

**FEDERAL COURT**

**B E T W E E N:**

**KATARINA ONUSCHAK**

**Applicant**

**and**

**CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS and  
THE BOARD OF DIRECTORS OF THE CANADIAN SOCIETY OF IMMIGRATION  
CONSULTANTS**

**Respondents**

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**APPLICANT'S REPLY**

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**PART I – STATEMENT OF FACTS**

1. The Applicant relies upon the statement of facts as expressed in the Applicant's memoranda of fact and law.

**PART II – ISSUES**

2. The Applicant maintains that the issues in this application are those raised in the Applicant's memoranda of fact and law.

**PART III – STATEMENT OF ARGUMENT**

**A. The Respondents Mischaracterized the Test for Leave**

3. The Respondents mischaracterized the test for leave for judicial review. As asserted in the Applicant's original memoranda of fact and law, the appropriate test to use when making a

determination as to whether leave should be granted is set out in *Wu et al. v. Minister of Employment and Immigration*. Specifically, it is whether there is “fairly arguable case, a serious question to be determined.”<sup>1</sup>

4. The citation for the *Brown* case that the Respondents rely upon at footnote 105 is not accurate; therefore the Respondents have not actually provided support for their position that a higher threshold is mandated. However, regardless of the accuracy of the case they relied upon, the standard set out in *Wu* has been repeatedly upheld in this Court as the established test.
5. This Court summarized the jurisprudence on the test for leave in the recent case of *Urbanczyk v. Canada (Minister of Public Safety and Emergency Preparedness)*,<sup>2</sup> When discussing whether leave should be granted, this Court stated the following:

For leave to be granted, the test or only consideration is whether there is "a fairly arguable case and a serious question to be determined" (*Bains v. Minister of Employment and Immigration* (1990), 47 Admin. L.R. 317, 109 N.R. 239, paragraph 1 (F.C.A.)).

6. In *Wu et al. v. Minister of Employment and Immigration* (1989), 7 Imm. L.R. (2d) 81 (F.C.T.D.), Madam Justice Barbara Reed wrote:

On a leave to commence proceedings application the task is not to determine, as between the parties, which arguments will win on the merits after a hearing. The task is to determine whether the applicants have a fairly arguable case, a serious question to be determined. If so leave should be granted and the applicants allowed to have their argument heard.

7. In *Virk v. Minister of Employment and Immigration* (1991), 13 Imm. L.R. (2d) 119 (F.C.T.D.), "arguable case" has been defined as one that has a chance of success on judicial review.

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<sup>1</sup> *Wu v. Canada (Min of Employment & Immigration)* [1989] F.C.J. No. 29;

<sup>2</sup> 2009 FC 552 at paras. 6-7.

8. Therefore, the threshold that must be met by the Applicant if leave for judicial review is required, is lower than what was asserted by the Respondents. All that must be demonstrated by the Applicant is that there is a chance of success on the judicial review. The Applicant submits that this is a low threshold that has been easily overcome in the case at bar.

### **B. The Application is Not Premature**

9. The remedies sought on this judicial review are not pre-emptive rulings or collateral attacks on the Applicant's discipline investigation. The Applicant is entitled, where there is uncertainty in the law, to have access to the courts in order to ask for a declaration as to the status of the law. As stated by the Supreme Court in *Operation Dismantle Inv. v. Canada*:

None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, *Borchard, Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,

... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; **he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty...**<sup>3</sup>

This sentiment was expanded upon later in the judgment of the Court:

**The common law action [for declaratory relief] affords a means of attack on the acts of public officials who have allegedly exceeded their powers.** However, in order to have standing to bring such an action a plaintiff must, as noted from Borchard, *supra*, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. The same point is made in de Smith, *Constitutional and Administrative Law* (4th ed.), at p. 604:

The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. ...<sup>4</sup>

10. In this case there is grave uncertainty with regards to fundamental questions surrounding the jurisdiction and authority of the Directors of the Society, their policies and procedures. This

<sup>3</sup> [1985] S.C.J. No. 22 at para. 32 [emphasis added].

<sup>4</sup> *Ibid.* at para. 93 [emphasis added].

uncertainty has affected the legal right of the Applicant to run in the Society's election for their governing body. As a result, the Applicant has the right to seek guidance in the form of declaratory relief from the court in order to have the uncertainty resolved even if she is also faced with an ongoing disciplinary investigation.

11. Moreover, although there may be some overlap on the issues in the two proceedings, the issues raised in this appeal extend beyond those that might be addressed in any disciplinary hearing. For example, whether the restriction on attendance at meetings or the nomination criteria that were imposed by the Directors are *ultra vires* the bylaws or in breach of the principles of natural justice are issues that fall outside the scope of any disciplinary action. These issues would consequently remain unresolved, or at most would be addressed indirectly, in a disciplinary proceeding. Therefore, it would still be necessary for them to be resolved by this Court.

12. The issues raised in this application are not only of great importance to the Applicant but to all of the members of the Society and to the general public as well. There is a public interest in ensuring that the issues raised in this application are addressed because it is important to establish that the Society is being properly run and that the directors of the Society are not acting outside of their given authority. The issues on this application need to be addressed regardless of the outcome of the Applicant's disciplinary hearing. Thus, it is correct for them to be determined by the Court at this time.

13. With regards to any issues where overlap may exist between the two proceedings, the overlap is not an absolute bar to the issues being heard and addressed by this Court. The Court has discretion to hear the issues in any event, particularly where there is an issue of jurisdiction of the decision

maker or where part of the relief sought is against a party over which the discipline process has no jurisdiction.<sup>5</sup>

14. Furthermore, the Applicant submits that the issues are best addressed together as they all form part of the overarching issue in this case: namely whether the actions of some of the directors have been *ultra vires* their powers and in breach of principles of natural justice. To separate the issues on this application would be to create the “piece meal” approach that the Respondents have indicated must be avoided. Consequently, this application is not premature and it is appropriate for this Court to deal with all of the issues as stated by the Applicant.

### **C. Restrictions on the Members’ Communications Were Not Appropriate.**

15. The Applicant does not dispute that professional regulatory bodies may restrict a member’s right to freedom of expression, where the speech at issue is clearly harmful and undermines public confidence in the profession. However, the Applicant submits that the application of the Society’s rule unreasonably restricted her speech in the circumstances of this case. Furthermore, the Society’s disciplinary investigation of the Applicant for making a statement that is critical of the Board of Directors constitutes a *prima facie* infringement on her right to express herself, and the Respondents bear the onus of establishing that the investigation is justified.

16. The Supreme Court of Canada has recognized that “some restrictions on freedom of expression are easier to justify than others”, and that “political speech ... is the single most important and protected type of expression. It lies at the core of guarantee of free expression”.<sup>6</sup> Political speech includes expressing unpopular and minority views, as well as criticizing the manner in which

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<sup>5</sup> *Kelly v. Ontario*, [2008] O.J. No. 1901 at para. 42.

<sup>6</sup> *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827 at paras. 10-11, as per McLachlin C.J., Major and Binnie JJ, writing in dissent.

institutions are run and leaders exercise their powers. In the speech at issue in this application, the Applicant was criticizing the conduct of the Board of Directors, an issue that directly relates to the governance of the Society. The expression at issue in this application is therefore a form of political speech which lies at the core of protected speech. Any infringement of this speech must be subject to rigorous scrutiny.

#### **D. The Applicant is a Member in Good Standing**

17. The Respondents' position is that the Applicant was suspended for five days, and the definition of 'good standing' excludes members who have been suspended. Therefore, even if the additional criteria to stand for election as a Consultant Director are *ultra vires*, the Respondents argue the Applicant was not a member in 'good standing', and would not have had the right to stand for election.

18. This position ignores the fact that the Applicant's suspension was based on her alleged non-compliance with the investigation process. The Applicant submits that the investigation is *void ab initio*, and that in any case, she made every effort to fully comply with the demands made by the investigator. Because the suspension flows directly from an invalid investigation, the suspension is also *void ab initio*, and the Applicant is a "member in good standing" and should have been allowed to stand for election as a Consultant Director.

#### **E. The Reasonableness of the Policies is Not the Issue**

19. The Respondents repeatedly indicated in their submissions that the actions of the Society were reasonable, particularly given that similar provisions have been enacted by other regulatory bodies. However, it is submitted that the provisions of other regulatory bodies are not at issue in this appeal and their existence does not necessarily render the actions of the Directors reasonable.

20. More importantly, the issue on this appeal is not whether the nomination criteria or the quiz were reasonable, but whether the Directors had the power to make them in the first place. It has been demonstrated in our memoranda of fact and law that the Directors did not have the applicable jurisdiction, therefore whether the resulting policies are reasonable is irrelevant.

#### **F. The Application is Not Statute Barred**

21. The Respondents' take the position that the Applicant is statute barred from judicially reviewing the appointment of John Ryan as Chair and Acting Chief Executive Officer and the use of electronic voting and meetings. This is because John Ryan was appointed as Chair in June of 2008, and CEO in March 2008, and electronic voting and meetings has been taking place since 2004, and therefore the application is well beyond the limitation period to judicially review a tribunal's decision or order.

22. The Applicant is not judicially reviewing a tribunal's decision or order. Instead, she seeks a declaration regarding the legality of the Respondent's' actions. This Court has recognized that where a judicial review application is not in respect of a tribunal's decision, the time limitation in s. 18.1(2) of the *Federal Courts Act* does not apply.<sup>7</sup> For example, in *Canadian Assn. of the Deaf v. Canada*, Justice Mosley held that "where the judicial review application is not in respect of a tribunal's decision or order, the 30-day limitation does not apply".<sup>8</sup> In this case, the Applicant challenges the on-going policy to use electronic meetings and voting, rather than a specific decision of the Respondents regarding the use of electronic voting. Similarly, the Applicant does not challenge the decision to appoint John Ryan as acting CEO, but seeks a declaration regarding

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<sup>7</sup> R.S. 1985, c. F-7.

<sup>8</sup> 2006 FC 971 at para. 72.

the legality of Mr. Ryan's ongoing service in both positions. In any event, regardless of how the Applicant's challenge is framed, "the nature of declaratory relief allows the Court to waive the 30-day requirement".<sup>9</sup>

#### **PART IV – COSTS SUBMISSIONS**

15. The *Rules* mandate that costs should only be awarded in special circumstances. The Applicant submits that the Respondents have not demonstrated any such circumstances in this case.

#### **PART V – ORDER REQUESTED**

16. The Applicant requests that leave be granted if necessary in this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2010.

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<sup>9</sup> *Ibid.* at para. 71.

**Court File No. T-1425-09**

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