

NOTICE OF PUBLICATION BAN

In the *College of Optometrists of Ontario and Dr. A. John Metzger*, this is notice that the Discipline Committee has issued an order under subsection 45(3) of the Health Professions Procedural Code (the Code), which is Schedule 2 to the Regulated Health Professions Act, 1991, banning the publication, broadcasting or disclosure of the name of any patient referred to during the hearing or in documents filed at the hearing, commencing May 16, 2017, or any information that would disclose the identity of any such patient.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

Every person who contravenes an order made under ... section 45 or 47... is guilty of an offence and on conviction is liable,

- (a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or
- (b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF OPTOMETRISTS OF ONTARIO**

Panel: Dr. Thomas-A. Noël, Chair
Dr. Patrick Quaid
Dr. Dino Mastronardi
Ms. Ellen Pekilis
Ms. Luisa Morrone

B E T W E E N:

The College of Optometrists of Ontario)	Ms. Bonni Ellis
)	Counsel for the College
)	of Optometrists of Ontario
)	
- and -)	
)	
)	
Dr. A. John Metzger)	Dr. A. John Metzger
)	Self-represented (not in attendance)
)	
)	
)	Ms. Julie Maciura
)	Independent Legal Counsel
)	
)	Heard on May 16 and 17, 2017

DECISION AND REASONS

This matter came before a Panel of the Discipline Committee of the College of Optometrists of Ontario on May 16 and 17, 2017, at Victory Verbatim, 222 Bay Street, Suite 900, Toronto, Ontario.

The purpose of the hearing was to consider allegations of professional misconduct referred by the Inquiries, Complaints and Reports Committee (“ICRC”) against Dr. A. John Metzger pursuant to the Panel’s authority under the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991* (the “Code”).

The five members of the Discipline Panel, referred to above, were in attendance, as well as Ms. Bonni Ellis, counsel for the College, accompanied by Dr. Paula Garshowitz, Registrar, and Ms. Julie Maciura, independent legal counsel to the Discipline Panel.

Dr. A. John Metzger was not in attendance and was not represented.

The hearing was called to order at 9:35 a.m. and the Chair introduced the Panel and the other participants.

Publication Ban

At the request of the College and pursuant to its authority under section 45(3) of the Code, the Panel made an order banning the publication, broadcasting or disclosure of the name of any patient referred to during the hearing or in documents filed at the hearing, or any information that would disclose the identity of any such patient.

Upon hearing the submissions of Counsel for the College with respect to the request, which was unopposed, the Panel's reasons for granting the request are that personal health information or other matters may be disclosed at the hearing, which are of such a nature that the harm created by disclosure would outweigh the desirability of adhering to the principle that hearings be open to the public.

Notice of Hearing

Ms. Ellis filed as Exhibit 1 the Notice of Hearing and an affidavit of service demonstrating that Dr. Metzger had been served with the Notice of Hearing on September 16, 2016. She confirmed that the College was proceeding with respect to all of the allegations in the Notice of Hearing.

Plea

As Dr. Metzger was not present, a plea of not guilty was entered on his behalf.

Proceeding in Absence of Dr. Metzger

Counsel for the College informed the Panel that College staff had contacted Dr. Metzger prior to the start of the hearing by telephone. In order to tender into evidence that conversation with Dr. Metzger, the College called Mr. Eyal Birenberg, Coordinator, Investigations and Hearings, as a witness.

Mr. Birenberg was affirmed and gave evidence that he telephoned Dr. Metzger's office this morning at approximately 9:12 a.m. and left a voicemail message saying that the hearing was about to start. Mr. Birenberg then called Dr. Metzger's home and was able to speak with him. Dr. Metzger told Mr. Birenberg that he did not plan on attending the hearing and said "it was not worth coming to Toronto to talk about one patient who was referred [to another Doctor]". Mr. Birenberg clarified with him that the hearing was about breaching the Interim Order of the ICRC. Dr. Metzger said he would not be attending and gave several reasons including that he could not leave someone with a chronic health condition for whom he was the primary caregiver; that it was hard to come to Toronto; that he lived 200 km away; and that he would not be able to find the place. At one point, he said he thought the hearing started on Wednesday, May 17.

Mr. Birenberg confirmed in his testimony that Dr. Metzger also said he did not plan to attend the hearing on either May 16 or May 17. Mr. Birenberg advised that Dr. Metzger confirmed that he understood the subject of the discipline committee hearing and was “going to send a fax”.

Ms. Ellis then had Mr. Birenberg review his affidavit (entered as Exhibit 2), which had been prepared because there had been a chance that Mr. Birenberg would not be able to attend the hearing for family reasons. That affidavit contained numerous letters sent by the College to Dr. Metzger informing him of the date of this hearing, as well as letters from College counsel.

Ms. Ellis also referred the Panel to the affidavit of her assistant Amy V., which was entered as Exhibit 3. That affidavit contained a letter to Dr. Metzger dated May 2, 2017 in which Ms. Ellis outlined the evidence she intended to call at the hearing. Ms. Ellis advised that she received no communication from Dr. Metzger in response to this letter.

Ms. Ellis made submissions with respect to why the Panel should proceed in the absence of Dr. Metzger. She reviewed the numerous attempts made by the College to engage with Dr. Metzger and the offers to assist him in understanding the hearing process. She also advised the Panel that the pre-hearing conference, which had been rescheduled at Dr. Metzger’s specific request to October 14, 2016, had been cancelled when Dr. Metzger had advised on two days’ notice that he would not be attending the pre-hearing for substantially the same reasons as were advanced for his non-attendance at this discipline hearing. Ms. Ellis also advised that Dr. Metzger did not attend the previous discipline hearing into his conduct held on April 24, 25 and 26, 2017.

The College had two witnesses scheduled to attend the hearing on May 16 and another one on May 17. In Ms. Ellis’ submission, those resources would be wasted if the hearing was adjourned. In her submission, the College had acted very fairly and the Panel should proceed in his absence. Dr. Metzger’s failure to respond to the College’s communication or engage in any form of discussion about the hearing process meant that there were no opportunities for discussion about options with respect to time, location or process that might have enabled his participation. In her submission, based on Dr. Metzger’s actions to date, if the hearing was adjourned there was no reason to think he would attend at any future dates.

The Panel sought advice from independent legal counsel who advised that the Panel had the discretion to adjourn the hearing, to proceed with the hearing, or to adjourn the hearing on terms such as making new dates peremptory to Dr. Metzger. She advised that in coming to their decision they consider the relevant factors, including the sufficiency of the reasons advanced for the request to adjourn; the timeliness of the request; the resources of the Committee; any prejudice to the parties; whether any adjournments have been granted previously; the consent of the parties; and any other relevant factor, such as the existence of an Interim Order.

After recessing to deliberate, the Panel decided to proceed with the hearing in Dr. Metzger’s absence. The Panel considered the relevant factors, and found that the factors in favour of proceeding with the hearing outweighed the factors in support of an adjournment (which Dr. Metzger had not actually sought).

In particular the Panel was not persuaded by the reasons for non-attendance given by Dr. Metzger. The Panel particularly considered Dr. Metzger’s claim that he had thought that the first day of the hearing was Wednesday May 17, 2017. The Panel reviewed this information in light of the lengthy trail of written correspondence with Dr. Metzger regarding scheduling and multiple attempts by the College to find a

mutually acceptable hearing date for this matter, particularly Tab I and Tab K of Exhibit 2. The letter in Tab I was delivered by courier and Dr. Metzger signed acknowledgement of receipt of the letter in Tab K.

The Panel further took into account the fact that even if he was confused about the start time for the hearing, Dr. Metzger had stated to Mr. Birenberg on the phone this morning that he had no intention of attending on May 17 either. Given the proof of delivery and the gravity of the circumstances, the Panel was not persuaded by Dr. Metzger's claim that he did not realize the hearing was not starting until May 17.

The Panel also considered Dr. Metzger's statement that he could not attend due to the fact that he was the primary caregiver for someone with a chronic condition. The Panel noted that Dr. Metzger had a lengthy notice period in which to make appropriate arrangements for that person's care. Further, Dr. Metzger's failure to respond or engage with the College and its communication to him regarding scheduling and process in relation to this hearing meant that there was no opportunity to discuss options, such as changing the location of the hearing to somewhere more convenient to him. The Panel considered the fact that he had requested (and received) an adjournment to the pre-hearing conference which demonstrated that he understood enough about the process that he could make such a request, and further that the College had demonstrated that it would be responsive to reasonable requests around process. The Panel also took into account the fact that the College had witnesses present and ready to testify.

Allegations

Ms. Ellis took the panel through the Notice of Hearing which had been filed as Exhibit 1. The Notice of Hearing alleged that:

1. Dr. Metzger committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1 of section 1 of Ontario Regulation 119/94, in that, between approximately June 8, 2016 and July 13, 2016, he contravened a term, condition or limitation to which his certificate of registration was subject and, in particular, he practised optometry without the supervision of a mentor optometrist, as set out in Appendix "A".
2. Dr. Metzger committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 36 of section 1 of Ontario Regulation 119/94 in that, between approximately July 13, 2016 and July 27, 2016, he contravened, by act or omission, the Act, the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts and, in particular, he contravened section 76 of the *Health Professions Procedural Code*, as set out in Appendix "A".
3. Dr. Metzger committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 39 of section 1 of Ontario Regulation 119/94 in that, between approximately June 8, 2016 and July 27, 2016, he engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, unprofessional or unethical and, in particular, he deliberately

contravened terms, conditions or limitations on his certificate of registration and/or deliberately prevented or tried to prevent the College from investigating whether he had engaged in misconduct and the extent of that misconduct, as set out in Appendix “A”.

The Notice of Hearing also set out, in Schedule “A”, further information about the allegations as follows:

Schedule “A”

Dr. (Alvin) John Metzger, OD (“the Member”) has been registered with the College of Optometrists of Ontario (“the College”) in the general class since 1974 and was, at all relevant times, a member of the College.

The Member practises optometry in Hanover and Orangeville.

On May 5, 2016 a panel of the Inquiries, Complaints and Reports Committee (ICRC) referred allegations of professional misconduct and incompetence regarding the Member to the Discipline Committee.

On June 3, 2016 the ICRC directed the Registrar to impose interim terms, conditions or limitations (TCLs) on the Member’s Certificate of Registration after providing him with notice of their intention to impose an Interim Order and an opportunity to respond.

The TCLs imposed on the Member’s Certificate of Registration required that he practise optometry under the supervision of a mentor optometrist until such time as he: (i) completed 20 hours of direct learning with a practice coach, (ii) completed any remediation recommended by the practice coach after the 20 hours of direct learning, and (iii) provided three patients with copies of their clinical records, notice that the care he provided them may not have met the standards, and advice that they be seen by another optometrist.

As of July 13, 2016, the Member had not completed the tasks that would allow him to practise optometry unsupervised.

The Registrar contacted the Member by phone on or about the morning of June 7, 2016 to advise him of the TCLs. Later that same morning the Member was served with correspondence regarding the TCLs including the ICRC’s decision and reasons.

On or about June 8, 2016, the College obtained information which suggested that the Member may be contravening the TCLs by practising without supervision before having completed the conditions necessary for that to occur.

On or about July 11, 2016 an investigator appointed under s. 75(1)(a) of the Code (“Investigator #1”) attended the Member’s practice in Hanover. Upon entering the Member’s practice, the investigator observed the Member conducting what appeared to be an eye examination on a female, who was looking through a phoropter while the Member was sitting directly across from her. Investigator #1 spoke to the Member and requested an eye examination using the fictitious name Z.B. Investigator #1 returned later that day and received an eye examination from the Member, who issued a prescription for lenses and provided Investigator #1 with a receipt after he

paid \$75 for the examination. There was nobody else present during Investigator #1's examination by the Member.

On July 13, 2016 a different investigator (Investigator #2) attended the Member's Hanover practice. Investigator #2 advised the Member of the purpose of her visit, which included obtaining the Member's appointment book and patient records for patients to whom the Member had provided care on or after June 8, 2016, including Investigator #1. Investigator #2 showed the Member her s. 75(1)(a) appointment of investigator.

Investigator #2 observed and obtained four patient records, which she thought might relate to appointments that had occurred on or after June 8, 2016 including the record the Member created in relation to Investigator #1. While Investigator #2 was reviewing these records, the Member asked her to leave. Investigator #2 advised the Member that she needed to obtain additional records but the Member repeated that she should leave the office. Investigator #2 reminded the Member of his obligation to cooperate with an investigation and advised him that failing to cooperate could be deemed professional misconduct. Investigator #2 also offered the Member an opportunity to contact legal counsel before having her leave the office. However, the Member repeated his request that Investigator #2 leave the office, which she did, without having an opportunity to obtain all of the documents she requested.

Opening Submissions

College Counsel gave brief opening submissions outlining what she anticipated the evidence would show. She reiterated that the College would be asking the Panel to make findings of professional misconduct after they had heard all of the evidence against Dr. Metzger.

Evidence and Analysis of Evidence

The Panel heard from the following witnesses.

Ms. Mina Kavanagh

The College called Ms. Mina Kavanagh, Director of Investigations and Resolutions for the College. Ms. Kavanagh was affirmed and testified that she had held this role for almost six years. Ms. Kavanagh is responsible for the complaints department and supports the ICRC and prepares their meetings and any follow-up steps required from those meetings.

She testified that Dr. Metzger had been the subject of an investigation by the ICRC stemming from a complaint made by a patient in 2015. That complaint was investigated and ultimately referred to discipline. At the same time, the ICRC also imposed an Interim Order on Dr. Metzger's certificate of registration.

Ms. Kavanagh testified about the requirement in the Code to notify members about the ICRC's intention to impose an Interim Order and to allow the member to make submissions about that intention. She confirmed that she sent out to Dr. Metzger the notice of intention to impose an Interim Order imposing

terms, conditions and limitations on his license to practice optometry and asked him to provide submissions. Dr. Metzger asked for an extension of the time in which to make submissions; he was provided with that and did eventually provide submissions.

The ICRC ultimately decided to impose the Interim Order and Dr. Metzger was informed of that decision. He was informed by way of a telephone call on June 7, 2016 from the Registrar, Dr. Garshowitz, in which Dr. Metzger was told that a package of information would be delivered to him that day reflecting the fact that the ICRC had directed Dr. Garshowitz to impose terms, conditions and limitations on his certificate of registration, and that as of June 8, 2016 Dr. Metzger would only be allowed to practise optometry with a mentor/supervisor present. Dr. Garshowitz offered to discuss the matter once Dr. Metzger had had a chance to review the package. Ms. Kavanagh was present during the phone call between the Registrar and Dr. Metzger (the call was on speakerphone) so Ms. Kavanagh could hear everything that was said.

Exhibit 4 (Tab 4(a) through (f)) in the College's Book of Documents) contains all of the documents that were sent to Dr. Metzger informing him of the Interim Order and explaining what he had to do in order to comply with it, which included practising only in the presence of a mentor optometrist until Dr. Metzger had successfully completed various remedial activities. Those remedial activities included completing 20 hours of direct learning with a practice coach as well as remediation recommended by that coach, and contacting three named clients and advising them that the care he had provided to them did not meet the standards of the profession and advising them to see another optometrist.

Dr. Metzger called the Registrar on June 8, 2016 after he received the package of information. There was some discussion between him and the Registrar about the coaching that he was required to do as well as the 20 hours of direct learning requirement.

Ms. Kavanagh testified that the Registrar told Dr. Metzger several times during that telephone conversation that he could not practice optometry unsupervised until he completed the remedial activities described in the material at Exhibit 4. Ms. Kavanagh testified that Dr. Garshowitz explained the terms, conditions and limitations in simple terms; that the College had identified two potential coaches at the University of Waterloo; and that it was Dr. Metzger's responsibility to proactively contact one or both of the coaches to make arrangements. Dr. Garshowitz encouraged Dr. Metzger to contact her if he had any questions about the order. Dr. Garshowitz suggested that Dr. Metzger seek legal advice. Ms. Kavanagh testified that Dr. Metzger did not contact Dr. Garshowitz again after the June 8, 2016 conversation.

A further letter to Dr. Metzger was sent by the College on June 9, 2016 (Exhibit 6) outlining instructions for the coaching and for the clinical supervisor.

After the telephone conversation with Dr. Metzger, Ms. Kavanagh instructed a College staff person to call Dr. Metzger's office and to try to get an appointment with him. As a result of those instructions, Ms. Kavanagh forwarded information to the Registrar, who then asked the ICRC to approve the appointment of an investigator (Exhibit 5) to determine if Dr. Metzger was breaching the Interim Order.

Investigators were then appointed to investigate Dr. Metzger's compliance with the Interim Order. The investigators were Mr. Ziggy Bardel and Ms. Amy Shillington, both from Benard and Associates.

Ms. Kavanagh outlined the instructions she gave to the investigators in regard to trying to pose as a patient and make an appointment with Dr. Metzger. She testified that she instructed Mr. Bardel to pose as

a patient and attempt to make an appointment at one of Dr. Metzger's two office locations. Mr. Bardel advised Ms. Kavanagh that he was able to make an appointment and did see Dr. Metzger, had an eye exam by Dr. Metzger and got a glasses' prescription on July 11, 2016. Mr. Bardel provided Ms. Kavanagh with a written report detailing his July 11, 2016 appointment with Dr. Metzger. Ms. Kavanagh provided the report to the ICRC. Ms. Kavanagh testified that Dr. Metzger had not complied with any aspect of the Interim Order by July 11, 2016, which was the date of Mr. Bardel's appointment with him.

Ms. Kavanagh testified that she then instructed the second investigator, Ms. Shillington, to attend at Dr. Metzger's office and obtain the patient record for Mr. Bardel. Ms. Shillington was also asked to look for and obtain, if they existed, twenty other records of patients seen by Dr. Metzger after June 8, 2016 and to get the appointment record for that time period as well.

Ms. Kavanagh testified that Ms. Shillington was able to obtain Mr. Bardel's client record (which was in the name of an alias used by him), as well as some random records but that the investigation was cut short when Dr. Metzger asked Ms. Shillington to leave the premises.

Ms. Kavanagh received Ms. Shillington's investigation report on July 14, 2016 and the ICRC met shortly thereafter. Both investigation reports form part of the Registrar's Report which was then sent to Dr. Metzger. He was given the opportunity to provide submissions with respect to it before the ICRC made its decision about what to do. Ms. Kavanagh sent the Registrar's Report to Dr. Metzger on July 18, 2016 and he was asked to make submissions within seven days. Dr. Metzger did make brief submissions (received on July 28, 2016 by the College) with respect to the report and those submissions were entered as Exhibit 7.

(College counsel made submissions as to why Dr. Metzger's submissions to the ICRC should be admitted into evidence as they are "admissions against interest" and therefore an exception to hearsay. Her submissions were supported by authorities, including *R v. Evans* at Tab 7 of her Book of Authorities on Finding. Independent legal counsel provided advice with respect to the submissions and the Panel accepted Dr. Metzger's written submissions into evidence, agreeing that they fell within an exception to hearsay. The Panel relied on the submissions of Counsel and *R. v. Evans* in concluding that Dr. Metzger did in fact make the submissions in question. They are on letterhead paper bearing his name and title and signed by him.)

Ms. Kavanagh confirmed that when the investigator Mr. Bardel attended at Dr. Metzger's office on July 11, 2016, the interim terms, conditions and limitations imposed on Dr. Metzger's certificate of registration remained unfulfilled. Ms. Kavanagh explained that the Interim Order was no longer in force (i.e., as at this day in the hearing, May 16, 2017) because they were lifted automatically when the previous discipline hearing was completed on April 27, 2017.

Ms. Kavanagh confirmed that Dr. Metzger had not complied with the Interim Order by the last date of the previous discipline hearing. After the discussion about coaching during that telephone call with Dr. Garshowitz on June 8, 2016, Dr. Metzger made initial contact with one of the practice coaches that had been identified by the College. However, those discussions did not go anywhere and no coach or supervisory arrangement was proposed. Otherwise, Dr. Metzger has made no attempts known to the College to comply with the Interim Order.

Ms. Kavanagh explained that Interim Orders were rarely imposed by the ICRC of the College; Interim Orders are extreme measures used in very serious cases.

Ms. Kavanagh gave her evidence in a forthright manner and the bulk of her evidence was supported by documentary material provided to Dr. Metzger. Ms. Kavanagh presented a detailed and orderly account of events that was internally consistent. Ms. Kavanagh's primary focus is public safety, specifically through investigating and resolving complaints about members made to the College. As a College employee, she has no personal complaint against Dr. Metzger and no personal interest in the conduct of his practice, the decisions of the ICRC, the investigation, or any discipline hearing. Ms. Kavanagh retained a neutral third party to investigate whether or not there was any evidence that Dr. Metzger was continuing to practice without complying with the terms, conditions and limitations on his license. Dr. Metzger was provided with a copy of all relevant documents at various points in the process and was invited to comment and interact with the College. Her evidence did not conflict with any other facts or evidence before the Panel. The Panel had no difficulty accepting Ms. Kavanagh's testimony.

The Panel believed on a balance of probabilities that Dr. Metzger was aware as of June 8, 2016 that he was no longer entitled to practise optometry unless he was in the presence of a College-approved mentor.

Mr. Ziggy Bardel

Mr. Zbigniew ("Ziggy") Bardel was affirmed and gave evidence that he has been a private investigator with Benard and Associates since January 2015. He reviewed for the Panel his credentials and the usual steps taken in documenting investigations. Mr. Bardel specializes in investigating professional misconduct for regulatory health colleges in Ontario.

With respect to the investigation into Dr. Metzger's conduct, Mr. Bardel testified that he was instructed by the College to try to make an appointment with Dr. Metzger to determine if he was complying with the limitations on his certificate of registration. Mr. Bardel telephoned Dr. Metzger's clinic in Hanover but was not successful in making contact. He tried the Orangeville office and they told Mr. Bardel that Dr. Metzger was away and that they were referring clients elsewhere. Mr. Bardel advised the College about this and discussed next steps. As a result of his conversation with College staff, Mr. Bardel attended at the Hanover clinic to see if he could get an appointment as a "walk-in" client.

Mr. Bardel testified that he attended Dr. Metzger's private practice in Hanover on July 11, 2016. When he walked in the door to the office he could see an examination room with its door open. Dr. Metzger was in that room with a female person. Dr. Metzger was using a phoropter on the woman's eyes.

Mr. Bardel identified Dr. Metzger from photographs of a grey-haired gentleman handling certain equipment which he said was the same person who identified himself as Dr. Metzger on July 11, 2016 at the Hanover location. Mr. Bardel testified that these photographs (Exhibit 8) had been taken during a previous investigation and were provided to him in advance of his attendance in Hanover to assist him in identifying Dr. Metzger.

Mr. Bardel testified that when he attended at Dr. Metzger's office he told Dr. Metzger that he was just passing by and looking to try to book an eye exam, and asked Dr. Metzger if he had any availability that

day. Dr. Metzger told him that he had a cancellation that afternoon at 1:30. Mr. Bardel returned at 1:30 p.m. that day, giving his alias.

When he returned at 1:30 p.m., Dr. Metzger took Mr. Bardel into the examination room down the hall and asked him questions about his last appointment and whether he took any medication. Dr. Metzger then proceeded with the eye exam. Mr. Bardel did not observe anyone else in the clinic at the time.

Mr. Bardel testified that Dr. Metzger shone a light in his eyes and then looked at his eyes through the phoropter. Dr. Metzger had him read letters off the wall and Dr. Metzger flipped through different lenses while testing his vision.

During the course of the appointment a female customer entered the office and Dr. Metzger left the examination room to go speak with her. During Dr. Metzger's absence, Mr. Bardel took photographs of the chair in the examination room, the phoropter and the patient record (in his alias) in which Dr. Metzger wrote. These were marked as Exhibit 9 (chart), Exhibit 10 (photograph of examination chair) and Exhibit 11 (photograph of phoropter).

Mr. Bardel estimates that Dr. Metzger was out of the examination room for approximately five minutes.

When the eye exam was completed, Dr. Metzger told Mr. Bardel that his prescription had not changed. They went to the dispensary part of the office and talked about costs. Dr. Metzger told him new lenses would cost \$230 and Mr. Bardel told him he wasn't ready to buy eyeglasses.

Mr. Bardel was given a prescription by Dr. Metzger dated 07/11/16 (marked as Exhibit 12). Mr. Bardel paid for the visit (\$75 in cash) and was given a receipt by Dr. Metzger for a "vision check", which was dated 07/11/16 (Exhibit 13). Mr. Bardel saw Dr. Metzger write the receipt.

Mr. Bardel also took a business card, which identified Dr. Metzger as an optometrist (Exhibit 14).

Mr. Bardel testified that he had been to optometrists approximately six or seven times in his life. He testified that his visit with Dr. Metzger was very similar to those other optometrist appointments he had in the past.

Mr. Bardel confirmed that the location at which he saw Dr. Metzger was the same as the one on Dr. Metzger's business card, namely 438 10th Street, Hanover, Ontario.

The Panel considered Mr. Bardel's testimony. Mr. Bardel testified in a clear and straightforward manner about matters that were in his personal observation. Mr. Bardel is a trained and licensed investigator who attended Dr. Metzger's office with the focused goal of observing whether or not there was any evidence that Dr. Metzger was in violation of the terms and conditions in the Interim Order.

Mr. Bardel is a neutral fact finder in this matter. He has no interest in the outcome of this case. Mr. Bardel attempted to make an appointment at Dr. Metzger's other office location at the Orangeville Clinic, where he was informed that Dr. Metzger was away doing education courses and it was unknown when he would return. They were referring patients to another doctor. Mr. Bardel called the College with this information. During the discussion it was determined that he would attend Dr. Metzger's private practice in Hanover at 438 Tenth Street, Hanover, Ontario and see if he could get a walk-in appointment. Mr.

Bardel's initial report indicated that he did not find evidence that Dr. Metzger was breaching the terms of the Interim Order of the ICRC at the Orangeville location, which supports his position as a neutral fact finder.

Mr. Bardel prepared notes and a written report for the College within a day of his visit to Dr. Metzger. During his testimony Mr. Bardel needed to refresh his memory from his notes as to the exact street address of the Hanover location, but was otherwise able to clearly recall the events of his July 11, 2016 visit to Dr. Metzger's office. His testimony is consistent with the photographs and documentation in Exhibits 12 - 14.

Mr. Bardel personally attended at Dr. Metzger's office at 438 10th Street, Hanover, Ontario. He identified Dr. Metzger from photographs which he showed the discipline panel. He personally received an eye exam from Dr. Metzger on July 11, 2016. Dr. Metzger was alone with Mr. Bardel during the eye examination. Mr. Bardel watched Dr. Metzger write patient notes of the visit, and received a prescription as well as a hand-written receipt dated July 11, 2016.

The Panel found Mr. Bardel's evidence to be credible and persuasive. It is consistent with the evidence of Ms. Kavanagh as to the instructions she had given him. On the basis of Mr. Bardel's evidence and in combination with Ms. Kavanagh's evidence, the Panel concluded on a balance of probabilities that Dr. Metzger performed an unsupervised eye examination on Mr. Bardel on July 11, 2016 and that he knew this was in violation of the Interim Order of the ICRC which came into effect on June 8, 2016.

Affidavit of Patient A

The Panel heard submissions from College counsel with respect to the admissibility of affidavit evidence of Patient A.

College counsel submitted that normally hearsay is not admissible in discipline hearings under the *Regulated Health Professions Act* ("RHPA"), and that affidavit evidence is technically hearsay because it is an out of court statement and the person swearing the affidavit is not present to be cross-examined. However, in some circumstances affidavit evidence is admissible, including when it essentially contains admissions of the registrant as that constitutes one of the "exceptions" to hearsay evidence, or when the evidence is not contentious, or when the conditions for admission pursuant to the principled exception to the hearsay rule apply.

College Counsel made submissions with respect to this issue, and proffered a Book of Authorities in support which contained an excerpt from the Rules of Civil Procedure (Rule 53.02), an excerpt from the *Law of Evidence*, Lederman, Bryant and Fuerst, 4th Edition, and a civil court case (*Cormack Animal Clinic v. Martyn Potter et al*, 2002 CanLII 713 ONSC).

College Counsel suggested that the Panel could admit the affidavit of Patient A pursuant to Rule 53.02 of the Rules of Civil Procedure, which provides that a court may order that the evidence of a witness may be given by affidavit unless an adverse party reasonably requires the attendance of the maker of the affidavit for cross-examination. Since Dr. Metzger was not in attendance at the hearing, in counsel's submission, he could not reasonably require the attendance of Patient A. College Counsel reviewed Exhibit 3, her letter of May 2, 2017 to Dr. Metzger. That letter provided Dr. Metzger with a summary of the evidence

that Patient A was expected to give. It also advised that Patient A might be unable to attend and that College Counsel might seek to have his evidence entered by affidavit.

Alternatively, College Counsel submitted that the Panel could admit the affidavit pursuant to the principled exception to the hearsay rule on the basis that the information in the affidavit was reliable (because it was sworn and because it was essentially corroborated by Dr. Metzger himself) and because it was reasonably necessary, given that Patient A was seventy-five years old and would find it difficult to travel to Toronto to give testimony in person at the hearing.

The Panel deliberated on the admissibility of the affidavit evidence of Patient A and decided to admit it.

The Panel felt that the appropriate route to possible entry of the affidavit was through the principled exception to the hearsay rule, as discussed in the *Cormack* case. The Panel found that the evidence in the affidavit was in fact “contentious” (because it went to the very issue that was before the Panel, i.e., whether Dr. Metzger had practised in violation of the Interim Order), but felt that in the circumstances it was appropriate to admit it as it was reasonably necessary and because the Panel felt it was reliable for the reasons set out below.

The Panel was of the view that the affidavit evidence of Patient A was reliable because it was given under oath, which was a “significant badge of reliability” as described by the court in *Cormack*, and also because the information in it was supported by Patient A’s daytimer/calendar showing an appointment for an “Eye Appt.” at 10:00 a.m. on June 30, 2016 with Dr. Metzger (listed as “Dr. Metzler” in his calendar). Furthermore Patient A deposed to having been a patient of Dr. Metzger’s for approximately 20 years and as such, the Panel found that it was unlikely that he had any animosity towards Dr. Metzger that would influence the information he provided in his affidavit. As an innocent bystander to the matter whose file simply happened to get picked up by the investigator, and with no complaint of his own against Dr. Metzger, the Panel concluded that Patient A would have no reason to falsify the information in his affidavit including his calendar entries regarding the date on which he saw Dr. Metzger.

With regard to the second part of the test for the principled exception to hearsay, i.e., whether the affidavit was “necessary”, the Panel notes that the court in the *Cormack* decision cited the leading case on this principle (*R v Khan*) which holds that “necessity for these purposes must be interpreted as “reasonably necessary”. In this case, the Panel notes that Patient A has deposed that he is a witness who happened to be caught up in this matter by pure chance. He is 75 years old and that it would be difficult for him to attend a hearing in Toronto. In all the circumstances the Panel agreed that it was reasonably necessary to admit the evidence of Patient A by way of affidavit.

Furthermore, the Panel also took into consideration the fact that College counsel had written to Dr. Metzger by letter dated May 11, 2017 (attached to the affidavit of Ani I., assistant to Ms. Ellis, dated May 15, 2017 which was marked as Exhibit 15), about Ms. Ellis’ intention to tender the evidence of Patient A by way of affidavit rather than calling him in person.

In that letter College counsel advised Dr. Metzger that she intended to enter the evidence of Patient A by way of affidavit and she asked Dr. Metzger to inform her as soon as possible if he wanted the opportunity to cross-examine Patient A. Dr. Metzger did not respond to College counsel’s letter.

The Panel noted that Dr. Metzger is not a lawyer and was not represented by counsel in this matter. He could not be expected to understand the nuances of different types of evidence and the rights of cross-examination. Nevertheless, College Counsel had taken steps to advise Dr. Metzger of the College's intention to enter Patient A's evidence via affidavit and to provide him with a summary of what that evidence was likely to be. Dr. Metzger did not raise any questions or concerns in response to the communications in Exhibit 3 and Exhibit 15. The Panel accepted that the College notified Dr. Metzger not once but twice of its intentions with respect to the evidence of Patient A and gave him an opportunity to engage with them on the topic. Dr. Metzger chose not to communicate with the College even to ask any questions he may have had about the impact of the plan to introduce Patient A's evidence by affidavit.

The Panel therefore determined that the affidavit of Patient A met the "reasonably necessary" and "reliability" tests for the Principled Exception to Hearsay, and accepted Patient A's affidavit into evidence as Exhibit 21.

The Panel then turned to considering the inconsistencies between the evidence of Patient A with two other exhibits:

1) Exhibit 17, the referral letter from Dr. Metzger to Dr. S. That letter states that Dr. Metzger examined Patient A on June 6, 2017. The Panel noted that there is nothing particularly unusual or wrong about faxing a referral letter to another doctor several weeks after seeing a patient.

However, College counsel had tendered as Exhibit 16 a letter faxed to her by Dr. Metzger on the morning of the hearing (although dated May 15, 2017) in which Dr. Metzger admits to having "recorded [Patient A's] visual acuity" "on or about June 30, 2016". The Panel discussed the statement "on or about June 30, 2016" and whether the bracketed date range could be interpreted as extending to a visit that occurred before June 8, 2016. Given the gravity of the situation facing Dr. Metzger and the importance to him of the Interim Order of the ICRC, the Panel decided that it was highly unlikely that Dr. Metzger would himself have made a statement placing the visit with Patient A "on or about" June 30 if it had actually occurred before the critical date of June 8, 2016 (at which time the conditions on his certificate of registration came into effect).

2) Exhibit 7, the handwritten and undated note faxed by Dr. Metzger to Eyal Birenberg, stamped "Received July 28, 2016". That note states: "Cut off date 06 08 16 . . . [Patient A] requested appointment with specialist - no exam". The Panel discussed whether checking visual acuities was, in fact, an optometric exam. A visual acuity check is not a controlled act and can be delegated to a technical assistant. However, the Panel concluded that even if a visual acuity check is not itself a controlled act it was offered by Dr. Metzger in the context of Patient A acting on the advice of his physician to see his optometrist. The Panel accepted that Patient A had contacted Dr. Metzger in his role as an optometrist and was relying on his professional advice and guidance as an optometrist in pursuing a referral to a specialist; and

The Panel concluded that Dr. Metzger's own statement that he saw Patient A "on or about" June 30, 2016 added to the reliability of Patient A's affidavit evidence that he saw Dr. Metzger on June 30, 2016. On that basis, the Panel further found on a balance of probabilities that the logical resolution to the inconsistency between Patient A's evidence with Dr. Metzger's statements in Exhibit 7 and Exhibit 17 was that Dr. Metzger's statements in Exhibit 7 and Exhibit 17 were self-serving falsehoods to hide the fact that he had seen Patient A after June 8, 2016.

However, in the absence of Patient A at the hearing to provide evidence in person and respond to any questioning about his memory of the dates and the details of his appointment with Dr. Metzger, the panel gave his evidence less weight than it gave to the evidence of Mr. Bardel.

Patient A's affidavit was marked (as Exhibit 21) after the Panel heard the evidence of Amy Shillington on May 17, 2017 who provided context to her meeting with Patient A.

The hearing recessed for the day at approximately 2:45 p.m.

Amy Shillington

The hearing resumed at approximately 9:30 a.m. on May 17, 2017. Ms. Amy Shillington was affirmed and gave evidence with respect to her work as an investigator with Benard and Associates. She has been employed there for seven years. She estimates that she has done approximately 500 investigations for various regulators. Ms. Shillington testified about the general procedure she follows with respect to documenting her investigations, including the fact that she makes notes during interviews or while she is attending on site and then she prepares a report right afterwards.

Ms. Shillington testified that she had been retained by the College with respect to Dr. Metzger and was asked to attend at his office in Hanover and to get his original appointment book for the period from June 8, 2016 to July 13, 2016 (the date she attended at his office); to obtain a sample of 20 original records from that same time period; and to obtain the original record for Mr. Bardel. She was provided with background information regarding the concern that Dr. Metzger may not be adhering to the terms, conditions and limitations on his certificate of registration.

Ms. Shillington testified that she attended at Dr. Metzger's Hanover office on July 13, 2016 at 12:45 p.m. but his office was closed. She returned at 1:38 p.m. that same day and entered his office at 1:40 p.m. She walked in and asked the male person there if he was Dr. Metzger and he said yes. Ms. Shillington had previously been shown a picture of Dr. Metzger by Mr. Bardel. Ms. Shillington confirmed that the gentleman depicted at Exhibit 8 is the same person who identified himself to her as Dr. Metzger on July 13, 2016.

Ms. Shillington testified that she told Dr. Metzger that she was there as an investigator on behalf of the College of Optometrists and that there was a concern with regard to the terms, conditions and limitations on his certificate of registration. She provided Dr. Metzger with her notice of appointment of investigator (Exhibit 5) and asked for access to his patient records. Dr. Metzger was about to lead her to his file room when Ms. Shillington noticed a file for Patient A sitting on the front desk of the office. She asked to see it and Dr. Metzger agreed. When asked by Ms. Shillington about the client, Dr. Metzger said he might have performed a sight test on the client in the past month and a half. The referral letter in Patient A's record was dated June 6, 2016 but Ms. Shillington noticed that it had been faxed by Dr. Metzger on June 30, 2016. The referral letter with attached patient record was entered as Exhibit 17.

Ms. Shillington also saw a second client record on the front desk in the name of Mr. Bardel's alias and she identified those as being the same records that had been marked as Exhibit 18. Ms. Shillington asked Dr. Metzger when he last saw Mr. Bardel (using his alias). Dr. Metzger told her that he performed a vision exam a month and a half ago. When Ms. Shillington asked Dr. Metzger why there was an invoice

dated July 11, 2016 in Mr. Bardel's client record he said he didn't know and that his secretary was responsible for billing.

Ms. Shillington did not see any other records on the desk. She asked Dr. Metzger to show her the filing cabinet beside the desk. Dr. Metzger agreed. She saw two files of other patients.

After they spoke about those files, Dr. Metzger told Ms. Shillington that he wanted her to leave his office. She advised him that she was there to collect 20 client records and asked for his cooperation. Dr. Metzger again asked her to leave, saying he had an appointment to attend. Ms. Shillington testified that Dr. Metzger had not said anything about an appointment when she first arrived at his office approximately twenty minutes earlier.

Ms. Shillington testified that she told Dr. Metzger that members of the College were required to cooperate with investigations and that failure to do so could be seen to be professional misconduct. Dr. Metzger responded by saying "All I do is professional misconduct" and gestured towards a large bound document. Ms. Shillington encouraged him to contact a lawyer or the College with respect to his obligation to cooperate with her investigation but Dr. Metzger declined to do so, despite being given a summons by Ms. Shillington which demonstrated the authority for her to attend and required Dr. Metzger to produce records on that day. The summons was entered as Exhibit 20.

Ms. Shillington told Dr. Metzger that she was taking four patient records with her. She normally provides a receipt to the registrant for such records but Dr. Metzger would not give her time to prepare one. Ms. Shillington went to retrieve her bag from the room that contained the filing cabinet and Dr. Metzger initially would not let her go into it (he physically blocked her way), only allowing her to do so when she indicated that she needed to retrieve her belongings. He then walked her to the door.

Ms. Shillington said that Dr. Metzger's demeanour and tone were not aggressive but he was adamant that he was not giving her the records she sought and he was clear that he did not want her in his office. Ms. Shillington left his office and drove off. She drove back past his office five minutes later and his car was gone. She then went and prepared her memo to the College and sent it to the College the next day.

Ms. Shillington testified that she interviewed Patient A on July 26, 2016 and the contents of her discussion with him are accurately summarized in her memo that was entered as Exhibit 19.

The Panel found that Ms. Shillington's evidence was credible and reliable. Ms. Shillington is a neutral third party retained by the College to follow up on the visit by her associate Mr. Bardel of July 11, 2016. She visited Dr. Metzger with specific written authority under Section 75 of the *Health Professions Procedural Code* to conduct an investigation and to collect specified records. As an investigator exercising her statutory authority, Ms. Shillington is solely interested in fulfilling her mandate to collect the specified records during her investigation. She has no personal interest in what the records show, the results of the investigation or the deliberations of the ICRC or Discipline Committee.

She testified in a clear and straightforward manner about the events and records that she observed during her visit to Dr. Metzger's office. She made notes after leaving his office and completed her written report to the College by the next day. Her testimony did not contain internal contradictions.

The Panel accepted on a balance of probabilities that Ms. Shillington had identified herself as an investigator acting on behalf of the College to Dr. Metzger. She had provided him with copies of the summons giving her authority to attend at his office and compel him to provide copies of the designated record sets.

Dr. Metzger initially complied with the statutory investigation by letting Ms. Shillington pick up and examine the four records she asked to see on the desk. However, when he refused to let her examine the contents of the filing cabinet or the file room, Dr. Metzger obstructed the investigation. He refused to provide her with copies of twenty records of patients seen after June 8, 2016 or his appointment book for that time period. He persisted in refusing to provide Ms. Shillington with access to the required records despite her cautioning him about his duty of compliance as a member of the College and that the consequences of his failure to comply with the investigation could be that he would be found to have obstructed an investigation. She cautioned him to seek legal advice. Dr. Metzger physically blocked her access to the file room, asked her to leave before the investigation was complete, and escorted her to the door once she had collected her personal effects.

The Panel accepted that these facts put together established, on a balance of probabilities, that Dr. Metzger failed to comply with the investigation being conducted by Ms. Shillington on behalf of the ICRC and obstructed her efforts to obtain the records she was authorized to obtain.

Closing Submissions of College

The College submitted that it had met the burden of proof and had proven on a balance of probabilities that Dr. Metzger was aware that an Interim Order was in place starting on June 8, 2016, that he had not complied with that Interim Order, and that he had practised optometry in contravention of that Interim Order.

College counsel reiterated the context in which Interim Orders are made, summarizing Ms. Kavanagh's evidence. College counsel submitted that if Dr. Metzger did not wish to participate in the coaching and other remedial aspects of the Interim Order, it was always open to him to simply refrain from practising optometry pending his first discipline hearing. What was not open to him was to practise optometry without complying with the Interim Order.

College counsel reminded the Panel that the reasons for the Interim Order were public protection, as demonstrated by Exhibit 4, which sets out the reasons why the ICRC imposed the Interim Order. The ICRC was concerned, while looking at the fruits of its previous investigation, that Dr. Metzger was exposing patients to harm or injury. The ICRC was sufficiently alarmed that it was not prepared to wait until the outcome of the first discipline hearing but instead felt that an Interim Order, which Ms. Kavanagh testified were rarely imposed, was necessary. The Interim Order is essentially remedial and not punitive in nature. Its goal is to keep the public safe.

Ms. Ellis reviewed the evidence of Ms. Kavanagh, including the documents that are Exhibit 4 and Exhibit 6, which in Ms. Ellis' submission demonstrated clearly that Dr. Metzger knew that June 8, 2016 was the date the Interim Order took effect and which required him to do various things before he could practice optometry unsupervised.

Dr. Metzger contacted one of the coaches, which demonstrates that he had knowledge of the limitations on his certificate of registration and that there was an expectation that he was to take positive action to fulfill the requirements in the Interim Order if he wanted to continue practising. Ms. Ellis also submitted that Dr. Metzger's fax to the College sent on July 27, 2016 in which he acknowledges that "06/08/16" is the "cut off date" shows that he was aware that the Interim Order went into effect on June 8, 2016. In the College's submissions there is evidence that establishes on a balance of probabilities that Dr. Metzger was told about the interim terms, conditions and limitations and how to fulfill them.

The College submitted that Ms. Kavanagh's evidence also established that as of July 11, 2016 when Dr. Metzger saw Mr. Bardel (under his alias), Dr. Metzger had not fulfilled the terms, conditions and limitations and in fact he had not fulfilled any of them by April 27, 2017, the last day of the previous discipline hearing.

The College submitted that Mr. Bardel's evidence established that Dr. Metzger performed an eye examination on Mr. Bardel with no one else present on July 11, 2016 and made chart entries, gave him a prescription and a receipt and that his business cards on display that day identified him as an optometrist.

With respect to Patient A, Ms. Ellis asked the Panel to prefer the affidavit evidence of Patient A and Ms. Shillington with respect to her meeting with Patient A, as compared to Dr. Metzger's statement on his faxed submissions to the College of July 27, 2016 (Exhibit 7), in which he lists Patient A's name and writes "no exam". In the College's submission Dr. Metzger's claim to not have done an exam of Patient A is inconsistent with patient A's evidence that he saw Dr. Metzger for an eye exam on June 30, 2016 (when the Interim Order was in place), which is supported by Patient A's calendar entry. Dr. Metzger's claim is also inconsistent with the referral letter regarding Patient A that Dr. Metzger sent by fax to Dr. S on June 30, 2016.

Additionally, Dr. Metzger's submissions of July 27, 2016 claiming "no exam" was done of Patient A is inconsistent with his own records showing he did an oculo visual assessment of Patient A, although supposedly on June 6, 2016 rather than June 30, 2016. Ms. Ellis also asked the Panel to consider Dr. Metzger's fax dated May 15, 2017 (Exhibit 16), in which he claims to have run into Patient A "on or about June 30, 2016" at a convenience store and that Patient A asked him to make an appointment with Dr. S for him and that Dr. Metzger said he could "and asked him to come over next door to my office, so I could update his vision level and look at his left eye, to facilitate his appointment with Dr. S. I recorded his visual acuity I then proceeded to send a referral letter to Dr. S", all of which is inconsistent with Dr. Metzger having seen Patient A on June 6, 2016 (before the Interim Order was in place), which is the date Dr. Metzger put on the letter relating to Patient A, and inconsistent with Patient A's evidence including his calendar entry.

The College submitted that Dr. Metzger's statement to Ms. Shillington on July 13, 2016 that he performed an assessment of Ziggy Bardel (known to Dr. Metzger by an alias) a "month and a half ago" is inconsistent with Mr. Bardel's evidence that he attended at Dr. Metzger's office posing as a patient on July 11, 2016, just two days before Ms. Shillington was there.

Ms. Ellis reviewed the scope of practice of optometry as well as the controlled acts authorized to the profession and submitted that it was clear that Dr. Metzger was practising optometry when he saw Mr. Bardel and Patient A on dates after the Interim Order was in place. With respect to Mr. Bardel, Dr. Metzger checked his visual acuity and wrote him a prescription. With respect to Patient A, Dr. Metzger

checked his visual acuity and diagnosed capsule clouding and referred him to Dr. S. In the College's submissions, Dr. Metzger was practising optometry within the scope of practice of the profession even if some of the things he did were not controlled acts, and in doing so he breached the terms, conditions and limitations on his certificate of registration.

With respect to the allegation that Dr. Metzger failed to cooperate and/or obstructed the investigation, Ms. Ellis referred the Panel to section 76 of the Code, which sets out the authority of an investigator. In her submission, members are required to cooperate with their regulator, including with investigations. Dr. Metzger was shown Ms. Shillington's formal notice of appointment and was given a summons for the charts she wished to obtain. Despite knowing that Ms. Shillington represented the College, Dr. Metzger failed to cooperate with her and in fact physically blocked her access to a room and then required her to leave his practice before she had completed her investigation. Ms. Shillington advised him to contact a lawyer or the College and warned him that failing to cooperate could itself be an allegation of misconduct against him, but still this was not enough to obtain his cooperation.

Ms. Ellis finally submitted that with respect to the "disgraceful, dishonourable, unprofessional or unethical" allegation, that Dr. Metzger's conduct constitutes all of those things. She referred the panel to authorities on this point demonstrating how the various terms have been viewed by regulators and courts in the past. The terms involve a moral failing or deceit, and cast doubt on a member's moral compass and fitness to carry out the higher obligations that the public expects of regulated professionals.

Finding on Misconduct

After considering the evidence entered and the submissions of College Counsel, the Panel found that the facts supported the following findings against Dr. Metzger:

1. That the Member committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1 of section 1 of Ontario Regulation 119/94, in that, between approximately June 8, 2016 and July 13, 2016, the Member contravened a term, condition or limitation to which his certificate of registration is subject and, in particular, he practised optometry without the supervision of a mentor optometrist, as set out in Appendix "A".
2. That the Member committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 36 of section 1 of Ontario Regulation 119/94 in that, between approximately July 13, 2016 and July 27, 2016, he contravened, by act or omission, the Act, the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts and, in particular, he contravened section 76 of the *Health Professions Procedural Code*, as set out in Appendix "A".
3. That the Member committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 39 of section 1 of Ontario Regulation 119/94 in that, between approximately June 8, 2016 and July 27, 2016, he engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as

disgraceful, dishonourable, unprofessional or unethical and, in particular, he deliberately contravened terms, conditions or limitations on his certificate of registration and/or deliberately prevented or tried to prevent the College from investigating whether he had engaged in misconduct and the extent of that misconduct, as set out in Appendix “A”.

Reasons for Finding of Misconduct

The Panel felt that the College proved the allegations on a balance of probabilities. It was more likely than not that Dr. Metzger did the things he was alleged to have done.

Allegation #1

For the reasons noted above, the Panel accepted the evidence of Mina Kavanagh and found on a balance of probabilities that Dr. Metzger was aware as of June 8, 2016 that he was no longer entitled to practise optometry except in compliance with the terms and conditions of the Interim Order of the ICRC which required the presence of a College-approved mentor/supervisor.

For the reasons noted above, the Panel accepted the evidence of Mr. Bardel and concluded on a balance of probabilities that Dr. Metzger performed an unsupervised eye examination on Mr. Bardel on July 11, 2016. In combination with the evidence of Ms. Kavanagh, the Panel found that Dr. Metzger did so with full knowledge, understanding and in complete disregard of the Interim Order of the ICRC which came into effect on June 8, 2016. The Panel therefore concluded that Dr. Metzger had engaged in misconduct in contravention of 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1 of section 1 of Ontario Regulation 119/94 in that he contravened a term, condition or limitation to which his certificate of registration is subject and, in particular, he practised optometry without the supervision of a mentor optometrist.

Allegation #2

For the reasons noted above, The Panel accepted the evidence of Ms. Shillington and found that on a balance of probabilities Dr. Metzger failed to comply with and obstructed the investigation being conducted by Ms. Shillington on behalf of the ICRC. The Panel therefore concluded on a balance of probabilities that in doing so, Dr. Metzger had engaged in misconduct in contravention of section 76 of the *Health Professions Procedural Code*, which is professional misconduct as defined in paragraph 36 of section 1 of Ontario Regulation 119/94.

Allegation #3

The Panel considered its findings of misconduct in Allegation #1 and #2 above in determining whether Dr. Metzger had also engaged in disgraceful, dishonourable, unprofessional or unethical conduct as alleged in Allegation #3.

The Panel relied on the excerpt from “*A Complete Guide to The Regulated Health Professions Act*” by Richard Steinecke at Tab 10 of the Book of Authorities to establish the test it applied in relation to Allegation #3. In particular, the Panel took notice of the following passages in relation to the test for determining whether a Member has engaged in disgraceful, dishonourable, unprofessional or unethical conduct:

“ . . . [I]t assumes a consensus within the profession that certain types of conduct are unacceptable for members. Members are judged according to that consensus and not on the private views of the Discipline Committee. . . . Expert evidence is not needed to establish that the conduct is unprofessional. It is presumed that the profession will often be harder than the general public on its own members.”

“Conduct that does not harm the practitioner’s client can still be unprofessional. This is particularly the case where . . . the conduct reflects a lack of integrity.” and

“The catch-all provision is not intended to capture the legitimate exercise of professional discretion or mere errors of judgment. However, conduct need not be dishonest or immoral to fall within the definition. A serious or persistent disregard for one’s professional obligations is sufficient.”

The Panel determined in relation to Allegation #1 above on a balance of probabilities that Dr. Metzger had provided unsupervised optometric services to Mr. Bardel and Patient A after June 8, 2016. Further, he did so with the knowledge that he was violating the Interim Order of the ICRC that was imposed to protect public safety by placing terms, conditions and limitations on his certificate of registration to practise optometry unsupervised after June 8, 2016.

For reasons also noted above, the Panel also concluded on a balance of probabilities that Dr. Metzger lied or was deceptive in the referral letter to Dr. S where he said he had seen Patient A on June 6, 2016 to cover up the fact that he had provided unsupervised optometric services in violation of the Interim Order of the ICRC after June 8, 2016.

Additionally, Dr. Metzger lied or was deceptive about the date on which he examined Ziggy Bardel. When questioned by Ms. Shillington, he said he had seen the patient about a month and a half previously (which would put the visit before the effective date of the Interim Order), and blamed his secretary for typing the date July 11, 2016 on the invoice. The Panel accepted the evidence of Mr. Bardel that Dr. Metzger gave him an unsupervised eye appointment on July 11, 2016. This is also evidence of deliberate dishonesty not just to the investigator but also to the College via its formally appointed representative.

Dr. Metzger further lied to the ICRC in Exhibit 7 where he wrote “No Exam” in relation to Patient A. For the reasons noted above, the Panel concluded on a balance of probabilities that it was more likely than not that Dr. Metzger had performed an unsupervised visual acuity check on Patient A, and that this would be considered the practice of optometry in violation of the Interim Order of the ICRC. However, the Panel gave lower weight to the evidence of Patient A. The Panel concluded as a question of fact that the visual acuity check performed by Dr. Metzger on Patient A on June 30 did meet the test of the unsupervised practice of optometry. However, the Panel concluded that even without Patient A’s affidavit evidence, the evidence of Mr. Bardel was sufficient to conclude on a balance of probabilities that Dr. Metzger had knowingly engaged in misconduct by examining Mr. Bardel without supervision after June 8, and that he lied about it to cover up the fact that he had breached the Interim Order of the ICRC.

With respect to the second head of the allegations against Dr. Metzger, it is the obligation of any registered member of a self-regulated profession to comply with the investigation of a duly appointed investigator. The Panel had concluded for reasons noted above as a matter of fact that Dr. Metzger had refused to cooperate with the College’s duly appointed representative. Ms. Shillington clearly explained

her authority. She had reasoned with him and cautioned him on the consequences of failure to comply. Dr. Metzger insisted that she leave without collecting the records that she had authority to obtain. He tried to physically block her access to the file room. By refusing to cooperate and provide her with the records she was authorized to obtain, Dr. Metzger frustrated and obstructed the investigation.

The Panel concluded that the facts established that Dr. Metzger had engaged in a pattern of behaviour that included ignoring the terms, conditions and limitations on his certificate of registration that had been imposed upon him to protect public safety by the ICRC in its Interim Order. The Panel further found that Dr. Metzger engaged in a pattern of lies and deceit to the College and its Investigator in an attempt to cover up his breach of the Interim Order. He had breached his professional obligation to comply with a duly authorized investigation ordered by his professional regulator. The Panel concluded that the Member knew or ought to have known that all of these behaviours were wrong and showed a lack of integrity that does not meet the high standards of behaviour required of a member of a self-regulated profession.

For these reasons, the Panel concluded that Dr. Metzger had engaged in disgraceful, dishonourable, unprofessional or unethical conduct.

Submissions on Penalty and Costs

College Counsel asked the Panel to order: 1) revocation of Dr. Metzger's certificate of registration; 2) a reprimand; and 3) costs of \$40,000.

Ms. Ellis submitted a second affidavit of her assistant Ani I. (Exhibit 22) which showed that Ms. Ellis had sent a letter to Dr. Metzger on May 11, 2017 advising him that the College would be arguing that he is ungovernable and seeking revocation of his certificate of registration.

Ms. Ellis reviewed cases dealing with the issue of ungovernability from other regulators and asked the Panel to find that the circumstances of this case demonstrated that Dr. Metzger is ungovernable and asked the Panel to make that finding.

Ms. Ellis made submissions with respect to the need to address the various principles of penalty, including public protection, general deterrence, specific deterrence and where appropriate, remediation. In her submission, Dr. Metzger's conduct was such that the only appropriate penalty was revocation. College counsel reviewed case law that she suggested was similar to the facts of this case that in her submission demonstrated that revocation was the appropriate penalty. She stressed that Dr. Metzger's conduct in this case compounded on his previous conduct – that is, he breached his Interim Order, which was put in place to protect the public, and then refused to allow the College to investigate the extent of his breach by failing to comply with the summons for his records and by ordering Ms. Shillington to leave his office.

College Counsel submitted that a reprimand was appropriate as it requires Dr. Metzger to attend to hear a message from this Panel with respect to his behaviour. While Ms. Ellis understood that such a request could be seen to be inconsistent with the College's view that Dr. Metzger is ungovernable, and as such, unlikely to attend a reprimand, she noted that the legislature had seen fit to make both revocation and a reprimand mandatory penalties in other cases (i.e., for certain sexual abuse findings).

Ms. Ellis asked the Panel to order \$40,000 in costs against Dr. Metzger. She advised the Panel that costs are separate from penalty and are intended to allocate the cost of discipline hearings fairly so that the entire cost is not borne by Dr. Metzger's peers (whose dues fund the College).

She submitted a Table of Partial Costs incurred by the College, which was marked as Exhibit 23, which showed that the College had spent more than \$46,000 on the investigation, prosecution and hearing of the matter. The College had summarized the costs spent on only some of the items for which that it could seek costs and was not seeking costs with respect to numerous other aspects (such as those associated with the ICRC review consideration and disposition, staff time, the adjournment request or catering costs). Ms. Ellis reviewed the College's authority to seek costs in an appropriate case as set out in section 53.1 of the Code.

She submitted that while it is appropriate for a Panel to take into consideration an individual member's ability to pay costs in determining the quantum, because Dr. Metzger failed to attend the hearing, he had provided no evidence with respect to his ability or inability to pay.

Penalty and Costs Decision

Having considered the Notice of Hearing, the evidence, and hearing the submissions of counsel for the College and having found Dr. Metzger guilty of professional misconduct as set out in the Order on Finding, the Panel made an Order:

1. Directing the Registrar to revoke the Member's Certificate of Registration; and
2. Requiring the Member to pay to the College costs in the amount of \$40,000.00, payable in two instalments, the first payment of \$20,000.00 payable within six (6) months of the date the Panel's order becomes final, and the second payment of \$20,000, payable within twelve (12) months of the date the Panel's order becomes final.

Reasons for Penalty and Costs Order

The Panel believed that the Penalty and Costs Order sought by the College, with the exception of the reprimand, was appropriate for the following reasons.

The Panel relied on the excerpt from "*A Complete Guide to The Regulated Health Professions Act*" by Richard Steinecke at Tab 1 of the Book of Authorities (Order) regarding the test to apply in determining whether revocation of Dr. Metzger's certificate of registration on the basis of ungovernability was an appropriate remedy.

In particular, the Panel noted that ungovernability "suggests a pattern of conduct that demonstrates that a member is unprepared to recognize his or her professional obligations and the regulator's role". The passage from Steinecke continued on to say that factors to consider in determining ungovernability include remorse, degree of willingness to be governed by the relevant regulatory body; likelihood of future misconduct; and ongoing co-operation with the regulator to address outstanding matters of misconduct.

The text continued as follows: “An assessment of ungovernability . . . ought to hold primary the protection of the public interest and ensure that the [regulatory body] retains the capacity to regulate the member and ensure that that interest is protected. At the same time, we must be mindful of any sincere demonstration of capacity on the part of the member to subject him/herself to the authority of the regulator.”

The Panel also particularly considered *The Law Society of Upper Canada v. Gray* at Tab #3 of the Book of Authorities (Order). The Panel is mindful of the fact that decisions of other regulatory panels are not binding, but found the discussion of ungovernability in the context of self-regulated professions particularly helpful and instructive:

“The Law Society exists to govern the profession in the public interest. If lawyers will not abide by the authority of the Law Society, and demonstrate that they abide by that authority, the Law Society cannot fulfill its mandate. . . . The Lawyer’s failure to co-operate with the Law Society and the prior orders of hearing panels . . . demonstrates his unwillingness to live by the governance structure of the Law Society, which is fundamental to the privilege of each and every lawyer to practice law and to the self-governance of the legal profession.”

Dr. Metzger was put on notice by the College on May 11, 2017 that the College intended to argue that he is ungovernable and that his registration should be revoked (Exhibit 22). He was urged to attend and the consequences of not attending were explained to him. He chose not to attend, and did not take the opportunity this could have provided to express remorse for his conduct.

The Panel has concluded as a matter of fact for reasons noted above that Dr. Metzger has engaged in a pattern of behavior that includes ignoring an Interim Order imposed by the Regulator to protect public safety and lying to the investigator, which by extension is lying to the regulator itself. Public protection is the paramount goal of the regulator. The Panel was particularly concerned that Dr. Metzger has frustrated that goal by ignoring the Interim Order and continuing to provide unsupervised optometric services, and lying about having provided those services to the Regulator. Obstruction of the College’s investigation defeats a fundamental tool that the Regulator has at its disposal to protect the public interest. Based on these facts, the Panel concluded that Dr. Metzger has shown no degree of willingness to be governed by the College.

Due to Dr. Metzger’s failure to participate in the hearing, the Panel has no information whatsoever about his state of mind in terms of likelihood of future misconduct. The Panel can only look at the facts before it. Since Dr. Metzger has engaged in a pattern of deceit and obstruction and shown no willingness to be governed by the College, the Panel cannot give him the benefit of the doubt in this matter.

The Panel accepts the evidence of Ms. Kavanagh which established that Dr. Metzger had taken no steps to implement the remedial conditions in the Interim Order of the ICRC. Those conditions were not intended as punishment, but were intended to protect the public interest by improving Dr. Metzger’s skill level through coaching. By continuing to provide unsupervised optometry services to the public after the issuance of the Interim Order, Dr. Metzger chose to frustrate rather than cooperate with addressing the outstanding matters.

For these reasons, the Panel concluded that Dr. Metzger has demonstrated ungovernability.

The Panel then considered whether revocation was the appropriate penalty for Dr. Metzger's ungovernable behavior. The Panel felt that revocation of the Member's license was necessary to protect the public; it addressed specific deterrence of this individual; and it provided general deterrence to the profession. In terms of remediation, since the Member had already disregarded a remedial Interim Order of the ICRC, the Panel was not persuaded that any penalty would have a remedial effect on the Member.

The Panel did not order a reprimand. An oral reprimand is intended to serve as specific deterrence by allowing the Member to more clearly understand the impact of his actions on public safety, his duties and obligations as a member of a self-governed profession and public trust in the regulatory process. An oral reprimand requires the Member to attend in person. The Panel determined that Dr. Metzger's ungovernable behavior and lack of willingness to be governed by the College meant that a reprimand would not serve a useful purpose as specific deterrence for this particular member. Given that Dr. Metzger did not participate in the discipline hearing, the Panel did not think that there was any meaningful likelihood that he would attend to hear a reprimand. The Panel was mindful that ordering a reprimand would likely mean wasted resources by College staff in attempting to schedule a reprimand.

Dated this 23 day of June, 2017, at Toronto, Ontario.

(Signed)

Dr. Thomas-A. Noël, Chair