IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *College of Dental Surgeons of British Columbia v. Wu,* 2013 BCSC 1986

Date: 20131015
Docket: L031494
Registry: Vancouver

Between:

College of Dental Surgeons of British Columbia

Plaintiff

And:

Tung Sheng Wu, also known as David Wu

Defendant

Before: Associate Chief Justice Cullen

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	B.B. Olthuis & G.A. Cavouras
The Defendant:	No one appeared
Place and Date of Hearing:	Vancouver, B.C. October 15, 2013
Place and Date of Judgment:	Vancouver, B.C. October 15, 2013

[1] **THE COURT:** These Reasons should be read in conjunction with my reasons of August 12th, 2013 issuing an injunction and a warrant for the arrest of the contemnor, Mr. Wu.

[2] This is an application to find the respondent Tung Sheng Wu in contempt of a consent order of this court made on June 11th, 2003 and entered on June 12th, 2003.

[3] The order reads as follows:

> (1) The Defendant Tung Sheng Wu, also known as David Wu, the Defendant, is not entitled to practice the profession of dentistry within the meaning of the *Dentists Act*, R.S.B.C. 1996, c. 94, ("the *Act"*) or to hold himself out in British Columbia as qualified or entitled to practice dentistry in British Columbia or elsewhere so long as he remains a person who is not registered in the dentist register^ under the *Act* in good standing;
>
> (2) The Defendant is not entitled to directly or indirectly use a name, title, or description implying or calculated to lead people to infer that he is a dentist or entitled to practice the profession of dentistry in British Columbia;
>
> (3) The Defendant be and is hereby restrained from practicing dentistry within the meaning of the *Act* holding himself out in British Columbia as qualified or entitled to practice dentistry in British Columbia or elsewhere or directly or indirectly using a name, title, or description in British Columbia implying or calculated to lead people to infer that he is a dentist or is entitled to practice the profession of dentistry in British Columbia or elsewhere.

[4] The order was made to resolve an action which the Plaintiff, the College of Dental Surgeons of British Columbia, launched against the defendant on May 27th, 2003 following an investigation which revealed evidence that he was engaged in the unlawful practice of dentistry.

[5] At all times material to the making of the consent order Mr. Wu was represented by counsel who evidenced Mr. Wu's approval and consent to the order by signing it on his behalf.

[6] In an earlier letter dated December 2nd, 2002 written on behalf of Mr. Wu in relation to what was then the proposed action against him, his counsel

acknowledged and agreed to the College's requirement for, among other things, a consent order from the Supreme Court of British Columbia prohibiting him from practicing dentistry without being licenced by the College.

[7] The letter read, in part, as follows:

> The writer has had several opportunities to discuss these requirements with Mr. Wu and Mr. Wu has indicated that these conditions are acceptable. Mr. Wu is contrite for his past violation of the *Dentists Act* and has determined after this incident never to practice dentistry unlawfully in British Columbia again.

[8] On April 11th, 2013, the plaintiff College received a complaint against the defendant in connection with his practice of dentistry and launched a new action by petition S133883 under which they applied for and were granted an order authorizing a search and seizure on May 28, 2013 by Madam Justice Dillon. The warrant to search authorized entry and the search of 4319 Southwood Street in Burnaby.

[9] The search of those premises was conducted on the following day, May the 29th, 2013. The defendant was present and at the time he was handed the following documents: the May 28, 2013 order of Madam Justice Dillon, the amended petition filed in this action, the affidavits of Michael Alexander Penner and Carmel Wiseman, and the Notice of Hearing which had been filed.

[10] Of note, the affidavit of Ms. Wiseman which was served on the defendant, after recounting the history of the previous proceedings, including the making of the original order, the details of the 2013 complaint, and a description of the ensuing investigation and what it revealed, included the following paragraph:

> Following the execution of any search and seizure orders made by this Court and upon a review of the evidence obtained, the College intends to bring proceedings for an injunction prohibiting the unauthorized practice of dentistry under the *HPA* and for contempt of court with respect to the 2003 injunction.

[11] The search which was subsequently conducted of the premises revealed extensive evidence of the practice of dentistry, including a waiting room, a bedroom set up as a "dental operation" which the affiant who assisted in the search, Dr. Alexander Penner, described as "filthy," various dental instruments, evidence of inadequate sterilization methods, and a computer with images of the mouths of children and adults, medications, laboratory slips, disposable needles, over 1,200 patient charts, and 119 dental models used for orthodontic treatment, among other items.

[12] The various charts revealed evidence that the defendant had been practicing dentistry "since at least 2003," as his patient charts indicate treatment dates since 2003 and leading up to and including 2013.

[13] There is uncontradicted evidence that the defendant has never been registered with the College of Dental Surgeons of British Columbia.

[14] I accept beyond a reasonable doubt that Mr. Wu was engaged in the practice of dentistry continuously since the time of the consent order until May of 2013.

[15] I am further satisfied beyond a reasonable doubt that he was aware of the consent order prohibiting him from practicing dentistry at all material times. I infer that from the existence of the consent order and from counsel's representations on his behalf, which while hearsay, are nonetheless circumstantial evidence of his knowledge and consent to the order given the duty of counsel not to act without instructions and to be forthright with counsel for the College and for the Court.

[16] In *Law Society of British Columbia v. Gorman,* 2011 BCSC 1484, Mr. Justice Savage summarized the principles governing an application for contempt as follows in paras. 26 to 28:

> The principles that govern an application for an order for contempt in this case are those which concern the breaching of a court order. The Court is exercising its power of contempt to uphold its dignity and process and respect for the rule of law. It is a civil contempt to disobey an order of the Court: *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 8.

> The onus is on the applicant to prove the elements of contempt beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment & Immigration),* [1990] 2 S.C.R. 217 at p.224. As Justice Allan observed in *Law Society of B.C. v. Yehia*, 2008 BCSC 1172, the applicant must prove that the alleged contemnor had notice of the order and deliberately engaged in the conduct and disobeyed the order. Except in instanter proceedings, the evidence in support of the application must be evidence that would be admissible at trial. Any ambiguity in the order redounds to the benefit of the alleged contemnor.
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> The elements of civil contempt for breach of a court order are: (1) the existence of a court order, e.g., an injunction prohibiting certain acts; (2) the alleged contemnor knew of the existence of the order and its terms; and (3) the alleged contemnor did one or more acts amounting to the disobedience of the terms of the order: *International Forest Products v. Kern*, 2000 BCSC 736, aff'd 2004 BCCA 349.

[17] I am, thus, satisfied that the College have proved beyond a reasonable doubt the essential elements of contempt as against Mr. Wu; that he has willfully disobeyed a court order, specifically paragraphs 1(a) and 1(c) of the order dated June 11th, 2003, so as to undermine the authority of the Court.

[18] In this case, there was no personal service and the defendant was absent from all hearings related to the contempt application. Rule 22-8(11) provides as follows:

> A party applying for an order for contempt must serve the alleged contemnor with a copy of the filed notice of application and all filed affidavits in support of it at least 7 days before the hearing of the application.

[19] In this case, Mr. Wu was not served personally with the requisite notice and affidavits, and although on August 12th, 2013 I concluded the threshold for the issuance of a warrant was established and ordered a warrant for his arrest, Mr. Wu has not been located or arrested. There is evidence before me that he may have fled the jurisdiction and made arrangements for a vehicle he was leasing and its contents, consisting in part of items used in his dental practice, to be shipped to another jurisdiction in Canada, or possibly overseas.

[20] These proceedings, which included the College's application for an injunction against Mr. Wu brought under petition S-133883, which injunction I granted on August 12, 2013, and this application to have him found in contempt brought under

the original action number L031494, have, however, proceeded on the basis of orders for substitutional service made by Madam Justice Dillon in relation to both proceedings on July 24th, 2013.

[21] In connection with this proceeding, Justice Dillon's order reads as follows:

> The College may pursuant to Rule 4-4 serve a copy of its notice of application for contempt of court as filed, together with a copy of this entered order, upon the Respondent by leaving it at …

And then the order sets out three addresses for substitutional service. The order concludes:

> … and such service is deemed to be good and sufficient service of such documents upon the Respondent.

[22] The College subsequently appeared before me again on September 24th, 2013 seeking a finding of contempt against Mr. Wu and seeking several orders in relation to a vehicle and its contents. At that time, to give the defendant a further opportunity to appear at and be heard at this hearing for contempt, I ordered, among other things, that the College is at liberty to proceed with its extant contempt of court application filed 26 July 2013 in the defendant's absence and in this regard the application shall be set down for hearing on the 9th day of October 2013.

[23] I also ordered that substitutional service would be deemed good and sufficient service of the September 24th, 2013 order by leaving it at specific addresses set out in the order. Service as required by Madam Justice Dillon's order of July 24th and my order of September 24th has been made, and in the result I proceeded to hear this application in the absence of the alleged contemnor.

[24] In doing so, I rely on and follow previous decisions of this court, including *Mobile Exchange, Inc. v. Moneyflow Capital Corporation*, 2012 BCSC 810 and *Law Society of British Columbia v. Gorman,* 2011 BCSC 1484.

[25] Counsel for the College argues that in view of the protractive, deliberate flouting of an order of this court and the potential for serious harm arising from the

alleged contemnor's activities this is a case that merits a finding of criminal contempt.

[26] Counsel for the College points to the evidence that the defendant has been continuously providing dentistry services since the 2003 order, the evidence of the inadequate sanitation of his dental practice and the exposure of his patients to serious health consequences, his apparent flight from the jurisdiction in the face of these proceedings, and the evidence of his apparent intent to resume his unlawful dental practice in another jurisdiction in Canada as critical conditions which elevate the seriousness of his contempt to justify a finding that it is criminal rather than civil in nature.

[27] The College relies on, in particular, the decisions of this Court and the Court of Appeal in *College of Midwives of British Columbia v. Lemay,* 2002 BCSC 6, 2002 BCCA 467 and 2003 BCCA 583.

[28] In that case, the contemnor was subject to an injunction restraining her from describing herself as a midwife and from practicing acts of midwifery. She was found to be acting in breach of the court order and was held to be in contempt, which the trial judge found to be criminal, holding as follows at paras. 33 and 34:

> The final issue is whether the contempt is civil or criminal. In *United Nurses of Alberta v. A.G. for Alberta* (1992), 89 D.L.R. (45th) 609, (S.C.C.), Madam Justice McLachlin at p. 636 drew the distinction between civil and criminal contempt in the following terms:
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> > These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the court's process is added to the breach it becomes criminal.
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> The B.C. government in 1995 designated midwifery as a health profession under the *Health Professions Act*, thereby moving to make midwifery and its practitioners accountable to the public through the formation of the College of Midwives which became the regulatory and licensing body for midwives practising within the province. In creating the College, the legislature placed the practice of midwifery in a more public position that it had previously occupied, recognizing the

> potential impact to the public, particularly mothers and babies, from the activities of midwives. Breaches of such legislation therefore become public in nature and for this reason I conclude that Ms. Lemay's actions constitute a criminal rather than a civil contempt.

[29] Subsequently, the court imposed a five-month sentence of incarceration on Ms. Lemay. She sought release pending appeal in a judgment dated August 19, 2002 BCCA 467. Mr. Justice Smith sitting in chambers refused her application for release.

[30] On appeal to the Court of Appeal from her conviction for criminal contempt, in dismissing her appeal, the Court, although expressing disagreement with the trial judge's Reasons for making a finding of criminal contempt, found a sufficient foundation in the evidence for upholding his conclusion. The Court's reasoning was set forth in its judgment at para. 36 and 38 which read as follows:

> The elements of criminal contempt for breach of a court order are: (1) disobedience of a court order; (2) in a public way; and (3) with intent, knowledge or recklessness that the disobedience will undermine the authority of the court. The party alleging contempt must prove each element beyond a reasonable doubt. See *United Nurses, supra* at paragraphs 49-55.
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> The uncontradicted evidence before the trial judge was that the appellant openly advised her students, clients and others of the court order which prohibited her from performing any of the acts described in s.5 of the Regulations, and that she then proceeded, on repeated occasions, to violate the terms of the order in the presence of her students, clients and others. She asked her clients to sign agreements acknowledging that she was not registered as a member of the College of Midwives, and that she was not permitted to perform the acts described in the order and the legislation.
>
> This conduct challenged the court's authority in a public way, was calculated to show that the court order was of no force or effect and to encourage or promote public disrespect of the court.
>
> Often criminal contempt will involve mass public disobedience of a court order:

I will not refer to the citations listed in support of that proposition.

> Sometimes criminal contempt may involve injury to the public interest. But it may occur in other circumstances as well. As McLachlin J. (as she then was) explained in *United Nurses, supra,* at paragraph 52, the gravamen of the offence of criminal contempt is "the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court."

> Here I am satisfied that there was a sufficient public quality to the appellant's conduct in her open, continuous and deliberate defiance of the court's order as to constitute criminal contempt.
>
> Although, with respect, I do not agree with the trial judge's reasoning on this issue, his conclusion in finding criminal contempt is fully supported by the evidence and the law.

[31] In my view, while the defendant's activities amounting to contempt clearly implicate the public interest, as did the activities of the contemnor in *Lemay,* as is evident from the Court of Appeal's judgment that of itself is insufficient to support a finding of criminal contempt.

[32] Here, there is no evidence, as there was in *Lemay*, and in other cases in which criminal contempt was found, of the open and public flouting of an order with the inevitable effect of advocating disobedience of the law.

[33] In the present case, while the defendant's breach of the order was deliberate, protracted and of long standing, it was done clandestinely without seeking to overtly challenge the court's authority to make the order. After the contemnor's activities were uncovered and brought to the public's attention they became a matter of significant public concern.

[34] It was not at the time the contemnor was in violation of the order, however, "open" or "flagrant," which is defined in the shorter Oxford English dictionary in relation to an offence et cetera, as "glaring, scandalous, flaming into notice." It is that element of open, willful and provocative defiance of the court's authority that is missing from the evidence of the contemnor's conduct in the case before me.

[35] That being so, while he is clearly guilty of civil contempt, I am not satisfied the College has proven to the requisite degree that his contempt is criminal in nature.

[36] As to the appropriate sentence, the College submits that whether the contemnor is found to be civilly or criminally in contempt the sentence should be one of committal to prison for a period of four to six months, with the upper end being more appropriate.

[37] In support of his submissions, counsel for the College cites the long period over which this order was deliberately breached, the motive of profit to the contemnor, the unsanitary conditions of the premises in which the practice was conducted, and the infection control concerns outlined in Dr. Penner's affidavit of July 15, 2013.

[38] The College points out the concern and worry that the public health notice issued by the Fraser Health Authority of potential risks of exposure to viruses or other unsafe conditions caused to former patients of the contemnor, and although there is so far no evidence of any adverse consequence, there is no certainty of an absence of such consequences.

[39] The College points out that there is no evidence of the contemnor's financial circumstances or whether he would be able to pay a fine and that whatever assets he has may indeed be offshore by now.

[40] The College points to the contemnor's attempt to flee this jurisdiction with a considerable amount of equipment, leading to the conclusion that he intended to carry on his unlawful practice elsewhere, which the College says is an aggravating factor.

[41] The College also seeks its costs as special costs, including the costs of the investigation to pursue Mr. Wu.

[42] In my view, the contemnor's conduct in the present case calls for a committal to jail. I have no evidence before me of his financial circumstances or ability to pay a fine and the conduct proven against him amounts to a deliberate and protracted violation of a court order more or less from its issuance up to the present.

[43] The conduct is serious as it implicates the health and safety of members of the public. While they may have been aware of the contemnor's lack of status and the unsanitary conditions of his operations, the potential impact on his clients and the public of the unregulated practice of dentistry is serious. Taken with that, the contemnor's flight from the jurisdiction in circumstances demonstrating that he

intended or intends to resume his unlawful practice elsewhere in Canada is an aggravating factor.

[44] Here, given the considerable publicity which attended the public notification of the health risk his practice present, and the provision to him of documents evidencing the College's intention to bring contempt proceedings, there is a clear indication of his intention to escape the consequences of his wrongdoing and to resume it elsewhere despite his knowledge of the significant and justified public concern that his activities give rise to.

[45] In my view, having reviewed the authorities provided to me by counsel for the College, and some others as well, the appropriate sentence here is to commit him to jail for a period of three months.

[46] While in *Lemay*, the contemnor was sentenced to five months, that was following a finding of criminal contempt on the basis of her open and provocative defiance of a court order and because she had previously been held in contempt. In his reasons for denying bail pending appeal, Mr. Justice Smith noted that the appropriate range of sentences for first offenders on criminal contempt charges is somewhere between three and five months. That is not the range of sentences for first offenders on civil contempt charges.

[47] In the authorities provided to me by the College on this hearing, the range appears to include a $500 fine, a three-month suspended sentence and probation, and up to 45 days of incarceration. While some of those cases appear to have some aggravating circumstances, in my view the combination of factors in the present case, including its deliberate and protracted character, the potential risk to public health, the contemnor's flight and apparent attempt to relocate his practice, and his apparent indifference to the order of the court calls for a somewhat more stringent sentence than in the ordinary case, to bring home to him and others that court orders must be obeyed.

[48] There will also be an order of special costs made against the contemnor. The finding of contempt is *prima facie* conduct "deserving of reproof or rebuke" through an award of special costs against the guilty party. See *Young v. Young,* [1993] 77 BCLR (2d) 314 (SC) *Telus Communications Inc. v. TWU*, 2006 BCSC 397 and *Sound Contracting Ltd. v. Regional District of Comox- Strathcona,* 2005 BCCA 167.

[49] In the circumstances, which include the fact that the contemnor is not here to speak to this matter, I will grant a similar order as was made in the case of *Mobile Exchange Inc. v. Moneyflow Capital Corp*., that the contemnor will have 30 days from the date of the service of this order upon him to apply on five days' notice to set aside the order which I have made.

[50] THE COURT: Is there nothing further, Mr. Olthuis?

[51] MR. OLTHUIS: My Lord, simply to clarify the award of special costs which -- is that to include then the investigative costs?

[52] THE COURT: Yes, it is.

[53] MR. OLTHUIS: Thank you, My Lord.

[54] THE COURT: And I want to be very clear, I am not approving them in advance. I do not know what they consist of. But it seems to me that is a legitimate disbursement subject to the prospect of potential taxation.

[55] MR. OLTHUIS: Thank you, My Lord, yes. We hadn't come with any evidence of --

[56] THE COURT: Right.

[57] MR. OLTHUIS: -- the costs assessment before Your Lordship this morning.

[58] THE COURT: No.

[59] MR. OLTHUIS: So we had anticipated that would go to an assessment.

[60] THE COURT: All right. Thank you.

[61] MR. OLTHUIS: Thank you, My Lord.

[62] THE COURT: We will adjourn now.

"A.F. Cullen ACJ."

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Associate Chief Justice Cullen