Submission on

Immigration Consultants

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
Canadian Bar Association

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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.