Federal Court  Cour fédérale

Date: 20110609

Docket: IMM-2244-11

Citation: 2011 FC 669

Vancouver, British Columbia, June 9, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Applicant in this matter is the Canadian Society of Immigration Consultants (the Society or CSIC). CSIC is currently named in s. 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*) as the regulatory body of immigration consultants whose members are "authorized representatives". As such, CSIC members may represent, advise

or consult with persons who are the subject of a proceeding or application under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). In a press release communicated to the public on March 18, 2010, the Minister of Citizenship and Immigration (the Minister), the Respondent in this matter, announced that CSIC would be replaced by a group known as the Immigration Consultants of Canada Regulatory Council (the ICCRC). An amendment to s. 2 of the *Regulations* to effect this change was pre-published in Part I of the Canada Gazette on March 19, 2011.

[2] By Notice filed April 4, 2011, CSIC commenced an application for leave and judicial review of the decision of the Minister to revoke CSIC's designation as the regulator of immigration consultants. In this motion, CSIC seeks an order of this Court to stay the decision of the Minister until the underlying application for leave and judicial review has been finally determined.

[3] For the following reasons, I have concluded that the motion should be dismissed.

II. Issues

[4] The overarching question before me in this motion is whether CSIC is entitled to the equitable remedy of an interlocutory injunction. It is well-established in relevant jurisprudence (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311; *American Cyanamid Co et al v Ethicon Inc et al*, [1975] FCJ No 1123) that entitlement to injunctive relief is based on establishing all elements of a tri-partite test.

[5] Thus, the issues before me are:

1. Is there a serious question to be tried?

2. Will CSIC suffer irreparable harm if the injunctive relief is not granted?

3. Does the balance of convenience favour CSIC?

III. Preliminary Matter

[6] A few days prior to the hearing of the motion for a stay, CSIC filed a motion seeking to admit the affidavit of Lorne Sossin, Dean of Osgoode Law School. Dean Sossin was retained as an "expert" by CSIC to provide an opinion on the issue of the reviewability of the decision to revoke the designation of CSIC.

[7] The problem that I have with Dean Sossin's affidavit is that it consists solely of a legal opinion on a matter of Canadian domestic law. As such, it is not admissible evidence (see, *Brandon (City) v Canada*, 2010 FCA 244, [2010] FCJ No 1202, at para 27; *Eurocopter v Bell Helicopter Textron Canada Ltée*, 2010 FC 1328, [2010] FCJ No 1650, at para 11; *Pan American World Airways Inc v The Queen and the Minister of Transport*, [1979] 2 FC 34 (TD) at para 21, affirmed [1980] FCJ No 1158 (FCA), 120 DLR (3d) 574, affirmed [1981] 2 SCR 565).

[8] The affidavit does not meet the test of necessity as described in *R v Mohan*, [1994] 2 SCR 9. The Supreme Court in *Mohan* set out four requirements to be met before expert evidence is accepted in a trial: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert. In the very recent case of *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, [2011] SCJ No 27, the Supreme Court reiterated its support for this test and, with respect to the requirement of "necessity", stated the following (at para 75):

> In considering the standard for the second of these requirements, "necessity", the Court [in *Mohan*] explained that an expert should

> not be permitted to testify if their testimony is not "likely to be outside the experience and knowledge of a judge".

[9] The Dean Sossin affidavit will not be admitted – for purposes either of this motion or as part of the Applicant's Record for the application for leave and judicial review.

IV. Background

[10] Foreign nationals, who wish to visit, work or live permanently in Canada, frequently need assistance to weave their way through the requirements of *IRPA* and the *Regulations*. Parliament, recognizing that non-lawyer consultants may provide such services but that unregulated consultants are not in the public interest, provided the Governor-in-Council (GIC) with the ability to regulate "who may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the [Immigration and Refugee Board]" (*IRPA*, s 91).

[11] In 2004, the *Regulations* were amended (SOR/2004-59) to recognize members of CSIC as "authorized representatives" under s. 2 of *Regulations*:

"authorized representative" means a member in good sanding of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003. [Emphasis added]	« représentant autorisé » Membre en règle du barreau d'une province, de la Chambre des notaires du Québec ou de la Société canadienne de consultants en immigration constituée aux termes de la partie II de la *Loi sur les corporations canadiennes* le 8 octobre 2003.

[12] A detailed history of the origins of CSIC is described in the Federal Court of Appeal decision in *The Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243, [2008] FCJ No 1093. I will not repeat that history in this decision. However, the following paragraphs set out the key facts directly relevant to this motion.

[13] Public criticisms of immigration consultants and CSIC have been ongoing since at least 2006. While CSIC may question the legitimacy of some of its critics, there is no question that the organization has been the subject of significant negative comments. As a result of the perceived problems with immigration consultants, the Parliamentary Standing Committee on Citizenship and Immigration was mandated by Parliament to study immigration consultants. CSIC was the focus of much of the Committee's attention. After public hearings across Canada, where many individuals and organizations were heard, the Standing Committee issued a lengthy report – "Regulating Immigration Consultants" – in June 2008. The Report contained a number of recommendations, including a recommendation that CSIC be restructured as a "new regulator" under stand-alone legislation. The Minister examined a number of options and, apparently for policy reasons, determined that, rather than stand-alone legislation, amendments could be made to *IRPA* and the *Regulations* to provide for better governance and accountability of immigration consultants.

[14] Bill C-35 was introduced into Parliament on June 8, 2010, by the Minister. Of importance, the proposed legislation expanded the regulatory oversight over immigration consultants and provided that the Minister could, by regulation, designate or change a regulator of immigration consultants. While Bill C-35 received Royal Assent on March 3, 2011, no date has been set for its coming into force. Until Bill C-35 comes into force, a change of the regulator can only be made by the GIC, in accordance with s. 91 of *IRPA*, as it currently exists.

[15] On June 8, 2010, the Minister announced that Citizenship and Immigration Canada (CIC) would launch a selection process to identify the governing body for immigration consultants. On June 12, 2010, a Notice of Intent was published in the Canada Gazette advising of a

"competitive public selection process." On August 28, 2010, a further Notice was published in the Canada Gazette inviting submissions from candidate entities "interested in performing the responsibilities of a governing body for the regulation of immigration consultants". A number of selection criteria were set out in the Notice. Four entities submitted proposals. A Selection Committee was struck to review submissions and to provide recommendations to the Minister as to which entities satisfied the "necessary competencies". In its Report, provided to the Minister on January 27, 2011, the Selection Committee found that the Institute of Chartered Canadian Immigration Practitioners (ICCIP) met the selection factors described in the Notice and that the CSIC "largely" met the factors. The Committee observed that ICCIP, in its submission, "made a concerted effort to demonstrate how the ICCIP would fully address areas of concerns that were expressed by the Standing Committee" and that CSIC "missed the opportunity to demonstrate how CSIC would address areas of concern".

[16] The Standing Committee Report was presented to the Minister along with a Memorandum from the Deputy Minister who set out three options that could be followed; the recommended option was to proceed to recommend to the GIC that the *Regulations* be amended so that ICCIP would be the regulator of immigration consultants.

[17] ICCIP has subsequently incorporated as ICCRC.

[18] On March 18, 2011, the Minister issued a News Release announcing that a notice would be published in the Canada Gazette proposing to amend the *Regulations* so that ICCRC would become

the regulator of immigration consultants. On March 19, 2011, the proposed regulatory amendments were pre-published in the Canada Gazette. The proposed amendments are:

1. To amend s. 2 of the *Regulations* to replace CSIC in the definition of "authorized representative" with ICCRC; and
2. To amend s. 13.1(2) of the *Regulations* to provide a transition period of 120 days for members of CSIC to continue to act as "authorized representatives".

[19] As described in a document on the website of the Secretariat of the Treasury Board of Canada entitled "Guide to the Regulatory Policy", pre-publication of a regulatory proposal is Step 7 in a process leading to GIC approval of a regulatory instrument. Pre-publication of a proposed regulation, together with a Regulatory Impact Analysis Statement (RIAS), "allows for public scrutiny and comment on the proposal". In this case, 30 days was allowed for comment. After this period expires, the proposed regulations may be updated. At the very least, if the proposal is not changed, the RIAS must be amended to reflect the comments received. Additional approvals must be obtained from Treasury Board. No regulation is enacted before the Treasury Board Ministers make a decision to recommend approval of the regulatory proposal by the GIC. Finally, the proposed regulatory instrument is sent to the GIC for approval. The Governor General makes the regulation by signing it and the regulation is then registered.

[20] In summary, at this time, the amendments to the *Regulations* have been pre-published in the Canada Gazette and comments have been received. There is little information before the Court on the current status of the amendments. We do have one indication that the Minister is proceeding on the track to implementation. That evidence is a further Contribution Agreement with ICCRC,

entered into on or about May 24, 2011. Beyond that contract, which is conditional on the regulatory amendments, there is no evidence as to when (or if) the amendments will be enacted.

V. Analysis

A. *Serious Issue*

[21] The first question to be asked on the tri-partite test is whether the application for judicial review of the Society raises a serious issue. The threshold to be met on the matter of serious issue is very low. With respect to the seriousness of the issue to be tried, the Supreme Court of Canada in *RJR-MacDonald*, above, at 337-338, held:

> The threshold is a low one. ... Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[22] As reflected in its Notice of Application and explained more fully in oral submissions on this motion, CSIC claims that the process leading to the Minister's decision to put forward the amendments to the *Regulations* was flawed in a number of ways. The alleged serious issues include the following:

- the Minister failed to comply with the principles of natural justice and procedural fairness;
- the Minister made his decision to replace CSIC on the basis of irrelevant considerations; specifically, the Minister relied on factors or competencies that were not identified in the Request for Submissions published August 28, 2010;
- the Minister erred by failing to comply with the legitimate expectations of CSIC that the process used to select the "new regulator" would be fair, open and transparent; and,

- the Minister's conduct, including his statements and involvement prior to and during the selection process, gave rise to a reasonable apprehension of bias.

[23] One of the key questions in this judicial review is the extent to which a decision of the Minister to proceed with the amendments to the *Regulations* is subject to a duty of fairness. The Minister presents strong arguments, based on a consistent line of authorities (see, in particular, *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735) that legislative decisions, such as this, are not subject to a duty of fairness. CSIC responds that, in general, ministerial decisions should be examined and assessed on a spectrum from administrative in nature to legislative. In this case, CSIC submits, a particular individual or entity has been singled out for adverse treatment. Thus, it argues, the Ministerial decision upon which the regulatory amendments are to be made is more administrative in nature and should be subject to the duty of fairness.

[24] In my view, CSIC has a very difficult case to win. Nevertheless, on the very low threshold of "neither frivolous nor vexatious", I am prepared to accept that there is a "serious issue".

B. *Irreparable Harm*

[25] The second prong of the tri-partite test is irreparable harm. Even though I have accepted that there is a serious issue, CSIC has failed to establish that it would suffer irreparable harm if this injunctive relief is not granted.

[26] Irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured because one party cannot collect damages from the other" (*RJR-MacDonald*,

above, at 135). To satisfy this branch of the test, evidence of such harm must be clear and non-speculative and must not be "simply based on assertions" (*Canada (Attorney General) v United States Steel Corp*, 2010 FCA 200, [2010] FCJ No 902, at para 7 [*US Steel*]). It also must consist of harm that would accrue between the hearing of this motion and disposition of the application for leave and judicial review.

[27] CSIC puts forward the following arguments on the question of irreparable harm:

- CSIC's fears are not speculative as the Minister has clearly announced his intentions and the amendments to the *Regulations* are ready for enactment;
- The denial of a stay will render the underlying judicial review nugatory (*Ghahremani v Canada (Minister of Citizenship and Immigration*), 2009 FC 722, [2009] FCJ No 883, at para 12; *Resulaj v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1168, [2003] FCJ No 1474; *S.A. v Canada (Minister of Citizenship and Immigration*), 2010 FC 549, [2010] FCJ No 653);
- CSIC will be wound down;
- CSIC will be forced to dismiss its 38 employees;
- There would be an "irrevocable detrimental impact on the Society, its employees, its members, the vast majority of whom approve of the Society as the regulator of the profession, and the public"; and
- CSIC will be exposed to significant third party liability.

[28] I first observe that the proposed regulatory amendment has not been enacted. There is no time line for the enactment of which anyone is aware (other than perhaps the Minister and the GIC).

This makes any allegation of irreparable harm speculative. The Minister's stated intentions are not sufficient for this Court to assume that the regulatory amendment will be passed by the GIC prior to the consideration of the application for leave and judicial and, if leave is granted, the hearing of the application.

[29] Moreover, even if the proposed regulatory change is enacted by the GIC, I have little evidence that CSIC will be irreparably harmed in the period between this motion and the final determination of the application for leave and judicial review. I accept that it is possible that CSIC will ultimately be "wound down", if the amendments are enacted. However, there is no evidence that the 38 people currently employed by the CSIC will immediately be out of work. In the absence of evidence to the contrary, I presume that the CSIC will still have funds collected from its members to continue operations during this interim period and to prepare for an orderly winding down, if necessary.

[30] CSIC asserts that its members will suffer an "irrevocable detrimental impact" if this injunctive relief is not granted. This alleged harm amounts to no more than a bald assertion. Moreover, irreparable harm to be assessed is that to CSIC and not to its members. In that regard, I have no evidence of harm that would come to the CSIC members. With respect to potential financial harm – such as third party liability – I simply have insufficient evidence of the nature of either the financial position of CSIC or of the extent of third party liabilities. No financial information was provided on this motion upon which I could conclude that there would be irreparable financial harm.

[31] The final aspect of irreparable harm is alleged to be the consequences if the proposed amendments to the *Regulations* are passed. CSIC argues that, if the amendments are passed, it will be unable to challenge the decision of the GIC. In other words, CSIC asserts that its application for judicial review will be moot. This does not, in and of itself, constitute irreparable harm (see, for example, *US Steel*, above, at para 17).

C. *Balance of Convenience*

[32] Since CSIC has not met its burden to demonstrate that it would suffer irreparable harm, there is no need to address the balance of convenience.

VI. Conclusion

[33] For these reasons, I would dismiss the motion.

[34] The parties suggest that this proceeding continue as a specially managed proceeding. I agree that this would assist the parties and the Court in determining the merits of the application for leave and judicial review.

[35] Finally, I note, with great appreciation, the cooperation of counsel for both parties in bringing this motion to a hearing in such short order and the high quality of the written and oral submissions.

ORDER

NOW THIS COURT ORDERS that:

1. The motion to admit the affidavit of Dean Lorne Sossin is dismissed and the affidavit is inadmissible for purposes of this motion and for the application for leave and judicial review;
2. The motion is dismissed; and
3. Pursuant to Rule 383 of the *Federal Courts Rules*, this proceeding will continue as a specially managed proceeding.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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