

FEDERAL COURT

BETWEEN:

OLUKAYODE ADEBOGUN

Applicant

and

CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Respondent

APPLICANT'S REPLY

PART I – STATEMENT OF FACTS

1. The Applicant relies on the facts as contained in his Application Record and summarized in his memorandum 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.
3. The Applicant notes that the Respondent's memorandum of argument emphasizes the need to make rules to ensure the election is fair, and that these rules were in place during the previous election for Consultant Directors. The Applicant does not challenge the Respondent's ability to make rules governing the election, nor their application in previous elections. Rather, the Applicant emphasizes that the issue is the *application* of the Respondent's rules, and rule making power, to him *in this particular election*.

Part III – STATEMENT OF ARGUMENT

A. The Respondent Mischaracterized the Test for Leave

4. The Respondent 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."¹ 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)*,² 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.

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 Respondent. All that must be demonstrated by the Applicant is that there is a chance of success on the judicial review.

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

²2009 FC 552 at paras. 6-7.

The Applicant submits that this is a low threshold that has been easily overcome in the case at bar.

B. Election law

9. The Respondent relies on *Harper v. Canada (Attorney General)*³ to support their contention that some restrictions on a candidate's ability to campaign are legitimate, and promote fairness by equalizing "the voices that can dominate the political discourse".⁴ For example, the Respondent justifies the decision prohibiting candidates from answering questions posed by 'third parties', including CAPIC, which is almost entirely composed of Society members, as "necessary to prevent the monopolization of an election and to prevent deprive opponents of a reasonable opportunity to speak and be heard".⁵

10. The Applicant agrees with this interpretation of *Harper v. Canada (Attorney General)*, and acknowledges that in some appropriate cases restrictions on campaigning may be legitimately needed to ensure a fair electoral process. However, the Applicant submits that the restrictions imposed on the Applicant's ability to campaign were not appropriate, because they were not directed at a party that was dominating the campaign dialogue. To the contrary, partially as a result of the region that the Applicant resides and works in, the Applicant had to overcome several obstacles just to ensure that he was heard in the debate. The Applicant lives and works in Regina, Saskatchewan where there are only 17 other Society members. The winners of the election were from both from areas where there is a high density of CSIC members such as in Montreal, Quebec (Dory Jade), and British Columbia (Eugenia Wang)., Candidates from such provinces have more access to Society members for campaign purposes. Due to his location in Regina, the Applicant already had less access to the electorate. Far from ensuring that candidates with less resources could campaign equally, the Respondent's actions simply served to further isolate the Applicant from the electorate, while advantaging those candidates who had larger personal networks.

³ [2004] 1 S.C.R. 827.

⁴ Respondent's memorandum of argument para. 98.

⁵ Respondent's Memorandum of Argument, at para. 110 [error in original].

11. Furthermore, the Respondent’s suggestion that the Applicant did not disagree that the restrictions on answering questions posed by third parties, is false. The Applicant clearly stated to the Respondent that he believed the rationale for the ruling was “questionable”, and explained to CAPIC that he was requesting removal of his answers to CAPIC questions solely because the Respondent had requested it.⁶

C. The Respondent’s Restrictions on the Applicant’s Campaign Are Unreasonable

12. The Applicant relies on his submissions contained in his memorandum of fact and law, and maintains that the Respondent has failed to establish that the restrictions imposed on the Applicant’s ability to campaign were reasonable.

13. For example, the Respondent’s maintain that it was reasonable to censor the Applicant’s campaign materials, requiring him to delete two sentences, which the Respondent claims are inaccurate. These statements raised legitimate election issues relating to the governance of the Society. The Applicant’s comment that “the current situation where board members set their own salary without members input is unacceptable in a democratic professional Society” accurately reflects his concern that Society members did not have any input into the salaries of Board members. The Respondent does not suggest that Society members do have any input into Board members’ salaries. Rather, the Respondent acknowledges that the Board approves the recommendations of the ‘compensation consultant’, without any input from Society members. The Applicant’s position is that Director’s compensation should be approved by members at the Annual General Meeting.⁷ The Respondent’s censoring of the Applicant’s concern regarding the compensation is therefore unreasonable.

14. The Applicant further notes that political speech “lies at the core of the guarantee of free expression” and “is the single most important and protected type of expression”.⁸ The Applicant maintains that Board members are setting their own salaries when they approve the compensation consultant’s recommendations without input from Society members.

⁶ Application Record, Affidavit of the Applicant, Exhibit “G”, p. 160 and 163.

⁷ Application Record, Affidavit of the Applicant, Exhibit “D”, p. 91.

⁸ *Harper v. Canada (Attorney General) supra* at paras. 10-11. Per McLachlin C.J., Major and Binnie JJ, dissenting.

While the Respondent is free to disagree with the accuracy of the Applicant's statement, this is precisely the type of disagreement that should be resolved through political debate, not censorship. The Respondent was censoring legitimate political speech during an election campaign. Given the importance of political speech and of allowing a full debate of the governance issues raised in the election, the Respondent has simply failed to show that their restrictions on the Applicant are reasonable.

15. Similarly, the Respondent has failed to demonstrate why the Applicant's self-promoting message could not be sent after the Applicant removed the link to his answers to CAPIC questions, as well as the sentence regarding the Director's salaries. The email to the Applicant simply stated that "in light of new information that has come to my attention since we last communicated I cannot approve your last message".⁹ The Respondent's memorandum states that the Applicant's self-promoting message continued to contain misleading information, but does not specify what information was misleading.¹⁰ To date, the Applicant does not know what part of his amended message was deemed to be misleading.

D. The Respondent's Actions Affected the Election Results

16. As set out in the Applicant's memorandum of fact and law, at paragraphs 84-85, election jurisprudence holds that once an Applicant establishes that a substantial irregularity has occurred, the onus shifts to the Respondent to show the irregularity did not affect the election result. The Applicant submits that the Respondent has not met their onus to establish their actions did not affect the election results.
17. While the Applicant was able to post his election platform on his website, when he attempted to reach out to Society members, through the Society's website, CAPIC's discussion board, or the use of self-promoting messages sent by the Society, he was prevented from doing so by the Respondent. In particular, the Respondent has not provided evidence to support the fact that the restrictions that they imposed on the Applicant did not disadvantage him. The Respondent did not address the impact on the

⁹ Application Record, Affidavit of the Applicant at para. 26.

¹⁰ Respondent's Memorandum of Argument, at para. 60.

Applicant's election results of not being able to send out his self-promoting message, which was arguably the most effective way to reach Society members. All three online forums in which the Applicant participated were attended by less than 60 people in total, including the Board of Directors and the candidates. Even the winning candidate, Dory Jade, expressed concern that he was not sure whether he was actually speaking to members, or just the other candidates and their staff.¹¹ The online forums were therefore not an effective way to communicate to the membership. Because his self-promoting message was not sent, he was denied his only chance to communicate his message to every single member of the Society.

18. As set out in the Applicant's memorandum of fact and law, the Applicant submits that the cumulative weight of the Respondent's actions constitute a substantial irregularity calculated to affect the results of the election. The Respondent's assertion that their actions against the Applicant did not affect the election results is speculative, and ignores the fact that the Respondent prevented the Applicant from using effective means to contact the membership of the Society at large.

PART IV – COSTS SUBMISSIONS

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

¹¹ Responding Application Record, Affidavit of John Koury, Exhibit "M" at p. 341.

PART V – ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of January, 2010.

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