Federal Court Cour fédérale

Date: 20191218

Dockets: IMM-5108-18
IMM-5109-18

Citation: 2019 FC 1628

Ottawa, Ontario, December 18, 2019

PRESENT: Mr. Justice Gascon

Docket: IMM-5108-18

BETWEEN:

CARLITO BENITO

Applicant

and

IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL

Respondent

Docket: IMM-5109-18

AND BETWEEN:

CHARLES BENITO

Applicant

and

IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Immigration Consultants of Canada Regulatory Council [ICCRC] is investigating allegations that Mr. Carlito Benito [Carlito] and his sons, Mr. Charles Benito [Charles] and Mr. Carl Mark Benito, who are immigration consultants, have assisted clients in illegally staying in Canada.

[2] The ICCRC is the governing body for individuals who, for payment, provide advice or representation on immigration matters in Canada and who are not otherwise subject to regulation by virtue of membership in a provincial law society or the *Chambre des notaires du Québec*. As a result of the designation of the ICCRC by the Minister of Citizenship and Immigration [Minister] under subsection 91(5) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], ICCRC members in good standing may represent or advise clients concerning matters relating to that legislation. Being a federal not-for-profit corporation, the ICCRC is governed by the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 [*CNFPCA*].

[3] On October 2, 2018, the Discipline Committee of the ICCRC [Discipline Committee] granted an urgent motion filed by the ICCRC for the interim suspension of the Benitos' right to act as immigration consultants [Decision], pending the completion of the investigation on their alleged activities and a hearing on the merits before a panel of the Discipline Committee.

[4] In separate applications, Carlito and Charles [together, the Applicants] now seek judicial review of this interlocutory ICCRC Decision. They claim that the one-member panel having issued the Decision was not lawfully constituted pursuant to section 158 of the *CNFPCA*; they allege that it is contrary to the *CNFPCA* for a non-director to be a member of the Discipline Committee and that a one-member panel cannot determine a disciplinary matter under the *CNFPCA*. They also contend that the urgent suspension motion underlying the Decision was premature. They further submit that the ICCRC's disciplinary process is in breach of natural justice under the common law, or in breach of fundamental justice under paragraph 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*] or section 7 of the *Canadian Charter of Rights and Freedom*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*]. They ask this Court to dismiss the Discipline Committee's Decision.

[5] The ICCRC responds that the Applicants' applications for leave and for judicial review should be dismissed for prematurity, as the administrative disciplinary process before the Discipline Committee remains in progress and is not completed. The ICCRC also denies that the one-member panel was improperly constituted under the *CNFPCA*. The ICCRC maintains that the urgent motion was brought before the Discipline Committee in accordance with the applicable by-laws and rules. The ICCRC further states that the process followed to reach the Decision did not breach any principles of natural or fundamental justice and that the Applicants had a fair process. For his part, the Minister simply argues that he should be removed as a responding party to these proceedings.

[6] The main issues to be determined by this Court on these applications for judicial review are as follows:

A. Are these applications premature?

B. Was it contrary to the *CNFPCA* for the panel of the Discipline Committee to be composed of a single member who was not a director of the corporation?

C. Was the urgent motion for an interim suspension premature?

D. Did the ICCRC's disciplinary process breach natural or fundamental justice?

[7] For the reasons that follow, I will dismiss these applications. First, I agree with the ICCRC that the applications are premature since the process before the Committee is in progress and, absent exceptional circumstances, the Court should not interfere with an on-going administrative process until it has been completed. This, in itself, would be sufficient to reject the two applications. Furthermore, I conclude that, under the *CNFPCA*, a panel of the Discipline Committee could be composed of a single member who was not a director of the corporation. I am also satisfied that the urgent motion for an interim suspension was not premature. Finally, I find no breach of fundamental justice or of procedural fairness in the ICCRC's disciplinary process leading to the Decision. There are therefore no grounds to justify this Court's intervention.

II. <u>Background</u>

A. *The factual context*

[8] The ICCRC brought disciplinary proceedings against the Applicants on the basis of allegations that the three members of the Benito family were involved in an illegal immigration scheme. The scheme can be briefly described as involving the Applicants transferring large amounts of money (up to $20,000) to their clients' bank accounts in order for them to prove to the immigration officials that their clients have sufficient funds to live and study in Canada, as is required by section 220 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 to obtain a study permit. After receiving the necessary paperwork proving that the money was in their account, the clients would, often on the same day, transfer the money back to the Applicants who would then charge them a fee. As part of this scheme, the Applicants' clients would submit an application to attend the Academy of Learning in Alberta. None of the Applicants' fifty-four clients who had obtained study permits ever attended the school. In addition, it is also alleged that the Applicants employed foreign nationals without work permits.

[9] Three complaints concerning the Applicants were received by the ICCRC between August 2016 and June 2018. The first two were from clients of the Applicants who complained about a scheme similar to the one described above. The third was filed by another immigration consultant on behalf of one of her clients who had sought the assistance of the Applicants in relation to a subsection 44(1) report for inadmissibility. The Applicants failed to respond to her

many inquiries, and the client was similarly unable to reach the Applicants to obtain the necessary background information.

[10] On August 24, 2018, the registrar of the ICCRC issued a Notice of Urgent Motion for Interim Suspension [Urgent Motion], returnable before the Discipline Committee on September 14, 2018. This Urgent Motion named the two Applicants and Mr. Carl Mark Benito. It sought the suspension of the Applicants' membership on the basis that there were reasonable grounds to believe that their continued registration as ICCRC members may result in harm to any member of the public or may undermine the public's confidence in the profession and the profession's regulator.

[11] On September 14, 2018, the parties appeared before a one-member panel of the Discipline Committee. The member agreed to adjourn the proceedings until counsel for Charles was able to participate. However, the panel proceeded to grant an "interim-interim" suspension order commencing on September 18, 2018, and staying in place until the panel of the Discipline Committee reconvened to hear the Urgent Motion.

[12] On September 14, 2018, the Applicants filed an application for leave and judicial review of the "interim-interim" order. On September 17, 2018, they also filed a motion seeking injunctions staying the "interim-interim" order pending the disposition of their application for judicial review and enjoining the Discipline Committee from continuing its proceedings on October 2, 2018. On that date, the Discipline Committee was scheduled to hear the ICCRC's Urgent Motion seeking an interim suspension of the Applicants' right to act as immigration

consultants. On September 20, 2018, this Court heard the motion for injunctions and dismissed it from the bench with reasons to follow. In his reasons issued on September 24, 2018 (*Benito v Immigration Consultants of Canada Regulatory Council)*, IMM-4540-18, September 24, 2018 [*Benito*]), Mr. Justice Annis recognized that the Court had jurisdiction over the matter based on *Zaidi v Immigration Consultants of Canada Regulatory Council*, 2018 FCA 116 [*Zaidi*] and *Watto v Immigration Consultants of Canada Regulatory Council*, 2018 FC 890. However, the Court found that the administrative process was ongoing and that it should wait to have a more sufficiently developed record to properly decide the issues advanced by the Applicants.

[13] On October 2, 2018, the Discipline Committee reconvened to consider the Urgent Motion, and rendered the Decision that is the subject of the present applications for judicial review.

B. *The ICCRC Decision*

[14] The Discipline Committee provided its reasons for the Decision on November 22, 2018.

[15] After reviewing the parties' submissions, the panel member determined that, pursuant to subsection 10.1(iv) of the *ICCRC Discipline Committee Rules of Procedure* [Committee Rules], the Applicants might have been engaging in serious misconduct that threatened current and potential clients and/or the public. To arrive at this conclusion, the panel member found that five factors were determinant, which read as follows:

> 1. The evidence was compelling based on the allegations made against the Member and this equivalates to reasonable grounds.
>
> 2. The evidence is credible, even though it is hearsay, as the source is a reliable source. This information was given by the courts, as so investigated by a Peace Officer whom is an authoritative person and credible source.
>
> 3. The Member breached the Order dated September 14, 2018. By his own admission, he did not directly communicate to his clients that he was suspended by ICCRC, which was part of the reason for his adjournment being granted. He further did not submit a new Designation of an Authorized Representative or Responsible Person Form to ICCRC by the deadline given in the Order.
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> 4. The timeline that ICCRC took to act in this matter was reasonable and without delay.
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> 5. There is evidence that pre-dates the article published in the CBC Edmonton which bears similarities to the article.

III. Analysis

A. *The prematurity of the applications*

[16] As a preliminary matter, the ICCRC submits that the Applicants have not exhausted all other available remedies before the administrative decision-maker as they could have appealed their interim suspension to the ICCRC Appeal Committee within 30 days of receipt of the Decision, pursuant to section 33.1 of ICCRC's By-Law 2017-1 [By-Law]. In addition, the investigation and disciplinary proceedings in relation to the Applicants' alleged activities continue and are not completed. As a result, says the ICCRC, the Applicants have not exhausted all their rights under the administrative process before pursuing their recourse before the courts,

and this Court should therefore refuse to hear their applications for judicial review (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*]).

[17] I agree with the ICCRC and find that, in the circumstances, the applications for judicial review should be dismissed for prematurity.

[18] The principle of judicial non-interference with on-going administrative proceedings in the absence of "exceptional circumstances" is well established. In essence, it provides that the administrative process must be completed before an applicant can seek relief from the courts and ask a motion judge to stop such process in its tracks (*Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 at para 46). I can do no better than reproduce the passages from *CB Powell* where the Federal Court of Appeal [FCA] aptly summarized the rationale for this principle in the context of judicial reviews, at paragraphs 30-33:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point […].
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional

> circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway […]. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience […]. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge […].
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high […]. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted […]. [T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
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> [Emphasis added; citations omitted.]

[19] This principle of judicial restraint in the context of an on-going or pending administrative proceeding was regularly recognized by the courts. When legislation sets out an administrative process consisting of a series of decisions and remedies, it must be followed to the end, barring

exceptional circumstances, before the courts may be asked to intervene. The parties must exhaust all adequate remedial recourses when Parliament has given administrative decision-makers the authority to make decisions rather than courts of law: ". . . absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (*CB Powell* at para 31). Therefore, the Applicants cannot by-pass the process established in the ICCRC disciplinary procedures by making an application for judicial review (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 51; *Public Service Alliance of Canada v Canada (Treasury Board)*, 205 FTR 270, 2001 FCT 568 (CanLII) at para 65, aff'd 2002 FCA 239).

[20] In this case, the Applicants should have followed the internal appeal mechanism available to them and the ICCRC disciplinary process. Their failure to do so is sufficient to dispose of these applications for judicial review. I would add that there is further support for refusing to entertain the applications for judicial review based on the Applicants' previous behaviour. Carlito had previously filed an application for leave and judicial review and brought an interlocutory injunction motion before this Court contesting his "interim-interim" suspension, and it was dismissed by Mr. Justice Annis on grounds of prematurity (*Benito* at paras 21-22). His pattern of behaviour of turning to this Court without exhausting the internal appeal mechanisms is the type of behaviour that is discouraged in *CB Powell*.

[21] The Applicants argue that their applications for judicial review should nonetheless be allowed to proceed at this point in time. They submit that the issues they raise "go to the very

existence" and to the legality of the administrative tribunal, and that this Court could find that the Discipline Committee is without jurisdiction, or that the disciplinary process breaches the rules of natural justice. They add that, in either event, proceeding with judicial review at this point in time may save a lot of time and expenses to the parties. They claim that their case fit with the type of "exceptional circumstances" referred to in *CB Powell*. I am not persuaded by these arguments. I instead find that the present situation does not belong with the exceptional circumstances identified by the FCA in *CB Powell*, which could have justified the Court to intervene at this stage. I observe that the cases relied upon by the Applicants predate *CB Powell* or have been overtaken by this FCA decision.

[22] I acknowledge that the doctrine of exhaustion of administrative remedies contemplates certain exceptions. However, the range of situations that allow for the general rule to be set aside are narrow and the threshold for exceptionality is high (*CB Powell* at para 33). Exceptional circumstances may emerge in very rare decisions where a court grants a writ of prohibition or an injunction against administrative decision-makers before or after the administrative process has begun. Conversely, the fact that an important legal issue is at stake or that concerns about procedural fairness arise do not allow the Court to expand the exception to the rule against the judicial review of interlocutory administrative decisions (*CB Powell* at para 33; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 683 at para 35). In addition, the presence of challenges raising jurisdictional grounds does not open the door to early recourses to the courts (*CB Powell* at paras 39-40):

> [39] When "jurisdictional" grounds are present or where "jurisdictional" determinations have been made, can a party proceed to court for that reason alone? Put another way, is the presence of a "jurisdictional" issue, by itself, an exceptional

> circumstance that allows a party to launch a judicial review before the administrative process has been completed?
>
> [40] In my view, the answer to these questions are [*sic*] negative. An affirmative answer would resurrect an approach discarded long ago.

[23] In the present case, as in *CB Powell*, there is an administrative disciplinary process at the ICCRC, and this process must be followed until completion, unless exceptional circumstances exist. In this administrative process, Parliament has assigned decision-making authority to the ICCRC and various administrative officials, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing a recourse to the courts, even on so-called "jurisdictional" issues relating to the Discipline Committee's power to act or on procedural fairness concerns. For all those reasons, the applications for judicial review must be dismissed for prematurity as the ordinary administrative process outlined in the ICCRC by-laws and rules ought to be followed, rather than this Court pre-empting the Discipline Committee's jurisdiction.

[24] For completeness, I will nonetheless deal with the Applicants' substantive arguments in support of their applications for judicial review. For the reasons detailed below, I am not persuaded by any of them.

B. *Section 158 and the panel composition*

[25] The Applicants first submit that, pursuant to section 158 of the *CNFPCA*, the Discipline Committee cannot consist of a non-member or a non-director of the corporation, as a plain

reading of that section does not give any disciplinary power to non-members. The Applicants note that while the provision is similar to provincial statutes regulating not-for-profit corporations, they have been unable to identify any cases interpreting section 158. The Applicants further submit that the term "committee" used in section 158 ordinarily means a group of individuals and cannot be limited to one member. As the member made her determination on the Urgent Motion by herself, the Applicants claim that the disciplinary body was contrary to the *CNFPCA* and that the Decision is invalid.

[26] I am not persuaded by the Applicants' arguments and I am instead satisfied that the Discipline Committee did not err in making the Decision and was validly constituted. Section 158 of the *CNFPCA* provides as follows:

The articles or by-laws may provide that the directors, the members or any committee of directors or members of a corporation have power to discipline a member or to terminate their membership. If the articles or by-laws provide for such a power, they shall set out the circumstances and the manner in which that power may be exercised.	Les statuts ou les règlements administratifs peuvent autoriser le conseil d'administration, les membres ou un comité du conseil ou des membres à prendre, contre un membre, des mesures disciplinaires allant jusqu'à son exclusion. Le cas échéant, ils prévoient également les circonstances justifiant la prise de telles mesures et les modalités applicables.

[27] Pursuant to section 158 of the *CNFPCA*, the ICCRC can therefore make by-laws that give power to discipline members of the organization and set out the circumstances and manner in which that power should be exercised. In addition, section 158 expressly sets out that both directors and members have the power to discipline another member.

[28] In my view, there is no doubt that the composition of the panel for the interim suspension hearing and the Decision respected the applicable regulatory framework. Based on a plain reading of section 158 of the *CNFPCA*, the ICCRC has the right to pass by-laws that may provide for the discipline of its members. That is exactly what the ICCRC has done. The ICCRC has exercised this authority in adopting the By-Law, which was approved by the members in November 2017. As the Court recently stated in *Watto v Immigration Consultants of Canada Regulatory Council*, 2019 FC 1024 [*Watto 2*], "[a]s long as a corporation that chooses to adopt articles or by-laws providing for a power to discipline members sets out in those by-laws 'the circumstances and the manner in which that power may be exercised', section 158 of the CNFPCA is complied with" (*Watto 2* at para 41).

[29] Section 31.7 of the By-Law provides the Discipline Committee with the power to order interim suspensions "at any time", if it is necessary to protect the public. The section expressly states that the person subject to a complaint must be given a fair opportunity to present its reasons for opposing an application for interim suspension. Section 47.1(j) of the By-Law further establishes that individuals are not eligible to serve as a director if they are a member of the Discipline Committee. In other words, the ICCRC has determined that directors of its organization cannot serve as members of the Discipline Committee; conversely, it is implied that non-directors can act as members of such committee. In addition, section 31.5 of the By-Law empowers the Discipline Committee to adopt rules of procedure to govern its disciplinary proceedings. The Discipline Committee exercised this power in adopting the Committee Rules. More specifically, regarding the composition of the Discipline Committee, section 11.2 of the

Committee Rules expressly provides that a single member of the Committee may "hear and determine any procedural and substantive matter in an urgent motion".

[30] In this case, the member of the Discipline Committee who heard and decided the Urgent Motion was not a director and she could hear the matter alone pursuant to rule 11.2 adopted by the Discipline Committee.

[31] It should also be noted that this Court has already concluded that non-members of the ICCRC can sit on a panel of the Discipline Committee pursuant to section 158 of the *CNFPCA*. In *Watto 2*, Mr. Justice Norris further determined that it was correct for the Discipline Committee to conclude that Parliament did not intend to impose a specific composition for this committee (*Watto 2* at paras 29-42).

[32] As correctly pleaded by all parties, the basic rules of statutory interpretation require reading the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21; see also *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23 and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26). In the present case, I find that these tools of statutory interpretation — the plain and grammatical meaning of the words, the statutory context and the legislative intent — all point inexorably to the conclusion that section 158 of the *CNFPCA* and the ensuing By-Law and Committee Rules allowed the one-member panel of the Discipline Committee to hear and decide the Urgent Motion and to render the Decision. Furthermore, as

pointed out by the ICCRC, subsection 33(2) of the *Interpretation Act*, RSC 1985, c I-21 provides that "[w]ords in the singular include the plural, and words in the plural include the singular". So, contrary to the Applicants' arguments, this principle of interpretation contemplates that "members" used in section 158 of the *CNFPCA* also means "member", and that the ICCRC could adopt by-laws and rules, as it did in this case with section 31.7 of the By-Law and section 11.2 of the Committee Rules, giving a single person the power to discipline a member in the context of urgent motions.

C. ***The prematurity of the Urgent Motion***

[33] As a second argument in support of their applications for judicial review, the Applicants submit that the Urgent Motion at the source of the Decision was premature. They submit that an urgent interim order such as the Decision can only be granted where there is a hearing pending on a complaint.

[34] I do not agree. None of the arguments advanced by the Applicants persuade me that the Discipline Committee could not be seized of the Urgent Motion in October 2018. Contrary to the Applicants' submissions, a hearing under section 31.7 of the By-Law does not require that the investigation be completed or that a complaint be formally referred by the Complaints Committee to the Discipline Committee, and the Applicants have not referred the Court to any precedent or compelling authority that would support such an interpretation. Section 31.7 simply says that, "at any time", the Discipline Committee may order suspension or restrictions on a member "pending the outcome of a hearing on the merits of the complaint", if it is satisfied that

denying the order may result in harm to the public and that the person subject of the complaint has been given a fair opportunity to oppose the application. It therefore suffices that a complaint has been made. Here, there were three ongoing complaints against the Applicants that were cited in the Decision. Furthermore, the Applicants had a full opportunity to present their reasons challenging the Urgent Motion and to contest the evidence submitted by the ICCRC. Nowhere does the By-Law say or imply that a hearing must be pending. On a plain reading of section 31.7 of the By-Law, I have no hesitation to conclude that the Urgent Motion was not premature.

[35] A plain reading of the provision also accords with the clear purpose of the section, which is to protect the public from harm that may result from allowing an ICCRC member to continue to offer services until the complaints and disciplinary process have come to term. In this case, I agree with the ICCRC that the suspension motion was timely considering the seriousness of the allegations faced by the Applicants.

D. *Breach of natural justice*

[36] Finally, the Applicants submit that the disciplinary procedures provided for in the ICCRC's By-Law breach their right to natural justice insofar as they do not allow any procedural safeguards, such as the right to summon a person, to cross-examine a witness, or to compel the production of evidence. Furthermore, they claim that there are no provisions in the *CNFPCA* allowing a consultant to breach solicitor-client privilege in order to defend themselves against a disciplinary proceeding. In this regard, the Applicants submit that the disciplinary procedures do not allow the Applicants to make a full and complete defence against the allegations leveled

against them. Moreover, the Applicants assert in their Further Memorandum of Argument that the *CNFPCA* is in breach of natural justice since it fails to protect the "legal-advice privilege" that, according to them, apply to immigration consultant-client communications. They argue that this privilege is applicable where the consultant is providing legal advice concerning the *IRPA* and the *Citizenship Act*, RSC 1985, c C-29. The Applicants rely on case law from various provincial courts, as well as the definition of privilege provided by the Supreme Court of Canada [SCC] in *Descoteaux et al v Mierzwinski*, [1982] 1 SCR 860 and in various dictionaries, in support of their alleged privilege.

[37] Again, I am not convinced by the Applicants' arguments.

[38] It must be remembered that the Applicants seek judicial review of the Decision of the Discipline Committee to issue an interim suspension. The procedural fairness arguments advanced by the Applicants can only relate to the process that led to that Decision. To the extent that the Applicants challenge hypothetical breaches to procedural fairness that may or may not happen at another stage of the disciplinary process or later in the Discipline Committee's proceedings on the merits, these arguments cannot be accepted at this stage.

[39] When the duty of an administrative decision-maker to act fairly is questioned or a breach of fundamental justice is invoked, it requires the reviewing court to verify whether the procedure was fair having regard to all of the circumstances (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18;

Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at paras 23-27. In conducting this exercise, the reviewing court is called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54).

[40] Whether a decision is procedurally fair must be determined on a case-by-case basis. It is well recognized that the requirements of the duty of procedural fairness are "eminently variable" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79) and "[do] not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53): the nature and extent of the duty will fluctuate with the specific context and the various factual situations dealt with by the administrative decision-maker, as well as the nature of the disputes it must resolve (*Baker* at paras 23-27; *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 at para 115). As the FCA eloquently expressed it in *CPR*, "[n]o matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at para 56).

[41] Therefore, the real question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is whether, taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered the parties a right to be heard and the opportunity to know and

respond to the case against them (*Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54).

[42] I do not detect any breach of procedural fairness in the way the disciplinary process leading to the Decision has been handled. The ICCRC's Code of Profession Ethics expressly recognizes a member's right "to defend allegations made against [them] in a court or administrative tribunal (including a disciplinary proceeding of the ICCRC)". Furthermore, section 31.7 of the By-Law sets out various procedural safeguards including providing the opportunity for the Applicants to make submissions. In fact, in this case, the Applicants have availed themselves of that opportunity and have even cross-examined the lead investigator who testified in support of the interim suspension. I further observe that, for the purposes of the Urgent Motion, the Applicants did not ask the panel of the Discipline Committee to exercise any powers to compel witnesses to testify, to obtain documentation or evidence or to order cross-examination. Similarly, no issue of legal-advice privilege arose in the process leading up to the Decision.

[43] I am satisfied that the procedural safeguards in place at the time of the Decision and in the process followed by the Discipline Committee on the Urgent Motion were amply sufficient to give the Applicants the high level of procedural fairness they were entitled to. I am not convinced that the Discipline Committee breached any principles of procedural fairness or natural justice. To the contrary, the Applicants had a fair and just process and I conclude that they knew the case they had to meet and had a full and fair chance to respond. Further to my review of the Decision and of the Applicants' submissions, I find that the Applicants have been

unable to explain how their right to natural justice or procedural fairness was breached during the interim suspension hearing leading to the Decision. I underscore that the Applicants have not offered to the panel of the Discipline Committee any evidence to counter or deny the allegations raised by the ICCRC regarding their activities. I further note that they have not asked to summons non-member witnesses or to compel the production of documents as part of the hearing on the Urgent Motion. In addition, the Applicants filed no evidence before the Discipline Committee to support their *Bill of Rights* or *Charter* arguments.

[44] Reviewing courts do not assess questions of procedural fairness in a vacuum, and it is not appropriate, at this time, to consider hypothetical breaches of procedural fairness or fundamental justice that may occur at the hearing on the merits before the Discipline Committee. If such issues eventually arise, the Applicants will have to first raise them before the panel hearing their case. Should the panel refuse to allow for the procedural safeguards the Applicants believe necessary to present a full and complete defence to the allegations, they will have the opportunity to subsequently seek to judicially review the Decision, with a full record in support of that application. The comments of Mr. Justice Noël in *Girouard v Canada (Attorney General)*, 2017 FC 449 are worth mentioning on this issue:

> [42] As seen above, the case law referring to prematurity and the "exceptional circumstances" exception is clear: issues of bias, jurisdiction, procedural fairness, and constitutionality do not have to be placed in a vacuum; without decisive evidence to support them, they do not warrant judicial intervention. Paragraph 33 of *Powell* is clear.
>
> > [33] Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process

> allows the issues to be raised and an effective remedy to be granted …

[45] I now briefly turn to the Applicants' argument on the legal-advice or solicitor-client privilege, essentially developed in their Further Memorandum of Argument of July 2019 and at the hearing before this Court. In essence, the Applicants submit that the legal-advice or solicitor-client privilege extend to immigration consultants under the common law, and claim that, by failing to recognize it, the ICCRC's disciplinary process breaches fundamental justice.

[46] I agree with the ICCRC that this is not a matter that this Court should consider and address at this time, for one simple reason: the legal-advice privilege of immigration consultants was not at issue in the context of the Urgent Motion nor was it a factor in the Decision of the Discipline Committee. I acknowledge that the Applicants raised, albeit briefly, the matter in their other written submissions supporting their applications for judicial review before this Court. However, the question of the applicability of legal-advice privilege to information disclosed by a client to an immigration consultant did not arise as part of the Urgent Motion or in the Decision. In terms of evidence, the Discipline Committee only considered the evidence provided by Ms. Natalie Wruck, the ICCRC's investigator, to suspend the Applicants on an interim basis. No issue of legal-advice privilege was invoked by the Applicants before the Discipline Committee and the Applicants only advanced the legal-advice privilege issue on a hypothetical basis. In the Urgent Motion, the ICCRC did not request or compel the production of, nor did the Applicants purport to rely on, any communications that the Applicants alleged were covered by any legal-advice privilege. There are no documents in dispute on which the Applicants, or their clients, claimed legal-advice privilege. The questions raised by the Applicants with respect to the legal-

advice privilege are therefore purely theoretical and hypothetical. In these circumstances, it would not be appropriate for the Court, without a sufficient record before it, to make the determination sought by the Applicants on the existence, or non-existence, of a legal-advice privilege for immigration consultants, and to assess whether this could amount to a breach of fundamental justice or procedural fairness. This issue could perhaps arise later in the disciplinary process before the Discipline Committee, if the Applicants effectively invoke the alleged legal-advice privilege, but it is not the case here with respect to the Urgent Motion and the Decision.

[47] In short, the Applicants are raising an issue that was not before the Discipline Committee and therefore was not addressed in the Decision. The general rule is that new issues which could have been raised before the administrative decision-maker should not be considered on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*] at paras 22-26; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*] at paras 37-47).

E. *The Minister as a party*

[48] The Minister requests that he be removed as a party to these applications for judicial review and takes no position on the merits or outcome of the present case. The Applicants do not contest the Minister's request.

[49] The Minister advances three main arguments in support of his request to be removed as Respondent. First, the Minister argues that Rule 104(1)(a) of the *Federal Court Rules*, SOR/98-

106 [Rules] provides this Court with the discretion to remove an unnecessary party. Second, the Minister submits that he has nothing to contribute to these applications, which exclusively concern a Decision of the ICCRC's Discipline Committee, a self-governing regulatory body. Third, the Minister asserts that in any case, the appropriate Respondent, the ICCRC, is already a party to the case and is actively defending it.

[50] The Minister argues in its written and oral submissions that despite Mr. Justice Norris' decision to keep the Minister as a party in *Watto 2*, this Court should allow his removal request under Rule 104(1)(a) (*Watto 2* at paras 12-18). He asserts that this rule should govern the removal of any unnecessary party to the case, and that the decision in *Watto 2* can be distinguished on the basis that Rule 104(1)(a) and this Court's previous jurisprudence under this Rule (such as *Hall v Dakota Tipi Indian Band*, [2000] 4 CNLR 108, 2000 CanLII 14944 (FC) [*Hall*] and *Sivak v Canada*, 2012 FC 272 [*Sivak*]) were not specifically considered in Mr. Justice Norris' reasons.

[51] Further to my review of the record and the circumstances of this case, and considering the wording of Rule 104(1)(a), I am satisfied that the Minister can be removed as a party to these proceedings. Rule 104(1)(a) as interpreted by this Court allows for the Minister's removal, and neither the Applicants nor the ICCRC object to the removal of the Minister. All parties recognize that the Minister has been named as a party only because of Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22, which provides that unless he or she is the applicant, the respondent to an application for leave is "in the case of a matter

under the IRPA, each Minister who is responsible for the administration of that Act in respect of this matter for which leave is sought".

[52] In *Watto 2*, Mr. Justice Norris affirmed that he did not see any way around this rule, given that the application for judicial review is proceeding under the *IRPA*, which is the source of the ICCRC's mandate to regulate immigration consultants, as stated by the FCA in *Zaidi*. Mr. Justice Norris recognized that the Minister's participation was clearly irrelevant for judicial review purposes in this context, but that only legislative changes could fix this unsatisfactory situation (*Watto 2* at para 17). However, as respectfully noted by the Minister during his oral pleadings, neither Rule 104(1)(a) nor the *Sivak* and *Hall* reasons were mentioned in Mr. Justice Norris' reasons in *Watto 2*. In *Hall*, Mr. Justice Pelletier ordered the relevant Minister to be removed as parties in the action because the plaintiff was not seeking any remedy from the Minister (*Hall* at paras 7-8). Similarly, in *Sivak*, Mr. Justice Russell ordered the removal of the Minister of Foreign Affairs as a party while relying on Rule 104(1)(a), and concluded that the plaintiff's claim that the Minister injured them by failing to meet its duty to oversee embassies and foreign missions was unfounded.

[53] In this case, I agree with the Minister that he is not a "proper or necessary party" as contemplated by Rule 104(1)(a) and that he would provide no assistance to the Court in the judicial review proceedings. In these circumstances, I am satisfied that the situation can be distinguished from *Watto 2* and that it is in the interests of judicial economy, practicality and fairness to exercise my discretion under Rule 104(1)(a) and order the removal of the Minister in

these applications for judicial review. The ICCRC is the appropriate Respondent in this case and has indeed vigorously defended against the Applicants' applications for judicial review.

F. ***Notice of constitutional question***

[54] Shortly before the hearing before this Court, the Applicants sent a Notice of constitutional question regarding the constitutional applicability or effect of (i) section 158 of the *CNFPCA* and (ii) the By-laws and Rules of the ICCRC related to disciplinary proceedings against its members. The Applicants indicated their intention to seek remedies pursuant to section 2 of the *Bill of Rights*, namely a declaration that these provisions abrogate, abridge or infringe their rights and freedoms pursuant to the *Bill of Rights* and, as such, should be held inoperative against the Applicants. The constitutional applicability or effect of these various provisions were not raised before the panel of the Discipline Committee.

[55] As mentioned above and as stated by the Court in *Watto 2*, the general rule is that new issues, which could have been raised before the administrative decision-maker, should not be considered on judicial review (*Alberta Teachers* at paras 22-26; *Forest Ethics* at paras 37-47; *Watto 2* at para 10). This is notably the case for *Charter* issues and constitutional issues (*Forest Ethics* at paras 37, 46). Here, the Applicants could have raised their constitutional questions before the Discipline Committee but did not. Had the issues been raised, the Discipline Committee could have received evidence relevant to them.

[56] In *Alberta Teachers*, the SCC noted that a reviewing court has a discretion to consider an issue raised for the first time on judicial review, but can refuse to do so where it would be inappropriate. The general rule is that "this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised" before the administrative decision-maker (*Alberta Teachers* at para 23). In support of this, the SCC invoked reasons such as the administrative decision-maker's role as fact-finder and merits-decider, its appreciation of policy considerations, and possible prejudice to other parties (*Alberta Teachers* at paras 23-26; *Forest Ethics* at para 57).

[57] I see no reason, and the Applicants have not provided any, to depart from the general rule here. It find that it would not be appropriate to exercise my discretion in favour of considering the constitutional issues raised by the Applicants for the first time on judicial review, and I therefore decline to consider them (*Forest Ethics* at paras 53-57).

IV. <u>Questions for certification</u>

[58] After the hearing before this Court, the Applicants asked the Court to certify one or more of the following questions:

> 1. Does section 158 of the *CNFPCA* allow disciplinary matters to be determined by a one-person panel, whether it consists of a director or a member of the corporation?
>
> 2. Is the disciplinary process as provided for in the *CNFPCA* and the Bylaws and Rules of ICCRC in breach of natural justice and, in particular in compliance with paragraph 2(e) of the Canadian Bill of Rights?

> 3. Are ICCRC members “lawyers” under common-law for purposes of protecting a client’s legal-advice (or solicitor-client) privilege?
>
> 4. Is it necessary to raise with a non-statutory tribunal jurisdictional issues that are ultra vires the tribunal’s enacting statute or are non-compliant with the Canadian Bill of Rights, before seeking review of a decision the tribunal made?

[59] For the reasons that follow, I find that none of these proposed questions meets the requirements for certification developed by the FCA.

[60] According to paragraph 74(d) of the *IRPA*, a question can be certified by the Court if “a serious question of general importance is involved”. To be certified, a question must be a serious one that (i) is dispositive of the appeal, (ii) transcends the interests of the immediate parties to the litigation, and (iii) contemplates issues of broad significance or general importance (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 [*Mudrak*] at paras 15-16; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 [*Zhang*] at para 9). As a corollary, the question must have been dealt with by the court and it must arise from the case (*Mudrak* at para 16; *Zhang* at para 9; *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at para 29).

[61] I consider that none of the questions meets the test because they are not issues of broad significance or general application and they are not dispositive of this case. Furthermore, I agree with the ICCRC that the Court should dismiss the Applicants’ proposed questions for

certification as they were not issues before the Discipline Committee hearing the matter that led to these applications for judicial review. As stated above, it is well established that a reviewing court should not, during a judicial review, consider questions not put before the administrative decision-maker for consideration and determination. The law on this issue is well settled and unsuitable for certification.

[62] I observe that in *Watto v Immigration Consultants of Canada Regulatory Council*, 2019 FC 1085 [*Watto 3*], Mr. Justice Norris refused the certification of two questions submitted by Mr. Watto regarding the lawfulness of the panel composition in his case and the interpretation of section 158 of the *CNFPCA*. The two questions at stake related to whether section 158 allows non-ICCRC members to sit on a panel. Mr. Justice Norris notably concluded that the broader question, which was similar to the first question above, effectively amounted "to a reference on the meaning of section 158 of the CNFPCA, something which is not permitted under paragraph 74(d) of the IRPA" (*Watto 3* at para 12). The same reasoning applies here with respect to the generally-worded questions for which the Applicants seek certification in this case.

[63] None of the proposed questions would be dispositive of the appeal as they go beyond the Decision and seek determinations regarding matters that were not addressed or decided by the Discipline Committee in the Decision. For example, the second question relates to the ICCRC's whole disciplinary process, as opposed to the process followed in the Urgent Motion leading to the Decision. As indicated above, I cannot detect any breach of procedural fairness or fundamental justice on the evidence before me with respect to the Urgent Motion and the Decision. In the same vein, the third question relating to whether the legal-advice or solicitor-

client privilege should extend to ICCRC members is a purely hypothetical question which was not at stake before the Discipline Committee and should not be addressed by the Court in the context of these applications for judicial review. As for the fourth question, I am satisfied that, in *CB Powell*, the FCA has already responded to this question regarding jurisdictional issues and the requirement to raise them before the administrative decision-maker (*CB Powell* at paras 39-40).

V. Conclusion

[64] For the reasons detailed above, the Applicants' applications for judicial review are dismissed. First, the applications are premature since the process before the Discipline Committee is in progress and there are no exceptional circumstances justifying the Court's interference with the ICCRC's on-going administrative process that is yet to be completed. Furthermore, I conclude that, under the *CNFPCA*, a panel of the Discipline Committee could be composed of a single member who is not a director of the ICCRC. I am also satisfied that the Urgent Motion was not premature, given the express language contained in the By-Law. Finally, I find no breach of fundamental justice or of procedural fairness in the ICCRC's disciplinary process leading to the Decision. There are therefore no grounds to justify this Court's intervention.

[65] There are no serious questions of general importance to be certified.

JUDGMENT in IMM-5108-18 and IMM-5109-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. The style of cause is modified to remove the Minister of Citizenship and Immigration as a Respondent.

3. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5108-18
STYLE OF CAUSE:	CARLITO BENITO v IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL
AND DOCKET:	IMM-5109-18
STYLE OF CAUSE:	CHARLES BENITO v IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	AUGUST 12, 2019
JUDGMENT AND REASONS:	GASCON J.
DATED:	DECEMBER 18, 2019

APPEARANCES:

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