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Federal Court



Cour fédérale

Date: 20260513

Docket: IMM-12116-25

Citation: 2026 FC 617

Ottawa, Ontario, May 13, 2026

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CANADIAN IMMIGRATION LAWYERS
ASSOCIATION

Applicant

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

REASONS AND JUDGMENT

I. Overview

[1] The responding Ministers [Ministers] bring this motion, seeking an order:

- A. Dismissing, as a preliminary question of law pursuant to Rule 104(1)(a) of the *Federal Courts Rules*, SOR/98-106 [Rules], the underlying application for leave and for judicial review [ALJR] on the basis that the Applicant, the Canadian Immigration Lawyers Association [CILA], lacks standing to bring the application and is therefore not a proper party;
- B. Striking the ALJR in its entirety pursuant to Rule 221(1)(a), without leave to amend, on the basis that the ALJR fails to raise any justiciable or reviewable matter; or
- C. In the alternative, striking the portions of the ALJR that seek relief under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].

[2] For the reasons that follow, the motion is allowed, and the ALJR is struck without leave to amend.

II. Background and Procedural History

[3] On May 22, 2025, CILA filed an ALJR under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] requesting leave to commence an application for judicial review “seek[ing] a declaration of a right to counsel in immigration and refugee applications, interviews and examinations.”

[4] The ALJR indicates that “[t]here is no file number or decision in this matter,” and that in the event leave is granted, the following relief will be sought:

1. That this Court issue the following declarations pursuant to section 18.1(3)(a) of the *Federal Courts Act*, RSC 1985, c F-7 [Act]:

a. there is a right to counsel in immigration and refugee applications, interviews and examinations in accordance with the common law and/or sections 7 and 15 of the *Charter*;

b. subsection 167(1) of the IRPA is underinclusive and therefore constitutionally invalid under section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11;

c. the right to counsel must be legally recognized by:

i. enacting amendments to the IRPA and promulgating regulations as necessary; and/or

ii. the Ministers revising their existing policies or adopting new policies.

2. An order as to costs; and

3. Such further and other relief as counsel may advise and this Court may allow.

[5] The ALJR then outlines the basis for judicial review and identifies in further detail the relief sought, stating:

A. CILA seeks the recognition of the right to counsel, at an individual's own expense, in immigration and refugee-related matters involving the Ministers.

B. Specifically, CILA seeks a declaration that the right to counsel exists beyond the contexts where counsel rights are already conferred by subsection 167(1) of the IRPA and paragraph 10(b) of *Charter* – which, respectively, apply to proceedings before the Immigration and Refugee Board of Canada and detentions.

- C. CILA seeks to confirm the existence of the right to counsel, under sections 7 and 15 of the *Charter* and the common law as a matter of procedural fairness, in all applications, interviews, and examinations pursued under the IRPA.
- D. Were there to be judicial recognition of the right to counsel in all contexts under the IRPA, the Ministers would give effect to the right through means that would include policy change, regulatory change, and/or amendments to the IRPA itself.

[6] The ALJR also provides an overview of the existing laws, policies, and practices regarding the right to counsel under the IRPA and asserts:

- A. There is no legal bar to individuals retaining and instructing counsel to represent them in matters relating to applications, interviews, and examinations under the IRPA; however, nor is there any corresponding legal obligation for the Ministers to recognize counsel, interact with them, and accord them participatory rights in those matters.
- B. The Ministers' policies and practices reflect counsel rights under subsection 167(1) of the IRPA and paragraph 10(b) of *Charter* but do not recognize this right in other contexts, and at times, the Ministers' public policies and messaging actively discourage individuals from retaining counsel in these other contexts.

[7] The ALJR further advances the position that the Court has jurisdiction to hear the application, stating:

- A. It falls within the meaning of "any matter" under the IRPA, as provided for at subsection 72(1) of the IRPA.

- B. A comprehensive legal challenge to the Ministers' lack of recognition of the right to counsel under the IRPA is the most efficient way to bring the issue before the Court.
- C. CILA asserts, and meets the test for, public interest standing in bringing the ALJR.

[8] Finally, the ALJR outlines the case CILA intends to put forward, and specifically:

- A. Summarizes the legal basis for the right to counsel under the common law and the *Charter*.
- B. Details the need for counsel in other immigration contexts and the benefits that would result were the right to counsel in all contexts under the IRPA be recognized.
- C. Describes the evidence to be introduced in support of the ALJR.

[9] On September 2, 2025, CILA perfected the application record, which includes seven affidavits. Six of those affidavits provide expert evidence from practicing immigration counsel, a practicing psychologist, and a professor of Justice Studies who is also a former Government of Canada employee with experience in administering and enforcing immigration and refugee law. The seventh is an “experiential” affidavit affirmed by the Executive Director of CILA.

[10] The Ministers have not filed a responding record pursuant to Rule 11 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR 93/22, but have instead brought this motion to which CILA has responded. As a result, the question of leave has not yet been considered or determined.

III. Issues

[11] The Parties broadly agree on the substantive questions raised on this motion but have framed those issues somewhat differently. Having reviewed and considered the Parties' written and oral submissions, I have identified the following single issue:

Is the ALJR bereft of any possibility of success, or doomed to fail? If so, on what basis?

IV. Preliminary Matters

[12] The motion also raises two preliminary matters: (1) is the motion premature; and (2) is the November 7, 2025 affidavit of Esther Bethou [Bethou Affidavit], filed as part of CILA's responding motion record, admissible?

A. *The motion is not premature*

[13] CILA takes the position that the Ministers' motion is premature for two reasons. First, CILA argues that neither the underlying application nor CILA's assertion of public interest standing are doomed to fail. CILA submits the application easily meets the requirement under section 18.1 of the *Act* – the ALJR relates to a “matter” for which relief is sought and the Ministers have failed to demonstrate that this is one of those “very clear cases” where the Court may dismiss an ALJR on a preliminary motion for lack of standing (*Sierra Club of Canada v Canada (Minister of Finance)*, 1998 CanLII 9124 (FC), [1999] 2 FC 211 at paras 24–26 [*Sierra Club*]; *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13; also see *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892 at para 37).

[14] CILA's argument to the effect that the motion is premature on the basis of its mere assertion that the underlying application is easily understood as relating to a "matter" under section 18.1 of the *Act*, that CILA easily satisfies the test for public interest standing, and therefore that the ALJR is not "doomed to fail" or "bereft of any possibility of success" is not persuasive. These issues underpin the Ministers' motion – they go to the merits of the motion and as such must be considered in light of the evidence and arguments advanced (*League for Human Rights of B'nai Brith Canada v Canada*, 2008 FC 146 at para 13, rev'd on other grounds 2008 FC 732).

[15] Second, CILA relies on the absence of a complete record – the Ministers have not filed a Certified Tribunal Record [CTR], there has been no cross-examination on the affidavits filed with CILA's application record, and leave has not been determined – to argue the motion is premature. CILA submits the Court may be unable to reach a fully informed decision on the question of whether the ALJR is doomed to fail. Similarly, and relying on *Lukács v Canada (Transportation Agency)*, 2021 FCA 141 at paras 33–40 [*Lukács*] where it was held that the issue of standing was more appropriately considered with the merits because the Court did not have sufficient evidence before it to make a fully informed decision on standing, CILA argues the incomplete record at this stage also prevents the Court from determining whether CILA lacks standing.

[16] Again, I disagree. Whether issues raised on a motion to strike can be determined on a preliminary basis is a matter of judicial discretion to be exercised in the context of the particular case (*Finlay v Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 SCR 607 at para 16). The incomplete nature of the record alone is not determinative of the question of whether

the ALJR raises a reviewable matter or whether CILA has standing. As was the case in *United Steel Workers v Canada (Citizenship and Immigration)*, 2013 FC 496 at para 8, it is not evident that the CTR or additional evidence is required to consider the issues raised on this motion.

There are comprehensive written submissions, well-articulated legal arguments, and, as CILA itself has described, a “well-developed factual record” before the Court (also see *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 at para 28 [CCR], citing *Sierra Club* at para 25 and *Canwest Mediaworks Inc v Canada (Attorney General)*, 2008 FCA 207 at para 10).

[17] In my opinion, the written submissions, legal arguments, and the factual record as it exists will allow for a proper determination of the issues raised on the motion, including that of standing. Unlike the situation in *Lukács*, there is no suggestion that the evidentiary record as it exists is unsettled.

B. *The Bethou Affidavit is admissible*

[18] CILA’s responding motion record contains the Bethou Affidavit with nine appended exhibits, including: four news articles dated from December 2024 to October 2025 describing the recent surge of immigration matters at the Federal Court and the lack of sufficient resources; a transcript of an October 2, 2025 CBC interview with former Chief Justice Crampton; three unreported Orders in Court files IMM-3433-17, IMM-3302-20, and T-816-21 dismissing motions to strike the Canadian Association of Refugee Lawyers as a party; and a Practice Direction and Special Order entitled “Backlog in processing applications for leave and judicial

review,” issued by the Federal Court on May 14, 2025, and providing for an extension of time to file application records in response to the exceptional increase of filings in immigration matters.

[19] Affidavits are generally not admissible in support of motions to strike ALJRs, or in support of an applicant response to a motion to strike. This because the facts alleged in the notice of application are taken as true and the “complete” grounds for the application are to be identified in the notice of application (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at para 52 [*JP Morgan*]). Limited exceptions to this general rule are permitted where the affidavit evidence furthers the interests of justice and does not undercut the justifications against admissibility (*JP Morgan* at paras 53–54).

[20] The Ministers have not objected to the Bethou Affidavit, and I am satisfied that the affidavit may be admitted as an exception to the general rule. The Bethou Affidavit provides the Court with background information and context that may be of some relevance to the extent matters of judicial economy and/or the scarcity of judicial resources arise.

V. Analysis

A. *Is the ALJR bereft of any possibility of success, or doomed to fail?*

(1) Applicable principles – Motions to strike an application

[21] Before considering the issue raised, an overview of the principles to be considered and applied on a motion to strike an application will be helpful:

- A. Rule 221 – “Motion to strike” – provides that the Court may strike out a pleading or dismiss an action on various grounds. The test on a motion to strike is whether it is “plain and obvious” that the action cannot succeed (*CCR* at para 14, citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 17, 22).
- B. Rule 221 does not contemplate the dismissal of applications. However, the jurisprudence recognizes that this Court has plenary jurisdiction to control its own process and, by way of analogy to Rule 221, that the Court possesses the discretion to strike out or dismiss an application (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA), [1995] 1 FC 588 at 600 [*David Bull*]; *JP Morgan* at paras 47–48; *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 72).
- C. However, the threshold to succeed in striking or dismissing an application is high. This because the summary nature of an application strongly favours – for reasons of practicality, efficiency, and the absence of precision in the pleadings – that objections be considered at the time the matter is heard on its merits.
- D. Only where the Court is satisfied the shortcomings identified are “of the exceptional sort that strik[e] at the root of this Court’s power to entertain the [application]” and/or in those rare circumstances where the Court is convinced that the application is “so clearly improper as to be bereft of any possibility of success” should a motion to strike an application for judicial review succeed (*Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7; *David Bull* at 600).

- E. As in a motion to strike out a statement of claim, no evidence may be led on a motion to strike an application, and the facts asserted in the application must be presumed to be true.
- F. An application is also to be read generously and in a manner that accommodates drafting deficiencies that might otherwise undermine the adequacy of the allegations.

Also see *League for Human Rights of B’nai Brith Canada v Canada*, 2008 FC 732 at paras 17–19, citing *Amnesty International Canada v Canadian Forces*, 2007 FC 1147 at paras 22–30 and *Sierra Club*.

- (2) The ALJR does not raise a reviewable matter under section 18.1 of the *Act*

[22] The ALJR has been brought under subsection 72(1) of the IRPA, which provides:

Application for judicial review

72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.

Demande d’autorisation

72 (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l’article 86.1, subordonné au dépôt d’une demande d’autorisation.

[23] However, 72(1) does not create the right to commence an application for judicial review in this Court. That right flows from sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act]. Those provisions read in part as follows:

**Extraordinary remedies,
federal tribunals**

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[...]

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[...]

Powers of Federal Court

18.1 (3) On an application for judicial review, the Federal Court may

**Recours extraordinaires :
offices fédéraux**

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[...]

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[...]

Pouvoirs de la Cour fédérale

18.1 (3) Sur présentation d'une demande de contrôle

judiciaire, la Cour fédérale peut :

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| <p>(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or</p> <p>(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.</p> | <p>a) ordonner à l’office fédéral en cause d’accomplir tout acte qu’il a illégalement omis ou refusé d’accomplir ou dont il a retardé l’exécution de manière déraisonnable;</p> <p>b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu’elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l’office fédéral.</p> |
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[24] Subsection 2(1) of the Act defines “federal board, commission or other tribunal” as:

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the <i>Constitution Act, 1867</i>; (<i>office fédéral</i>)	office fédéral Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d’une prérogative royale, à l’exclusion de la Cour canadienne de l’impôt et ses juges et juges adjoints, d’un organisme constitué sous le régime d’une loi provinciale ou d’une personne ou d’un groupe de personnes nommées aux termes d’une loi provinciale ou de l’article 96 de la <i>Loi constitutionnelle de 1867</i>. (<i>federal board, commission or other tribunal</i>)
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[25] Section 18.1 of the *Act*, not subsection 72(1) of the IRPA, therefore prescribes when judicial review is available. This was explained by the Federal Court of Appeal [FCA] in

Zaghib v Canada (Public Safety and Emergency Preparedness), 2016 FCA 182:

[29] The focus on whether Mr. Zaghib’s application was a “decision, determination, order, measure or question arising under the IRPA” betrays a misunderstanding of the thrust of section 72 of the *Act*. That section does not create a right to have a matter arising under the *Act* judicially reviewed. That right arises from sections 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[30] Section 18 grants the Federal Court exclusive jurisdiction over judicial review of federal administrative action. Section 18.1 provides that an application for judicial review may be brought “by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.” A matter includes an order or decision but it is not limited to decisions: see *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at paragraphs 24 and 25. An allegation that a public officer has failed to discharge a duty imposed upon her by law is a matter which is amenable to judicial review.

[31] Section 72 simply imposes additional procedural requirements, in the immigration context, on the exercise of the right to seek judicial review. Subsection 72(1) provides that leave is required to commence an application for judicial review. It does not define when judicial review is available. The words “... any matter — a decision, determination or order made, a measure taken or a question raised — under this *Act* ...” are not intended to limit the access to judicial review granted by section 18.1 but rather to ensure that they are given the broadest scope so as to include any matter, including “any question raised.”

[26] A “matter” under section 18.1 is not limited to an order or a decision, but includes any “matter in respect of which relief is sought” – “an ‘act or thing’, a failure, refusal or delay to do an ‘act or thing’, a ‘decision’, an ‘order’ and a ‘proceeding’” (*Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 24 [*Air Canada*]).

[27] However, not all federal administrative conduct can be judicially reviewed – a matter that fails to affect legal rights, impose legal obligations, or cause prejudicial effects is not reviewable (*Air Canada* at paras 28–29; *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133 at para 29 [*Democracy Watch*]). For the Court to have jurisdiction, an applicant must identify “some actual conduct triggering [their] right to bring a judicial review application” (*Olumide v Canada*, 2016 FC 558 at para 13 [*Olumide*]).

(a) *Legal rights, legal obligations, and prejudicial effects*

[28] The underlying ALJR seeks to have the Court recognize an existing right to counsel in all proceedings under the IRPA, including applications, interviews, and examinations. It also seeks changes to the Ministers’ policies so that this right is not only judicially recognized, but also recognized and implemented by the Ministers, and seeks to eliminate public messaging that CILA alleges actively discourages individuals from retaining counsel.

[29] In bringing the ALJR and asserting standing as a public interest litigant, CILA does not assert that the matters raised affect its own legal rights, impose legal obligations upon it, or cause it prejudicial effects. Rather, the Ministers’ failure to recognize an existing right to counsel in immigration contexts beyond those provided for under paragraph 10(b) of the *Charter* and subsection 167(1) of the IRPA, and/or the active discouraging of individuals from retaining counsel impacts, CILA submits, upon the legal rights of those individuals who initiate, or are subjected to, proceedings under the IRPA.

[30] The jurisprudence is somewhat ambiguous in identifying whose legal rights must be affected to trigger a right to bring a judicial review (see for instance *Democracy Watch* at para 41; *Air Canada* at paras 29, 42; *Democracy Watch v Ontario Integrity Commissioner*, 2021 ONSC 7383 at para 47). Must the applicant's legal rights be impacted, is a demonstrated impact on the legal rights of the subject of the impugned administrative conduct sufficient, or is demonstrating that legal rights are generally impacted enough?

[31] I am inclined to the view that, at least where the lone applicant is a public interest litigant, a demonstrated impact on the legal rights of those affected by the impugned administrative conduct may be sufficient. However, I need not reach a conclusion on this issue because, as addressed below, I am of the opinion that the ALJR fails to identify any administrative conduct or action that constitutes a reviewable matter under section 18.1 of the *Act* and that would therefore trigger the right to bring the ALJR.

(b) *CILA has failed to identify a reviewable matter*

(i) Ministers' position

[32] The Ministers argue that in seeking review of (1) the alleged practice of not recognizing a right to counsel and (2) the unconstitutionality arising from an omission in the IRPA, CILA does not seek judicial review of the administrative conduct of a federal board, commission or other tribunal, and has therefore failed to identify a reviewable "matter" (*Act*, ss 2, 18 and 18.1).

[33] First, the constitutional challenge to subsection 167(1) of the IRPA is untethered to any administrative conduct and therefore is not a "matter." Second, to the extent CILA challenges

guidelines and policies, these matters are not reviewable. Third, the ALJR seeks to challenge the conduct of multiple federal departments with different underlying facts in contravention of Rule 302, which limits judicial review to a single order unless the Court orders otherwise. For these reasons, collectively or individually, the Ministers argue the ALJR is fundamentally flawed and bereft of any possibility of success.

[34] As explained below, I largely agree with the Ministers' submissions.

(ii) No course of conduct

[35] The Parties do not dispute that a “matter” under section 18.1 is not limited to an order or a decision of a federal board, commission or other tribunal. However, and as stated above at paragraph 27, not all federal administrative conduct is subject to judicial review (*Air Canada* at para 29; *Democracy Watch* at para 29). Nor do the Parties appear to dispute that a “matter” may include a policy or course of conduct, and that a course of conduct includes a closely connected course of allegedly unlawful government action and may also include an ongoing practice (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 173; *Key First Nation v Lavallee*, 2021 FCA 123 at paras 34–35; *Uyghur Rights Advocacy Project v Canada (Attorney General)*, 2023 FC 126 at para 36).

[36] CILA first clarifies that contrary to the Ministers' objections, it is not challenging or seeking judicial review of the Ministers' policies or guidelines. CILA characterizes the Ministers' alleged failure to recognize the right to counsel beyond the rights conferred at subsection 167(1) of the IRPA and paragraph 10(b) of the *Charter* as the “practice” of not

recognizing counsel in certain immigration matters and also points to the “[Ministers’] derivative practices” in this regard.

[37] In responding to the Ministers’ Rule 302 submissions, CILA takes the position that the Ministers’ alleged practices of actively discouraging individuals from retaining counsel reflect a course of conduct, and that this conduct is closely connected because each instance is linked to subsection 167(1) of the IRPA. These practices, CILA argues, are therefore derivative of subsection 167(1).

[38] In *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 [Truehope], the Court was considering a motion under Rule 302 to review two decisions within a single application. The Court noted that a continuing act may be reviewed under a single application, but it “must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies” (Truehope at para 6, citing *Mahmood v Canada*, 1998 CanLII 8450 (FC) at para 10).

[39] In *Canadian Assn of the Deaf v Canada*, 2006 FC 971 [Assn of the Deaf], the underlying incidents involved different facts and different government departments. The Court nonetheless dismissed the respondent’s objection that the application was improperly constituted because judicial review was sought for more than one decision, finding there to be commonality – a single common policy was in issue and that policy was being applied to the same interested community (Assn of the Deaf at para 66).

[40] In the case before me, the alleged practice of failing to recognize a right to counsel beyond the rights conferred at subsection 167(1) of the IRPA and paragraph 10(b) of the *Charter* encompasses the activities of three different government departments in the performance of the distinct duties and responsibilities imposed on those departments under the IRPA. Certain of the alleged practices are reflected in various policies and guidelines. These practices arise from the jurisprudence that has identified specific situations and circumstances in which the right to counsel may arise beyond those identified at subsection 167(1) (see paragraph 72 below). It is that jurisprudence that is being interpreted and applied by way of the various policies and practices identified by CILA, not subsection 167(1) of the IRPA.

[41] I therefore cannot agree with CILA's position that the asserted link to subsection 167(1) demonstrates a closely connected course of conduct.

[42] Further, the alleged practices 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. The impact or significance of those outcomes, both objectively and subjectively, is similarly wide ranging, distinguishing these situations from the facts relied upon in *Truehope* and *Assn of the Deaf*.

[43] The only identified connection or commonality between occurrences of the impugned alleged practice is the underlying issue of representation. This factor alone is not sufficient to demonstrate a course of conduct that is closely connected where incidents of the impugned alleged practice arise in such a wide and varied number of circumstances.

[44] The alleged failure to recognize the right to counsel in certain immigration contexts does not reflect a closely connected course of allegedly unlawful government action. The impugned alleged practice therefore does not disclose a reviewable conduct or matter under section 18.1 of the *Act*.

[45] For the same reasons, the ALJR is not compliant with Rule 302 (an application for judicial review is to be limited to a single order), and I am not persuaded there is a basis upon which the Court might exercise its discretion under Rule 302.

(iii) Constitutional challenge not grounded in any government action

[46] CILA acknowledged in oral submissions that the constitutional challenge alleging subsection 167(1) of the IRPA violates sections 7 and 15 of the *Charter* is not tethered to any administrative conduct, but submits it need not be. Relying on *Alhilal v Canada (Citizenship and Immigration)*, 2025 FC 1201 at paras 56–59 [*Alhilal*], and the recent FCA decision in *Bird v Canada (Attorney General)*, 2025 FCA 70 [*Bird FCA*], CILA argues this Court has jurisdiction to determine “independent constitutional challenges,” and therefore can adjudicate the constitutionality of subsection 167(1) of the IRPA in the absence of a specific administrative decision affecting an individual.

[47] In *Alhilal*, Justice Lobat Sadrehashemi allowed the appeal of an associate judge’s order to remove the originating document in an ALJR. In doing so, she considered the interpretation of “matter” under section 18.1 of the *Act* and subsection 72(1) of the IRPA in the context of a

constitutional challenge and confirmed the broad ambit of a matter subject to judicial review, stating:

[58] This general understanding that a matter under sections 18 and 18.1 of the *Federal Courts Act* encompasses more than only reviews of decisions is not altered when a party has raised a challenge to the constitutional validity of a provision and/or seeks declaratory relief. The same principle applies – a decision is not required.

[48] CILA's reliance on *Alhilal* to support its position that independent constitutional challenges may be brought under sections 18 and 18.1 is misplaced. *Alhilal* does not, in my view, stand for the principle that sections 18 and 18.1 of the *Act* confer jurisdiction to the Court to adjudicate independent constitutional challenges.

[49] In addressing the issue of whether a constitutional challenge not tied to a “decision” can be judicially reviewed, Justice Sadrehashemi was concerned with two determinations made by the associate judge. First, the notion that there must be a decision to challenge in order to seek judicial review, and second, the characterization of the ALJR in issue as an independent constitutional challenge (*Alhilal* at para 56). She then finds that the associate judge erred in characterizing the essential character of the proceeding as an independent *Charter* challenge because the *Charter* challenge was instead tethered to a request for relief in the form of a prohibition (*Alhilal* at paras 61, 65–66).

[50] Justice Sadrehashemi's statement at paragraph 58 simply reaffirms that a constitutional challenge need not be tied to a specific administrative decision to constitute a matter amenable to

judicial review. She did not conclude a constitutional challenge need not be tied to a “matter” under section 18.1.

[51] CILA also places much weight on *Bird FCA* where the FCA finds the application judge erred in determining the constitutional challenge in issue could not be brought by application in the absence of an underlying administrative decision. CILA relies on *Bird FCA* to argue the FCA has clearly held an independent constitutional challenge may be brought under sections 18 and 18.1 of the *Act*. Again, I do not share CILA’s interpretation of *Bird FCA*.

[52] *Bird FCA* is a short decision of two paragraphs. The FCA’s conclusion that the application judge erred is not supported by any analysis – it appears the error was not in dispute – and there are few background facts disclosed in the decision. However, the FCA does speak to the absence of “an underlying administrative decision” (at para 1; emphasis added). In other words, *Bird FCA* reiterates that a “matter” under sections 18 and 18.1 of the *Act* is not limited to a decision or order. *Bird FCA* does not, as CILA asserts, conclude a constitutional challenge to federal legislation brought by way of application need not be tied to a “matter” under section 18.1.

[53] In granting the appeal in *Bird FCA*, the FCA returned the matter to this Court for “determination on all remaining issues.” After this motion was argued, Justice Cecily Strickland released Judgment and Reasons in *Bird v Canada (Indigenous Services)*, 2026 FC 425 [*Bird FC*]. Justice Strickland allowed the application for judicial review in part, declaring a portion of the challenged legislation, the *Canoe Lake Cree First Nation Citizenship Law* [Citizenship Law], to be unconstitutional and of no force and effect. The Citizenship Law had been enacted by the

Canoe Lake Cree First Nation [CLCFN] pursuant to section 10 of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[54] Justice Strickland notes in *Bird FC* that the “Applicants state that they are challenging the decision of the CLCFN to enact the Citizenship Law contrary to the *Charter*, the *Constitution Act*, 1982 and *McCallum* [*v Canoe Lake Cree First Nation*, 2022 FC 969]” (at para 25).

However, the Citizenship Law was challenged in the absence of any decision taken under the authority of the challenged legislation. Justice Strickland found the absence of an administrative decision not to be an obstacle to the Court considering the constitutional challenge by way of application, stating:

[24] This Court has also held that even if there has not been a “decision,” the Court has jurisdiction to hear a challenge to the constitutional validity of a legislative enactment, which in this case is the Citizenship Law (see *Collins* at para 50; see also *Janvier v Chipewyan Prairie First Nation*, 2021 FC 539 at para 12).

[55] The Court invited the Parties to provide short written submissions addressing the impact, if any, of *Bird FC* on the issues before the Court on this motion. The Parties did so, and those submissions have been reviewed and considered.

[56] CILA reasserts its position that *Bird FCA* definitively holds that this Court derives the jurisdiction by way of section 18.1 to determine an “independent constitutional challenge” to federal legislation. CILA also submits that *Bird FC* follows and applies *Bird FCA* as it was bound to do, that I am similarly bound to do so under the principles of vertical and horizontal *stare decisis*, and that to the extent that *Olumide* – where Justice René Leblanc, relying on *Olumide v Conservative Party of Canada*, 2015 FCA 218 at para 8, found that an applicant

cannot bring a “stand-alone” constitutional challenge by way of application absent administrative conduct or action (at para 15) – is inconsistent, *Bird FCA* overrules that decision. I remain unpersuaded.

[57] *Bird FC* unquestionably considered a constitutional challenge to the impugned Citizenship Law in the absence of a decision taken pursuant to that law.

[58] However, the Citizenship Law in *Bird FCA*, and in turn *Bird FC*, was not legislation enacted by Parliament; unlike the IRPA in this instance, it was a law enacted by the CFCLN, a body that, when exercising decision-making authority under the *Indian Act*, is a federal board, commission or other tribunal within the meaning of sections 2, 18 and 18.1 of the *Act*. That *Bird FC* does not expressly distinguish between the reviewability of the legislative enactments of a delegated authority such as the CFCLN and the legislative enactments of Parliament does not extend the scope of sections 18 and 18.1, or broaden Parliament’s definition of a “federal board, commission or other tribunal” to include Parliament itself.

[59] In my view, neither *Bird FCA* nor *Bird FC* stand for the proposition that a constitutional challenge to federal legislation, untethered to any administrative action or conduct, can be brought by way of application, and are therefore not inconsistent with *Olumide*.

[60] In addition to *Alhilal* and *Bird FCA*, CILA also cites four additional decisions in support of its argument that this Court has jurisdiction to judicially review independent constitutional challenges – *Osborne v Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 SCR 69, aff’g 1988 CanLII 9455 (FCA), [1988] 3 FC 219, rev’g in part 1986 CanLII 7612 (FC), [1986] 3

FC 206 [*Osborne*]; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203, aff'g 1996 CanLII 3885 (FCA), [1997] 1 FC 689, aff'g in part 1993 CanLII 2997 (FC), [1994] 1 FC 394 [*Corbiere*]; *PH v Canada (Attorney General)*, 2020 FC 393 [*PH*]; and *Deegan v Canada (Attorney General)*, 2019 FC 960 [*Deegan*]. Each of these decisions is readily distinguished; three on the basis that the underlying proceeding was an action, not an application (*Osborne*, *Corbiere*, and *Deegan*), and in *PH*, the constitutional challenge was tethered to a matter under sections 18 and 18.1 of the *Act*.

[61] An independent constitutional challenge is not a reviewable matter under section 18.1 of the *Act* (*Olumide* at paras 8–15).

(c) *Conclusion*

[62] Having found the Ministers' alleged practice of failing to recognize the right to counsel in certain immigration contexts does not constitute a reviewable conduct, and that the independent constitutional challenge to subsection 167(1) of the IRPA is not a reviewable matter, this Court has no jurisdiction to hear the ALJR. This flaw is fatal, and as such I conclude the ALJR is bereft of any possibility of success.

[63] The Ministers also requested that the Court dismiss or strike out the ALJR on the basis that CILA does not have standing to bring the underlying application and that CILA lacks standing to seek relief under subsection 24(1) of the *Charter*. The finding that the ALJR does not raise a reviewable matter under section 18.1 of the *Act* is, however, determinative of the motion. I therefore need not consider those issues.

[64] I will nonetheless, in the interests of completeness, address the question of public interest standing. In doing so, I need not apply the principles and thresholds governing a motion seeking to strike an application for judicial review, nor finally determine, as the Ministers request, the issue of standing as a preliminary question of law under Rule 104(1)(a) (*CCR* at paras 18–30).

B. *Public interest standing to bring the application*

[65] Section 18.1 of the *Act* provides that an application for judicial review “may be made... by anyone directly affected by the matter in respect of which relief is sought.” It is not disputed that section 18.1 encompasses applicants “who are not directly affected when they meet the test for public interest standing” (*Canada (Royal Canadian Mounted Police Public Complaints Commission) v Canada (Attorney General)*, 2005 FCA 213 at para 56).

[66] CILA has not taken the position it is directly affected by the matters raised in the ALJR, but asserts that it is in the public interest to grant CILA standing and that it satisfies the test for public interest standing (*Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 304–308).

[67] The public interest standing test was set out by the Supreme Court of Canada [SCC] in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] and was more recently considered in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 where the SCC reaffirmed the three factors that are to be cumulatively assessed and given a liberal and generous interpretation in the exercise of a Court’s discretion to grant or deny public interest standing:

[28] The decision to grant or deny public interest standing is discretionary (*Downtown Eastside*, at para. 20). In exercising its discretion, a court must cumulatively assess and weigh three factors purposively and with regard to the circumstances. These factors are: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the action has a genuine interest in the matter, and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court (para. 2).

(1) Serious justiciable issue

[68] CILA contends that “the under inclusiveness of the right to counsel by s[ubsection] 167(1) of the IRPA” – a “matter” under section 18.1 of the *Act* – raises an important constitutional issue and therefore a serious justiciable issue. Having found CILA’s independent constitutional challenge is not a reviewable matter, I cannot agree that CILA raises a serious justiciable issue in this regard.

[69] The Ministers also submit no serious justiciable issue arises because success on the ALJR would require the “Court to overturn scores of cases from this Court, the FCA and the SCC” holding that there is no absolute right to counsel in IRPA matters. In response, CILA argues that the principles of vertical and horizontal *stare decisis* do not apply for two reasons.

[70] First, the exceptions to vertical *stare decisis* articulated in *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*] and *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] apply because CILA’s challenge to subsection 167(1) of the IRPA is unique and novel. Second, the principles of horizontal *stare decisis* do not apply to the prior decisions of this Court relied on by the Ministers because each of those cases are irrelevant or distinguishable.

[71] In *Carter* at paragraph 44, the SCC held that a lower court may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate.”

[72] CILA’s argument that the ALJR captures immigration-related contexts beyond those where subsection 167(1) of the IRPA and paragraph 10(b) of the *Charter* confer a right to counsel does not raise a new legal issue. Nor does it disclose a fundamental shift in the debate. The long line of jurisprudence from this Court, the FCA and the SCC cited by the Ministers demonstrates that the right to counsel has been considered and determined in multiple immigration contexts on a case-by-case basis involving a wide variety of circumstances outside those covered by subsection 167(1) of the IRPA or paragraph 10(b) of the *Charter* (see for example *Dehghani v Canada (Minister of Employment and Immigration)*, 1993 CanLII 128 (SCC), [1993] 1 SCR 1053 (an immigration examination for routine information-gathering purposes does not trigger a right to counsel under section 7 of the *Charter*); *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 55 and *Liu v Canada (Citizenship and Immigration)*, 2017 FC 562 at para 55 (no absolute right to counsel in proceedings leading to the issuance of a deportation order under section 44 of the IRPA); *Canada (Citizenship and Immigration) v Paramo de Gutierrez*, 2016 FCA 211 at paras 50–54 (subsection 167(1) of the IRPA provides a right to counsel at a pre-hearing interview conducted as part of a hearing’s fact-finding process)).

[73] This approach accords with the established and binding principle that outside the context of paragraph 10(b) of the *Charter*, a right to counsel pursuant to the *Charter* or the common law

is to be determined on the basis of a case-specific and multifactored inquiry (*British Columbia (Attorney General) v Christie*, 2007 SCC 21 at paras 23, 25, 27 [*Christie*]).

[74] Nor does the evidence disclosing the high stakes nature and complexity of immigration processes, or identifying that individuals may encounter barriers related to their personal attributes, experience a diminished ability to meaningfully participate in immigration-related proceedings, and see a diminished likelihood of a successful outcome in the absence of counsel suggest the exceptions to vertical *stare decisis* identified in *Bedford* and *Carter* are of application.

[75] Similarly, the legal arguments identified by CILA do not raise issues that undermine the general principle set out in *Christie* and that is reflected in the immigration-specific jurisprudence. For example, CILA cites *New Brunswick (Minister of Health and Community Services) v G(J)*, 1999 CanLII 653 (SCC), [1999] 3 SCR 46 [*G(J)*] in identifying that an individual's capacity is "to be considered as an additional *Baker* factor" raising a new legal argument. Yet, in *G(J)* the SCC recognized the constitutional obligation to provide state-funded counsel only in "the particular circumstances of this case" (at paras 1–2). While *G(J)* may reflect a change or development in the law, a mere change cannot engage the circumstances identified in *Carter*. The new legal issues raised or change in law that would cause the reconsideration of the settled rulings of higher courts must demonstrably impact upon the legal framework or analysis underpinning that otherwise binding jurisprudence (*Carter* at paras 44–46).

[76] For similar reasons, CILA's position that horizontal *stare decisis* is of no application is equally unpersuasive. That the cases cited by the Ministers can be distinguished on their facts

highlights the application of the general principle in *Christie*, and they are not inconsistent with that principle.

[77] There is no merit to the argument that the exceptions to the doctrine of vertical *stare decisis* are available to CILA or that the principles of horizontal *stare decisis* are inapplicable in the circumstances of this case.

(2) Real stake or genuine interest

[78] The Ministers argue CILA has not demonstrated a “real stake” or “genuine interest” in the litigation. The Ministers cite CILA’s limited history as an association with an interest in Canadian immigration systems and laws, the fact that it has not previously been granted standing as a public interest litigant, and that the organization’s stated roles include representation of the immigration bar in advancing this position. The Ministers also argue that CILA does not require public interest standing to participate in litigation, CILA members having the ability to act in their traditional role as counsel on behalf of those clients directly affected by the impugned statutory provisions and policies identified in the ALJR. CILA’s interest, the Ministers argue, is purely jurisprudential.

[79] CILA submits it has a “real stake” or “genuine interest” in the issues raised in this proceeding, having continuously advocated for the right to counsel in immigration matters since its creation in January 2021. It submits that its limited litigation history is attributable to its recent formation and that its failure to have represented individuals adversely impacted by the

non-recognition of the right to counsel is not a basis upon which to refuse public interest standing.

[80] I am satisfied that CILA has disclosed a commitment to advancing a comprehensive right to counsel in IRPA matters and is not a “mere busybody.” CILA having conceived of this challenge, compiled an application record including seven affidavits, and having advanced well-articulated legal issues in commencing proceedings are factors that support a conclusion that CILA has a real stake or interest in this instance.

(3) Reasonable and effective means of bringing the issue before the Court

[81] CILA submits this proceeding is a reasonable and effective way to address the issues raised. CILA contends the four non-exhaustive factors identified in *Downtown Eastside* at para 51 under this branch of the test all weigh in favour of granting public interest standing: (1) it has the capacity to bring forward the litigation based on its resources, expertise, and submission of a comprehensive evidentiary record; (2) the matter transcends CILA’s interests in assisting directly affected individuals who face significant barriers in access to justice; (3) alternative, more effective means to challenge the failure to recognize the right to counsel do not exist; and (4) those more directly affected by the issues raised support CILA’s standing and are not content with the *status quo*.

[82] There is little dispute on factors one, two, and four. However, the Parties do disagree on the third factor.

[83] CILA argues that litigating the right to counsel on a case-by-case basis and in a specific factual context is (1) unrealistic and impractical, and (2) needlessly overburdens the Court, whose resources have been recognized to be scarce.

[84] The Ministers argue, and I agree, the question of the right to counsel in immigration matters is one that has been raised, and continues to be raised, by directly affected individuals such that there is no concern that the issue would be immunized from judicial scrutiny.

[85] While I acknowledge that case-by-case determinations impact on scarce judicial resources, this factor must be weighed against the nature of the issue to be determined – recognizing the right to counsel outside the paragraph 10(b) context in the absence of a directly affected individual also deprives the Court of the context and circumstances required to meaningfully engage in a case-specific and context-dependent analysis.

(4) Conclusion

[86] Having individually addressed and cumulatively considered the three *Downtown Eastside* factors, I find that CILA's assertion of public interest standing fails in this instance. As a result, had I concluded above the ALJR was not doomed to fail, I would nonetheless find that CILA cannot be granted public interest standing, and the Ministers' motion would be allowed on this ground.

VI. Leave to Amend

[87] During oral submissions, CILA raised the possibility of amending the ALJR, specifically in the event the Court were to conclude certain of the relief sought was not available to it.

[88] In *Olumide*, Justice Leblanc addresses when an amendment to pleadings should be allowed and when they should be denied in the context of an application, stating:

[24] Amendments for pleadings should be allowed at any stage of an action for the “purpose of determining the real question in controversy between the parties” (*Varco Canada Limited v Pason Systems Corp*, 2009 FC 555, at para 25 [*Varco Canada*]). However, amendments will be denied, and pleadings will be struck, when it is plain and obvious that the underlying claim discloses no reasonable cause of action (*Varco Canada*, at para 26; *Cardinal v R* (1993), 72 FTR 309, 46 ACWS (3d) 377). In this case, the Applicant’s amendments just build on his theory of the case. They do not remedy the fact that he does not challenge the conduct of some “federal board, commission or other tribunal” so as to trigger his right to bring a judicial review application and the Court’s authority to entertain it.

[89] In this case, amendments will not remedy the fundamental flaws in the pleadings, nor will amendments remedy the reasons for my conclusion that CILA has not raised a matter subject to judicial review under section 18.1 of the *Act*.

[90] Leave to amend the ALJR will therefore not be granted.

JUDGMENT in IMM-12116-25

THIS COURT’S JUDGMENT is that:

1. The Respondents’ motion is granted.
2. The application for leave and for judicial review is struck without leave to amend.

“Patrick Gleeson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-12116-25

STYLE OF CAUSE: CANADIAN IMMIGRATION LAWYERS
ASSOCIATION v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION, THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS, AND
THE MINISTER OF EMPLOYMENT AND SOCIAL
DEVELOPMENT CANADA

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DATE OF HEARING: DECEMBER 10, 2025

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DATED: MAY 13, 2025

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