

CITATION: Haramic v. College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario (Registrar), 2017 ONSC 5668
DIVISIONAL COURT FILE NO.: 381/17
DATE: 20170925

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: ELISABETH HARAMIC, Applicant/Moving Party

AND:

THE REGISTRAR OF THE COLLEGE OF REGISTERED PSYCHOTHERAPISTS AND REGISTERED MENTAL HEALTH THERAPISTS OF ONTARIO and THE COLLEGE OF REGISTERED PSYCHOTHERAPISTS AND REGISTERED MENTAL HEALTH THERAPISTS OF ONTARIO, Respondents/Responding Parties

BEFORE: Spies J.

COUNSEL: *Michael Gordner*, for the Applicant/Moving Party

Rebecca Durcan, for the Respondents/Responding Parties

HEARD at Toronto: September 11, 2017

ENDORSEMENT

The Motion

[1] The Applicant, Elisabeth Haramic, brings this motion to stay the April 20, 2017 decision (the "Decision") of the Respondent, the Registrar of the College of Registered Psychotherapists and Registered Mental Health Therapists in Ontario (the "College"), revoking her Certificate of Registration in the College ("Certificate"), pending the completion of her application for judicial review of the Decision before this Court, currently scheduled for December 20, 2017.

The Facts

[2] Ms. Haramic became a member of the College on April 8, 2015. On September 6, 2016, an individual, ("MS"), made a complaint to the College. Ms. Haramic was not aware of this complaint until she received a letter dated March 2, 2017 from the College advising her about a College investigation into the allegations made by MS. In that letter she was advised of 12 allegations made about her conduct and that the Registrar had submitted a Report of the College's investigation to the Inquiries, Complaints and Reports Committee (ICRC) to conduct an investigation, following which, the ICRC would make a decision which could include referring

specified allegations to the Discipline Committee for a hearing. She was also advised that, in addition, the Registrar had the ability to revoke her Certificate for "providing false or misleading information" on her application for registration.

[3] Ms. Haramic was given a copy of the Report and was advised that she had 30 days to provide a written response to the Report and to make any submissions regarding a possible administrative revocation of her Certificate.

[4] Ms. Haramic did respond in writing, without the benefit of legal advice, and her version of the facts and incidents with respect to the 12 allegations contrasted significantly with those set out in the Report. No further follow-up was requested of Ms. Haramic, no hearing was conducted, the matter was not referred to a panel or committee, and she was not provided with an opportunity to cross-examine or test any of the evidence relied upon by the College.

[5] On April 20, 2017, Ms. Haramic received the Decision and detailed reasons of the Registrar revoking her Certificate, the most serious penalty available to a College, "effective immediately", as a result of the Registrar finding that Ms. Haramic failed to make certain disclosures when she submitted her application for registration. Ms. Haramic was not given any opportunity to make submissions to the Registrar as to what the penalty should be in light of the Registrar's finding, although, as I will come to, the Registrar's powers on penalty are limited to revocation. There is no internal appeal available of that Decision and so Ms. Haramic's only recourse is to seek judicial review of the Decision in this Court.

[6] Ms. Haramic was also served with a Notice of Hearing dated May 25, 2017, advising her that the ICRC had referred specified allegations against her to the Discipline Committee of the College. Four of the allegations in the Notice of Hearing relate to the same alleged non-disclosure of information issues that the Registrar found and there are two additional complaints. I note that there is, therefore, a possibility of inconsistent results as the Discipline Committee could dismiss one or more of the four allegations and even if findings of guilt were made, may decide to impose a lesser penalty than that of revocation. When the Registrar was asked about this by Mr. Gordner, counsel for Ms. Haramic, she took the position that it did not matter what the Discipline Committee decided to do after a full hearing as her Decision to revoke Ms. Haramic's Certificate would still stand. It is the Registrar's position that if Ms. Haramic wishes to become a member of the College again, she must apply anew and meet the requirements as set out in O. Reg. 67/15: Registration under the *Psychotherapy Act, 2007*, S.O. 2007, c. 10, Sched. R, (the Registration Regulation).

[7] The Registrar gave detailed reasons for her Decision. Although she stated in her reasons that her analysis relied on information that was generally uncontested or admitted by Ms. Haramic and that she made no findings of credibility, she also stated that she was "able to assess at a general level, the strength and plausibility of the evidence before me." In my view the reasons for Decision of the Registrar make it clear that she made factual findings against Ms. Haramic that are very much disputed by Ms. Haramic. In particular, she rejected all of Ms. Haramic's explanations which she relied upon to justify her non-disclosure of the matters of concern to the Registrar.

[8] Without getting into the dispute in any detail, Ms. Haramic admitted that she only disclosed one of two complaints made against her to the Canadian Counselling and Psychotherapy

Association, which she explained was an inadvertent mistake. This explanation was rejected by the Registrar. Furthermore, the Registrar found that Ms. Haramic should have disclosed the detail of four other prior relationships when she made her application, which Ms. Haramic disputed. There is a serious question as to whether or not there was a positive duty to disclose these other relationships given the position of Ms. Haramic as to the nature of those relationships and the fact that they had never been the subject of a criminal or administrative finding of misconduct.

[9] In revoking Ms. Haramic's certificate the Registrar found that all she needed was "reasonable grounds" which she defined in the language set out in s. 4(1) (vii) of the Registration Regulation, which provides that in applying for a certificate an applicant must disclose "[a]ny other event that would provide reasonable grounds for the belief that the applicant will not practice psychotherapy in a safe and professional manner", what I would describe as the "basket clause". She went on to state:

"Reasonable grounds" does not mean that the College needs to prove that the events amount to professional misconduct. Rather, "reasonable grounds" means that there is a legitimate concern calling the applicant's character into question. This is a relatively low threshold and ensures that the College is informed about whoever applies for registration, and approves only qualified applicants. (Decision at p. 6, emphasis in original.)

[10] The Registrar revoked the Certificate on the basis that the Applicant provided false or misleading information in her application by failing to disclose that she: (a) had been the subject of a complaint by her professional association in 2011 and that a significant finding had been made against her; and (b) had sexual relationships and/or dual relationships with current and former psychotherapy clients.

Analysis

[11] Ms. Haramic has commenced a judicial review application in which she raises two aspects of the Decision for this Court to review: (1) the process by which the Decision was reached; and (2) the merits of the Decision itself. Ms. Haramic submits that the Decision was not only contrary to natural justice and procedural fairness, but was based on errors in fact and law, leading to an outcome that is manifestly unreasonable.

[12] On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application, which includes a stay of the order appealed from; see s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[13] Counsel agree that the test to determine whether a stay should be granted was laid down by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 43. According to that judgment, a motion to stay may be granted only if the moving party demonstrates that:

- a) there is a serious question to be determined;
- b) the applicant will suffer irreparable harm if the stay is not granted; and

- c) the balance of convenience favours the applicant.

Serious Question to be Tried

[14] Counsel agree that the threshold to establish the first prong of the test is a low one. This Court should not extensively review the merits but must determine that the issues raised are not frivolous or vexatious. It is the position of the College that there is no serious issue to be tried and that the Applicant's claim is frivolous and vexatious.

[15] The Respondents also take the position that because they act in the public interest, the Applicant may be required to meet a higher than usual standard. Ms. Durcan, counsel for the Respondents, submits that a substantial issue ought to be necessary when an injunction is brought against a public authority. She relies on *Metz v. Prairie Valley School Division No. 208*, 2007 SKQB 269, where the Queen's Bench stated, at para. 22, that:

The rationale for requiring the higher standard when seeking an injunction against a public authority is that the public authority represents the public interest, and should not be temporarily prevented from acting unless there is real merit to the claim being advanced.

[16] I note, however, that the court continued to state, in para. 22, that usually in such cases the facts are not much in dispute but:

In those cases which present complicated factual or legal issues which do not lend themselves to a preliminary assessment, a lower standard of "serious question to be tried" may be appropriate.

[17] For the reasons that follow, I find that the Applicant has met both standards. In my view there are serious questions as to whether or not the procedure followed by the Registrar, and in particular the fact that she made her Decision without affording Ms. Haramic with a full hearing, was contrary to natural justice and procedural fairness. I am also of the view that there may be a serious issue with respect to the low threshold applied by the Registrar in coming to her Decision which would, if in error, be an error of law. I come to these conclusions with respect to the process followed and the test applied, not the merits of Ms. Haramic's defences save to say that the defences raised by Ms. Haramic are not in my view frivolous or vexatious. I have also not considered whether or not s. 3(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 requires a hearing, given the Registration Regulation is silent on the point, as that issue was not argued by the parties.

[18] Section 3(2) of the: Registration Regulation states as follows:

An applicant shall be deemed not to have satisfied the registration requirements for a certificate of registration if the applicant makes a false or misleading statement or representation on or in connection with his or her application, and any certificate of registration issued to such an applicant may be revoked by the Registrar. [Emphasis added]

[19] The position of the College is that the Registrar, alone, has the statutory power to administratively revoke a certificate of registration when she believes that an applicant has provided false or misleading information in an application for registration. There is no need or requirement for the Registrar to refer the decision to the Registration Committee or hold a hearing before a decision is made.

[20] Ms. Durcan argues that Regulation does not impose any notice or procedural obligations on the Registrar before she can revoke a certificate of registration. She submits that this can be contrasted with other legislation which does impose such obligations. For example, a provision under the *Ontario College of Trades and Apprenticeship Act, 2009* provides that the Registrar must first provide notice to the person and provide the person with 30 days to make written submissions. I note that that statute also does not impose the requirement for a hearing.

[21] It is true that no process is set out in the *Psychotherapy Act* or the Regulations as to what procedure is to be used by the Registrar or what test she should apply. However, that in my view does not mean that the Registrar can adopt a procedure that does not accord with basic principles of procedural fairness and natural justice. Revocation of a member's certificate is the most serious penalty that can be imposed by the Discipline Committee. In my view, such a drastic remedy ought not to be imposed on a member without a full hearing. If, for example, the College's position were correct, a member of the College who had been practicing in good standing for 25 years could have her certificate revoked by the Registrar on the same basis without a hearing.

[22] In my view, the merits of the Ms. Haramic's defences to the allegations of non-disclosure requires findings of fact that will include an assessment of credibility and a determination of the relevance if any of the other relationships the Registrar found ought to have been disclosed. It will also require a finding of whether or not there was a duty to disclose these other relationships as the application form is arguably not clear on whether these types of matters even need to be disclosed. These questions, in my view, would be best determined in a full hearing allowing for the usual right of the parties to call evidence, cross-examine witnesses and make oral submissions.

[23] I appreciate that the College is statutorily mandated to protect and serve the public interest and that the College does this in part by setting registration requirements and regulating the conduct of psychotherapists in Ontario. However, it is significant in my view that when an applicant applies to become a member of the College, if the application is not accepted, it must be referred to a three-person panel of the Registration Committee of the College and the applicant is then entitled to a full hearing. It seems perverse that the Registrar would have the power to revoke a certificate, after it is granted, without a full hearing. Furthermore, the applicant may ask for a review of any adverse decision by the Health Professions Appeal and Review Board, a less costly process than coming to this Court for judicial review.

[24] When questioned by Mr. Gordner, the Registrar admitted that she could have referred the matter to a committee; I presume the Registration or Discipline Committee. She chose not to do so although the same issues are in fact going to be dealt with by the Discipline Committee. Once the Registrar decided to deal with the matter herself, her only option was to revoke Ms. Haramic's Certificate if she found, as she did, that Ms. Haramic had made material non-disclosures in her

application for a Certificate. Unlike the Discipline Committee, the Registrar has no other powers in these circumstances.

[25] The evidence from the College is that it is not the only regulator where this power to revoke a certificate is delegated to the Registrar by the Legislature. Apparently 8 or 9 of the 26 Colleges have similar provisions although in the case of the Royal College of Dental Surgeons of Ontario, such concerns are referred by regulation to a committee. In addition, the Ontario College of Trades also has this power. Furthermore, the evidence of the Registrar is that two other registrars of other Colleges have discharged their authority to revoke certificates in a similar fashion to that employed by the Registrar. I did not find this submission of any assistance as counsel concede that this will be the first time that this power is tested in this Court.

[26] For these reasons I am satisfied that there is a serious question to be determined on Ms. Haramic's application for judicial review, at least with respect to the process used by the Registrar in revoking Ms. Haramic's Certificate and the test applied. I would also characterize these as substantial issues.

Irreparable Harm

[27] In *RJR-MacDonald*, the Supreme Court of Canada interpreted "irreparable" as "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

[28] The College submits that the Applicant will not face irreparable harm should the stay not be granted largely because although the Applicant can no longer use the title "psychotherapist" or hold herself out as a member of the College, she can still provide the same services that she provided before she became a member of the College. The Respondents also argue that the claim that a stay would prevent further damage to the Applicant's reputation cannot be supported when a review of the public registry indicates that several of the same allegations are also listed against the Applicant and will be heard by the Discipline Committee.

[29] The Applicant has claimed that the revocation has already caused irreparable harm and that it will continue to do so. The evidence is clear that this matter was extensively reported in the Windsor area through the media and although I appreciate, as Ms. Durcan submitted, that some of the adverse impact on Ms. Haramic's reputation has occurred as a result of the same allegations pending before the Discipline Committee, the very fact that the Registrar revoked her Certificate clearly suggests that the Registrar has already found her guilty of four of the six allegations. Members of the community could not be expected to distinguish between the Decision of the Registrar and the presumption of innocence that Ms. Haramic still enjoys. No doubt this has had a serious adverse impact on Ms. Haramic's professional reputation and will continue to do so until she has an opportunity to have the Decision set aside and/or a full hearing on the merits before the Discipline Committee.

[30] The Registrar's Decision has also caused financial harm to Ms. Haramic as two of her sources of income; Homewood Health and one insurance company have severed their ties with her as a result of this matter. Ms. Haramic also describes the impact the revocation of her Certificate

has had on her community in her Affidavit filed in support of this motion. Although she can still provide the same services, clearly her ability to do so is adversely impacted by the fact that she is no longer licenced as a psychotherapist.

[31] In the *Law Society of Upper Canada v. Igbinsun*, [2011] L.S.D.D. No. 25 at para. 31, the background of the case is recited including the fact that the lawyer brought a motion to stay the orders of the hearing panel and appeal panel before the Divisional Court. In opposing the stay, the Law Society argued that there was no irreparable harm because the charges had already become public knowledge. The stay order was granted as Justice Lane found that there were serious issues of procedural fairness to be argued in the appeal and that further harm could come to the lawyer because once knowledge of the disbarment was disseminated to other lawyers, his clientele would be very hard to regain and his reputation inevitably further damaged. I find that this is exactly what has occurred here and will continue to occur.

[32] I would add that normally, with financial loss, the issue is whether or not it is quantifiable. In this case however, even if it were, the chance of success in recovering damages from the College is remote or non-existent. As such I am satisfied that Ms. Haramic is suffering irreparable harm as long as she is without her Certificate.

[33] In my view the damage to Ms. Haramic's reputation would be impossible to quantify and although it might be possible to quantify her financial losses, causation would be a difficult issue in light of the outstanding Discipline Committee hearing. Furthermore, any action for damages against the College would be virtually impossible to win. In this sense the damages are unquantifiable and uncollectible.

[34] For these reasons I am satisfied that Ms. Haramic has suffered irreparable harm.

Balance of convenience

[35] I agree with Ms. Durcan that my assessment of the balance of convenience requires that I take into account the fact that the College is mandated to serve and protect the public interest. Although the Registrar made some references to safety concerns in her Decision, and in particular whether or not Ms. Haramic's conduct in terms of non-disclosure called into question her ability to practice psychotherapy safely, reading her reasons as a whole, her primary concern seems to have been that she had found that Ms. Haramic had failed to disclose certain matters that she felt that she should have disclosed when she applied for registration.

[36] When it was expressly suggested to the Registrar in cross-examination that she felt that what Ms. Haramic had done was "unsafe," she responded that she felt that Ms. Haramic had "not disclosed information on her registration application that she should have." (Transcript of the Cross-examination of the Registrar at p. 8). This exchange makes it clear that the Registrar's real concern was the alleged non-disclosure, not that Ms. Haramic's current practice is unsafe. There is no evidence of any immediate harm to the public should Ms. Haramic's Certificate be restored pending the judicial review application. In fact arguably, as a member of the College, there is more protection for the public as Ms. Haramic is subject to the rules and regulations and standards of practice of the College which has the power to supervise her practice. That would not be the case

if, as the College suggests, she continues to provide the same psychotherapy services without a Certificate.

[37] Ms. Durcan submitted that this motion is somewhat analogous to an application by members of the BC Veterinary Medical Association for an injunction restraining the Association from proceeding with disciplinary hearings brought against them by the Association. The application was dismissed because it would have been inappropriate and improper to stay the disciplinary hearings: *Bajwa et al. v. B.C. Veterinary Medical Association et al.*, 2006 BCSC 137 at para. 6. In my view that case is completely distinguishable as Ms. Haramic is not seeking to prevent a hearing-she is seeking one.

[38] For these reasons I find that the balance of convenience favours Ms. Haramic and her request for a stay. Ms. Haramic's reputation continues to deteriorate, and her career and ability to earn a living are continuously in jeopardy.

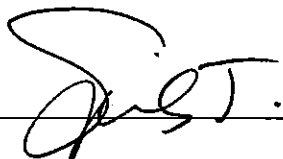
Disposition

[39] For these reasons I grant the motion and order that the Decision of the Registrar is stayed until the final disposition of the judicial review application.

Costs

[40] Having succeeded on the motion I find that Ms. Haramic is entitled to costs on a partial indemnity basis. Mr. Gordner provided a Costs Outline with partial indemnity costs totaling just over \$34,000; double Ms. Durcan's costs of \$17,000 all in. Ms. Durcan submits that the costs claimed are simply too high and that the hours and quantum are vastly disproportionate to the issues. She points out that although Mr. Gordner is an experienced criminal lawyer, he conceded that he does not practice in this area and the Respondents should not be responsible for his education in this area of the law. I agree.

[41] In my view, considering all of the relevant factors, an appropriate amount for costs is \$15,000, payable by the Respondents to the Applicant within 30 days.



Spies J.

Date: September 25, 2017