Federal Court  Cour fédérale

Date: 20110427

Docket: IMM-2077-10

Citation: 2011 FC 496

Ottawa, Ontario, April 27, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PHILIP MOONEY, RHONDA WILLIAMS
and
GERD DAMITZ

Applicants

and

CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of three decisions (Decisions) made by the Canadian Society for Immigration Consultants (CSIC / the Society) in response to a complaint against the Applicants.

BACKGROUND

[2] The Applicants are current or former board members of the Canadian Association of Professional Immigration Consultants (CAPIC), a non-profit organization that provides education, information and recognition to immigration consultants and engages in lobbying on their behalf. The professional regulator for immigration consultants in Canada is CSIC. The Federal Court of Appeal confirmed in *Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 243 [*Law Society of Upper Canada*] at paragraph 73, that the Governor-in-Council has sub-delegated to CSIC the legislative power to enact its own rules, standards and qualifications for membership. Accordingly, CSIC has established *Rules of Professional Conduct* and a *Complaints and Discipline Policy*. Pursuant to regulations enacted under section 91 of the Act, all three Applicants are CSIC members.

[3] In June 2008, the Standing Committee on Citizenship and Immigration published its report entitled *Regulating Immigration Consultants* (Report), which was a study of "unacceptable practices of immigration consultants." In its final report, the Standing Committee recommended that CSIC, as it currently exists, should be wound up and then re-established under federal statute. John Ryan, Chairman and Acting CEO of CSIC, opined that this recommendation, in particular, was "unacceptable."

[4] On 24 June 2008, Mr. Mooney drafted and published on the CAPIC website an open letter (Letter) supporting the recommendations of the Standing Committee's Report. The Letter criticized

Mr. Ryan's comments and noted that CAPIC had urged CSIC to "think of the greater good of the profession, and accept the [proposed] changes." It included the following relevant statements:

> Unfortunately, our Regulator appears to have chosen the route of self-preservation…. What the committee has offered all of us, is to reinforce these successes with real authority to better protect consumers from those who are not regulated…. The response from CSIC does not acknowledge this point, since it would mean a total restructuring of the Corporation, and at the very least, a new governance structure. They call this "unacceptable".
>
> We believe that what is "unacceptable" is that the Board of the Regulator acts as though only they understand what is best for consumer protection and what is best for the profession. The Standing Committee listened to all kinds of input before issuing their report, including much input from consultants themselves, who clearly expressed frustration with the way their Regulator operates….
>
> We believe that what is "unacceptable" is a Complaints and Discipline process that does not apply to unregulated agents, and which cannot have its decisions enforced in law even for its own members, because the Society is not supported by statute. It is also unacceptable that its decisions cannot be subject to judicial review, meaning that members could lose their right to practice even if an error is made in the process.
>
> … Mr. Ryan states that CSIC has a Strategic Plan. That is news to most of us, as we have never seen it…. Perhaps that is why so many feel that CSIC is busy doing things to us, instead of listening. Mr. Ryan also states that CSIC presents Audited Financial statements to its members. Again, there is no mention of this on their web site, and to the best of our recollection, we have not seen one in two years. In the past, any Audited Statement that we have seen has been so top-level, that members cannot see how their fees are being spent in any kind of meaningful way….

[5] Wenda Woodman, the Complaints and Discipline Manager of CSIC, believed that the publication of this Letter may have constituted a breach of the Society's *Rules of Professional Conduct*. Consequently, she launched a complaint against all CAPIC board members. On 3 July 2008, Pierre Briand of CSIC began an investigation into the alleged breach.

[6] Rules 16.5 and 16.6 of CSIC's *Rules of Professional Conduct* state:

> An Immigration Consultant shall act toward the Society with respect and dignity.
>
> An Immigration Consultant shall not bring discredit upon the Society by acting in such a way as to undermine or threaten to undermine the Society's mandate and/or governing principles.

[7] Between September 2009 and April 2010, CSIC closed the complaint against all CAPIC board members except the Applicants. The complaint alleged that the Applicants had discredited the Society and had included inaccurate statements in the Letter. During a 17-month investigation, Mr. Briand interviewed the Applicants as well as other CAPIC board members and requested certain documentation. Based on his findings, the Complaints and Discipline Manager determined that disciplinary action should be taken against the Applicants and the nature of that action.

[8] CSIC issued an Administrative Discipline Order against Mr. Mooney and fined him $1000 for "undermining" and "bringing discredit" upon CSIC. CSIC issued a Letter of Warning to both Ms. Williams and Mr. Damitz for "withholding and concealing information" during the investigation.

DECISIONS UNDER REVIEW

[9] The Decisions are comprised of the following the documents: in the case of Mr. Mooney, an 18 March 2010 Administrative Discipline Order from Ms. Woodman, which was informed by a 12 December 2009 Closing Memorandum from Mr. Briand; in the case of Ms. Williams, a 31 March 2010 Letter of Warning from Ms. Woodman, which was informed by a 14 December 2009 Closing

Memorandum from Mr. Briand; and, in the case of Mr. Damitz, a 1 April 2010 Letter of Warning from Ms. Woodman, which was informed by a 14 December 2009 Closing Memorandum from Mr. Briand.

Mr. Mooney

[10] The Closing Memorandum pertaining to Mr. Mooney indicates that Mr. Mooney published the Letter in question, which was "confrontational," "unfavourable and negative to CSIC" and "far from being in the tone of someone promoting the 'enhancement' of CSIC." Its "misinformation" was widely available to the public at large over a period of months, which "marred" CSIC's reputation. Moreover, Mr. Mooney failed to observe CAPIC's own procedures when he neglected to put the Letter forward for discussion at a board meeting and to circulate it for comments. Finally, Mr. Briand asked Mr. Mooney to provide an accurate list of the directors serving on CAPIC's board at the time that the Letter was published as well as related emails and minutes, and it took Mr. Mooney months to comply with these requests.

[11] The Administrative Discipline Order states that Mr. Mooney's reporting on CSIC in the Letter was not accurate and that he never solicited CSIC's input before publication. As a member of CSIC, Mr. Mooney had a duty to the profession and to the Society to comply with its *Rules of Professional Conduct* and the spirit of these rules at all times. Mr. Mooney was found to have breached Rules 16.5 and 16.6 and, in consequence, was fined $1000 in accordance with the Society's *Complaints and Discipline Policy*.

Ms. Williams

[12] The Closing Memorandum pertaining to Ms. Williams states that Mr. Briand asked her to name the CAPIC board members who were serving at the time the Letter was published and who were also members of CSIC. She responded that she did not remember that information. Mr. Briand then asked her to verify a list of CAPIC's board of directors to ensure that no names were missing. She reviewed the list and replied that she thought the list accurate. As secretary of the CAPIC board of directors, Ms. Williams was the holder of the records and the minutes. It would have been a simple matter for her to verify the list and provide a definite answer, but she did not do so. This conduct fell short of that expected from a professional.

[13] The Letter of Warning states that Ms. Williams breached the Society's *Complaints and Discipline Policy* by "withholding and concealing information reasonably required for the purpose of an investigation." Her duty to cooperate with the investigation included refreshing her memory prior to her interview with Mr. Briand and reviewing relevant documents, particularly the list of CAPIC board members. Relying on "I don't think so" is misleading and amounts to withholding and concealing information. The Letter of Warning was placed in Ms. William's membership file.

Mr. Damitz

[14] The Closing Memorandum pertaining to Mr. Damitz observes that he bore responsibility for the publication of the Letter, along with Mr. Mooney. In his interview with Mr. Briand, Mr. Damitz frequently questioned the relevance of the investigator's questions and was "hesitant" regarding the

composition of the board of directors of CAPIC at the time the Letter was published. As an active board member, he could have requested access to the minutes to refresh his memory before or after the interview, but he did not do so. Mr. Damitz thereby failed to cooperate fully and acted "contemptuously" with respect to the investigative process.

[15] The Letter of Warning states that Mr. Damitz breached the Society's *Complaints and Discipline Policy* by "withholding and concealing information reasonably required for the purpose of an investigation." His duty to cooperate with the investigation included refreshing his memory prior to his interview with Mr. Briand and reviewing the list of CAPIC board members. The Letter of Warning was placed in Mr. Damitz's membership file.

[16] These documents comprise the Decisions under review.

ISSUES

[17] The Applicants raise the following issues:

(a) Whether the Decisions were made for an unauthorized purpose;

(b) Whether the Decisions are discriminatory against the Applicants;

(c) Whether the Administrative Discipline Order violates section 2(b) of the *Charter*;

(d) Whether CSIC failed to provide procedural fairness to the Applicants with respect to:

i. disclosure of particulars,
ii. opportunity to respond,
iii. requests for evidence that was beyond the scope of its investigation, and
iv. adequacy of reasons; and

(e) Whether the Decisions raise a reasonable apprehension of bias.

STATUTORY PROVISIONS

[18] The following provisions of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], are relevant to these proceedings:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
2. Everyone has the following fundamental freedoms:	**2.** Chacun a les libertés fondamentales suivantes :
[…]	[…]
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ….	(b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; ….

[19] The following provisions of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act) are applicable in these proceedings:

Regulations **91.** The regulations may govern who may or may not represent, advise or consult with a person who is the subject of a	**Règlement** **91.** Les règlements peuvent prévoir qui peut ou ne peut représenter une personne, dans toute affaire devant le ministre,

proceeding or application before the Minister, an officer or the Board.	l'agent ou la Commission, ou faire office de conseil.

[20] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), are applicable in these proceedings:

Interpretation	**Définitions**
2. The definitions in this section apply in these Regulations.	**2.** Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
"authorized representative" means a member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003.	« représentant autorisé » Membre en règle du barreau d'une province, de la Chambre des notaires du Québec ou de la Société canadienne de consultants en immigration constituée aux termes de la partie II de la *Loi sur les corporations canadiennes* le 8 octobre 2003.
[…]	[…]
Representation for a fee	**Représentation contre rémunération**
13.1 (1) Subject to subsection (2), no person who is not an authorized representative may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.	**13.1** (1) Sous réserve du paragraphe (2), il est interdit à quiconque n'est pas un représentant autorisé de représenter une personne dans toute affaire devant le ministre, l'agent ou la Commission, ou de faire office de conseil, contre rémunération.
[…]	[…]

Students-at-law	**Stagiaires en droit**
(3) A student-at-law shall not be deemed under subsection (1) to be representing, advising or consulting for a fee if the student-at-law is acting under the supervision of a member in good standing of a bar of a province or the Chambre des notaires du Québec who represents, advises or consults with the person who is the subject of the proceeding or application.	(3) Pour l'application du paragraphe (1), un stagiaire en droit n'est pas considéré comme représentant une personne ou faisant office de conseil contre rémunération s'il agit sous la supervision d'un membre en règle du barreau d'une province ou de la Chambre des notaires du Québec qui représente cette personne dans toute affaire ou qui fait office de conseil.

[21] The following provisions of the Canadian Society for Immigration Consultants, *Rules of Professional Conduct* (Rules), are applicable in these proceedings:

PART 16: Responsibility to the Society and Others	**PARTIE 16 RESPONSABILITÉ ENVERS LA SOCIÉTÉ ET LES AUTRES**
[…]	[…]
16.5 An Immigration Consultant shall act toward the Society with respect and dignity.	**16.5** Un consultant en immigration doit se comporter envers la Société avec respect et dignité.
16.6 An Immigration Consultant shall not bring discredit upon the Society by acting in such a way as to undermine or threaten to undermine the Society's mandate and/or governing principles.	**16.6** Un consultant en immigration ne doit pas jeter le discrédit sur la Société en agissant de manière à saper ou à menacer de saper le mandat et/ou les principes directeurs de la Société.

[22] The following provisions of the Canadian Society for Immigration Consultants, *Complaints and Discipline Policy* (Policy), are applicable in these proceedings:

2.6 No Member shall withhold, destroy or conceal any information, documents or thing reasonably required for the purpose of an investigation by an Investigator.

2.6 Aucun membre ne peut retenir, détruire ou dissimuler des renseignements, des documents ou des éléments qui sont raisonnablement requis aux fins d'une enquête effectuée par un enquêteur.

[…]

[…]

3.3 After considering a matter that has entered the complaints and compliance process and any response in writing from the Member, the Manager may do one or more of the following:

3.3 Après avoir examiné une question qui a été soumise au processus de plaintes et de conformité et la réponse écrite du membre, le directeur peut prendre l'une ou plusieurs des mesures suivantes :

(a) take no action;

(a) ne prendre aucune mesure;

(b) require the Member to successfully complete educational or upgrading measures specified by the Manager at the Member's expense;

(b) exiger que le membre suive et termine avec succès les programmes d'éducation ou de perfectionnement qu'il prescrira, aux frais du membre;

(c) advise, caution or warn the Member in writing;

(c) conseiller, avertir ou mettre en garde le membre par écrit;

(d) require the Member to appear before the Manager or a person designated by the Manager, at a time and place specified by one of them, to be cautioned in person;

(d) exiger que le membre comparaisse devant lui ou devant une personne qu'il aura désignée, au moment et à l'endroit stipulés par l'un d'entre eux, afin d'être averti en personne;

(e) refer the matter to another body that could more appropriately deal with the matter;

(e) soumettre la question à un autre organisme qui pourrait traiter la question de façon plus appropriée;

(f) refer the matter to the Discipline Council for a Hearing;

(f) soumettre la question au conseil de discipline aux fins de la tenue d'une audition;

(g) require the Member to take such other action that the Manager considers appropriate that is not inconsistent with the By-Laws of the Corporation.	(g) exiger que le membre prenne d'autres mesures qu'il jugera appropriées et qui ne sont pas incompatibles avec les règlements de la Société.
(h) suspend a Member;	(h) suspendre le membre ;
(i) impose a financial penalty upon the Member.	(i) imposer une pénalité financière au membre.

STANDARD OF REVIEW

[23] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[24] An inquiry into whether the Decisions were made for an unauthorized purpose is an inquiry into whether the decision-maker acted outside its jurisdiction. The issues raised by the Applicants—jurisdiction, discrimination and *Charter* infringement, procedural fairness and reasonable apprehension of bias—are reviewable on a standard of correctness. See *Dunsmuir*, above. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process. Rather, it will undertake its own analysis of the question.

ARGUMENTS

The Applicants

Decisions Were Made for an Unauthorized Purpose

[25] The Applicants contend that CSIC, a statutory delegate, used its delegated power for an unauthorized purpose, specifically to silence the Applicants' criticism and to prevent certain members from running for CSIC board positions.

[26] Justice Rand in *Roncarelli v Duplessis*, [1959] SCR 121 at pages 15 and 16, stated:

> "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption….
>
> "Good faith" in this context … means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

[27] The Applicants assert that, although CSIC is authorized to discipline its members, it cannot do so as retribution for criticism. See *Desjardins v Canada (Royal Canadian Mounted Police, Commissioner)* (1986), 3 FTR 52, [1986] FCJ No 237 (QL) at paragraph 6.

[28] In considering whether a discretionary decision is based on improper considerations, the Court must determine the purpose of the enabling statute. Any ambiguity regarding whether the administrative decision is within the scope of the decision-maker's enabling statute must be

resolved in favour of the applicant. See *Shell Canada Products Ltd. v Vancouver (City)* (1993), [1994] 1 SCR 231, [1994] SCJ No 15 (QL) at paragraphs 97-98.

[29] The purpose of CSIC's enabling legislation is to protect the public against unscrupulous consultants. See *Onuschak v Canadian Society of Immigration*, 2009 FC 1135 at paragraphs 15 and 17. The Applicants allege that this does not accord with CSIC's actual purpose in launching the complaint, which was to silence and punish its critics. Use of delegated power for an unauthorized purpose is *ultra vires* the jurisdiction of the decision-maker and may be quashed on judicial review. See Jones and De Villars, *Principles of Administrative Law*, 4th ed. (Scarborough: Thomson Carswell, 2004) [Jones and De Villars] at page 169.

Decisions Are Discriminatory

[30] The Applicants argue that there is no justification for CSIC's decision to dismiss the complaint against all other CAPIC board members except the Applicants. This decision was discriminatory, as it was "partial and unequal between different classes." See *Moresby Explorers Ltd. v Canada (Attorney General)*, 2006 FCA 144 at paragraph 23. An administrative decision that is discriminatory is *ultra vires* and may be quashed. See Guy Régimbald, *Canadian Administrative Law* (Markham: LexisNexis, 2008) at page 208.

Decisions Violate the Applicants' Freedom of Expression

[31] The Applicants argue that, in deciding to investigate and to discipline members for commenting on matters of public importance, CSIC violated their right to free expression, which is protected under section 2(b) of the *Charter*. The protection of political speech is a fundamental purpose of section 2(b). As Chief Justice Brian Dickson of the Supreme Court of Canada observed in *R v Keegstra* (1990), 117 NR 1, [1990] SCJ No 131 (QL) at paragraph 89:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

[32] The Applicants rely on *Slaight Communications Inc. v Davidson* (1989), 59 DLR (4^{th}) 416, [1989] SCJ No 45 (QL) at paragraph 87, for the proposition that administrative decisions that breach the *Charter* may be quashed by the reviewing court. In that case, the Supreme Court of Canada stated:

> The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter,

> unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1…. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.

[33] The Applicants also argue that, because the original decision to investigate was in breach of their *Charter* rights, all subsequent decisions arising as a result of the unlawful investigation, including the Letters of Warning, should be quashed. See *Kuntz v Saskatchewan Association of Optometrists* (1992), [1993] 3 WWR 651, [1992] SJ No 644 (QL) (QB).

CSIC Breached Its Duty of Procedural Fairness

[34] A duty of fairness applies to all disciplinary investigations and decisions. See *Kuntz*, above. With respect to the investigation, the Applicants argue that, in the instant case, CSIC failed to provide them with sufficient particulars of the allegation and a fair opportunity to respond. See *Syndicat des employés de production du Québec et de l'Acadie v Canada (Human Rights Commission)* (1989), [1989] 2 SCR 879, [1989] SCJ No 103 (QL). Furthermore, the investigation was overbroad. CSIC requested documentation and information beyond the scope of the investigation and entered into a "fishing expedition." CSIC's persistent inquiries into the identities of CAPIC board members at the time that the Letter was published were beyond the scope of the investigation.

[35] With respect to the disciplinary measures, the Applicants assert that Mr. Mooney's Administrative Discipline Order failed to disclose which of the comments in the Letter were

inaccurate. As for the Letters of Warning, the Applicants argue that they also breach the rules of procedural fairness because they resulted from CSIC's overbroad inquiries into the identities of CAPIC board members.

Investigation and Decisions Raise a Reasonable Apprehension of Bias

[36] The test for reasonable apprehension of bias is whether a reasonably informed bystander would perceive that the adjudicator was biased. See *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)* (1992), [1992] 1 SCR 623, [1992] SCJ No 21 (QL) at paragraph 22. The Applicants contend that CSIC's investigation and its Decisions raise a reasonable apprehension of bias for the following reasons:

(a) The Complaints and Discipline Manager acted as both complainant and decision-maker with respect to the investigation;

(b) Although the complaint concerned a single Letter, CSIC unjustifiably took over 17 months to conduct its investigation;

(c) The investigation looked into matters unrelated to the complaint, including CAPIC's internal operations, its workings and its historic views of CSIC and CSIC activities;

(d) The Decisions have effectively prevented the Applicants from running for a position on CSIC's board of directors, and there have long been concerns that CSIC uses its disciplinary procedures to prevent members from running for office; and

(e) The impetus for the complaint was criticism of CSIC.

The Respondent

CSIC's *Rules* and *Discipline Policy* Not Made for an Unauthorized Purpose

[37] The Federal Court of Appeal has recognized CSIC's sub-delegated power to establish rules and policies to fulfill its mandate. See *Law Society of Upper Canada*, above. The Respondent submits that CSIC's *Rules of Professional Conduct* and its *Complaints and Discipline Policy* constitute subordinate legislation enacted within the scope of the Society's enabling legislation and that, for this reason, they are valid. See Jones and De Villars, above, at pages 100, 105, 107-08.

[38] Contrary to the Applicants' assertions, there is no evidence that the *Rules* or *Policy* were adopted in bad faith or for a purpose irrelevant (and, therefore, improper) to the Society's mandate which, according to its Letters Patent, is to regulate consultants in the public interest in accordance with the Society's policies and procedures. Neither does the establishment of the *Rules* or *Policy* constitute an abuse of discretion. Consequently, there is no basis upon which the Court can interfere. See *Maple Lodge Farms Ltd. v Canada*, [1982] 2 SCR 2 at pages 7 and 8.

Decisions Do Not Discriminate

[39] The Applicants argue that the Decisions single them out for treatment that is harsher than that meted out to the other CSIC members of the CAPIC board of directors who were serving when the Letter was published. The Respondent contends that this is not accurate. Mr. Mooney was disciplined because he wrote the Letter in question and because he published it without soliciting input from other members, contrary to CAPIC procedures. Ms. Williams and Mr. Damitz were

disciplined for withholding and concealing information during the investigation. Had these two been cooperative, the complaint against them would have been dismissed, as it was dismissed against ten of the other CAPIC board members.

CSIC's *Rules* and *Policy* Do Not Violate the *Charter*

[40] CSIC's *Rules of Professional Conduct* and its *Complaints and Discipline Policy* require members to treat the Society with respect and to refrain from discrediting the Society by undermining its mandate and principles. Regulatory bodies commonly impose similar obligations on their members. They have readily been upheld by the Court and do not offend the *Charter*. See *Perry v Association of Professional Engineers and Geoscientists of the Province of British Columbia*, 2005 BCSC 1102 at paragraphs 8, 14 and 15; *Ahrens v Alberta Teachers Association* (1994), 15 Alta LR (3d) 388, [1994] AJ No 30 (QL) (QB) at paragraph 2; *Histed v Law Society of Manitoba*, 2007 MBCA 150 at paragraph 54.

[41] Moreover, the right to freedom of expression, as stated by the Courts, is not absolute. The Courts have readily held that a member's right to freedom of expression does not outweigh the public interest in the code of conduct of a regulatory body. That these codes of conduct serve an important social value has been recognized and has withstood scrutiny in the context of *Charter* challenges. See *Perry*, above, at paragraphs 14, 15 and 19-21; *Ahrens*, above, at paragraphs 18, 19, 22 and 23; *Histed*, above, at paragraphs 40, 46, 54, 55, 60-63 and 67-79.

Procedural Fairness Was Observed

[42] The Respondent asserts that, at the investigative stage, particulars of the complaint are not required; notice of the nature of the complaint suffices. See *Kutsogiannis v Association of Regina Realtors Inc*. (1989), 79 Sask R 214, [1989] SJ No 439 (QL) (QB) at page 8; *Strauts v College of Physicians and Surgeons of British Columbia* (1997), 36 BCLR (3d) 106, [1997] BCJ No 1518 (QL) (CA) at paragraphs 13-16.

[43] Nevertheless, all people listed as board members on the CAPIC website, including the Applicants, were provided particulars of the allegations made against them via a Notice of Complaint and Investigation. This notice cited Rules 16.5 and 16.6 as well as the specific parts of the Letter that offended those rules. The board members were reminded that, during the investigation, they were bound by the CSIC Rules to provide requested documentation, to reply to inquiries promptly and to cooperate with the investigator.

[44] The Respondent contends that the Applicants were provided sufficient notice of the complaint. In matters of professional discipline, the duty of procedural fairness is limited, particularly at the investigative stage, due to the important role that professional bodies play in protecting the public interest. See *Butterworth v College of Veterinarians of Ontario*, [2002] OJ No 1136 (QL) (Div Ct) at paragraph 2; *Silverthorne v Ontario College of Social Workers and Social Service Workers* (2006), 264 DLR (4th) 175, [2006] OJ No 207 (QL) (Div Ct) at paragraphs 15-18; *Strauts*, above, at paragraphs 6 and 7.

[45] The Applicants also argue that they were not afforded an opportunity to respond to the complaint and investigation. The Respondent contends that, in the case of administrative bodies, such as CSIC, procedural perfection is not imposed. See *Knight v Indian Head School Division No 19* (1990), 69 DLR (4th) 489, [1990] SCJ No 26 (QL) at paragraph 49. Considerable deference is owed a decision-maker that has the authority under statute to choose its own procedures. See *Baker v Canada (Minister of Citizenship and Immigration)* (1999), [1999] 2 SCR 817, [1999] SCJ No 39 at paragraph 27. Nonetheless, the Applicants were invited to put their case forward, to submit evidence and to respond to the investigator's inquiries. The Applicants requested multiple extensions of time, which were granted. Contrary to the Applicants' claims, CSIC observed its duty of procedural fairness.

[46] With respect to sufficiency of reasons, the Respondent points out that the Administrative Discipline Order clearly states that Mr. Mooney was the author of the Letter and that measures were being taken against him for disseminating misleading and inaccurate information about CSIC and for undermining CSIC's mandate and its governing principles. Similarly, the Letters of Warning clearly state that disciplinary measures were being taken against Ms. Williams and Mr. Damitz for withholding and concealing information during the course of an investigation. The Supreme Court of Canada held in *R v REM*, 2008 SCC 51 at paragraphs 17 and 25, that reasons are sufficient when they inform the individuals whose rights, privileges or interests are affected why the decision was made and when they permit effective judicial review. In this case, that threshold was met. CSIC was not obliged to set out every finding leading up to the decisions. See *REM*, above, at paragraph 35.

Allegations of Reasonable Apprehension of Bias Are Without Merit

[47] The Respondent submits that the allegation of reasonable apprehension of bias is without merit. The party alleging bias must demonstrate that there is a real likelihood that bias exists; mere suspicion is insufficient. See *Zündel v Citron* (2000), [2000] 4 FC 225, [2000] FCJ No 679 (QL) (CA) at paragraph 36.

[48] The Respondent argues that CSIC's Complaints and Discipline Department is independent of all other departments. The Manager's performance of "overlapping functions," by both initiating an investigation and imposing a remedy, will not generally raise a reasonable apprehension of bias. See *Brosseau v Alberta (Securities Commission)* (1989), 57 DLR (4th) 458 at 464, [1989] SCJ No 15.

[49] With respect to the investigation, Mr. Briand is an investigator with 29 years of experience. He joined CSIC less than a month before he began his investigation. Investigators in a professional complaint situation are entitled to be suspicious and must be given latitude. See *College of Physicians and Surgeons of the Province of Alberta v JH*, 2008 ABQB 205 at paragraphs 81, 116, 124 and 127.

[50] That the investigation took 17 months to complete is largely due to the actions of the Applicants, who submitted incomplete and inconsistent evidence, who requested and were granted extended periods of time to respond to requests for documentation and information and who underwent changes in counsel. The Respondent relies on *Blencoe v British Columbia (Human*

Rights Commission), 2000 SCC 44 at paragraphs 101-04 to argue that, in any event, delay in an investigation results in unfairness only if it impairs a person's ability to respond to the complaint. That did not happen in this case.

[51] Contrary to the Applicants' assertions, the Administrative Discipline Order does not preclude Mr. Mooney from practising in Quebec, as he remains a CSIC member in good standing. Furthermore, the disciplinary measures were not undertaken to prevent Mr. Mooney and Mr. Damitz from running for the 2010 CSIC election. Mr. Mooney, because he was previously disciplined in 2008, was already disqualified from running. Mr. Damitz was issued a Letter of Warning because he refused to cooperate fully with the investigation. Had he been cooperative, the complaint against him would have been dismissed, as it was dismissed against the other CAPIC board members.

The Decisions Were Reasonable

[52] The Respondent asserts that the Decisions fall within the acceptable range as set out in *Dunsmuir*, above. CSIC's Manager of Complaints and Discipline found that the Letter in question: contained comments about CSIC and its rules, structure and *modus operandi*; discredited CSIC and the profession; undermined CSIC's independence, integrity and effectiveness as well as its mandate and governing principles; and widely disseminated to the public at large inaccurate statements about CSIC and its role as regulator. Mr. Mooney's involvement in drafting and publishing the Letter contravened Rules 16.5 and 16.6 of the *Rules of Professional Conduct*, which warranted disciplinary measures. Similarly, the conduct of Ms. Williams and Mr. Damitz, in withholding and

concealing information during the investigation into the publication of the Letter, contravened section 2.6 of the *Complaints and Discipline Policy*. For that reason, they deserved Letters of Warning.

Applicants' Reply

[53] The Applicants submit that the Respondent has misstated and mischaracterized the nature of their *Charter* challenge. This challenge is directed at CSIC's decision to discipline Mr. Mooney for exercising his right to free expression, which is constitutionally protected, and not at the constitutionality of Rules 16.5 and 16.6 themselves. As a result, the Respondent introduces irrelevant evidence regarding the similarity of Rules 16.5 and 16.6 to provisions in the ethical codes of other regulatory bodies.

[54] The Saskatchewan Court of Appeal in *Whatcott v Saskatchewan Assn. of Licensed Practical Nurses*, 2008 SKCA 6 at paragraphs 31, 32, 36, 43 and 56, provides the correct analytical framework for deciding this issue. I paraphrase the Applicants' summary as follows:

(a) An administrative tribunal's decision can be challenged on the basis that the decision itself has infringed *Charter* rights;

(b) An administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*;

(c) In analyzing whether a decision infringes the *Charter*, the administrative law standard of review is irrelevant. The applicable standard is correctness. The issue is the effect of the decision on the constitutional guarantee of freedom of expression;

(d) Where the constitutionality of a decision is at issue, a constitutional analysis must be undertaken;

(e) Where section 2(b) of the *Charter* is concerned, the Court must first determine whether section 2(b) has been infringed. The two-part test is set out in *Irwin Toy v Québec (Attorney General)* (1989), [1989] 1 SCR 927, [1989] SCJ No 36: First, is the activity protected as free expression? Second, does the impugned decision infringe that protected activity in purpose or effect?;

(f) If section 2(b) has been infringed, the Court must consider whether the decision can be saved by section 1 of the *Charter*. Under section 1, the decision-maker has the burden of satisfying the Court, based on cogent evidence, that the infringement can be justified "in a free and democratic society."

[55] The Applicants rely on *Whatcott*, above, at paragraphs 56-79, to argue that the Decisions violate Mr. Mooney's freedom of expression. The onus is on CSIC to provide evidence that the infringement is justified, but it has not done so.

[56] The Applicants also allege that aspects of the Respondent's evidence are self-serving and unsubstantiated. First, Mr. Mooney denies the allegation that information contained in the Letter is incorrect. The Respondent has not furnished evidence to prove otherwise. Second, the Respondent did not identify the CAPIC board members who claimed to be deprived of an opportunity to comment on or approve the Letter. The Applicants argue that, as this "evidence" was used to justify the disciplinary order against Mr. Mooney, the Respondent must bring it forward so that the Applicants can assess its reliability.

Respondent's Further Memorandum

[57] The Respondent contends that Mr. Mooney failed in his duty to ensure that every director on the CAPIC board had an opportunity to vote on the Letter. Mr. Mooney has admitted that statements which he attributed to other board members and to the Report were, in fact, his own. He also admitted that parts of the Letter were untrue. For example, when Mr. Mooney wrote that the Society's decisions cannot be judicially reviewed, he did not verify the accuracy of that statement; this statement is, in fact, untrue. In consequence, the Respondent asserts that the discipline meted out to Mr. Mooney was lenient.

[58] The Respondent further contends that the disciplinary action against Ms. Williams and Mr. Damitz was similarly lenient. Because they were involved in the appointment of directors to the CAPIC board, they had access to information that was required in the investigation but were not forthcoming with that information. The disciplinary action against them was corrective.

[59] Contrary to the Applicants' assertions, the decision to discipline the Applicants was appropriate and not discriminatory. The other CAPIC directors were not disciplined because, by virtue of their much more limited roles in the events in question, they were not deserving of discipline. Unlike Mr. Mooney, they did not write the Letter; and unlike Ms. Williams and Mr. Damitz, they did not withhold information. The instant case is distinguishable from *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 212. In that case, there were contradictory approaches to the same policy. In the instant case, the policy was applied consistently. The fact that

some directors were disciplined and others were not is due to the differences in conduct particular to each CAPIC director.

[60] The Respondent also argues that the investigation was not overbroad. Rather, the inquiries into CAPIC activities and its by-laws were aimed at discovering whether or not CAPIC board members were attempting to undermine the Society and at clarifying contradictory information regarding the appointment of directors.

[61] Finally, the disciplinary action undertaken does not offend section 2(b) of the *Charter*. *Charter* rights are not absolute. Under section 1, they may be infringed where the infringement is "prescribed by law" and "demonstrably justified in a free and democratic society."

[62] The Respondent contends that the Decisions were made in accordance with Rules 16.5 and 16.6. These *Rules* are "limits prescribed by law." Decisions made under similar rules of professional conduct have been upheld by courts. See, for example, *Histed*, above.

[63] The Decisions are also demonstrably justified in a free and democratic society. The Decisions result from action taken by the Society in fulfillment of its mandate to regulate immigration consultants in the public interest. A necessary corollary of that mandate is protecting the integrity of the immigration consultancy profession, which entails review of members' conduct that may discredit the Society by undermining the Society's governing principles or mandate.

[64] The Applicants cite *Whatcott*, above, for the proposition that the Society's disciplinary action was not rationally connected to protecting the integrity of the profession. In that case, the court found no rational connection because the nurse's picketing of a Planned Parenthood clinic was conducted on his off-duty time. These facts are distinguishable from the instant case. Mr. Mooney made inaccurate statements in his capacity as an immigration consultant. They were published on a website available to the general public, and they were aimed directly at the integrity and mandate of the Society as a regulator. There is a rational connection between the Decisions to take disciplinary action and the Society's mandate to protect the public and ensure respect for the profession.

[65] Moreover, the Decisions minimally impair Mr. Mooney's section 2(b) rights. He was issued an Administrative Discipline Order and fined $1000. He was never suspended or prevented from practising as an immigration consultant or from making other statements regarding the Report and the Society. The objectives of ensuring respect and integrity in the profession and protecting the public interest outweigh the deleterious effects on Mr. Mooney.

ANALYSIS

Philip Mooney

[66] The Decision regarding Mr. Mooney is contained in the 18 March 2010 Administrative Discipline Order issued by Ms. Woodman as the Complaints and Discipline Manager. I think it helps to cite that order in full:

> I have considered the available information relating to the matter that has entered the complaints and discipline process including your response and the report of the investigator, Mr. Pierre Briand to

determine whether a disposition other than a referral to a Discipline Hearing is appropriate in the public interest.

You have been found to have breached Part 16.5 and Part 16.6 of the *Rules of Professional Conduct* when on 24 June 2008, you authored and posted an article on the website of the Canadian Association of Professional Immigration Consultants (CAPIC) entitled "CSIC's Comments on the Standing Committee Report."

Part 16.5 of the *Rules of Professional Conduct*

The article contained statements about the regulator that were not reliable and that were presented as statements of fact. As a CSIC member and as the author of the article, you failed to ensure the integrity of the publication by verifying the accuracy of the information with the regulator prior to publication. In addition, you did not seek the regulator's input in order to accurately report their response. This article appeared on the front page of the website on 24 June 2008 and continued to be posted until October 2008 thereby widely disseminating misinformation about the regulator to the public and CSIC members who accessed the website.

Part 16.6 of the *Rules of Professional Conduct*

The article is not directed at government or legislative policy and as such is neither a comment on public policy nor a comment on the Standing Committee Report. Rather, the article is a reaction to and is directed at the regulator's response to the Standing Committee Report. The published article acts to undermine the regulator's mandate and governing principles.

As a CSIC member you have a responsibility to the regulator and to the profession. This responsibility extends to your duty to comply with the provisions of the *Rules of Professional Conduct*. This duty is not abrogated by your membership in an association of immigration consultants. CSIC members are expected to follow the *Rules of Professional Conduct* and the spirit of the Rules at all times.

Order

Pursuant to section 3.3(g) of the *Complaints and Discipline Policy*, you are fined in the amount of one thousand ($1,000) dollars. In order to comply with this Order, you are required to make payment to the Canadian Society of Immigration Consultants by 5 p.m. on Friday, April 9, 2010.

[67] Ms. Woodman clearly states that, in reaching her decision, she has "considered the available information relating to the matter that has entered the complaints and discipline process … ." This representation, however, is not correct. Ms. Woodman did not review the "available information" before reaching her Decision.

[68] During cross-examination on 1 December 2010, Ms. Woodman confirmed the following:

(a) She relied upon Mr. Briand's 12 December 2009 Closing Memorandum in making the Decision;

(b) She did this because she assumed that, as the investigator, Mr. Briand would provide her with a balanced view of the evidence that was collected as well as the conclusions formed as a result of the evidence;

(c) She did not review the transcripts of the interviews conducted by Mr. Briand;

(d) The transcripts of the interviews were available to her and she could have requested them. She chose not to do this because she asked Mr. Briand to provide her with the relevant information from the interviews in his Closing Memorandum;

(e) Any evidence from the interviews, or any documentation, that Mr. Briand chose not to refer to in his Closing Memorandum was not known to Ms. Woodman.

[69] It is clear then, that in making the Decision about Mr. Mooney (and this is also the case with Ms. Williams and Mr. Damitz) Ms. Woodman did not consider the full record of "available information" but chose, instead, to rely upon Mr. Briand's selective account of the interviews and the conclusions he drew from that selective account and included in his Closing Memorandum.

[70] Ms. Woodman's Decision also assumes that Mr. Mooney was the sole author of the Letter that was posted on the website of the Canadian Association of Professional Immigration Consultants. In fact, this appears to be why Mr. Mooney was singled out as having breached Rules 16.5 and 16.6: "on 24 June 2008, you authored and posted an article …".

[71] Ms. Woodman does not explain how she comes to this conclusion. There is evidence that Mr. Mooney, although he took the lead in drafting the Letter, was not its sole author, and there is further evidence that other directors agreed with his approach. In all likelihood, Ms. Woodman's conclusion is based solely upon Mr. Briand's conclusions as contained in his Closing Memorandum rather than her personal assessment of the record.

[72] The interesting thing about this conclusion is that it is contradicted by Mr. Briand himself who, when it suits his purpose, assigns collective responsibility to all of the directors of CAPIC for the posting of the Letter; even those directors who did not actively participate in drafting the Letter. In a letter to Ms. Janet Burton dated 24 August 2009, he had the following to say on point:

> It is clear to me that you did not participate in the drafting of the Phil Mooney's (*sic*) publication, nor did you provide him with a response when he forwarded you an email on it. However, as a Member of the BOD of a Society (*sic*), <u>you are equally and mutually responsible for the actions taken by its President and Members.</u> [emphasis added]

[73] Here we see an acknowledgment by Mr. Briand that all directors were "equally and mutually responsible" for the Letter. And yet, Ms. Woodman, who says that she relied upon Mr. Briand's Closing Memorandum, appears to be unaware of Mr. Briand's position on this point and singles out Mr. Mooney for discipline. The most likely explanation for this is that Mr. Briand's

position on “equal” and “mutual” responsibility for the Letter is not articulated in his Closing Memorandum.

[74] Mr. Briand’s letter to Ms. Burton also makes it clear that Mr. Briand was fully aware that Mr. Mooney had e-mailed Ms. Burton and provided her, as a director of CAPIC, with an opportunity to comment upon and contribute to the content and format of the Letter. This does not sound to me like a renegade director acting alone. This is a director who has taken the initiative in drafting the Letter but who has sought input and support from fellow directors. What is strange to me, then, is that Mr. Briand did not make his position on “equal” and “mutual” responsibility clear in his Closing Memorandum to Ms. Woodman. If he did not, then Ms. Woodman made a fundamental mistake of fact when she issued the Discipline Order against Mr. Mooney because Ms. Woodman did not independently review the principal evidence and she relied upon Mr. Briand’s providing her with his conclusions based upon what she thought was a balanced view of the evidence. If Mr. Briand did make his position on “equal” and “mutual” responsibility clear in his Closing Memorandum, then Ms. Woodman’s Discipline Order against Mr. Mooney also contains a reviewable error because she ascribes sole authorship and full responsibility to Mr. Mooney for the Letter.

[75] Ms. Woodman finds Mr. Mooney in breach of Rule 16.5 of the *Rules of Professional Conduct* because (and I paraphrase):

(a) The Letter contained statements about the regulator that were not reliable and that were presented as statements of fact;

(b) As a CSIC member and as the author of the article, Mr. Mooney failed to ensure the integrity of the publication by verifying the accuracy of the information with CSIC prior to publication;

(c) Mr. Mooney did not seek CSIC's input in order to report an accurate response; and

(d) The Letter appeared on the front page of the website on 24 June 2008 and continued to be posted until October 2008 thereby widely disseminating misinformation about CSIC to the public and to CSIC members who accessed the website.

[76] As a set of reasons for discipline, and as a justification, the Discipline Order is seriously inadequate. The suggestion appears to be that it is a breach of Rule 16.5 of the *Rules of Professional Conduct* for a member to publish an article that is critical of CSIC without seeking CSIC's input and confirmation. Rule 16.5, however, merely says that an "Immigration Consultant shall act towards the society with respect and dignity." Respect and dignity do not require consultation prior to publication. Ms. Woodman appears to feel that members should not be critical of CSIC in public without CSIC's prior approval or confirmation. I see nothing in the *Rules of Professional Conduct* or in the governing jurisprudence that would support such a position. It suggests that CSIC simply wishes to control and censor CAPIC and CSIC members.

[77] At the hearing of this application in Toronto on 13 January 2011, counsel for CSIC clarified for the court that CSIC does not take the position that public criticism of CSIC by its members is, *per se*, against the *Rules of Professional Conduct*. Counsel advised that the problem in the present case is that the criticism was based upon inaccuracies. In other words, CSIC's position is that Mr.

Mooney breached Rule 16.5 and did not act towards the society with respect and dignity because the article was inaccurate.

[78] Ms. Woodman refers to inaccuracy in her reasons, but she does not say what was inaccurate about the Letter. On this point, then, the Decision is procedurally unfair because it does not explain to Mr. Mooney the ways in which the Letter was inaccurate. It contains assertions without reasons or explanation. See *VIA Rail Canada Inc. v national Transportation Agency* (2000), [2001] 2 FC 25, [2000] FCJ No 1685 (QL) (CA).

[79] It is true that, in his letter of 24 June 2008 to Mr. Mooney setting out the complaint, Mr. Briand explained as follows:

> Please be advised that the Society, acting as complainant in this matter, has commenced an Investigation alleging that you have breached the Rules of Professional Conduct (the 'Rules'). Specifically, it is alleged that you:
>
> By publicly publishing a letter on the C.A.P.I.C. website on 24 June 2008, including comments toward the society, its rules, structures and "modus operandi", you have drawn discredit on the Society and on the Profession. Your article undermines the Society principles of independence, integrity and effectiveness. Your letter contained misleading and inaccurate statements and misrepresentations about CSIC and its role as regulator. The statements contained in the letter undermine CSIC and its members.
>
> Breached Rule 16.5 an Immigration Consultant shall act toward the Society with respect and dignity. You stated that:
>
> 1. We believe that what is "unacceptable" is a Complaints and Discipline process that does not apply to unregulated agents, and which cannot have its decisions enforced in law even for its own members, because the Society is not supported by statute. It is also unacceptable that its decisions cannot be subject to judicial review, meaning that members could lose their right to practice even if an error is made in the process.

> 2. Mr. Ryan states that CSIC has a Strategic Plan. That is news to most of us, as we have never seen it. It does not appear anywhere on the web site. Perhaps that is why so many feel that CSIC is busy doing things to us, instead of listening.
>
> 3. Mr. Ryan also states that CSIC presents Audited Financial statements to its members. Again, there is no mention of this on their web site, and to the best of our recollection, we have not seen one in two years. In the past, any Audited Statement that we have seen has been so top-level, that members cannot see how their fees are being spent in any kind of meaningful way.
>
> 16.6 An Immigration Consultant shall not bring discredit upon the Society by acting in such a way as to undermine or threaten to undermine the Society's mandate and/or governing principles. (As above)
>
> By publishing your article concerning the CSIC comments on the Standing Committee Report you are misrepresenting the facts. By these comments you displayed lack of respect toward the Society, and also brought discredit against the Society mandate and governing principles. Your comments as President of CAPIC and member of the CSIC were also made on behalf of the CAPIC Board of Directors.

[80] So Mr. Mooney knew what the complaint was, but he was never told which aspects of the complaint were established by the investigation and/or accepted by Ms. Woodman, who wrote the Administrative Discipline Order.

[81] Even assuming that Ms. Woodman accepted that all aspects of the complaint had been established by the investigation, she does not indicate as such in her Decision. Clarification has been provided following the Decision, but even that does not explain the rationale for a breach of Rule 16.5 by Mr. Mooney. I will address each of the grounds set out in the complaint in turn.

[82] First of all, Mr. Mooney is accused of inaccuracy because, in the Letter, he said it was unacceptable that CSIC decisions "cannot be subject to judicial review, meaning that members could lose their right to practice even if an error is made in the process."

[83] As subsequently established, decisions of CSIC are subject to judicial review, even if this might not occur in the Federal Court. So, as information, Mr. Mooney's statement is inaccurate. But he is held to account for it because, Ms. Woodman appears to suggest, he "failed to ensure the integrity of the publication by verifying the accuracy of the information with the regulator prior to publication." This allegation has to be looked at in context.

[84] The June 2008 *Report of the Standing Committee on Citizenship and Immigration* that was in the public domain at page 3, offered the following as one of the justifications as to why CSIC should be wound up and a new regulatory regime established:

> These grievances stem from various issues, and no doubt many arise because CSIC is a relatively new organization struggling to strike the right balance to regulate previously unregulated professionals. However, the Committee believes that problems at CSIC are attributable to more than just growing pains. Fundamentally, the Society is not being given the tools it needs to succeed as a regulator. As a federally-incorporated body, CSIC has no power to sanction immigration consultants who are not members of the Society, and it cannot seek judicial enforcement of the disciplinary consequences it imposes on those who are members. Further, because CSIC's jurisdiction is not governed by statute, there is no possibility for dissatisfied members and others to influence the Society's internal functioning though (*sic*) judicial review. In the view of the Committee, these shortcomings should be addressed by new legislation.

[85] CSIC was well aware of these words because it reviewed the Standing Committee Report and published a strong rejection of the justifications offered for dissolving CSIC and establishing a

new regime. It was after this response that CAPIC came to the conclusion that CSIC was not listening to its members, and the Letter came to be written and published as a response to CSIC's response to the Standing Committee Report.

[86] In its response to the Standing Committee Report, CSIC heavily criticized the Report, but it did not say that the Report was inaccurate about the availability of judicial review.

[87] Hence, as the debate stood at the time of the Letter, there was nothing to suggest that what the Standing Committee had said about the unavailability of judicial review was inaccurate. Mr. Mooney has indicated that his view on the unavailability of judicial review was based upon the Standing Committee Report and advice he received from lawyers. He says that everyone believed this to be the case. We do not know how and when CSIC adopted a contrary view. But it certainly does not look to me as though Mr. Mooney was being negligent or irresponsible in his views on this matter. It seems to have been the general view at the time and it was certainly the view of the Standing Committee.

[88] Having failed to identify to its members that the Standing Committee position on judicial review was not accurate, CSIC then disciplined Mr. Mooney for making a mistake about the unavailability of judicial review. CSIC now says that he breached Rule 16.5 because he did not confirm the accuracy of the judicial review situation himself. This is a heavy onus to place upon a member regarding accuracy, particularly in a context where the Standing Committee had obviously done its own research and CSIC had not informed its members that the Standing Committee was inaccurate on this issue. It is obviously not a standard that CSIC asks of other members or of its own

officers. Ms. Woodman herself has revealed that she does not feel obliged actually to review "the available information" before subjecting a member to discipline but feels free to rely upon the Closing Memorandum presented by Mr. Briand, which was partial and inaccurate and which Ms. Woodman thought was something very different from what Mr. Briand had produced.

[89] Strictly speaking, it is true that Mr. Mooney – as well as others responsible for the Letter – was inaccurate regarding the availability of judicial review. What is unclear is whether this was the inaccuracy that Ms. Woodman was referring to in the Administrative Discipline Order issued against Mr. Mooney, and how material this inaccuracy was in her decision to discipline Mr. Mooney, and the form that the discipline took. In my view, this is not the behaviour of a responsible and objective regulator disciplining a member. This reveals a sensitive regulator looking for ways to make an example of Mr. Mooney.

[90] The second ground alleged in the Complaint for a breach of Rule 16.5 by Mr. Mooney is that the letter was inaccurate when it said:

> Mr. Ryan states that CSIC has a Strategic Plan. That is news to most of us, as we have never seen it. It does not appear anywhere on the web site. Perhaps that is why so many of us feel that CSIC is busy doing things to us, instead of listening.

[91] The Letter does not say that CSIC does not have a Strategic Plan; it simply says that, if it does, it is news to most members because they have never seen it.

[92] No evidence has been placed before me to show that this statement is not a reliable account of the facts, as Ms. Woodman purportedly alleged in the Discipline Order issued against Mr. Mooney.

[93] Mr. Briand casts further light upon this point in his affidavit at paragraph 17:

> Further, the June 24 Letter suggested that the Society does not have a Strategic Plan. This is inaccurate. The Society has a Strategic Plan and [it] was referenced in its Annual Report that was available to the members on the Society's website prior to the June 24 Letter. Attached as Exhibit "E" is a copy of the Society's Annual Report for 2005-2006 posted on the Society's website.

[94] First of all, Mr. Briand is inaccurate when he says that the Letter suggests the Society does not have a Strategic Plan. The Letter says that, if a Strategic Plan exists, that is news to most members because they have never seen it.

[95] If we turn up Exhibit "E" and the Annual Report referred to by Mr. Briand, the following small paragraph appears at page 5:

> The Board, the administrative team, and the Committees, continue their work to further develop the CSIC strategic plan. Included in that plan is a regulatory strategy that covers all functions of the Society.

[96] Clearly, this reference does not say that CSIC has a Strategic Plan. It says CSIC is working on one, and it does not refute in any way what the Letter says about members not having seen a Strategic Plan. In fact, it confirms what was in the Letter because members are not likely to have been shown a Strategic Plan that is still being developed.

[97] It seems to me then that any inaccuracies about the existence of a Strategic Plan are all made by CSIC, not by Mr. Mooney or the board of CAPIC. And yet, Mr. Mooney may have been disciplined for this alleged inaccuracy.

[98] The third inaccuracy that appears in the Complaint against Mr. Mooney relates to the following statement in the Letter:

> Mr. Ryan also states that CSIC presents Audited Financial Statements to its members. Again, there is no mention of this on their web site, and to the best of our recollection, we have not seen one in two years. In the past, any Audited Statement that we have seen has been so top-level, that members cannot see how their fees are being spent in any kind of meaningful way.

[99] Mr. Mooney is not told in the Administrative Discipline Order which aspects of this statement CSIC regards as inaccurate or untrue. CSIC appears to be relying upon the Complaint to provide the grounds and the explanation which are lacking in the Discipline Order, but the Complaint simply quotes from the Letter.

[100] The Court has been presented with no evidence to show that:

(a) The CSIC website mentioned at the material time that CSIC presents Audited Financial Statements to its members; or

(b) Past statements have not been top-level so that members can see how their fees are spent in a meaningful way.

The Court is referred in the Respondent's Further Memorandum of Fact and Law to the cross-examination of Mr. Mooney which touches on these points, but it is by no means clear that what occurred at the cross-examination invalidates Mr. Mooney's criticism. Mr. Mooney admits that the

point was not framed properly. There was a financial statement on the web site posted in September 2007 which Mr. Mooney saw. The point he was trying to make was that it had been two years since members had received updated financial information.

[101] The only evidence I had before me suggests that, as of 24 June 2008, the most up-to-date financial disclosure from CSIC was for the period ending on 31 October 2006.

[102] My conclusion on Ms. Woodman's unexplained allegations of inaccuracy as a basis for finding Mr. Mooney in breach of Rule 16.5 of the *Rules of Professional Conduct* is that the only material inaccuracy that it appears to have occurred in the Letter was regarding the unavailability of judicial review, and it is not clear what role is played in Ms. Woodman's decision to discipline Mr. Mooney and whether Ms. Woodman was even aware that Mr. Mooney was simply re-iterating the opinion of the Standing Committee and relying upon advice received from lawyers.

[103] Taken together, the alleged inaccuracies suggest to me that CSIC was itself inaccurate and overharsh in dealing with Mr. Mooney. It looks to me as if CSIC was more concerned to make an example of Mr. Mooney than with finding accurate and objective reasons for doing so.

[104] It is very telling, in my view, that when Mr. Briand interviewed Mr. Mooney as part of the investigation, Mr. Mooney was never asked to explain the basis for the statements in the Letter concerning judicial review, the Strategic Plan or the Audited Financial Statements.

[105] Even if Mr. Mooney had been the sole author of the Letter, Ms. Woodman had no clear basis for issuing the Administrative Discipline Order for a breach of Rule 16.5. During the course of these proceedings, it has emerged that CSIC acted against Mr. Mooney because it regarded him as the sole author of the Letter, and this confirms the import of the Discipline Order.

[106] Ms. Woodman's justification for disciplining Mr. Mooney as the sole author is inconsistent with the following facts:

i. The Letter was amended by Mr. Mooney to account for comments received from other board members. Tad Kawecki told Mr. Briand during his interview that he made a comment to Mr. Mooney about the posting. An amendment to the Letter resulted. Ron Liberman e-mailed Mr. Mooney with comments, which were incorporated into the Letter. Mr. Briand had a copy of the e-mails sent from Mr. Mooney to the CAPIC board to solicit comments. He also had the e-mail from Ron Liberman containing his proposed changes. These e-mails were not referenced in Mr. Briand's Closing Memorandum concerning Mr. Mooney; and

ii. The Letter underwent significant changes from June 23 to June 24. The e-mails sent on June 23 and June 24 made it clear that the changes resulted from input received from other directors. Ms. Woodman admitted that she did not review the documents to see whether any changes were made, nor did she recall reviewing Mr. Mooney's e-mails wherein he asked directors for comments. She may have been misled by Mr. Briand who wrongly believed that there were no changes made to the draft. On cross-examination, Mr. Briand admitted that his belief that the draft underwent no changes was important to his conclusion that Mr. Mooney was the sole author.

[107] Ms. Woodman's conclusions that Mr. Mooney was the sole author of the Letter and that the process followed to post the Letter was unusual were no doubt influenced by Mr. Briand's incomplete Closing Memorandum concerning Mr. Mooney. In it, Mr. Briand cites the evidence from a second interview of Mr. Tad Kawecki to the effect that:

i. It was unusual for a posting to be finalized so quickly; and

ii. Mr. Kawecki regarded the Letter as being from Mr. Mooney alone.

[108] Mr. Briand failed, however, to advise Ms. Woodman that:

i. Mr. Kawecki's evidence from his first interview was that there was no rule at CAPIC as to how communications from the board were to be posted;

ii. The evidence of Gerd Damitz, Ron Liberman and Praveen Shrivastava was that the Letter was posted in accordance with CAPIC's usual practice. The usual practice was that a draft comment was e-mailed to directors. If there was no opposition to the draft, and amendments to the posting were made in accordance with director feedback, the article was posted;

iii. Tad Kawecki and Ron Liberman provided comments to Mr. Mooney about the Letter prior to it being posted, which resulted in amendments;

iv. Rhonda Williams, Gerd Damitz, Julia Brodyansky, Russell Monsurate, Ron Liberman, Praveen Shrivastava and Tarek Allam told Mr. Briand that they agreed with the content of the letter;

v. Mr. Briand concluded, based on the evidence, that Tarek Allam, Ron Liberman and Russell Monsurate each agreed to the posting of the Letter. In his closing letters to them he

stated: “Your action in agreeing to post the document as it stood was interpreted as a challenge to CSIC your regulator”;

vi. Mr. Briand’s belief was that all CAPIC directors were responsible for the Letter. In his 24 August 2009 Closing Memorandum to Janet Burton, Mr. Briand provided his view that “as a Member of the BOD of a Society (*sic*), you are equally and mutually responsible for the actions taken by its President and Members.”

[109] As regards Mr. Mooney’s breach of Rule 16.6 of the *Rules of Professional Conduct*, the Administrative Discipline Order provides as follows:

> The article [Letter] is not directed at government or legislative policy and as such is neither a comment on public policy nor a comment on the Standing Committee Report. Rather, the article is a reaction to and is directed at the regulator’s response to the Standing Committee Report. The published article acts to undermine the regulator’s mandate and governing principles.

[110] In my view, this statement is not accurate. The Letter actually refers to the Standing Committee Report and points out that CAPIC welcomed the two principal recommendations in that report. It asks CSIC to accept the changes recommended by the report for the “greater good of the profession.”

[111] So the Letter is obviously directed at government and legislative policy as well as CSIC’s position concerning which direction that policy should take. The fact that the Letter deals with CSIC’s response to the Standing Committee Report does not mean that it is not directed at government and legislative policy. Ms. Woodman appears to be suggesting that it is permissible for

members to discuss the Standing Committee Report but it is not appropriate to discuss CSIC's response to that Report. There is nothing in Rule 16.6 that would support such a position.

[112] Ms. Woodman does not explain how discussing, and obviously disagreeing with, CSIC's response to the Standing Committee Report "undermined the regulator's mandate and governing principles." Ms. Woodman simply assumes that disagreement with the CSIC response must necessarily undermine the regulator's mandate and governing principles. In fact, it amounts to an assertion that any agreement with the Standing Committee's principal recommendations undermines CSIC's mandate and governing principles. There is, in my view, no basis for this assertion.

[113] The Standing Committee Report and its principal recommendations are obviously a legitimate and thoughtful attempt to suggest ways in which CSIC could, and should, be reformed so that it might better fulfill its mandate and governing principles. The Letter in support of such reforms also supports the same goals.

[114] The Letter is obviously composed by people who want to see improved protection of the public from unconscionable and unqualified immigration consultants and improved regulation of the profession. There can be legitimate disagreement about the best way to fulfill and further the regulator's mandate and governing principles, but the present officers of CSIC do not have a monopoly on that discussion. In disciplining Mr. Mooney in this way, they are attempting to prevent CSIC members from advancing opinion on how CSIC can better fulfill its mandate and governing principles if that opinion does not accord with their own. In my view, this is not a legitimate use of

CSIC's *Rules of Professional Conduct*. Counsel for CSIC conceded at the hearing of this application that, apart from the alleged inaccuracies contained in the Letter, CSIC did not regard the rest of the Letter as a breach of its *Rules of Professional Conduct*. I see this as an acknowledgment that legitimate criticism that forms part of the debate emanating from the Standing Committee Report is not a breach of the Rules. The evidence before me suggests that the Letter was no more than a legitimate contribution to that debate. CSIC's sensitivities to criticism are understandable, but I see no reason why Mr. Mooney should have been singled out for discipline.

[115] In addition, the Decision was also procedurally unfair. CSIC should have raised the specifics of the complaint with Mr. Mooney during the investigation so as to provide him an opportunity to explain and answer them. Also, Ms. Woodman should have explained in her Discipline Order which aspects of the complaint she was satisfied had been established. The Discipline Order is unreasonable because it mistakenly assumes that Mr. Mooney was acting alone when he composed and posted the Letter, and it unfairly singles him out for discipline when even the Investigator, Mr. Briand, takes the position, as articulated to Ms. Burton, that all directors "are equally and mutually responsible for the actions taken by its President and Members." Either Mr. Briand failed to explain this guiding principle to Ms. Woodman or she misunderstood his position. Ms. Woodman's conclusion that Mr. Mooney was the sole author of the Letter appears to have been prompted by Mr. Briand's partial Closing Memorandum in which he cites evidence from a second interview of Tad Kawecki to the effect that it was unusual for a web site posting to be finalized so quickly and that Mr. Kawecki believed the Letter to be the sole work of Mr. Mooney. Mr. Briand seems to have turned a blind eye to evidence that directly contradicts his conclusions. He does not advise Ms.

Woodman that there is evidence that directly contradicts his conclusions. Further, he does not advise Ms. Woodman that:

i. Mr. Kawecki stated in his first interview that there was no rule at CAPIC as to how communications from the board were to be posted;

ii. The evidence of Gerd Damitz, Ron Liberman and Praveen Shrivastava was that the Letter was posted in accordance with CAPIC's usual practice. The usual practice was that a draft comment was e-mailed to directors. If there was no opposition to the draft, and amendments to the posting were made in accordance with director feedback, the article was posted;

iii. Tad Kawecki and Ron Liberman provided comments to Mr. Mooney about the Letter prior to it being posted, which resulted in amendments;

iv. Rhonda Williams, Gerd Damitz, Julia Brodyansky, Russell Monsurate, Ron Liberman, Praveen Shrivastava and Tarek Allam told Mr. Briand that they agreed with the content of the Letter;

v. Mr. Briand concluded, based on the evidence, that Tarek Allam, Ron Liberman and Russell Monsurate each agreed to the posting of the Letter. In his closing letters to them he stated: "Your action in agreeing to post the document as it stood was interpreted as a challenge to CSIC your regulator";

vi. Mr. Briand's belief was that all CAPIC directors were responsible for the Letter. In his Closing Memorandum to Janet Burton, Mr. Briand provided his view that "as a Member of the BOD of a Society (*sic*), you are equally and mutually responsible for the actions taken by its President and Members."

[116] As a general rule, disciplinary bodies set the standard for what does and does not constitute professional conduct and, absent a finding of unreasonableness, courts should not intervene where a disciplinary tribunal decides that such standards have been breached. See *Tobin v Canada (Attorney General)*, 2009 FCA 254.

[117] The jurisprudence is also clear, however, that where the decision under review was unreasonable, intervention is warranted. *Salway v Assn. of Professional Engineers and Geoscientists of British Columbia*, 2010 BCCA 94 (leave to appeal denied [2010] SCCA No 122), at paragraph 32, is a recent and especially useful case as it applies *Dunsmuir* to the context of professional discipline. In that case, a unanimous BC Court of Appeal found that

> The reasonableness standard of review acknowledges that there is "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Reasonableness requires courts to give deference to a professional body's interpretation of its own professional standards so long as it is justified, transparent and intelligible. The pre-*Dunsmuir* decisions relied on by the respondent, including *Reddoch*, no longer set the standard for professional misconduct as conduct that is dishonourable, disgraceful, blatant or cavalier. Rather, it is the disciplinary body of the professional organization that sets the professional standards for that organization. So long as its decision is within the range of reasonable outcomes -- i.e., it is justified, transparent and intelligible -- it is not for courts to substitute their view of whether a member's conduct amounts to professional misconduct.

[118] In *Onuschak v Canadian Society of Immigration*, 2009 FC 1135 at paragraph 15, Justice Harrington found that CSIC's nine stated purposes "really boil down to one":

> [t]o regulate in the public interest eligible persons who are members of the Corporation and advise or represent individuals, groups and entities in the Canadian immigration process …, as determined in

> accordance with the policies and procedures published by the corporation from time to time.

[119] In *Association des courtiers et agents immobiliers du Québec v Proprio Direct inc.*, 2008 SCC 32 [*Association des courtiers*], the Supreme Court addressed discipline review in the context of consumer protection. The Court's comments on consumer protection are helpful in the present case, given that the goal of CSIC, as found by Justice Harrington, is consumer protection and that CSIC is arguing that Mr. Mooney harmed the public and the public image of CSIC by publishing misinformation in the Letter.

[120] In *Association des courtiers*, Proprio Direct inc., a real estate broker, required its vendors to pay a non-refundable "membership fee" when they signed an exclusive brokerage contract, in addition to having to pay a commission if the property sold. Complaints were made to the appellant Association about this practice. The discipline committee decided that Proprio Direct's actions contravened the requirements of the Real Estate Brokers Act (REBA). The Court of Québec agreed. The Court of Appeal did not. It found that, under REBA, the parties were free to make their own contractual agreements, even though REBA was a law of public order for consumer protection. The Supreme Court of Canada allowed the appeal with dissent. The Court found that what was at issue in this case was the interpretation by the discipline committee of its home statute, a question squarely within its specialized expertise and statutory responsibilities. Reasonableness was the standard applicable and the discipline committee's decision was reasonable. A plain reading of the Act supported this view. The purpose of the Act was to protect consumers, and the legislature had explicitly restricted the parties' freedom of contract by making the language of the compensation clause a mandatory requirement of the contract. Consumer protection trumped freedom of contract:

17 The purpose of *REBA* is to protect consumers. As s. 66 states, the "primary role" of the Association is the protection of the public from breaches of ethical norms by members of the real estate profession.

18 Upholding these ethics is at the core of the discipline committee's mandate and the Quebec Court of Appeal has consistently applied a reasonableness standard to its decisions under *REBA*. This deferential degree of scrutiny was articulated in *Pigeon v. Daigneault*, [2003] R.J.Q. 1090, by Chamberland J.A., and in *Pigeon v. Proprio Direct inc.*, J.E. 2003-1780, SOQUIJ AZ-50192600 by Dalphond J.A. In the first of these cases, as in this case, no privative clause existed. Chamberland J.A. explained that, despite the absence of this protection, the expertise of the committee dictated a deferential standard of review:

> [TRANSLATION] ... even though the Act provides for a right of appeal from the Discipline Committee's decisions, the expertise of the Committee, the purpose of the Act and the nature of the issue all favour greater deference than under the standard of correctness. The appropriate standard of review is therefore reasonableness ... . [19]

19 Dalphond J.A. amplified the rationale for deferring to the committee's expertise in the second case which, by virtue of a slightly different legislative scheme, had a form of privative clause:

> [TRANSLATION] Regarding the expertise of the Discipline Committee, as my colleague Chamberland J.A. pointed out in *François Pigeon v. Stéphane Daigneault* ... it is not in doubt. The majority of the Committee's members come from the real estate brokerage field (s. 131 of the Act) and have an intimate knowledge of that sector of economic activity. The legislature thus intended to establish a peer justice system, as it was aware that on questions of ethics, the expected standards of conduct are generally better defined by people who work in the same sector and can gauge both the interests of the public and the constraints of the specific economic sector (*Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869). On the other hand, a judge of the Civil Division of the Court of Quebec ... cannot claim to have special expertise in the area of professional discipline, and this is even more true in matters

> relating to real estate brokerage. This second factor once again favours some deference as regards the interpretation of the standards of conduct applicable to brokers and the imposition of appropriate penalties. [Emphasis added; para. 27.]

> 20 The decision under appeal in this case is a departure from that deferential approach. In my view, with respect, the standard of review applied in the earlier cases by Dalphond and Chamberland JJ.A. is to be preferred and is in greater compliance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 (at paras. 54 and 55). In particular, the presence or absence of a privative clause, while relevant, is not determinative (*Dunsmuir*, at para. 52).
>
> 21 What is at issue here is the interpretation by the discipline committee, a body of experts, of its home statute (*Dunsmuir*, at para. 54. See also *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 32). The legislature assigned authority to the Association, through the experience and expertise of its discipline committee, to apply - and necessarily interpret - the statutory mandate of protecting the public and determining what falls beyond the ethical continuum for members of the Association. The question whether Proprio Direct breached those standards by charging a stand-alone, non-refundable fee falls squarely within this specialized expertise and the Association's statutory responsibilities. I see nothing unreasonable in the discipline committee's conclusion that the provisions requiring a sale before a broker or agent is entitled to compensation, are mandatory.

[121] I draw from these words that the Complaints and Discipline Manager, Ms. Woodman, in the present case may have expertise in the interpretation of CSIC's Rules and Policies and also in what constitutes a violation of the Rules and Policies. However, it is my view that, because her exercise of discretion both in deciding to discipline the Applicants and how to discipline them rests upon mistakes of fact, the Decisions are not reasonable.

[122] Ms. Woodman based the following findings on a faulty and unreasonable interpretation of the evidence as it was presented in the Investigator's Closing Memorandum: that Mr. Mooney was the sole author of the Letter; that the Letter was based on inaccuracies; and that Ms. Williams and Mr. Damitz, during the investigation, intentionally withheld and concealed information regarding the composition of the CAPIC board of directors. Ms. Woodman's Decisions fall squarely within the terms employed in paragraph 18.1(4)(*d*) of the *Federal Courts Act*, based on erroneous findings of fact "made in a perverse or capricious manner or without regard for the material before it." In my view, no amount of deference can right these erroneous findings.

[123] What we have in this case is the Investigator's "partial" and inconclusive Closing Memorandum, the purpose of which was to inform the Decisions. And we have the Decisions, which were made without proper regard for the evidence. We have unreasonableness at both stages: the investigatory stage and the decision-making stage.

[124] With respect to the second "other issue" namely, the exercise of discretion—that is, the Complaints and Discipline Manager's choice of whether and how to discipline the Applicants—this also is reviewable on the reasonableness standard. See *Dunsmuir*, above, at paragraph 51.

[125] Justice Trainor of the Supreme Court of Ontario–High Court of Justice observed at paragraph 33 of *Spring v Law Society of Upper Canada* (1988), 50 DLR (4th) 523, 64 O.R. (2d) 719 (QL), that "marshalling evidence, deciding facts, ruling on credibility, and other matters necessary in decision-making, can hardly be described as a task that is foreign to the legal profession." Certainly, immigration consultants are not necessarily lawyers. However, as indicated

in her affidavit evidence, Ms. Woodman is a lawyer. At minimum, she was obligated to root her findings of fact in the evidence. However, her "marshalling" of the evidence was, in my view, materially inaccurate. The evidence provided in the Closing Memorandum and the transcripts was inconclusive on key points: that Mr. Mooney was the sole author of the Letter and that Ms. Williams and Mr. Damitz deliberately withheld information during the course of the investigation. Nevertheless, the Complaints and Discipline Manager treated the evidence as if it was conclusive, and she used this evidence to justify the disciplinary measures meted out. Decisions built on such crumbling foundations cannot stand.

[126] There is little jurisprudence regarding CSIC and, therefore, no case law regarding whether the Complaints and Discipline Manager can be considered an expert tribunal. In *Law Society of New Brunswick v Ryan*, 2003 SCC 20, the Supreme Court of Canada found that the appropriate standard of review for professional discipline proceedings in the legal context, albeit with respect to lawyers and not immigration consultants, was reasonableness *simpliciter*. At paragraph 34, the Court indicates that, with respect to the sanction that should be applied to the misconduct, a tribunal "has more expertise than courts":

> [t]he Discipline Committee's expertise is not in a specialized area outside the general knowledge of most judges (such as securities regulation in *Pezim, supra*, or competition regulation in *Southam, supra*). However, owing to its composition and its familiarity with the particular issue of imposing a sanction for professional misconduct in a variety of settings, the Discipline Committee arguably has more expertise than courts on the sanction to apply to the misconduct.

[127] Justice de Montigny in *Kinsey v Canada (Attorney General*), 2007 FC 543 at paragraphs 43-47, recognized that the tribunal's choice of sanction is entitled to "strong deference":

There is no doubt that the Commissioner (and the Board whose decision he reviews on appeal) has greater expertise relative to the Court with respect to the realities and demands of policing, and what sanctions would be appropriate to ensure the integrity and professionalism of the police force. This factor militates in favour of affording the Commissioner's decision strong deference.

With respect to the purpose of the legislation, the RCMP Act grants the RCMP, as directed by the Commissioner, the primary responsibility for developing and maintaining standards of professionalism and discipline within its own ranks. Therefore, in carrying out this duty, the Commissioner is not simply establishing rights between parties. He balances the interests of the RCMP member subject to the disciplinary action with those of the Force and the Canadian public, by ensuring police officers who have engaged in disgraceful conduct are sanctioned in a manner that maintains public confidence in the RCMP. By balancing the interests of different constituents, this factor again militates in favour of a higher degree of deference to the Commissioner's decisions on sanction.

Finally, sanctions to be imposed for disgraceful conduct by RCMP members are primarily fact-driven determinations, discretionary in nature. Again, this signals that Parliament intended the Commissioner's decisions to be subject to significant deference.

As a result of the foregoing analysis, the proper standard of review of a sanction imposed by the Commissioner pursuant to s. 45.16 of the RCMP Act is clearly patent unreasonableness. As a matter of fact, this is also the standard which my colleagues have applied to decisions of the Commissioner imposing sanctions for breaching the Code of Conduct (see *Gill v. Canada (Attorney General)*, 2006 FC 1106; *Gordon v. Canada (Solicitor General)*, 2003 FC 1250; *Lee v. Canada (Royal Canadian Mounted Police)*, [2000] F.C.J. No. 887 (QL)). The Commissioner's decision should thus only be set aside if clearly irrational or evidently not in accordance with reason (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 52).

As for the issues of bias and procedural fairness, they do not engage a standard of review analysis. These issues must always be reviewed as questions of law. If the decision-maker has breached his duties through the manner in which he made his decision, it must be set aside (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404).

[128] All that being said, the degree of deference that a court must afford an expert tribunal is dependent on the tribunal acting in a way that is supported by the evidence. The Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.* (1997), [1997] 1 SCR 748, [1996] SCJ No 116 (QL) [*Southam*], at paragraph 62, quotes R.P. Kerans' *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), which observes: "Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible."

[129] In the instant case, the Court cannot ignore the absence of conclusive findings and the presence of contradictions in the Investigator's Closing Memorandum, its failure to address contradictory evidence, and the subsequent failure of the Complaints and Discipline Manager to base her Decisions on the evidence that was presented in the Closing Memorandum. Applying *Southam*, above, neither the Closing Memorandum nor the Decisions are defensible. The Investigator's Closing Memorandum draws conclusions that are not supported by the transcripts, and the Decisions draw conclusions that are not supported by the Closing Memorandum. In addition, it is my view that the Closing Memorandum and the Decisions are procedurally unfair for reasons given herein.

[130] In my view, then, the Administrative Discipline Order against Mr. Mooney must be quashed as being procedurally unfair and unreasonable. It is also my view, as I will discuss in detail later, that the Letters of Warning issued against Ms. Williams and Mr. Damitz should also be quashed.

[131] The Applicants have raised various additional grounds for reviewable error as regards Mr. Mooney. Given my basic conclusions about procedural fairness and unreasonableness as set out above, I do not think it is necessary to address those additional grounds.

Rhonda Williams and Gerd Damitz

[132] The Letter of Warning that Ms. Woodman issued against Ms. Williams says that Ms. Woodman "considered the available information relating to the matter … ." As I pointed out with regard to Mr. Mooney, this is not an accurate statement of how Ms. Woodman arrived at her conclusions. Again, she appears to have relied upon Mr. Briand's partial and incomplete account that was set down in his Closing Memorandum, and she appears to have an inaccurate understanding of what Mr. Briand's Closing Memorandum was intended to provide.

[133] Ms. Woodman finds that Ms. Williams has "breached section 2.6 of the *Complaints and Discipline Policy* by withholding and concealing information reasonably required for the purpose of an investigation … ."

[134] Unlike the case of Mr. Mooney, Ms. Woodman then goes on to explain in some detail why she has reached this conclusion. The gist of it appears to be that Ms. Williams was not clear about who was and who was not a CAPIC board member as of 24 June 2008, and Ms. Woodman believes that Ms. Williams should have been able to confirm this fact because she was "the minute taker and secretary" at a 13 June 2008 CAPIC board meeting that dealt with the election of new directors. In particular, Ms. Williams is accused of not disclosing that Katarina Onuschak and Ed Dennis were

present as directors at the 13 June 2008 meeting. CSIC regards this omission as being important to its investigation because it wanted to identify which CAPIC directors were responsible for the 24 June 2008 Letter.

[135] Ms. Woodman summarizes the complaint against Ms. Williams and her conclusions as follows:

> As a CSIC member, you have a duty to cooperate in the investigation and to answer questions asked by the Investigator that may touch upon the matter under inquiry. This duty to cooperate includes refreshing your memory prior to the interview including the review of relevant documents. To rely on "I don't think so" when you compiled the minutes for the June 13, 2008 board meeting is misleading and amounts to the withholding and concealing of information.

[136] There is no evidence of intentional concealment on the part of Ms. Williams.

[137] The Letter of Warning against Mr. Damitz is similar to the one against Ms. Williams except that he is singled out for a warning for failing to cooperate and withholding and concealing information. The Letter of Warning informs Mr. Damitz that, at the 13 June 2008 board meeting:

> You were identified as the director who seconded motion #2 approving the appointment of Sol Gombinsky as Ontario Chapter President and Ed Dennis and Katarina Onuschak as members at large. The minutes listed fifteen members present on June 13, 2008 including Katarina Onuschak and Ed Dennis. The June 13, 2008 minutes also welcomed them as new directors. As a director you have a responsibility to verify and attest to the accuracy of the board minutes. No amendments to the June 13, 2008 minutes were disclosed during the course of the investigation.

[138] As with Ms. Williams, there is no evidence of intentional concealment by Mr. Damitz.

[139] The complaint against both of them appears to single them out for a warning, when other directors present at the 13 June 2008 meeting were not, because Ms. Williams took the minutes at the meeting and Mr. Damitz seconded the motion for approving the appointments.

[140] The record shows some genuine confusion among the directors interviewed concerning the precise composition of the CAPIC board on 24 June 2008 and, in particular, concerning the status of Mr. Dennis and Ms. Onuschak, both of whom seem to have been present and to have participated in board meetings even though their status as directors was not clear at the time.

[141] Prior to any interviews being conducted, Mr. Briand requested and received a list of CAPIC directors as of 24 June 2008. The list provided to Mr. Briand did not include Ed Dennis and Katarina Onuschak. It appears that these two individuals had been approved to act as directors at a CAPIC board meeting held 13 June 2008, but they were not directors on 24 June 2008 because neither had yet provided a consent to act as a director. This did not happen until August 2008.

[142] As part of his investigation, Mr. Briand was provided with minutes of the 13 June 2008 board meeting which showed Sol Gombinsky, Ed Dennis and Katarina Onuschak in attendance. The minutes stated: “welcome to new members.”

[143] In a letter to Applicants’ counsel, Mr. Briand referenced the approvals contained in the minutes and requested clarification of who was on CAPIC’s board as of 24 June 2008. Counsel provided the following response dated 15 September 2009:

> Ed Dennis and Katerina (*sic*) Onuschak were prospective members of the CAPIC board on 24 June 2008, but were not members. They

> did not become members of the board until August, 2008, when they executed consents to act as a CAPIC director. We are attaching their consents. Until the consents were executed, Ed and Katerina (*sic*) were not CAPIC board members.
>
> As can be seen from the above, the board member list provided to you throughout your investigation was correct.

[144] There were further exchanges between Mr. Briand and counsel concerning the timing of the appointment of Mr. Dennis and Ms. Onuschak to the CAPIC board.

[145] The evidence of when Mr. Dennis and Ms. Onuschak joined the board was confusing. There was contradictory documentary evidence on the issue. Directors who were asked by Mr. Briand about the composition of the board as of June 24 had difficulty recalling it.

[146] During Mr. Briand's interviews of CAPIC directors, nobody said with any certainty that Mr. Dennis and Ms. Onuschak were directors on 24 June 2008. Mr. Mooney said that the list provided to Mr. Briand was accurate but that people were subsequently added to the board. Tad Kawecki, Praveen Shrivastava and Tarek Allam told Mr. Briand that they were unsure who was on the board as of 24 June 2008. Keith Frank and Janet Burton said that they did not believe Mr. Dennis and Ms. Onuschak were on the board as of 24 June 2008.

[147] Mr. Damitz and Ms. Williams provided evidence that was similar to the evidence of other directors. Mr. Damitz's evidence was that Mr. Dennis and Ms. Onuschak were not directors on 24 June 2008 but that this was a transition period and he could not remember the precise dates on which they joined the board. After being read a list of directors that included Mr. Dennis, but not Ms. Onuschak, Ms. Williams responded that she did not think anyone was missing from the list.

[148] Although Mr. Briand had the power to do so, he never contacted Mr. Dennis or Ms. Onuschak to inquire when they became directors.

[149] It is clear from e-mails exchanged between Mr. Dennis and Ms. Onuschak on 10 July 2008 that, as of this date, they did not yet consider themselves directors of CAPIC. They both referenced the fact that they did not have a vote on CAPIC's board as of that date.

[150] Mr. Briand acknowledged in his affidavit and in his cross-examination that, based on the evidence, he could not determine whether Mr. Dennis and Ms. Onuschak were directors on 24 June 2008. Yet, Mr. Briand made his recommendations on the basis that Mr. Dennis and Ms. Onuschak were directors.

[151] Ms. Williams and Mr. Damitz both seem to have correctly believed that Mr. Dennis and Ms. Onuschak were not directors on 24 June 2008. In any event, neither Ms. Williams nor Mr. Damitz anticipated questions about the composition of the board prior to their interview. Neither of them was asked to follow-up on this issue. It is apparent from the interview transcripts that Mr. Briand appeared satisfied with the answers provided by Mr. Damitz and Ms. Williams. In the circumstances, there was no reason for them to refresh their memories or consult the minutes. Had they done so, they presumably would have confirmed that Mr. Dennis and Ms. Onuschak were not directors on 24 June 2008.

[152] In his Closing Memorandum to Ms. Woodman, Mr. Briand did not disclose that he:

i. was unsure, based on the evidence, whether or not Mr. Dennis and Ms. Onuschak were directors on 24 June 2008;

ii. had not asked Ms. Williams or Mr. Damitz (before, during or after their interviews) to review their records to confirm who was on the board as of 24 June 2008.

[153] CSIC justified its Decision against Mr. Damitz on the basis that he seconded a motion approving the appointment of new directors. His act of seconding the motion allegedly placed him in a different position from those CAPIC directors who merely participated in the meeting and voted in favour of the motion.

[154] CSIC justified its Decision against Ms. Williams on the basis that she took the minutes. Yet, Mr. Briand understood that the minutes were available to all directors and that all directors were equally well-placed to review their records. Ms. Woodman suggested in her cross-examination that it was the act of taking the minutes that placed Ms. Williams in a unique position vis-à-vis the other directors.

[155] The Decisions against Ms. Williams and Mr. Damitz are difficult to square with CSIC's findings of fault (but no disciplinary action) against certain other CAPIC directors. For example:

i. In his closing letter to Tarek Allam, Mr. Briand stated:

> You were also questioned on your knowledge of the CAPIC Board Members as of June 24, 2008 during the interviews. You replied that you did not know exactly who the Board Members were at that time. The evidence showed that you were present on a BOD meeting on June 13, 2008, where Katarina Onuschuk (*sic*), Ed Dennis and Sol Gombinsky were accepted as members. The evidence shows that your memory

had failures, but that you were present on the June 13 meeting. In the future, you should verify the records and call back the investigator to correct your answer.

ii. In his closing letter to Janet Burton, Mr. Briand stated:

> During the interview… I questioned you about who were the Members of the BOD at the time the article went (*sic*) published on [the] CAPIC website. You answered me a few names, but you failed to mention Sol Gombinsky, Ed Dennis and Katarina Onuschuk (*sic*). It is clear through the evidence gathered, that on June 13, 2008, you attended a meeting where 3 new BOD members were approved, and you were within the attending BOD members who approved them. You were therefore fully aware of their presence on the BOD at the time Phil Mooney published his article. This showed me that you did not fully cooperate during this investigation. This is contrary to article 2.6 of the Complaint and discipline policy … .
>
> …
>
> Further to this, you are required to answer all questions put to you by the investigator truthfully. A lapse of memory is not a satisfactory response when you were noted as being present at the meetings… .

[156] I have carefully reviewed those portions of the interview transcript where Mr. Briand questions Ms. Williams and Mr. Damitz concerning the structure of the CAPIC board as of 24 June 2008.

[157] In the case of Ms. Williams, she provides help, for example, by pointing out that Marc Haan (who was on the list that Mr. Briand had in his possession) was not a director but rather a staff member and that Kay Adebogun was not on the board in June. Apart from that, and going from memory, Ms. Williams does not think that there was anyone else on the board who did not appear on the list, but she also says "I wasn't writing down the names though so … ."

[158] What is striking is that Mr. Briand appears to be entirely satisfied with the way Ms. Williams has addressed the issue. He actually tells her so:

> I don't think I have anymore question (*sic*) for you. You've answered my questions concerning your involvement for up to now.

[159] Just before he says this, Ms. Williams had indicated to him that she cannot be absolutely certain about the composition of the board as of 24 June 2008:

> "I don't think so. I wasn't writing down the names though so … ."

[160] So Mr. Briand knew that Ms. Williams was not entirely certain and was just doing her best from memory. Had he not been satisfied with her answer, there was nothing to stop him from asking her to check the applicable records of CAPIC and get back to him. Had he done so, the accuracy of Ms. Williams' recollection would have been confirmed as it later was by counsel. Yet he never does this and leaves Ms. Williams with a clear message: "You've answered my questions … ."

[161] Because of the way Mr. Briand treated her at the investigation, Ms. Williams could have had no idea that he expected her to know (or that Ms. Woodman would later expect her to know) that she should have a clear picture of the director situation by virtue of the fact that she took minutes. Ms. Williams was given no opportunity to investigate what has since been revealed to be quite a complex issue about whether Mr. Dennis and Ms. Onuschak were, in fact, directors at the material time. In fact, she was led to believe that she had answered Mr. Briand's questions.

[162] To single Ms. Williams out for a warning in this context was unfair and unreasonable. She was led to believe that she had satisfied Mr. Briand's investigation. What is more, although the evidence is not entirely clear, it appears that the answer she gave may well have been accurate, even though she warns Mr. Briand that she is speaking only from memory and that "she wasn't writing down the names though so … ."

[163] Ms. Woodman issues the warning on the basis that Ms. Williams had a duty to cooperate which includes "refreshing your memory prior to the interview including the review of relevant documents." This duty, of course, is common to all of the directors, but ten of them were not warned of it. In addition, there is no evidence that Ms. Williams did not refresh her memory before the meeting. As it turns out, the status of Ms. Onuschak and Mr. Dennis at the relevant time is quite complex, and there is no conclusive evidence that Ms. Williams did not get their status right at the interview with Mr. Briand. Further, Ms. Woodman's conclusions are at odds with Mr. Briand's indication at the interview that Ms. Williams had answered his questions and that he gave her no indication that he wanted to confirm what she had told him from memory. Once again, the Letter of Warning issued against Ms. Williams is in direct contravention of Mr. Briand's principle – as stated to Ms. Burton – that he regards all directors as equally and mutually responsible.

[164] We are dealing only with disciplinary review here, but it appears to me that Ms. Williams has not been treated fairly. She was never made aware of the case she had to meet. See *Swanson v Institute of Chartered Accountants of Saskatchewan*, 2007 SKQB 480. Also, the decision to warn her has no objective basis.

[165] As regards Mr. Damitz, the transcript of his interview with Mr. Briand makes it clear that he did his best to confirm the list of directors from memory but that he could not be absolutely sure because the board was going through a "transition period" at that time. Again, Mr. Briand could easily have asked that Mr. Damitz check the situation and get back to him, but there is no indication in the interview transcript that he is dissatisfied with Mr. Damitz's qualified response from memory.

[166] I find that, for much the same reasons as in Ms. Williams's, it was unreasonable and unfair to single Mr. Damitz out for a warning when other directors were excused, and that Mr. Damitz was never made aware of the case he had to meet or provided with an opportunity to answer the complaints against him.

Conclusion

[167] For the reasons given, I have to conclude that the Decisions against all three Applicants must be quashed.

[168] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submissions of the opposite party. Following that, a Judgment will be issued.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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