

1938
 * Oct. 4.
 * Dec. 12.

THE ATTORNEY - GENERAL FOR }
 BRITISH COLUMBIA (PLAINTIFF). } APPELLANT;
 AND
 DAVID COWEN (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
 COLUMBIA

*Injunction—Professions—Foreign dentist advertising in British Columbia—
 Holding out “as being qualified or entitled” to practice—Restraining
 advertising—Advertiser not licensed in British Columbia—Dentistry
 Act, R.S.B.C., 1936, c. 72, ss. 62, 63.*

The respondent, a citizen of the United States residing in Spokane, Wash-
 ington, where he practices dentistry, inserted advertisements in news-
 papers in British Columbia, with a view of inducing residents of that
 province to go to him for dental treatment. The respondent was not
 licensed under the *Dentistry Act* (R.S.B.C., 1936, c. 72) and did not
 do any work in British Columbia. Section 62 of that Act provides
 that “any person not registered under the Act * * * who prac-
 tises dentistry or dental surgery in the province shall be guilty of an
 offence against this Act”; and section 63 provides that “any person
 shall be deemed to be practising the profession of dentistry” who
 does certain specified things “or who holds himself out as being
 qualified or entitled to do all or any of the above things * * *.”
 At the suit of the Attorney-General on relation of the College of
 Dental Surgeons of the province, the trial judge granted an injunc-
 tion restraining the respondent from (a) holding himself out within
 the province by means of advertising as being qualified to practise
 dentistry and (b) advertising within the province in a manner which
 if done by a registered dentist would be improper or unprofessional.
 On appeal to the Court of Appeal, this judgment was set aside.

Held, affirming the judgment of the Court of Appeal (53 B.C.R. 50), that
 the respondent was not subject to the provisions of the *Dentistry Act*
 of British Columbia. This statute applies only to a person holding
 himself out within the province as being qualified or entitled to do
 in the province any of the things enumerated in section 63; and *held*,
 also, that the dental college has no right to be granted an injunction
 restraining the respondent, who is not one of its members, from
 inserting advertisements which may, in the opinion of the college,
 be considered as improper or unprofessional conduct.

APPEAL from the judgment of the Court of Appeal
 for British Columbia (1), reversing the judgment of the
 trial judge, D. A. MacDonald J. (2), by which the re-
 spondent was restrained from advertising in the province
 of British Columbia in respect of the practice of dentistry.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

(1) (1938) 53 B.C.R. 50; [1938] 2 W.W.R. 497; [1938] 1 D.L.R. 758.
 (2) (1937) 52 B.C.R. 305; [1938] 1 W.W.R. 48.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

R. L. Maitland K.C. for the appellant.

J. A. MacInnes and *F. C. Aubrey* for the respondent.

THE CHIEF JUSTICE.—I have fully considered the able and ingenious argument of Mr. Maitland who rests his appeal on two grounds: first, that the respondent in his advertisements in the newspapers in Fernie and Nelson held himself out as qualified or entitled to examine, diagnose, or advise or to perform operations as set forth in section 63 of the *Dentistry Act* (R.S., 1936, c. 72); second, that these advertisements were offences against the rules of professional ethics as understood and practised by the members of the dental profession properly qualified to practice in British Columbia.

As regards the second ground, notwithstanding the able and attractive manner in which it was advanced by Mr. Maitland, I am really unable to discover anything in the *Dentistry Act*, nor do I know of any rule or principle of law which confers upon the dental college or the qualified members of the dental profession the right to invoke the aid of the courts in regulating the conduct of people who are not members of the profession, except by way of prosecution under section 62, which is now to be considered in connection with the first ground.

As to the first ground, section 63 is concerned with defining what constitutes "practising the profession of dentistry within the meaning of" the *Dentistry Act*. By that definition acts constituting the practice of dentistry fall into two main categories. The first of these categories comprises examining, diagnosing, advising on the condition of the teeth and the jaws; taking, making, performing and administering impressions, operations and treatments of, for and upon the teeth and jaws; and fitting artificial teeth and dentures in and upon the jaws. The second category includes cases in which anybody "holds himself out as being qualified or entitled to do all or any" of the things falling within the first category.

By section 62, any person not registered under the Act "who practices dentistry or dental surgery in the prov-

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ince" in the sense of section 63 is guilty of an offence against the Act.

On behalf of the appellant it is contended that by the advertisements in evidence the respondent held himself out as being qualified or entitled to do all or some of the things which constitute the practice of dentistry as embraced within the first category; and that, as the publication of the advertisement is an act within British Columbia, done at his instance, he is thereby practising dentistry in that province.

I am disposed to attribute a liberal and comprehensive scope to the word "qualified"; but I think the advertisements with which we are here concerned do not fall within the second category in section 63 for this reason. The primary object of the statute is to regulate the practice in British Columbia of dentistry in the ordinary sense of these words; in the sense, that is to say, of the first of the categories in section 63. Authority to practise dentistry in British Columbia in this sense is given to persons on the register by section 61; and, by section 62, persons not on the register are prohibited from doing so. Then, there is statutory authority by section 61, to do the things within the second of the categories of section 63 (holding out) and there is a prohibition against them by section 62 which applies to persons who are not registered. The last mentioned authority and prohibition are plainly ancillary; and, *prima facie* therefore, they do not extend to things having no intelligible relation to the practice of dentistry in British Columbia in the ordinary sense, that is to say, in the sense of the first category; and that seems to be an admissible reading of the language. The words "holds himself out" (in British Columbia) "as being qualified or entitled to do all or any of the above things" may fairly be read as equivalent to "presents himself in British Columbia," etc.; and, having regard to the context, to the sense in which such words as "entitled" and "qualified" are employed in other parts of the Act, and to the general object of the statute, I think that is the right construction.

The appeal accordingly should be dismissed with costs.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The appellant, the Attorney-General for British Columbia, on the relation of the College of Dental Surgeons of British Columbia, brought action against the respondent, David Cowen, for an injunction. Before the judge of first instance the motion for an injunction was by consent turned into a motion for judgment, which judgment was given in the following terms:—

This Court doth order, adjudge and decree that the defendant be and he is hereby perpetually restrained from holding himself out within the province of British Columbia by means of advertising of any kind as being qualified to practise the profession of dentistry and the defendant, his servants and agents and each and every of them be and he is and they are hereby perpetually restrained from advertising within the province of British Columbia in respect of the practice of dentistry in any manner which if done by a member of the College of Dental Surgeons of British Columbia would be improper or unprofessional.

On appeal, this judgment was set aside with Mr. Justice O'Halloran dissenting, as he would have dismissed the appeal with a variation in the judgment by striking out the words:—

and the defendant, his servants and agents and each and every of them be and he is and they are hereby perpetually restrained from advertising within the province of British Columbia in respect of the practice of dentistry in any manner which if done by a member of the College of Dental Surgeons of British Columbia would be improper or unprofessional.

The respondent is a United States citizen residing in Spokane, in the state of Washington. He has an office there and in Coulee Dam in the same state where he practises his profession of dentistry. He does not do any work in British Columbia. In various newspapers published in the southeastern part of British Columbia he has inserted advertisements which, in the opinion of several members of the relator college, are unethical and unprofessional. The respondent takes the position that he is not bound by these opinions, with which he does not agree, and insists that he has the right to continue such advertisements.

The appellant's claim may be divided into two branches. The first depends upon the construction of section 63 of the *Dentistry Act* of British Columbia, R.S.B.C., 1936, chapter 72, which reads as follows:—

Any person shall be deemed to be practising the profession of dentistry within the meaning of this Act who, for a fee, salary, reward, or commission paid or to be paid by an employer to him, or for fee, money, or compensation paid or to be paid either to himself or an employer, or any other person, examines, diagnoses, or advises on any condition of the tooth or teeth, jaw or jaws of any person, or who

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either directly or indirectly takes, makes, performs, or administers any impression, operation, or treatment or any part of any impression, operation, or treatment of any kind, of, for, or upon the tooth or teeth, jaw or jaws, or of, for, or upon any disease or lesion of the tooth or teeth, jaw or jaws, or the malposition thereof, of any person, or who fits any artificial denture, tooth, or teeth in, to, or upon the jaw or jaws of any person, or *who holds himself out as being qualified or entitled to do all or any of the above things*: Provided that this section shall not interfere with the privileges conferred upon physicians and surgeons by any Act relating to the practice of medicine and surgery in this province, nor with the privileges heretofore conferred upon registered students, nor with the ordinary vending or calling of a druggist.

The real dispute hinges upon the meaning to be ascribed to the italicized words. The mere enumeration of certain things, the doing of any one of which is to be deemed practising, was apparently not considered sufficient for the protection of the profession and the public. The enumeration would make clear that certain things were considered dentistry as to which some question might otherwise arise but the legislature has not attempted to declare the doing of any of these acts outside the province an offence and in my opinion it has not constituted the advertising done by the respondent an offence. I read the words under discussion to relate to a holding out within the province by a person that he has the education and training, or that he is registered under the Act, to do any of the enumerated things *in the province*.

That construction is borne out by a reference to the other sections of the Act. By section 2 a College of Dental Surgeons in and for the province of British Columbia is continued, the membership of which is to be composed of those who on or before a certain date were by law authorized to practise the profession *in the province* and of all other persons who may become and be registered members under the Act. By sections 3 and 4 the members are constituted a body corporate with a governing body styled the Council. By section 19, this Council is to cause to be kept by the registrar "The Register of the Members of the College of Dental Surgeons of British Columbia," and by section 20:—

Only those persons whose names are entered and registered in the register shall be qualified and permitted to practise dentistry and dental surgery *in the province* except as hereinafter provided.

Provision is then made for the registration of members, for the rectification of the register in certain events and (section 39) for the suspension or cancellation of the regis-

tration of any person registered under the Act who, after due inquiry by the Council, is adjudged to have been guilty of infamous or unprofessional conduct. By section 56, there is due and payable to the College annually by each member of the College actually engaged in the practice of his profession, the sum of ten dollars, upon which a certificate is to be issued by the registrar stating that such member is entitled to practise the profession *in the province*. By section 57, if any member practises the profession *in the province* without having taken out a certificate for the current year, he is rendered subject to a fine and suspension from membership. By section 59 an annual list of members is to be prepared and a copy published in the *Gazette*;

and production of a copy of the *Gazette* containing the list shall be *prima facie* evidence of the right of every person named in the list to practise the profession of dentistry or dental surgery *in the province* for one year from the date of the list, and the absence of the name of any person from the list shall be *prima facie* evidence that such person is not registered or entitled to practise under this Act.

Section 61 enacts that every person registered and holding an unexpired annual certificate shall be entitled to practise the profession *in the province*, while section 62 provides that any person not registered under the Act or not holding an unexpired annual certificate or permit (for which provision is made later in the statute), or who has been suspended from practice, or whose name has been erased from the register, who practises the profession *in the province* shall be guilty of an offence against the Act.

Without mentioning in detail later sections of the Act in which the expression is used, a final reference may be had to the proviso in section 63 itself whereby

this section shall not interfere with the privileges conferred upon physicians and surgeons by any Act relating to the practise of medicine and surgery *in this province*.

These continued references make it clear to me at least that the proper construction of section 63 is as I have indicated.

The second branch of the appellant's case is that even if the above conclusion be held to be the correct one, it is against the public interest to permit the respondent to continue advertisements of the nature complained of. As to this, it appears sufficient to point out, that while, in the opinion of several reputable dentists in the province,

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such advertising, if done by a member of the College, would be improper or unprofessional conduct, such matters are by the Act left to the Council for inquiry and determination subject to an appeal; and furthermore, the Council could, of course, exercise jurisdiction only over its own members. Having concluded that the respondent had not committed an offence against the Act, I fail to see how it may be said that he has infringed any public right at common law. There is no basis for the suggestion that he had committed public mischief.

I would dismiss the appeal with costs.

CANNON J.—I would dismiss the appeal with costs.

HUDSON J.—The defendant is a dentist residing and practising his profession in the city of Spokane, in the state of Washington. Although not a member of the College of Dental Surgeons of British Columbia, he advertises freely in a number of newspapers in British Columbia published in cities near the border, with a view to inducing residents of British Columbia to go to him for dental treatment. This action was brought in the name of the Attorney-General on the relation of the College of Dental Surgeons of British Columbia, for an injunction restraining the defendant, his servants and agents from advertising by any means in the province of British Columbia in respect of the practice of dentistry by him, and particularly from advertising in such respects in any newspapers published in British Columbia.

The complaint of the relator is, first, that the advertising of the defendant was of such a nature that, if carried on by a member of the plaintiff college, it would be considered as a breach of professional ethics and as unprofessional conduct, according to the standards of that college; secondly, that the defendant's advertising campaign was an invasion of the statutory rights of members of the plaintiff college.

On a motion for injunction heard by agreement as a motion for judgment before Mr. Justice MacDonald, an order was made perpetually restraining the defendant from holding himself out within the province of British Columbia by means of advertising, as being qualified to practise the profession of dentistry. On appeal to the Court of

Appeal this judgment was reversed by a majority of the Court. Chief Justice Martin there held that the *Dentistry Act*, chapter 72 of R.S.B.C., is concerned alone with the practice of dentistry within the province, and the prohibition there of acts relating to the practice of dentistry does not extend to those carried outside it, as in this case. Mr. Justice McQuarrie concurred with the Chief Justice and held that the plaintiff is not subject to any rule, regulation or principle of ethics established by the College of Dental Surgeons of British Columbia, of which he is not a member, and furthermore that there is no statutory enactment prohibiting a resident of a foreign country from advertising in British Columbia. Mr. Justice O'Halloran took the view that the advertising in question did not amount to any violation of the provisions of the statute on the ground that it was of a non-professional or non-ethical character, but held that by the provisions of the statute the defendant had no right to hold himself out in British Columbia as being qualified to practise the profession of dentistry, even though that practice was carried on in another jurisdiction.

I agree with the view that the advertising itself although it may be unethical and unprofessional according to the standards of the plaintiff college, does not justify an injunction against the defendant who is not a member of such a college.

The purpose of the *Dentistry Act* was to regulate and control the practice of dentistry in the province of British Columbia. Sections 62 and 63 seem to me to be the only ones which require consideration in this case. Section 62 provides:

Any person not registered under this Act, or not holding an unexpired annual certificate or permit as hereinafter provided, or who has been suspended from practice, or whose name has been erased from the register, who practises dentistry or dental surgery in the province shall be guilty of an offence against this Act.

Section 63:

Any person shall be deemed to be practising the profession of dentistry within the meaning of this Act who * * *

Then follows an enumeration of the different acts which shall be considered as "practising dentistry." This portion of the section ends by these words:

or who holds himself out as being qualified or entitled to do all or any of the above things.

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Section 62 creates the offence, namely, the practice by unqualified persons of dentistry in the province. Section 63 defines what shall be considered the practice of dentistry. Mr. Maitland ably and ingenuously argued that the later words in the section meant "holding out within the province" and must be construed to include the practice of dentistry, whether within or without the province. After very careful consideration of all that has been said, I cannot agree with this argument. It seems to me quite clear that the "holding out" referred to in the section must mean holding out as being qualified to do the things which were forbidden by the preceding words and by section 62, namely, the practice of dentistry within the province.

I think, therefore, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Maitland, Maitland, Remnant & Hutcheson.*

Solicitor for the respondent: *F. C. Aubrey.*
