Are You Represented? Consultant Regulation after Bill C-35

Deanna Okun-Nachoff and Michael Greene

Introduction

The CBA Citizenship and Immigration Law Section has consistently maintained that in order to protect the public interest and the integrity of Canada's immigration system, in particular the interests of vulnerable immigration applicants, only members in good standing of a provincial or territorial law society or the Chambre des Notaires du Québec should practice immigration law for remuneration[1].

If consultants are going to continue to be permitted to provide immigration services for remuneration, it is imperative that they are properly regulated. In the six years that the Canadian Society of Immigration Consultants (CSIC) has functioned, there has been evidence of ineffective consultant regulation. As a result, public confidence in the system has eroded and the public interest is not being adequately protected.

Aside from provincial and territorial regulators of the legal profession (law societies and the Chambre des Notaires du Québec), there does not currently exist an organization with the necessary independence, capacity and mandate to establish and promote ethical and professional standards among consultants, or to monitor, investigate and discipline consultants. Such an organization would necessarily require statutory authority to audit, subpoena and seize documents during investigations.

In addition to lacking adequate legal authority to effectively enforce professional and ethical standards, CSIC has been mired in allegations of financial mismanagement, lack of accountability, and controversy over governance issues. In the meantime, there have been virtually no controls on the so-called "ghost consultants" who provide advice and prepare applications without declaring their involvement on the face of the application, thus avoiding the scrutiny of the regulator and the law.

The federal government is currently undertaking two major initiatives. They have enacted legislation to prohibit the activities of unlicensed consultants, and they have given the Minister more power to appoint and control the regulator. The Minister also invited proposals from interested parties who wanted to be appointed as regulator. At the conclusion of the review process, the Minister has proposed a new organization, the Immigration Consultants of Canada Regulatory Council (ICCRC), as the

[1] The CBA Section has written seven submissions on the issue of immigration consultants, as follows: June 1995, "Submission on Immigration Consultants," online: www.cba.org/CBA/sections_cship/pdf/95-14-ENG.pdf; July 1999, "Submission on Immigration Consultants," online: www.cba.org/CBA/sections_cship/pdf/99-31-eng.pdf; November 2002, "Submission on Immigration Consulting Industry," online: www.cba.org/CBA/sections_cship/pdf/nov_02.pdf; December 12, 2005, Letter to the Minister of Citizenship and Immigration, online: www.cba.org/CBA/sections_cship/pdf/society.pdf ; July 10, 2007, Letter to the Minister of Citizenship and Immigration, online: www.cba.org/CBA/sections_cship/pdf/csic.pdf; July 2, 2010, Letter to Citizenship and Immigration Canada, online: www.cba.org/CBA/submissions/pdf/10-47-eng.pdf; October 2010, "Bill C35, the Cracking Down on Crooked Consultants Act", online: www.cba.org/CBA/submissions/pdf/10-72-eng.pdf. Attached are copies of the

designated regulator. The old regulator, CSIC, has filed a Federal Court application challenging that decision.

This paper will discuss the history of Canada's attempts to regulate immigration consultants, the recent Government initiatives, and the repercussions for representatives.

Canada's History on Regulation of Immigration Consultants

The search for an effective mechanism to regulate non-lawyers in the immigration field has spanned more than 15 years in Canada. The Standing Committee on Citizenship and Immigration issued its first report on the subject in November 1995[2]. At the time, immigration consultants were bound by no professional guidelines, and there was nothing in Canadian immigration law to prohibit an unlicensed consultant from charging a fee to act in an immigration matter.

- *Advisory Committee on Regulating Immigration Consultants*

In October 2002, the government established an Advisory Committee to propose recommendations to the immigration minister at that time, Minister Dennis Coderre. The Advisory Committee's report, which was released in May 2003, included recommendations for self-regulation of immigration consultants, and for amendments to the *Immigration Act* that would confine the practice of immigration law for a fee to registered barristers, solicitors and immigration consultants[3].

Following the Advisory Committee's report, Citizenship and Immigration Canada (CIC) created a Secretariat on Regulating Immigration Consultants in June 2003, with a mandate to implement the recommendations of the Advisory Committee.

- *Implementation of the Advisory Committee's Recommendations*

In October 2003, CSIC was incorporated federally as an independent not-for-profit organization, with a mandate to "protect the consumers of immigration consulting services and ensure the competent and professional conduct of its members"[4].

Amendments to the *Immigration and Refugee Protection Regulations* were passed in April 2004 which: a) defined "authorized representative" as including only members in good standing of a provincial law society, the Chambres des notaires du Québec or CSIC; b) mandated that representatives be identified on all applications, and c) prohibited all but authorized representatives from charging a fee to represent,

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[2] House of Commons, *Immigration Consultants: It's Time to Act*, 9th Report of the Standing Committee on Citizenship & Immigration, December 1995.

[3] Report of the Advisory Committee on Regulating Immigration Consultants, Minister of Public Works & Government Services Canada, May 2003, online: www.csic-scci.ca/images/File/Report%20of%20the%20Advisory%20Committee%20on%20Regulating%20Immigration%20Consultants-new.pdf

[4] House of Commons, Standing Committee on Citizenship & Immigration, *Regulating Immigration Consultants*, 10th Report, 2nd Session, 39th Parliament, June 2008, online: www.parl.gc.ca/content/hoc/Committee/392/CIMM/Reports/RP3560686/cimmrp10/cimmrp10-e.pdf

advise, or consult any person who is the subject of a proceeding or application before the Minister, an officer or the Immigration and Refugee Board[5].

- *Report of the Standing Committee on Citizenship and Immigration*

Complaints about unscrupulous immigration consultants continued to abound even after the creation of CSIC, and concerns quickly arose about CSIC's capacity to effectively regulate and discipline its members. Several key members of the CSIC board resigned in quick succession amid allegations of mismanagement and reckless spending.

In February 2008, CSIC launched the Canadian Migration Institute (CMI), a federally incorporated for-profit subsidiary of CSIC with a mandate to "educate, accredit and advocate on immigration law and policy". Although CMI was intended to operate independently of CSIC, it soon came to light that the directors of the CSIC board were also serving as directors of CMI, leading to concerns that CMI had created a means for Directors of the not-for-profit CSIC board to profit from mandated professional development activities of its members.

In April 2008, the Standing Committee on Citizenship and Immigration initiated a study regarding the regulation of immigration consultants. The Committee heard from witnesses across the country, including members of the public and professionals from within the industry. The Committee's report, which was issued in June 2008, included a summary of the complaints that had been expressed by witnesses, including excessive membership fees, questionable competency testing of CSIC members, lack of transparency and accountability of the CSIC Board, and extravagant compensation for CSIC Directors. Complaints were also made about the conflict of interest for CSIC Directors also acting as Directors of CMI, and about the chilling effect of the CSIC Rules of Professional Conduct which made it a professional offense to "undermine" CSIC.

The Standing Committee report included a number of recommendations to improve the effectiveness of CSIC, and to reduce the problem of unregistered consultants (so-called "ghost consultants"). In particular, the Standing Committee recommended that the government pass new legislation to re-establish CSIC as a non-share capital corporation, so that it could operate in the same manner as a provincial law society, with appropriate mechanisms for licensing, assessment of professional competence, creation of prohibitions and offences, complaints resolution and a compensation fund. The Standing Committee report also recommended that the statute re-establishing CSIC identify unauthorized practice as a prohibition and an offence.

With respect to the problem of "ghost consulting", the committee recommended that steps be taken to ensure that only authorized representatives are permitted to advise or consult with a person who is the subject of a proceeding or application before the Minister of Citizenship and Immigration, an immigration officer or the IRB. They recommended that similar limitations be placed on pre-submission

[5] Canada Gazette, Part II, April 14, 2004, online: http://gazette.gc.ca/archives/p2/2004/2004-04-14-x/html/sor-dors59-eng.html.

work, and that everyone be required to disclose the use of any representative. Finally, the Committee's report recommended that the government combat the problem of unlicensed consultants practicing overseas by simplifying immigration applications, and by improving information to potential applicants about the rules regarding authorized representatives.

Bill C-35: the Cracking Down on Crooked Consultants Act

- *Overview*

On 8 June 2010, the government introduced Bill C-35: the *Cracking Down on Crooked Consultants Act*. The Legislation, which received Royal Assent on 23 March 2011, prohibits anyone from directly or indirectly representing or advising a person for consideration in an immigration proceeding unless that person is a lawyer, a Quebec notary, or a member of a body designated by the government. The law imposes penalties on "ghost consultants" who engage in unauthorized practice, and gives the Minister authority to designate a regulator and to revoke that designation. It also establishes mechanisms for the Minister to ensure that the appointed regulator operates in the public interest. *The full text of Bill C-35 is included as Appendix A to this paper*.

- *Ghost Consultants*

Prior to the enactment of Bill C-35, section 91 of the *Immigration and Refugee Protection Act* read as follows: "The Regulations may govern who may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board".

Bill C-35 replaces the previous section 91 with a comprehensive set of provisions creating offences for unlawful representation or advising, providing penalties for breaches of these provisions, and authorizing the Minister to make Regulations governing who can provide advice or representation, what body can govern registered consultants and setting out the accountability of such a body to the Minister. Section 91 (1) of the amended legislation reads as follows: "Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration – or offer to do so – in connection with a proceeding or application under this Act".

The amended section 91 is intended to eliminate the problem of "ghost consultants" who provide advice or representation when they are not licensed to do so, to address repeated complaints of incompetent and unethical persons providing advice and assistance in immigration matters. Under the former legislation, "ghost consultants" could not be disciplined by any regulatory body and could not be prosecuted unless caught directly in a misrepresentation. While the previous legislation prohibited such persons from making representations to CIC, these unscrupulous individuals would avoid this problem by "ghosting" the applications or by falsely representing that they were not receiving a fee for their services. The previous provisions were also restricted to controlling people who represented individuals in connection with proceedings or applications under the Act. The new provision is far more expansive in including:

a. Direct or indirect representation;
b. Advising a person for consideration;
c. Offering to advise or represent in connection with a proceeding or application under this Act.

- *Who is Authorized to Represent and Advise?*

The amended regulation authorizes the following persons to represent or advise a person for consideration in connection with a proceeding under the IRPA:

a. Lawyers who are members in good standing of a provincial law society;
b. Notaries who are members in good standing of the Chambre des notaries du Quebec; and
c. Any other member in good standing of a law society including a paralegal or student-at-law.

The section also allows certain representatives to "assist persons in connection with an application under the Act" where they do so on behalf of an entity that been authorized to provide such services in an agreement or arrangement with the federal government.

- *Inclusion of Paralegals Among Authorized Representatives*

Section 91(2)(b), which empowers non-lawyer members of provincial law societies to provide representation (including paralegals), was inserted into the final version of the legislation after it had already gone to the Standing Committee following second reading. It appears that this subsection was included following representations by the Law Society of Upper Canada (LSUC). The LSUC represented to the Standing Committee that, since it was now effectively regulating paralegals, it could regulate paralegals who provide immigration services. The Government proposed a "friendly amendment" granting their request. The problem with this proposal is that it authorizes an additional 3,000 paralegals to provide immigration advice and representation. Unlike with consultants who will be regulated by the national body designated by the Minister, the Minister will have no ability to control the accreditation or educational standards for such individuals. The LSUC brief does not indicate that they consulted with either the CBA or OBA immigration sections, but acknowledges that they consulted with paralegals. Ironically, it appears that the LSUC may have been successfully lobbied by unregulated consultants.

Before the Bill became law, it had to pass through the Senate. The standing Senate committee on social affairs, science and technology declined to propose any amendments but did make the following observation in its report:

> The committee notes that paralegals have been added to the categories of persons authorized under the Bill to represent, advise or consult with a person for consideration and therefore adds the following observation:
>
> That a paralegal representing, advising or consulting with a person for consideration in connection with a proceeding or application under the *Immigration and Refugee Protection Act* should undergo training and examination specifically related to immigration practices.

Since this is only a recommendation, it is not binding. It can only be hoped that provincial law societies and the Barreau du Quebec will follow the recommendation and insist that paralegals at least meet the standards of the national regulatory body before they are allowed to represent or advise in immigration matters.

- *Contracting Out of C-35*

Canada had followed the UK and other countries in making arrangements with such international organizations as VSF to assist temporary residence applicants for a fee. These people operated outside the jurisdiction of CSIC, but with the cloak of legitimacy of CIC. These organizations and their employees were not required to meet any standards of ethics or competence. Essentially they were self-regulated with the commercial contract with CIC expected to act as their motivator for good behaviour.

The government had previously been criticized for violating its own legislation by permitting third party organizations to assist people to apply to come to Canada. The amended section 91(4) now legalizes these activities, without any requirement for professional or ethical competence by the organization or its representatives. Bill C-35 authorizes the activities of "entities" that sign agreements with the government of Canada to "provide services to assist persons in connection with an application". Perhaps more disturbingly, it contemplates such entities extending their services to applicants for permanent residence.

This situation raises ethical issues. These entities and their employees are at least arguably in a conflict of interest such that a lawyer in similar circumstances might not be permitted to act. The entities owe their existence to a contract with CIC. If they want to keep the contract and their jobs, they must ensure that they serve CIC's best interests. That being the case, what incentive is there to consider other options for the applicant, to argue a marginal or humanitarian case or to challenge a negative decision? Moreover what, if any, incentive is there for them to advocate on the applicant's behalf? In reality, it appears that their true client is the government of Canada; their duty is to ensure that all questions are answered and all required documents are attached. No more.

In these circumstances, it is arguably the government's duty to warn that the entities and their employees are neither qualified nor motivated to ensure that the applicant's best interests are pursued or advocated.

What is the responsibility of counsel when the visa office is encouraging, if not requiring applicants to use the services of these agencies? Although there may be some benefit in using an agency that has been trained by CIC and is familiar with local issues and requirements, surely counsel must be careful to caution clients that the agency may not be competent to deal with complex issues or difficult applications.

- *Penalties*

Subsection 91 (9) now makes a person violating 91(1) liable on prosecution by indictment to a fine of up to $100,000.00 or imprisonment of up to 2 years or both, or on summary conviction to a fine of not more than $20,000.00, imprisonment of up to 6 months or both. A prosecution may now be brought up to 5 years following the violation.

- *Enforcement*

Inland: As with other violations of the IRPA, it is expected that enforcement of these provisions will be the responsibility of the CBSA. CBSA officers will investigate and, where appropriate, lay charges of offences committed in Canada. In most Canadian jurisdictions, Special Crown Prosecutors have been assigned to review immigration violations and decide whether prosecution is appropriate. As we understand it, these matters are no longer handled by Police Authorities.

Overseas: Technically CIC and the CBSA have no authority to enforce s. 91 outside of Canada. However, s. 135 of the IRPA provides: "an act or omission that would by reason of this Act be punishable as an offence if committed in Canada is, if committed outside Canada, an offence under this Act and may be tried and punished in Canada." Thus, if an offender should set foot in Canada, they could be prosecuted. Moreover, even without a conviction, such individuals could become criminally inadmissible to Canada if an officer has reasonable grounds to believe that they have committed an offence, provided that it is also an offence in the jurisdiction where it was committed. The Minister has been encouraging foreign governments to enact and enforce stronger controls against offshore immigration consultants.

It appears likely that CIC will use misrepresentation provisions against applicants in order to enforce the Act. Some visa offices (eg. Hong Kong) have been utilizing this approach for some time. Applicants would be asked to disclose the name of any individual or organization who has provided them with advice or assistance. Failing to disclose would constitute misrepresentation if it were subsequently discovered. Use of an unauthorized representative could result in refusal of an application, although this could be legally open to challenge.

- *Using Overseas Agents: professional and ethical concerns*

Canadian based lawyers and consultants who utilize the services of overseas agents to recruit clients and assist with applications could be exposed to liability for the actions of those agents. A lawyer who uses an agent who provides advice or assistance, without adequate supervision of those services by the lawyer, may be a party to an offence under s. 91. Furthermore, many unlicensed consulting companies hire one or more lawyers or consultants to "front" their applications. If a lawyer or licensed consultant allows this to occur with little or no control over the activities of the agency, then they are arguably facilitating violations of s. 91, if not participating in those violations.

- *The Power to Designate or Revoke Designation of a Regulator for Immigration Consultants*

Section 91(5) gives the Minister the power to designate by regulation a body whose members would be authorized to represent or advise a person in connection with a proceeding under the Act. Section 91 (5.1) expressly provides that the Minister also has the power to revoke such a designation. The express revocation power was added after second reading at the recommendation of the CBA. Our position was that although revocation could be read into the designation power, its omission could lead to an uncertain interpretation and expose the Minister to litigation if he purported to revoke a designation. We had further advocated that the Minister be given the power to appoint a trustee to take control of the regulator if the best interest of the public were not being protected, but this was not accepted.

- *Ensuring Accountability*

Section 91(6) authorizes the Minister to make regulations requiring the designated consultant's body to provide information to the Minster to enable the Minister to "evaluate whether the designated body governs its members in a manner that is in the public interest so that they provide professional and ethical representation and advice." This provision has the potential to create meaningful accountability and to address many of the concerns that were raised about the previous regulator. The section expressly allows the Minister to request information about governance. This should include remuneration of directors and executives, enforcement of professional and ethical standards, as well as standards for obtaining and maintaining membership. On the other hand, the effectiveness of this provision will depend upon the motivation and determination of the Minister and the Department.

Selection of a Regulator for Immigration Consultants

Within days of introducing Bill C-35, the government issued a notice on the Canada Gazette regarding its intention to launch a competitive public selection process to identify a regulatory body for immigration consultants[6]. The public was invited to provide comments regarding the selection process.

In a second notice, published in the Canada Gazette on 28 August 2010, the government announced that a Selection Committee had been established, and invited submissions from candidates interested in becoming the designated regulator of immigration consultants[7]. The notice sets out the selection criteria to be employed by the committee in assessing the credentials of the interested candidates, namely: competence, integrity, accountability, viability, and good governance.

On 19 March 2011, Minister Kenney proposed amendments to the IRPR that would designate the ICCRC as the regulator whose members will be authorized to represent clients in immigration law[8]. The

6 Canada Gazette, Part 1, 12 June 2010, online: www.gazette.gc.ca/rp-pr/p1/2010/2010-06-12/html/notice-avis-eng.html#d104

7 Canada Gazette, Part 1, 28 August 2010, online: www.gazette.gc.ca/rp-pr/p1/2010/2010-08-28/html/notice-avis-eng.html#d111

8 *Canada Gazette*, Part I, 19 March 2011, online: http://gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg2-eng.html

proposed amendment includes a transitional provision that would allow CSIC members in good standing to continue practicing for a period of 120 days following the coming into force of the proposed amendments.

In proposing this latest set of amendments to the IRPR, the government has rejected the Commons Committee's recommendation that stand-alone legislation be created to establish a statutory regulator, and that the government should create and operate that body themselves. According to the Regulatory Impact Analysis Statement, this proposal was rejected "due to concerns about the lengthy and resource intensive implementation process". The trade-off is that the alternative offers less control and less accountability.

In describing the purpose of the proposed amendments, the government indicated in the following words the rationale for appointing ICCRC in place of CSIC:

> Consistent with the selection factors outlined in the Call for Submissions published in the *Canada Gazette*, Part I, in August 2010, ICCRC has demonstrated has demonstrated that it meets the necessary organizational competencies to effectively regulate immigration consultants. It has also demonstrated the ability to foster a culture of transparency and openness in order to be properly accountable to its membership and to the Canadian public. The proposed entity has demonstrated its commitment to sound financial management and reporting, as well as a plan to ensure a membership base that would provide for the sustainability of the body through the promotion of membership to qualified practitioners. By proposing fee reductions, it is believed that members will get better value for their money, belong to an entity that practices good financial management and creates an incentive for new consultants or "ghost" consultants to participate in a legitimate association that provides support and oversight.

- *CSIC's Response to the ICCRC Appointment*

Just weeks after the Federal Government announced its intention to appoint ICCRC in place of CSIC as the regulatory body for immigration consultants, CSIC applied to the Federal Court for leave and judicial review of that decision. In their submission, CSIC has alleged that the process adopted by the government to revoke CSIC's designation was made "in bad faith" and was based on "irrelevant, improper and unstated criteria". CSIC has also made a stay motion to Federal Court, seeking to enjoin the government from proceeding with its proposal to designate ICCRC (or indeed any new regulatory body for immigration consultants) in place of CSIC.

CSIC's submission to Federal Court includes an affidavit from its CEO, John Ryan, which contains numerous allegations against the current directors of ICCRC (several of whom previously served as directors of the Canadian Association of Professional Immigration Consultants ("CAPIC")), and against the current directors of CAPIC.

In his affidavit dated 12 April 2011, Mr. Ryan points to disciplinary decisions made by CSIC against several of the ICCRC directors for breach of CSIC's rules of professional conduct. Three of these disciplinary decisions have since been quashed by the Federal Court on judicial review.

We have attached copies of CSIC's application for leave and stay motion, as well as the Federal Court decision quashing CSIC disciplinary decisions against three of ICCRC's directors (Appendices B, C and D, respectively).

Conclusion: The Future of Consultant Regulation

It is still unclear whether the government's latest efforts to ensure proper regulation of immigration consultants will prove effective. Numerous obstacles will need to be overcome before the public interest can be properly safeguarded.

To begin with, CSIC has demonstrated its intention to fight the government's proposal to replace them as the designated regulator. At a minimum, these efforts may delay the appointment of a new regulator. Even if the Federal Court deals decisively with CSIC's stay motion and application for judicial review, it is unclear whether ICCRC has the capacity to effectively regulate immigration consultants or whether, as recommended by the Commons Committee, government oversight is truly required.

Since the Minister has discretionary power to designate a regulatory body or revoke a designation, he also has the authority to choose not to designate such a body. If CSIC is successful with its litigation and the Minister does not have confidence in CSIC, he has the option of declining to designate and terminating CSIC's authority. This brings us back to the CBA's original recommendation.

There is further uncertainty with respect to enforcement of the new prohibitions against unauthorized practice. At the date of writing, the government has yet to provide any information about how they intend to "crack down" on the activities of ghost consultants operating entirely outside the jurisdiction.

Although CIC has stepped up efforts to inform the public about the risks of utilizing the services of an unlicensed immigration consultant, they have not followed the advice of the Commons Committee and simplified immigration processes. Indeed, both temporary and permanent residence applications have become increasingly complex. This, coupled with the fact that CIC appears to be taking a more enforcement-minded approach to even "innocent" misrepresentations, we expect the demand for representation in immigration matters will only increase.

Appendices:

1. **Appendix A**: Bill C-35
2. **Appendix B**: CSIC Application for Leave and Judicial Review and Stay Motion
3. **Appendix C**: CSIC Stay Motion
4. **Appendix D**: *Mooney et al.* v. *Canadian Society of Immigration Consultants*, 2011 FC 496
5. **Appendix E**: Letter from CBA Citizenship and Immigration Law Subsection to Citizenship and Immigration Canada, 2 July 2010
6. **Appendix F**: CBA Citizenship and Immigration Law Subsection Submission regarding Bill C-35, October 2010

Appendix A

C-35

Third Session, Fortieth Parliament,
59 Elizabeth II, 2010

HOUSE OF COMMONS OF CANADA

BILL C-35

An Act to amend the Immigration and Refugee Protection Act

FIRST READING, JUNE 8, 2010

MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

C-35

Troisième session, quarantième législature,
59 Elizabeth II, 2010

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-35

Loi modifiant la Loi sur l'immigration et la protection des réfugiés

PREMIÈRE LECTURE LE 8 JUIN 2010

MINISTRE DE LA CITOYENNETÉ, DE L'IMMIGRATION ET DU MULTICULTURALISME

90563

SUMMARY

This enactment amends the *Immigration and Refugee Protection Act* to change the manner of regulating third parties in immigration processes. Among other things it

(*a*) creates a new offence by extending the prohibition against representing or advising persons for consideration — or offering to do so — to all stages in connection with a proceeding or application under that Act, including before a proceeding has been commenced or an application has been made;

(*b*) exempts from the prohibition

(i) members of a provincial bar or the Chambre des notaires du Québec, and students-at-law acting under their supervision,

(ii) members of a body designated by the Minister of Citizenship and Immigration, and

(iii) entities, and persons acting on the entities' behalf, acting in accordance with an agreement or arrangement with Her Majesty in right of Canada;

(*c*) extends the time for instituting certain proceedings by way of summary conviction from six months to five years;

(*d*) gives the Minister of Citizenship and Immigration the power to make transitional regulations in relation to the designation by the Minister of a body;

(*e*) provides for oversight by that Minister of a designated body through regulations requiring the body to provide information to allow the Minister to determine whether it governs its members in the public interest; and

(*f*) facilitates information sharing with regulatory bodies regarding the professional and ethical conduct of their members.

SOMMAIRE

Le texte modifie la *Loi sur l'immigration et la protection des réfugiés* afin de changer la façon de réglementer les tiers qui interviennent dans le processus d'immigration. Il prévoit notamment :

a) la création d'une nouvelle infraction en élargissant l'interdiction de représenter ou de conseiller une personne — ou d'offrir de le faire —, moyennant rétribution, de sorte qu'elle s'appliquera non seulement à toute étape d'une demande ou d'une instance prévue par cette loi, mais également avant la présentation de la demande ou l'introduction de l'instance;

b) une exception à cette interdiction pour :

(i) les membres du barreau d'une province ou de la Chambre des notaires du Québec, ainsi que pour les stagiaires en droit agissant sous leur supervision,

(ii) les membres d'un organisme désigné par le ministre de la Citoyenneté et de l'Immigration,

(iii) les entités et les personnes qui agissent en leur nom, lorsqu'elles agissent conformément à un accord ou à une entente conclus avec Sa Majesté du chef du Canada;

c) la prolongation du délai pour intenter certaines poursuites par voie de procédure sommaire, qui passe de 6 mois à 5 ans;

d) la faculté du ministre de la Citoyenneté et de l'Immigration de prendre des règlements transitoires relativement à la désignation d'organismes;

e) la surveillance de tout organisme désigné par ce ministre au moyen de règlements l'obligeant à fournir des renseignements pour permettre au ministre de vérifier s'il régit ses membres dans l'intérêt public;

f) la simplification de l'échange d'information avec les organismes de réglementation en ce qui a trait à la conduite de leurs membres sur les plans professionnel ou de l'éthique.

Also available on the Parliament of Canada Web Site at the following address: **http://www.parl.gc.ca**

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante : **http://www.parl.gc.ca**

3rd Session, 40th Parliament,
59 Elizabeth II, 2010

HOUSE OF COMMONS OF CANADA

BILL C-35

An Act to amend the Immigration and Refugee Protection Act

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Cracking Down on Crooked Consultants Act*.

IMMIGRATION AND REFUGEE PROTECTION ACT

2001, c. 27

2. Section 91 of the *Immigration and Refugee Protection Act* and the heading before it are replaced by the following:

Representation or Advice

Representation or advice for consideration

91. (1) Subject to this section, no person shall knowingly represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under this Act.

Persons who may represent or advise

(2) A person does not contravene subsection (1) if they are a member in good standing of

(*a*) a bar of a province or the Chambre des notaires du Québec; or

(*b*) a body designated under subsection (5).

Students-at-law

(3) A student-at-law does not contravene subsection (1) by offering or providing representation or advice to a person if the student-at-law is acting under the supervision of a member

3[e] session, 40[e] législature,
59 Elizabeth II, 2010

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-35

Loi modifiant la Loi sur l'immigration et la protection des réfugiés

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sévissant contre les consultants véreux*.

LOI SUR L'IMMIGRATION ET LA PROTECTION DES RÉFUGIÉS

2001, ch. 27

2. L'article 91 de la *Loi sur l'immigration et la protection des réfugiés* et l'intertitre le précédant sont remplacés par ce qui suit :

Représentation ou conseil

Représentation ou conseil moyennant rétribution

91. (1) Sous réserve des autres dispositions du présent article, commet une infraction quiconque sciemment représente ou conseille une personne, moyennant rétribution, dans le cadre d'une demande ou d'une instance prévue par la présente loi, ou offre de le faire.

Personnes pouvant représenter ou conseiller

(2) Est soustrait à l'application du paragraphe (1) quiconque est membre en règle, selon le cas :

a) du barreau d'une province ou de la Chambre des notaires du Québec;

b) d'un organisme désigné en vertu du paragraphe (5).

Stagiaires en droit

(3) Le stagiaire en droit qui représente ou conseille une personne, ou qui offre de le faire, est soustrait à l'application du paragraphe (1) s'il agit sous la supervision d'un membre en

in good standing of a bar of a province or of the Chambre des notaires du Québec who is representing or advising the person — or offering to do so — in connection with a proceeding or application under this Act.

règle du barreau d'une province ou de la Chambre des notaires du Québec qui représente ou conseille cette personne, ou qui offre de le faire, dans le cadre d'une demande ou d'une instance prévue par la présente loi.

Agreement or arrangement with Her Majesty

(4) An entity, including a person acting on its behalf, that offers or provides services to assist persons in connection with an application under this Act, including for a permanent or temporary resident visa, travel documents or a work or study permit, does not contravene subsection (1) if it is acting in accordance with an agreement or arrangement between that entity and Her Majesty in right of Canada that authorizes it to provide those services.

Accord ou entente avec Sa Majesté

(4) Est également soustraite à l'application du paragraphe (1) l'entité — ou la personne agissant en son nom — qui offre ou fournit des services dans le cadre d'une demande prévue par la présente loi, notamment une demande de visa de résident permanent ou temporaire, de titre de voyage ou de permis d'études ou de travail, si elle agit conformément à un accord ou à une entente avec Sa Majesté du chef du Canada l'autorisant à fournir ces services.

Designation by Minister

(5) The Minister may, by regulation, designate a body whose members in good standing may represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under this Act.

Désignation par le ministre

(5) Le ministre peut, par règlement, désigner un organisme dont les membres en règle peuvent représenter ou conseiller une personne, moyennant rétribution, dans le cadre d'une demande ou d'une instance prévue par la présente loi, ou offrir de le faire.

Regulations — required information

(6) The Governor in Council may make regulations requiring the designated body to provide the Minister with any information set out in the regulations for the purpose of assisting the Minister to evaluate whether the designated body governs its members in a manner that is in the public interest so that they provide professional and ethical representation and advice, and for any other purpose related to preserving the integrity of policies and programs for which the Minister is responsible under this Act.

Règlement : renseignements requis

(6) Le gouverneur en conseil peut, par règlement, exiger que l'organisme désigné fournisse les renseignements réglementaires au ministre afin de l'aider à vérifier si l'organisme régit ses membres dans l'intérêt public de manière qu'ils représentent ou conseillent les personnes en conformité avec les règles de leur profession et les règles d'éthique, et à toute autre fin liée à la préservation de l'intégrité des orientations et des programmes relevant de sa compétence en vertu de la présente loi.

Regulations — transitional measures

(7) The Minister may, by regulation, provide for measures respecting any transitional issues raised by the exercise of his or her power under subsection (5), including measures

(*a*) making any person or member of a class of persons a member for a specified period of a body that is designated under that subsection; and

(*b*) providing that members or classes of members of a body that has ceased to be a designated body under that subsection continue for a specified period to be authorized to represent or advise a person for consideration

Règlement : mesures transitoires

(7) Le ministre peut, par règlement, prévoir des mesures à l'égard de toute question transitoire soulevée par l'exercice du pouvoir que lui confère le paragraphe (5), notamment des mesures :

a) donnant à toute personne — individuellement ou au titre de son appartenance à une catégorie déterminée — le statut de membre d'un organisme désigné en vertu de ce paragraphe pour la période prévue par règlement;

b) permettant à tout membre — individuellement ou au titre de son appartenance à une catégorie déterminée — d'un organisme qui a

— or offer to do so — in connection with a proceeding or application under this Act without contravening subsection (1).

Persons made members of a body

(8) For greater certainty, nothing in measures referred to in paragraph (7)(*a*) exempts a person made a member of a body under the measures from the body's disciplinary rules concerning suspension or revocation of membership for providing — or offering to provide — representation or advice that is not professional or is not ethical.

3. The heading after section 129 of the Act is repealed.

4. The Act is amended by adding the following after section 133:

Limitation period

133.1 (1) A proceeding by way of summary conviction in respect of an offence under section 117, 126, 127 or 131 may be instituted at any time within, but not later than, five years after the day on which the subject-matter of the proceeding arose.

Application

(2) Subsection (1) does not apply if the subject-matter of the proceeding arose before the day on which this section comes into force.

5. Subsection 150.1(1) of the Act is amended by striking out "and" at the end of paragraph (*a*), by adding "and" at the end of paragraph (*b*) and by adding the following after paragraph (*b*):

(*c*) the disclosure of information relating to the professional or ethical conduct of a person referred to in paragraph 91(2)(*a*) or (*b*) in connection with a proceeding or application under this Act to a body that is responsible for governing or investigating that conduct or to a person who is responsible for investigating that conduct, for the purposes of preserving the integrity of policies and programs for which the Minister is responsible.

cessé d'être un organisme désigné visé au même paragraphe de continuer d'être soustrait à l'application du paragraphe (1) pour la période prévue par règlement.

Précision

(8) Il est entendu que toute personne qui, en vertu d'un règlement pris en vertu de l'alinéa (7)*a*), a reçu le statut de membre d'un organisme est assujettie aux règles de discipline de cet organisme concernant la suspension ou la révocation de ce statut si elle représente ou conseille une personne, ou offre de le faire, d'une manière contraire aux règles de sa profession ou aux règles d'éthique.

3. L'intertitre suivant l'article 129 de la même loi est abrogé.

4. La même loi est modifiée par adjonction, après l'article 133, de ce qui suit :

Prescription

133.1 (1) Toute poursuite par voie de procédure sommaire à l'égard d'une infraction visée aux articles 117, 126, 127 ou 131 se prescrit par cinq ans à compter du fait reproché.

Application

(2) Le paragraphe (1) ne s'applique pas si le fait reproché est survenu avant l'entrée en vigueur du présent article.

5. Le paragraphe 150.1(1) de la même loi est modifié par adjonction, après l'alinéa *b*), de ce qui suit :

c) la communication de renseignements relatifs à la conduite, sur le plan professionnel ou de l'éthique, d'une personne visée aux alinéas 91(2)*a*) ou *b*) dans le cadre d'une demande ou d'une instance prévue par la présente loi à l'organisme qui régit la conduite de cette personne ou à l'organisme ou à la personne qui enquête sur cette conduite, et ce en vue de la préservation de l'intégrité des orientations et des programmes relevant de la compétence du ministre.

TRANSITIONAL PROVISION

Persons authorized to represent, advise or consult

6. Despite subsection 91(1) of the *Immigration and Refugee Protection Act*, as enacted by section 2 of this Act, a person — other than a member in good standing of a bar of a province or of the Chambre des notaires du Québec — who, immediately before the coming into force of this section, was authorized under regulations made under the *Immigration and Refugee Protection Act* to, for a fee, represent, advise or consult with a person who was the subject of a proceeding or application before the Minister of Citizenship and Immigration, an officer designated under subsection 6(1) of that Act or the Immigration and Refugee Board, may represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under that Act until regulations made under subsection 91(5) of that Act, as enacted by section 2 of this Act, come into force.

DISPOSITION TRANSITOIRE

Personnes autorisées à représenter ou à faire office de conseil

6. Malgré le paragraphe 91(1) de la *Loi sur l'immigration et la protection des réfugiés*, édicté par l'article 2, toute personne — à l'exception d'un membre en règle du barreau d'une province ou de la Chambre des notaires du Québec — qui, à l'entrée en vigueur du présent article, est autorisée, en vertu d'un règlement pris en vertu de cette loi, contre rémunération, à représenter une personne dans toute affaire devant le ministre de la Citoyenneté et de l'Immigration, l'agent désigné en vertu du paragraphe 6(1) de la même loi ou la Commission de l'immigration et du statut de réfugié, ou à faire office de conseil, peut représenter ou conseiller une personne, moyennant rétribution, dans le cadre d'une demande ou d'une instance prévue par la même loi, ou offrir de le faire, jusqu'à l'entrée en vigueur du premier règlement pris en vertu du paragraphe 91(5) de la même loi, édicté par l'article 2.

COORDINATING AMENDMENTS

Bill C-11

7. (1) Subsections (2) and (3) apply if Bill C-11, introduced in the 3rd session of the 40th Parliament and entitled the *Balanced Refugee Reform Act* (in this section referred to as the "other Act"), receives royal assent.

(2) If section 2 of this Act comes into force before section 8 of the other Act, then that section 8 is repealed.

(3) If section 8 of the other Act comes into force on the same day as section 2 of this Act, then that section 8 is deemed to have come into force before that section 2.

DISPOSITIONS DE COORDINATION

Projet de loi C-11

7. (1) Les paragraphes (2) et (3) s'appliquent en cas de sanction du projet de loi C-11, déposé au cours de la 3e session de la 40e législature et intitulé *Loi sur des mesures de réforme équitables concernant les réfugiés* (appelé « autre loi » au présent article).

(2) Si l'article 2 de la présente loi entre en vigueur avant l'article 8 de l'autre loi, cet article 8 est abrogé.

(3) Si l'entrée en vigueur de l'article 8 de l'autre loi et celle de l'article 2 de la présente loi sont concomitantes, cet article 8 est réputé être entré en vigueur avant cet article 2.

COMING INTO FORCE

Order in council

8. The provisions of this Act, other than section 7, come into force on a day or days to be fixed by order of the Governor in Council.

ENTRÉE EN VIGUEUR

Décret

8. Les dispositions de la présente loi, à l'exception de l'article 7, entrent en vigueur à la date ou aux dates fixées par décret.

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EXPLANATORY NOTES

Immigration and Refugee Protection Act

Clause 2: Existing text of the heading and section 91:

Representation

91. The regulations may govern who may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.

Clause 3: Existing text of the heading:

PROCEEDS OF CRIME

Clause 4: New.

Clause 5: Relevant portion of subsection 150.1(1):

150.1 (1) The regulations may provide for any matter relating to

NOTES EXPLICATIVES

Loi sur l'immigration et la protection des réfugiés

Article 2 : Texte de l'intertitre et de l'article 91 :

Réglementation de la représentation

91. Les règlements peuvent prévoir qui peut ou ne peut représenter une personne, dans toute affaire devant le ministre, l'agent ou la Commission, ou faire office de conseil.

Article 3 : Texte de l'intertitre

PRODUITS DE LA CRIMINALITÉ

Article 4 : Nouveau.

Article 5 : Texte du passage visé du paragraphe 150.1(1) :

150.1 (1) Les règlements régissent :

Appendix B

Court File No. IMM-2244-11

FEDERAL COURT

THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Applicant

- and -

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTRALISM

Respondent

APPLICATION FOR LEAVE AND FOR JUDICIAL REVIEW

TO THE RESPONDENT(S)

AN APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR JUDICIAL REVIEW UNDER SUBSECTION 72(1) OF THE IMMIGRATION AND REFUGEE PROTECTION ACT has been commenced by the applicant.

UNLESS A JUDGE OTHERWISE DIRECTS, THIS APPLICATION FOR LEAVE will be disposed of without personal appearance by the parties, in accordance with paragraph 72(2)(d) of the Immigration and Refugee Protection Act.

IF YOU WISH TO OPPOSE THIS APPLICATION FOR LEAVE, you or a solicitor authorized to practice in Canada and acting for you must immediately prepare a Notice of Appearance in Form IR-2 prescribed by the Federal Courts Immigration and Refugee Protection Rules, serve it on the tribunal and the applicant's solicitor or, if the applicant does not have a solicitor, serve it on the applicant, and file it, with proof after service, at the Registry, within 10 days after the service of this application for leave.

IF YOU FAIL TO DO SO, the Court may nevertheless dispose of this application for leave and, if the leave is granted, of the subsequent application for judicial review without further notice to you.

Copies of the relevant Rules of Court, information on the local office of the Court and other necessary information may be obtained from any local office of the Federal Court or the Registry in Ottawa, telephone: (613)992-4238.

Date: April 4, 2011

Issued by _____

Local Registrar

Address of Court Office:

180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: The Minister of Immigration,
Citizenship and Multiculturalism
Jean Edmonds Tower South
365 Laurier Avenue West, 3rd Floor
Ottawa, ON K1A 1L1

c/o Department of Justice
19th Floor, The Exchange Tower
130 King Street West
Toronto, ON M5X 1K6

APPLICATION

The applicant seeks leave of the Court to commence an application for judicial review of:

1. The decision of the Minister of Citizenship, Immigration and Multiculturalism (the "Minister") made on a date unknown, but communicated to the applicant on March 18, 2011, to revoke the Applicant's designation as the regulator of Immigration Consultants and select the Immigration Consultants of Canada Regulatory Council (the "ICCRC") as the designated regulator of immigration consultants.

In the event that the leave is granted, the applicant seeks the following relief by way of a judicial review:

2. An Order of *certiorari* setting aside the decision of the Minister revoking the Applicant's designation and selecting the ICCRC as the designated regulator of immigration consultants.

3. An Order granting interim relief:

(i) staying the revocation of the Applicant's designation and the designation of the ICCRC as the new regulatory body for immigration consultants until such time as the within Application is determined;

(ii) enjoining the Minister from revoking the Applicant's designation and taking any further steps based on his proposed designation of the ICCRC as the new regulatory body of immigration consultants until such time as the within Application is determined; and

(iii) enjoining the Minister from designating any new regulatory body whose members in good standing may for a fee represent, advise or consult a person subject an immigration proceeding under the *Immigration and Refugee Protection Act* pursuant to s. 91 of the *Immigration and Refugee Protection Act* and s. 5 of Bill C-35, *An Act to amend the Immigration and Refugee Protection Act* which received Royal Assent on March 24, 2011, until such time as the within Application is determined or a new Request for Submissions is published;

4. An Order requiring the respondent to produce all relevant material to this application, including all submissions submitted to the Minister and provided to the Selection Committee (as defined herein); all emails and other communication between the Minister, the ICCRC, the Canadian Association of Professional Immigration Consultants and the Institute of Chartered Canadian Immigration Practitioners; all emails and other communication between the Department of Citizenship and Immigration Canada and the ICCRC the Canadian Association of Professional Immigration Consultants and the Institute of Chartered Canadian Immigration Practitioners; all emails and other communication between the Selection Committee and the Minister and CIC; all emails and other communication between the Minister and CIC regarding the ICCRC, the Canadian Association of Professional Immigration Consultants and the Institute of Chartered Canadian Immigration Practitioners; and such other relevant records that may exist.

5. An Order requiring the respondent to pay the applicant its costs of this application.

6. Such further and other relief as to this Honourable Court may seem just.

In the event that the leave is granted, the application for judicial review is to be based on the following grounds:

A. The Canadian Society of Immigration Consultants

7. For the past seven years, the Society has been the recognized regulator of certified Canadian immigration consultants ("Immigration Consultants"). Under the *Regulation Amending the Immigration and Refugee Protection Regulations* (the "Regulations"), only Immigration Consultants who are members of the Society are "authorized representatives" who may, for a fee, represent, consult or advise persons subject of an immigration proceedings.

8. The Society has established and implemented the necessary policies, rules and procedures to regulate its members in the public interest including: by-laws, membership criteria, rules of professional conduct, complaints and discipline policies, continuing professional development programs, errors and omission insurance requirements and a compensation fund.

9. The Society regulates its members independently from the Minister and CIC. Neither the Minister nor CIC are involved in the Society's regulation of Immigration Consultant in order to avoid conflict and an appearance of unfairness as the Minister or a CIC official are either a party opposed in interest to the immigration consultant's client, or the decision-maker in an immigration proceeding. The Federal Court of Appeal has held that the Society's purposes, by-laws, governance structure and arm's length relationship to the Minister make it an appropriate body to act as the "gatekeeper" to the profession.

B. The Society Designation as the Regulator Revoked

10. On June 8, 2010, the Minister announced that he would embark on an open, fair and transparent selection process for a regulator of immigration consultants, the very position occupied by the Society. The Minister also made it clear that he would "crackdown" on crooked consultants including "ghost consultants".

11. On August 28, 2010, the Minister issued a request for submissions ("Request for Submissions") for applicants interested in becoming the regulator setting out specific selection factors that would be considered in selecting a regulator.

12. On March 18, 2011, the Minister announced that the Society would be replaced as the designated regulator of Immigration Consultants with the ICCRC and the Regulations would be amended accordingly.

C. The Minister's Decision to Designate the ICCRC as the Regulator

(i) The Process

13. The decision of the Minister to select the regulator of Immigration Consultants was to be made based on an open, fair and transparent selection process.

14. The ICCRC however never submitted a proposal to be the regulator. In fact, the ICCRC was only incorporated on February 18, 2011 and has no prior experience in establishing and running a self-governing regulatory body.

15. ICCRC's directors and president and CEO are former directors of the Canadian Association of Professional Immigration Consultants ("CAPIC"), a voluntary immigration

practitioner association that accepts "ghost consultants", who had repeatedly called for the dissolution of the Society and lobbied the Minister and CIC to have the Society replaced as the regulator.

16. Prior to the Minister's announcement of the Selection Process, the Minister made a number of inaccurate, misleading and prejudicial statements in the House of Commons, the media and on CIC's website concerning the Society and the supposed need to designate a new regulator, including unfounded statements that the Society's governance, accountability and operations do not ensure that immigration consultants are being adequately regulated in the public interest. Attempts by the Society to address these unfounded and prejudicial statements with the Minister and CIC went unanswered.

17. During the Selection Process, assurances by CIC to the Society that the composition of the Selection Committee would be announced once selected by the Minister were made but not carried out.

18. The Minister's decision to revoke the Society's designation as the regulator was made in bad faith and was based on irrelevant, improper and unstated criteria. Although the Society was found by the Selection Committee to have met all the Selection Factors, the Society was not designated by the Minister for failing to address concerns expressed in a House of Commons Standing Committee Report of June 2008. The House of Commons Standing Committee Report of June 2008 was not a Selection Factor. Indeed, the Standing Committee Report had recommended that the Society be

re-established under a stand-alone legislation and did not recommend that the Society be replaced with a new regulator.

19. False representations were made by CIC to the Society that a decision had not been made regarding the selection of a new regulator. Indeed, the Minister and CIC already had discussions with the new regulator and entered into a contribution agreement when representations were made to the Society that no decision had yet been made regarding the selection of the designated regulator.

(ii) The Request for Submissions

20. Pursuant to the Request for Submissions, candidates were to be assessed by a panel of external experts and officials from CIC selected by the Minister (the "Selection Committee"). The Selection Committee was to base its decision on the following five specific selection factors: competence, integrity, accountability, viability and good governance (the "Selection Factors").

21. The Request for Submissions further provided that applicants must demonstrate that their organization had or will have the capacity to effectively regulate immigration consultants in the public interest. The Request for Submissions also provided that as the regulator of a self-governing profession, the body is expected to provide a procedurally fair and accessible complaint and discipline mechanism, a code of conduct, errors and omissions insurance for members, liability insurance for the body itself, a compensation fund, and a commitment to provide full services in both official languages to both members and clients. The Society has all these measures in place already.

22. The Request for Submissions provided that applicants must in detail respond to the Selection Factors and provide supporting documentation such as a financial plan, a human resources plan, codes of conduct or other appropriate documents. The Request for Submissions specifically provided that candidates will be evaluated on their experience and expertise in establishing and running a regulatory body.

23. The Selection Committee was to provide the Minister with an impartial assessment as to which organization demonstrated the necessary competence, integrity, accountability, good governance and viability to effectively regulate the profession.

(iii) CAPIC/ICCIP/ICCRC

24. The Institute of Chartered Canadian Immigration Practitioners ("ICCIP") filed a submission to be the recognized as the regulator of Immigration Consultants. ICCIP is not a legal entity and has no legal status.

25. The ICCIP's submissions were really the submissions of the Canadian Association of Professional Immigration Consultants ("CAPIC"). CAPIC developed, led and delivered ICCIP's submissions.

26. CAPIC is a voluntary immigration practitioner association. Unlike the Society, its mandate is not to protect the public interest but rather to advocate on behalf of the best interests of immigration consultants.

27. Philip Mooney, Rhonda Williams, Gerd Damitz, Christopher Daw and Sylvie Bertrand (who are now directors of ICCRC) previously served on the Board of Directors

of CAPIC in various capacities including the position of President and as members of CAPIC's Governance Committee. Brenda Nasaralli and Depack Kholi are executive members of CAPIC's Prairie Chapter and Ontario Chapter respectively. They have since been appointed as directors of the ICCRC.

28. Under Mooney, Williams, Damitz, Daw and Bertrand's tenure on the CAPIC Board, CAPIC accepted ghost consultants as members of CAPIC. Ghost consultants are individuals who practice as immigration consultants but are not certified or regulated, and are not members of the Society. Ghost consultants are a significant problem in the immigration consulting profession. Ghost consultants do not meet the necessary competency or ethical standards yet hold themselves out to vulnerable immigrants and refugees as qualified Immigration Consultants. In some instances, ghost consultants have held themselves out as certified Immigration Consultants by virtue of their membership in CAPIC.

29. CAPIC repeatedly called for the dissolution of the Society, took actions to undermine the Society as the professional regulator and disseminated false information about the Society in an attempt to undermine the Society's mandate and authority to regulate immigration consultants. Mooney was disciplined by the Society in March 2010 for breaching the Society's Rules of Professional Conduct.

30. CAPIC's current President, Jeffrey Hemlin, was recently found guilty of serious professional misconduct and numerous breaches of the Rules of Professional conduct. The allegations relating to Hemlin concern Hemlin doing work with an immigration agent who operated in China who Hemlin described as a "notorious ghost consultant".

Hemlin, among other things, signed blank Use of Representative forms and provided them to the person he described as a "notorious ghost consultant" who then used the form in support of immigration applications to Canada. The Use of Representative Form is the document used by CIC to ensure that only "authorized representatives" are retained by immigrants. While Hemlin denied wrongdoing, an independent discipline panel found his actions to constitute professional misconduct.

31. CAPIC also lobbied the Government, the Minister and members of CIC to replace the Society as the regulator of Immigration Consultants.

32. Among other things, Mooney, Williams and Damitz met with Les Linklater, Assistant Deputy Minister, Strategic and Program Policy of Citizenship and Immigration Canada and other members of CIC, as early as 2008 to lobby for the replacement of the Society and/or the change of the Society's Board. Williams and Linklater had been work colleagues and close friends. At the time these discussions occurred, Mooney, Williams and Damitz were CAPIC directors and were not registered as lobbyists under the *Lobbying Act*.

33. Through the relationship with Linklater and other members of CIC, Mooney, Williams and Damitz acted in an "advisory capacity" to the Minister. Indeed, prior to embarking on the Selection Process, Linklater requested from CAPIC a list of 20 names of persons who could operate a regulatory body of immigration consultants.

(iv) The Selection Committee Report

34. Contrary to the Minister's assertion, and the legitimate expectation of the Society, the Selection Process was not an open, transparent or fair process.

35. In response to the Request for Submissions, the Society delivered detailed and extensive submissions. The Society's submissions addressed each of the Selection Factors set out in the Request for Submissions. It was the only established regulator that delivered submissions.

36. The ICCRC did not make any submissions pursuant to the Request for Submissions.

37. On January 27, 2011, the Selection Committee delivered its recommendation to the Minister (although the recommendation was not released publicly until March 18, 2011). Contrary to the legitimate expectation of the Society and the promises of the Minister, none of the members selected by the Minister to be on the Selection Committee had any experience in establishing or running a self-governing regulatory profession.

38. In its Report to the Minister, the Selection Committee reported that the Society and ICCIP met all the Selection Factors and received the same assessment.

39. However, the Selection Committee in assessing ICCIP's submissions failed, among other things, to consider that ICCIP was not a legal entity and that its proposal was that of CAPIC. The Selection Committee made no mention of the lack of integrity of

CAPIC and its directors, it's acceptance of ghost consultants or the finding of professional misconduct against CAPIC's President.

40. The Selection Committee made no negative findings about the Society's effectiveness in regulating immigration consultants nor did the Committee make any findings that the Society failed to carry out its mandate of protecting the public interest. Further, the Selection Committee did not find any concerns about the Society's governance and accountability that the Minister and CIC previously expressed prior to the Selection Process.

41. The Selection Committee stated that it preferred ICCIP over the Society because the Society failed to demonstrate how it would address the concerns expressed in a House of Commons Standing Committee Report of June 2008. This was an irrelevant consideration and one in which the Society was not asked to address in the Minister's Request for Submissions. Indeed, the House of Commons Standing Committee Report of June, 2008, was not even mentioned in the Request for Submissions let alone identified as a Selection Factor. As such, the Society had no prior knowledge or legitimate expectation that the Standing Committee Report would be considered.

42. Indeed, the House of Commons Standing Report of June 2008 recommended that stand-alone legislation be introduced that re-establishes the Society and provide for the same type of matters covered by founding statutes of provincial Law Societies. The Standing Committee recognized that the Society had not been given the tools to regulate ghost consultants. The Supplementary Opinion of the Standing Committee recommended that a period of time be given to the Society to come to maturation. At

no time did the House of Commons Standing Committee recommend that the Society be replaced with a new regulator.

(v) The Minister Selects the ICCRC

43. CAPIC/ICCRC was selected by the Minister as the designated regulator of immigration consultants even though it did not make any submissions to be the designated regulator. In doing so, the Minister seeks to revoke the Society's status as the regulator. The Directors and President and CEO of CAPIC/ICCRC were the same CAPIC members who had lobbied CIC and the Minister to have the Society replaced as the regulator and acted in an advisory capacity to the Minister with respect to alternative regulators. Notwithstanding the Minister's statements that he would crack down on "ghost consultants", the Minister selected CAPIC/ICCRC, an organization that accepts ghost consultants and whose president was found to have been guilty of professional misconduct in respect of his dealings with a ghost consultant.

44. Contrary to the Selection Factors established by the Minister, the Society's submissions were assessed based on unstated and irrelevant criteria. The Minister's selection of CAPIC/ICCRC was an abuse of discretion.

45. Representatives of CAPIC/ICCRC had discussions with the Minister and CIC during the Selection Process. CAPIC/ICCRC clearly have had foreknowledge from the Minister and CIC that it would be designated as the regulator. Indeed, ICCRC was only incorporated on February 18, 2011, one month before the Minister announced his decision. Its only purpose was to be selected by the Minister as the designated regulator. The directors are the very same CAPIC members who accepted ghost

consultants as members of CAPIC, lobbied the Minister, Linklater and CIC as early as 2008 to replace the Society as the regulator.

46. CAPIC/ICCRC and CIC have already entered into a contribution agreement in advance of the announcement of the Minister's decision whereby CIC will fund the development and start-up costs of ICCRC. According to CIC's cost-benefit analysis the anticipated start-up costs for ICCRC was stated to be $3.6 million. The anticipated costs assume without any basis that CAPIC/ICCRC would assume the Society's infrastructure, staff and services.

47. Further, contrary to the principles of independence as enunciated by the Federal Court of Appeal, three future directors of ICCRC will be appointed by CIC.

48. The Minister erred in law in failing to comply with the principles of natural justice and procedural fairness.

49. The Minister erred in law in failing to comply with the legitimate expectations of the Society and others who in good faith participated in what was represented to be a fair, open and transparent public selection process which did not occur.

50. The Minister erred in law in failing to exercise his discretion in a reasonable manner by failing to consider all relevant considerations and by taking into account irrelevant considerations.

51. The Minister's conduct, including his statements and involvement prior to and during the Selection Process, as well as those of persons acting on his behalf, give rise to a reasonable apprehension of bias.

52. The Minister was biased against the Society when it selected the ICCRC as the regulator of immigration consultants.

53. The revocation of the Society will irreparably harm the Society and cause detrimental impact on its employees and the public. The Society will no longer be the regulator and its staff will have to be dismissed. The Society will have to cease its current investigations of complaints made by the public against consultants. As noted by the Minister and CIC, the revocation of the Society will cause the demise of the Society.

The Following Documentary Evidence will be used at the hearing of the application:

1. The Affidavit of John Ryan and such other affidavits that may be filed in accordance with the Rules.

2. Such further and other material as advised by counsel and permitted by this Honourable Court.

In the event that leave is granted, the Applicant proposes that the application for judicial review be heard at 180 Queen Street West, Suite 200, Toronto, Ontario, in the English language.

APRIL 4, 2011

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Court File No.

FEDERAL COURT

BETWEEN:

THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Applicant

- and -

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTRALISM

Respondent

APPLICATION FOR LEAVE AND FOR JUDICAL REVIEW

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LAWYERS FOR THE APPLICANT

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____

day of APR 4 2011 A.D. 20____

Dated this ____ day of APR 4 2011 20____

Appendix C

Court File No.: IMM-2244-11

FEDERAL COURT

BETWEEN:

THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Applicant

- and -

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondent

NOTICE OF MOTION

TAKE NOTICE that counsel for the Applicant herein will make a motion before the presiding judge of the Court, at the Court House at 180 Queen Street West in Toronto at a date and time to be set by the Court.

THIS MOTION IS FOR an order granting a stay of the decision of the Minister of Citizenship, Immigration and Multiculturalism dated March 18, 2011, revoking the Applicant's designation as the regulator of immigration consultants and selecting the Immigration Consultants of Canada Regulatory Council (the "ICCRC") as the designated regulator of immigration consultants.

AND TAKE NOTICE that the grounds for the motion are:

A. The Canadian Society of Immigration Consultants (the "Society")

1. For the past seven years, the Society has been the regulator of certified Canadian immigration consultants. The Society's mandate s to regulate immigration consultants in the public interest. In carrying out its mandate, the Society has established and implemented the necessary policies, rules and procedures to regulate its members in the public interest including: by-laws, membership criteria, rules of professional conduct, complaints and discipline policies, continuing professional development programs, errors and omission insurance requirements and a compensation fund.

2. The Federal Court of Appeal has held that the Society's purposes, by-laws, governance structure and arm's length relationship to the Minister make it an appropriate body to act as the "gatekeeper" to the profession.

B. The Society's Designation as the Regulator Revoked

3. On March 18, 2011, the Minister announced his decision that the Society would be replaced as the designated regulator of immigration consultants with the ICCRC.

4. The decision of the Minister to select the regulator of immigration consultants was to be made based on an open, fair and transparent selection process established by the Minister. Requests for Submissions were issued by the CIC. Candidates were specifically to be assessed by a Selection Committee based on five Selection Factors.

5. Although the Selection Process established by the Minister was to be fair, transparent and open to all, including the Society, the Minister made a number of inaccurate, misleading and prejudicial statements during the Selection Process in the House of Commons, the media and on CIC's website concerning the Society and the supposed need to designate a new regulator. These statements included unfounded statements that the Society's governance, accountability and operations do not ensure that immigration consultants are being adequately regulated in the public interest.

6. The Selection Committee did not find any concerns about the Society's governance and accountability that the Minister previously expressed. On the contrary, the Society was found by the Selection Committee to have met all the Selection Factors. The Selection Committee made no negative findings about the Society's effectiveness in regulating immigration consultants nor did the Committee make any findings that the Society failed to carry out its mandate of protecting the public interest.

7. The Society was not designated as the regulator by the Minister, however, for failing to address concerns expressed in a House of Commons Standing Committee Report of June 2008. The House of Commons Standing Committee Report of June 2008 was not a Selection Factor. Indeed, the Standing Committee Report had recommended that the Society be re-established under stand-alone legislation and did not recommend that the Society be replaced with a new regulator.

8. Instead, the ICCRC was designated by the Minister. However, the ICCRC however never submitted a proposal under the Request for Submissions. The ICCRC

was only incorporated on February 18, 2011 and has no prior experience in establishing and running a self-governing regulatory body.

9. ICCRC's directors and president and CEO are former directors of the Canadian Association of Professional Immigration Consultants ("CAPIC"), a voluntary immigration practitioner association that accepts "ghost consultants" who are not regulated. CAPIC has repeatedly called for the dissolution of the Society and has lobbied the Minister and CIC to have the Society replaced as the regulator. Through certain relationships with CIC, these directors acted in an "advisory capacity" to the Minister in "offering alternatives" to the Society as regulator. Indeed, prior to embarking on the Selection Process, CIC official requested from CAPIC a list of 20 names of persons who could operate a regulatory body of immigration consultants.

10. Representatives of ICCRC had discussions with the Minister and CIC during the Selection Process. ICCRC had foreknowledge from the Minister and CIC that it would be designated as the regulator. Indeed, ICCRC was only incorporated on February 18, 2011, one month before the Minister announced his decision. ICCRC and CIC had also already entered into a contribution agreement in advance of the announcement of the Minister's decision whereby CIC will fund $3.6 million in development and start-up costs of ICCRC.

11. False representations were made by CIC to the Society that a decision had not been made regarding the selection of a new regulator. Indeed, the Minister had already made his decision and CIC entered into a contribution agreement when representations were made that no decision had been made.

12. The Minister seeks to revoke the Society's status as the regulator. As the Minister and CIC expressed, should the Minister's decision be carried out and the Society is replaced as the regulator, the Society would be forced to be wound down. This would have a significant detrimental impact not only on the Society, but also its employees, its members the vast majority of whom approve of the Society as the regulator of the profession, and the public. If the Society is forced to be wound down, the Society will also have no alternative but to dismiss its 38 employees. The Society has a number of obligations to third parties, including contractual commitments to suppliers and landlords. The Society will be exposed to significant liability should the Society be wound down. The 99 complaints and 155 open investigations from the public regarding immigration consultants will not be addressed, nor will the Society's 21 ongoing disciplinary proceedings.

13. The Society's application to seek judicial review of the Minister's decision revoking the Society's designation as the regulator and designating the ICCRC as the regulator raises serious issues of breach of natural justice and procedural fairness, bias, abuse of discretion and violation of the principles of legitimate expectation.

14. The revocation of the Society will irreparably harm the Society and will lead to a detrimental impact on its employees and the public. The Society will no longer be the regulator and its staff will have to be dismissed. The Society will have to cease its current investigations of complaints made by the public against consultants. As noted by the Minister and CIC, the revocation of the Society will cause the demise of the Society.

15. The balance of convenience favours maintaining the *status quo* until the Society's application is heard and determined. The Society has been regulating licensed immigration consultants for the past seven years. In doing so, the Society has effectively protected the public interest. Indeed, the Selection Committee, in its review of the Society's regulation of consultants found that the Society met all the requirements of accountability, governance, integrity, competence and viability. The Selection Committee made no finding that the Society did not regulate effectively or failed to carry out its mandate of protecting the public interest.

16. The Society submits that a stay of the Minister's decision to replace the Society with a recently incorporated organization with no prior experience in regulating immigration consultants is in the public interest.

17. The Society submits that the test for balance of convenience is satisfied based on the detrimental effect that the Society will suffer and the protection of the public interest that a stay would serve.

AND TAKE NOTICE that in support of the motion will be:

1. The Affidavit of John Ryan, sworn April 12, 2011;

2. The Affidavit of Keith Frank, sworn April 13, 2011;

3. The Affidavit of Nigel H. Thomson, sworn April 13, 2011; and

4. Such further and other material as advised by counsel and permitted by this Honourable Court.

AND TAKE NOTICE THAT THE RELIEF SOUGHT is an order staying the decision of the Minister, pending a consideration of the application for leave and, if leave is granted, of the application for judicial review.

AND TAKE NOTICE that the expected duration of the motion is 2 hours.

Dated at Toronto this 13th day of April, 2011.

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LAWYERS FOR THE APPLICANT

Court File No.: IMM-2244-11

FEDERAL COURT

BETWEEN:

THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Applicant

- and -

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondent

NOTICE OF MOTION

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LAWYERS FOR THE APPLICANT

Appendix D

Federal Court  Cour fédérale

Date: 20110427

Docket: IMM-2077-10

Citation: 2011 FC 496

Ottawa, Ontario, April 27, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PHILIP MOONEY, RHONDA WILLIAMS
and
GERD DAMITZ

Applicants

and

CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Respondent

REASONS FOR JUDGMENT

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

DECISIONS UNDER REVIEW

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

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

Mr. Mooney

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

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

Ms. Williams

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

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

Mr. Damitz

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

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

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

[16] These documents comprise the Decisions under review.

ISSUES

[17] The Applicants raise the following issues:

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

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

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

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

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

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

STATUTORY PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

[…]

[…]

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

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

(a) take no action;

(a) ne prendre aucune mesure;

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

ARGUMENTS

The Applicants

Decisions Were Made for an Unauthorized Purpose

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

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

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

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

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

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

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

Decisions Are Discriminatory

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

Decisions Violate the Applicants' Freedom of Expression

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

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

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

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

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

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

CSIC Breached Its Duty of Procedural Fairness

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

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

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

Investigation and Decisions Raise a Reasonable Apprehension of Bias

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

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

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

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

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

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

The Respondent

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

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

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

Decisions Do Not Discriminate

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

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

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

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

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

Procedural Fairness Was Observed

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

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

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

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

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

Allegations of Reasonable Apprehension of Bias Are Without Merit

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

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

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

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

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

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

The Decisions Were Reasonable

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

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

Applicants' Reply

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

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

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

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

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

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

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

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

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

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

Respondent's Further Memorandum

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

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

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

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

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

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

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

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

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

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

ANALYSIS

Philip Mooney

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

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

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

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

Part 16.5 of the *Rules of Professional Conduct*

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

Part 16.6 of the *Rules of Professional Conduct*

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

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

Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> relating to real estate brokerage. This second factor once again favours some deference as regards the interpretation of the standards of conduct applicable to brokers and the imposition of appropriate penalties. [Emphasis added; para. 27.]
>
> 20 The decision under appeal in this case is a departure from that deferential approach. In my view, with respect, the standard of review applied in the earlier cases by Dalphond and Chamberland JJ.A. is to be preferred and is in greater compliance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 (at paras. 54 and 55). In particular, the presence or absence of a privative clause, while relevant, is not determinative (*Dunsmuir*, at para. 52).
>
> 21 What is at issue here is the interpretation by the discipline committee, a body of experts, of its home statute (*Dunsmuir*, at para. 54. See also *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 32). The legislature assigned authority to the Association, through the experience and expertise of its discipline committee, to apply - and necessarily interpret - the statutory mandate of protecting the public and determining what falls beyond the ethical continuum for members of the Association. The question whether Proprio Direct breached those standards by charging a stand-alone, non-refundable fee falls squarely within this specialized expertise and the Association's statutory responsibilities. I see nothing unreasonable in the discipline committee's conclusion that the provisions requiring a sale before a broker or agent is entitled to compensation, are mandatory.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rhonda Williams and Gerd Damitz

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed and the Decisions against the Applicants are quashed and set aside.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2077-10
STYLE OF CAUSE:	**PHILIP MOONEY, RHONDA WILLIAMS and GERD DAMITZ** **and** **CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 13, 2011
REASONS FOR JUDGMENT	**Russell J.**
DATED:	April 27, 2011

APPEARANCES:

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Appendix E

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 2, 2010

Sandra Harder
Acting Director General
Immigration Branch
Citizenship and Immigration Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Ms. Harder,

Re: Selection of a Regulator for Immigration Consultants

Further to your letter of June 16, 2010, I am pleased to respond on behalf of the National Citizenship and Immigration Section of the Canadian Bar Association (CBA Section) to your request for input on the factors to be used in the selection of a regulator for immigration consultants.

We preface our remarks by expressing our disappointment in the short deadline to respond to your request (July 2, 2010). We share the Minister's concern about the lack of public confidence in the current regulator, the Canadian Society of Immigration Consultants (CSIC). In the six years CSIC has functioned, evidence has arisen showing the lack of effective regulation of consultants, and as a result, consumer protection is at risk. Whether effective regulation is possible and, if so, how it could be accomplished, are complex issues, with potentially significant administrative and financial implications. Our comments should be considered preliminary given the time constraints under which we composed our response. We ask you to consider allowing all stakeholders additional time to respond to give this serious matter the in-depth consultation and reflection it deserves.

Introduction

Consumer protection in the immigration field is of paramount importance. We agree with the findings of the Commons Standing Committee on Citizenship and Immigration. In its 2008 Report, *Regulating Immigration Consultants,*[1] the Committee related serious problems with the structure and management of CSIC . The appropriate selection factors have been previously identified by the CBA Section[2] and others. But beyond this, the question remains whether consultants are capable of effective self-regulation.

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1 Online: www2.parl.gc.ca/content/hoc/Committee/392/CIMM/Reports/RP3560686/cimmrp10/cimmrp10-e.pdf.

2 See CBA'S July 1999 submissions, "Submission on Immigration Consultants" at pages 5-7, and November 2002 "Submission on Immigration Consulting Industry," at pages 6-14. Both are attached for your reference, as is our June 1995 submission, "Submission on Immigration Consultants."

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tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

CBA Section's Position

The CBA Section's position on immigration consultants is summarized in the CBA's 1996 resolution[3], namely that that only members in good standing of a provincial or territorial law society should practice immigration law for remuneration, or alternatively, if consultants are permitted to provide immigration services for remuneration, they must be properly regulated. In particular, they must be governed by a licensing body that would:

- Set admission requirements;
- Establish standards of competency;
- Set up an insurance or compensation fund;
- Adopt a code of ethics;
- Establish a complaint mechanism;
- Define offences and penalties; and
- Fix an annual licensing fee.

These were in fact the criteria used to establish CSIC. Experience has shown that relying on these general criteria alone is not sufficient to govern the establishment of a regulatory body. Structural change is needed to the existing regulatory scheme and more detailed parameters must govern a new body if it is to function appropriately in the public interest. The government should also consider lessons to be learned from other countries' approaches to regulation. In view of the time constraints, our comments focus on a few required changes that are immediately apparent.

In the end, consultants should be permitted to offer immigration services only if they can demonstrate that they can be effectively self-regulated. There are good reasons for insisting upon this, as set out in our 1999 submission:

> In our view, CIC should not set up its own body to regulate consultants. Professionals must bear the responsibility to establish and maintain a regulatory body to monitor its members. The substantial costs should be borne by those who wish to benefit financially from the representing immigration clients, not from scarce tax dollars. CIC resources are better devoted to its primary responsibility to administer the *Immigration Act*, including timely processing of immigrant and non-immigrant visa applications.
>
> If immigration consultants are not willing to effectively self-regulate, then the public interest is far better protected by legislating to limit immigration practice to members of a provincial or territorial law society.[4]

Whether consultants would be capable of effective self-regulation with a new regulatory regime is not entirely clear. They have failed to demonstrate their capacity to effectively regulate their activities in the last six years.

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3 CBA Resolution 96-03-M.

4 *Supra* note 1 at 8.

Investigation and Prosecutorial Powers

A regulatory body must be capable of employing effective mechanisms to investigate and prosecute discipline matters, including statutory powers to audit, subpoena and seize documents, as is the case with provincial and territorial law societies. The Standing Committee's finding is consistent with the CBA Section's position:

> The Committee recommends that the Government of Canada introduce stand-alone legislation to re-establish the Canadian Society of Immigration Consultants as a non-share capital corporation. Such an "*Immigration Consultants Society Act*" should provide for the same types of matters covered by founding statutes of provincial law societies, including, but not limited to: functions of the corporation, member licensing and conduct, professional competence, prohibitions and offences, complaints resolution, compensation fund and by-laws. Once the regulator is re-established as a corporation under a federal statute, the existing body that was incorporated under the *Canada Corporations Act* may be wound up.[5]

Among CSIC's problems is the fact that it was not given powers similar to provincial law societies to properly investigate and prosecute discipline matters. It is within the power of the federal government to enact the legislation envisioned by the Standing Committee.[6] If the federal government wishes to continue permitting consultants to provide services and represent clients in relation to matters under the *Immigration and Refugee Protection Act* (IRPA), it must provide the new regulatory body with effective statutory powers to investigate and prosecute incompetent and unethical practices.

Separating Regulation from Representation

In recent years, it has become apparent that CSIC considers itself not only a regulatory body but a representative body advancing the interests of consultants. For example, it participates in CIC's annual meetings with groups of lawyers' representatives and consultants' representatives (though its wholly-owned subsidiary, the Canadian Migration Institute). This creates an insurmountable conflict of interest. Regulators must act exclusively in the public interest. The reasonable perception could arise that CSIC is not disciplining members for ethical and professional conduct violations because this would create embarrassment for their organization or consultants in general. Instead, it appears that disciplinary efforts have focused on silencing members of the organization who criticize the current directors and management.

The Australian experience shows that a representative body cannot act effectively as a regulator. Recently, the Australian government has taken regulatory powers away from the Migration Institute of Australia (MIA) and created a government administered regulatory body, Office of Migration Agents Registration Authority (MARA) after the failure of their previous experience. CSIC/Candian Migration Institute was modeled after MIA.

The Canadian legal profession serves as a model for this separation. The CBA is distinguished from provincial and territorial law societies. Each law society is responsible for the regulation of the legal profession in its respective jurisdiction. The law societies conduct their regulatory and governance responsibilities with an over-arching mandate of public protection. The CBA brings the perspective of lawyers to both professional and public interest issues.

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5 *Supra,* note 1 at 3.

6 *Law Society of British Columbia v. Mangat,* [2001] 3 S.C.R. 113; *Law Society of Upper Canada v. CSIC,* 2008 FCA 243. See also *Putnam v. Alberta (Attorney General)*, [1981] 2 S.C.R. 267 regarding the federal government's constitutional capability of regulating professions under its jurisdiction (there, the RCMP).

Therefore, we make the following recommendations:

- Any new regulatory body should be strictly limited to a regulatory function. It should have no ties with any representative organization.

- Directors of any new organization should be paid only modest honaria, comparable to similar self-regulating bodies. Directors should not be permitted to be employed or to enter into non-arms length contracts with the regulatory body.

Condition Precedent to Regulatory Scheme is Definition of Immigration Legal Services

CBA's 1996 resolution urged the government to define immigration legal services by statute as:

a) appearing as counsel;

b) drafting, revising or settling any document for use in any judicial or extra-judicial proceeding arising under the *Act*;

c) giving legal advice;

d) making an offer to do anything referred to in paragraphs (a) through (c);

e) making a representation that the person is qualified or entitled to do anything referred to in paragraphs (a) through (c) when any of the foregoing acts are done for, or in expectation of, a fee, gain or reward, direct or indirect, from the person for whom the acts are performed.

CIC's current position (outlined on its website)[7] is that work prior to an application being filed does not require an authorized representative and all legal advice, counseling, preparation and presentation before a citizenship or immigration application is filed is not legal work. This message may conflict with provincial and territorial legislation regulating the provision of legal services and is detrimental to the protection of the public. It is also inconsistent with other jurisdictions like the United Kingdom (UK), which defines "immigration practice" and "immigration advice" in a manner which appears to encompass pre-application legal work,[8] as well as Australia, which explicitly

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[7] As an example, the following is excerpted from the portion of CIC's website concerning the use of representatives (www.cic.gc.ca/english/information/representative/rep-who.asp):

Other people who offer immigration advice or assistance

People who provide immigration-related advice or assistance for a fee before the application is filed are not obliged to be authorized representatives. However, be aware that non-authorized representatives or advisors are not regulated. This means that they may not have adequate knowledge or training. It also means that you cannot seek help from the professional bodies (that is, the law societies, CSIC, etc.) if that person provides you with the wrong advice or behaves in an unprofessional way. [Emphasis added]

[8] The *Immigration and Asylum Act 1999,* defines "immigration advice" as "advice which—

(a) relates to a particular individual;

(b) is given in connection with one or more relevant matters;

(c) is given by a person who knows that he is giving it in relation to a particular individual and in connection with one or more relevant matters; and

(d) is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings.

"Immigration services" are defined as "the making of representations on behalf of a particular individual—

(a) in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or

(b) in correspondence with a Minister of the Crown or government department, in connection with one or more relevant matters;

defines "immigration assistance" to include advice and services related to preparing the application.[9] Although it appears Bill C-35 attempts to address this issue in part,[10] a clear definition of immigration legal services is a condition precedent to any regulatory regime and consideration of selection factors. The law should be completely clear that immigration legal services, as defined, can be carried out only by licensed representatives. Otherwise, problems with "ghost consultants" will continue.

Consultation with Domestic and International Stakeholders

The CBA Section recommends extensive consultation with other stakeholders, including the Immigration Appeal Division, the Canada Border Services Agency, Service Canada and front line CIC officers, regarding the role of representatives. In addition, CIC should consult with other countries as to their experiences in regulating consultants. In our opinion, Canada should apply a critical eye and be very cautious when considering the adoption of regimes of consultant regulation from other "competitor" jurisdictions.

The Australian consultant industry was self-regulated by the Migration Institute of Australia (MIA). In July 2009, the Minister revoked the appointment of the MIA under allegations of "conflicts of interest" and "structural flaws".[11] The Minister has since established MARA under the Department of Immigration and Citizenship, and in August 2009 appointed an advisory board (independent from the Department) comprised of representatives of the Migration Institute of Australia, the Law Council of Australia, universities, the not-for-profit immigration assistance sector, consumer and community advocates, the Department and includes the CEO of the Office of the MARA.

In the UK, the Office of the Immigration Services Commissioner (OISC) allows three levels of registration for consultants with varying scope depending on the specific practice area (e.g. Level 1 clearance does not allow any work on asylum cases, but does allow basic work on entry clearances and applications to enter or remain). Practice areas are defined as: a) asylum, b) entry clearance, leave to enter or leave to remain, c) nationality and citizenship, d) EU and EEA immigration law, and e) detention, temporary admission, CIO bail, immigration judge bail. There is evidence that the OISC also has its problems. Reporting on a 2009 prosecution in Isleworth Crown Court against a large "visa fraud factory," the London Paper stated that OISC exams to qualify as an immigration

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[9] See the *Migration Act 1958,* s.276(1):

1) For the purposes of this Part, a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by:
   a. preparing, or helping to prepare, the visa application or cancellation review application; or
   b. advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or
   c. preparing for proceedings before a court or review authority in relation to the visa application or cancellation review application; or
   d. representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.

[10] Clause 1 of Bill C-35 states only that, "Subject to this section, no person shall knowingly represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under this Act." The Bill does not provide a general definition of immigration legal services.

[11] See www.minister.immi.gov.au/media/media-releases/2009/ce09033.htm, www.minister.immi.gov.au/media/media-releases/2009/ce09014.htm, and www.minister.immi.gov.au/media/media-releases/2009/ce09072.htm.

adviser were wide open to fraud as they could be taken online.[12] This online initiative appears to have some similarities to CSIC's recently introduced E-Academy for consultants.

Both the UK and Australia exempt lawyers from regulation under OISC and MARA, respectively. MARA has the mandate to investigate complaints against lawyers for the purpose of making referrals to their own regulatory bodies. The OISC in the UK also also monitors the operations of "Designated Professional Bodies" whose members are exempted and ordinarily forwards complaints of members to their own professional bodies.

The US restricts written submissions and appearances before administrative tribunals and courts in immigration matters to lawyers and non-profit organizations. The law does allow accredited non-attorneys to act in certain circumstances. In most cases, they are allowed to complete legal forms at the direction of the consumer. They are not, however, permitted to give legal advice pertaining to the particular facts of an individual's case. All immigration representatives must register with the United States Immigration & Naturalization Service (INS). Where an immigration consultant is disciplined by the regulatory body and the punishment is suspension, practice monitoring or expulsion, that the body be required to report the member to INS, who would in turn revoke that person's privileges as a registered representative.

Scope and Breadth of Regulatory Scheme

Even if self-regulation of consultants is permitted to continue under a new regulatory regime, some consideration should be given as to whether the scope of their practice should be limited as in the UK and the US. Specifically, historic areas of abuse like refugee claims or extraterritorial provision of immigration services could be prohibited or restricted, as could work of significant legal complexity, so as to limit the unauthorized practice of law.

Transitional Provisions and Consumer Protection

Given the problems documented in the 2008 Standing Committee Report, in its companion report entitled *Migrant Workers and Ghost Consultants*[13], as well as in Federal Court proceedings documenting the governance skirmishes between the CSIC board and members,[14] the CBA Section understands the department's desire to act quickly. Unfortunately, time does not permit us to comment in detail on proposed transitional provisions, including whether and how the government is entitled to wind up CSIC as a corporation under the *Canada Corporations Act*.

However, we recommend that a transitional body composed of former justices, former high ranking members of tribunals with extensive immigration and refugee experience, academics and other

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12 These issues are documented in the following online news reports: www.thelondonpaper.com/thelondonpaper/news/london/news/immigration-fraud-is-damning-indictment-of-home-office; www.dailymail.co.uk/news/article-1190567/The-Indian-illegal-immigrant-wives-Britains-biggest-visa-scam.html; and http://news.bbc.co.uk/2/hi/uk_news/england/london/8081354.stm.

13 Online: www2.parl.gc.ca/content/hoc/Committee/402/CIMM/Reports/RP3969226/402_CIMM_Rpt08/402_CIMM_Rpt08-e.pdf.

14 See the affidavits filed in Federal Court judicial review application of Katarina Onuschak, challenging the 2009 CSIC elections, T-1767-09, and those filed in the Federal Court judicial review application of Philip Mooney et al., regarding CSIC's discipline investigation of members of CAPIC for publicly criticizing CSIC and supporting the recommendations of the 2008 report of the Commons Committee, T-1304-08 (in particular, the Affidavit of former CSIC investigator Robert Kewley alleging that at times CSIC's complaints and investigations process was used for political purposes). In the latter case, the application was dismissed as being premature (decision to investigate not being one from which judicial review may be sought).

professionals with relevant governance expertise (such as accountants) form a regulatory board, operating in conjunction with an advisory panel comprised of immigration lawyers, consultants, and NGO's, to act as regulator as a new regulatory scheme is developed. The purpose of this transitional body and advisory panel would be to safeguard the public interest. This would necessarily include the supervision of the Canadian Migration Institute, the wholly-owned CSIC subsidiary in which CSIC requires membership for all consultants. All documents relating to complaints against CSIC members would be turned over to this transitional body, which would be authorized to investigate, subject to a reasonable limitation period, adjudicate and dismiss complaints or sanction where appropriate. Establishing these transitional provisions should in no way be taken as endorsing the status quo regarding the appropriate scope of consultant practice.

Summary of Recommendations

The following is a summary of our recommendations:

- The provision of immigration legal services should be confined to members of a provincial or territorial law society and members of the Chambre des Notaires unless the government is confident that consultants are capable of self-regulation in the public interest.

If so:

- The same general criteria for any consultant regulatory body, as outlined in the CBA Section's previous submissions, remain valid and should be used. However, structural change is needed to the existing regulatory scheme and more detailed parameters must be provided to any new body if it is to function appropriately.

- The government should follow the Commons Committee recommendation of winding up CSIC and establishing a new non-share capital corporation in legislation to regulate consultants, with similar powers as provincial law societies. This includes requisite statutory powers to investigate and prosecute discipline matters (i.e. audit, subpoena, seizure of documents).

- Any new regulatory body should be strictly limited to a regulatory function. It should have no ties with any representative organization.

- Directors of any new organization should be paid only modest honaria, comparable to similar self-regulating bodies. Directors should not be permitted to be employed or to enter into non-arms length contracts with the regulatory body.

- As a condition precedent to a new regulatory scheme for consultants, there should be a comprehensive statutory definition of immigration legal services, and a requirement that these services be carried out only by licensed representatives.

- Before any changes are instituted, there should be extensive consultation with other stakeholders, including the Immigration Appeal Division, the Canada Border Services Agency, Service Canada and front line CIC officers, regarding the role of representatives. In addition, CIC should consult with other countries as to their experiences in regulating consultants.

- A transitional body composed of former justices, former high ranking members of tribunals with extensive immigration and refugee experience, academics and other professionals with relevant governance expertise (such as accountants) should be constituted as a transitional

regulatory board, operating in conjunction with an advisory panel comprised of immigration lawyers, consultants, and NGO's, while as a new regulatory scheme is developed.

- Some consideration should be given as to whether the scope of consultants' practice should be limited, as in other jurisdictions.

Conclusion

In recent years, the CBA has expressed significant concern about the manner in which Canada regulates immigration consultants.[15] "Ghost consultants" have been allowed to flourish, CSIC has been mired in governance issues and allegations of financial mismanagement, and CSIC members and other consultants have been subject of high profile allegations of fraud and abuse. We believe that the provision of immigration legal services should be limited to members of the provincial and territorial law societies and the Chambre des Notaires, unless immigration consultants can be properly regulated in the interests of public protection.

If consultants are allowed to continue providing immigration services, an overhaul of the system is required. Recent experience, including that of other countries like Australia and the UK, highlights the significant challenges in regulating consultants. As it stands, the current statutory and governance structure does not permit effective regulation, immigration legal services are not clearly specified in legislation and confined to authorized representatives, and there is no viable national alternative that can regulate based upon the essential "selection factors." Other regulatory models must be fully explored.

The challenges facing regulation are not the result of personalities currently involved with CSIC. CSIC cannot simply be quickly remodeled and reintroduced with a clearer mandate and stronger powers. To attempt to do so would be to ignore the fundamental factors at play and the complexity of the problem that has plagued Canada for decades. As the findings of the Commons Committee and other documentation have shown, the problems extend far beyond ghost consultants and rest firmly in the lack of proper regulation. The soaring social, financial and emotional costs to vulnerable immigrants, as well as the negative impact on the integrity of the immigration system and public confidence generally, can no longer be countenanced.

We would be pleased to provide further input regarding consultant regulation. We hope the comments that we have been able to provide in this short timeframe have been helpful.

Yours truly,

(signed by Kerri Froc for Stephen Green)

Stephen Green
Chair, National Citizenship and Immigration Law Section

Enclosures (3)

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15 *Supra,* footnote 1. See also our letters to the Minister of Citizenship and Immigration in 2005 and 2007: www.cba.org/CBA/sections_cship/pdf/society.pdf; and www.cba.org/CBA/sections_cship/pdf/csic.pdf

Submission on

Immigration Consultants

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
Canadian Bar Association

July 1999

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Submission on
Immigration Consultants

PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on Immigration Consultants

I. INTRODUCTION

In 1995, the House of Commons Standing Committee on Citizenship and Immigration concluded its study on immigration consultants, documenting serious and on-going problems flowing from the absence of regulation of immigration consultants.[1] Since then, there have been no regulatory changes to provide needed public protection, either through the *Immigration Act* or through enactment of appropriate provincial and territorial legislation.

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) presented a submission to the Parliamentary Committee, encouraging regulation of those who practise immigration law for a fee.[2] The Section is concerned about the lack of progress to implement regulations.

Provisions in the *Immigration Act* that address the practice of law or client representation deal only with representation before two of the three divisions of the Immigration and Refugee Board (IRB).[3] Nothing in the *Immigration Act* permits or prohibits a non-lawyer from acting within the broader areas of immigration legal practice, including drawing, revising or settling any document for use in a proceeding which is judicial or extra-judicial in nature under the *Immigration Act*, giving advice on immigration matters, representing a client in matters arising under

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1 House of Commons, *Immigration Consultants: It's Time to Act*, Ninth Report of the Standing Committee on Citizenship and Immigration, December 1995

2 Canadian Bar Association, National Immigration Law Section, *Submission on Immigration Consultants*, June 1995

3 Sections 30 and 69(1) refer to the Adjudication Division and the Convention Refugee Determination Division.

the *Immigration Act* such as the preparation of visa applications, appearances before the Appeal Division of the IRB, or appearances before the Federal Court of Canada.

Citizenship and Immigration Canada (CIC) has undertaken discussions with organizations representing immigration consultants, with a possible view to implementing a regulatory scheme. CIC has invited the Section to comment on certain issues in establishing a regulatory scheme. The Section's views are based on its overarching goal of promoting laws and policies in the public interest, and the experience of its members as part of a longstanding self-regulated profession. The Section would welcome the opportunity to share its expertise to assist CIC and the associations of immigration consultants in developing regulatory models.

II. CANADIAN BAR ASSOCIATION POSITION

Public protection demands that those who provide advice in immigration matters must be regulated. In 1996, the governing Council of the Canadian Bar Association adopted the following resolution, which provides the basis for our comments:

> **WHEREAS** the *Immigration Act* provides that the Governor in Council may make regulations requiring any person other than a member of a Bar in any province or territory of Canada to obtain a license from a prescribed authority to appear as "counsel" before the Immigration and Refugee Board;
> **WHEREAS** the Immigration Law Section of The Canadian Bar Association participated in consultations with representatives of the Government of Canada and the Immigration and Refugee Board in November 1991, and presented its position with respect to the regulation of immigration consultants;
> **WHEREAS** the Immigration Law Section presented a submission on regulating immigration consultants to the Parliamentary Sub-Committee on Immigration Consultants & Diminishing Returns in June 1995;
> **WHEREAS** incidents of abuse indicate that certain measures are needed to protect the public interest in the provision of immigration consultant services;
> **WHEREAS** unlicensed and unregulated non-resident immigration consultants cannot be effectively sanctioned for conduct which contravenes the *Immigration Act* or *Regulations*;

BE IT RESOLVED THAT The Canadian Bar Association urge the Government of Canada

1. To amend the *Immigration Act* to define the practice of immigration law to include:
   a) appearing as counsel;
   b) drafting, revising or settling any document for use in any judicial or extra-judicial proceeding arising under the *Act*;
   c) giving legal advice;
   d) making an offer to do anything referred to in paragraphs (a) through (c);
   e) making a representation that the person is qualified or entitled to do anything referred to in paragraphs (a) through (c);

   when any of the foregoing acts are done for, or in expectation of, a fee, gain or reward, direct or indirect, from the person for whom the acts are performed.

2. To further amend the *Immigration Act* to provide:
   a) that only members in good standing of a provincial or territorial law society can practice immigration law for remuneration; or
   b) that only "counsel" can practice immigration law for remuneration, unless prohibited by a court of relevant jurisdiction, that counsel be defined to include members in good standing of a provincial or territorial law society, and consultants who are licensed by a licensing body, and that a licensing body for immigration consultants be established which will:
      i) set admission requirements;
      ii) establish standards of competency;
      iii) set up an insurance or compensation fund;
      iv) adopt a code of ethics;
      v) establish a complaint mechanism;
      vi) define offences and penalties; and
      vii) fix an annual licensing fee to cover the administrative costs of the licensing body so that there will be no cost to federal, provincial or territorial governments.

3. Alternatively, if the Government of Canada declines to limit those who may practice immigration law as set out in paragraphs 2(a) or 2(b) above, to limit the practice of immigration law only to individuals who are ordinarily resident in Canada.

III. SELF-REGULATION OF IMMIGRATION CONSULTANTS

We understand that CIC prefers a model requiring anyone involved in the immigration advocacy process to be either a member of a law society or to be licensed under federal, provincial or territorial laws to regulate the practice of immigration consultants. The options are for governments to establish regulatory bodies, or for immigration consultants to establish regulatory bodies. This discussion focusses on a self-regulation model.

The onus would be on immigration consultants wishing to provide immigration advice and services to submit a proposal to the federal, provincial or territorial governments to establish a licensing body. Each provincial or territorial government or the federal government would assess the proposal against existing standards for self-governing bodies. The self-governing body would have to provide admission requirements, standards of competency, an insurance or compensation fund, a code of ethics, a complaint mechanism, offences and penalties, and an annual licensing fee to cover administrative costs, so there would be no cost to the government.

Would this measure be effective in controlling consultants and reducing the risks of abuse?

Such a measure would be effective only:

- if the regulatory body were effective in establishing licensing requirements to ensure that only qualified individuals were granted or permitted to maintain membership; and
- if the body ensured that its members adhered to strict ethical and competency standards.

The Section recommends the following requirements to ensure public protection, which expand on the list of licencing requirements in the CBA resolution:

- Entrance requirements should be based on demonstrated knowledge of immigration matters, including examinations to demonstrate knowledge of the *Immigration Act*, CIC policy and procedures, and practice ethics, including conflict provisions. The regulatory body must ensure that educational standards are similar to those of comparable licensed occupations and specifically to those of provincial or territorial law societies. It is anticipated that former CIC employees could write entrance examinations without necessarily attending entry-level education courses.
- Members must be Canadian citizens or permanent residents not subject to a removal order, and demonstrate fluent English or French language skills.
- The body must ensure that its members are of good character.
- Each member seeking admission should have a probationary period of at least one year before qualifying for full membership. Probationary members would act under direct supervision of a senior member of the body, who would assume full responsibility for the probationary member's actions.
- The regulatory body should create an advisory panel, such as exist for law societies, where members could consult on a confidential basis with senior members and would be encouraged to maintain the highest quality of practice. The advisory panel should include senior immigration consultants, lay members and members of a provincial or territorial law society.
- Sanctions for non-compliance to regulations must be real. The range of sanctions should include suspension, expulsion, fines, further educational requirements, or monitoring by another licensed member. Disciplinary measures should include a requirement that the regulatory body immediately report to CIC any immigration consultant disciplined for misrepresentation or fraud, suspended, subject to practice monitoring, or expelled.
- A compensation scheme must be established. This would be funded by annual membership fees, insurance levies and insurance policies purchased by the body.
- Clients with a complaint of incompetence or unethical behaviour against a member must have the right to make representations, to have a full

investigation and a written decision and to an appeal mechanism within the regulatory body.

Finally, licensing regulations must be explicit and strictly adhered to. Any regulatory scheme must give protection equal to that of law societies regulating lawyers, which ensure that members in good standing have complied with high education, training and character standards and that members practice ethically and responsibly.

How could extraterritoriality be ensured?

The Section commends to CIC the registration model used by the United States Immigration & Naturalization Service (INS) as a practical mechanism to screen out unauthorized individuals from representing parties in immigration matters. Firstly, US legislation restricts counsel in immigration matters to lawyers and non-profit organizations, for written submissions and matters before administrative tribunals and courts.[4] Secondly, the G-28 *Notice of Entry of Appearance as Attorney or Representative* must be submitted to the INS by all representatives.[5] Only a US citizen or alien lawfully admitted for permanent residence may execute this document. The INS need not communicate with any non-authorized representative.

By adopting the registration model, CIC could ensure that only lawyers, licensed immigration consultants or unpaid representatives of religious, charitable or social service organizations, who were Canadian citizens or permanent residents in good standing, could represent parties in proceedings under the *Immigration Act* to CIC or the IRB.

Once the regulatory body is established by regulation, how will CIC and the IRB ensure that it will maintain strict standards?

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4 Title 8, US Code of Federal Regulations, 8 CFR 292.1

5 See Appendix A.

The Section recommends that, where an immigration consultant is disciplined by the regulatory body, and the punishment is suspension, practice monitoring or expulsion, the body would be required to report the member to CIC. CIC would in turn revoke registration privileges of that person. Consultants subject to practice monitoring would have a member in good standing submit registration forms on behalf of the disciplined member's clients and take full responsibility as client representative. A consultant subject to sanctions and revocation of registration privileges should be motivated to adopt higher practice standards.

Another way to ensure compliance would be to impose a mandatory, substantial fine on consultants found to practise irresponsibly or unethically. A regulatory body will not want the expense of paying fines to dissatisfied clients from the insurance fund and will be motivated to expel those consultants or ensure that their practice improves. We recommend that consultants found liable should pay the costs of their disciplinary hearing and a portion of any fine imposed, as is required by lawyers.

An example of a professional liability insurance plan is that offered to members of the American Immigration Lawyers Association. Three types of liability protection are covered under the plan:

- *professional liability insurance* protects against charges of negligent acts, errors or omissions in rendering services in the professional capacity as an immigration lawyer;
- *personal injury liability insurance* protects the insured against charges of false arrest, detention or imprisonment, libel, slander or wrongful entry or eviction. This coverage is provided at no additional cost to the insured; and
- *disciplinary proceedings coverage* for defense expenses in disciplinary complaint/sanction against the insured. This is optional coverage with a separate premium. Various deductibles are available, beginning at $1,000.

The regulatory body could provide a similar insurance plan for immigration consultants. In out view, there should be a mandatory insurance requirement for immigration consultants to practice.

A self-regulating body would thus ensure that incompetent or unscrupulous immigration consultants are either denied membership, improve their practice or are ultimately expelled.

> ***If the discussions with the associations of consultants proved unproductive, should CIC adopt the Australian model by setting up its own body to regulate consultants, despite the possible objections of certain provinces?***

We understand that CIC is also considering the option of government regulation of immigration consultants. Licensing of professions falls within the jurisdiction of provincial and territorial governments. However, the provinces and territories have shown no willingness to establish regulatory bodies to control immigration consultants.

In our view, CIC should not set up its own body to regulate consultants. Professionals must bear the responsibility to establish and maintain a regulatory body to monitor its members. The substantial costs should be borne by those who wish to benefit financially from the representing immigration clients, not from scarce tax dollars. CIC resources are better devoted to its primary responsibility to administer the *Immigration Act*, including timely processing of immigrant and non-immigrant visa applications.

If immigration consultants are not willing to effectively self-regulate, then the public interest is far better protected by legislating to limit immigration practice to members of a provincial or territorial law society.

IV. OTHER PUBLIC PROTECTION ISSUES

> ***How can CIC ensure that lawyers specializing in immigration will have to meet the same rigorous education and training admission standards that are contemplated in order to practice in the field.***

Lawyers are regulated by their respective law societies and any issue of individual competency can and must be addressed directly to that lawyer's law society. The

Section continues to encourage CIC to report lawyers to their respective law societies for any allegation of unprofessional conduct in representing clients or for behaviour unbecoming a member of the bar.

CIC authority to impose standards on lawyers may hinge on a Supreme Court of Canada decision in *Law Society of British Columbia v. Mangat.* In 1993, the British Columbia Law Society sought an injunction under the *Legal Professions Act* against an immigration consultant until he became a member in good standing of the Law Society, and a permanent injunction against the agents, officer and directors of his consultant firm to prohibit its members from practising law. The *Legal Professions Act* prohibits any one from practising law within the province unless that person is a member in good standing of the Law Society of British Columbia. The *Immigration Act* permits a person appearing before two of three Divisions in the IRB to be represented by a barrister or solicitor or other counsel. The injunctions were granted in the British Columbia Supreme Court in August 1997.

The British Columbia Court of Appeal allowed an appeal in November 1998. The majority decision determined that the restrictive provisions in the *Legal Professions Act* and the sections in the *Immigration Act* are valid but conflicting. The Court determined that the constitutional doctrine of "paramountcy" applies: to the extent that a federal law and a provincial law conflict, the provincial legislation is inoperative and not applicable. Thus, the consultant would, by operation of the *Immigration Act*, be permitted to represent a party before the Adjudication Division and the Convention Refugee Determination Division. MacKenzie, J. pointed out that representation is limited only to the two specific activities in the *Immigration Act*.

MacKenzie, J. said that the Law Society "might be entitled to an injunction restraining activities within the scope of the *Legal Profession Act* but beyond the scope of the *Immigration Act* protection." However, the limited injunction question was not put to the Court and no decision was rendered on that point.

The Law Society of British Columbia has sought leave to appeal to the Supreme Court of Canada and a decision is expected soon.

Regardless of the ultimate outcome of the *Mangat* case, the Section strongly opposes any proposal that CIC impose qualifications on lawyers in good standing, who are already subject to the disciplinary measures of their respective law societies.

That said, the Section is equally concerned that the quality of representation for clients is high and that the best interests of the public are served. Therefore, the Section is willing to work with CIC in devising voluntary education and training standards for immigration lawyers, consistent with those expected of licensed immigration consultants. Lawyers will be motivated to participate in such training and education if CIC recognizes them as knowledgeable in the field of immigration law and accords them due respect as they represent their clients.

If CIC uses a training and education system as a mechanism to delay processing the cases of lawyers who do not participate, or does not recognize the expertise of participating lawyers, the system will fail. If the system provides a benefit in client representation, it will succeed in its objective to ensure high quality lawyer representation.

Is adequate use made of a system of compensation, financial or other, for dissatisfied clients who have retained a lawyer or consultant?

Clients dissatisfied with their immigration lawyer can always complain to the lawyer's licensing body. Law societies have a legislated responsibility to investigate each complaint regardless of its merit. The complainant has an opportunity to make detailed submissions, as does the lawyer. The law society must render its decision in a timely fashion. If misconduct is determined, the law society must discipline the offending lawyer. Penalties range from reprimands for mild misconduct, to re-education requirements, fines, practice monitoring, suspension and disbarment. Thus, a client has real recourse against poor representation from a lawyer.

Without regulation, there is no real recourse for a client against poor consultant representation.

A practical method of recourse is currently used, although it is difficult to determine how widespread the practice is. Many consultants and lawyers act on a "guarantee-of-product" basis rather than "fee-for-service". The immigration practitioner contracts that fees are refundable if the client does not receive the objective, that is, an immigrant or temporary visa. This provides some assurance that the lawyer or consultant will represent the client to the best of their ability.

Does CIC presently have a responsibility to require that immigration consultants are regulated in the practice of immigration law?

In our view, the federal government, through CIC, has a duty to the public it serves to ensure that immigration consultants are regulated to the same level as lawyers in those areas it has decided non-lawyers should be permitted to act.

As the *Immigration Act* currently stands, immigration consultants have the right to represent clients before two levels of the IRB. Immigration consultants have also taken the position that they are permitted to practice immigration law generally. However, clients have no recourse against incompetent or unscrupulous consultants other than costly civil remedies or criminal charges. For the majority of immigration clients who are located outside of Canada, civil and criminal remedies are so impractical as to be without any real effect.

On the other hand, clients represented by lawyers in good standing with their law societies have real recourse against poor legal advice.

Other countries are looking to control the activities of immigration consultants. For example, Taiwan adopted legislation to create a new department responsible to regulate consultants in April 1999. This entity has already adopted regulations regarding legal guarantees to be provided by consultant to clients, performance

bonds to be posted, and mandatory professional insurance. Two years ago, Korea opened the practice of immigration consultancy market to anyone; prior to that only three licensed consultants could do so. It is anticipated that Korea will adopt a model based on the Taiwanese regulation system. In China, there is increasing discussion to adopt a law that will recognize immigration consultancy as a business in order to impose regulations on its practice.

In the United Kingdom, the Immigration and Asylum Bill has passed second reading. This legislation would attach criminal sanctions against those who provide immigration advice or represent individuals in immigration matters, unless that person is registered with the Immigration Services Commissioner or is a member of a law society or bar.

In Australia, the practice of immigration consultancy is strictly regulated. Under the *Migration Act* 1958, the practice of "immigration assistance" is broad, including preparing, or helping to prepare, visa applications or preparation for court proceedings relating to visa applications for fee or other reward. A person who violates the restrictive provisions is subject to imprisonment for ten years. The Migration Agents Registration Authority maintains a register of migration agents permitted to provide immigration assistance. Registrants must be a citizen or permanent resident of Australia or New Zealand. The Migration Agents Registration Authority powers include determining which agents qualify for entrance, monitoring conduct of both agents and lawyers in their immigration practices, and taking disciplinary action against agents.

V. CONCLUSION

In conclusion, we strongly encourage CIC to take immediate steps to ensure that those who seek immigration advice are protected, by implementing legislation that will ensure that only lawyers and qualified immigration consultants are permitted provide advice or represent clients before CIC and the IRB, and by concluding discussions leading to effective self-regulation of consultants.

Submission on Immigration Consulting Industry

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

November 2002

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Submission on Immigration Consulting Industry

PREFACE

The Canadian Bar Association is a national association representing over 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on Immigration Consulting Industry

I. INTRODUCTION

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to make recommendations to the Advisory Committee on the Immigration Consulting Industry (the Advisory Committee). We congratulate the Advisory Committee and the Minister for taking this important step in considering in how to license and regulate immigration consultants in Canada.

The CBA Section starts from the proposition that there should be a dependable mechanism to prevent unscrupulous immigration consultants from using their fiduciary position for their own profit, or mismanaging their clients' immigration affairs. We understand that this also represents a prime objective of the Committee. As stated by the House of Commons Standing Committee on Citizenship and Immigration:

> For a number of years, the public, the Department, and Parliament have been aware of the numerous problems created by unscrupulous immigration consultants. … In 1995, this Committee studied the matter and reported that it was time that the exploitation of vulnerable people by unscrupulous consultants must end, and made practical recommendations as to how that could be accomplished. Over six years later, with little concrete progress having been made, the title of the report seems ironic: *Immigration Consultants: It's Time to Act*. …The Committee urges the Department to treat this as a matter of concern and proceed with implementation of a regulatory system as soon as possible.[1]

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1 *Building a Nation: The Regulations under the Immigration and Refugee Protection Act,* Report of the Standing Committee On Citizenship And Immigration, March 2002 (Parliament of Canada), Recommendation #62.

In the view of the CBA Section, the proposed regulatory mechanism should be an independent licensing agency that governs the conduct of consultants. It should be created by, but remain at arms length from, Citizenship and Immigration Canada (CIC). The CBA Section has supported the establishment of a regulatory agency in earlier submissions.[2] A regulatory agency would serve similar purposes vis-à-vis consultants as provincial law societies vis-à-vis lawyers.

II. MODEL REGULATORY SYSTEMS

Canada does not need to reinvent the wheel. Good regulatory systems already exist in other jurisdictions. In this submission, we primarily rely upon those recently established by the U.K. and Australia as precedent models. These are good bases upon which Canada can build its system, borrowing from strengths, reforming areas of weakness, and adding to areas where lacunas exist.

A. U.K. SYSTEM

Recent U.K. legislation paved the way for comprehensive regulation of immigration consultants ("advisers") through the Office of the Immigration Services Commissioner (OISC). What has resulted since the passage of the *Immigration and Asylum Act 1999* (the U.K. Act) in the form of the OISC and its regulatory regime, is a rich resource of policy, rules and procedures. The OISC's ultimate objective is to eliminate unscrupulous behaviour of advisers, which places naive immigrants in difficult and unenviable situations.

i) The OISC

The U.K. Act provided for the establishment of the OISC, an independent body consisting of a Commissioner, staff, and a disciplinary tribunal, to regulate consultants. The OISC is a recent advent in the U.K.: it only became an offence

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2 *Submission on Immigration Consultants*, CBA, June 1995, See Appendix A; *Submission on Immigration Consultants*, CBA, July 1999, See Appendix B.

to violate the rules as of April 30, 2001. Advisers and organizations providing immigration advice or services without either being registered with the OISC, or granted a certificate of exemption (such as law firms and lawyers) are subject to criminal sanction.

ii) Areas of Responsibility

The OISC has six primary areas of responsibility:

- regulating immigration advisers in accordance with the Commissioner's *Code of Standards* and *Rules*;
- processing applications for registration or exemption from immigration advisers;
- maintaining and publishing the register of advisers;
- promoting good practice by immigration advisers;
- receiving and handling complaints about immigration advisers; and
- taking criminal proceedings against advisers who are acting illegally.

Advisers in the non-profit sector must apply for a certificate of exemption from the regime. Members of designated professional organizations (primarily law societies) are exempted from OISC registration.

The OISC provides useful information on its web site (www.oisc.org.uk) for advisors who wish to register, and for the public who use their services. These include a Register — a current list of all registered and exempted organizations and individuals — and a service called Adviser Finder, which helps individuals to locate an immigration adviser by geographic location and area of interest (for example, immigration or asylum).

iii) Levels of Expertise

The OISC registers advisers under one of three levels. These mirror the levels given to caseworkers (including lawyers) under the Community Legal Service's Quality Mark System[3]:

OISC Level	**CLS's Quality Mark System**
(n/a)	Assisted Information
Level 1: Initial Advice	General Help
Level 2: Casework	General Help with Casework
Level 3: Specialist	Specialist Advice

iv) Code of Standards and Rules

Schedule 5 of the U.K. Act mandates that the Commissioner establish a Code of Standards to govern the conduct of immigration advisers. The U.K. Act also requires the Commissioner to make rules for professional practice, conduct and discipline of registered persons. The Commissioner has published both a *Code of Standards* and a set of *Rules* that serve as the basis for regulation of advisers.

The *Code of Standards* sets the benchmark for the conduct of persons providing immigration advice or immigration services, whether paid, volunteer, or otherwise. The *Rules* go beyond *Code's* basic benchmarks, and focus on the work of registered advisers in order to ensure that persons seeking advice are dealt with fairly and honestly, and receive competent advice. Together, these two sets of guidelines adopt many of the same standards used to regulate lawyers.

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3 The OISC based their rules and Code on the Quality Mark (QM), a recent initiative of the Community Legal Service (CLS). The CLS was a major initiative launched by the U.K. government in April 2000 to improve public access to legal aid, and information, advice and legal services through local networks of services. Organizations and lawyers can apply for the QM through a prescribed procedure. The QM is a quality control mechanism for legal services, analogous to the ISO 9000/1 mark for goods. It is intended that all consumer of legal services will recognize the QM and gain the confidence that their service provider satisfies this government-approved standard. Three Quality Marks standards can be obtained by those who apply for them: 1-Information; 2-General Help; and 3-Specialist Help.

v) Insurance

Registered advisers are required by the *Rules* to have indemnity insurance. The amount per case has not been prescribed. Advisers must have regard to their own businesses and risks in order to assess the amount of insurance they require.

vi) Complaints

The OISC investigates complaints made against immigration advisers. It can accept complaints made against not only advisers, but also members of the designated professional bodies. Complaints may originate from clients, other advisers or members of the public. The OISC can investigate a complaint on its own accord, if warranted. Complaints must be launched within six months of the alleged incident, although the Commissioner may grant extensions in certain cases. These incidents must concern:

- the competence or fitness of an adviser;
- the competence or fitness of an employee or contractor to the adviser;
- breaches of the *Rules* or *Code of Standards*.

Complaints found to have a basis may be referred to the Immigration Services Tribunal.

The legal structure to this mechanism is found in the *Complaints Scheme*, a detailed set of rules created and enforced by the Commissioner, which guides the public and the OISC in the complaints process. The Scheme stipulates where, why, how, what and which complaints should be made — in approximately 60 rules. Complaints may be lodged informally by telephone (followed up in writing), or formally, through forms issued by the OISC. All complaints are subject to confidentiality provisions, intended to encourage any person to make a complaint, irrespective of immigration status in the U.K.. The Scheme addresses issues as diverse as the standard of proof (balance of probabilities), third party complaints and duties incumbent on the complainant's target. Investigative powers of the Commission established by the Scheme include entry of premises (without force) and making copies of documents or records.

The Scheme also sets out a detailed procedure for the OISC to follow after a complaint has been laid, and after it has been substantiated. If the complaint is referred to the Tribunal, and the Tribunal upholds the charges, it can impose a range of sanctions, including penalties and restriction, suspension or prohibition on the continued provision of immigration services.

Perhaps the trickiest issue of the Scheme, which would also prove difficult in any complaint scheme adopted by a Canadian regulatory body, is the cross-jurisdictional responsibility and oversight in disciplining exempted members. Under the U.K. Scheme, exempted members (e.g. members of law societies or those providing not-for-profit immigration services) may nonetheless be subjects of OISC complaints. The Commissioner will undertake the initial investigation of these complaints, but the Scheme states a preference for the professional bodies to assume carriage of any validated complaints against these exempt members, and for their professional bodies (such as law societies) to co-operate with the OISC. This question of jurisdiction will be one of the key issues to decide: would Canada's prospective regulatory body have authority to censure lawyers who practice immigration law, or would it leave investigation and discipline to provincial and territorial law societies, concentrating only on consultants?

B. AUSTRALIAN SYSTEM

At the time of the CBA Section's 1999 submission, the U.K. regime had not yet been implemented. However, Australia had already instituted their regulatory regime for consultants, and we summarized it thus:

> In Australia, the practice of immigration consultancy is strictly regulated. Under the *Migration Act 1958*, the practice of "immigration assistance" is broad, including preparing, or helping to prepare, visa applications or preparation for court proceedings relating to visa applications for fee or other reward. A person who violates the restrictive provisions is subject to imprisonment for ten years. The Migration Agents Registration Authority maintains a register of migration agents permitted to provide immigration assistance. Registrants must be a citizen or permanent resident of Australia or New Zealand. The Migration Agents Registration Authority powers include determining which agents qualify for entrance, monitoring conduct of both agents and lawyers in their immigration practices, and taking disciplinary action against agents.[4]

III. CBA POSITION

The CBA policy on immigration consultants is based on a resolution adopted by its governing Council in 1996:

> BE IT RESOLVED THAT The Canadian Bar Association urge the Government of Canada
>
> 1. To amend the *Immigration Act* to define the practice of immigration law to include:
>
> a) appearing as counsel;
> b) drafting, revising or settling any document for use in any judicial or extra-judicial proceeding arising under the *Act*;
> c) giving legal advice;
> d) making an offer to do anything referred to in paragraphs (a) through (c);
> e) making a representation that the person is qualified or entitled to do anything referred to in paragraphs (a) through (c);
>
> when any of the foregoing acts are done for, or in expectation of, a fee, gain or reward, direct or indirect, from the person for whom the acts are performed.
>
> 2. To further amend the *Immigration Act* to provide:
>
> a) that only members in good standing of a provincial or territorial law society can practice immigration law for remuneration; or
> b) that only "counsel" can practice immigration law for remuneration, unless prohibited by a court of relevant jurisdiction, that counsel be defined to include members in good standing of a provincial or territorial law society, and consultants who are licensed by a licensing body, and that a licensing body for immigration consultants be established which will:
>
> i) set admission requirements;
> ii) establish standards of competency;
> iii) set up an insurance or compensation fund;
> iv) adopt a code of ethics;
> v) establish a complaint mechanism;
> vi) define offences and penalties; and
> vii) fix an annual licensing fee to cover the administrative costs of the licensing

4 Supra, note 2, at p.12.

> body so that there will be no cost to federal, provincial or territorial governments.

The CBA Section provided submissions advocating the regulation of consultants to the House of Commons Standing Committee on Citizenship and Immigration 1995, and to Citizenship and Immigration Canada in 1999[5]. We continue to support the recommendations in these submissions. These submissions summarized Canadian immigration law, and explained the rationale and need for regulation. Since the need has already been established, the questions to be answered are no longer "why" and "when", but rather "what" and "where"

IV. ISSUES FOR THE ADVISORY COMMITTEE

The CBA Section sees ten major issues that must be addressed in implementing a regulatory system for immigration consultants in Canada. We will comment on each issue in turn.

1. What broader structure should be used to regulate consultants?
2. Under whose jurisdiction should the governing body fall?
3. Who should be eligible to apply for a license?
4. Should there be a qualifying exam, and if so, how should currently practicing consultants be assessed?
5. What should the Code of Conduct state?
6. How should the Code of Conduct be monitored, and members disciplined?
7. Should different levels of expertise or skill be defined and regulated?
8. What kind of insurance should be required?
9. Who should be administrators of the regulatory agency and of its disciplinary body? How should they be appointed, and how should they be paid?
10. Are any reforms to IRPA and the Regulations required to implement the Regulatory agency and the Code? For instance:
    (a) what should the definition of "counsel" be?

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5 See Appendices A and B.

(b) is specific legislative language required to address when immigrants should have access to counsel, and if so, when should both consultants and lawyers be allowed to act, and when should only lawyers be able to act?

A. What Broader Structure Should Be Used to Regulate Consultants?

An independent licensing or certification body (the regulatory agency) should be created. The regulatory agency should be responsible for administration of the regime in its entirety, and should be headed by a commissioner selected by Parliament. The regulatory agency should be responsible for the following primary tasks:

- issuing licensing requirements;
- creating application forms and directives;
- assessing applicants qualifications (residency, language and knowledge);
- approving a standardized test, and potentially administering the test;
- implementing a Code of Conduct and complaints procedure;
- conducting complaints investigations;
- referring meritorious complaints and Code violations to a Disciplinary Tribunal;
- ensuring an insurance scheme is in place;
- carrying out disciplinary measures;
- fixing fees to cover annual budget, ensuring no ongoing administrative costs are borne by the federal, provincial or territorial governments (initial start-up costs for the investigation and commencement of the regulatory agency should be borne by CIC); and
- reporting to Parliament on an annual basis.

Each of these responsibilities should be assigned to one of three divisions of the regulatory agency:

- membership and compliance
- investigations and complaints
- disciplinary tribunal,

The commissioner should be responsible for:

(a) overseeing administration (such as staffing, finances, and budgets) of the three divisions
(b) promoting and marketing the regulatory agency, including oversight of web site and public appearances
(c) suggesting and implementing (where prescribed) reforms to rules; and
(d) preparing a detailed annual report to Parliament.

Given the broad scope of its mandate, the regulatory agency and commissioner's office would require several permanent staff members. The commissioner should be responsible for the Rules and directives issued from that office.

The CBA Section recommends that the Advisory Committee approve a draft Code of Conduct and complaints procedure, in advance of the establishment of any Regulatory agency. Amendments to these rules should be recommended by the commissioner, and approved by Order in Council or regulation.

The regulatory agency should operate a disciplinary tribunal which would fall under the aegis of the Office of the Commissioner, but remain operationally at arms length from the investigations and complaints division. The Tribunal should review any complains validated by the investigations and complaints division through its investigations.

B. Under Whose Jurisdiction Should the Regulatory Agency Fall?

In our view, the federal government should oversee the regulatory agency, which should be created by statute. A province or territory could opt out of the regulatory scheme, if it adopted a similar alternative. The provinces and territories would likely assent to the regulatory agency, its Code of Conduct and disciplinary mechanisms, given that no similar model exists, and start-up costs and time for implementation of a parallel system would be prohibitive.

C. Who Should Be Eligible to Apply for a License?

Practicing consultants and new entrants to the field should be able to apply for a license, as should not-for-profit organizations and their representatives who

provide free immigration services. Those who provide *pro bono* services should have to meet the ordinary requirements, including course work and testing, but should be exempted from fee payments. Lawyers in good standing with a provincial or territorial law society are already adequately regulated and must be exempted from the regime entirely.

There should be a residency requirement. All qualifying organizations should have an office operating in Canada. A consultant working alone should be resident in Canada. Qualifying consultants could live outside of Canada if working for a licensed employer with a permanent establishment in Canada. At minimum, all consultants should have to:

- speak fluent English or French (passing as part of the qualifying exam);
- be a Canadian citizen or permanent resident, at least 18 years of age; and
- satisfy the regulatory agency of their good character.

Certain persons should be ineligible from becoming immigration consultants:

- former employees of CIC, the RCMP, or DFAIT, until one year after their date of departure from employment with the federal department or agency;
- persons with Canadian criminal convictions for fraud, theft, violent crime, or any other analogous indictable offence, or equivalent foreign offences, unless a minimum of five years has passed since the completion of any sentence, or a pardon has been granted, and the commissioner finds that the applicant has been rehabilitated. Police checks and similar evidence should be submitted to substantiate this facet of the application.

Finally, upon meeting the other qualifications, the consultant should have to complete a one year probationary period under the supervision of an established member of the regulatory agency.

D. Should There Be a Qualifying Exam, and If So, How Should Currently Practicing Consultants Be Assessed?

In our view, there should be a compulsory pre-registration program through educational institutions approved by the regulatory agency, consisting of a minimum one year full time course and a standardized entrance exam. Established models include the Immigration Practitioner Certificate Programs offered by UBC and Seneca College[6]. Other educational institutions would want to offer the program if it were a licensing requirement, so geographic limitations in access to these programs should vanish.

In addition to the qualifying exam and the pre-registration course, we recommend two continuing education requirements:

- a yearly requirement to attend at least one full-day educational seminar approved by the regulatory agency (but which may be run by another organization such as a law society); and
- a recertification test every five years, to ensure that knowledge is current.

E. What Should the Code of Conduct State?

In our view, a Code of Conduct for immigration consultants should include provisions on:

- competence, including requirement for continuing education
- honesty and integrity;
- professionalism;
- respect for clients rights and privacy;
- avoidance of negligence;
- accurate and timely reporting to clients;
- responsible handling of finances;
- avoiding conflicts of interest;
- illicit fee sharing and referral arrangements;
- dealings with government officials, and representations to clients about knowledge of government officials

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6 See *http://cic.cstudies.ubc.ca/immigration_practitioner.htm* and *www.senecac.on.ca/cdl/pip-immigration_practitioner.html*. These are offered as examples, and not necessarily endorced by the CBA.

- representations to clients about predicted success in any given application;
- withdrawal from cases;
- requirement to indicate in retainer letters and advertisements, and to post in offices:
    - membership in good standing of the regulatory agency;
    - status as a licensed immigration consultant and not a lawyer, and
    - existence of the Code of Conduct, and how to contact the complaints division in the event of breaches;
- penalties for breaching Code
- minor offences should be dealt with through requirements for practice monitoring, additional education (in the case of incompetence, for instance) or extra levies payable to the regulatory agency (in instances of negligence, for instance)
- serious or repeat offences (such as trust fund violations) should result in summary or indictable offenses; and
- penalties for unauthorized practice should also result in hybrid offences, as with similar breaches of IRPA or law society rules;
- suspension or revocation of licenses should be also be available as a penalty for serious or repeat breaches of the Code

Disciplinary guidelines should outline procedures for complaints referred by the complaints division to the disciplinary tribunal. The guidelines should set out the procedural rights of both complainant and respondent. Consultants found liable by the disciplinary tribunal should have to pay a portion of the cost of the hearing, so that all costs are not borne by the regulatory agency or its insurer.

The Code of Conduct and Disciplinary Guidelines can be drawn from a rich source of precedents:

- in Canada, the CBA *Model Code of Professional Conduct* and each law society's rules of professional conduct;
- in Australia, the Migration Agents Registration Authority's *Code of Conduct*

- in the U.K., OISC's *Code of Standards*, *Commissioner's Rules*, and

Complaint's Scheme.

The CBA Section would welcome the opportunity to work with the Advisory Committee to develop a draft Code of Conduct based on these precedents.

F. How Should the Code of Conduct Be Monitored and Members Disciplined?

The Code of Conduct should be monitored by both the Membership and Compliance, and Investigations and Complaints Divisions of the regulatory agency. Clients would monitor consultants through their ability to lodge complaints. Clients will be made aware of the Code through retainer letters, office signs and advertisements. The disciplinary tribunal will undertake all disciplinary proceedings. The question of appellate rights (from fines, suspensions, or license revocation) is an open one.

G. Should Different Levels of Expertise or Skill Be Defined and Regulated?

Britain recognizes different skill levels. Australia does not. The Advisory Committee should seek more information on this matter from representatives of those jurisdictions.

H. What Kind of Insurance Should Be Required?

Liability insurance should be required to cover claims of negligence and misuse of client funds. We understand that the Advisory Committee is examining this issue in detail, and we would welcome the opportunity to comment on any proposed insurance model.

I. Who Should Administer the Regulatory Agency and the Disciplinary Body? How Should They Be Appointed, and How Should They Be Paid?

The regulatory agency should be administrated by a Commissioner, with responsibility to oversee staff in the Commissioner's office and the three divisions. The Commissioner should appoint all staff except members of the

disciplinary tribunal. Tribunal members should be named to a roster by the federal government, with input from the provinces. They should be comprised of lawyers, immigration consultants, and other professionals (such as accountants or engineers). Hearings would take place as needed, in the geographic region where the complaint arose. The Commissioner would choose three panellists from the roster for each hearing. Each panel should consist of one lawyer (presiding), one immigration consultant, and one other professional.

J. Are Reforms to IRPA and the Regulations Required to Implement the Regulatory Agency and the Code?

i) what should the definition of "counsel" be?

The CBA resolution noted above summarizes our position on this issue.

ii) is specific legislative language required to address when immigrants should have access to counsel, and if so, when both consultants and lawyers should be allowed to act, and when only lawyers should be able to act?

Immigrants should have access to counsel for all legal proceedings under IRPA, including examinations and hearings, where their acquired rights as temporary or permanent residents may be negatively affected. Consultants should be limited in their scope of activity as outlined in the CBA Council resolution above. Amendments to IRPA will be necessary in this regard. The CBA Section would be pleased to assist the Advisory Committee in drafting proposed amendments.

Counsel should be allowed to participate in any application, submission, hearing, appeal or other proceeding under IRPA and the Regulations. Counsel should be entitled to attend at any proceedings under which legal rights already acquired (as a temporary or permanent resident) are at jeopardy, or may be revoked or impaired. Consultants may be not be able to appear before certain appellate bodies. For instance, they cannot represent clients before the Federal Court of Canada. Appearances of consultants in oral hearings will always depend upon the Rules of the Tribunal in question, and any limitations under IRPA.

V. CONCLUSION

A Canadian regulatory agency for immigration consultants should comprise elements of Australia's and Britain's systems, with modifications customized for Canada. The Advisory Committee has asked the CBA Section to provide further details for a draft Code of Conduct, comments on proposed insurance models, and regulatory language required to implement the regulatory agency and Code within IRPA and its Regulations. The CBA Section would be pleased to meet with the Advisory Committee to address these and other matters relating to its mandate.

SUBMISSION ON

IMMIGRATION CONSULTANTS

NATIONAL IMMIGRATION LAW SECTION
OF THE CANADIAN BAR ASSOCIATION

June 1995

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Submission on Immigration Consultants

PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers, students and judges across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Immigration Law Section, with assistance from the Legislation and Law Reform Directorate at National Office. The submission has been reviewed by the Legislation and Law Reform Committee, and has been approved as a public statement of the National Immigration Law Section.

Submission on

Immigration Consultants

I. Introduction

One of the objectives of the Canadian Bar Association is to improve the law by assisting in the development of laws that protect the public interest. It is the position of the Immigration Law Section of the Canadian Bar Association that public interest can properly be served only when those formally trained in the practice of law and duly registered as barristers and solicitors, or alternatively those licensed to meet rigid standards, represent anyone within the purview of immigration law. The exploitation of applicants for Canadian permanent residence by unscrupulous consultants was the subject of scrutiny by the federal government as early as 1981. Former Chair of the Immigration and Refugee Board, Gordon Fairweather, expressed his desire to regulate immigration consultants.

In 1991, the Immigration Law Section of Canadian Bar Association conducted meetings with the Immigration and Refugee Board, the Department of External Affairs and the Department of Employment and Immigration to address concerns relating to the immigration consultant issue. The Immigration Law Section recommended the exercise of the authority in

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The Exploitation of Potential Immigrants by Unscrupulous Consultants, a discussion paper issued by the Honourable Lloyd Axworthy, Minister of Employment and Immigration, April 1981.

"License Refugee Consultants - Fairweather" *Montreal Gazette* (19 December 1988) B6.

section 114(1)(v) of the *Immigration Act* to require that any person acting as counsel in the advocacy process in immigration for any fee, reward or other form of remuneration be required to be a member in good standing of a provincial or territorial bar. Two possible alternatives were put forward. The position of the Immigration Law Section has remained unchanged.

II. Scope of Immigration Practice

The practice of immigration law is wide-ranging. Clients seek a variety of goals, the most obvious of which is to obtain or maintain Canadian permanent immigrant status or temporary status as either visitor, student or foreign worker in Canada. Lawyers also assist individuals who run afoul of any number of provisions in the *Immigration Act*.

The *Immigration Act* and *Regulations* form a complex set of legislation. A lawyer must be conversant with the interaction of the legislation (subject to frequent amendment) and the policy and procedure which are integral parts of an immigration law practice. Most lawyers practising immigration law develop specialized knowledge over several years. Most non-immigration lawyers are hesitant to advise on immigration matters, referring clients to recognized practitioners in the field.

As in any area of law, the legislation forms only a part of a lawyer's considerations. Case law interpreting the legislation must be considered throughout the application process. Lawyers must review extensive case law to keep abreast of recent decisions.

See minutes of meeting between the CBA, External Affairs, Employment and Immigration Canada, and Immigration and Refugee Board, November 10, 1991. Copy included in the reference document, Appendix A.

To demonstrate the depth of legal knowledge needed to properly assist members of the public to achieve their goals, we offer several examples of the scope of an immigration practice.

1. Admission to Canada

All non-Canadian citizens seeking to enter Canada must obtain a visa prior to coming to Canada either as a visitor or as a permanent resident. The presumption is that anyone seeking entry intends to remain as a permanent resident. Consequently, many people genuinely seeking entry as visitors are considered to be attempting to bypass regular permanent resident processing. Clients may be confused as to their goals and it is crucial that the lawyer assist them to clarify their goals prior to proffering any advice.

Temporary Status

Visitors are people outside of Canada who wish to come to Canada for a temporary period of time, including temporary workers with employment authorizations, students with student authorizations, and visitors granted visitor records. Each type of temporary status has specific legislated requirements for issuance. The provisions governing the granting of temporary status are found throughout the *Immigration Act*, its regulations and in Citizenship and Immigration Canada policy.

A few exceptions to this requirement are set out in the *Immigration Act* or by policy.

Permanent Resident Status

There are several categories of immigrants (those seeking permanent resident status in Canada). For each category, provisions in the *Immigration Act*, the regulations and Citizenship and Immigration policy govern. An immigrant must be advised of the appropriate category in which to apply. Without exploring the person's background and goals in Canada, individuals may apply in a category which does not accurately reflect their employment intentions in Canada. To properly assess an individual's qualifications one must fully explore their previous employment, education and its equivalency to Canadian standards, the source and extent of assets, and other factors relevant to a proper assessment. All these factors are then compared with the relevant law. Independent and business categories are reviewed as examples:

> An **Independent** applicant is selected according to the government's perceived need for certain occupations in Canada. Applicants must achieve a minimum number of points, awarded for education, training and vocation, experience, age, English and French language ability and likelihood to settle well in Canada.
>
> **Business** applicants include those applying under the entrepreneur, investor, or self-employed categories. Each category has criteria under which the applicant is judged with respect to their ability to establish a successful business in Canada.
>
> The **Entrepreneur** is assessed on the applicant's business track record and ability to establish a commercial venture that will meet a minimum financial threshold and contribute significantly to the Canadian economy while providing employment to at least one Canadian citizen or permanent resident.
>
> Contrast the **Investor**, who must have an established record of direct management of a business, a stipulated minimum net worth and a willingness to commit a large investment into venture capital projects for a prescribed period of time.
>
> **Self-Employed** applicants must demonstrate the ability and intention to establish a business that will employ at least themselves and contribute significantly either to the Canadian economy or to Canadian cultural or artistic life.

2. Appearances before quasi-judicial tribunals or Courts

Failed immigration applicants, sponsors of rejected sponsorship applications, visitors, students and foreign workers who neglected to

extend their visas, landed immigrants in violation of the provisions in the *Immigration Act* and *Regulations* must appear for an Examination by a Senior Immigration Officer, an Adjudication Board or the Immigration Appeal Board. Refugee claimants must appear before the Convention Refugee and Determination Division and failed refugee claimants have the right to appeal to Federal Court.

Immigration and Refugee Board

Each division of the Immigration and Refugee Board -- Adjudication, Convention Refugee Determination and Immigrant Appeal -- has rules governing the practice and procedure within its jurisdiction.

- **Adjudication Division**

The variety of cases brought before this Division include people seeking entry to Canada who are allegedly inadmissible or people in Canada either as visitors or permanent residents who are alleged to have violated a provision of the *Immigration Act*. An Adjudicator is comparable to a judge in court. For example, an Adjudicator may decide whether visitors have overstayed the period allowed to visit Canada or whether a permanent resident has become inadmissible due to a criminal conviction in Canada. To prepare properly, the lawyer must interview the client and other witnesses, review relevant documents, research comparable cases and prepare legal argument. If it appears that an individual's constitutional rights have been violated, the lawyer must notify the federal and provincial governments. Further research and preparation are necessary to present constitutional arguments. Of course, counsel must first know to make such an argument.

The decisions at these hearings often have permanent consequences for the persons concerned –- their ability to remain in or to ever re-enter Canada. If the allegations against the individual are proven, then the

adjudicator must decide on the type of removal order. In most situations, the adjudicator has the option to issue a departure order or a deportation order. With a departure order, the person must leave Canada but can re-apply for entry at a later date. If a deportation order is issued, the person will never be allowed to re-enter Canada without written approval of the Minister of Citizenship and Immigration and repayment of the removal cost. The lawyer must present all the circumstances of the case so the Adjudicator can make a reasoned decision. The decision is based on legislated criteria, that is, whether that person will leave Canada within the stipulated period and whether, in all the circumstances, that person ought to be allowed to return to Canada. If the Adjudicator determines that these conditions are not met, a deportation order must be issued. Moreover, under recent amendments, if a person fails to leave Canada within 30 days of the issuance of the departure order, it will automatically become a deportation order.

- **Convention Refugee and Determination Division (CRDD)**

The CRDD determines whether refugee claimants would be safe from persecution in their country of citizenship. The determination affects the refugee claimant and the claimant's relatives, both in Canada and in the claimant's country of citizenship. Board members apply the UNHCR definition of what constitutes a Convention Refugee and decide whether the person has grounds to fear persecution owing to the person's race, religion, nationality, membership in a particular social group or political opinion. Individual circumstances must be weighed in light of case law which contemplates all components of the definition of Convention refugee, ranging from the standard of proof to be applied to clarifying each branch of persecution.

Immigration Act, s.32.02. [S.C. 1992, c.49, s.22].

Under the current policy, certain classes of failed refugee claimants can apply for permanent resident status on humanitarian or compassionate grounds. The lawyer must obtain detailed background information on the client to make a proper submission to support a successful application.

- **Immigration Appeal Division**

Generally, appeals arise when a permanent resident is ordered removed from Canada or when an applicant for permanent residence sponsored by a relative has been denied an immigration visa. There are many situations where someone can be found removable from or inadmissible to Canada, for example, prior criminal convictions, a pattern of criminal activity or having certain medical conditions. Often, counsel will present complex legal arguments which include comparisons of Canadian law with foreign law. Under current law, the Board member decides whether there has been an error in fact or in law and also considers whether in all the circumstances the person should remain in or be admitted to Canada. Under legislation now under consideration by Parliament, equitable jurisdiction would be removed and appeal rights severely limited in certain cases.

Ibid.

Federal Court of Canada

Where the *Immigration Act* does not permit appeal to the Immigration Appeal Division, the venue for possible review is the Trial Division of the Federal Court. The scope of judicial review is narrower than appeal rights in the Immigration Appeal Division, and is limited to setting aside decisions violating principles of natural justice or procedural fairness, errors in law or findings of fact made in a capricious or perverse manner. There is no automatic right to judicial review, except in the case of decisions made by visa officers. In other situations, leave must be obtained from a judge of the Trial Division. Leave applications are in writing, setting out the facts, the decision made, and affidavit evidence and legal argument for why leave should be granted. If leave is granted, the parties appear before a judge to present oral argument. There is no appeal of a refusal of leave and no appeal from the decision made on judicial review unless the judge certifies that there is a serious question of general importance arising from the decision and has stated that question.

Needless to say, the practice before the Federal Court of Canada must follow the *Federal Court Act* and *Federal Court Rules*. Failure to comply with time limitations or required documentation could lead to loss of the right of appeal or dismissal of the appeal.

III. Current Legislation Governing Persons Appearing as Counsel in Immigration Matters

1. Federal Legislation

Subsection 114(1)(v) of the *Immigration Act* provides that:

Federal Court Immigration Rules, 1993, ss.7 & 10

R.S.C. 1985, c.I-2.

The Governor in Council may make regulations . . .

(v) requiring any person, other than a person who is a member of the bar of any province, to make an application for and obtain a licence from such authority as is prescribed before the person may appear before an adjudicator, the Refugee Division or the Appeal Division as counsel for any fee, reward or other form of remuneration whatever;

Consequently, Parliament has contemplated regulations in respect of "non-lawyers" appearing on behalf of persons concerned before an adjudicator in the case of an inquiry; before the Refugee Division in Refugee Determination proceedings; or before the Immigration Appeal Division on appeals relating to immigration sponsorship or non-compliance with the *Immigration Act* or Regulations. Subsection 114(1)(v) exempts volunteers from immigrant or refugee agencies who appear without remuneration. Although the *Immigration Act* permits regulations governing appearances by "non-lawyers" before an adjudicator, the Refugee Division or the Appeal Divisions, no regulations have been passed to date.

In the *Federal Court Rules*, it is clear that "non-lawyers" are not permitted to appear in Federal Court. The *Supreme Court Act* and *Rules of the Supreme Court of Canada* have similar provisions prohibiting "non-lawyers" appearing before the Court.

"Persons Concerned" is defined in *Immigration Regulations*, 1978 SOR/78-172 s.2(1):

(a) with respect to an inquiry, the person who is the subject of the inquiry and includes any member of that person's family who may be included in any deportation order or conditional deportation order made against that person or in any departure order or conditional departure notice issued to that person, and

(b) with respect to a hearing pursuant to subsection 46(3) of the *Act*, as amended by S.C. 1988, c.35, s.14, the person who is the subject of the hearing.

An inquiry is a proceeding conducted by an adjudicator usually in public, and in the presence of persons with respect to whom the inquiry is to be held where practicable, to determine whether a person is admissible to Canada or should be removed from Canada. The procedure related to an inquiry is set forth in Sections 29 to 36 of the *Immigration Act*.

Rule 300(1) of the *Federal Court Rules*, C.R.C. 1978, c.663 states that an individual may act in person or be represented by a solicitor in any proceeding in the court.

Supreme Court Act, R.S.C. 1985, c.S-19:

s.22 All persons who are barristers or advocates in a province may practise as barristers, advocates and counsel in the Court.

s.23 All persons who are attorneys or solicitors of the superior courts in a province may practise as attorneys, solicitors, and proctors in the Court.

2. Provincial Legislation

The extent to which provincial legislation prohibits non-lawyers from practising law varies throughout Canada. However, the purpose of the legislation is the same: to protect the public from unqualified individuals providing legal services. The authority of the law societies is limited to requiring persons who practise law, or hold themselves out to practice law, to be registered members of the respective Law Society and hence subject to professional standards. The Law Society Acts also provide for group insurance funds so that aggrieved clients have recourse for damages in the event of breach of duty or ethics by lawyers.

The jurisdiction of provincial law societies does not extend to governing "non-members" who act in immigration matters not within the definition of practising law. No existing legislation requires Immigration Consultants to be registered or to be tested as to their knowledge and expertise.

Provincial legislation relating to the practice of law by "non-lawyers" in the provinces of British Columbia, Alberta and Ontario were selected for analysis in this submission.

British Columbia

Section 26(1) of the *Legal Profession Act* prohibits any person, other than a member of the law society in good standing, to engage in the practice of

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Rules of the Supreme Court of Canada, SOR/83-74:
12(1) A party to any proceedings may appear on his own behalf or by counsel.

1 "Counsel" includes a barrister, a solicitor or a lawyer representing a party.

law. (There are a few stated exceptions in the Act.) In Section 26(1), the practice of law is defined to include, *inter alia*:

> (a) appearing as counsel or advocate,
> (b) drawing, revising or settling ...
> (ii) a document for use in a proceeding, judicial or extra-judicial, ...
> (iv) a document relating in any way to proceedings under a Statute of Canada or the Province ...
> (c) doing any act or negotiating in any way for the settlement of, or settling, a claim or demand for damages, ...
> (e) giving legal advice,
> (f) the making of an offer to do anything referred to in paragraphs (a) to (e) and
> (g) the making of a representation by a person that the person is qualified or entitled to do anything referred to in paragraphs (a) to (e).

An immigration consultant, who is a "non-member" of the Law Society of British Columbia, could, in the course of acting for a person, perform some or all of the acts set out in (a), (b), (c), (e), (f), or (g), and would therefore be subject to sanction of the *Legal Profession Act*. Violation of the *Legal Profession Act* would result in a civil action by the Law Society of British Columbia. In a civil case now before the Supreme Court of British Columbia, an immigration consultant is being sued for allegedly practising in contravention of the *Legal Profession Act*. The case will be heard sometime in 1996.

Alberta

The *Legal Profession Act* of Alberta has a narrower ambit than that in British Columbia. Subsection 103(1) provides that:

> 103(1) No person shall, unless he is an active member of the society,
> (a) practice as a barrister or as a solicitor,
> (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
> (c) commence, carry on or defend any action or proceeding before a court or a judge on behalf of any person, or

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Legal Profession Act, R.S.B.C. 1987, c.25, as amended. See excerpt of the legislation in the reference document, Appendix A.

Law Society of British Columbia v. *Jaswant Singh Mangat and Westcoast Immigration Consultants Ltd.* (Supreme Court of British Columbia). Excerpts of pleadings are included in the reference document, Appendix A.

Legal Profession Act, R.S.A. 1990, c.L-9.1.

(d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort.

The authority of s.103(1) does not extend to quasi-judicial proceedings such as appearances before an adjudicator, the Refugee Division or the Appeal Division.

Ontario

Section 50(1) of the *Law Society Act* contains a simple provision regarding the practice as a barrister or a solicitor:

> Except where otherwise provided by law,
> (a) no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold themselves out as or represent themselves to be a barrister or solicitor or practise as a barrister or solicitor;

It appears that immigration consultants can deliver immigration services as long as they do not call themselves a barrister or solicitor in Ontario. Conversely, a suspended member of the Law Society of Upper Canada (a barrister and solicitor whose practice has been suspended for violation of the *Code of Professional Conduct* or the *Law Society Act)* cannot practise immigration law and procedure; otherwise, the suspended member will be subject to further sanction, including possible disbarment.

The Law Society of Upper Canada sets standards and provides for certification of lawyers wishing to hold themselves out as specialists in immigration law. While certification is not required to practice

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R.S.O. 1990, c.L.8.

A solicitor and barrister whose practice of law has been suspended by the Law Society because of violation of the cannons of professional ethics or the *Law Society Act*.

Pursuant to the Alberta *Legal Profession Act*, *supra*, note 15, "disbar" means terminate the membership of a person in the [Law] Society by (i) an order made under Part 3 or any predecessor of the Act of the Benchers then holding office, or (ii) the resignation of that person under Section 58.

Certification requirements are included in the reference document, Appendix A.

immigration law, the specialist lawyer must demonstrate stated levels of expertise and experience in immigration matters.

IV. Rationale for Regulations Governing Immigration Consultants

In the Government's 1981 discussion paper, a study of the representation of immigration applicants and conduct of unscrupulous immigration consultants was rationalized on three grounds:

* incompetence of immigration consultants;
* exorbitant fees charged by immigration consultants; and
* unprofessional and unethical conduct of some consultants.

1. Incompetence of Immigration Consultants

Anyone can set up business as an immigration consultant, regardless of qualification. These immigration consultants are not subject to any test of competency before they provide advice to would-be immigrants and refugee claimants. Where former employees of Citizenship and Immigration Canada establish immigration consulting businesses, they may indeed possess a higher level of competency than fly-by-night immigration consultants who prey on would-be immigrants. The concern, however, is with the standard of competency of immigration consultants in general. At present, no federal or provincial regulation governs the qualification of immigration consultants.

Supra, note 1.

2. *The Exorbitant Fee Charged by Immigration Consultants*

"Gullible immigrants" are said to be taken advantage of by unscrupulous immigration consultants who charge "unduly high fees" for simple services. This observation by the task force in the 1980's became more apparent in the 1990's. For example, a former Chair of the Immigration Law Section (BC) of the Canadian Bar Association, was asked by an immigration consultant to "take over the files of 500 Fijian refugee claimants and to take the cases to inquiry because the consultant was closing his business". This immigration consultant had charged $500 "just for filling out a form". Three immigration consultants investigated by the RCMP in April 1991 were said to be charging refugee claimants in the range of $2,000 to $4,000 for the application of "phony" employment authorizations.

While some lawyers with less than desirable knowledge and experience in immigration matters may charge in the same price range, lawyers are subject to professional rules and ethical guidelines through their provincial governing bodies. A mechanism exists for clients alleging over-billing to have the lawyer's account "taxed" by an officer of the Court.

3. *Unprofessional and Unethical Conduct of Some Immigration Consultants*

Supra, note 1, p.1.

Immigration Consultants are defined as "individuals, other than lawyers, who offer advice or representation to immigrants in relation to immigration matters for remuneration... [and] who hold themselves out as having expertise in immigration matters which will assist potential immigrants in their applications.", *Supra*, note 1, pp. 1 & 2.

Supra, pp. 3 & 4.

"Immigration Consultants Accused of Exploitation" *Vancouver Sun* (26 September 1990) B1 and B2.

Ibid., p. B2.

"Immigration Consultants Shut Down Operations" *Toronto Star* (27 April 1991) A3.

Of greater concern to government officials, law enforcement bodies, consumer rights groups, law societies and the general public is the unprofessional and unethical conduct of some immigration consultants.

For example, Jose Rafael was convicted in 1989 for counselling Roman Catholics to make refugee claims on the ground of persecution as Jehovah's Witnesses in Portugal. According to the former Director of Immigration, B.C.-Yukon region, some immigration consultants advised Fijian refugee claimants to prolong the refugee claim process rather than accept Departmental advice to return to Fiji and seek re-entry as regular immigrants. Gordon Fairweather, former Chair, Immigration and Refugee Board, stated that thousands of refugee claimants were counselled to make bogus refugee claims although they admitted coming to Canada to seek economic gain rather than safety from persecution.

Immigration consultants have joined lawyers in fraudulent schemes to issue unauthorized work visas to otherwise not qualified non-Canadian workers in a bid to stay in Canada. Along the same fraudulent scheme, an Edmonton immigration officer and an immigration consultant were involved in issuing work visas to 29 visitors to Canada for which they were not qualified. In other cases, immigration consultants made "unethical promises" and guaranteed results for their clients. Would-be immigrants have been counselled to invest in shell companies without assets to qualify as business immigrants.

"Convicted Refugee Adviser Must Pay Fine Before Appeal" *The Toronto Star* (28 February 1989) A11.

"Immigration Consultants Accused of Exploitation" *Vancouver Sun* (26 September 1990) B1.

Supra, note 2.

"Immigration lawyer, adviser face charges in fraud case" *The Toronto Star* (8 August 1989) A4.

"Mounties Charge Immigration Officer - False Work Visas issued" *Edmonton Journal* (4 June 1992) A1.

"Immigration Consultants Accused of Exploitation" *The Vancouver Sun* (26 September 1990) B2.

With global political instability, the desperation of would-be immigrants has heightened in recent years. The need to regulate immigration consultants by either the federal or provincial governments will become more acute in the years to come.

V. Conclusions

The recurring problems with fraudulent practices by immigration consultants are evident in bogus refugee claims, wrongful issuance of work visas, loss of investment by business immigrants and the increasing number of illegal immigrants in Canada. While the conduct of some lawyers can come under scrutiny, lawyers are subject to sanction by the provincial governing bodies and can lose their licence to practise law for fraud or unethical conduct.

Furthermore, the Canadian Bar Association and the law societies provide a national network of continuing legal education programs, so that members keep abreast of the latest developments in the law. The Immigration Law Section consults regularly with the Minister of Citizenship and Immigration and departmental officials on matters of mutual concern.

Immigration consultants are bound by no professional guidelines or qualification. The level of knowledge and experience of immigration consultants are uneven and they are not subject to sanction for unethical conduct except through the *Criminal Code*, the *Immigration Act* and provincial legislation governing the practice of law.

For example, the Law Society of Upper Canada disbarred Constance Nakatsu for fraud and Angelina Codina for knowingly counselling clients to violate the *Immigration Act*.

Provincial bodies governing the practice of law have limited scope, and thus would not lend themselves to governing the standards and conduct of immigration consultants. At best, the law societies can only prohibit the immigration consultants from practising law which is differently described from province to province. They do not have the authority to set standards for immigration consultants.

The Organization of Professional Immigration Consultants (OPIC) was established in 1991 to distinguish themselves from the "unscrupulous immigration consultants" OPIC attempts to set standards for its members. However, it is only a voluntary organization and cannot bind all immigration consultants.

VI. Recommendations

Public protection demands that those providing advice in immigration matters must be regulated. Such regulation must include entrance requirements, licensing regulations, disciplinary measures for fraud and misrepresentation, and a compensation scheme for protection of the clients.

This regulation can be achieved in one of two ways:

1. amend the *Immigration Act* to provide that only members in good standing of a provincial or territorial law society can act in any immigration matter for remuneration.

2. amend the *Immigration Act* to provide that only counsel can act in any immigration matter for remuneration, unless prohibited by the

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"Immigration Advisers Join to Set Standards" *The Toronto Star* (30 November 1991) A20.

"Immigration matters" includes provision of advice,preparation of immigration application, business outlines, and representation at refugee hearings, inquiries and appeals.

court of relevant jurisdiction. "Counsel" would be defined as members of good standing of any provincial or territorial law society; or any person in good standing under provincial legislation governing the licensing of immigration consultants.

1. Permit Only Lawyers to Act in Immigration Matters

Given the complexity of immigration matters, it could be argued that such advice can be given only by those formally trained in the practice of law.

For example, legislation in the United States restricts counsel in immigration matters to lawyers and non-profit organizations. The law pertains to written submissions and matters before administrative tribunals and courts.

Specific amendments to the *Immigration Act* would be as follows:

1) **That s.114(1), allowing the Governor in Council to make regulations respecting immigration consultants, be repealed.**

2) **That s.30 be amended to remove the words "...barrister, solicitor or other...", so that it would read: *Every person with respect to whom an inquiry is to be held shall be informed of the person's right to obtain the services of counsel and to be represented by such counsel at the inquiry and shall be given a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense.***

3) **That s.69(1) be amended to remove the words "...barrister, solicitor or other...", so that it would read: *In any proceedings before the Refugee Division, the***

This condition will prohibit immigration consultants from appearing in Federal Court and the Supreme Court of Canada, as provided in the *Federal Court Act* and the *Supreme Court Act*.

8 CFR 103.2(b)

Minister may be represented by counsel or an agent and the person who is the subject of the proceedings may, at that person's own expense, be represented by counsel.

4) **That a definition of "counsel" be added to s.2, to mean a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province or territory to do or perform in relation to legal proceedings;**

5) **That the following provision be added to the Act:**
"No one but a barrister or solicitor who is a member in good standing of a bar of a province in Canada may:
(a) appear as counsel,
(b) draw, revise or settle any document for use in any proceeding judicial or extra-judicial, arising under this *Act*,
(c) give legal advice,
(d) make an offer to do anything referred to in paragraphs (a) to (c), or
(e) make a representation that the person is qualified or entitled to do anything referred to in paras (a) to (c)
but it does not include
(f) any of those acts if it is not done for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed."

2. Permit Lawyers and Licensed Immigration Consultants to Act in Immigration Matters

The alternative option would require anyone involved in the advocacy process in immigration to be either a member of a law society or to be licensed by a province under a law to regulate the practice of immigration consultants.

The onus would be on immigration consultants wishing to provide immigration advice and services to submit a proposal to the provincial

governments to establish a licensing body. Each provincial government would assess the proposal as with other existing self-governing bodies. The self-governing body would have to include admission requirements, standards of competency, an insurance or compensation fund, a code of ethics, a complaint mechanism, offences and penalties, and an annual licensing fee to cover administrative costs, so there would be no cost to the government.

For example, in Alberta, the *Real Estate Agents' Licensing Act*, RSA. 1980, c.R-5, requires a licensed real estate agent to have certain level of training, competency and personal integrity, and to pay the fees prescribed by the Act. The Alberta *Licensing of Trades and Business Act*, RSA, c.L-13 is included in the reference document, Appendix A.

Appendix F

Bill C-35, the *Cracking Down on Crooked Consultants Act*

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

October 2010

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

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Bill C-35, the *Cracking Down on Crooked Consultants Act*

Bill C-35, the *Cracking Down on Crooked Consultants Act*

I. INTRODUCTION

The Canadian Bar Association's National Citizenship and Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-35, the *Cracking Down on Crooked Consultants Act*. Since 1995, we have made six prior submissions on the issue of immigration consultants, including our most recent letter in July 2010.[1]

We share the concerns about protecting the public from unscrupulous individuals who exploit vulnerable immigration applicants, and from unqualified representatives who may do more damage than provide meaningful assistance. In the six years the Canadian Society of Immigration Consultants (CSIC) has functioned, there has been evidence of ineffective consultant regulation. As a result, public confidence in the system and consumer protection are at risk. We appreciate that this is a difficult problem to solve. The CBA Section has consistently maintained that in order to ensure the best outcomes for the public and in particular, vulnerable immigration applicants, only members in good standing of a provincial or territorial law society or the Chambre des Notaires du Québec should practice immigration law for remuneration. Alternatively, if consultants are permitted to provide immigration services for remuneration, it is imperative that they are properly regulated. Whether it is possible to effectively regulate consultants and, if so, how to accomplish this, are complex issues, with potentially significant administrative and financial implications.

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1 See: June 1995, "Submission on Immigration Consultants," online: http://www.cba.org/CBA/sections_cship/pdf/95-14-ENG.pdf; July 1999, "Submission on Immigration Consultants," online: http://www.cba.org/CBA/sections_cship/pdf/99-31-eng.pdf; November 2002, "Submission on Immigration Consulting Industry," online: http://www.cba.org/CBA/sections_cship/pdf/nov_02.pdf; December 12, 2005, Letter to the Minister of Citizenship and Immigration, online: http://www.cba.org/CBA/sections_cship/pdf/society.pdf; July 10, 2007, Letter to the Minister of Citizenship and Immigration, online: http://www.cba.org/CBA/sections_cship/pdf/csic.pdf; and July 2, 2010, Letter to Citizenship and Immigration Canada, online: http://www.cba.org/CBA/submissions/pdf/10-47-eng.pdf.

We agree with the Bill's extension of the prohibition against unregulated persons representing immigration applicants for remuneration to all stages of the immigration process. This amendment is necessary to combat the problem of "ghost consulting," which the Standing Committee on Citizenship and Immigration has previously considered in its June 2008 and June 2009 reports.[2] The lack of regulation and enforcement in this area has led to a proliferation of incompetent and unethical consultants, with no means of accountability and no recourse for their victims. We recommend some amendments to assist in strengthening the relevant provisions of Bill C-35.

Aside from provincial and territorial regulators of the legal profession (law societies and the Chambre des Notaires du Québec) there does not currently exist an organization with the necessary independence, capacity and mandate to establish and promote ethical and professional standards among consultants, or to monitor, investigate and discipline consultants. Such an organization would necessarily require statutory authority to audit, subpoena and seize documents during investigations.[3]

In addition to lacking adequate legal authority, CSIC has demonstrated an inability to effectively regulate consultants. In addition to media articles,[4] these problems are well documented in the reports by this Committee and in Federal Court proceedings documenting the governance skirmishes between the CSIC board and members.[5]

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2 "Regulating Immigration Consultants," online: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3560686&Language=E&Mode=1&Parl=39&Ses=2;
"Migrant Workers and Ghost Consultants," online: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3969226&Language=E&Mode=1&Parl=40&Ses=2.

3 See our July 2010 letter to Citizenship and Immigration Canada.

4 The best known of these is the *Toronto Star* exposé, "Lost in Migration," a series of articles uncovering the extent of the ghost consultant problem in 2007.

5 See the affidavits filed in Federal Court judicial review application of Katarina Onuschak, challenging the 2009 CSIC elections, T-1767-09, and those filed in the Federal Court judicial review application of Philip Mooney et al., regarding CSIC's discipline investigation of members of CAPIC for publicly criticizing CSIC and supporting the recommendations of the 2008 report of the Commons Committee, T-1304-08 (in particular, the Affidavit of former CSIC investigator Robert Kewley alleging that at times CSIC's complaints and investigations process was used for political purposes). In the latter case, the application was dismissed as being premature (decision to investigate not being one from which judicial review may be sought).

It should not be presumed that the best way forward is to continue the self-regulation of immigration consultants, given the Canadian experience to date and the experience of other nations. The CBA Section suggests that the Committee consider recommending that representation of immigrants and the practice of immigration law be limited to members of provincial and territorial law societies and the Chambre des Notaires du Québec.

If the Government of Canada continues with its experiment of permitting consultants to provide immigration services, we believe that the proposed legislation requires further safeguards to ensure accountability and to give the Minister greater oversight of the regulatory body. This would include the power to revoke the Minister's designation under s. 91(5) and the power to appoint a trustee to assume control of the designated body in the event that it fails or is unable to act in the public interest.

II. BEST PRACTICES – FOREIGN JURISDICTIONS

In considering a Canadian approach to the regulation of immigration consultants, the Committee should consider "best practices" from other jurisdictions and learn from the problems that persist in these jurisdictions after a regulatory regime was implemented.

A. Australia

In 1998, Australia employed a similar approach to Bill C-35, passing regulations to prohibit the practice of immigration law by consultants who were not registered with the Migration Agents Registration Authority (MARA). The Australian government did not maintain control over the MARA, but rather appointed the Migration Institute of Australia (MIA), the self-regulating body for migration agents that had operated up to that point. This approach proved unsuccessful and by July 2009, the Australian government was forced to revoke MIA's appointment under allegations of "conflict of interest" and "structural flaws"[6]. When the MARA re-opened in August 2009, it did so *only* under the Department of Citizenship and Immigration.

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6 See www.minister.immi.gov.au/media/media-releases/2009/ce09033.htm, www.minister.immi.gov.au/media/media-releases/2009/ce09014.htm, and www.minister.immi.gov.au/media/media-releases/2009/ce09072.htm.

B. United Kingdom

In the United Kingdom, by contrast, immigration legislation designates an Office of the Immigration Services Commissioner (OISC) to regulate consultants, but leaves ultimate control with the Secretary of State, who maintains the power to designate professional bodies that are exempt from registration, and the power to revoke privileges for those professional bodies that have "consistently failed to provide effective regulation of its members in their provision of immigration advice or immigration services".[7] Any rules introduced by the Commissioner must be vetted by the public, by the law societies and by the bench.

The UK passed further legislation in 2007 to create another level of monitoring. The Legal Services Board was created with a mandate to protect and promote the public interest, improve access to justice, promote consumer protection, and maintain adherence to ethical practice standards across the legal services sector.

The UK has divided the practice of immigration law into three levels of increasing complexity and restricting practice at each level to those consultants who have proven an appropriate degree of training and education. Recent reports show that the system has fallen short due to shortcomings in OISC's testing and disciplinary mechanisms.

C. United States

The United States has attempted to protect the public interest by restricting the practice of immigration law to US attorneys. The legislation does not prohibit non-lawyers from assisting applicants to complete immigration forms, and also allows for appointment of accredited professionals in certain circumstances where legal services are provided for a nominal fee. The implications of allowing non-lawyers to provide these immigration services are discussed further below.

III. "REPRESENT OR ADVISE" AND BILL C-35

The triggering language in Bill C-35 is "represent or advise" in connection to a proceeding or application under the *Immigration and Refugee Protection Act*. Since 1996,[8] the CBA Section

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7 Section 86(2), the *Immigration and Asylum Act* 1999.

8 CBA Resolution 96-03-M.

has urged the government to define clearly what immigration services are being regulated. Other immigrant receiving nations have recognized the need to clearly distinguish legal advice (which can only be provided by an authorized representative) from "legal information" (which can be provided by unlicensed consultants).

The UK defines "immigration practice" and "immigration advice" in a manner which appears to encompass pre-application legal work.[9] Australia explicitly defines "immigration assistance" to include advice and services related to preparing the application.[10] In our view, the language of section 91 should be broadened to include all work in preparing an immigration application.

Although the US has arguably been most effective in preventing the unauthorized practice of immigration law, the greatest weakness of the US legislation is the limited definition of immigration practice,[11] which rests on an incorrect assumption that a representative can fill in

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9 The *Immigration and Asylum Act* 1999, defines "immigration advice" as "advice which—

(a) relates to a particular individual;

(b) is given in connection with one or more relevant matters;

(c) is given by a person who knows that he is giving it in relation to a particular individual and in connection with one or more relevant matters; and

(d) is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings.

"Immigration services" are defined as "the making of representations on behalf of a particular individual—

(a) in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or

(b) in correspondence with a Minister of the Crown or government department, in connection with one or more relevant matters;

10 See the *Migration Act* 1958, s.276(1):

1) For the purposes of this Part, a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by:

a. preparing, or helping to prepare, the visa application or cancellation review application; or

b. advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or

c. preparing for proceedings before a court or review authority in relation to the visa application or cancellation review application; or

d. representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.

11 TITLE 8, CODE OF FEDERAL REGULATIONS (8 CFR), § Sec. 1.1(k):

(k) The term "preparation," constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.

immigration forms without providing legal advice. This under inclusive definition has enabled many unscrupulous "notarios" to continue operating.

Under Bill C-35, section 91(1) of the *Immigration and Refugee Protection Act* would read: "… no person shall knowingly represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under this *Act*." This could be strengthened to prevent unscrupulous consultants from hiding behind the fact that they do not receive compensation directly from clients. More restrictive wording would also prevent businesses such as recruiting agencies from attempting to evade the legislation by receiving payment for recruitment services and then completing immigration documents notionally "for free."
To effectively curb "ghost consulting" activities, the language in proposed s.91(1) should be broadened to include all instances of applying laws and regulations to the facts of an individual case for remuneration. We do not believe that such wording would affect the current operations of Members of Parliament and non-governmental organizations assisting refugees and immigrants in the public interest.

Recommendation

1. **The CBA recommends that section 91(1) be amended to read: "Subject to this section, no person shall knowingly represent, advise a person or otherwise engage in any activity for direct or indirect consideration — or offer to do so — in connection with a proceeding or application under this Act."**

Proposed IRPA section 91(2) gives lawyers, notaries and licensed consultants the same standing, empowering them to "represent or advise" an immigration applicant under s.91(1):

> (2) A person does not contravene subsection (1) if they are a member in good standing of:
>
> (a) a bar of a province or the Chambre des notaires du Québec; or
>
> (b) a body designated under subsection (5).

Whether s.91(2)(b) should remain in the Bill as currently written is the subject of the next section (Self Regulation of Consultants). However, if s.91(2)(b) does remain in the Bill, it should restrict those who may perform certain immigration services to members of a bar of a province or territory and the Chambre des notaires du Québec. Members of a bar of a province or territory and the Chambre des notaires du Québec have received a formal university-level

education aimed at developing the ability to analyze and address complex legal issues. Many issues in the immigration context not only involve immigration law but other areas of law, such as administrative, criminal, constitutional and human rights law. Inadmissibility or validity of a foreign marriage are just two examples of issues that require a sophisticated legal analysis for a representative to be able to competently advise and draft documents for clients.

Recommendation

2. **If subsection 91.(2)(b) remains, then the following subsection should be added:**

   91 (2)(c) Even where a body has been designated under subsection (5), the following acts should only be performed by members of a bar of a province or territory and the Chambre des notaires du Québec:

   a) appearing as counsel;
   b) drafting, revising or settling any document for use in any application under the Act or in any proceeding before a court, tribunal or adjudicator;
   c) giving legal advice;
   d) making an offer to do anything referred to in paragraphs a) through c);
   e) making a representation that the person is qualified or entitled to do anything referred to in paragraphs a) through c).

Proposed s.91(4) indicates that those who have "an agreement or arrangement [with] Her Majesty in right of Canada" to assist persons with immigration applications "including for a permanent or temporary resident visa, travel documents or a work or study permit," will not contravene s.91(1) if those entities are acting in accordance with that agreement.

The Minister must pass regulations before authorizing a "designated body" outlined in s.91(5). Accredited educational institutions are one example of a designated body that may be legitimately authorized by the Ministry. However, this provision is too broad and allows the government to enter into agreements or arrangements without oversight and clearly defined criteria or regulations. At the very least, the *Act* should require these agreements or arrangements to be publicized and open to public consultation prior to coming into force.

If agreements are allowed, it will be even more important for the legislation to clearly prescribe the scope of permissible activities under s.91(4). Assistance should only be permitted by way of an agreement if it does not refer to providing legal services, (i.e. representation and advice) to applicants. Assistance should be limited to administrative support such as mailing services, printing documents and facilitating correspondence between CIC and the individuals concerned. Any individual acting pursuant to an agreement should be in contravention of section 91(1) if providing any other services.

The CBA Section has raised concerns that existing Visa Application Centres (known as VACs) are providing advice to immigration applicants. Section members have recounted instances where VACs have advised applicants (wrongly) on the necessity of including certain documents or providing assistance in the completion of forms. The agreements between government and these entities have not been made public.

Recommendation:

3. **The CBA recommends, if agreements or arrangements are permitted:**

   The Act should distinguish the right to provide assistance in s.91(4) from the right to provide immigration advice and representation in s.91(1);

   The Act should require that the agreements or arrangements be publicized and open to public consultation prior to coming into force.

IV. SELF-REGULATION OF CONSULTANTS

Subsection 91(5) provides:

> The Minister may, by regulation, designate a body whose members in good standing may represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under this Act.

The CBA's Section believes that only members in good standing of a provincial or territorial law society or the Chambre des Notaires du Québec should practice immigration law for consideration. If that recommendation were followed, there would be no need for s.91(5).

If the conclusion of the Committee is that the Minister should be empowered to designate a body to regulate consultants, the *Act* should also provide the power to revoke a designation, in the event that a body is no longer respecting the established criteria. The *Act* should also grant the ability to create regulations addressing revocation, including the circumstances in which a designated body would no longer be recognized.

The language in section 91(5) is permissive, in that the Minister may decide not to designate a body and is under no legal obligation to do so. A designation should only be made if a licensing body meets all the necessary criteria for effective regulation in the public interest and has demonstrated its ability to ensure effective regulation of consultants.

Subsection 91(5) will also require further consequential amendments if our recommendation to broaden the language in s.91(1) is accepted.

Recommendation

4. **The CBA recommends:**

   The *Act* should explicitly permit revocation of a designation under s.91(5), and empower the creation of regulations specifying criteria to be used in making the decision whether to revoke a designation.

Proposed s.91(6) provides:

> The Governor in Council may make regulations requiring the designated body to provide the Minister with any information set out in the regulations for the purpose of assisting the Minister to evaluate whether the designated body governs its members in a manner that is in the public interest so that they provide professional and ethical representation and advice, and for any other purpose related to preserving the integrity of policies and programs for which the Minister is responsible under this *Act*.

We agree that, to maintain public confidence and ensure consumer protection, it is vital for the government to maintain an ongoing role to ensure that the appointed regulatory body conducts itself in an appropriate manner. While we welcome additional supervisory powers given to the Minister to ensure that the designated body is acting in the public interest, the proposed amendments do not go far enough. We suggest that the *Act* specifically establish the power of the Minister to make orders addressing the failure to provide information or to act in the public interest, including suspending or revoking the designation of the body.

We also suggest that the Minister have the power to appoint a trustee to assume control of the designated body in the event that the Minister determines that the body has failed to protect the public interest. In our July 2010 submission to Citizenship and Immigration Canada, we proposed that while an appropriate regulator was being considered, the government should appoint a transitional body composed of former justices, former high-ranking members of tribunals with extensive immigration and refugee experience, academics, and other professionals with relevant governance expertise (such as accountants). We also propose that the transitional body could act as trustee.

Recommendation

5. **The CBA recommends:**

   The *Act* should explicitly grant to the Minister the power to order the suspension or revocation of a body's designation for failure to provide information under s.91(6) or for failure to act in the public interest;

   The *Act* should grant the Minister the power to appoint a trustee to assume control of the designated body in the event of a determination of a failure to protect the public interest.

Any regulatory body must be capable of employing effective mechanisms to investigate and prosecute discipline matters, including statutory powers to audit, subpoena and seize documents, as is the case with provincial and territorial law societies. This is a significant challenge. We do not believe a body currently exists that is so empowered and is willing to take on this task. Whether a body that is not specified in the legislation, but is designated as regulator by the Minister, could receive these statutory powers is a question that is beyond the scope of this submission.

International experiences highlight the inherent challenges of self-regulation for consultants where, like CSIC, internal governance problems and lack of enforcement of ethical and professional standards, among other things, have failed to serve the public interest. On the other hand, law societies have a long history of successfully regulating and disciplining their members. Having consultants work under the supervision of lawyers would allow for regulation using a body already in place, with a proven track record of effective regulation in

the public interest, without falling susceptible to the inherent pitfalls of consultant regulation in Canada and abroad.

V. CONCLUSION

History in Canada and abroad has shown self regulation for consultants to be a failure. As the findings of this Committee and other documentation have shown, the problems extend far beyond ghost consultants and rest firmly in the lack of proper regulation. The social, financial and emotional costs to vulnerable immigrants, as well as the negative impact on the integrity of the immigration system and public confidence generally, can no longer be tolerated.

Over the past several decades, the Canadian government has moved from little to no regulation to full regulation of immigration consultants with no significant change. Under the current regime, unscrupulous consultants and ghost consultants have been allowed to flourish within and outside of Canada. CSIC has been mired in allegations of financial mismanagement and governance issues and CSIC members and other consultants have been the subject of high profile allegations of fraud and abuse.

Other immigrant receiving nations including Australia, the United Kingdom and the United States have experienced similar problems in attempting to regulate the provision of legal services to immigrants. Canada should learn from these experiences and make a renewed commitment to consumer protection in the immigration context.

The CBA Section respectfully submits that the public can be most effectively protected and significant costs can be spared if the representation of immigrants and the practice of immigration law are restricted to members of provincial and territorial law societies and the Chambre des Notaires du Québec, and those who work under their direction and control.

If consultants are to be permitted to continue providing immigration services, they must be effectively regulated by a body over which the government has appropriate oversight. This will require the strengthening of proposed legislative amendments in Bill C-35.