Federal Court  Cour fédérale

Date: 20101028

Docket: T-1086-10

Citation: 2010 FC 1064

Ottawa, Ontario, October 28, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

IMMIGRATION AND REFUGEE BOARD OF CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Immigration and Refugee Board ("IRB") seeks a stay of what it says are two decisions of the Public Service Commission ("PSC") relating to the appointment of an individual I will refer to in these reasons as "JL". The IRB also seeks to stay twelve other PSC investigations into Board appointments. The stay is sought pending a decision of this Court in relation to the IRB's application for judicial review of the PSC's findings with respect to the JL appointment.

[2] For the reasons that follow, I find that the IRB has not demonstrated with clear and convincing evidence that it will suffer irreparable harm if the stay is not granted. As a consequence, the motion will be dismissed.

Background

[3] The IRB is Canada's largest independent administrative tribunal. It renders more than 47,000 decisions each year in relation to refugee and other immigration matters. The mandate of the PSC is to safeguard the integrity of the public service staffing process.

[4] The PSC conducted an audit covering the period between January 2006 and June 2009 in order to determine whether the IRB had the appropriate framework, systems and practices in place to manage its staffing activities. The audit also examined whether the IRB's appointments and appointment processes complied with the *Public Service Employment Act*, 2003, c. 22, ss. 12, 13, as well as the PSC's Appointment Framework, the IRB's human resources policies and other governing authorities.

[5] The PSC found that 33 of the 54 appointments examined did not meet the merit principle, the guiding values of fairness, access, transparency and representativeness, or both. The PSC was also concerned that the IRB was appointing former Governor in Council appointees through non-advertised processes or through advertised processes in which the experience criteria could only be satisfied by former GIC appointees to the IRB.

[6] As a result of the findings of the audit, the PSC initiated investigations into 13 appointments. One of these was the appointment of JL to a permanent position with the IRB. The PSC advised the IRB that the object of the investigation into JL's appointment was to determine whether the appointment was based on merit, whether there was an error, omission or improper conduct that affected the selection of the successful candidate, and whether favouritism played any role in the appointment.

[7] In the course of the PSC investigation, concerns were expressed by representatives of the IRB with respect to the procedure that was being followed. In particular, the IRB objected to the fact that it was not able to review and comment on the investigator's analysis prior to the finalization of the investigator's report.

[8] On June 8, 2010, the PSC investigator sent the IRB a copy of what she described in a covering letter as the "final investigation report". The report itself concluded that favoritism did not play a role in JL's appointment. However, It did, however, conclude that the appointment was not made on the basis of merit. The report also found that there were errors that affected the selection of JL, as the narrative assessment used to in assessing qualifications did not demonstrate that JL met all of the essential qualifications for the position in question.

[9] By letter dated June 28, 2010, the PSC confirmed that it had conducted an investigation into the appointment of JL, and had concluded that "the matter raised was founded". The letter went on to identify certain proposed corrective action, and invited comments from the IRB in that regard.

[10] It is the June 8, 2010 and June 28, 2010 “decisions” relating to the appointment of JL that are at issue in the application for judicial review that underlies this motion. Quotation marks are used in referring to these decisions, as there is an issue between the parties as to whether either document constitutes a decision that is amenable to judicial review.

[11] The issue raised by the IRB’s application for judicial review is whether the process followed by the PSC in its investigation of the JL appointment satisfied the requirements of procedural fairness. Amongst other forms of relief, the IRB seeks an order prohibiting the PSC from applying the approach adopted in the JL investigation in future investigations.

[12] After the commencement of the application for judicial review, the PSC rendered a decision identifying certain corrective action to be taken in relation to the JL appointment. This essentially involved the reassessment of JL in relation to certain essential qualifications for the position at issue.

[13] In the meantime, PSC investigations into 12 other appointments are ongoing.

[14] The IRB now seeks a stay of the June 8, 2010 and June 28, 2010 “decisions” relating to the JL appointment. The IRB also seeks to stay the PSC investigations into the other 12 appointments pending a decision from this Court in relation to the procedural fairness issues raised in the JL investigation.

The Test for a Stay

[15] The parties agree that in determining whether the IRB is entitled to a stay, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 10.

[16] That is, the IRB must establish:

> 1) That there is a serious issue to be tried in the underlying application for judicial review;
> 2) That irreparable harm will result if the stay is not granted; and
> 3) That the balance of convenience favours the granting of the stay.

[17] The test is conjunctive, which means that the IRB has to satisfy all three elements of the test before it will be entitled to relief.

[18] In light of my conclusion in relation to the issue of irreparable harm, it is not necessary to consider the first and third elements of the *RJR-MacDonald* test. In particular, it is unnecessary to address what the respondent says are procedural defects in the IRB's underlying application for judicial review, including the prematurity argument.

Will the IRB Suffer Irreparable Harm if the Stay is not Granted?

[19] A stay should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard if the stay is not granted: *Lake Petitcodiac*

Preservation Assn. Inc. v. Canada (Minister of the Environment) (1998), 149 F.T.R. 218, [1998] F.C.J. No. 797 at para. 23.

[20] Irreparable harm is harm that cannot be quantified in monetary terms, or that cannot be cured by an award of damages: *RJR-MacDonald*, at para. 59.

[21] The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if its motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, 40 C.P.R. (4th) 210, at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[22] It will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted. Allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, [2008] F.C.J. No. 8 at paras. 22-25.

[23] The IRB argues that it will suffer two different forms of irreparable harm if the stay is not granted. Firstly, it says that it will suffer reputational harm, including a loss of public confidence in the IRB as an institution. Secondly, it says that it will not be able to recover compensation for the resources that have been and will be expended in relation to the PSC investigations, in the event that it is ultimately successful on its application for judicial review.

[24] A third category of irreparable harm was identified by the IRB in its memorandum of fact and law. This is the potential negative impact on the IRB's staffing authority that could flow from flawed investigative findings. According to the IRB, negative findings could lead to the PSC withdrawing the delegated staffing authority of the Chairperson. Reference is also made in the memorandum to the potential loss of JL as an employee. These matters were not pursued at the hearing, and I understand them to have been abandoned. I would note that, in any event, there is no clear, non-speculative evidence to support either claim.

i) ***Reputational Harm***

[25] Dealing first with the issue of reputational harm, the IRB says that as an administrative tribunal, the Board and its employees are held to a higher standard than other employers. Findings that appointments were not made in accordance with merit, or that favoritism played a role in appointments could permanently erode public confidence in the IRB.

[26] The affidavit of the IRB's Executive Director asserts that by conducting its investigations in a manner that prevents the IRB from making submissions on the investigator's findings, the PSC is likely to arrive at conclusions based on errors and omissions that could otherwise have been easily corrected. Any negative findings that may be made by the PSC could raise suspicions about the hiring processes and integrity of the IRB and its employees.

[27] The Executive Director also asserts that flawed investigations that result in erroneous findings may wrongfully and irrevocably impact on the career opportunities and reputations of the individuals involved.

[28] Insofar as the alleged potential harm to individual IRB employees is concerned, none of these individuals is a party to this proceeding. In this regard, the Supreme Court observed in *RJR-MacDonald* that:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect *the applicants' own interests* that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. (at para. 58) [emphasis added]

[29] The jurisprudence is clear that the question for the Court is not whether third parties may suffer irreparable harm if the relief sought is not granted, but rather whether the party seeking the stay will itself suffer such harm: see, for example, *Mainil v. Canada (Canadian Wheat Board),* 2004 FC 1768, [2004] F.C.J. No. 2143, at para. 61; *Chinese Business Chamber of Canada v. Canada*, 2005 FC 142, [2005] F.C.J. No. 163, at para. 58; *Dodge v. Caldwell First Nation of Point Pelee*, 2003 FCT 36, [2003] F.C.J. No. 45, at paras. 20-21.

[30] Insofar as the potential damage to the reputation of the IRB itself is concerned, it is important to note that the positions in issue are staff positions. There is no suggestion that any of the individuals whose appointments are under investigation by the PSC make decisions with respect to the merits of any of the cases before the IRB.

[31] Moreover, we have no way of knowing at this point what the outcome of the remaining 12 PSC investigations will be. This uncertainty is reflected by the assertions in the affidavit of the IRB's Executive Director, most of which are couched in conditional terms. He states that flawed investigations "*may* wrongly and irrevocably impact the reputation and career opportunities and reputations of the individuals involved". He goes on to state that any negative findings made by the PSC "*could* improperly cast a significant shadow over [the work of the IRB] and damage the reputation of and erode public confidence in the IRB …"

[32] Where the Executive Director does make unqualified allegations of reputational harm in his affidavit, these statements consist of little more than general assertions unsupported by any concrete or specific evidence.

[33] The Federal Court of Appeal has confirmed that a party cannot satisfy the irreparable harm component of the *RJR-MacDonald* test in relation to allegations of reputational harm by relying upon simple assertions: *Choson Kallah Fund of Toronto v. The Minister of National Revenue*, 2008 FCA 311 [2008] F.C.J. No. 1576 at paras. 5 and 8, (leave to appeal denied, [2008] S.C.C.A. No. 528).

[34] Furthermore, to the extent that harm may be caused to the reputation of the IRB as a consequence of the PSC's investigation of its staffing practices, it appears that this harm has likely already occurred. The PSC's October 2009 audit was released publicly, and the matters giving rise

to this motion were discussed in a front page article in the Ottawa Citizen published on October 12, 2010, which article was reproduced in a number of newspapers across Canada. The IRB has not provided clear and non-speculative evidence that there will be any additional harm caused to its reputation between now and the time that its application for judicial review is heard if the stay is not granted.

ii) ***Lost Resources***

[35] The second category of irreparable harm relied upon by the IRB relates to the resources that it has expended, or will have to expend in relation to the various investigations.

[36] These are not out-of-pocket expenses. Rather, the IRB claims to have already incurred approximately $70,000 in salary costs for the time spent by individuals involved in responding to the PSC's concerns. To put this number into context, the overall annual budget of the IRB is approximately $113 million. No estimate has been provided as to the additional internal costs that will be incurred between now and the time that the IRB's application for judicial review will be heard.

[37] I am not persuaded that the expenditure of resources in this case will result in irreparable harm to the IRB.

[38] In response to questions from the Court, counsel for the IRB quite properly conceded that every employer responding to any kind of statutory investigative process will necessarily incur

administrative costs of the sort in issue here. Moreover, there is no evidence before the Court to suggest that the diversion of resources will interfere with the ability of the IRB to carry out its statutory mandate.

[39] There is some case law that supports the IRB's contention that these type of costs can, in certain circumstances, constitute irreparable harm: see, for example, *Re Island Telephone Company Limited* (1987), 67 Nfld. & P.E.I.R. 158 (P.E.I.S.C.). However, as Justice Rothstein has pointed out, this case involves the relationship between a regulated utility and the regulatory commission having jurisdiction over it: *Brocklebank v. Canada (Minister of National Defence)*, [1994] F.C.J. No. 1496, 86 F.T.R. 23 at para. 11 (F.C.T.D.). The situation here is obviously quite different.

[40] The other case relied upon by the IRB on this point is *Newlab Clinical Research Inc. v. Newfoundland and Labrador Assn. of Public and Private Employees*, [2003] N.J. No. 305, 232 Nfld. & P.E.I.R. 332 (Nfld SC). However, in contrast to the situation that we have here, the evidence in that case satisfied the motions judge that the ongoing viability of the respondent employer would be put in jeopardy if the stay were not granted.

[41] As Justice Rothstein observed at paragraph 11 of *Brocklebank*, as a general rule, the inability to recover costs incurred in the ordinary course of litigation has not been considered to be sufficient to meet the irreparable harm test. The same may be said of the costs incurred in responding to an investigation.

[42] In a similar vein, this Court has observed that the time and costs expended in defending a proceeding in which the jurisdiction of the decision-maker was in question "were more a matter of inconvenience than irreparable harm": see *ICN Pharmaceuticals Inc. v. Canada (Patented Medicine Prices Review Board)*, [1995] F.C.J. No. 1644, 65 C.P.R. (3d) 1 (F.C.T.D.) at para. 3. See also *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, 2004 FCA 347, [2004] F.C.J. No. 1713 at para. 14, *Bell Canada v. Communications, Energy and Paperworkers Union*, [1997] F.C.J. No. 207127 F.T.R. 44, (F.C.T.D) at paras. 37-40, and *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] F.C.J. No. 1504, 58 C.P.R. (3d) 342 (F.C.A.).

Conclusion

[43] Having failed to satisfy the irreparable harm component of the *RJR-MacDonald* test, it follows that the IRB's motion for a stay is dismissed. Costs are fixed at $2,000.

ORDER

THIS COURT ORDERS AND ADJUDGES that the motion for an interlocutory injunction is dismissed, with costs to the respondent fixed in the amount of $2,000.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1086-10
STYLE OF CAUSE:	IMMIGRATION AND REFUGEE BOARD OF CANADA v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 27, 2010
REASONS FOR ORDER AND ORDER:	MACTAVISH J.
DATED:	October 28, 2010

APPEARANCES:

James Cameron	FOR THE APPLICANT
Robert MacKinnon Agnieszka Zagorska	FOR THE RESPONDENT

SOLICITORS OF RECORD:

James Cameron Barristers and Solicitors Pointe Claire, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT