
CANADA / JUDGMENT

Ip v. Wilson

2022 BCCA 59

COURT

British Columbia Court of Appeal

DECIDED

1 February 2022

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2022 BCCA 59 Ip v. Wilson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ip v. Wilson,

2022 BCCA 59

Date: 20220201

Docket: CA46183

Between:

Vincent Kay-Lo Ip

Appellant

(Petitioner)

And

Galt Wilson, Heidi M. Oetter, and the College of Physicians and

Surgeons of British Columbia

Respondents

(Respondents)

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Stromberg-Stein

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated May 28, 2019 (Ip v. Wilson, 2019 BCSC 2519, Vancouver Docket S187616).

Oral Reasons for Judgment

The Appellant, appearing in person

(via videoconference):

V.K. Ip

Counsel for the Respondents

(via videoconference):

J.P. Whittow, Q.C.

M. Ollek

Place and Date of Hearing:

Vancouver, British Columbia

February 1, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 1, 2022

Summary:

The appellant doctor challenges the dismissal of his petition for judicial review of a resolution of the College of Physicians and Surgeons of British Columbia to investigate his practice and the closure of that investigation when he provided an Undertaking to no longer engage in clinical practice unless the College determined the Undertaking should be removed. He also seeks to adduce fresh and new evidence on appeal. Held: Appeal dismissed. The judge did not err by dismissing the petition under Rule 9-5 or declining to undertake judicial review. The judge's reasoning was sound and he was correct to strike out the pleading or conclude the issue did not merit judicial review. The judge did not err by concluding the closure of the investigation was not an exercise of statutory power of decision that canceled the appellant's registration. The judge did not err by failing to consider the relevance of an unrelated inquiry into the advertising of the appellant's clinical trainee. The Court will not admit new or fresh evidence other than evidence that was before the chambers judge as it is unrelated to the substance of the appeal and would have made no difference to the judge's decision or to the appeal. The College took all necessary investigatory steps, acted with restraint where warranted, and adhered to the Undertaking the appellant, with the benefit of independent legal counsel, voluntarily provided. This Undertaking

brought the practice investigation to an end, and the College notified the appellant of all steps necessary to resume clinical practice. To do so, and to remove the Undertaking, the appellant must go through the College and address the concerns regarding his clinical practice.

- [1] STROMBERG-STEIN J.A.: Dr. Vincent Kay-Lo Ip, the appellant, is a former registrant of the respondent College of Physicians and Surgeons of British Columbia ("College"). Heidi Oetter, the Registrar and Chief Executive Officer of the College, and Galt Wilson, its Senior Deputy Registrar, are also respondents. This appeal arises from the dismissal of Dr. Ip's petition for judicial review of a resolution of the College to investigate his practice and the closure of that investigation when Dr. Ip provided an Undertaking to no longer engage in clinical practice unless the Registrar determined the Undertaking should be removed.
- [2] In addition, Dr. Ip seeks to raise new matters and introduce new or fresh evidence.
- [3] Dr. Ip seeks the following orders or remedies from this Court, which, with the exception of (b), are unavailable:
- (a) costs from the proceeding below;
 - (b) an order setting aside the order below;
 - (c) restoration of his licensure;
 - (d) access to files related to the investigation into his practice;
 - (e) an order setting aside the College's resolution to investigate his practice;
 - (f) an order setting aside his Undertaking;
 - (g) an order requiring the College to remove the limiting clause from his Certificate of Professional Conduct; and
 - (h) an order setting aside the order of the chambers judge advising Dr. Ip to submit an amended affidavit to protect the identities of the complainants.
- [4] In addition to hearing Dr. Ip's oral submissions, before the hearing of this appeal we have had the opportunity to read the submissions of the parties, the reasons of the chambers judge, and all the materials filed on the record. For the reasons that follow, I would dismiss the appeal.

Facts

- [5] The relevant factual history is described in *Ip v. Wilson*, 2019 BCCA 189, which dismissed Dr. Ip's appeal from the dismissal of his application for the production of documents in this matter:

- [5] The dispute that underlies this appeal stems from Dr. Ip's relationship with the respondent College of Physicians and Surgeons (the College) between 2014 and 2018. The College governs physicians in B.C. in accordance with the Health Professions Act, R.S.B.C. 1996, c. 183 [HPA].
- [6] In 2014, when Dr. Ip was a practicing physician and registrant of the College, three complaints were made about his conduct, each alleging that Dr. Ip communicated with patients or prospective patients in a rude or aggressive manner. The College referred the complaints to an inquiry committee, which commenced an investigation under [s. 33(6)(b) of the Health Professions Act].
- [7] In January 2015, the Deputy Registrar of the College communicated with Dr. Ip about a notice on his website advertising the medical practice of a clinical trainee that incorrectly described the trainee as a resident physician. The matter was considered to be an error and no action was taken by the College about it.
- [8] On November 23, 2015, the inquiry committee resolved to close the 2014 complaints and conduct a more general investigation into Dr. Ip's practice. This was done under s. 33(4) of the [Health Professions Act], which permits an inquiry committee, on its own motion, to investigate a registrant regarding various matters, including unprofessional conduct and competence to practice. Dr. Ip and the complainants were informed of this by letters dated December 10, 2015.
- [9] On May 13, 2016, before the investigation started, Dr. Ip advised the College that he intended to cease clinical practice and limit his professional activities to research. On July 7, 2016, he signed a written Undertaking to this effect. This Undertaking provided as follows:

I, VINCENT KAY LO IP ..., hereby consent to the following Undertakings to the College of Physicians and Surgeons of British Columbia (the "College"):

1. Effective July 6, 2016, I will limit my professional activities to the area of research and will no longer engage in clinical practice.
2. I authorize the College to notify any other person or body whom the College, in its sole discretion, considers it appropriate to provide notice of these Undertakings.
3. I agree that, upon enquiry or request to the College, or at its discretion, the College may provide details of the requirements of these Undertakings.
4. I agree that these Undertakings will remain in full force and effect until the Registrar determines that they should be removed.
5. I agree that any breach of these Undertakings may constitute unprofessional conduct and may result in a disciplinary action under the Health Professions Act. I further acknowledge that these Undertakings would be admissible at such a disciplinary action.

6. I understand and agree that I have voluntarily entered into these Undertakings with full awareness of my rights and responsibilities and I have had the opportunity to seek independent legal advice with respect to those rights and responsibilities and the consequences of these Undertakings.

[10] In light of Dr. Ip's undertaking to limit his professional activities to research, on October 11, 2016, the inquiry committee closed the practice investigation. Dr. Ip was informed of this in a letter sent on behalf of the inquiry committee on December 15, 2016, which stated in part:

At its meeting on October 11, 2016, the Inquiry Committee was advised of your retirement from clinical practice and undertakings to limit your practice to medical research.

Based on this information, the Committee directed this matter be concluded with notification that concerns regarding your clinical practice would have to be addressed if you were to re-apply for licensure in the future.

This letter will be retained in your permanent file at the College

- [11] Over a year later, in December 2017, Dr. Ip sent a "Request for Certificate of Professional Conduct" to the College, asking it to forward such Certificate to the College of Physicians and Surgeons of Manitoba. The Certificate provided by the College, dated December 20, 2017, stated that Dr. Ip "must limit his professional activities to the area of research and will no longer engage in clinical practice".
- [12] On January 8, 2018, Dr. Ip submitted a "Retirement/Resignation from the College" form to the College, to be effective February 1, 2018. He then wrote to the College seeking permission to "correct" the December 20, 2017 Certificate, outlining several reasons, one of which concerned his lack of access to clinical charts regarding one of the 2014 complaints.
- [13] In a letter dated February 28, 2018, the College advised Dr. Ip that his standing with the College was determined by the Undertaking, which remained in effect until the Registrar determined it should be removed. It also stated that if Dr. Ip wished to return to clinical practice, he would be required to undergo "a comprehensive assessment of skill and knowledge".
- [14] This Certificate and the Undertaking appears to form the genesis of Dr. Ip's petition in the court below, which was filed July 10, 2018, as against the College, its Registrar and Senior Deputy Registrar. Dr. Ip says that he has been denied registration in Manitoba, apparently because the terms of the Certificate negatively affected how the College of Physicians and Surgeons of Manitoba considered his application for registration.
- [6] The Inquiry Committee's resolution to investigate Dr. Ip's practice, referred to in para. 8 of the quotation above, was numbered Resolution 15-911 and assigned College file number IC 2015-1154.

- [7] Dr. Ip had counsel when he executed and sent the College his written Undertaking. He had counsel when he was notified by letter that the Inquiry Committee directed the practice investigation be closed, but concerns regarding his clinical practice would have to be addressed if he were to re-apply for licensure in the future. Dr. Ip remained registered with the College until his resignation, effective February 1, 2018.
- [8] An additional aspect of this case is that prior to the hearing of the petition, the B.C. Supreme Court made three sealing orders in respect of three affidavits Dr. Ip filed. Each time Dr. Ip filed an affidavit he revealed confidential information identifying the complainant patients. and each time the chambers judge made a sealing order and ordered Dr. Ip to amend the affidavit. Once again, at the hearing of the petition, the chambers judge ordered Dr. Ip to amend his fourth affidavit to prevent the disclosure of confidential patient information.

Reasons of the Chambers Judge

- [9] Dr. Ip sought judicial review of Resolution 15-911, and the "Undertakings signed on July 7, 2016". He sought an order "setting aside" the resolution. The respondents brought an application to strike the petition pursuant to Rule 9-5(1)(a), (b), and (d) of the Supreme Court Civil Rules. Dr. Ip amended his petition on August 30, 2018, seeking a third order "setting aside Order file IC 2015-1154". Further, he claimed that in January 2015, when investigating the advertising matter, the Deputy Registrar made a "College Executive Order" terminating the practice investigation.
- [10] On May 28, 2019, the petition was heard at the same time as the respondents' application to strike the petition. Although the chambers judge was unable to discern with precision Dr. Ip's claims or aims, he concluded Dr. Ip sought an order to remove from the Certificate of Professional Standing the restriction that the Undertaking remain in effect until the Registrar determines it should be removed.
- [11] The judge found the decision by the Inquiry Committee to close the investigation file did not affect Dr. Ip's ability to practice and was not an exercise of a statutory power of decision subject to judicial review. Nor was Dr. Ip's provision of the Undertaking the exercise of a statutory power subject to judicial review.
- [12] The judge noted Dr. Ip was no longer a member of the College, as he had resigned voluntarily, and concluded no useful purpose would be served by judicial review. Further, because Dr. Ip could apply for reinstatement, the judge held there were adequate remedies and judicial review was premature. (The statutory process for reinstatement is governed by s. 20 of the Health Professions Act, R.S.B.C. 1996, c. 183 and the College's bylaw 2-3(2).) Apparently, Dr. Ip has since applied for reinstatement to the College, but the process is not yet complete. The judge concluded there was no live controversy between the parties at the time and judicial review was an inappropriate tool.

- [13] In dismissing Dr. Ip's petition, the judge held it did not disclose a claim that could be ascertained or determined. The judge again ordered Dr. Ip to revise his affidavits to protect the identities of the patient complainants. The judge ordered Dr. Ip to pay the respondents' costs.
- [14] I would note a technical matter of importance to this Court's review of the decision. The chambers judge, it seems, had three not entirely distinct options in dealing with this matter. He could have: (1) struck the petition under Rule 9-5; (2) declined to undertake a judicial review; or (3) undertaken a judicial review. It is reasonably clear the judge did not undertake a judicial review. It is less clear, however, whether the judge made his order under Rule 9-5 or decided the case was so devoid of merit that he simply declined to undertake judicial review. Fortunately, nothing turns on that in this case. The judge may have made his decision based on the first or the second option, or some combination of the two. While each of these attracts a different standard of review that this Court must apply, it does not change the outcome. In my view, it was both reasonable and correct for the judge to dismiss Dr. Ip's meritless claims.

Issues

- [15] Dr. Ip raises a number of issues with respect to the decision of the judge, as well as new matters. The respondents have attempted to clarify and frame the issues as follows:
- (1) Did the judge err by dismissing the petition under Rule 9-5 or declining to undertake judicial review?
 - (2) Did the judge err by failing to conclude the Inquiry Committee canceled Dr. Ip's registration?
 - (3) Did the judge err by failing to consider the relevance of the January 2015 advertising inquiry involving the clinical trainee?
 - (4) Should this Court admit new or fresh evidence in affidavits filed by Dr. Ip?

Relevant Law

Statutory Powers

- [16] Section 1 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, defines "statutory power" as:

a power or right conferred by an enactment

- (a) to make a regulation, rule, bylaw or order,
- (b) to exercise a statutory power of decision,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,

- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability

[17] Section 1 defines "statutory power of decision" as:

a power or right conferred by an enactment to make a decision deciding or prescribing

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
- (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it

[18] In similar circumstances to this case, courts have held that a decision to close a file pertaining to a complaint or a provisional assessment in an investigation are not exercises of statutory power: *Taylor v. The Law Society of British Columbia*, 2010 BCSC 1098 at para. 34; *Ridsdale v. Anderson*, 2016 BCSC 942 at para. 82. Further, a settlement agreement between a regulatory body and a suspended registrant is not the exercise of a statutory power of decision: *Stelmaschuk v. The College of Dental Surgeons of B.C.*, 2015 BCSC 1766 at para. 14; see also *Head and Commissioner of the Ontario Provincial Police (Re)*, 40 O.R. (2d) 84 at 85, 127 D.L.R. (3d) 366, *aff'd* *Head v. Graham*, [1985] 1 S.C.R. 566 at 566-67, 16 D.L.R. (4th) 768.

Rule 9-5 of the Supreme Court Civil Rules

[19] The relevant portions of Rule 9-5 read:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious, [or]
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Analysis

Did the judge err by dismissing the petition under Rule 9-5 or declining to undertake judicial review?

- [20] Dr. Ip submits the judge erred by holding that the decision of the College to close the practice investigation did not constitute an exercise of a statutory power of decision amenable to judicial review. He contends the judge failed to understand the Inquiry Committee erased his licensure and did not fully appreciate that the decision forever altered his ability to practice because it revoked his licensure and permanently removed his ability to remove the Undertaking, thus making it an exercise of a statutory power.
- [21] In response to the respondents' submissions with respect to Rule 9-5, Dr. Ip contends that not only was the judge not considering the merits of the case, the matter was not decided under Rule 9-5.
- [22] I agree with the respondents that the judge's reasons demonstrate he considered the grounds for the dismissal of the petition under Rule 9-5, while also deciding whether the petition merited judicial review. As the respondents point out, the judge's articulation of the facts and the orders sought by Dr. Ip demonstrate his intention to engage with and dismiss the petition substantively and not purely on technical or procedural grounds. The bases upon which the judge dismissed the petition--no exercise of a statutory power or statutory power of decision, Dr. Ip's incomplete engagement with the statutory process, no live controversy, and no ascertainable claim--support this argument. While it would have been preferable for the judge to have identified the basis on which he was making his determination, in my view, he did not err in coming to any of these conclusions.

Did the judge err by failing to conclude the Inquiry Committee canceled Dr. Ip's registration?

- [23] Dr. Ip asserts the judge erred by misapprehending that his licensure was intact prior to the Inquiry Committee decision and the judge should have ordered a removal of the Undertaking.
- [24] The respondents interpret Dr. Ip's claim to be that the College's decision to accept the Undertaking and to close the investigation effectively revoked Dr. Ip's licensure and the judge erred in concluding there was no reviewable decision. The respondents contend the judge's decision in this regard is a discretionary one under Rule 9-5(1)(b), to which this Court owes deference. Alternatively, if the judge dismissed the petition on its merits, he made no palpable and overriding error in his apprehension of the facts. The respondents also submit that Dr. Ip misconstrues the decision of the College and its impact. The Undertaking itself, as well as the College's decision to accept the Undertaking and close the investigation, did not erase Dr. Ip's licensure.
- [25] I agree. The decisions or actions of the College are not an exercise of statutory authority.
- [26] Dr. Ip remained licensed, subject to his Undertaking not to engage in clinical practice, until his voluntary resignation from the College in February 2018. Even after resigning, Dr. Ip could apply for reinstatement (and apparently has done so).

[27] Dr. Ip does not dispute any of the other grounds upon which the judge dismissed the petition, which independently justify the dismissal. Moreover, setting aside the actions or decisions of the College would change nothing for Dr. Ip, as he would still have to apply for reinstatement to the College. Therefore, there was no practical purpose in a judicial review.

Did the judge err by failing to consider the relevance of the January 2015 advertising inquiry involving the clinical trainee?

[28] Dr. Ip submits the judge erred by misapprehending the relevance of the investigation into the improper advertising of the clinical trainee he was supervising. I understand Dr. Ip to say that as a result of the January 7, 2015, telephone conversation with the Deputy Registrar regarding advertising on the clinical website (during which the College says Dr. Ip and the clinical trainee agreed the advertising was an error, done without their knowledge, and apologized and no further action was taken), the College made a "College Executive Order" indicating there was no evidence of wrongdoing, which terminated the practice investigation.

[29] The respondents submit Dr. Ip's contentions regarding the clinical trainee are unrelated to the Undertaking and the College's decision to close the practice investigation, do not challenge the judge's order, and are not the subject of this appeal.

[30] This Court fully considered the clinical trainee advertising matter in Dr. Ip's disclosure appeal: 2019 BCCA 189. The College provided the documents in its possession and consistently maintained there was no "College Executive Order".

[31] On appeal, Dr. Ip has not made clear what relevance this argument has to the substance of the petition. Dr. Ip is, in part, attempting to adduce new or fresh evidence relating to the advertising matter as he continues to maintain the College investigation into his clinical practice was terminated by the "College Executive Order", therefore his Undertaking was unnecessary and invalid, and there should be no restrictions on his Certificate of Professional Conduct.

[32] Dr. Ip made this submission before the chambers judge. Although the judge did not address this particular issue in his reasons, it is clear from the transcript he rejected this argument and noted that both the BC Supreme Court and this Court in the disclosure appeal had rejected it.

[33] The judge did not err in failing to consider matters relating to the advertising inquiry involving the clinical trainee. In my view, this matter is unrelated and irrelevant to this appeal.

Should this Court admit new or fresh evidence?

[34] The test for fresh evidence, that is, "evidence in existence at the time of trial that could have affected the result" (Struck v. Struck, 2003 BCCA 623 at para. 37), is found in Palmer v. The Queen, [1980] 1 S.C.R. 759 at 775, 106 D.L.R. (3d) 212:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [35] The overarching question is whether admitting the evidence is in the interests of justice: *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 56, 59 B.C.L.R. (3d) 47.
- [36] The test for the admissibility of new evidence, that is, "evidence of matters that occurred subsequent to the order appealed from" (*Jens v. Jens*, 2008 BCCA 392 at para. 24), is more stringent. While the interests of justice are still an overarching consideration, courts will generally not admit new evidence except in rare or exceptional circumstances and where the evidence is likely to affect the result: *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCCA 148 at para. 10.
- [37] Dr. Ip has brought two motions to adduce fresh evidence pursuant to Rule 31 of the Court of Appeal Rules. Broadly, he seeks to adduce three affidavits containing evidence or argument with respect to the inquiry into the advertising of the clinical trainee, including his attempts to access documents in the College's possession related to this inquiry and an outstanding petition before the Supreme Court regarding this matter; his efforts to achieve reinstatement to the College; and materials related to and including the sealing orders made against him in the course of these proceedings.
- [38] At least some of this evidence is not fresh evidence, as Dr. Ip says it was in the application record before the chambers judge and he simply neglected to add it to his appeal book.
- [39] The respondents do not oppose the admission of any part of the evidence Dr. Ip inadvertently omitted from his materials on this appeal that formed part of the application record before the judge. The respondents categorize this evidence as an affidavit from the clinical trainee regarding communications with the College; various sealing orders made against Dr. Ip; an order made by the Supreme Court on an application of Dr. Ip for the production of documents in the proceedings that are the subject of this appeal; and the reasons of this Court upholding that order. Nor do they oppose the admission of the indices of Dr. Ip's application record before the chambers judge, which Dr. Ip attached to a letter to the Court of Appeal Registry.
- [40] The respondents oppose the admission of the balance of the evidence, however.

- [41] The respondents submit that which is new evidence would have made no difference had it been available before the chambers judge. Nor does this material merit admission on appeal given the lack of rare or exceptional circumstances in which to admit the material. This evidence is, broadly and as described by the respondents, correspondence between Dr. Ip and the College; personal notes of Dr. Ip's regarding these communications; materials regarding Dr. Ip's attempts to seek documents from the College; evidence of Dr. Ip's attempts to regain admission to the College; and an amended petition in that proceeding.
- [42] The respondents also submit the fresh evidence Dr. Ip applies to admit does not meet the test in *Palmer* and, in particular, would have made no difference to the chambers judge's ruling. This evidence includes materials related to Dr. Ip's attempts to obtain documents from the College.
- [43] The respondents also note Dr. Ip includes, in one of his three affidavits, new argument concerning the production of records, which is not evidence and should not be admitted.
- [44] I agree. Except where the admission of evidence is unopposed by the respondents because it was inadvertently omitted from Dr. Ip's materials, I would not admit the new or fresh evidence as it is unrelated to the substance of the appeal, would have made no difference to the chambers judge's ruling and would make no difference on this appeal.

Disposition

- [45] In this case, the College fulfilled its public-protection mandate in a proper manner. It took all the necessary investigatory steps, acted with restraint where warranted, and adhered to the Undertaking Dr. Ip, with the benefit of independent legal counsel, voluntarily provided. This voluntary, informed Undertaking brought an end to the practice investigation because Dr. Ip agreed to no longer engage in clinical practice and to limit his professional activities to research. Dr. Ip was notified that if he ever applied for reinstatement to clinical practice, he would have to satisfy the Registrar that the Undertaking should be removed. It is only Dr. Ip's attempts to remove the Undertaking without going through the Registrar that has brought him here today. This Court cannot provide him the remedies he seeks. There are no shortcuts. To remove the Undertaking from the Certificate of Professional Conduct, Dr. Ip will need to do what he undertook to do: go through the Registrar and address the concerns regarding his clinical practice.
- [46] I would dismiss the appeal with costs to the respondents.
- [47] BENNETT J.A.: I agree.
- [48] FISHER J.A.: I agree.
- [49] BENNETT J.A.: The appeal is dismissed with costs to the respondents.

"The Honourable Madam Justice Stromberg-Stein"

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