Court File No. CV-14-518696

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

FEDERATION OF ONTARIO TRADITIONAL CHINESE MEDICINE ASSOCIATION, ONTARIO ACUPUNCTURE EXAMINATION COMMITTEE, CANADIAN ASSOCIATION OF ACUPUNCTURE & TRADITIONAL CHINESE MEDICINE, COMMITTEE OF CERTIFIED ACUPUNCTURISTS OF ONTARIO, JAMES X. N. YUAN, JIA LI, JIN WANG and YONG LANG

Plaintiffs
(Respondents)

and

COLLEGE OF TRADITIONAL CHINESE MEDICINE PRACTITIONERS AND ACUPUNCTURISTS OF ONTARIO and MINISTER OF HEALTH AND LONG TERM CARE OF ONTARIO

Defendants
(Moving Party)

ENDORSEMENT

The College and the Minister bring motions to strike out the statement of claim as disclosing no reasonable cause of action and as being an abuse of process of the court. I address the various issues below.

1. The claim under the Human Rights Code, RSO 1990, c. H. 19 (the "Code")

There is no civil cause of action under the Code. A civil cause of action cannot be grounded directly in an allegation of a breach of human rights legislation. If a breach of the Code is alleged, the remedy must be sought under the Code. No civil proceeding is possible based solely on an infringement of a right under Part I of the Code (Honda Canada Inc v. Keays, 2008 SCC 39 at paras 63-64; Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 SCR 181 at para 27; s. 46.1(2) of the Code). There is no independent tort of discrimination in Canada.

The plaintiffs acknowledge that "their cause of action is under the Charter, not under the Code". Consequently, the civil claim under the Code discloses no reasonable cause of action.

2. The corporate plaintiffs do not have standing to bring a claim for discrimination

The claim is for $600 million in damages based on the declaration sought by the plaintiffs "that the Defendants discriminated against the Plaintiffs on the basis of ethnic origin" (para. 1(4) of Statement of Claim). Regardless of the issue estoppel/res judicata arguments I discuss below, section 15 rights do not apply to corporations. Section 15 protects human dignity by prohibiting

discrimination on the basis of personal characteristics such as race or ethnic origin. A corporation is not an "individual" within section 15 and accordingly has no standing to invoke its provisions (Lalonde v Ontario (Health Services Restructuring Commission, [1999] O.J. No. 4488 at para. 90, affirmed [2001] O.J. No. 4767 (C.A.); Canada (Attorney General) v. Hislop, 2007 SCC 10 at para. 73).

The plaintiffs submit that they can obtain "public interest" standing to bring the claim. However, there is no claim made in the public interest – rather the plaintiffs seek $600 million in damages (see Odhavji v. Woodhouse, 2003 SCC 69 at para 76). In any event, there are numerous individuals in the claim as plaintiffs which demonstrate their willingness to assert their own alleged rights under s. 15(1) of the Charter, obviating the need for corporate plaintiffs to do so (Canada (AG) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45).

The plaintiffs also rely on Benner v. Canada (Secretary of State), [1997] 1 SCR 358 to submit that a "targeted" third party can seek Charter relief. However, that does not permit a corporate plaintiff to have standing to seek a declaration for violation of s. 15 Charter rights, as I discuss above.

Consequently, the corporate plaintiffs cannot seek the section 15 relief requested.

3. Issue Estoppel/Abuse of Process

The plaintiffs submit that their claims can be divided into two categories (i) "Constitutional Claims" i.e. claims that the Registration Regulation is unconstitutional because it discriminates on the basis of ethnic origin against "Ethnic Mainland Chinese ("EMC") and (ii) other claims not arising out of constitutionality (the "Remaining Claims"). The plaintiffs submit that the Remaining Claims are those set out as (i) depriving the EMC of equal opportunities for Council membership of the College (ii) excluding the EMC from the leadership of the College, (iii) excluding EMC during the consultation process, (iv) making discriminatory remarks against EMCs and (v) undermining the FOTCMA by the above impugned conduct.

I address each category of claims below on the basis of both issue estoppel and abuse of process.

<u>Category 1: Constitutional Claims</u>

The plaintiffs submit that their Constitutional Claims are based on discrimination from the Registration Requirement [*sic*] ("RR") against EMC which the plaintiffs submit were not before the Divisional Court (2014 ONSC 351) which only addressed whether the RR were discriminatory based on the Chinese race speaking Chinese language. However, the "issue" to determine on a question of issue estoppel is based on the relief sought before the court, not a legal "label" of the claim.

Before the Divisional Court, the plaintiffs Yuan and Li and the FOTCMA sought a declaration on judicial review that the RR breached both s. 7 and s. 15 of the Charter. The plaintiffs (then applicants) alleged the RR was unconstitutional because it provided for English or French proficiency requirements and because it did not provide for a "doctor" class of registrants. The applicants alleged a breach of s. 15 "based on race and linguistic origin" (see Notice of Application for Judicial Review). The Notice of Constitutional Question alleged discrimination

under s. 15 since "ethnic Chinese origin constitutes an enumerated group under s. 15 while Chinese linguistic origin is an analogous ground, which have been historically stigmatized and alienated, and subject to discrimination" and that "the [RR] and their enforcement, discriminate against the group". The applicants before the Divisional Court were represented by counsel.

The Divisional Court rejected the argument of unconstitutionality both with respect to the language-fluency requirement and for the lack of a "doctor class" of registrants. No appeal was taken by the applicants.

Recently, the College sought an injunction to enjoin Yuan, Li and the present corporate plaintiffs from contravening the TCMA and other legislation. The respondents to the injunction proceeding resisted the injunction on the basis that the RR was discriminatory on the basis of race and ethnic status, raising the same issues and based on the same evidence as the Constitutional Claims. Mew J. held that the Divisional Court decision was final and issue estoppel precluded the respondents from using that case to relitigate the constitutionality of the RR.

I adopt the same analysis as Mew J. and find that the Constitutional Claims cannot be brought both on the basis of issue estoppel and abuse of process.

a) Issue estoppel / Abuse of process

The issue was the same before the Divisional Court as on this claim: were the language fluency provisions and absence of a "doctor class" regulation in the RR a breach of section 15. The Divisional Court held that the language fluency provisions of the RR were not "discriminatory requirements" and that the absence of a regulation establishing a "doctor class" of registrants is "a matter of policy that cannot be part of the court's consideration" (Div Ct 2014 ONSC 351 at paras 7 and 12).

The plaintiffs submit that the "issue" was not the same as the plaintiffs submitted at the Divisional Court that the Charter breach was discriminatory "against the Chinese race speaking [the] Chinese language" and now seek to argue discrimination based on ethnic origin. However, a party cannot re-open litigation to try a new argument that is open to it at first instance. Litigation by instalment is not tolerated (Moran v Cunningham (2009), 96 OR (3rd) 783 at para 83-85). By way of example, in Skypower CL 1 LP et al v. Ontario Power & HMQ, 2014 ONSC 6950, "self-targeting was not raised although allegedly relevant", yet the court found an abuse of process since "the plaintiffs have re-characterized the unlawfulness argument with a different cause of action and a different theory as to why the FIT Rules changed" (para 31, 39).

The plaintiffs submit that it was due to a failure by their prior counsel in the Divisional Court that the theory of discrimination against EMC based on ethnic group was not advanced. However, that does not change the "issue" before the Divisional Court, i.e. whether the RR was unconstitutional as a breach of section 15. Any recourse the plaintiffs may seek against counsel does not alter the issue determined by the court.

For these reasons, I agree with the analysis of Mew J. in the injunction proceedings that "the application of the principles of issue estoppel preclude the [plaintiffs] from using this case to re-litigate the constitutionality of the Registration Regulation" (2015 ONSC 661 at paras. 50-54),

even though the plaintiffs' arguments are based on this new theory (which is the same theory advanced in this action). The Divisional Court decision was final and not appealed.

Further, the parties are either the same (FOTCMA, Yuan, Li) or privies. There is a "sufficient degree of identification" between FOTCMA and the other corporate plaintiffs "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), 96 OR (3d) 1, 2009 ONCA 536 at paras 60-64, leave refused 2009 SCCA No. 383, citing Gillese J. at para. 62). The other individual plaintiffs Wang and Lang are members of the FOTCMA and swore affidavits in support of the FOTCMA in its response to the College's application for an injunction. Further, since directors and officers may be considered as privies of their companies (EnerNorth, at para. 61), the other corporate plaintiffs are privies as Yuan is a director and officer of all the caproate plaintiffs and Li is a director or officer of two of them.

For the above reasons, I find that the Constitutional Claims should be struck under the doctrine of issue estoppel. The plaintiffs accept in court that these claims are based on the alleged Charter violation. While the court must take a "fastidious approach" to determining if the issue is the same (Almrei v AGC, 2011 ONSC 1719 at para. 42), the "same question" was decided at the Divisional Court – i.e. was the RR a breach of s. 15. Allowing new arguments does not prevent an "injustice" (Danyluk v Ainsworth Technologies Inc, 2001 SCC 44). The parties had a full opportunity to raise all issues before the Divisional Court, file a full evidentiary record, and canvass all legal arguments.

Further, the plaintiffs ask the court not to apply issue estoppel due to the "supremacy of the constitution". However, the rule of issue estoppel does not circumvent the supremacy of the constitution. Rather, it requires that parties not litigate cases by instalment, with new theories of the case or causes of action raised after a final determination of the issue. As the Divisional Court fully considered the s. 15 issue based on the arguments and evidence before it, the supremacy of the Constitution is not infringed by the application of issue estoppel.

In any event, even if the formal requirements of res judicata were not met, the relitigation of the Constitutional Questions is an abuse of process as the "litigation before the court [is] in essence an attempt to relitigate a claim which the court has already determined" (Toronto (City) v CUPE, Local 79, 2003 SCC 63 at paras. 37, 42, 51-55). The plaintiffs seek a determination by the court of the same question before the Divisional Court. The constitutionality of the language fluency requirements and the absence of a doctor class of registrants were fully tigated before the Divisional Court. Permitting a party to relitigate such issues simply on the basis of a new theory is an abuse of process.

b) Other flaws with the Constitutional Claims

With respect to the Minister, I agree with the settled law that the action could not proceed in any event since "an action for public law damages – including constitutional damages – lies against the state and not against individual actors" (Vancouver (City) v Ward, [2010] 2 SCR 28 at para 22). Consequently, no claim lies against the Minister.

Further, the defect cannot be remedied by joinder or substitution of the Crown for the Minister. The plaintiffs did not provide the mandatory notice of claim under section 7(1) of the Proceedings Against the Crown Act. The failure to provide such notice in advance of commencing the claim renders an action a nullity (Creative Stock Photography Agency Ltd v. HMQ, 2011 ONSC 5178 at para. 8).

c) Conclusion on Constitutional Claims

For the above reasons, I strike the Constitutional Claims with no leave to amend.

Category 2: Remaining Claims

The plaintiffs submit that even if the Constitutional Claims are struck, the Remaining Claims can be permitted to stand, if the claim is amended to properly set out the factual basis for the claims. The plaintiffs submit that the doctrine of abuse of process or issue estoppel does not apply, and as such they should be granted leave to amend to set out these claims. I do not agree.

First, all of these Remaining Claims were raised before Justice Mew on the injunction, almost word-for-word as argued in the factum. Justice Mew found that all of these claims were a re-packaging of claims arising from the alleged unconstitutionality of the RR. At paragraph 51 of his reasons, Mew J summarizes the essential nature of the Remaining Claims. I adopt his conclusion at para. 52 that "the reframing of the respondents' arguments do not mask the reality that their complaints still emanate from the linguistic requirements of the [RR] and the decision of 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 [RR] for a second time, having failed on the first attempt".

In other words, the operational problems relied upon by the plaintiffs in the Remaining Claims (except for defamation, which I address below) are all consequences of the Divisional Court decision upholding the constitutionality of the RR. To allow such claims to continue would represent, as Mew J. held, a second (or third, as the Mew J. decision is under appeal) attempt to relitigate the issue.

In any event, I note that the issue of the duty to consult was raised at the Divisional Court (see par. 3(6) of the applicant's factum and the evidence led at par. 45 et seq. of Mr. Li's affidavit at the Divisional Court).

To the extent that the plaintiffs could bring a claim for "various statements and remarks over the years to defame and discredit the culture and professional reputation of the EMCs" (as submitted at paragraph 18 of the plaintiffs' factum), there is no act of defamation pleaded against any of the individual plaintiffs, and only against the EMCs at large. Any defamation action which could be brought based on particular statements alleged to cause harm to the individual plaintiffs. Further, even if the allegations in the claim are accepted as true, almost all of the impugned comments (see par. 48-54) are made well before the 2 year period prior to the December 2014 statement of claim, and the only paragraph that addresses conduct within the limitation period (para. 55) is not pleaded as defamatory to the plaintiffs. For the above reasons, while I do not find that the plaintiffs cannot bring an action for defamation, they cannot amend the claim to do so as there is

no basis in the claim to support a proper defamation action, so I strike the defamation claim as well without prejudice to the plaintiffs issuing a claim if the allegations can survive limitation issues or any statutory privilege defence (or any other defence of the College).

I further note that there are no allegations of defamation against the Minister so that claim must be struck in any event.

Order and Costs

For the above reasons, I strike the statement of claim and dismiss the plaintiffs' action without leave to amend. The defendants were fully successful on the issue of the existing claim and are entitled to their costs. Given the importance of the issues, the complex research required, the detailed and multiple factums and briefs of authorities, and the thorough motion records received, I find the partial indemnity costs of $18,707.15 for the College and $15,007.70 for the Minister to be extremely reasonable and well within the amount of costs an unsuccessful party would expect to pay. I order the plaintiffs, jointly and severally, to pay costs of $18,707.15 to the College and $15,007.70 to the Minister, all inclusive of taxes and disbursements, within 30 days of the order.

March 31, 2015 Justice Glustein

4565374