

1998

S.H. No. 146747

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Carmichael v. Nova Scotia (Provincial Dental Board), 1998 NSSC 79

BETWEEN:

DR. HAROLD D. CARMICHAEL

PLAINTIFF

- and -

PROVINCIAL DENTAL BOARD OF NOVA SCOTIA

DEFENDANT

DECISION

HEARD: at Halifax, Nova Scotia before The Honourable Justice
Walter R.E. Goodfellow on June 17, 1998

DECISION: June 17, 1998 (orally)

COUNSEL: A. Douglas Tupper, Q.C.
Solicitor for the Plaintiff

Peter Green, Q.C. & Angela Green, Article Clerk
Solicitors for the Defendant

GOODFELLOW, J.

1. BACKGROUND

Dr. Harold D. Carmichael is a duly licenced registered dentist who commenced his practice of dentistry in Lunenburg, Nova Scotia in 1979. He remained in Lunenburg until 1998 and decided in late 1997 to move his professional practice to Bridgewater and for that purpose, leased space in the Bridgewater Mall and arranged for lease hold improvements.

Dr. Carmichael commenced practice in Bridgewater on February 2, 1998 and to celebrate his relocation, arranged for a grand opening on February 6, 1998. He placed an announcement in the local Bridgewater newspapers, The Bulletin and the Progress Enterprise that conformed with the advertising standards, promulgated by the Provincial Dental Board on Nova Scotia under the Dental Act. Unfortunately, the published version of the announcement initially contained an incorrect telephone number. One of the local newspapers took the initiative and contacted Dr. Carmichael about his new office, at which time he was advised the newspaper representative, a Ms. Liz Brown of the telephone number error. It was Dr. Carmichael's understanding that Ms. Brown wanted to do a human interest story about his relocation to Bridgewater and in part, to compensate because of the mistakes made by the newspaper in the announcements. When Ms. Brown completed her interview of Dr. Carmichael, he advised her he should probably review anything that the paper intended to publish and Ms. Brown responded the ... if

changes took place, it could not be published. Dr. Carmichael then specifically reminded Ms. Brown and warned her, a Dentist was not permitted to advertise.

The article was published without having been seen or reviewed by Dr. Carmichael. He did not seek, request, or pay for the article. The only advertisement he sought and paid for was within the acceptable standards, ie. the original announcement. An examination of the page of which the article is published, shows that it is accompanied by a photograph taken of the official opening and also it shows the advertisement sought and paid for by Dr. Carmichael's practice. Three additional congratulatory notices were provided, one from the Mall, one from one of Dr. Carmichael's suppliers, and one from the contractor who did the lease hold work for Dr. Carmichael. It is uncontradicted that Dr. Carmichael and no one on his behalf, authorized or solicited or approved these additional congratulatory announcements.

Mr. Alan Sangster, the local representative of the Dental Equipment Supplier provided a letter dated the 16th of March, 1998, unequivocally stating that neither Dr. Carmichael or his staff have any knowledge of the advertisement and he went on to say, "I placed it in the newspaper on my own accord. It was done in the form of a thank you and I was not aware of any advertising standards as set out by the NS Dental Association." This letter was copied to the Executive Director of the Association.

The Executive Director instructed that Dr. Carmichael be charged in contravention

of Sub-Section 5 of Section 8 of the Regulations and also further charges of Contravention of Sub-paragraphs b and f of Section 6 of the Regulations, for display of a sign stating Grand Opening and Everyone Welcome that was placed outside the clinic office. Dr. Carmichael ordered this sign for delivery the 2nd of February, 1998. It was not delivered until sometime on the day of the opening, the 6th of February, 1998. His intent was to place the sign inside his clinic and in fact, his evidence is that the only time he saw the sign, it was left in the clinic by the deliverer and that is the last time he saw it, and it read "Grand Opening - Friday, February 6 - 4-9 p.m. - Everybody Welcome".

As I indicated, it was delivered and Dr. Carmichael makes it clear in his affidavit, paragraphs 29 and 30. Paragraph 29 "It was left sitting in front of the reception desk inside my office, when it was delivered by the supplier. That is the only time I saw the Grand Opening sign." Paragraph 30 "I neither moved the Grand Opening sign into the general hallway of the Bridgewater Mall, nor did I request that any other person move the sign to that location. The purpose of the Grand Opening sign was not to give notice of the Reception to the public generally, but rather to notify existing patients of the Grand Opening Reception."

The charges give notice of the hearing before the Discipline Committee of the Provincial Dental Board for Friday, the 1st of May, 1998 and Dr. Carmichael was given notice of possible penalties under Section 29.1 of the Regulations, namely:

- (a) cancellation of license or certificate of registration;**

- (b) suspension of license for any specified period of time;**
- (c) cancellation or suspension of license or certificate of registration to occur at a specified date in the future unless you meet specified conditions before the specified date;**
- (d) cancellation or suspension of a license or certificate of registration subject to restoration if you meet specified conditions in the future;**
- (e) suspension of license subject to a reduction in the term of the suspension if you meet the specified conditions;**
- (f) restrictions on your license for a specified or unspecified period of time which restrictions may be removed if you meet specified conditions;**
- (g) reprimand on the written records kept by the Registrar;**
- (h) monitoring of your practice by the Registrar or an agent appointed by the Registrar for a specified period of time;**
- (i) payment of all or part of the costs of the disciplinary proceeding including per diem fees for members of the Committee or Board, counsel fees, reporter fees, facility charges, and other charges incurred in the proceedings.**

The Discipline Hearing has been stayed, pending the outcome of this application.

2. The Application

This application seeks a declaration that the advertising standards of the Provincial Dental Board, Regulation #4 are unconstitutional, as unjustifiably infringing Dr.

Carmichael's freedom of expression. The remedy sought is an order of prohibition under C.P.R. 56.02, preventing the Dental Board from proceeding with the hearing:

**Provincial Dental Board
Regulation 4 - Advertising Standards**

- 1. The term "advertising" in relation to the dental profession must be taken in its broadest sense and includes all those methods by which persons registered under the Dental Act are made known to the public, with their knowledge, consent, or acquiescence, in a manner which can fairly be regarded as directly or indirectly having for its purpose attracting patients, expanding services, or aggrandizing that person's professional reputation.**
- 2. Subject to the Dental Act and these Standards, a dentist, clinic, centre, or group may advertise.**
- 3. Advertising by a dentist, clinic, centre, or group shall:**
 - (a) be accurate and not be false, misleading, or deceptive,**
 - (b) be of a dignified nature, in good taste, so as to uphold the dignity, honour and ethics of the profession and not bring the dentist, clinic, centre, group, or profession into disrepute, and without limiting the generality of the foregoing, shall not,**
 - (c) refer to the quality of services to be provided,**
 - (d) claim any superiority for a dentist, clinic, centre, or group over any other dentist, clinic, centre, or group,**
 - (e) use the words "specialist" or "specializing" or other words suggesting a recognized special status unless the member is a certified specialist,**
 - (f) be broadcast on radio or television or any other media of communication unless specifically permitted by these Standards.**

4. (1) Members of the profession may apply to the Registrar of the Board for a variance in circumstances that are considered unusual.

(2) The Registrar's decision on a variance application may be appealed to the Provincial Dental Board.

5. (1) A dentist may practice under:

(a) his or her own name,

(b) the names of the dentists with whom he or she practices in partnership or with whom he or she is associated,

(c) a title for the practice using the words "clinic" or "center".

(2) More than one dentist may practice under a title using the words "clinic", "centre" or "group".

(3) No dentist or group of dentists may use a name that includes any words or phrase which implies the existence of any specialization, exclusivity, or superiority as to treatment or equipment, except a certified specialist who may include the name of the specialty in the dental practice title.

6. No member, clinic, centre, or group, in connection with a practice shall display or permit to be displayed:

(a) any sign other than a sign which in its character, position, size and wording is merely such as may be reasonably required to indicate the location of an entrance to the premises in which a dental practice is being conducted,

(b) any sign containing or consisting of anything except his or her name or name of clinic, address, telephone number(s), degrees, profession, hours, languages spoken and specialty if any,

(c) any sign which the letters exceed 8" (21 cm) in height or width, these measurements to include

either line or shade or both. These limitations may be exceeded in order to conform with signs in the immediate vicinity subject to a variance application approval pursuant to Section 4,

- (d) any sign of intermittent, flashing, or neon illumination,
- (e) any sign in either form or design consisting of logos, slogans, or pictures or containing anything other than alpha/numeric symbols,
- (f) any sign where the location of the sign is outside of the property line of the building, shopping centre, or office complex in which the practice is located.

7. (1) Professional cards may contain the dentist's name, vocational designation (dentist, D.D.S., D.M.D., certified specialist), and other approved or accredited degrees, certificates and diplomas. In addition, the dentist's office address, office hours, telephone number, logos, languages spoken, and directory maps may be included on the professional card provided that all the information is presented in such a manner as to preserve the dignity and ethics of the profession.

(2) An account, receipt, appointment card, or reminder notice issued by a member to one's patients may state the information permitted on a professional card, as well as the information required to fulfill the purpose of the document.

(3) A member or group practice may issue an announcement card stating information permitted on a professional card for the purpose of informing fellow practitioners and active patients of:

- (a) a change of location of a dental practice,
- (b) a leave of absence of a member,
- (c) a resumption of a practice by a member,
- (d) a retirement of a member from a practice,
- (e) a take-over of a practice by another member,
- (f) a new member or associate joining the dental

practice.

(4) No member, nor any other person with or without the consent of a member, shall either directly or indirectly solicit operations from the general public for personal gain, by:

(a) the circulation of handbills, folders, flyers, professional cards, instruction sheets or the like,

(b) the insertion of the information pertaining to his or her professional practice in any handbill, programs, yearbooks, time books, or other printed matter of like character,

(c) the verbal presentation of any information concerning the member's practice of dentistry.

(5) Members may allow their name and title to be printed in a contributor's list of a yearbook or the like provided there is no direct solicitation to the general public for personal gain.

8. (1) Authorship of books on scientific or professional subjects and the publication of articles or correspondence in professional journals, newspapers, magazines, or periodicals is permissible.

(2) Publications shall be in a manner which can be regarded as educating the public and to bring to the public's attention the availability of dental services, new developments, discoveries, and delivery systems in dentistry.

(3) Any scientific information must be totally supportable by recognized professional research.

(4) No member shall initiate or promote interviews with him or her by the press, radio, or television concerning dentistry.

(5) Notwithstanding subsection (4), where a member is approached by the press, radio, or television for an interview concerning dentistry, the member may do so where:

(a) comments are limited to matters of general interest

concerning dentistry,

- (b) no reference is made to the member or his or her practice for the purpose of attracting patients, expanding services, or aggrandizing that member's professional reputation.

9. (1) Members may place an announcement in the newspaper to inform the public of the following:

- (a) commencement of a dental practice,
- (b) change of a practice location,
- (c) leave of absence,
- (d) resumption of a practice,
- (e) retirement,
- (f) takeover of a practice by another member,
- (g) a new member or associate joining a practice.

(2) In announcements for the purpose of clauses (c), (d) or (e) in subsection (1), arrangements for the care of patients affected, if any, may be stated.

(3) Newspaper announcements permitted to be published shall:

- (a) not exceed two standard newspaper columns in width and 10 centimeters in depth.
- (b) contain only the member's name, vocational designation, address, office hours, telephone number(s), and languages spoken.

(4) In announcements for purpose of (a) to (g) in subsection (1), members shall be permitted to place such announcement before the public up to 15 days prior to and 30 days following the event inclusive in provincial and local newspapers.

10. (1) Members may place a listing but not a display advertisement in the yellow pages to inform the public of the following:

- (a) the name of the dental practitioner,**
- (b) the dental practice title,**
- (c) the address of the dental practice,**
- (d) the dental practice telephone number,**
- (e) the residence phone number,**
- (f) the certified specialty, if applicable,**

(2) Members of a group practice may list their respective names and specialty, if any, under its collective name.

(3) Members who are certified specialists may be listed under a separate group heading in conjunction with the regular listing.

(4) Members may list in other commercial directories if:

- (a) the directory is a directory for the member's geographic region.**
- (b) the listing conforms to subsection (1).**

11. Members may publish periodic newsletters directed only to patients who have been treated by the member during the immediately preceding 24 months and which contain general information on developments in the profession of interest to members of the general public and suggestions designed to encourage better dental health. Any scientific information must be totally supportable by recognized professional research. [emphasis added]

4. Issues

The application raises two issues:

- (1) Do sections 8(5), 6(b) and 6(f) of the Nova Scotia Advertising Standards limit**

the applicant's freedom of commercial expression?

- (2) Is the limit reasonable and demonstrably justified in a free and democratic society?

It is important to note that the issues before this Court relate solely to the constitutionality of the Nova Scotia Advertising Standards. The question of whether a violation of the Nova Scotia Advertising Standards has occurred is an issue for the Discipline Committee of the Provincial Dental Board.

5. Charter of Rights

The Charter of Rights and Freedoms Charter Constitution Act of 1982 guarantees every Canadian the basic right of Freedom of Expression, Section 2(b) everyone has the following and fundamental freedoms:

- b. Freedom of Thought, belief, opinion and expression, including Freedom of the Press and other media of communications.

6. The Hearing

I agree with counsel for the Provincial Dental Board of Nova Scotia, that the question of whether or not violations of the NS Advertising Standards has occurred, is an issue solely for the Discipline Committee of the Provincial Dental Board. I am disposed, in fairness, to give gratuitous advice that if there is no other evidence than that is before me, and it is accepted, it is highly improbable that a prosecution can meet the lowest threshold of a preliminary enquiry and that a jury on this evidence properly instructed, could not, in my view, convict.

The standard, of course, before the Discipline Committee is somewhat higher than

this, the lowest of thresholds.

7. Issue (1)

Do sections 8(5), 6(b) and 6(f) of the Nova Scotia Advertising Standards limit the applicant's freedom of commercial expression?

The Nova Scotia advertising standards seeks to restrict dental professionals to advertising that is accurate and of a dignified nature, so as to uphold the dignity and ethics of the profession. The respondent does not dispute that in this regard, the Nova Scotia advertising standards do contravene the Freedom of Expression provision in the Charter.

8. Issue (2)

Is the limit reasonable and demonstrably justified in a free and democratic society?

Section 1 test for justification was explored in the Supreme Court of Canada to some length in **Rowe College of Dental Surgeons Ontario v. Rocket** [1990] 111 N.R. 161. At page 176, the court stated, "two criteria must be satisfied to establish that a limit on Charter of Rights is reasonable in a free and democratic society. First the objective, which the limit is designed to achieve, must be of sufficient importance to warrant overriding a constitutional protected right.

Second, if such an objective is established, the party ... Section 1 must show that the means chosen to achieve the objective, that is the limit ... is reasonable and ... justified. Include that the means chosen are reasonable and ... justified, the court must be satisfied with three things.

1. The measures designed to meet a legislative objective must be rationally connected to the objective.

2. The means you should impair as little as possible, the right of freedom in

question.

3. There must be proportionality between the effect of the measures, which are reasonable for limiting the Charter of Rights and the legislative objection on the limit of those rights. In effect, this involves balancing the invasion of rights guaranteed by the Charter, against the objective to its limitation of those rights, is directed.

Section 6(b) does permit a specific and limited degree of expression by way of signage. There is a variety of information not permitted on signs, which would not undermined professionalism or protection of the public. Policies regarding waiting time before appointments and information regarding physical facilities and equipment, do nothing to mislead, are capable of verification and only add to the information on which a consumer can make an informed choice. The announcement of an opening night reception for patients cannot be construed as something that the public needs to be protected from. Similarly, the blanket prohibition of signage outside the property line of the area which the practice is located, found in Section 6(f), prohibits any expression, including the limited expression is permitted in Sub-section (b). The charging of Dr. Carmichael under the Advertising Standards for this innocuous sign which inadvertently was left in the hallway, demonstrates the provisions in Sub-section 6, impair Dr. Carmichael's freedom of expression, far greater than is necessary and are disproportionate to the alleged objective of protection.

9. Newspaper Article

The blanket prohibition in Section 8(5) on any comments to a member of the press for the purpose of attracting patients, expanding services, or aggrandizing that member's professional reputation, is neither a minimal impairment on freedom of expression nor a limitation proportional to the objective of public protection and professional integrity.

A description of the physical premises out of which a dental practice is operated could be interpreted as a reference to a practice for the purpose of attracting patients.

However, such an expression is not one that would mislead consumers or impugn the reputation of the profession. Information regarding physical premises, including equipment used, is capable of verification by the non-expert and is valuable information to a consumer making what the Supreme Court of Canada has said is a "relatively important consumer decision:.

What is wrong, or potentially misleading, with statements to a newspaper reporter about how comfortable the new office is, how good the parking is, how accessible it is, a call forwarding system, etc. Are these not things consumers want to know to make an informed choice about the services that they will require? The charging of Dr. Carmichael under the Advertising Standards for the innocuous and innocent statements in the newspaper article about the comfort of his office demonstrate the provisions in Subsection 8 impair Dr. Carmichael's freedom of expression far greater than is necessary, and are disproportionate to the alleged objective of protection. I would say, such is a matter of expression. I would not even call what took place an advertisement. It seems to me to seek to restrict the kind of information arising from this interview, is far to severe a limitation on Dr. Carmichael's freedom of expression.

I would add also that I conclude the onus upon the Provincial Dental Board of Nova Scotia has not been met in any event.

With respect to the remedy, it seems to me the only appropriate remedy is that sought. A stay will issue.

10. Costs

Counsel have been heard on costs. This is not a case for solicitor and client costs. It falls within the category of a heavy Chambers Hearing beyond the one hour variety and Dr. Carmichael shall have his party and party costs, which I tax in the amount of \$1,500.00 plus disbursements of \$100.00, payable by the Provincial Dental Board of Nova Scotia

forthwith.

J.