Federal Court  Cour fédérale

Date: 20110721

Docket: IMM-4403-11

Citation: 2011 FC 910

Toronto, Ontario, July 21, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ANNA PEGGY FRIDRIKSDOTTIR
JONATHON R. DRISCOLL

Applicants

and

CANADIAN SOCIETY OF
IMMIGRATION CONSULTANTS

Respondent

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] The Applicants are immigration consultants. For a fee, they represent persons who require assistance in wending their way through the provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. The Applicants have commenced an application

for leave and judicial review in which they seek certain injunctive and declaratory relief against the Respondent, the Canadian Society of Immigration Consultants [the Society or CSIC], a not-for-profit corporation of which the Applicants were members. In this motion, they seek an interim order in the nature of a mandatory injunction

- enjoining CSIC from holding itself out as the regulator of immigration consultants with the power to suspend them;

- directing CSIC to place on its website a notice, in a form provided in the motion, that it is no longer the regulator of immigration consultants; and

- directing CSIC to remove all the names of individuals it allegedly suspended after June 30, 2011.

[2] The question before me in this motion is whether the Applicants are 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] A.C. 396 (HL)) that entitlement to injunctive relief is based on establishing all elements of a tri-partite test. The Applicants must persuade me that

a. There is a serious question to be tried;

b. The Applicants will suffer irreparable harm if the injunctive relief is not granted; and

c. The balance of convenience favours the Applicants.

II. Background

[3] Until June 30, 2011, when legislative amendments came into force (described below), CSIC was named in s. 2 of the Regulations as the only regulatory body of immigration consultants whose members were "authorized representatives". As such, IRPA and the Regulations permitted CSIC members to represent, advise or consult with persons who were the subject of a proceeding or application under IRPA.

[4] As of June 30, 2011, amendments to IRPA and to the Regulations came into force, as follows:

- Bill C-35, *An Act to Amend the Immigration and Refugee Protection Act* [Bill C-35], under which s. 91 of IRPA was replaced with a new s. 91 which, in simple terms, provides for who can and cannot "represent or advise a person for consideration – or offer to do so – in connection with a proceeding or application under this Act" and which also allows the Minister, by regulation, to "designate a body whose members in good standing may represent or advise a person for consideration – or offer to do so - in connection with a proceeding or application under this Act" (s. 91(5));

- *Regulations Amending the Immigration and Refugee Protection Regulations* (SOR/2011-129), under which consequential amendments were made to the Regulations, including the repealing of the definition of "authorized representative" from s. 2 of the Regulations; and

- *Regulations Designating a Body for the Purposes of Paragraph 91(2)(c) of the Immigration and Refugee Protection Act* (SOR/2011-142), under which:

    - the Immigration Consultants of Canada Regulatory Council [the ICCRC] was designated, for purposes of s. 91(2)(c) of IRPA "as a body whose members in good standing may represent or advise a person for consideration – or offer to do so – in connection with a proceeding or application under this Act"; and

    - a transition period of 120 days was provided for persons who were members of CSIC on the date the regulations came into force.

[5] It is undisputed that CSIC is challenging the validity of the government's actions in replacing it as the recognized regulatory body for immigration consultants. That matter is currently being case managed by Justice Martineau of this Court.

[6] Many members of CSIC – including the Applicants – chose to pay their CSIC membership dues by instalments, the fifth of which was due on July 1, 2011. Many of those members, considering that they no longer needed to be members of CSIC to continue working as immigration consultants, refused to pay the fifth instalment.

[7] On July 7, 2011, CSIC posted a list of "599 suspended consultants who are no longer authorized CSIC members", stating that "These members have been suspended by CSIC and are no longer authorized representatives". As of the date of the hearing of this motion, the list of suspended members is no longer on the website.

[8] Also, as of the date this motion was brought, the CSIC website included a page entitled "Why should I become a Certified Immigration Consultant?" The page included a statement that CSIC certification "confirms that the consultant is an authorized representative recognized by the Federal, Provincial and Territorial Governments". As of the writing of these reasons, that part of the CSIC website is restricted; it appears that members of the public cannot access that information.

[9] With this abbreviated background, I turn to consider the issues.

III. Serious Issue

[10] With respect to the question of serious issue, CSIC argues that, because the Applicants were seeking a mandatory interim injunction, the test for serious issue is much higher than the

usual “non-frivolous or non-vexatious” (*Horvath v. Syncrude Canada Ltd*., 2006 ABQB 185, at para 7; *J.M. (Litigation Guardian of) v. Regina Roman Catholic Separate School Division No. 81* (1994), 128 Sask.R. 206, at para 2 (Sask. CA); *Valley Equipment Ltd. v. John Deere Ltd.*, (1996) 171 N.B.R. (2d) 300, at para 4 (NBQB)).

[11] I acknowledge that the jurisprudence cited by CSIC does indicate a higher standard for serious issue on a party seeking an interim mandatory injunction. However, the Federal Court of Appeal, in *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 FCR 274, at para 46, when faced with an argument for a higher standard, concluded that “. . . the fact that the Crown is asking the Court to require the appellants to take positive action will have to be considered in assessing the balance of convenience”. In that case, the Court of Appeal found that the Crown’s argument was neither frivolous nor vexatious and that, therefore, a serious question was to be tried. The Applicants argue that I am bound by *Sawridge*. I agree.

[12] However, I do not need to determine whether the Applicants meet a threshold on either standard. This is because the determinative issue is whether the Applicants have established irreparable harm.

IV. Irreparable Harm

[13] For purposes of an injunction, the Applicants must establish that they would suffer irreparable harm if the interim relief is not granted.

[14] Irreparable harm is “harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other” (*RJR-MacDonald*, above, at 341). 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.

[15] The Applicants submit that the actions of CSIC are causing irreparable harm to the Applicants and other immigration consultants in the same position by creating confusion in the industry and by tarnishing the specific reputation of the Applicants. More specifically, the inclusion of their names on the website, as “suspended” and no longer “authorized representatives” of an organization that is holding itself out to be the official regulatory body “can have a severe and irreparable harm on the Applicants’ practices”. The Applicants submit that the harm inflicted on the Applicants’ reputation “can have far reaching consequences on the consultant’s practice and therefore their livelihood”.

[16] The second aspect of the alleged irreparable harm is to the public. The Applicants submit that CSIC’s holding itself out as the regulator of immigration consultants creates confusion for the public. This, in turn, they assert, “tarnishes the reputation and abilities of the newly formed regulatory body, creates public confusion, and calls into question the overall regulatory scheme of immigration consultants”.

[17] Much of the alleged harm results from the inclusion of the Applicants' names on the CSIC suspended list on the website. This list is no longer on the CSIC website.

[18] The alleged irreparable harm also flows from the Applicants' assertion that CSIC continues to hold itself out as the legitimate regulator, a role that has now been given to ICCRC by Bill-35 and the regulatory amendments. I have reviewed the CSIC website references drawn to my attention by the Applicants. Having reviewed the CSIC website, I cannot conclude definitively that the references demonstrate that CSIC is disobeying IRPA or the Regulations, as they now stand.

[19] I note that the website no longer contains any explicit statement that CSIC is the body designated by the government.

[20] It seems, however, that the Applicants' argument is that the cumulative effect of various entries in the website together with comments by the Chairman of the CSIC Board, leave "confusion" as to who the designated body is.

1 As part of its Mission, CSIC states that "At CSIC, we protect consumers of Certified Canadian Immigration Consultant services through the accreditation and regulation of our members." The Applicants object to the words "accreditation and regulation". In my view, CSIC, even though it is no longer the designated body under the Regulations, may choose to continue its "services" of "accreditation and regulation". It may also "regulate" its own members. The fact that another corporate body has the legislative mandate to offer services under

IRPA and the Regulations does not automatically mean that CSIC can no longer offer additional value to its members or the public. How and whether that happens will be something that cannot be determined in the short term.

2 In the “history” section of the website, CSIC does not disobey the law by describing itself as the body that was designated in 2004. That is an accurate fact. It is perhaps unclear from this statement whether CSIC is the designated body at this time. Lack of clarity does not, in and of itself, create confusion.

3 On the website, CSIC poses and answers the question “Why use a Certified Consultant?” This, too, the Applicants submit, creates confusion. I do not agree. CSIC could continue to “certify” its members and to promote those members as providing an “assurance of quality” to members of the public, at a higher level than by using a consultant whose only holds membership in the designated body.

4 Under “Mandate”, CSIC describes itself as “a not-for-profit, self-regulatory body”. The Applicants submit that CSIC cannot be a “self-regulatory body” since it is not the designated body under the Regulations. I cannot see how this phrase should be limited in meaning as argued. So long as CSIC is a corporation with by-laws and members, it may choose to “regulate” those members.

[21] Finally, the Applicants point to CSIC’s list of members; they are not on that list, since they have been suspended for failure to pay their fees. The Applicants submit that the

membership list leaves the impression that they are not qualified to provide immigration services under IRPA. In the face of the “clear” message being conveyed by the CSIC website that it is still the regulator, whose members are the only consultants who can offer services under IRPA, persons searching for a qualified consultant will believe that the Applicants are not qualified to provide immigration services under IRPA. This conclusion would only be valid if the underlying website demonstrated that CSIC continues to hold itself out as the only body, whose members are entitled to represent. In my view, the evidence is not clear that it does.

[22] I agree that there may be some ambiguous terms used in the CSIC website. Moreover, the Chair of CSIC, if reported correctly by the media, has erroneously stated that “there is nothing legally that states CSIC is no longer the regulator”. However, even if considered cumulatively, I cannot conclude that the website comments and the remarks of CSIC’s Chair cause confusion that rises to the level of irreparable harm.

[23] With respect to the alleged harm to ICCRC, I observe that the newly-minted regulator, if it feels itself to be in danger, could have brought its own application or action to this Court. Surely, ICCRC has a significant role to play in clearing up any confusion.

[24] I agree that there is some confusion for the public in general – and, that CSIC is not completely innocent in this confusion. For obvious reasons, CSIC wishes to hold itself ready to step back into the regulatory role should it succeed in its various matters before this Court. However, as I have discussed above, the current version of CSIC is not, in my view, deliberately misleading.

[25] One serious problem that I have with this entire matter and the question of confusion is that Citizenship and Immigration Canada has not, as of the date of this hearing, removed all references to CSIC from its website. While there is reference to Bill C-35, many of the forms to be submitted for immigration purposes still contain references to CSIC. In my view, this creates much more confusion than the website of CSIC.

[26] With respect to the allegation of confusion, I note that Ms. Fridriksdottir, one of the Applicants, acknowledges that her website contains a link to the CSIC website. Why would this Applicant continue to maintain this link on her website?

[27] In addition, I believe that much of the confusion has already been resolved and that the affected parties (including the government, CIC, ICCRC and the consultants themselves) will continue to clarify any residual confusion over the next few weeks.

[28] The Applicants have failed to establish that they would suffer irreparable harm if this mandatory injunction is not granted.

V. **Balance of Convenience**

[29] Since the Applicants have failed to persuade me that there is irreparable harm, there is no need to address the balance of convenience.

VI. Conclusion

[30] Having failed to persuade me that they would suffer irreparable harm, the Applicants' motion fails.

[31] The Applicants also request that this application continue as a specially-managed application. At this stage, with the issues poorly defined and the underlying facts changing daily, I do not believe that it would be a wise use of judicial resources to manage this particular application as a specially-managed application at this time.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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