

Federal Court



Cour fédérale

Date: 20210708

Docket: T-834-20

Citation: 2021 FC 726

Ottawa, Ontario, July 8, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

IMMIGRATION CONSULTANTS OF CANADA
REGULATORY COUNCIL

Plaintiff/
(Defendant by Counterclaim)

and

CICC THE COLLEGE OF IMMIGRATION AND CITIZENSHIP
CONSULTANTS CORP., NUHA NANCY SALLOUM, and RYAN DEAN

Defendants

AND BETWEEN:

CICC THE COLLEGE OF IMMIGRATION
AND CITIZENSHIP CONSULTANTS CORP.

Plaintiff by Counterclaim

and

HER MAJESTY THE QUEEN

Defendant by Counterclaim

ORDER AND REASONS

I. **Overview**

[1] In this motion, the Defendant, Nuha Nancy Salloum, appeals under Rule 51 of the *Federal Court Rules*, SOR/98-106 [the Rules], an Order of Prothonotary Furlanetto (as she was

then) [the Prothonotary] dated December 10, 2020, in which the Court ordered that the Defendant/Plaintiff by Counterclaim, CICC The College of Immigration and Citizenship Consultants Corp. [CICC] must appoint a solicitor of record and file a notice of appointment in accordance with the Rules.

[2] As explained in more detail below, this motion is dismissed because, in deciding to order that CICC appoint counsel, the Prothonotary applied the relevant law and made no palpable and overriding error in the application of that law.

II. **Background**

A. *The Parties*

[3] The Plaintiff, Immigration Consultants of Canada Regulatory Council [ICCRC], is a national self-regulatory body that oversees regulated immigration and citizenship consultants in Canada. It is designated as such under s 91(5) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and s 21.1(5) of the *Citizenship Act*, RSC 1985, c C-29. Sections 83-85 of the *College of Immigration and Citizenship Consultants Act*, SC 2019, c 29, s 292 [Consultants Act], which received Royal Assent in June 2019 and came into force in December 2020, provide a mechanism for ICCRC to take steps to continue as the regulator under the name “College of Immigration and Citizenship Consultants”.

[4] The Defendant, CICC, is a corporation, incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44, on October 25, 2019. The Defendant, Nuha Nancy

Salloum, is the Chairwoman and Chief Operating Officer of CICC. The Defendant, Ryan Dean, was the Chief Executive Officer of CICC, until he submitted his letter of resignation on December 7, 2020.

[5] As explained below, Her Majesty the Queen [the Crown] is also a party to this proceeding, as a Defendant by Counterclaim.

B. The Underlying Action

[6] The underlying action is a trademark and copyright dispute. ICCRC alleges that the Defendants have violated provisions of the *Trademarks Act*, RSC 1985, c T-13. CICC brought a counterclaim, seeking relief against ICCRC and the Crown under the *Trademarks Act* and the *Copyright Act*, RSC 1985, c C-42.

[7] ICCRC filed a motion for an interlocutory injunction seeking to restrain the Defendants from using the name “CICC The College of Immigration and Citizenship Consultants Corp.” and its variants. That motion was heard by Justice Fuhrer on November 20, 2020, and the motion was granted by Order dated December 24, 2020.

C. Background Leading to the Impugned Order

[8] When the action was commenced, the Defendants were collectively represented by counsel. However, prior to the cross-examination upon the affidavits filed for the interlocutory injunction motion, the Defendants dismissed their counsel. They then filed notices to be self-

represented in this proceeding, with Ms. Salloum seeking to represent CICC. In response, the Court directed that, as a corporate body, CICC must be represented by a solicitor unless leave is obtained under Rule 120 of the Rules for an officer to represent the corporation.

[9] Ms. Salloum brought a motion under Rule 120 on October 19, 2020. In support of that motion, Ms. Salloum swore affidavits, deposing that CICC is a *pro bono* corporation that does not hold a bank account, collect membership fees or receive compensation, and does not retain any earnings. She also deposed that she has used up an available line of credit to fund legal fees when CICC was previously represented by counsel. Her submissions asserted that she is the sole owner of all common shares of CICC and that, if she was not given leave to represent CICC, she would have to take out a mortgage against her home to pay for counsel for CICC.

[10] On November 3, 2020, the Prothonotary issued an Order granting Ms. Salloum leave to represent CICC through the preliminary motion stage [the November Order]. The November Order also states:

... However, I will maintain discretion to consider the issue of representation on an ongoing basis, should it become clear that Ms. Salloum is unable to handle the complexity of the proceeding on behalf of the corporate Defendant, without the assistance of counsel and/or if the proceeding is no longer moving forward expeditiously.

D. Order Under Appeal

[11] Subsequently, the Prothonotary held a case management conference [CMC] on December 3, 2020, to address, among other things, the conduct of the proceeding. Following the CMC, the

Prothonotary issued the Order dated December 10, 2020, that is now under appeal in this motion [the December Order]. The Prothonotary ordered, among other things, that CICC must appoint a solicitor of record and file a notice of appointment in accordance with Form 124B of the Rules. While the December Order required these steps to be taken by December 28, 2020, that deadline has subsequently been extended by directions issued by the Court, most recently on April 26, 2021, such that the current deadline is July 16, 2021.

III. **Issue**

[12] In this motion, Ms. Salloum seeks an order allowing her appeal and granting her leave to continue to represent CICC. In the alternative, if this appeal is dismissed, she requests an extension of 30 days, from the date of the Court's decision, to appoint a solicitor for CICC.

[13] Mr. Dean supports Ms. Salloum's motion. ICCRC takes the position that this motion should be dismissed and is supported by the Crown in its position.

[14] Therefore, the sole substantive issue in this motion is whether the Prothonotary erred in ordering CICC to appoint a solicitor.

IV. **Standard of Review**

[15] The Federal Court of Appeal in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215, established that a decision of a prothonotary under appeal to a judge of this Court is subject to the standard of review from *Housen v Nikolaisen*, 2002 SCC 33

[*Housen*]. Based on this standard, questions of law, and questions of mixed fact and law where an extricable legal principle is at issue, are reviewable on the standard of correctness. Otherwise, questions of fact or mixed fact and law are reviewable on the standard of palpable and overriding error. Both parties recognize that this is the appropriate standard of review in this matter.

V. Analysis

[16] Ms. Salloum's principal argument in support of her appeal is that CICC is unable to afford counsel and that, in issuing the December Order requiring it to appoint counsel, the Prothonotary erred in failing to consider CICC's impecuniosity. I note that in the course of her oral submissions on the hearing of this appeal, Ms. Salloum also argued that the December Order demonstrates bias on the part of the Prothonotary, as it will result in CICC going into default in its defence of this proceeding, because it will be unable to afford to retain counsel. However, Ms. Salloum provided no evidence, and made no submissions, that would support a finding of bias. My analysis of this appeal will therefore focus on her principal argument that the Prothonotary failed to properly take into account CICC's inability to afford counsel.

[17] Ms. Salloum relies on *Alpha Marathon Technologies Inc v Dual Spiral Systems Inc*, 2005 FC 1582 [*Alpha*], in which Justice Snider explained the factors to be considered by the Court in a Rule 120 motion as follows (at paras 3-4):

[3] The parties agree that the factors to be considered by the Court in a Rule 120 motion are those set out in *Kobetek Systems Ltd. v. Canada*, [1998] 1 C.T.C. 308, 98 G.T.C. 6041 (F.C.T.D.), at para. 6. These factors are:

1. whether a corporation can pay for a lawyer;

2. whether the proposed representative will be required to appear as advocate and witness;
3. the complexity of the legal issues to be determined (and thus whether it appears that the representative will be able to handle the legal issues); and
4. whether the action can proceed in an expeditious manner.

[4] These factors collectively address the "special circumstances" required to allow a lay person to represent a corporation. Although these factors are not necessarily determinative or exhaustive (*Chase Bryant Inc. v. Canada*, [2002] T.C.J. No. 663 at para. 6 (T.C.C.)), the onus on the applicant to establish special circumstances is a high one (*Source Services Corp. v. Source Personnel Inc.*, [1995] F.C.J. No. 1658 (QL) (F.C.T.D.) at para. 4). The applicant must provide "clear and unambiguous evidence" establishing special circumstances, and these circumstances must be "unusual, uncommon and exceptional and the result of external forces as distinct from the voluntary acts of the Defendant" (*Source Services*, at paras. 4-5).

[18] Noting the first of the factors set out in *Alpha* (i.e., whether a corporation can pay for a lawyer), Ms. Salloum also emphasizes the statement in *Alpha* that the ability of the corporation to pay for legal representation is without a doubt the most important factor for the Court to consider (at para 5).

[19] Ms. Salloum relies upon her affidavit evidence in support of her position that CICC cannot afford counsel. She deposes that CICC has never accepted any form of compensation, monetary or otherwise, for its services, that CICC does not collect fees from its members, and that it does not have a bank account. She also deposes that she has used an available line of credit to fund corporate legal fees in the past and that this credit line has been exhausted. Ms. Salloum submits that the only means by which she could fund counsel for CICC would be to mortgage her home, in which other members of her family also have an interest. She argues that she and

her family should not be expected to incur personal cost of this nature in order to fund the corporation's legal representation.

[20] In assessing whether these arguments raise an error on the *Housen* standard, it is necessary to consider the Prothonotary's analysis, as demonstrated by the combination of the November Order and the December Order. The November Order, which granted Ms. Salloum leave to represent CICC through the preliminary motion stage of this proceeding, referred to her submissions surrounding the corporation's impecuniosity as follows:

The Court notes that the corporate Defendant and Ms. Salloum are involved in other proceedings in this Court, T-1033-20. In those proceedings, the corporate Defendant is represented by counsel. Ms. Salloum asserts that in order to pay for counsel, she obtained a personal line of credit, which she used to pay counsel's fees. She asserts that if counsel were required to be retained for this proceeding she would have to pay for the proceeding personally, by taking a mortgage out against her own house as the corporate Defendant does not itself have any liquid assets to use for payment. Ms. Salloum asserts that her former counsel was discharged from this file in part because of the fees charged and the inability to continue to pay such fees, and that she cannot personally afford to finance the action on behalf of the corporation.

[21] The November Order then noted that ICCRC took no position on the Rule 120 motion, as ICCRC's primary concern was to ensure that its interlocutory injunction motion was heard in a timely manner. The Prothonotary also commented that, while Ms. Salloum would likely be an affiant in the proceeding, she would be acting on her own behalf regardless of whether CICC was represented by counsel. Taking into account these factors, the Prothonotary decided to allow Ms. Salloum to represent CICC, at least through the preliminary motion stage. However, the November Order maintained the Prothonotary's discretion to consider the issue of representation

going forward, should it become clear that Ms. Salloum was unable to handle the complexity of the proceeding on behalf of CICC without assistance from counsel and/or if the proceeding was no longer moving forward expeditiously.

[22] The December Order again noted this retention of discretion to revisit the representation issue and then identified a number of considerations, based on which the Prothonotary concluded that Ms. Salloum would have difficulty handling the complexity of the legal issues in dispute and that the action would not be able to proceed forward in an expeditious manner without the assistance of counsel acting on behalf of CICC. I will return to those considerations later in these Reasons.

[23] The combination of the November Order and December Order clearly demonstrates that the Prothonotary was aware of the factors identified in *Alpha*. Both Orders reference *Alpha*, as well as the subsequent decision by the Federal Court of Appeal in *El Mocambo Rocks Inc v SOCAN*, 2012 FCA 98 [*El Mocambo*]. The November Order also expressly sets out the relevant factors, including whether the corporation can pay for a lawyer, and, in the paragraph recited above, notes Ms. Salloum's submissions in relation to this factor. Therefore, notwithstanding that the reference to this factor is not expressly repeated in the December Order, it is clear that the Prothonotary was aware of the applicable law. Applying the correctness standard, I find no basis to conclude that the Prothonotary made an error of law.

[24] Turning to the application of the law to the facts of this case, while the Prothonotary canvassed Ms. Salloum's submissions on the ability to pay for a lawyer for CICC, I do not read

the November Order as having made any particular findings in relation to this factor. Similarly, while the December Order notes that CICC already has representation in another proceeding before this Court, the Prothonotary makes no particular finding on CICC's ability to pay for counsel. In assessing whether this gives rise to a palpable and overriding error, I have considered Ms. Salloum's submission that *Alpha* describes ability to pay for counsel as the most important factor. Reviewing the full paragraph from *Alpha*, in which that statement was made, assists in understanding the statement:

[5] The ability of Dual Systems Inc. to pay for legal representation is without a doubt the most important factor for the Court to consider. In *Chase Bryant Inc.*, at para. 7, Associate Chief Judge Bowman stated for the Tax Court of Canada that, where a company can afford to pay a lawyer, "it is difficult to imagine circumstances which would justify a departure from the rule that a corporation must be represented by counsel". The Federal Court of Appeal expressed the view that this Court "must be satisfied that the corporations are truly unable to pay for a lawyer" (*S.A.R. Group Relocation Inc. v. Canada (Attorney General)*, [2002] F.C.J. No. 367 at para. 2).

[25] In my view, Justice Snider was not suggesting that inability of a corporation to pay for legal representation was an overriding consideration that necessarily warranted success in a Rule 120 motion. Rather, she was explaining that, in circumstances where a company could afford counsel, a Rule 120 motion would be unlikely to succeed.

[26] In the case at hand, while the Prothonotary was conscious of Ms. Salloum's submissions on impecuniosity, the decisions in both the November Order and December Order turned on other considerations.

[27] The November Order granted Rule 120 leave for Ms. Salloum to represent CICC through the preliminary motion stage, which I interpret to mean the then pending interlocutory injunction motion brought by ICCRC. That decision to grant leave turned significantly on the interest in having an expeditious hearing and determination of the injunction motion. The Prothonotary noted that Ms. Salloum was likely to be a witness in the proceeding, which is one of the *Alpha* factors. However, because Ms. Salloum would in any event be acting as an advocate on her own behalf, the Prothonotary did not consider that factor to preclude granting Rule 120 leave.

[28] By the time of the December 3, 2020 CMC that resulted in issuance of the December Order, ICCRC's interlocutory injunction motion had already been heard by Justice Fuhrer on November 20, 2020. The Prothonotary's decision to order CICC to appoint counsel at that stage turned on the third and fourth Alpha factors, i.e., the complexity of the legal issues and whether Ms. Salloum would be able to handle them, and whether the action could proceed expeditiously with Ms. Salloum representing the corporate Defendant.

[29] I have considered whether the Prothonotary made a palpable and overriding error in arriving at that decision, against the backdrop of Ms. Salloum's evidence of CICC's inability to pay for counsel or the absence of an express finding by the Prothonotary on that factor. In making this determination, I am guided by *El Mocambo*, in which Justice Mainville of the Federal Court of Appeal explained the operation of the factors to be considered in assessing whether a party has demonstrated the special circumstances required by Rule 120 as follows (at para 3):

[3] In order to demonstrate special circumstances under Rule 120 in the context of an appeal to this Court – and though other factors

may apply depending on the nature of the appeal – a corporation must at least demonstrate that (a) it cannot afford a solicitor; (b) that the issues in appeal are not of such a complexity as to be beyond the reasonable capabilities of the proposed representative; and (c) that the appeal can be handled expeditiously by the proposed representative.

[Emphasis added]

[30] As noted in *El Mocambo*, there may be other factors that guide consideration of a Rule 120 motion. Therefore, the factors identified therein should not be regarded as a definitive test. However, Justice Mainville’s explanation that a corporation seeking Rule 120 relief must at least demonstrate those factors supports a conclusion that the factors are to be regarded as conjunctive. Certainly, informed by that jurisprudence, it would not be a palpable and overriding error not to treat the factors as conjunctive in a particular case. As I interpret the Prothonotary’s reasoning in the case at hand, the finding that Ms. Salloum would be unable to handle the complexity of the legal issues and move the matter forward expeditiously (i.e., failure to satisfy those factors) was determinative. The Prothonotary therefore concluded that Rule 120 relief was not appropriate beyond the stage of the interlocutory injunction motion. I find no palpable and overriding error in this reasoning.

[31] I also understand Ms. Salloum to be contesting the Prothonotary’s findings with respect to those factors. The December Order states that the determination related to these factors was based on the materials filed and the conduct taken in the proceeding leading up to ICRCC’s motion for interlocutory injunction and in the steps following that motion. By way of detail, the Prothonotary refers to:

- A. Numerous letters and emails received by the Court from Ms. Salloum, beyond the materials and steps contemplated by the Rules, including correspondence seeking the advice of the Court in respect of steps to be taken;
- B. The Court considering it imperative to bring order to the proceeding in order to allow it to move forward in an efficient and logical manner;
- C. The exigencies of the Court's business and that matters cannot be heard the moment they are filed or submitted;
- D. The Defendants seeking to introduce a further party into the proceeding and to expand the scope of their counterclaim, adding to the complexity of the proceeding; and
- E. CICC intending to bring at least three further motions as next steps in the proceeding.

[32] I do not understand Ms. Salloum to be challenging the Prothonotary's identification of steps in the proceeding that the Defendants intended to pursue. However, she takes issue with the Prothonotary's conclusion that she was corresponding with the Court at an inappropriate level, either in volume or content, creating a need for the retention of counsel in order to bring order to the proceeding. Ms. Salloum describes this finding as based on her correspondence to the Court in response to correspondence from ICCRC's counsel, which had inaccurately stated the date the Consultants Act was coming into force.

[33] In support of this motion, Ms. Salloum filed a copy of the transcript of the CMC that resulted in issuance of the December Order. The correspondence surrounding the date that the Consultants Act came into force was the subject of discussion between Ms. Salloum, the Prothonotary, and Justice Fuhrer who also participated in the CMC. The transcript demonstrates that Ms. Salloum argued that she was compelled to send the correspondence about which the Prothonotary was expressing concern, in order to correct the inaccurate date that had been provided by ICCRC's counsel.

[34] Justice Fuhrer addressed this argument by pointing out that the impugned correspondence from ICCRC's counsel was a two-sentence letter and that the appropriate response from Ms. Salloum would have been a factual one, identifying that the registration date of the applicable order-in-council was different from the date the order-in-council was issued. Justice Fuhrer stated that what Ms. Salloum filed was not an appropriate response.

[35] I appreciate that these comments are those of Justice Fuhrer, not the Prothonotary. However, during the CMC, both judicial officers expressed similar concerns about the volume and nature of correspondence the Court had recently received. Having reviewed the transcript, I find that Ms. Salloum's arguments, to the effect that her correspondence with the Court on the subject of the Consultants Act was appropriate, raise no palpable and overriding error by the Prothonotary.

[36] Finally, I note that, at the conclusion of her reply submissions during the appeal, Ms. Salloum referred to correspondence with a law society surrounding circumstances that she

considered may raise a conflict of interest in the other parties' counsel's involvement in this proceeding. Ms. Salloum encouraged the Court to consider addressing this issue in deciding her appeal. I will comment only that there is no motion before the Court, or indeed any evidence, raising a conflict of interest on the part of any counsel in this proceeding.

[37] Having found no error by the Prothonotary on the *Housen* standard, this motion and appeal must be dismissed. At the hearing, neither party spoke to Ms. Salloum's request that, if the appeal is dismissed, the Court provide 30 days from the date of the Court's decision for CICC to appoint a solicitor. I consider it appropriate to afford CICC a brief period of time to comply with the Court's Order, once the result of this appeal is known, and I find the proposed time frame reasonable. My Order will so provide.

VI. Costs

[38] Each of CICC and ICCRC sought costs against the other in the event of its success in this motion. ICCRC has been successful, and it proposes that it be awarded lump sum costs of \$1000. However, costs are in the discretion of the Court and, in the circumstances of this matter, I award costs in the cause.

ORDER in T-834-20

THIS COURT ORDERS that:

1. Ms. Salloum's motion and appeal are dismissed.

2. CICC The College of Immigration and Consultants Corp. is granted 30 days from the date of this Order to appoint a solicitor of record and file a notice of appointment of solicitor in accordance with Form 124B of the *Federal Courts Rules*.

3. Costs of this motion shall be in the cause.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-834-20

STYLE OF CAUSE: IMMIGRATION CONSULTANTS OF CANADA
REGULATORY COUNCIL V CICC THE COLLEGE
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PLACE OF HEARING HELD BY VIDEOCONFERENCE VIA
VANCOUVER

DATE OF HEARING JUNE 29, 2021

ORDER AND REASONS: SOUTHCOTT J.

DATED: JULY 8, 2021

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