

**CITATION:** College of Traditional Chinese Medicine et al. v. Sherry X. Yin, 2015 ONSC 5613  
**COURT FILE NO.:** CV-15-524551  
**DATE:** 20150911

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** COLLEGE OF TRADITIONAL CHINESE MEDICINE PRACTITIONERS  
AND ACUPUNCTURISTS OF ONTARIO, Applicant

**AND:**

SHERRY X. YIN a.k.a. XUEPING YIN, Respondent

**BEFORE:** Graeme Mew J.

**COUNSEL:** *Jaan Lilles*, for the College

*C. MacLeod and Bianca Thomas*, for the Respondent

**HEARD:** 1 September 2015

Application under section 87 of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18

**ENDORSEMENT**

[1] Since 1 April 2013, practitioners of Traditional Chinese Medicine and Acupuncture in Ontario have been regulated by the *Traditional Chinese Medicine Act, 2006*, S.O. 2006, c. 27 which, in turn, designates the practice of traditional Chinese medicine and acupuncture as a regulated health profession, pursuant to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

[2] Individuals wishing to practise traditional Chinese medicine and acupuncture are required to register as members of the applicant College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (the “College”).

[3] The respondent holds Bachelor’s, Master’s and Doctorate degrees in traditional Chinese medicine from Shandong University, China. From 1998 until 1 April 2013, she openly and lawfully practised traditional Chinese medicine and acupuncture in Ontario at her Advanced Alternative Medical Centre, describing herself as “Dr. Sherry X. Yin”.

[4] The respondent is not and has never been a registered member of the College. However, the College alleges that she has, since 1 April 2013, held herself out as “practising traditional Chinese medicine and operated a traditional Chinese medicine and acupuncture clinic. Accordingly, the College seeks orders permanently enjoining the respondent from unauthorised practice, from holding herself out as a traditional Chinese medicine practitioner or acupuncturist and from holding herself out as a member, employee or agent of bodies that she falsely

represents, or knows are falsely represented as, regulating, under statutory authority, individuals who practice traditional Chinese medicine or acupuncture in Ontario.

[5] On 22 June 2015, Hood J. made an interim order requiring the respondent to immediately cease and desist:

- (a) Using the title “Doctor” or any abbreviation thereof;
- (b) Using the title “Traditional Chinese Medicine Practitioner” or “Acupuncturist” or any variation thereof;
- (c) From holding herself out as a person qualified to practice in Ontario as a Traditional Chinese Medicine Practitioner or Acupuncturist;
- (d) Performing controlled acts limited to members of the College and advising persons with respect to their health in circumstances in which it is reasonably foreseeable that serious harm may result from treatment or advice or from an omission from them.

[6] The case against the respondent arises from the evidence of an investigator, engaged by the College, who presented himself to the respondent at her place of work as a prospective patient. The parties have different accounts of what happened between the investigator and the respondent. In essence, the applicant says that the respondent communicated a traditional Chinese medicine diagnosis and offered to perform acupuncture on him, whereas the respondent says that she merely gathered information from the investigator and, based upon the information garnered, discussed various health care options with him and made referrals to appropriate health care providers.

[7] Given the differences in the respective recollections of the investigator and the respondent, for the purposes of determining whether the applicant should be granted the relief which it seeks, I have relied, where the evidence conflicts, on the evidence adduced by the respondent, i.e. the evidence most favourable to the position taken by the respondent.

[8] Before turning to the events of 29 January and 3 February 2015 (the dates of the investigator’s interactions with the respondent), a little more about the respondent and her background.

[9] Since 1998 the respondent has served as an adviser on family and women’s health for the Chinese Professional Women of Canada. In 2012, she was invited by the Federal Minister of Health to join the Advisory Council on Traditional Chinese Medicine, a position which she still holds.

[10] Although she can communicate in English, the respondent’s formal language skills are limited. She often requires assistance from a translator to communicate with native English speakers during formal meetings. She can, however, carry on a conversation on an informal basis, albeit without proper usage. When working with a non-Chinese client, she repeats her message several times to ensure that she is understood.

[11] The respondent has not registered with the College because the College has not yet introduced a “Doctor” class of membership. Registrants with the College are designated as “Traditional Chinese Medicine practitioners. As a result, the respondent feels that she would:

“...Have to lower my professional title and competence and restrict my practice to treating conditions approved by the College. In contrast to a TCM practitioner, a TCM Doctor is allowed to treat over 700 diseases.”

[12] It should be noted that the applicant challenges the respondent’s assertion that registering with the College would restrict the scope of the respondent’s practice. But it is common ground that, even if registered with the College, the respondent could not use the title “Doctor”.

[13] During the relevant period the respondent was a Director of Federation of Ontario Traditional Chinese Medicine Association (the “Federation”). Ms. Yin was also the president of the Committee of Certified Acupuncturists of Ontario and the Canadian Association of Acupuncture & Traditional Chinese Medicine, and was an officer and director of the Ontario Acupuncture Examination Committee.

[14] By an order dated 6 February 2015, the Federation and the other corporate entities described were enjoined from holding themselves out as bodies which regulate the practice of traditional Chinese medicine and acupuncture in Ontario: *College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association*, 2015 ONSC 661.

#### The Investigation

[15] The investigator hired by the applicant was Douglas Kavanagh. On 29 January 2015, Mr. Kavanagh attended at an address located on Bayview Avenue. This is a mixed commercial/residential building owned by the respondent and her daughter which houses what the respondent described as an “alternative medical centre”. Mr. Kavanagh knocked on the back door of the building and, when the respondent opened the door, asked the respondent if her name was Sherry and if this was her clinic. She confirmed that her name was Sherry and that this was her centre.

[16] Mr. Kavanagh told the respondent that he had been referred to the respondent by “Jessica”, a friend of his daughter at the University of Toronto. The respondent informed Mr. Kavanagh that it was customary to make an appointment for a consultation. He asked her how much she charged for a first visit and how long it would last. She responded that the cost of a first visit would be \$50 and that it would take about an hour to an hour and a half.

[17] The respondent gave Mr. Kavanagh her business card, which identified her as “Dr. Sherry X. Yin (Ph.D., DTCM., Ac.)” and represented that the respondent was a “Specialist of Acupuncture & Traditional Chinese Medicine” with “over 30 years clinical practise”.

[18] On 3 February 2015, Mr. Kavanagh returned to the centre for his scheduled appointment. According to the respondent, the first visit always entails gathering information about a person’s physical, emotional, spiritual and social conditions/factors as well as a discussion of various health care options and proper referrals available to the individual based on the evaluation.

[19] Mr. Kavanagh showed the respondent a small cyst on his left wrist. She asked him to rest his forearm on the desk, with his palms up. She then rubbed the area of Mr. Kavanagh's left wrist and began tapping it with two or three fingers. She then proceeded to do the same tapping motions to the right wrist. The respondent denies that she performed pulse diagnosis on Mr. Kavanagh. Instead, she says that she applied pressure around the lump on his left wrist and applied the same pressure on his right wrist for a comparison and reference in order to make the proper referral. The respondent also asked Mr. Kavanagh a number of questions including whether any one in his family had a history of high blood pressure, stomach problems and whether he ate spicy foods.

[20] She also inspected Mr. Kavanagh's tongue.

[21] Following this, the respondent expressed her opinion to Mr. Kavanagh that his condition may be a result of poor blood circulation and that, in Chinese, his lump is referred to as "blood stasis". She elaborated that Mr. Kavanagh's issue was a circulation problem coupled with the fact that he had excessive internal heat from his stomach, liver and digestive system. She explained to Mr. Kavanagh that her opinion was based on more than 30 years of clinical health practice and education.

[22] According to the respondent, she first suggested to Mr. Kavanagh that he undergo manual manipulation of the lump (he had told her that he had tried repeatedly to get rid of the lump by draining it with a needle at his doctor's office but that the lump always came back within two weeks or so). Mr. Kavanagh then asked her about other treatment options available to him. She informed Mr. Kavanagh that such lumps are often treated with acupuncture in traditional Chinese medicine and that his condition would likely improve after two weeks of treatment.

[23] Upon hearing this information, Mr. Kavanagh advised the respondent that he was afraid of needles but said that he was interested in learning what acupuncture entailed and wanted to see how it worked. The respondent says that to educate Mr. Kavanagh about acupuncture, she invited him to view what used to be a treatment room. The respondent says that in fact she was in the process of packing away all unused acupuncture equipment for her daughter who would soon begin practice as a naturopath. She acknowledged that the room also contained a small sharps disposal container, but that it was empty and did not have a cover. The respondent also explained to Mr. Kavanagh, step by step, what would happen during an acupuncture session and informed him about the prices charged by various acupuncturists.

[24] There is no evidence that the respondent, in fact, herself performed or offered to perform acupuncture on Mr. Kavanagh.

[25] The respondent charged Mr. Kavanagh \$45 for her time and advice regarding treatment options available to him for his lump. She also provided him with a receipt. She claims this receipt was on a template which had been created when she opened her centre 16 years previously. The receipt has various options for the service provided, including "Acupuncture", "Naturopathic Medicine" and "check-ups". The receipt given to Mr. Kavanagh had "\$45.00" inserted under the heading "check-ups". The receipt goes on to record that "The sum of forty-five dollars (\$45.00) was paid as profession fees on Feb. 03, 2015." Underneath this narrative appears a registration number and the words "member of Canadian Association of Acupuncture

& Traditional Chinese Medicine since 1998”. Below that are the words “Dr. Sherry X. Yin (Ph.D., DTCM, Ac.)” and the words “Thank you for choosing alternative medical services provided by AAMC.

[26] According to the respondent, both the business card which she gave to Mr. Kavanagh and the template for the receipt had been prepared prior to the coming into force of the *Traditional Chinese Medicine Act*, 2006. She claims that she does not use business cards anymore because she no longer practises traditional Chinese medicine. Any clients that she currently counsels or refers to other registered practitioners are her former patients who know her contact information. She acknowledges providing Mr. Kavanagh with a card, but only did so because she asked him to call her if he could not make his appointment on 3 February 2015 and not to solicit his business and/or to advertise her services.

[27] In addition to affidavits from Mr. Kavanagh setting out his interactions with the respondent, and from Allan Mak, the Director, Administration and Professional Practices of the College, the applicant also tendered an expert report from Jianping Fu, a member of the College with the title of Registered Traditional Chinese Medicine Practitioner and Registered Acupuncturist, currently practicing a full scope of traditional Chinese medicine and acupuncture in Ontario with 28 years of experience. He was asked to express an opinion on whether it could be concluded from the report of MKD International Inc. (the agency which provided Mr. Kavanagh), that the respondent was practicing traditional Chinese medicine including acupuncture and communicating a traditional Chinese medical diagnosis. Mr. Fu concluded that the respondent had engaged in the practice of traditional Chinese medicine including acupuncture and had communicated a traditional Chinese medical diagnosis identifying a body system disorder using traditional Chinese medicine techniques. The respondent challenges Mr. Fu’s evidence, principally on two grounds, namely: (a) Mr. Fu opines on the ultimate issue to be determined by the court and is not, therefore, properly the subject of opinion evidence; and (b) because of his close connection with the College and his prior dealings with the respondent, he does not possess the necessary qualities of independence and objectivity to be qualified as an expert.

[28] It does appear that the respondent and Mr. Fu have a history with each other and, indeed, Mr. Fu describes himself as having been “a Council Member of the College since 2008”. I share the respondent’s concerns about the ability of Mr. Fu to approach his task with the necessary degree of independence and objectivity which expert witnesses are required to possess. Although Mr. Fu signed a Form 53 “Acknowledgment of Expert’s Duty” pursuant to Rule 53.03(7), that alone is not enough to mitigate my concerns. Furthermore, some of Mr. Fu’s conclusions do, indeed, stray into the territory which should be occupied by the finder of fact in this case. Accordingly, I have not relied on Mr. Fu’s evidence in coming to my conclusions.

### Findings and Conclusions

[29] The evidentiary record does not disclose that the respondent performed acupuncture on Mr. Kavanagh. Although there is a dispute as to whether or not the respondent herself offered to provide acupuncture services to Mr. Kavanagh (she says she did not, he says she did), I am satisfied that a reasonable person would apprehend that, on the balance of probabilities, the respondent’s centre was, at the time of Mr. Kavanagh’s visit, equipped to provide acupuncture

services. I do not find the respondent's explanation that some 22 months after it became unlawful for her to practise acupuncture, she was in the process of decommissioning her treatment room.

[30] A reasonable interpretation of the respondent's examination of and discussion with Mr. Kavanagh is that she was providing advice to him. Indeed, she expressed an opinion on the cause of his cyst and the effectiveness of acupuncture as a treatment for it. I do not accept the respondent's characterisation of what happened as being the provision of information relating to health, rather than the communication of a diagnosis and medical advice.

[31] I find equally unconvincing the respondent's explanations with respect to her business card and the receipt which she gave Mr. Kavanagh. The respondent, due to her involvement with the Federation and various other organisations, would have been extremely aware of the regulatory environment after 1 April 2013. Yet nearly two years later, she was still using business cards and a receipt template which clearly and unequivocally represented her as a doctor of traditional Chinese medicine and an acupuncturist.

[32] Accordingly, I arrive at the following conclusions with respect to the relief sought by the applicant.

[33] I am satisfied that the respondent has violated s. 4 of the *Traditional Chinese Medicine Act 2006*. This provision designates the controlled acts which members of the College are authorised to perform. These acts including performing acupuncture and communicating a traditional Chinese medicine diagnosis.

[34] The respondent is not a member of the College and is therefore not authorised to perform acupuncture or to communicate a traditional Chinese medicine diagnosis. Notwithstanding this, the respondent did communicate a traditional Chinese medicine diagnosis on 3 February 2015. Although I have not found that on that occasion she performed acupuncture on Mr. Kavanagh, or offered to perform acupuncture, the presence of acupuncture needles in her treatment room and her demonstration to Mr. Kavanagh of what acupuncture treatment of his cyst would involve, leads me to conclude that the respondent continued to hold herself out as an acupuncturist although prohibited from doing so due to her lack of registration with the College.

[35] The respondent has also breached s. 8 of the *Traditional Chinese Medicine Act 2006*. Section 8(1) provides that no person other than a member of the College shall use the titles "Traditional Chinese Medicine Practitioner" or "Acupuncturist", or any variation thereof.

[36] The respondent's business card asserted that she is a "Specialist of Acupuncture & Traditional Chinese Medicine" and makes use of the acronyms "DTCM" and "Ac.". The respondent's use of these titles is a breach of s. 8(1).

[37] In addition, the respondent has breached s. 8(2) of the *Traditional Chinese Medicine Act 2006*. This provision is contravened when a person who is not a member of the College holds herself out as a person who is qualified to practice in Ontario as a traditional Chinese medicine practitioner or acupuncturist or in a speciality of traditional Chinese medicine.

[38] The test is whether, on a balance of probabilities, a member of the public would reasonably infer from the conduct of the respondent that he or she was recognised by law or

otherwise as a traditional Chinese medicine practitioner or acupuncturist: *College of Opticians of Ontario v. City Optical Inc.*, 2009 CanLII 37934 (ON SC) at para. 58.

[39] The respondent has violated s. 8(2) by:

- (a) Holding herself out as someone entitled to practice traditional Chinese medicine and perform acupuncture, as evidenced by her business card;
- (b) Communicating a traditional Chinese medicine diagnosis to Mr. Kavanagh; and
- (c) Operating an alternative medical centre which, on any reasonable view, is established for the purposes of enabling the respondent to provide traditional Chinese medical and acupuncture services.

[40] The College also alleges that the respondent has breached s. 30(1) of the *Regulated Health Professions Act, 1991* which provides:

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.

[41] The respondent acknowledges that she provided Mr. Kavanagh with advice. However, the respondent denies that she did so within the scope of practice of a traditional Chinese medicine practitioner or that it is reasonably foreseeable that serious bodily harm may have resulted from the treatment or advice that she provided or from an omission from them.

[42] When someone embarks, as the respondent did when she encountered Mr. Kavanagh, on the provision of advice with respect to options available for the treatment of a cyst, and doing so, as she acknowledged, with the benefit of her more than 30 years of clinical health practice and education, she was not only advising Mr. Kavanagh with respect to his health, but she was doing so in circumstances in which the consequences could be extremely serious in terms of Mr. Kavanagh's future health. Health care practitioners take on a significant responsibility when they diagnose and treat a person. I do not think it would be an exaggeration of the possible consequences of the respondent's interaction with Mr. Kavanagh to conclude that it was reasonably foreseeable that serious bodily harm could result from the treatment or advice which the respondent provided. Accordingly, I am satisfied that she has breached s. 30(1) of the *Regulated Health Professions Act*.

[43] The respondent has also violated s. 33(1) of the *Regulated Health Professions Act*. This mandates that individuals are prohibited from using the title "Doctor" or any abbreviation thereof in the course of providing or offering to provide health care to an individual in Ontario unless that individual is a member of a college that authorizes its members to use the title "Doctor".

[44] As matters presently stand, no member of the applicant College is, as a result of his or her membership, entitled to use the title "Doctor". While the respondent in the present case does hold a Doctor of Philosophy degree, and, as such, might legitimately refer to herself as "Doctor"

in other circumstances, the use of that title in connection with providing or offering to provide health care is not permitted. Accordingly, the respondent has violated s. 33(1).

[45] The final assertion made by the applicant is that the respondent has breached s. 34(2) of the *Regulated Health Professions Act, 1991*. This prohibits an individual from holding 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.

[46] While it is a matter of record that the Federation and the other traditional Chinese medicine corporate entities with which the respondent has been affiliated in one capacity or another were found by the court to have held themselves out as statutorily authorised regulators of traditional Chinese medicine and acupuncture, those entities have been restrained from so doing since 2 June 2014, when an interim injunction was obtained (subsequently made permanent). There was no evidence presented by the applicant that these various TCM corporate entities were, at the time of Mr. Kavanagh's interaction with the respondent, or subsequently, in active breach of s. 34(2). Even if the respondent continues to be associated with those entities, the evidentiary record simply does not support the applicant's contention that she is in breach of s. 34(2).

[47] By way of postscript, I note that the respondent is not the first and likely not the last individual who, prior to 1 April 2013, served the community as a practitioner of traditional Chinese medicine and acupuncture, but who no longer does so because of the licensing regime that came into force with the *Traditional Chinese Medicine Act 2006*. The establishment of the College was preceded by a period of consultation in which certain members of the traditional Chinese medicine community claim that they were prejudiced by a series of political machinations which included flawed consultation and electoral processes, and which are claimed to have resulted in a regulatory regime which is unacceptable to certain members of the traditional Chinese medicine community. As I have previously indicated, if people in the position of the respondent want to change the regime, or change the people who run the College, then they must take a different route than defying what is now the law of this province (see: 2015 ONSC 661 (CanLII) at para. 94). The respondent presents as a dignified individual. It is always disconcerting when the rules and regulations which pertain to one's profession or livelihood change. For the respondent, the loss of the ability to use the title "Doctor" is the main reason that she has not pursued membership of the College. She has paid a very high price for her principles. That said, the College will no doubt wish to reflect on whether the interests of the public would be better served by finding a way to bring some of the individuals, like the respondent, who have chosen not to register with the College, back into the fold.

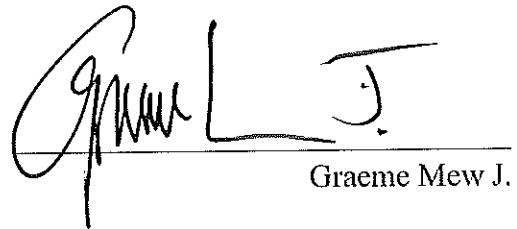
[48] By reason of the foregoing the relief sought in subparagraphs 1(a) through (j) of the notice of application is granted.



Costs

[49] I am provisionally of the view that the applicant is entitled to costs on a partial indemnity scale. Having regard to the amounts that the parties have respectively put forward as their own partial indemnity fees and disbursements, and to the factors enumerated in rule 57.01 and the applicable jurisprudence, I would fix the amount of costs payable by the respondent to the applicant at \$30,000, inclusive of HST and disbursements.

[50] Should either party wish to persuade me that my provisional determination of costs (scale, by whom payable or amount) is inappropriate, that party may make a brief submission in writing, not to exceed three pages, in support of a different outcome. Such submission should be delivered by 25 September 2015 and any submission in response by 2 October 2015.



Graeme Mew J.

**Date:** 11 September 2015