

July 23, 2026

Judicial Administrator
Federal Court of Appeal
180 Queen Street West, Suite 200
Toronto, Ontario M5V 3L6

Via Portal

Re: *Canadian Immigration Lawyers Association v. MCI et al.*, File A-235-26

The proposed Appellant writes pursuant to the Direction of Biringer J.A. (dated June 23, 2026) “allowing the parties to make complete submissions to the Court as to whether or not the appeal may be entertained.” The Direction states:

The Court asks the parties to provide submissions on whether or not the notice of appeal should be removed from the Court file pursuant to Rule 74 of the *Federal Courts Rules*, S.O.R./98-106 given that section 74(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, provides that an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge of the Federal Court certifies that a serious question of general importance is involved and states the question. No question of general importance has been certified in the underlying proceeding.

For the reasons detailed below, the Court has jurisdiction to hear this appeal.

The decision under appeal: *CILA v. Canada (Citizenship and Immigration)*, [2026 FC 617](#)

The Canadian Immigration Lawyers’ Association (“CILA”) commenced an application for leave and judicial review, consisting of: (1) a constitutional challenge to the limited scope of the right to counsel under s. 167(1) of the *Immigration and Refugee Protection Act* (“IRPA”) under ss. 7 and 15 of the *Charter*, on the basis that it is underinclusive; and (2) a constitutional and common law challenge to the policies and practices of the three Respondent ministries—Immigration, Refugees and Citizenship Canada (“IRCC”), Public Safety and Emergency

Preparedness (“PSEPC”), and Employment and Social Development Canada (“ESDC”) which are derivative on s. 167(1), and that limit the scope of the right to counsel to the contexts where that right is conferred by s. 167(1) and s. 10(b) of the *Charter*, on the basis that those policies and practices are underinclusive under the *Charter* and/or violate the right to procedural fairness at common law. They sought a declaration of invalidity under s. 52 of the *Constitution Act, 1982* in relation to s. 167(1) of the *IRPA*, and declarations pursuant to s. 24(1) of the *Charter* and s. 18.1(3)(a) of the *Federal Courts Act* [*FCA*] against the Respondent ministries in relation to their derivative policies and practices.

The proposed appeal concerns the Application Judge’s decision ([2026 FC 617](#)) allowing the Respondents’ motion to strike the application. In that decision, the Application Judge ruled, despite the high test for a motion to strike to succeed—i.e., the matter must be “so clearly improper as to be bereft of any possibility of success”¹—that he lacked jurisdiction to hear the matter. The Respondents asserted that: the *Charter* and common law challenges did not target a reviewable “matter” under s. 18.1 of the *FCA*; the proposed Appellant lacks standing to seek a remedy under s. 24(1) of the *Charter*; the matter was not limited to a single order, as Rule 302 of the *Federal Courts Rules* requires; and the proposed Appellant lacks public interest standing to bring these challenges.

The Application Judge ruled in favour of the Respondents. In summary he ruled that he lacked jurisdiction to hear the matter because:

1. The *Charter* challenge to s. 167(1) of the *IRPA* was not a reviewable “matter” under s. 18.1 of the *FCA*, because it was an “independent constitutional challenge” which was untethered to any administrative conduct (paras [46-61](#)).

¹ *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1994 CanLII 3529](#).

2. The *Charter* challenges to the policies and practices of the Respondent ministries were not “derivative” on s. 167(1) of the *IRPA* and therefore were not a “course of conduct” in support of a reviewable “matter” under s. 18.1 of the *FCA* (paras [40-41](#)).
3. The common law challenge to the policies and practices of the Respondent ministries were not a “course of conduct” and therefore were not reviewable matters under s. 18.1 of the *FCA* (paras [42-44](#)).
4. Rule 302, which limits judicial review to a single order unless the Court orders otherwise, was a bar to the *Charter* and common law challenges to the policies and practices of the Respondent ministries because they were not a “course of conduct”, and the Court declined to exercise its discretion to waive the requirements of Rule 302 (para [45](#)).

The Application Judge also concluded that the proposed Appellant lacked public interest standing (paras [65-86](#)). Finally, the Application Judge did not consider whether CILA had standing to seek relief under s. 24(1) of the *Charter*, because it was not necessary to do so (para [63](#)).

This submission is based on s. 74(d) of the *IRPA*

The proposed Appellant noted two distinct jurisdictional issues in their letter to the Court (dated May 25, 2026): (1) the requirement for a certified question under s. 74(d) of the *IRPA*; and (2) the restriction under s. 72(2)(e) of the *IRPA* that “no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.”

The Court has limited these submissions to the first issue, the requirement for a certified question under s. 74(d) of the *IRPA*. Because the Court has not sought submissions on the issue of whether the notice of appeal should be removed from the Court file based on s. 72(2)(e) because the Application Judge’s decision is interlocutory, the proposed Appellant proceeds on the

assumption that the Court accepts that the Application Judge’s decision is in substance a final order because it ends the litigation. The proposed Appellant reserves the right to respond to any submissions the Respondents may make which allege that the decision is interlocutory, not final.

This Court can hear an appeal in the absence of a certified question

Section 27(1) of the *FCA* permits an appeal to the Federal Court of Appeal from any final or interlocutory decision of the Federal Court. But the preclusive clauses in ss. 72(2)(e) and 74(d) of the *IRPA* oust the application of s. 27(1) *FCA*, as a consequence of s. 75(2) of the *IRPA*.² In particular, the preclusive clause in s. 74(d) provides that there is no right of appeal to this Court unless “in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.”

Despite these preclusive clauses, this Court permits appeals pursuant to s. 27(1) of the *FCA* for applications brought under the *IRPA* when doing so is necessary to protect the rule of law. As the Court explained in *Huntley*: “We agree that, despite the apparently plain language of paragraph 74(d), Parliament cannot have intended to immunize alleged errors from appellate scrutiny which, if not subject to review, would undermine the rule of law and public confidence in the due administration of justice.”³

Subhaschandran established that this Court can hear an appeal in an application brought under the *IRPA* that is otherwise barred by a preclusive clause when the Federal Court had failed to exercise or exceeded its jurisdiction. In that case, this Court heard the Minister’s appeal of a lengthy Federal Court adjournment of a stay motion—an interlocutory decision—notwithstanding s. 72(2)(e), on this basis. This Court stated: “In situations where a judge refuses to exercise his

² *Mahjoub v. Canada (Citizenship and Immigration)*, [2011 FCA 294](#) at paras 7-12

³ *Canada (Citizenship and Immigration) v. Huntley*, [2011 FCA 273](#) at para 7 [*Huntley*].

jurisdiction, the law is clear that the remedy is of a mandatory nature requiring the judge or court to exercise its jurisdiction.”⁴

Tennant confirmed that this Court may also hear appeals notwithstanding the lack of a certified question, including when the Federal Court has refused to exercise jurisdiction. That case involved an appeal of a decision by the Federal Court under the *Citizenship Act*, which contains a preclusive clause, s. 22.2(d), that prevents an appeal in the absence of a certified question, like s. 74(d) of the *IRPA*. The Court stated: “The case law establishes that certain types of errors will justify hearing an appeal in the face of a preclusive clause”.⁵ The Court explained that these errors include bias or reasonable apprehension of bias and the refusal to exercise jurisdiction.⁶ While this Court reaffirmed *Mahjoub*’s holding that a jurisdictional error does not include “mere errors of law”, the Court refused to narrowly define the precise nature of a jurisdictional error.⁷

Most recently, in *Ewen*, this Court heard the Minister’s appeal from the interlocutory decision of the Federal Court to issue an interim stay of a removal under the *IRPA* pending submissions on a *Charter* issue which the Court itself had introduced on its own motion. This Court concluded that the Federal Court had exceeded its jurisdiction and rendered a decision that was “fundamentally flawed”.⁸ *Ewen* summarized the circumstances under which appellate review is available notwithstanding *IRPA*’s preclusive clauses as follows:

[17] In a long line of cases going back to at least the decision of this Court in *Subhaschandran v. Canada (Solicitor General)*, 2005 FCA 27 at paras. 13, 17, it has been recognized that appellate review may be available when a case raises “very fundamental matters” or “truly exceptional matters” that “strike right at the rule of law”: *Mahjoub v.*

⁴ *Subhaschandran v. Canada (Solicitor General)* (F.C.A.), 2005 FCA 27 at para 16 [Subhaschandran].

⁵ *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206 at para 37 [Tennant].

⁶ *Tennant*, at para 37.

⁷ *Tennant*, at para 41.

⁸ *Canada (Public Safety and Emergency Preparedness) v. Ewen*, 2023 FCA 225 at para 29 [Ewen].

Canada (Citizenship and Immigration), 2017 FCA 144 at paras. 19-21. There is an additional exception to the rule that no appeal lies from interlocutory orders. Where the alleged error has been made in the context of a “separate, divisible judicial act”, and involves the exercise of a power that is not found in the *IRPA*, appellate review is not governed by that Act: *Harkat v. Canada (Attorney General)*, 2021 FCA 209 at para. 25; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, 1997 CanLII 322 (S.C.C.) at para. 66.⁹

As explained below, this appeal concerns the Application Judge’s failure to exercise jurisdiction, which falls squarely within this Court’s “very fundamental matters” exception to s. 74(d).

The Application Judge’s decision raises jurisdictional errors

This appeal raises a fundamental issue: whether the Federal Court has jurisdiction under s. 18.1 of the *FCA* to permit a challenge by way of an application (as opposed to an action) to a provision of the *IRPA* that is linked to a course of conduct as evidenced by policies and practices, but without challenging specific administrative conduct. As set out in the Notice of Appeal, the Application Judge ruled that he lacked jurisdiction to hear such a challenge. In so ruling, he made a jurisdictional error that concerns “very fundamental matters” that “strike at the rule of law” (*Ewen*) because of his failure to exercise jurisdiction.

The Application Judge’s error (Grounds of Appeal, para 1a) was his failure to exercise jurisdiction by characterizing this “independent constitutional challenge” to s. 167(1) of the *IRPA* as being untethered to any administrative conduct. He then concluded that this challenge was outside the scope of a reviewable “matter” under s. 18.1 of the *FCA*. But the Application Judge mischaracterized the “essential character of the pleadings”,¹⁰ which is to seek changes to the policies and practices of the Respondent ministries. These are undoubtedly “matters” under s. 18.1. The fact the Respondents’ policies and practices derive from s. 167(1) does not alter what this case

⁹ *Ewen* at para 17.

¹⁰ See *Alhilal v. Canada (Citizenship and Immigration)*, 2025 FC 1201 at para 62.

is fundamentally about. Moreover, the Respondent ministries clearly fall within the definition of a “federal board, commission or other tribunal”.

The Application Judge’s failure to exercise jurisdiction rests on his misinterpretation of the *Bird* litigation, which was put to him in oral argument, and later in supplementary written submissions (dated May 4, 2026) provided pursuant to a post-hearing direction from the Application Judge (dated April 23, 2026).

Bird is a challenge under s. 15(1) of the *Charter* to the *Canoe Lake Cree First Nation Citizenship Law* [**Citizenship Law**], which the Canoe Lake Cree First Nation enacted pursuant to delegated authority under s. 10 of the *Indian Act*. *Bird* was brought as an application for judicial review under s. 18.1 of the *FCA* as an “independent constitutional challenge” to the *Citizenship Law*—i.e., in the absence of any administrative decision under that Act. In *Bird FC (1)*, the Federal Court dismissed the application, on the basis that since “there is no administrative decision being challenged ... this matter is not properly framed as a judicial review”—that is, because s. 18.1 of the *FCA* does not confer jurisdiction to determine an “independent constitutional challenge”.¹¹

The applicants appealed to this Court, and “argue[d], amongst other things, that the Federal Court erred in finding that the matter could not be brought by application for judicial review in the absence of an underlying administrative decision being challenged”¹² *Bird FCA* allowed the appeal, stating that “we agree with the appellants and the respondent Canoe Lake Cree First Nation that the Federal Court erred in its determination of this issue”.¹³ In other words, *Bird FCA* held that s. 18.1 of the *FCA* does indeed confer jurisdiction on the Federal Court to determine an “independent constitutional challenge”.

¹¹ *Bird v. Canoe Lake First Nation and Canada (AG)*, [2024 FC 1205](#) at para 8 [*Bird FC (1)*].

¹² *Bird FCA* at para 1.

¹³ *Bird v. Canada (AG)*, [2025 FCA 70](#) at para 2 [*Bird FCA*].

This Court remanded the matter to the Federal Court. In *Bird FC(2)*, the Federal Court considered the “independent constitutional challenge” and found that s. 12.02 of the *Citizenship Law* discriminated based on sex in contravention of s. 15(1), that s. 25 of the *Charter* did not shield this breach by operation of s. 28 of the *Charter*, and that the breach was not justified under s. 1.¹⁴ The Federal Court declared s. 12.02 of the *Citizenship Law* unconstitutional and of no force or effect.¹⁵

Bird FCA bound the Application Judge under the doctrine of vertical *stare decisis*. *Bird FC(2)* bound him under the doctrine of horizontal *stare decisis*. But he declined to follow either decision. Notwithstanding the clear holding of *Bird FCA*, the Application Judge alleged this Court was unclear because the decision was “a short decision of two paragraphs” that “is not supported by any analysis”, and with “few background facts disclosed in the decision” (para [52](#)). Respectfully, *Bird FCA* may be concise, but it is not unclear.

The Application Judge also improperly distinguished *Bird FC(2)* on the basis the constitutional challenge was to delegated legislation, as opposed to an Act of Parliament, and that Parliament did not fall within the definition of “federal board, commission or other tribunal” (para [58](#)). But this ignored *Bird FC(2)*’s holding that “the Court has jurisdiction to hear a challenge to the constitutional validity of a legislative enactment”, which did not distinguish between primary and secondary legislation.¹⁶ To reiterate, while it is undisputed that Parliament falls outside the definition of a federal board, commission or other tribunal under s. 2(1) of the *FCA*, the Application Judge ignored that the “essential character of the pleadings” (*Alhilal*) is to seek changes to the policies and practices of the Respondent ministries.

¹⁴ *Bird v. Canada (AG)*, [2026 FC 425](#) [*Bird FC(2)*].

¹⁵ *Bird FC(2)* at para [252](#).

¹⁶ *Bird FC(2)* at para [24](#).

The Application Judge made three further errors in failing to exercise jurisdiction (Grounds of Appeal, paras 1b, 1c, and 1d). He concluded that the policies and practices on the lack of right to counsel:

1. were not “derivative” on s. 167(1) of the *IRPA* and therefore could not support the constitutional challenge to that provision as a reviewable matter under s. 18.1 of the *FCA* (Ground of Appeal, para 1b);
2. were not reviewable “matters” pursuant to the common law under s. 18.1 of the *FCA* (Ground of Appeal, para 1c); and
3. were subject to Rule 302 since they were not a single matter (Ground of Appeal, para 1d) and in the alternative, failed to exercise his discretion to waive Rule 302.

The Application Judge’s failure to exercise jurisdiction in these three instances was based on a common error—his determination that the Respondent ministries’ policies and practices were not a “course of conduct”. Assessing the evidence in silos instead of as a whole, the Application Judge based his conclusion on his determination that those policies and practices concern “the activities of three different government departments in the performance of the distinct duties and responsibilities imposed on those departments under the *IRPA*” that concern “specific situations and circumstances” (para [40](#)), “arise in a wide range of proceedings and varying factual situations, situations that engage a similarly extensive range of issues and in turn lead to a wide range of outcomes” (para [42](#)), and “arise in such a wide and varied number of circumstances” (para [43](#)).

Respectfully, the Application Judge ignored the fact that the challenge rests on unequivocal, uncontradicted expert evidence, presumed to be true on a motion to strike, that the policies and practices of the different Respondent Ministries were all derivative on s. 167(1) of the

IRPA and therefore were a “course of conduct” over which the Court had jurisdiction to review as a single “matter” under s. 18.1 *FCA*:

1. **IRCC**: Affidavit of Jacqueline Bonisteel (dated August 19, 2025), paras 6, 37-38; Affidavit of Shalini Konanur (dated August 19, 2025), paras 12-13.
2. **ESDC**: Affidavit of Jacqueline Bonisteel (dated August 19, 2025), paras 6, 37-38.
3. **PSEPC** (which includes the Canadian Border Services Agency): Affidavit of Lorne Waldman (dated August 19, 2026), paras 10, 21-23.

This evidence on the derivative nature of the “course of conduct” establishes that the Federal Court indeed has jurisdiction to consider this challenge, but the Application Judge failed to exercise it.

Conclusion

The Court has jurisdiction to hear this appeal. As a result, the proposed Appellant requests that the Court allow the appeal to proceed.

Sincerely,



Maureen Silcoff
Silcoff Shacter



Sujit Choudhry
Circle Barristers

IN THE FEDERAL COURT OF APPEAL

B E T W E E N :

CANADIAN IMMIGRATION LAWYERS ASSOCIATION

Appellant
(Applicant in the Federal Court)

-and-

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS, and THE MINISTER OF EMPLOYMENT AND
SOCIAL DEVELOPMENT CANADA**

Respondents
(Respondents in the Federal Court)

SOLICITOR'S CERTIFICATE OF SERVICE

I, Maureen Silcoff, Solicitor, certify that I caused the Respondent to be duly served with written submissions by sending a copy by email to the Department of Justice on July 23, 2026 to AGC_PGC_TORONTO.IMM@justice.gc.ca.

Dated at Toronto, this 23rd day of July 2026.



Maureen Silcoff
Silcoff, Shacter

Solicitor for the Appellant



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Service of Written Submissions in CILA v. MCI et al. File A-235-26

TOR Immigration Court <TORJUSTICEIMMIGRATION@justice.gc.ca>

Thu, Jul 23, 2026 at 7:43 AM

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