COURT OF APPEAL FOR ONTARIO

CITATION: College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association (Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario), 2015 ONCA 851
DATE: 20151207
DOCKET: C60110

Sharpe, Cronk and Miller JJ.A

BETWEEN

College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario

Applicant (Respondent)

and

The Federation of Ontario Traditional Chinese Medicine Association, A. K. A the Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario, the Ontario Acupuncture Examination Committee, the College of Traditional Chinese Medicine & Pharmacology Canada, the Canadian Association of Acupuncture & Traditional Chinese Medicine, Committee of Certified Acupuncturists of Ontario, James X.N. Yuan, and Jia Li

Respondents (Appellants)

Sean Hu, representative for the corporate appellants

James X.N. Yuan, acting in person

Jia Li, acting in person

Jaan Lilles and Laura Robinson, for the respondent College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario

Zachary Green, for the intervener the Attorney General of Ontario

Heard: November 30, 2015

On appeal from the judgment of Justice Graeme Mew of the Superior Court of Justice, dated February 6, 2015, with reasons reported at 2015 ONSC 661.

By the Court:

[1] The appellants, individuals and corporations engaged in various capacities in the practice of traditional Chinese medicine, appeal the decision of the Superior Court granting the respondent College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (the "College") declaratory and injunctive relief. The application judge found that the corporate appellants falsely held themselves out as regulatory colleges, that the individual appellants had wrongly held themselves out as representatives of the regulator, that certain of the appellants had engaged in unauthorized practice, and that the individual appellants had engaged in the unauthorized use of the protected titles "Doctor" or "traditional Chinese medicine practitioner", all contrary to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 and the *Traditional Chinese Medicine Act, 2006*, S.O. 2006, c. 27.

[2] In their defense to the claims of the College, the appellants submitted that the *Traditional Chinese Medicine Act, 2006* and, in particular the Registration Regulation made under that Act, were discriminatory and violated their s. 15 *Charter* rights. The application judge rejected that defense on the ground that both individual appellants and one of the corporate appellants had previously unsuccessfully advanced essentially the same argument in an application before

the Divisional Court: see *Yuan, Li v. Transitional Council of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2014 ONSC 351, 316 O.A.C. 272 (Div. Ct.). In that same application, the Divisional Court also dismissed the claim that the College had acted unlawfully in not enacting a regulation to permit the use of the title "Doctor" in relation to the practice of traditional Chinese medicine. The appellants did not seek leave to appeal the Divisional Court's decision. The application judge held that the Divisional Court judgment barred the appellants from advancing the same arguments on grounds of *res judicata*, issue estoppel or abuse of process.

A. ISSUE ESTOPPEL AND ABUSE OF PROCESS

[3] In our view, the application judge did not err by refusing to entertain the appellants' constitutional argument on the ground that it had been conclusively and finally determined against them in the prior proceeding. We agree with his conclusion that the required elements of issue estoppel were made out.

[4] The three preconditions for issue estoppel are:

1) the issue must be the same as the one decided in the prior decision;

2) the prior judicial decision must have been final; and

3) the parties to both proceedings must be the same or their privies.

See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 25.

(1) Same issue

[5] The central argument presented to the application judge was that the language proficiency requirement set out in the Registration Regulation is discriminatory. That same argument was unsuccessfully advanced before the Divisional Court. The appellants contend that before the Divisional Court, their s. 15 argument was that the language requirement discriminated against all people of Chinese origin, whereas before the application judge they argued that the language proficiency requirement was discriminatory against ethnic mainland Chinese practitioners.

[6] We agree with the application judge, at para. 52 of his reasons, that by reframing their argument in this manner, the appellants cannot "mask the reality that their complaints still emanate from the linguistic requirements of the Registration Regulation." As pointed out in *Danyluk*, at para. 18, litigants are "only entitled to one bite at the cherry" and are required "to put their best foot forward to establish the truth of their allegations when first called upon to do so." The applicable principle is that "litigation is conclusive upon issues actually brought before the court and upon any issues which the parties, exercising reasonable diligence, should have brought forward on that occasion": *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Gen. Div.), aff'd (1997), 32 O.R. (3d) 651 (C.A.). The appellants have always complained that the language proficiency requirement is discriminatory and they have failed to provide an

adequate explanation for why they could not, with reasonable diligence, have advanced the same argument that they sought to make before the application judge in the application before the Divisional Court.

[7] The appellants argue that the Divisional Court did not deal with the question whether the language proficiency requirement was discriminatory contrary to the Ontario *Human Rights Code*, R.S.O 1990, c. H.19. We agree with the respondent that the determination by the Divisional Court that the language proficiency requirement was not discriminatory under the *Charter* also answered the threshold issue of discrimination under the *Code*. It was not open to the appellants to re-litigate what in substance was the same argument by giving it a different legal label.

(2) Final decision

[8] The order of the Divisional Court dismissing the previous application was a final order. The appellants did not seek leave to appeal that order.

(3) Same parties

[9] The two individual appellants were parties to the Divisional Court proceeding as was the Federation of Ontario Traditional Chinese Medicine Association. All corporate appellants, except Committee of Certified Acupuncturists of Ontario, share the same registered address and they all share many of the same directors and officers, including the two individual appellants.

In the context of these proceedings, this constitutes a sufficient degree of identification among the parties "to make it just to hold that the decision to which one was a party should be binding in the proceedings to which the other is a party": *Re EnerNorth Industries Inc.*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 62. In any event, even if the same parties requirement for issue estoppel is not strictly met, permitting the appellants to re-litigate the issue that was determined by the Divisional Court would amount to an abuse of process: see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37.

(4) Discretion

[10] Finally, we are not persuaded that the application judge erred by failing to exercise his discretion to permit the appellants to avoid the doctrines of issue estoppel and abuse of process. The application judge thoroughly reviewed the evidence and submissions of the appellants and concluded that they were simply re-litigating the same case before him that they had advanced before the Divisional Court. We agree with that conclusion and while we understand the appellants' frustration over the effect of the Registration Regulation, we see no basis for permitting them to re-litigate the issue whether that Regulation is discriminatory.

B. INJUNCTION AND DECLARATORY RELIEF

[11] The evidence before the application judge amply supported his findings that the College was entitled to declaratory and injunctive relief on the grounds that the corporate appellants falsely held themselves out as regulatory colleges, that the individual appellants had wrongly held themselves out as representatives of the regulator, that certain of the appellants had engaged in unauthorized practice, and that the individual appellants had engaged in the unauthorized use of the protected titles "Doctor" or "traditional Chinese medicine practitioner," all contrary to the *Regulated Health Professions Act*, 1991 and the *Traditional Chinese Medicine Act, 2006.*

C. DISPOSITION

[12] Accordingly, the appeal is dismissed with costs to the respondent fixed at $12,500, inclusive of disbursements and taxes.

Released: RTS

DEC 07 2015

R.A. Blair J.A.

E.A. Cronk J.A.

J.A.