Federal Court  Cour fédérale

Date: 20190730

Docket: IMM-3546-18

Citation: 2019 FC 1024

Ottawa, Ontario, July 30, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

MUHAMMAD AFZAL WATTO

Applicant

and

IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL AND MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Immigration Consultants of Canada Regulatory Council [ICCRC] is the governing body for individuals who, for payment, provide advice or representation on immigration matters and who are not otherwise subject to regulation by virtue of membership in a provincial law society or the *Chambre des notaires du Québec*.

[2] As a result of the designation of the ICCRC in June 2011 by the Minister of Citizenship and Immigration under subsection 91(5) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], members of the ICCRC who are in good standing may represent or advise paying clients concerning matters relating to that Act. (A similar designation was made under subsection 21.1(5) of the *Citizenship Act*, RSC 1985, c C-29.)

[3] Among other things, pursuant to its regulatory mandate the ICCRC has established entry-to-practice requirements; it oversees the professional development and conduct of its members; it receives, investigates and adjudicates complaints against members; and it administers a disciplinary process to sanction members who fail to meet the applicable standards.

[4] Being a federal not-for-profit corporation, the ICCRC is governed by the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 [*CNFPCA*].

[5] The applicant is an immigration consultant and a member of the ICCRC. In December 2015, he became the subject of a complaint to the ICCRC. Following an investigation, the complaint was referred to the ICCRC Discipline Committee for a hearing.

[6] Rule 2.2 of the *ICCRC Discipline Committee Rules of Procedure* provides that a hearing on the merits of a complaint shall be heard by three members of the Discipline Committee, of whom at least one must be a public member of the Committee.

[7] The hearing of the complaint against the applicant commenced on February 8, 2018, before a three-member panel. At the outset of the hearing, the applicant raised several preliminary issues, including an objection to the composition of the panel on the basis that one of its members (the Chairperson) is not a member of the ICCRC. The applicant contended that this was inconsistent with section 158 of the *CNFPCA*. The panel dismissed the applicant's objection in a written decision released on July 12, 2018.

[8] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*. The central issue in this application is whether section 158 of the *CNFPCA* precludes someone who is not a member of the ICCRC from sitting on a panel of the Discipline Committee. For the reasons that follow, I agree with the panel that it does not.

[9] Before the panel, the applicant also raised issues concerning reasonable apprehension of bias. The panel rejected these objections as well in its July 12, 2018, decision. The applicant challenged this determination in his original Memorandum of Argument in support of his application for leave and judicial review. However, this issue was not addressed in the applicant's Further Memorandum of Argument or in oral submissions. In my view, substantially for the reasons given by the panel, this issue is without merit.

[10] The applicant also raised several new issues in this application (including constitutional issues and issues under the *Canadian Bill of Rights*, SC 1960, c 44) that were not raised before the panel. The general rule is that new issues which could have been raised before the administrative decision-maker should not be considered on judicial review (*Alberta (Information*

and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61 at paras 22-26; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, [2015] 4 FCR 75, 2014 FCA 245 at paras 42-47; *Erasmo v Canada (Attorney General)*, 2015 FCA 129 at para 33). There is no reason to depart from this general rule here.

[11] The application for judicial review will, therefore, be dismissed.

II. PRELIMINARY ISSUE – THE PARTICIPATION OF THE MINISTER

[12] The applicant originally named the ICCRC, the Attorney General of Canada and the Minister of Citizenship and Immigration as respondents on this application for judicial review. When the applicant's motion for an interlocutory stay of the proceedings of the panel of the Discipline Committee came before me on August 28, 2018, the Attorney General of Canada and the Minister asked to be removed as respondents.

[13] For reasons given in the course of granting the motion for an interlocutory stay, I acceded to the request to remove the Attorney General of Canada as a respondent (see *Watto v Immigration Consultants of Canada Regulatory Council*, 2018 FC 890 at paras 19-20 [*Watto*]). On the other hand, I was not persuaded that it was appropriate (or even permissible) to remove the Minister (see *Watto* at paras 21-22).

[14] My decision not to remove the Minister was made expressly without prejudice to the right of the Minister to renew his request at the hearing of the application for judicial review.

The request was, indeed, renewed. However, I am still not persuaded that the Minister can be removed from this proceeding.

[15] As I stated in my previous decision, there is much force to the Minister's submission that he has nothing to contribute to this application, which is concerned exclusively with a decision of the ICCRC, a self-governing regulatory body. Neither the applicant nor the ICCRC suggests otherwise. Nevertheless, this application is proceeding under the *IRPA*, which is the source of the ICCRC's mandate to regulate immigration consultants (*Zaidi v Immigration Consultants of Canada Regulatory Council)*, 2018 FCA 116 at para 9 [*Zaidi*]).

[16] Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that, unless he or she is the applicant, the respondent to an application for leave is "in the case of a matter under the *Immigration and Refugee Protection Act*, each Minister who is responsible for the administration of that Act in respect of the matter for which leave is sought." By virtue of the designation of the ICCRC under section 91(5), it is the Minister who has delegated the authority to regulate immigration consultants to the ICCRC (*Zaidi* at para 9). The present matter arises in respect of the regulation of an immigration consultant by the ICCRC in the form of a discipline proceeding. In this respect at least, the Minister is "responsible for the administration of the Act in respect of the matter for which leave is sought." I simply do not see any way around Rule 5(2)(b) given the decision of the Federal Court of Appeal in *Zaidi*, despite the fact that this issue was not addressed expressly in *Zaidi* itself.

[17] This is clearly an unsatisfactory situation given that there is no good reason for the Minister to participate in this application for judicial review. In my view, however, it can only be rectified by legislative changes that clarify the role of the Minister in a proceeding such as this.

[18] Consistent with his request to be removed as a respondent, the Minister took no position on any of the issues arising with respect to the merits of this application for judicial review.

III. DECISION UNDER REVIEW

[19] Section 158 of the *CNFPCA* provides as follows:

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

[20] The panel of the Discipline Committee found that there were "two plausible interpretations of this provision from which this Panel could choose" – one narrower, the other broader. It set out the two interpretations as follows:

1. Section 158 is intended to place limits on the membership on a discipline committee, such that a corporation may not have articles or by-laws providing for a discipline

committee composed of anyone other than directors of the corporation, members of the corporation, or any committee of directors or members;

2. Section 158 is not intended to be exhaustive, and does not limit a corporation's ability to make by-laws to create a discipline committee that includes individuals who are not directors or members.

[21] The panel adopted the second, broader interpretation of the provision. It reached this conclusion by starting with the basic rule of statutory interpretation as stated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Following this approach, the panel noted that the permissive "may" in the provision has two possible implications. One is that a corporation has the choice whether or not to provide in its articles or by-laws for a power to discipline a member. The other is that in providing for a discipline power, "the corporation has the further discretion as to who will exercise it."

[22] The panel found that this second implication followed from the wording of section 158, particularly when viewed in the context of the Act as a whole. The panel compared section 158 with section 194(1) of the same Act. The latter provision gives a corporation the option of creating an audit committee. However, in contrast with section 158, section 194(1) provides that if an audit committee is established, it "shall be composed of not less than three directors, a majority of whom are not officers or employees of the corporation or any of its affiliates." In the

panel's view, this demonstrated that when Parliament intends that a committee is required to have a specific composition, it says so expressly and uses mandatory language like "shall." Section 158, on the other hand, contains no such language with respect to who may exercise the discipline power. Instead, the only mandatory element is found in the second sentence, which simply states that if the articles or by-laws of the corporation provide for a discipline power, "they shall set out the circumstances and the manner in which that power may be exercised."

[23] The panel also noted that section 152 of the *CNFPCA* provides that directors have a broad power to regulate the "activities or affairs" of the corporation through by-laws. ("Activities" and "affairs" of a corporation are both defined terms in the Act.) The panel found that there was nothing in section 158 that limited this expansive authority.

[24] The panel also considered that there were slight differences between the English and French versions of section 158 but found that they did not assist in resolving the interpretative issue before it.

[25] Counsel for the ICCRC had submitted to the panel that the interpretive exercise should also take into account section 91(5) of the *IRPA*, the provision under which the ICCRC had been designated by the Minister. The panel disagreed, finding that the provision, while obviously important to the ICCRC's mandate, did not "provide any additional corporate powers to the ICCRC beyond what is provided in the [*CNFPCA*]."

[26] In short, the panel found that by enacting section 158, Parliament merely intended to confirm that corporations incorporated under the *CNFPCA* have the authority to discipline members. It did not circumscribe the manner in which a corporation might choose to exercise this authority, apart from requiring that if the articles or by-laws provide for such a power, they must set out the circumstances and manner in which it may be exercised. The panel therefore concluded that it was constituted in accordance with the law.

IV. STANDARD OF REVIEW

[27] The applicant and the ICCRC agree that the Discipline Committee's interpretation of section 158 of the *CNFPCA* should be reviewed on a correctness standard. I also agree.

[28] An administrative body benefits from a presumption of deference when interpreting "its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54; *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 55). The presumption that the reasonableness standard applies when a court is reviewing a decision in which a specialized administrative tribunal has interpreted and applied its enabling statute or a statute with a close connection to its function does not apply here. The rationale for deference is absent when the decision-maker ventures into domains with respect to which expertise and familiarity cannot be presumed. The *CNFPCA* is a general public statute. Even though the ICCRC is incorporated under it, the statute is otherwise completely unconnected to the organization's work in regulating immigration consultants. Expertise and familiarity with the legislation cannot be presumed. No deference is warranted.

V. ANALYSIS

[29] The interpretation of section 158 of the *CNFPCA* appears to be a matter of first impression. Similar provisions are found in the *Non-Profit Corporations Act, 1995*, SS 1995, c N-4.2, (section 119) and the *Not-for-Profit Corporations Act, 2010*, SO 2010, c 15 (section 50(1)). There do not appear to be any reported cases dealing with either of these provisions (or a similar provision in predecessor legislation in Saskatchewan). The record of Parliamentary proceedings regarding the *CNFPCA* sheds no additional light on the intended meaning of section 158. One must therefore be guided simply by the principles of statutory interpretation and by section 12 of the *Interpretation Act*, RSC 1985, c I-21 (as amended).

[30] Largely for the reasons given by the panel, I agree with its interpretation of section 158 of the *CNFPCA*. None of the applicant's submissions have persuaded me that the interpretation adopted by the panel is incorrect.

[31] Beginning with the text of the provision, I find (as did the panel) that the first sentence of section 158 is ambiguous. On its face, it is susceptible to two different interpretations. One is that a power to discipline members may be exercised by directors, members or committees of directors or members and no one else. The other is that a power to discipline members may be exercised by directors, members or committees of directors or members but it is not restricted exclusively to directors, members or committees of directors or members. Read in isolation, there is no way to tell which meaning was intended by Parliament.

[32] However, this ambiguity can be resolved by looking at the provision in context and in light of its purpose.

[33] Section 158 is found in Part 10 of the *CNFPCA*, which concerns "By-laws and Members." In my view, it serves two purposes.

[34] One of these purposes is to confirm that corporations incorporated under the *CNFPCA* may adopt articles or by-laws concerning the discipline of their members should they wish to do so. Predecessor legislation, the *Canada Corporations Act*, RSC 1970, c C-32, had been silent on this point. However, there is no reason to think that corporations lacked the power to discipline members prior to the enactment of section 158 or that the provision was intended to set out exhaustively who may exercise this power. As the panel notes, corporations have always enjoyed a broad power to regulate their activities and affairs through by-laws (something confirmed by section 152 of the *CNFPCA*). I agree with the panel that had Parliament intended to limit in respect of the power to discipline members the otherwise broad powers of directors to regulate the activities and affairs of a corporation through by-laws, it would have done so expressly.

[35] The second purpose of the provision is to require that <u>if</u> the articles or by-laws of a corporation provide for such a power, "they shall set out the circumstances and the manner in which that power may be exercised." This aspect of the provision is not engaged here.

[36] This interpretation is consistent with the purpose of the *CNFPCA* as a whole. Section 4 of the *CNFPCA* provides as follows:

The purpose of this Act is to allow the incorporation or continuance of bodies corporate as corporations without share capital, including certain bodies corporate incorporated or continued under various other Acts of Parliament, for the purposes of carrying on legal activities and to impose obligations on certain bodies corporate without share capital incorporated by a special Act of Parliament.	La présente loi a pour objet de permettre la constitution ou la prorogation de personnes morales — y compris celles constituées ou prorogées sous le régime d'une autre loi fédérale — sous forme d'organisations sans capital-actions en vue de l'exercice d'activités licites, et d'assujettir aux obligations qu'elle prévoit certaines personnes morales sans capital-actions constituées par une loi spéciale du Parlement.

[37] The only obligation set out in section 158 is that if the articles or by-laws of a corporation provide that the directors, members or a committee of directors or members have a power to discipline a member, "they shall set out the circumstances and the manner in which that power may be exercised." Had Parliament intended to circumscribe the class of persons who may exercise this power in any circumstance, it would have said so expressly.

[38] I agree with the panel that this interpretation is supported by comparing section 158 with section 194(1) of the *CNFPCA*, which concerns the composition of an audit committee should one be established. Section 194(1) is also found in Part 10 of the Act. It is clear from comparing the two provisions that had Parliament intended to limit the power to discipline members only to directors, members or committees of members or directors, it would have said so expressly, just as it dictated the composition of an audit committee with mandatory language. The only part of section 158 that is engaged here is purely permissive: the articles and by-laws of a corporation

may provide for a power to discipline members to be exercised by directors, members or committees of directors or members. Read in context, it is evident that this does not mean that this power may only be exercised by directors, members or committees of directors or members.

[39] The ICCRC points to two other regulatory organizations incorporated under the *CNFPCA* that have public members serve on discipline tribunals – the Investment Industry Regulatory Organization of Canada, which regulates investment dealers and trading activity on Canadian securities markets, and the Mutual Funds Dealers Association of Canada, which provides oversight to mutual fund dealers. While it is interesting to know that other similarly incorporated regulatory bodies follow the same practice as the ICCRC in this respect, this is of little assistance in the absence of any indication that anyone has actually turned his or her mind to the question of statutory interpretation raised here.

[40] The ICCRC also submits that it furthers the public interest mandate of the ICCRC and "adds a crucial layer of legitimacy" to involve non-members in the adjudication of its discipline proceedings. The ICCRC submits that interpreting section 158 of the *CNFPCA* in a way that precludes the involvement of non-members "would delegitimize the ICCRC and other self-regulatory organizations like it." While I do not question the broader point about the value that non-members can add to regulatory proceedings conducted by a body mandated to act in the public interest, it does not assist in the interpretation of section 158 of the *CNFPCA*. The provision applies to a wide range of not-for-profit corporations besides regulatory bodies, of which there appear to be very few. In the absence of direct evidence on the point (and there is

none), it is difficult to accept that Parliament had this particular objective in mind in enacting section 158.

[41] The reference to directors, members or committees of directors or members in section 158 of the *CNFPCA* doubtless reflects the fact that for most bodies incorporated under this Act, there would be no reason for anyone else to be involved in disciplining members. Of course, the articles or by-laws of a corporation that provide for a discipline power could limit its exercise to directors, members or committees of members or directors. However, section 158 of the *CNFPCA* does not require the corporation to limit the class of those who may exercise this power in this way. As long as a corporation that chooses to adopt articles or by-laws providing for a power to discipline members sets out in those by-laws "the circumstances and the manner in which that power may be exercised," section 158 of the *CNFPCA* is complied with.

[42] On the basis of the foregoing, I find that the interpretation of section 158 of the *CNFPCA* adopted by the panel of the Discipline Committee is the correct one. Accordingly, the panel did not err in concluding that its constitution was consistent with this provision.

VI. CONCLUSION

[43] For these reasons, the application for judicial review is dismissed.

[44] The parties requested the opportunity to consider their positions with respect to whether to request certification of a serious question of general importance under section 74(d) of the *IRPA* after having had an opportunity to review the Court's reasons for judgment. I agreed that

this would be appropriate. Since this application was argued, the *College of Immigration and Citizenship Consultants Act* (being Division 15 of the *Budget Implementation Act, 2019, No. 1*, SC 2019, c 29) was enacted. I would ask the parties to address in particular the implications, if any, of this development for whether a question warranting certification arises here. The parties are asked to provide their respective positions within ten days of receipt of these reasons. If more time is required, they may contact the Court.

JUDGMENT IN IMM-3546-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3546-18
STYLE OF CAUSE:	MUHAMMAD AFZAL WATTO V IMMIGRATION CONSULTANTS OF CANADA REGULATORY COUNCIL ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 19, 2019
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JULY 30, 2019

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