
CANADA / JUDGMENT

Honborg v. Private Career Training Institutions Agency

2015 BCSC 965

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 965 Honborg v. Private Career Training Institutions Agency

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Honborg v. Private Career Training Institutions Agency,

2015 BCSC 965

Date: 20150601

Docket: S153517

Registry: Vancouver

Between:

Kenneth G. Honborg, and DSC Hotel Management Systems Ltd., doing business as Executive Hotel Management College

Plaintiffs

And

Private Career Training Institutions Agency

Defendant

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Appearing on his own behalf:

K. Honborg

Counsel for the Defendants:

C.E. Hunter

H.E. Cochran

Place and Date of Hearing:

Vancouver, B.C.

May 29, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 1, 2015

[1] There are two applications before me:

1. An application to stay the suspension of the operations of the plaintiff, DSC Hotel Management Systems Ltd. d.b.a. Executive Hotel Management College ("College"). The plaintiff, Mr. Honborg, owns the College and represented it in this litigation; and
2. An application by the defendant, Private Career Training Institutions Agency ("Agency"), to strike the plaintiffs' claim.

[2] If the application to strike is successful, it automatically nullifies the application for a stay. For that reason, I will address the defendant's application first. Before doing so, it is important to outline the relevant statutory provisions.

The Statutory Scheme

[3] The College runs a hotel management school for international students. Like other such institutions, it is regulated pursuant to the Private Career Training Institutions Act, S.B.C. 2003, c. 79 [Act]. The Agency is established pursuant to s. 2 of the Act. Section 3 sets out the objects of the Agency stating:

3 The agency has the following objects:

- (a) to establish basic education standards for registered institutions and to provide consumer protection to the students and prospective students of registered institutions;
- (b) to establish standards of quality that must be met by accredited institutions;
- (c) to carry out, in the public interest, its powers, duties and functions under this Act.

[4] The Agency must appoint a registrar who carries out the functions and duties assigned to him or her in order to meet the objects of the Act. Section 7 stipulates only registered institutions can offer career training. In order to be registered, s. 8 requires the institution to satisfy the registrar that it meets the registration requirements and pays all fees. Once registered, an institution can be accredited under s. 9. The Agency must grant accreditation to a registered institution that applies and pays all fees, if it satisfies the accreditation

requirements. The registrar may suspend or cancel registration or accreditation, if the registrar is satisfied that the institution no longer complies with the statutory requirements.

- [5] The agency is authorized to establish bylaws under s. 6(1), including with regard to establishing requirements for registration (s. 6(1)(h)), accreditation (s. 6(1)(i)) and renewal, suspension, cancellation or reinstatement of institutions' registration or accreditation (s. 6(1)(l)). The registration and accreditation requirements are contained in ss. 14 - 17 and 18 - 22 of the Agency's bylaws.
- [6] Section 8(3) of the Act allows the registrar to refuse to register an institution, or renew its registration, if the registrar considers it is in the public interest to do so in light of the institution's financial standing (governed in part by bylaw 25) or the institution's past conduct.
- [7] Section 8(4) allows the registrar to suspend (with conditions, if appropriate) an institution for a period of time or cancel its registration. The impact of s. 8(4) is that it empowers the registrar to monitor institutions for continuing compliance. In order to protect students already in the program, a suspended institution may still continue to provide training to current students but may not enroll future students until suspension is lifted (s. 8(5)).
- [8] A person affected by the registrar's suspension, cancellation or refusal of registration or accreditation may apply to the registrar for a reconsideration of the decision within 30 days from the date of the decision (s. 10(1) and (2)). That reconsideration decision then can be appealed to the Agency's board (s. 10(3) and (4)).
- [9] The provincial government assumed direct responsibility for the regulation of private career training institutions in April 2014 by appointing a public administrator in place of the Agency's board, as permitted under s. 22. Draft legislation was introduced in February 2015 which intended to replace the Act, but it was not enacted.

Facts

- [10] The College first applied for registration in February 2013. It was advised in April 2013 that its application was incomplete and a number of outstanding issues had to be resolved before the application could move forward. Those issues were addressed and the College was registered in June 2013.
- [11] In February 2014, the federal government amended a regulation under the Immigration and Refugee Protection Act, S.C. 2001, c. 27, which had the effect of denying a student visa to any person applying to study at a Canadian institution unless that institution was accredited by the province in which it was situated. The federal government required each province to create and provide a "Designated List of Institutions".

- [12] Shortly thereafter, the British Columbia Ministry of Advanced Education ("Ministry"), which has responsibility for the Act, announced that in order to be designated for the purpose of the federal regulation, each institution offering secondary or language education programs to international students would need to receive an "Education Quality Assurance" designation. To be eligible to apply for that designation, the institution had to be accredited under the Act.
- [13] Counsel informed me, and Mr. Honborg did not disagree, that the Ministry also established a transition period such that institutions that were in the process of getting accredited when the new regulation came into force have until December 31, 2015 to obtain accreditation. This applies to the College because it submitted an application for accreditation in October 2014 and the Agency started the accreditation process in January 2015.
- [14] Mr. Honborg sent an email to the Agency's legal counsel dated April 15, 2015, when the College was still in the accreditation process. He said he was providing it as an update of a pressing legal matter. Among the things mentioned in that letter are the fact that the College had started legal action against the federal government alleging implementation of the policy (the February 2014 regulation) was discriminatory and violated the Charter of Rights and Freedoms. The College also alleges the policy is destructive to its business and caused irreparable harm to its reputation. As of June 2014, all agents stopped working with the College and visas for every student wanting to apply to the college were denied. He then wrote: "[a]t this time, we are not including the [Agency] in this action, since we believe the [Agency] is attempting to work with us to resolve the issues under its jurisdiction".
- [15] Next, he requested the assistance of the Agency with regard to some difficulties the College was having with student refunds:

"The purpose of this letter is to advise you of the situation, and to request further assistance in providing the remaining refunds. Since we have no revenue for over 9 months, all of our resources have been used to provide refunds to students, but we did not expect a 100% denial rate. We are in a position where we cannot continue to complete the remaining refunds, due to cash limitations. I have attached a spreadsheet listing the remaining outstanding refunds."

[Emphasis added.]

- [16] Bylaw 25.1 requires institutions to possess adequate revenues and assets to meet their financial responsibilities. Bylaw 37.15 requires that refunds to students be paid within 30 days of the withdrawal from the institution.
- [17] The registrar responded to Mr. Honborg's letter by letter dated April 23, 2015. The registrar said the College's registration would be suspended on April 30, 2015, unless it could demonstrate within seven days that all necessary refunds were processed. The Agency acknowledges it received correspondence from the College following this letter, but its position is that none of that correspondence demonstrated that all necessary refunds had been processed.

- [18] The College responded to that letter with a number of emails dated the same day. In one of those emails, the College said its request for assistance was because "the [A]gency was the cause of the difficulties by implementing an unlawful, discriminatory policy." I assume the policy referred to is the federal government's regulation or the provincial government's response to that regulation.
- [19] That email went on to say it was "formal notice" that if its registration was suspended the College would seek redress in the British Columbia Supreme Court to reverse the suspension and recover damages. The College further alleged the Agency not only has a duty to assist students, it has a duty to assist institutions. Mr. Honborg characterized the Agency's actions as "heavy handed" and draconian, accused an agency official of being prejudiced towards the College and making "slandorous suggestions" and stated the Agency's suggestion that the College could not meet its financial obligations was "libelous".
- [20] On April 27, 2015, the Agency responded to the numerous emails from Mr. Honborg and, in its letter, offered to consider extending the date by which the College had to demonstrate compliance by confirming the refund of all student tuition. As of the date of the hearing, the College had not yet provided the confirmation requested by the Agency that student refunds have been processed.
- [21] On April 30, 2015, the plaintiffs filed a notice of civil claim against the Agency. That notice alleges the Agency was negligent because, among other things, it failed to approve the College's application for accreditation in a reasonable manner, failed to exercise reasonable care when implementing policies, wilfully interfered with the College's practices and delayed approvals when it knew the delay would cause the College to suffer harm and loss. As a result of that negligence, the plaintiffs seek damages and certain specific costs. They also seek "an order directing the Agency to approve accreditation of the College."
- [22] In part 3 of the notice of civil claim which sets out the "Legal Basis", the plaintiffs say the Agency owed it a duty of care. They also "plead and rely" on the Canadian Charter of Rights and Freedoms. I confirmed that no notice of Constitutional Question had been sent to the Attorneys General; moreover, there is no particularity attached to the Charter claim - not even a section is identified. I, therefore, find the constitutional claims are not properly brought and cannot be considered in these applications.
- [23] The Agency did not suspend the College until May 5, 2015. In a letter sent that day, the Agency stated the suspension was "based on [the College's] inability to comply with Bylaws 25.1 and 37.15." That letter again stated that the College's suspension could be lifted if it could "provide confirmation that all necessary refunds, being those owing longer than 30 days have been completed" by May 26, 2015. The letter also confirmed that failure to meet that deadline would result in cancellation of the College's registration.

- [24] In that letter, the Agency advised the College of its right to seek a reconsideration (the deadline for that is June 5, 2015). On May 26, 2015, the Agency again contacted the College seeking any evidence that the College had met the condition for reinstatement and indicating, again, that the Agency would consider a further extension to the deadline to provide a response to June 1, 2015. It also again reminded the College of the deadline to seek reconsideration and suggested an extension to that date could be requested.
- [25] The College's response to the Agency was that it was seeking a stay in court and would not comment further.
- [26] The Agency's legal counsel swore an affidavit and in it she says the Agency has received complaints about the adequacy of refunds received from the College. The College was notified of the complaints but in response sent correspondence saying "this matter is currently before the Supreme Court." The College offered no further information.
- [27] During the hearing Mr. Honborg confirmed that he was aware of the Agency's offer to extend the deadline to provide confirmation and of the right to seek reconsideration but that he consciously chose not to pursue those because he does not believe he can get a fair hearing because of the Agency's bias against the College. Other than his disagreement with the Agency's decision, there is no evidence to substantiate the claim of prejudicial treatment.

Applicable Legal Principles

- [28] The Agency submits the claim should be struck pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules as "disclosing no reasonable claim" and/or Rule 9-5(1)(d) as an abuse of the court's process. I will address abuse of process first.
- [29] Abuse of process as identified in Rule 9-5(1)(d) is a flexible doctrine. The court must take into account whether allowing the claim to proceed would violate the principles of "judicial economy, consistency, finality and the integrity of the administration of justice": *Willow v. Chong*, 2013 BCSC 1083 at para. 21. This doctrine encompasses situations where a claim is a collateral attack on an administrative decision that could be appealed or challenged with an application for judicial review. The Supreme Court of Canada in *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9 confirmed that "[t]he proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity No parallel action lies in tort" (see also *Cimaco International Sales, Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342 at para. 56 [Cimaco]). As long ago as 1999, this court recognized the impropriety of attacking administrative law decisions by way of a civil action in *Berscheid v. Ensign*, [1999] CanLII 6494 (B.C.S.C.), referred to in *Cimaco* at para. 42:

- [51] As a result of this distinction between judicial review and civil litigation, a party cannot seek a remedy statutorily provided for by judicial review process through civil proceedings. Such an evasion of the judicial review process is known as a collateral attack and is prohibited. Where the legislature clearly intends to confer jurisdiction on an appeal tribunal to hear and determine certain matters, the court lacks the jurisdiction to do so [citation omitted]
- [30] The court is not restricted to the pleadings when assessing abuse of process under Rule 9-5(1)(d). It may be appropriate to consider some evidence that is adduced for the purpose of characterizing the claim as abuse of process: *Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176 at para. 34.
- [31] With regard to Rule 9-5(1)(a), the issue is whether it is plain and obvious on the basis of the pleadings, and assuming the facts alleged in them are true, that the claim discloses no cause of action or that it has no reasonable prospect of success: *R. v. Imperial Tobacco Canada*, 2011 SCC 42 cited in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 17.
- [32] The court may not consider additional evidence but it may be appropriate to look behind allegations and subject the pleadings to a skeptical analysis. As stated by Madam Justice Fisher in *Willow v Chong*, 2013 BCSC 1083 at para. 19:
- [19] The rule that material facts in a notice of civil claim must be taken as true does not mean that allegations based on assumption and speculation must be taken as true. This was discussed in *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, where Dickson J. (as he then was) stated that "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven". In *Young v Borzoni*, 2007 BCCA 16, the court stated (at paras. 30-31) that great caution must be taken in relying on *Operation Dismantle* as a general authority that allegations in pleadings should be weighed as to their truth, but it is not fundamentally wrong to look behind allegations in some cases, and it may be appropriate to subject the allegations in the pleadings to a sceptical analysis. It was considered appropriate in *Young*, where the plaintiff made sweeping allegations of things like intolerance, deceit, harassment, intimidation and falsifying documents against the defendants, which the court concluded could only be viewed as speculation.
- [33] *Willow* was also an application to strike a civil claim brought against the Agency and, therefore, it is very helpful because it addresses the same legislative scheme. In that case, the Agency cancelled the registration and accreditation of an institution and sought an interlocutory and permanent injunction to stop it from operating. That institution was purporting to issue certificates for doctoral degrees implying the holder of a certificate could practice as a doctor in Chinese medicine. The Agency was successful in obtaining an injunction.

- [34] The institution commenced a civil claim alleging the agency had maliciously shut it down despite knowing the financial harm that would be visited upon the institution because of lost profits. The trial judge agreed with the Agency that the plaintiffs' claims all stemmed from the dissatisfaction with the decisions made pursuant to the Act against the institution.
- [35] In that case, the institution did specifically plead it suffered a breach of natural justice (as well as a breach of the Charter of Rights and Freedoms). However, the civil claim also alleged "malice, intent to interfere with contractual relations and intent to injure." The trial judge stated at para. 33: "[d]espite these allegations, I have concluded that substantively, the plaintiffs' claims against the Agency defendants are based on alleged errors that were either appealable under the [Act] or judicially reviewable under the Judicial Review Procedure Act, RSBC 1996, c 241." That was one basis upon which the application to strike was granted.

Analysis

- [36] I agree with the Agency that the claim must be struck as constituting both an abuse of process and as disclosing no reasonable claim. On behalf of the plaintiffs, Mr. Honborg freely admitted that he chose not to pursue any mechanism for internal review because, in his submission, no process conducted by the Agency could be fair. His pleadings and the statements he made in court allege bias, prejudice and discriminatory attitude against Agency officials. Other than his suspicion, there is no evidence on the record to give an air of reality to those accusations. Mr. Honborg admitted in court that his main complaint is that he believes the decision to suspend the College's registration was wrong; he wants the court to overturn it. He alleges many other things, but I am satisfied that, in substance, the civil claim is a challenge to the impending (at the time) suspension of the College. It is very telling that the notice of civil claim was filed April 30, 2105, even before the suspension occurred on May 5, 2015.
- [37] There can be no doubt that the claim is nothing more than a collateral attack on the Agency's statement of its intent to suspend the College and, ultimately, the suspension. The plaintiffs were fully aware of the reconsideration process but chose to ignore it "go straight to court." They intentionally evaded the internal mechanisms for review. In support of his claim that the Agency's review mechanisms would be a "waste of time", Mr. Honborg alleged certain facts about whether any application for reconsideration had been allowed and whether previously suspended institutions were "able to survive". The Agency filed evidence contradicting those claims.
- [38] Mr. Honborg claims, other than due to his perceived lack of fairness, he was compelled to seek redress in court because of urgency. The plaintiffs are concerned about being able to obtain accreditation before the start of the next school year in September 2015. Mr. Honborg stated that the 30 day reconsideration period was too long given that urgency. But it was pointed out that 30 days was the maximum time that reconsideration of a decision could be sought. The plaintiffs could have filed a request for reconsideration the day after the suspension and sought a decision urgently. Mr. Honborg refused to engage the process.

There is no civil cause of action and, even if an application for judicial review had been pursued, it could not have succeeded for the failure to pursue the statutory remedies.

- [39] I also find that the Agency has conducted itself in a reasonable manner. In its April 23, 2015 letter, the Agency informed the plaintiffs of exactly what could be done to avoid suspension and provided a deadline. The Agency then offered to extend that deadline if the College indicated it needed the extra time to respond. The College did not reply to that offer and it did not bring itself within compliance.
- [40] In its May 5, 2015 letter suspending the College's registration, the Agency again clearly identified what could be done to lift that suspension and by what date. It again set out the plaintiffs' opportunity to seek reconsideration. Even on the date of the deadline for the College to provide documents confirming refunds had been processed, the Agency again offered to consider another extension, if so requested. Instead, the College brought its application seeking a stay.
- [41] For all those reasons, I conclude the Agency has easily and clearly demonstrated on a balance of probabilities that the pleadings are an abuse of the court's process.
- [42] I also find the Agency has established that it is "plain and obvious" that the claim cannot succeed. As several cases noted above make clear, a public agency charged to act in the public interest (see. s. 3 of the Act) does not owe a private duty of care. No tort exists for "non-compliance with a statute". Merely invoking the language of negligence in a notice of civil claim does not substantiate that such a claim exists. I find it is beyond doubt the action launched by the plaintiffs is nothing more than an attempt to overturn the suspension, even before it was issued. Indeed, during the hearing, Mr. Homberg stated he did not care about the damages but wanted the court to force the Agency to issue accreditation to the College.
- [43] The plaintiffs allege the Agency owed a duty of care to ensure proper administration of the Act. They appear to seek damages as a result of not yet receiving accreditation and/or because of delays in approving registration. It is plainly obvious that there is no duty of care. The Agency exercises all its powers and duties in regulating the College and other institutions from the Act. Even the wording of the notice of civil claim itself implicitly acknowledges that relief sought flows from administrative law in that the plaintiffs seek "an order directing the Agency to approve of accreditation" which is akin to an order for mandamus; such an order is only available under the Judicial Review Procedure Act.
- [44] Moreover, the Agency is correct in pointing out that it would be inconsistent with the Agency's mandatory duties to protect the public interest in s. 3 to impose on it a private duty of care in favour of the very institutions that are to be regulated by the legislation.

- [45] One of the plaintiffs' complaints is that it sought access to a student refund fund established by the legislation. The plaintiffs say other institutions have been able to access those funds to meet refund obligations. In that way, it alleges that the Agency had a duty to financially assist the College. This is a misreading of the entire statutory scheme which is to protect consumers and the public interest by regulating standards for the conduct of institutions offering career training. The fund established by the Act is for the benefit of students: s. 15.
- [46] Having read all the evidence and considered all submissions of counsel and Mr. Honborg, I strike the plaintiffs' notice of civil claim pursuant to Rule 9(5)(1)(a) and (d).

The Application for a Stay

- [47] Since there is no longer a claim, the plaintiffs' application for a stay is now moot. However, I am satisfied that even if the application to strike had not been brought or was not successful, the plaintiffs have not established they are entitled to a stay for the reasons I now briefly review.
- [48] The test for granting a stay is well established and it requires the applicant to show the case in which the stay is sought raises a serious issue to be tried, that it would suffer irreparable harm if the stay is not granted and that the balance of convenience favours a stay: *RJR - MacDonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 311 at 334 and 347 - 349.
- [49] The threshold for meeting the first branch of the test is very low; so long as action is not frivolous or vexatious, the applicant passes this step. I agree with the Agency that the stay would fail on this ground alone.
- [50] On a preliminary note, the notice of civil claim was filed before the College was suspended and, therefore, the notice does not identify a "decision" to be stayed; it had not happened yet. In my mind, that is sufficient to meet the "frivolous and vexatious" test. But I also refer to and rely on the discussion earlier in this decision as to why the action discloses no reasonable claim, which is also relevant to whether a serious issue has been raised. In particular, Willow confirms that it is improper to seek damages in a civil claim against the Agency for claims that could be appealed under the statute or brought under the Judicial Review Procedure Act.
- [51] With regard to irreparable harm, the Agency says the plaintiffs have failed to adduce evidence or particulars to support its claim that it will suffer direct losses if the stay is not granted. Instead, bald assertions to that effect are made in the affidavits. I agree, but even if some evidence was adduced on that point, the purported "harm" could be completely avoided if the College could confirm that it is complying with the Agency's directions and statutory requirements regarding refunds.
- [52] Mr. Honborg emphasizes that, with regard to the refunds, he had been dealing directly with Agency's legal counsel about the difficulties the College was having processing a refund for a student in India. I have no reason to doubt that the College was experiencing difficulties

with that student, but the information the College itself provided to the Agency listed many more refunds that were not processed. That is more consistent with Mr. Honborg's April 15, 2015 letter in which he described general difficulty with cash flow and not just difficulty verifying certain students' identity.

- [53] Lastly, the balance of convenience does not favour granting a stay. I find that the irreparable harm from granting a stay greatly outweighs the possible harm that might occur on behalf of the plaintiffs (but which was not established in the evidence). Where a stay is sought restraining a government agency from acting in the public interest, there is a strong presumption of irreparable harm to the public: *British Columbia Teachers' Federation v. British Columbia*, 2014 BCCA 75 at paras. 20 - 21. In this case that harm is specifically identified in s. 3 of the Act (see discussion of the nature of the public interest in *Private Career Training Institutions Agency v. Prana Yoga Teacher College Inc.*, 2013 BCSC 17 at paras. 37 - 38).
- [54] For those reasons, I am satisfied on a balance of probabilities that the plaintiffs have not established that they could meet the test for granting a stay.

Conclusion

- [55] The defendant's application to strike the civil claim and dismiss the proceeding pursuant to Rule 9-5(1) is granted. This eliminates the plaintiffs' application for a stay but, in the alternative, if the claim had not been struck, I would have dismissed the stay application because the evidence does not establish on a balance of probabilities that the plaintiffs could meet any of the three steps of the test for granting a stay.

"Sharma J."

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