

CITATION: College of Traditional Chinese Medicine Practitioners and Acupuncturists of
Ontario v. Federation of Ontario Traditional Chinese Medicine Association, 2015 ONSC 661
COURT FILE NO.: CV-14-501514
DATE: 20150206

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
COLLEGE OF TRADITIONAL CHINESE) *J.T. Curry and J.E. Lilles, for the Applicant*
MEDICINE PRACTITIONERS AND)
ACUPUNCTURISTS OF ONTARIO)
)
Applicant)
)
– and –)
)
THE FEDERATION OF ONTARIO)
TRADITIONAL CHINESE MEDICINE) Sean Hu, in person (as representative of the
ASSOCIATION a.k.a. THE COMMITTEE) corporate respondents with leave granted
OF TRADITIONAL CHINESE) under Rule 15.01(2))
MEDICINE PRACTITIONERS AND)
ACUPUNCTURISTS OF ONTARIO, THE) Xiao Ning Yuan, in person
ONTARIO ACUPUNCTURE)
EXAMINATION COMMITTEE, THE) Jia Li, in person
COLLEGE OF TRADITIONAL CHINESE)
MEDICINE AND PHARMACOLOGY) *S. Zachary Green* for the Attorney General
CANADA, CANADIAN ASSOCIATION) of Ontario (Intervener)
OF ACUPUNCTURE AND)
TRADITIONAL CHINESE MEDICINE,)
COMMITTEE FOR CERTIFIED)
ACUPUNCTURISTS OF ONTARIO,)
CHINESE MEDICINE &)
ACUPUNCTURE CLINIC OF TORONTO,)
JAMES X.N. YUAN, JIA LI AND ZHI)
HONG ZHAO)
)
Respondents)
)
)
) **HEARD:** In Toronto on 10 September and
) 10 October 2014

REASONS FOR DECISION

MEW J.

[1] The College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (referred to in these reasons as the applicant or the “College”) was formally established on 1 April 2013, pursuant to s. 5 of the *Traditional Chinese Medicine Act, 2006*, S.O. 2006, c. 27 (“TCMA”), as the regulator in Ontario of Traditional Chinese Medicine Practitioners and Acupuncturists.

[2] Section 3 of TCMA provides:

The practice of traditional Chinese medicine is the assessment of body system disorders through traditional Chinese medicine techniques and treatment using traditional Chinese medicine therapies to promote, maintain or restore health.

[3] The TCMA incorporates the Health Professions Procedural Code (the “Code”) set out in schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (“RHPA”). Accordingly, the same regulatory scheme which governs 23 other groups of health care professionals which are also regulated by statute in Ontario, and have similar professional Colleges, applies to the applicant.

[4] Section 4 of the TCMA describes the “authorized acts” that may be undertaken in the course of engaging in the practice of traditional Chinese medicine:

In the course of engaging in the practice of traditional Chinese medicine, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:

1. Performing a procedure on tissue below the dermis and below the surface of a mucous membrane for the purpose of performing acupuncture.
2. Communicating a traditional Chinese medicine diagnosis identifying a body system disorder as the cause of a person’s symptoms using traditional Chinese medicine techniques.

[5] Prior to the enactment of the TCMA and the subsequent establishment of the College, the practice of traditional Chinese medicine and acupuncture was not regulated in Ontario.

[6] The respondents are individuals and corporate entities who are alleged to have engaged in numerous breaches of the RHPA and the TCMA.

[7] On 2 June 2014, I granted an interim injunction against the respondents (except Zhi Hong Zhao) pursuant to s. 87 of the RHPA: 2014 ONSC 3334 (CanLII).

[8] The College now seeks declarations that the respondents have breached the TCMA, the RHPA and the Code (collectively the “TCM Legislation”), and requests permanent injunctions

pursuant to s. 87 of the RHPA enjoining the respondents from further breaching the TCM Legislation.

Background

[9] The history of traditional Chinese medicine and acupuncture (“TCM”) spans thousands of years. In 2001, an advisory report provided by the Health Professions Regulatory Advisory Council to the Ontario Minister of Health and Long Term Care (*Traditional Chinese Medicine and Acupuncture*, archived online at www.hprac.org/en/reports/resources/tcm_2001.pdf), estimated that there were between 1,100 and 2,000 TCM practitioners in Ontario.

[10] The advisory report provides greater narrative on the features of the TCM system. In its introductory paragraphs (at pages 1-2) it states:

TCM is a unique system of health care, with its own diagnostic and assessment methods, unique treatment principles and its own language and terminology. However, like Western medicine, the goal of TCM is the promotion, maintenance and restoration of health.

Traditional Chinese medicine (TCM) and Western medicine are commonly understood as two distinct and divergent systems of medicine. Unlike Western medicine, TCM is not based on the function [of] specific organs of the body. Whereas Western medicine is largely based on Western scientific concepts, TCM is based more on metaphysical concepts and uses a language that is difficult to interpret using Western physiological and biochemical terms. There are complexities in fitting the Eastern paradigm into the Western context, and vice versa.

Traditional Chinese Medicine (TCM) is a professional health system that has a range of applications from health promotion to the treatment of diseases. TCM is rooted in Chinese culture and has spread, with variations, to the world through several thousand years. Fundamental concepts of TCM are embedded in the philosophical world views of Taosim, Confucianism and Buddhism. It considers the person, as a whole, and nature to be interrelated.

[11] After receiving the advisory report, the Ministry of Health and Long Term Care engaged in a series of consultations which led to the establishment of a group of four members of the Ontario legislature (the “MPP Consultation Group”) to undertake public consultations. The MPP Consultation Group reported to the Minister in summer 2005 (*Traditional Chinese Medicine and Acupuncture in Ontario – Report to the Minister of Health and Long Term Care*, online www.health.gov.on.ca/en/common/ministry/publications/reports/tc_med/tc_med_eng.pdf). At page 3 of the Executive Summary to the MPP Consultation Group’s report it was noted:

Participants from the TCM and acupuncture community indicated they possess varying education and training levels. Some were trained in various parts of the world, such as China, Korea, Taiwan, the United States of America, and others

were trained in Canada. Participants suggested a wide range of education and training programs should be acceptable for entry to practice and registration with a future regulatory body. While having a diverse opinion on acceptable education and training, most participants agreed that high education and training standards should be set for entry into the profession for both those currently practising TCM and for future practitioners.

[12] The MPP group recommended that the profession of traditional Chinese medicine and acupuncture practised within the TCM context should be regulated under the RHPA under a new profession-specific Act and that a new regulatory college for TCM should be created and that such a college should develop future standards of practice regulation for treatment modalities used by TCM practitioners.

[13] The recommendations of the MPP group led to the passage of the TCMA and the establishment of the College.

[14] In 2008, a transitional Council of the College was appointed by the Lieutenant Governor in Council to prepare the necessary infrastructure (such as developing tests and courses, and drafting regulations) so that the College would be ready to exercise its regulatory functions with immediate effect.

[15] Effective 1 April 2013, traditional Chinese medicine and acupuncture became regulated health professions, and the performance of a controlled act (i.e., communicating a traditional Chinese medicine diagnosis) and using the protected title “Traditional Chinese Medicine Practitioner”, became illegal unless the person was registered with the College (with respect to the practice of acupuncture, a practitioner must be a member of either the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario, or of certain other Colleges listed in s. 8 of O. Reg. 107/96, made pursuant to the RHPA).

[16] In order to become registered with the College, applicants must meet the requirements set out in O. Reg. 27/13 (the “Registration Regulation”), made pursuant to the TCMA, which took effect on 1 April 2013.

[17] Registration with the College entitles a member to use the protected titles/designations “Traditional Chinese Medicine Practitioner” (R. TCMP) and/or “acupuncturist” (R. Ac).

[18] The registration regulation provides for five classes of registration, two of which are pertinent to the matter in hand:

- a) The Grandparented Class; and
- b) The General Class.

[19] Under s. 4(1) 4 of the Registration Regulation, an applicant for registration “must be able to speak, read and write either English or French with reasonable fluency.” However, applicants for a Grandparented Certificate of Registration do not have to meet this language requirement.

[20] The College asserts that the Grandparented Class permits those practitioners who were practising traditional Chinese medicine in Ontario before 1 April 2013, and who meet what the College describes as “the basic, non-exemptible requirements” identified in the Registration Regulation, to obtain a certificate of registration, regardless of whether the practitioner undertook formal education or was, instead, trained on the job by a master.

[21] Under s. 6 of the Registration Regulation, an applicant for a Grandparented Certificate of Registration:

1. Must have completed a minimum of 2,000 traditional Chinese medicine patient visits in Canada, which may include traditional Chinese acupuncture patient visits, within the five-year period immediately prior to 1 April 2013;
2. Must have submitted the completed application to the Registrar on or before 1 April 2014;
3. Must have successfully completed the Safety Program that was set or approved by the Council or by a body that is approved by the Council for that purpose; and
4. Must have successfully completed the jurisprudence course set or approved by the Registration Committee.

[22] Applicants for registration in the Grandparented Class who do not have sufficient English or French language skills are allowed to have the assistance of translators to take the Safety Program and the jurisprudence course. They must also provide a written language plan which addresses inter-professional and continuity of care issues that may arise from the applicant’s lack of fluency in English or French.

[23] The Grandparented Class is, however, a temporary class of membership and, as the regulation presently stands, will be revoked on 1 April 2019. After that date the practitioners of TCM who wish to continue doing so in Ontario will have to register in the General Class.

[24] To transition to a General Class Certificate of Registration, a Grandparented member will have to meet the language requirement of s. 4(1) 4 of the Registration Regulation and provide evidence of an additional three years of 1,200 traditional Chinese medicine patient visits (over and above the 2,000 patient visits information submitted for the Grandparented registration) plus complete a “Prior Learning Assessment” process, which includes submitting evidence of experience and training.

[25] The College presently has 2,858 registered members, only 70 of whom fall within the General Class (R. Ac and R.TCMP), 2,568 of whom are Grandparented and 158 of whom are classified as “General Provisional” (the use of the titles “Provisional Traditional Chinese Medicine Practitioner” or “Provisional Acupuncturist” is addressed by s. 5(2) of the Registration Regulation, but was not the subject of argument during the course of the application). The record does not account for the difference of 62 between the total number of registered members and the total of the three categories referred to.

The Respondents

[26] The corporate respondents are entities associated in various ways with traditional Chinese medicine in Ontario:

- a) The Federation of Ontario Traditional Chinese Medicine Association (the “Federation”) is an Ontario corporation;
- b) The Federation also carries on business as The Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario (the “Committee”), also known as the CTCMPAO;
- c) The Ontario Acupuncture Examination Committee (the “OAEC”) is an Ontario corporation which also goes by the name “Ontario Acupuncture and Traditional Chinese Medicine Examination Committee”; and previously went by the name “Ontario Acupuncture Board”;
- d) The College of Traditional Chinese Medicine & Pharmacology Canada is an Ontario corporation;
- e) The Canadian Association of Acupuncture & Traditional Chinese Medicine (the “Association”) is an Ontario corporation;
- f) The Committee for Certified Acupuncturists of Ontario (the “CCAO”) is an Ontario corporation.

[27] The corporate respondents are related entities. All of the corporate respondents, except the CCAO, have the same registered address.

[28] Furthermore, the corporate respondents share many of the same directors and officers:

- a) The respondent James X.N. Yuan is a Director of the Federation; Chairman and Advisory Council member of the Committee; the President and Director of the Association; the President and Director of the College of Traditional Chinese Medicine & Pharmacology Canada; a Director of the OAEC; and the Secretary, General Manager and Director of the CCAO;
- b) The respondent Jia Li is the Vice-Chair and Advisory Council member of the Committee; the President and Director of the OAEC; and the Treasurer of the CCAO;
- c) Daping Zhang is Director of the Federation; and Advisory Council member of the Committee; an Officer and Director of the Association; an Officer and Director of the OAEC; and the President and a Director of the CCAO;
- d) Steven Shiju Liu is a Director, Co-chair and Secretary-General of the Federation; and an Advisory Council member of the Committee; and

- e) Sherry Xueping Yin is Director of the Federation; and Advisory Council member of the Committee; the President and Director of the Association; an Officer and Director of the OAEC; and the President and a Director of the CCAO.

[29] The respondents James X.N. Yuan and Jia Li, (a third individual respondent, Zhi Hong Zhao not having been served with the notice of application) are alleged to have engaged in the unauthorised practice in Ontario of traditional Chinese medicine and acupuncture, contrary to the TCMA.

[30] The individual respondents are all self-described as “ethnic mainland Chinese” individuals, that is, people originating from mainland China and having Mandarin as their main language.

The Allegations

[31] The corporate respondents are alleged to have breached s. 34(1) of the RHPA by falsely holding themselves out as bodies that regulate, under statutory authority, individuals who practice traditional Chinese medicine and acupuncture in Ontario. These respondents are also alleged to have started a registration process that purports to authorise individuals to practice traditional Chinese medicine and acupuncture in Ontario. The College also claims that some of the corporate respondents have announced plans to certify individuals to practice as “Doctors of Traditional Chinese Medicine”, which is a title that only the College can confer under the applicable legislation (in which regard, at the present time, the College has not created a “Doctor Class” of registration).

[32] As against the individual respondents, it is alleged that they, along with the Chinese Medicine and Acupuncture Clinic of Toronto and the College of Traditional Chinese Medicine and Pharmacology Canada, are in breach of ss. 3 and 4 of the TCMA and ss. 27 and 30(1) of the RHPA by engaging in the unauthorised practice of TCM. Mr. Yuan and Mr. Li are also said to have breached s. 8(1) and 8(2) of the TCMA and s. 33 of the RHPA by using prohibited titles and designations, namely, the title “Doctor”.

The Record

[33] I was provided with a substantial evidentiary record to consider, including affidavits from the Registrar of the College and a number of affidavits contained in the respondents’ record from various individuals in or associated with the TCM community: Shigi Liu, James X.N. Yuan, Jia Li, Dr. Hua Wu (Associate Professor in French and Asian Studies at Huron University College, University of Western Ontario), Hanfei Bao, Xin Liu (a Ph.D. candidate in Statistical Science from the University of Western Ontario), John Balzevic (Chair of the College of Traditional Practitioners and Acupuncturists of British Columbia), Jin Wang, Jiedong Wang, Peiying Shen, Yong Lang, Michael Chiang, Leona Xing and Christiane Séguin. Some of the deponents of these affidavits were cross-examined. Transcripts of the cross-examinations of some of the respondents on the affidavits provided by them in the Divisional Court matter were also filed.

The Constitutional Issue

[34] The respondents also delivered a Notice of Constitutional Question in which they challenged the constitutional validity of the Registration Regulation. In their Notice of Constitutional Question, dated 31 July 2014, they contend that:

Provisions in the registration regulations such as the English or French fluency requirement and the omission of the Doctor Class barriers set by the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (the College) to exclude Ethnic Mainland Chinese (EMC) from the practice of the profession Traditional Chinese Medicine (TCM) in Ontario, taking advantage of EMC's weakness in English fluency and strength in TCM background, the two widely recognized characteristics of this ethnic group. It is "ethnic cleansing" in the TCM profession.

The Discrimination Allegations

[35] A number of the deponents of affidavits filed by the respondents make reference to the discriminatory character and effects of the Registration Regulation. Some of those individuals have practiced traditional Chinese medicine in Ontario for many years. They trained at various educational institutions in China, had used the title "Doctor" and, in many cases, had, initially, welcomed the recognition of their profession which was implicit in the establishment of the College and its inclusion with other regulated health professions in Ontario.

[36] The basis of the alleged discrimination is that the individual respondents and other "ethnic mainland Chinese" (EMC) people, that is people who have emigrated from mainland China in recent decades, are members of an identifiable ethnic group. According to Associate Professor Hua Wu of the University of Western Ontario:

They share the same culture, language, social background, and place of origin, and are identifiable and distinguishable from the rest of the Chinese race in Canada.

[37] Professor Wu explains that while there are no shortage of success stories in the EMC community in Canada, a generally recognised characteristic of this group is a relatively lower level of English proficiency. This stands in contrast to people of Chinese origin from Hong Kong which, even since Britain returned Hong Kong sovereignty to China in 1997, has operated under the "one country, two systems" arrangement, with, according to Professor Wu, the result that people from Hong Kong have a different socio-economic experience and, typically, higher proficiency in the English language than the EMC. She continues:

This language weakness [of EMC] is a generally recognized characteristic of this group. This language weakness is usually noticeable in their speaking, reading, writing and listening and is common to students, employees, employers, entrepreneurs, and other individuals from Mainland China; and as a result it is a

generally recognized barrier in their access to education, employment and other opportunities in Canada.

[38] According to the affidavit of Xin Liu, a Ph.D. in Statistical Science at the University of Western Ontario, there were around 2,075 EMCs practicing TCM in Ontario before 1 April 2013. Mr. Liu's survey reviewed data obtained from a number of websites as well as from the Federation and identified EMC individuals based on their surnames spelt in Pinyin (the standard system of romanised spelling for transliterating Chinese). He concludes that only 976 of those 2,075 EMCs had been licensed by the College by the end of June 2014 and suggests that many of those individuals would likely cease to be eligible for registration once the Grandparented Class is eliminated (because of lack of English language skills).

[39] The respondents contrast the regime in Ontario, and in particular the language requirements, with that in British Columbia, where the College of Traditional Chinese Practitioners and Acupuncturists of British Columbia permits qualifying examinations and courses to be taken in the Chinese language. According to John Balzevic who at the time of swearing his affidavit (18 July 2013) was the Chair of the British Columbia College:

We have never encountered any difficulties whatsoever, in the treatment of patients nor have I heard of any problems with doctors and practitioners of TCM, based on the fact of using the Chinese language to get licensed, take courses and treat our patients.

In fact, I can categorically state that having minimally competent ability to read the Chinese language is an advantage in TCM in that, the medical literature, historically, was in Chinese, and, currently, much of it is still in Chinese.

Furthermore there are many Chinese-speaking patients who may not speak English and or feel more comfortable addressing their health care concerns, with their TCM Doctor/Practitioner, directly in the Chinese language.

[40] There is no reliable information as to the portion of TCM patients who cannot communicate effectively in English. But according to Shigi Liu, one of the co-chairs of the corporate respondents, a "significant number of patients are immigrants from Mainland China."

[41] The applicant, not surprisingly, denies that its regulation or practices are discriminatory and points, in particular to its responsibilities, as a regulator, to protect the public interest as well as to measures it has taken to accommodate registrants in the Grandparented Class by allowing the use of translators to assist with tests. Furthermore, as the College points out, language fluency requirements are common to all other health professions in Ontario. Such requirements enable health care providers to respond to and communicate with other health care professionals, to understand patient records and to work collaboratively with other parts of the health care community.

Res Judicata and Abuse of Process

[42] Regardless of the merits of the respondents' constitutional arguments, the applicant and the Attorney General submit that the challenge must fail because:

- a) The doctrine of *res judicata* and abuse of process preclude the respondents from challenging the constitutional validity of the registration regulation; and
- b) To the extent that the respondents' *Charter* challenge relates to the process by which members of the College's Council are elected and by which appointments are made to the College's staff, the respondents lack the standing necessary to mount such a challenge.

[43] The basis for the *res judicata* argument is the decision of the Divisional Court in *Yuan 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.) [*Yuan*]. That case involved an application for judicial review by, amongst others, Mr. Yuan, Mr. Li and the Federation of Ontario Traditional Chinese Medicine Association, all respondents in the current proceeding, who alleged that the Registration Regulation was "contrary to ss. 7 and 15 of the *Charter*" because it discriminated against Mandarin speakers and because it failed to include a "Doctor" class of registration.

[44] There was extensive evidence provided to the Divisional Court in respect of these questions including nine cross-examinations. The Divisional Court dismissed the application. With respect to the language fluency requirements of the registration regulation, the Divisional Court held:

[11] Section 4(1) of the Registration Regulation requires that applicants for membership in the TCM College be able to speak, read and write either English or French with reasonable fluency. Section 4(2) exempts members of the Grand-parented class from this requirement, and s. 7(1) requires such a member to practise in accordance with a written plan submitted by the member and that has been approved by a panel of the Registration Committee as being one that effectively deals with inter-professional and continuity of care issues arising from the member's lack of fluency in English or French. The practitioner Applicants pointed out that TCM is culturally, racially and linguistically Chinese-based and therefore there should be no language restrictions. They submitted that the language fluency requirements in the Registration Regulation were discriminatory and contravened s. 15 of the *Charter*.

[12] However, in *Lalonde v. Ontario (Commission de restructuration des service de santé)*, [2001] O.J. No. 4767 (C.A.) at paras. 96 to 101, the Ontario Court of Appeal ruled that language alone is not a protected ground under s. 15 of the *Charter*, and that the *Charter* cannot be used directly or indirectly to expand language rights beyond the English and French languages protected under s. 16.

[13] It is clear that the TCMA and its Regulations do not prohibit the practice of TCM in Chinese or in any other language. Language fluency requirements are also common to all other health professions in Ontario, the public interest being

the ability of health care providers to respond to inquiries about patients from other health professionals, to comprehend patient records from other health professionals, to provide speedy and accurate information about a patient during emergency and to communicate and work collaboratively with other parts of the health care community. These are not discriminatory requirements.

[45] With respect to a lack of “Doctor Class” of registrants, the Divisional Court held:

[5] Section 12 of the TCMA provides that the College “may make regulations” in respect of the use of the “doctor” title, prescribe a class of certificates of registration for members using that title, prescribe standards and qualifications, setting examinations and other such related matters. At paragraph 55 of her affidavit, former College Registrar Emily Cheung gave evidence that:

The College anticipates that it will soon begin developing the competencies for “Doctors of TCM” and working with the Ministry to create regulations establishing a new class of members who can use the title “doctor”.

[6] The College has elected to commence with regulations dealing with the classes and titles already described, which the Applicants argued dealt with a lesser part of the overall discipline of TCM, albeit part of it, and not the core purpose of the TCMA. In response, the Respondents pointed out that the section of the TCMA creating the College had only been proclaimed on April 1, 2013. By fashioning the Registration Regulation first, “practitioners” and “acupuncturists” were able to practise. Nearly 2,000 members had been registered since that time.

[7] Until a regulation prescribing the use of the title “doctor” is enacted, s. 33 of the RHPA prohibits the use of the title “doctor”, which was the case before the enactment of the TCMA. When the College is ready to enact a regulation under s. 12 of the TCMA, s. 33(2.1) of the RHPA will be proclaimed and the prohibition against the use of the title “doctor” under that Act will be exempted. The fact that there is no doctor class yet under the TCMA does not affect the scope of practice set out in s. 3 of the TCMA and the acts authorized under s. 4 of that Act. We conclude that if, when and how the College enacts one or more regulations under s. 12 of the TCMA is a matter of policy that cannot be part of the court’s consideration.

[46] The Divisional Court’s decision was delivered on 31 January 2014. No leave was sought to appeal that decision. In advancing the argument that the respondents are trying to re-litigate the very constitutional challenges that were dismissed by the Divisional Court, the Attorney General and the applicant rely on the principles established in the Supreme Court of Canada decision in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 [*Danyluk*] at para. 18 in which the court said:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. ... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[47] In determining whether issue estoppel precludes the re-litigation of issues previously decided in another court proceeding, three conditions must be satisfied by the responding party:

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* at para. 25; *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 23 and *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279 at para. 33).

[48] While the respondents appear to have maintained similar arguments to those presented to the Divisional Court in terms of the Registration Regulation being discriminatory, they also argued that the operation of the rules, policies and standards are discriminatory. The argument is framed in these terms:

The College has adopted many rules, policies, and standards that are neutral on the surface but actually discriminatory against Mainland Chinese.

[49] The respondents do not concede that their constitutional challenge to the Registration Regulation itself represents a re-litigation of the issues presented to the Divisional Court. But they argue in the alternative that even if the Registration Regulation is not, in and of itself discriminatory, it operates in a discriminatory way because it places insurmountable obstacles in the path of individuals who, prior to 1 April 2013, were able to engage in the practice of TCM, but who can no longer do so because, as ethnic Mainland Chinese individuals, they do not possess and do not have the capacity to acquire sufficient English language skills to meet the requirements of the Registration Regulation for either Grandparented or General Classes of registration.

Issue Estoppel Applies

[50] In the *Yuan* case, the same sections of the *Charter* were argued, the decision was final, and the applicants included the same parties (or their privies) as the respondents in the present matter. It must follow that the application of the principles of issue estoppel preclude the respondents from using this case to re-litigate the constitutionality of the Registration Regulation.

[51] The arguments relating to the allegedly discriminatory operation of the Registration Regulation are based on behaviour going back to 2008 when the Transitional Council was established. Without going into the very detailed history, the essence of the respondents' arguments is that EMC individuals were excluded from meaningfully participating in the consultation process and the subsequent appointment and election of members of the Council and senior officials of the College. As a result, despite the measures taken by the College to accommodate the linguistic characteristics of the respondents and other EMC persons (which, the respondents assert, are essentially tokenistic), the operation of the College and the implementation of its rules, regulations and policies, has been fashioned to exclude EMC persons.

[52] The reframing of the respondents' arguments do not mask the reality that their complaints still emanate from the linguistic requirements of the Registration Regulation and the decision by the Council not, at least so far, to activate a "Doctor" class of registrant. By characterising the applicant's enforcement of the regulations as discriminatory in an "operational" way, the respondents are trying to do indirectly what they cannot do directly, namely, challenge the constitutional validity of the Registration Regulation for a second time, having failed on the first attempt.

[53] I was left in no doubt as to the sincerity of the respondents. At the risk of oversimplifying what they claim has happened to them, they believe that through a series of political machinations, which included flawed consultation and electoral processes, they and other members of the ECM community in Ontario have been systematically excluded from continuing their work and activities as members of the TCM community. They have put forward cogent arguments as to why they should be allowed to participate. The fact that many people who are similarly situated to the individual respondents are able to practice their profession in the province of British Columbia and to communicate with their regulator in the Chinese language inevitably causes them to question whether they are being fairly treated by the Ontario College. The very name of their medical art – traditional Chinese medicine – and the demographics of not only the practitioners but also the members of the public who use the services of TCM practitioners – inevitably fuels the respondents' sense that they are being discriminated against.

[54] However, the fact remains that they have already unsuccessfully challenged the constitutionality of the legislation. The current respondents cannot, in my view, try again. The extent to which they can obtain assistance from this court is dependent upon there being a juridical basis upon which the court could intervene. On the present record, there is no such basis.

Standing

[55] Given my findings on the constitutional challenge, it is not necessary for me to consider the issue of standing. Suffice it to say that none of the individual respondents are members of the College. Mr. Yuan and Mr. Li have not applied for a certificate of registration in any class. They have also not registered for the Jurisprudence Course or the Safety Program. As the Divisional Court noted in *Yuan* (at para. 9):

... if there was such a right [to practice a profession], there was no denial here, because by their own choice and for their own reasons, the practitioner Applicants have not applied for registration under the TCMA.

Declaratory and Injunctive Relief

[56] I return then to the substantive allegations made against the respondents.

[57] Whether the respondents are in breach of the legislation involves consideration of the evidence leading to findings of fact which are then measured against the legislation to determine whether a breach has occurred.

[58] The College says that the corporate respondents have held themselves out as regulatory colleges by:

- a) Establishing a registration process that purports to authorize individuals to practice traditional Chinese medicine and acupuncture in Ontario;
- b) Intentionally adopting business and corporate names and corporate structures that are confusingly similar to that of the College;
- c) Issuing press releases and making public statements that denigrate the College and claim that the Federation and the Committee are the statutory regulators of traditional Chinese medicine and acupuncture in Ontario; and
- d) Establishing a “certification” process for “Doctors of Traditional Chinese Medicine”.

[59] At the hearing of the interim injunction application which took place on 26 May 2014, the College presented sufficient evidence to satisfy me that the corporate respondents should be enjoined having regard to the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 as modified by *College of Opticians of Ontario v. John Doe 1 (c.o.b. Great Glasses)* 2006 CanLII 42599 (Ont. S.C.).

[60] Having now had the benefit of a far more extensive evidentiary record, including transcripts of cross-examinations of representatives of the applicant and the respondents, I am satisfied that the interim relief ordered by me should be made permanent (in fairness to the respondents, I should record that the focus of their response to the application has been their allegations of discrimination; they have raised no further persuasive evidence in response to the

core allegations made by the College with respect to the respondents' breaches of the RHPA and the TCMA).

[61] Mr. Yuan is (or was, until the interim injunction took effect) a practitioner of traditional Chinese medicine and acupuncture and, as noted, Director/Officer of the corporate respondents. He has also represented himself as the owner of the Clinic and as a "Doctor of Traditional Chinese Medicine." In that regard, a printout of the website of the College of Traditional Chinese Medicine and Pharmacology Canada described Mr. Yuan as "Doctor Yuan" and stated that he operates a "Professional Clinic" that offers traditional Chinese medicine and acupuncture treatments.

[62] Mr. Li is (or was, until the interim injunction took effect) a practitioner of traditional Chinese medicine and acupuncture and a Director/Officer of the Committee, the OAEC, and the CCAO. He, too, represents himself as a Doctor of Traditional Chinese Medicine.

[63] The evidentiary record indicates that neither Mr. Yuan nor Mr. Li are members of any other regulatory College that would permit its members to practice acupuncture or to use the "Doctor" title.

[64] The Clinic is a traditional Chinese medicine and acupuncture clinic operating out of the offices of the College of Traditional Chinese Medicine & Pharmacology Canada. It is a sole proprietorship registered in the name of Mr. Yuan.

[65] Section 87 of the Code permits the College to apply to the Superior Court for an order directing a person to comply with the TCM legislation:

Court orders

87. The College may apply to the Superior Court of Justice for an order directing a person to comply with a provision of the health profession Act, this Code, the *Regulated Health Professions Act, 1991*, the regulations under those Acts or the by-laws made under clause 94 (1) (1.2), (1.3) (s), (t), (t.1), (t.2), (v), (w) or (y).

[66] An order under s. 87 may be made against an individual or a corporation.

[67] An order under s. 87 is, in effect, a statutory injunction. However, the College is not required to prove irreparable harm if the relief sought is not granted. Rather, the court must ask whether there has been a continued breach of the statute by the person against whom the relief is sought and whether the statute permits the court to make an order against that person: *College of Physicians and Surgeons of Ontario v. Stewart* (unreported endorsement, 6 March 2014, Chiapetta J., ONSC); *College of Opticians of Ontario v. City Optical Inc.*, [2009] O.J. No. 2200 (S.C.J.) [*City Optical*] at para. 59.

The Corporate Respondents Have Held Themselves Out as Regulatory Colleges

[68] Section 34 of the RHPA prohibits a corporation from holding itself out as a body that regulates, under statutory authority, individuals who provide health care:

Holding out as a College

34.(1) No corporation shall falsely hold itself out as a body that regulates, under statutory authority, individuals who provide health care.

[69] In Richard Steinecke, *A Complete Guide to the Regulated Health Professions Act*, loose-leaf (2014-Rel. 27) (Toronto: Thomson Reuters Canada Ltd., 2014) at p. 11-15, three elements of a breach of s. 34 are identified:

- (a) The body must be a corporation;
- (b) The holding out must be false;
- (c) The holding out must contain the assertion that the corporation regulates, under statutory authority, individuals who provide health care.

[70] I am satisfied that the evidentiary record supports the allegations made by the applicant that the Federation, operating under its own name or the name of the Committee has breached s. 34 of the RHPA by:

- (a) Establishing a registration process that purports to authorize individuals to practice traditional Chinese medicine and acupuncture in Ontario;
- (b) Intentionally adopting business and corporate names and corporate structures that are confusingly similar to that of the College;
- (c) Issuing press releases and making public statements that denigrate the College and claim that the Federation and Committee are statutory regulators of traditional Chinese medicine and acupuncture in Ontario; and
- (d) Establishing a “certification” process for “Doctors of Traditional Chinese Medicine”.

[71] I am also satisfied that the OAEC has breached s. 34 of the RHPA. The evidentiary record indicates that the OAEC serves as an integral part of the Federation and Committee’s “registration” process. The OAEC offers four examinations that purportedly qualify an individual to practice Chinese traditional medicine or acupuncture in Ontario (a written acupuncture examination, an acupuncture clinical examination, a traditional Chinese medicine examination and a traditional Chinese medicine clinical examination).

[72] This is graphically illustrated by the “Introduction” page on the OAEC’s website which stated that the OAEC examinations permit an individual to be “fully qualified” to practice acupuncture:

The OAEC certification testifies to the public, to the government and insurance companies that you have met the professional standards of skill, training and knowledge necessary for safe and competent practice in acupuncture. The OAEC

certificate will install [*sic*] confidence in the public as it is an indication that the holder has met stringent standards and is fully qualified to practice acupuncture.

[73] The College of Traditional Chinese Medicine & Pharmacology, which operates out of the same address as the Federation, the Committee, the OAEC and the Association, appears to form part of the Federation and Committee's registration process. In a letter written by an individual to the College, and exhibited to the first affidavit of Allan Mak (Director, Administration and Professional Practices of the College), the individual explained that the College of Traditional Chinese Medicine & Pharmacology played a key role in the licensing process organized by the Federation and the Committee by representing itself as the body that administered the OAEC exams:

I called the [College of Traditional Chinese Medicine & Pharmacology Canada] and they were surprised that [the College] did not acknowledge their exams and they too were puzzled by this revelation. It is my hope that these exams that I successfully completed meet the requirements for membership into [the College] and I am asking for your assistance to bring a resolution into the confusion as soon as possible.

[74] The CCAO also plays a part in the registration process. The Committee's "Application Form for the Practitioner of TCM and Acupuncture in Ontario" requires payment of \$280 to be made to CCAO. The name alone of CCAO – "Committee for Certified Acupuncturists of Ontario" misleadingly suggests that the CCAO is a certifying body for acupuncturists in Ontario.

[75] Similar conclusions apply to the Association (the application form referred to above was to be submitted to the Association). Furthermore, in an email from the Federation dated 5 March 2014 to its members, it was stated that membership in the Association's grandparent class would close in May 2014. This email implies that the Association is the body that authorizes practitioners to practice traditional Chinese medicine legally in Ontario (the date of May 2014 approximating with the closing off date for applications for the grandparented class under the applicant's Registration Regulation).

[76] It is abundantly clear from the evidentiary record that people could at best be confused and at worst misled as to the status of the corporate defendants and their involvement in the regulatory process applicable to the licensing and practicing of traditional Chinese medicine and acupuncture in Ontario.

Mr. Yuan and Mr. Li Have Held Themselves Out as Representatives of a Regulator

[77] Section 34(2) of the RHPA provides that:

No individual shall hold himself or herself out as a member, employee or agent of a body that the individual falsely represents as or knows is falsely represented as regulating, under statutory authority, individuals who provide health care.

[78] In his text, *A Complete Guide to the Regulated Health Professions Act* at p. 11-15, Richard Steinecke identifies four elements of a breach of s. 34(2):

- (a) A person must be an individual, not a corporation;
- (b) The individual must hold him or herself out as a member, employee or agent of a body;
- (c) The individual or body must also hold out that it regulates, under statutory authority, individuals who provide health care; and
- (d) The holding out in point (c) must be false.

[79] The titles and offices held by Mr. Yuan and Mr. Li in the corporate defendants have also been set out in earlier paragraphs in some detail. Furthermore, the evidentiary record discloses that Mr. Yuan and Mr. Li served as keynote speakers at the Federation's 8 March 2014 meeting and, according to the Federation's subsequent press release, Mr. Yuan announced that the Federation would begin to certify traditional medicine doctors.

Unauthorised Practice

[80] Section 27(1) of the RHPA prohibits persons from performing a "controlled act" in the course of providing health care services to an individual unless the person is a member of a regulatory College or the performance of the "controlled act" has been delegated to the person by a member.

[81] Section 4 of the TCMA authorizes members of the College to perform two controlled acts, namely, performing acupuncture and communicating a traditional Chinese medicine diagnosis.

[82] It is a contravention of s. 27(1) of the RHPA for a person who is not a member of the College to perform either of these controlled acts.

[83] Furthermore, s. 30(1) of the RHPA prohibits a person from treating or advising a person with respect to his or her health in circumstances where it is reasonably foreseeable that serious bodily harm may result:

30.(1) No person, other than a member treating or advising within the scope of practice of his or her profession, shall treat or advise a person with respect to his or her health in circumstances in which it is reasonably foreseeable that serious bodily harm may result from the treatment or advice or from an omission from them.

[84] Both individuals and corporations can be found to be in breach of ss. 27 and 30(1): *College of Optometrists of Ontario v. SHS Optical Ltd. (c.o.b. Great Glasses)*, [2003] O.J. No. 3077.

[85] Mr. Yuan, Mr. Li, the Clinic and the College of Traditional Chinese Medicine & Pharmacology Canada are not members of the College. Mr. Li and Mr. Yuan both admitted in relation to these proceedings that they have practised traditional Chinese medicine and

acupuncture in Ontario since the Registration Regulation came into force. Furthermore, in the factum they submitted on the interim injunction motion in this proceeding, it was written of Mr. Yuan and Mr. Li that “Doctor Yuan and Dr. Li’s continued practice in TCM is justifiable.”

[86] A printout from the website of the College of Traditional Chinese Medicine & Pharmacology Canada described Mr. Yuan as a “Dr. of Traditional Chinese Medicine” practising out of a “professional clinic” at the College of Traditional Chinese Medicine & Pharmacology Canada (although on behalf of Mr. Yuan it was submitted that he has obeyed the interim injunction and closed his TCM practice in June 2014).

Unauthorised Use of Protected Titles

[87] Section 33 of the RHPA prohibits a person from using the title “Doctor” in the course of providing or offering to provide health care to individuals in Ontario, unless a person is a member of a College that authorizes its members to use the title:

33. (1) Except as allowed in the regulations under this Act, no person shall use the title “doctor”, a variation or abbreviation or an equivalent in another language in the course of providing or offering to provide, in Ontario, health care to individuals.

[88] Although the TCMA provides authority to the College to establish a “Doctor class” of registrants, it has not yet done so. Consequently, practitioners of traditional Chinese medicine and acupuncture in Ontario are prohibited from using the title “Doctor” in the course of providing or offering to provide health care unless they are a member of a College that permits its members to use that title.

[89] Section 8(1) of the TCMA prohibits non-members of the College from using the titles “traditional Chinese medicine practitioner” or “acupuncturist,” a variation or abbreviation or an equivalent in another language. Section 8(2) prohibits non-members from holding themselves out as persons who are qualified to practice in Ontario as a traditional Chinese medicine practitioner or acupuncturist or in a specialty of traditional Chinese medicine.

[90] The test for “holding out” is set out in *City Optical*, at paras. 58-59:

... [T]he basic test is whether, on a balance of probabilities, a reasonable member of the public would infer from the conduct of Ms. Arthur that she was recognized by law or otherwise as an optician ...

... As this is an objective test, whether or not Ms. Arthur had the subjective intention to hold herself out as an optician is irrelevant to the determination of this issue.

[91] The evidentiary record is replete with examples of Mr. Yuan and Mr. Li describing themselves as “Doctors of traditional Chinese medicine” (or variants on that description) and as qualified to practice traditional Chinese medicine and acupuncture in Ontario.

[92] Indeed, and somewhat ironically, on the website of Health Canada's Advisory Council on Traditional Chinese Medicine, Mr. Yuan and Mr. Li, who are members, are described as "Doctors".

Conclusion

[93] As matters presently stand, the respondents are, or have been, until restrained by the interim injunction, breaking the law. They must stop doing so. Whether they like it or not, the College is carrying out a regulatory function under statutory authority. The Divisional Court has decided that the regulations which the College seeks to enforce, and which the respondents challenge in order to defend this application, are constitutional.

[94] If the respondents want to change the regulations, the Act, or the people who run the College, they must take a different route. They cannot achieve any of those things in this litigation.

[95] For the foregoing reasons:

- (a) The constitutional challenge by the respondents is rejected;
- (b) The declaratory relief sought by the applicants in the notice of application is granted; and
- (c) The injunctive relief requested by the applicant is granted on a permanent basis.

Costs

[96] I am provisionally of the view that the applicant is entitled to its costs. The applicant should provide its bill of costs and a written submission not to exceed five pages in respect of the issue of costs within three weeks of the release date of these reasons. The respondents should deliver any responding submission on the issue of costs no more than two weeks following the delivery of the applicant's submissions.

Graeme Mew J.

CITATION: College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association, 2015 ONSC 661

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

COLLEGE OF TRADITIONAL CHINESE MEDICINE
PRACTITIONERS AND ACUPUNCTURISTS OF
ONTARIO

Applicant

– and –

THE FEDERATION OF ONTARIO TRADITIONAL
CHINESE MEDICINE ASSOCIATION a.k.a. THE
COMMITTEE OF TRADITIONAL CHINESE
MEDICINE PRACTITIONERS AND
ACUPUNCTURISTS OF ONTARIO, THE ONTARIO
ACUPUNCTURE EXAMINATION COMMITTEE,
THE COLLEGE OF TRADITIONAL CHINESE
MEDICINE AND PHARMACOLOGY CANADA,
CANADIAN ASSOCIATION OF ACUPUNCTURE
AND TRADITIONAL CHINESE MEDICINE,
COMMITTEE FOR CERTIFIED ACUPUNCTURISTS
OF ONTARIO, CHINESE MEDICINE &
ACUPUNCTURE CLINIC OF TORONTO, JAMES
X.N. YUAN, JIA LI AND ZHI HONG ZHAO

Respondents

REASONS FOR JUDGMENT

Mew J.