BCVMA Code of Ethics prohibited the advertising of fixed fees and comparative statements in advertising. Section 16(i) restricts a veterinarian to using one name for his facility [3].</p> <p>Dr. Bratt argued that the by-laws violated his right to freedom of expression protected by s. 2(b) of the <i>Canadian Charter of Rights and Freedoms</i> (the “<i>Charter</i>”).</p> <p>The Court found that the advertising restrictions did limit Dr. Bratt’s freedom of expression. The Court was satisfied that the restrictions on advertising fixed fees and comparative statements were rationally linked to their objectives of protecting the public from misleading advertising and promoting professionalism [39]. The court upheld the prohibition on the use of comparative statements in advertising as a sufficiently minimal means of achieving the stated objectives [59]. However, the Court found that the prohibition on fixed-fee advertising overreached the objectives of the rule and had adverse effects on one’s freedom of expression [60].</p> <p>The Court therefore declared only s. 15(a) of the Code of Ethics of the</p>

	<p>BCVMA, i.e. the prohibition against advertising fixed fees, of no force and effect.</p> <p>With regards to using more than one name for his veterinary facility, he BCVMA stated that the objective of the restriction was to prevent the public from being confused, misled, deceived or inconvenienced [71]. The Court found a rational connection between the rule and the objective. The Court also found that the rule was the least intrusive measure of achieving the objective, and that the potential of the use of more than one name for a facility or practice to mislead the public outweighed the infringement of the petitioner's freedom of expression [76-77].</p>
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Title	<i>Griffin v. College of Dental Surgeons of British Columbia</i>
Citation	1988 CanLII 3072 (BC S.C.)
Noted up	Mentioned – 1
Source	CanLII
Search Terms	<p>Full text CanLII advanced search: "advertising" and "professional" and "regulation" Jurisdictions. None. Legislation. None. Courts. All. Boards and Tribunals. Discipline.</p>
Link	http://www.canlii.com/en/bc/bcsc/doc/1988/1988canlii3072/1988canlii3072.html
Accessed	November 23, 2009
Relevance	Advertising, Freedom of Expression
Summary	<p>Dr. Griffin sought a declaration that s. 71 of the <i>Dentists Act</i>, s. 87A of the Regulations and s.8, 9(d) and 9(e) of the Code of Ethics of the College of Dental Surgeons of B.C. violated his freedom of expression guaranteed by s. 2(b) of the <i>Canadian Charter of Rights and Freedoms</i>.</p> <p>The Court concluded that “while commercial advertising may be considered a form of expression, it does not come within the realm of expression circumscribed and guaranteed in "freedom of expression" in s. 2 (b) of the Charter.” [13]</p> <p>Note: <i>Bratt v. British Columbia Veterinary Medical Association and Muller</i> states at para. 49 that this case (<i>Griffin</i>) was decided prior to the Supreme Court of Canada decision of <i>Rocket v. Royal College of Dental Surgeons of Ontario</i>. The advertising rules of the College of Dental Surgeons of B.C. have since been amended.</p>

Title	College of Opticians of Ontario and Mr. Arthur Kochberg C-202 Feb. 12, 2009
Search terms	“Great Glasses”
Link	http://www.coptont.org/DISCIPLINE/discipline.aspv
Accessed	November 23, 2009
Relevance	Eye Examinations. Advertising.
Summary	<p>The college alleged that the optician engaged in professional misconduct, contrary to the <i>Opticianry Act, 1991</i> by conducting an eye examination and dispensing eye glasses to a customer without the prescription of an optometrist or a physician.</p> <p>The optician allowed staff members to sign Vision Care Forms for insurance purposes on his behalf and indicate that he was the dispensing optician, although he did not meet with or dispense to any of the patients for whom the forms were completed.</p> <p>The optician also advertised “Free Eye Tests” to the public, which was misleading as the tests were not performed by authorized persons. The optician pleaded “no contest” to all allegations.</p>

Appendix 1: Description of Databases

CanLII⁸

CanLII (Canadian Legal Information Institute) is a free online legal website providing access to primary sources of Canadian law. The site contains statutes and regulations published by official printers from the federal and provincial jurisdictions. Legislative updates are carried out on a weekly basis.⁹ Sources include decisions of the Supreme Court of Canada from 1948 to date, some decisions prior to 1948 and all Ontario judgments since 1876. Practice rules are also provided.¹⁰

LexisNexis Quicklaw¹¹

LexisNexis Quicklaw offers access to a collection of databases including case law from all Canadian jurisdictions, administrative tribunal decisions, legislation and legal commentary in the form of texts, journals, newsletters and indexes. In addition to Canadian materials, LexisNexis Quicklaw includes American case law and legislation and selected U.K. and Commonwealth judgments. Decisions are in the form of digests or full text. They may be either electronic versions of printed reports (e.g., *Ontario Reports*) or unreported current judgments¹² as received directly from the courts.¹³

Westlaw Canada

Westlaw Canada provides online access to the Canadian Encyclopedic Digest, Carswell Law Reports, unreported court decisions, the Canadian Abridgement and secondary legal sources such as journal articles and commentary. U.S. case law and legislation from the state and federal levels may also be accessed through Westlaw.¹⁴

⁸ http://rc.lsuc.on.ca/library/research_law_ca_cases.htm#canada

⁹ http://rc.lsuc.on.ca/library/research_law_ca_legis.htm

¹⁰ http://rc.lsuc.on.ca/library/research_law_ca_cases.htm#canada

¹¹ http://rc.lsuc.on.ca/library/research_databases.htm

¹² Unreported full text judgements from Canadian courts can be accessed through the “All Canadian Court Cases” group source. (QuickLaw Source Information)

¹³ http://rc.lsuc.on.ca/library/research_databases.htm

¹⁴ http://rc.lsuc.on.ca/library/research_databases.htm