



February 14, 2006

Michel Dupuis
Citizenship and Immigration Canada
Director, Social Policy Programs
300 Slater Street
Ottawa ON K1A 1L1

Dear Sir,

RE: Discussion Paper: Proposal to Amend the *IRP Regulations* to Permit Information Sharing

I write to you on behalf of the Canadian Bar Association (CBA) with respect to Citizenship and Immigration Canada's November 2005 discussion paper entitled, "Proposal to Amend the *IRP Regulations* to Permit Information Sharing" (the Discussion Paper). The CBA is concerned about the impact of the proposal upon client privacy and upon the *Charter* rights of clients and their lawyers.

The proposal in the Discussion Paper arises out of a recommendation of the Ministerial Advisory Committee on Regulating Immigration Consultants in May 2003, that the regulatory body for immigration consultants should "develop a mechanism for regular communication and interaction with lawyers' associations, Citizenship and Immigration, the Immigration and Refugee Board, the RCMP and other appropriate agencies." The proposal, however, is to provide regulatory authorization for communications by *Citizenship and Immigration Canada* to the Canadian Society of Immigration Consultants (CSIC), the law societies, the Canadian Border Services Agency (CBSA), and other third parties regarding misconduct by authorized representatives in immigration matters. Further, the proposed authorization would extend to communications about alleged misconduct of immigration consultants *and* lawyers. The Discussion Paper indicates that CIC has determined that regulatory amendment permitting the sharing of information is preferred because of the difficulties in obtaining consent and the complexities in complying with the *Privacy Act* and section 8 of the *Charter of Rights and Freedoms*. In our view, this information sharing also engages "due process" issues under section 7 of the *Charter*.



Our discussions with Jessica Menchions of your office clarified the intended parameters of the proposal. She advised us that:

- CIC has no intention of being judge and jury with respect to the conduct of authorized representatives. Rather, the intent is that CIC will report concerns about alleged misconduct of representatives to the appropriate governing body (not third parties). It would remain with the governing body to deal with the complaint;
- CIC wants to formalize the information exchange between CIC and CBSA, which has been occurring to date based on the “consistent use” umbrella, but recent Supreme Court of Canada cases raise *Charter* questions about the practice.¹;
- A Memorandum of Understanding between CBSA and CIC is pending signature (possibly by March 2006) which will outline the responsibilities between CBSA and CIC on information sharing with the proposed regulatory change to codify same;
- At present, the Minister’s previous public statement that CIC has an arm’s length relationship with CSIC stands; and
- CIC is continuing to treat consultants “in good standing with CSIC” as authorized representatives, the same as lawyers. CIC will defer to CSIC and the Law Societies to discipline their members.

Notwithstanding the foregoing, the Canadian Bar Association has two fundamental concerns about the intent and scope of the proposal:

- Client privacy
- Discipline of Lawyers

Client Privacy

- We oppose any amendment to the IRPA regulations that permits clients’ privacy interests to be bypassed without their consent. Democratic principles require that if citizens’ rights to privacy are to be infringed, there must be a demonstrable need to do so, and their rights must be interfered with as little as possible to accomplish the objective. There is nothing in the Discussion Paper that shows obtaining consent from clients is a significant impediment for CIC in reporting misconduct.
- Even assuming such an impediment, the appropriate balancing of public interests and individual rights to privacy occurs in the relevant section of the *Privacy Act*. A government institution may disclose personal information so long as “the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,” or the “disclosure would clearly benefit the individual to whom the information relates.”² Viewed against both tests, the proposed amendment fails. It would

¹ *R. v. Ling* [2002] 3 S.C.R. 814; and *R. v. Jarvis* [2002] 3 S.C.R. 757.

² Clause 8(2)(m).



completely tilt the balance away from individual privacy rights on the basis of administrative expediency. There is no sufficient public policy interest that justifies a systematized disregard of immigration clients' privacy.

Discipline of Lawyers

- The proposal places lawyers and consultants on the same footing without regard to functional differences between CSIC and the law societies, particularly CSIC's apparent absence of effective competence and professional accountability standards.³
- Despite statements to the contrary, the Discussion Paper proposes that CIC officials could communicate with a number of third parties on their assessment of an authorized representative's conduct. This would circumvent the disciplinary function of law societies and would allow CIC to make its own assessments of conduct. This is inappropriate, in that it undermines the self-regulating status of the legal profession.
- The appropriate forum for discipline regarding alleged misconduct by lawyers or Quebec notaries is the responsible regulatory body. We stress the importance of upholding the integrity of lawyers' self-regulation to ensure independence from the state. A regulatory system that would diminish the independence of the legal profession by making it (or creating the perception that it is) subject to the control of government would seriously harm the role of lawyers in a democratic society.
- We oppose any change to the IRPA regulations that would provide a blanket endorsement for information exchanges between CIC/CBSA and a lawyer's law society (or the Chambre des notaires du Quebec) or with any other third party, or would diminish CIC's obligation to make an individualized assessment of the need and legal authority to disclose information. Mechanisms already exist within our law societies which allow CIC/CBSA, our clients, or the public to file complaints or raise concerns about a lawyer's conduct or competence. We do not dispute that CIC and CBSA are entitled to make complaints in their own right to the relevant regulatory body about an authorized representative's alleged misconduct. However, any concerns are raised, rightfully so, on a case-by-case basis, following due diligence principles, and in a manner consistent with the *Charter*.

Law Societies have an established record of effectively regulating their members and disciplining those shown not to meet the established standards. CIC has demonstrated no reason for it to interfere with this process. The CBA has consistently and emphatically highlighted the connection between the role of self-regulation and the rule of law. Lawyers are entitled, and indeed are obliged by their professional tenets, "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law."⁴ If there is pressure placed on lawyers to refrain from representing

³ I raised these concerns in a letter dated December 12, 2005 to then Minister Volpe (copy attached for your ease of reference).

⁴ See Chapters IX and XII of the CBA's Code of Professional Conduct, online at <http://www.cba.org/cba/Epiigram/february2002/codeeng.pdf>, and <http://www.cba.org/CBA/resolutions/pdf/04-01-A-Annex5.pdf>, respectively.



a client, from advancing a position, or undertaking a particular legal strategy because of concerns as to how a state actor might respond and characterize their conduct to others under the rubric of “information sharing,” then there is no assurance that the law will be applied equally to all.

We believe that the key issue at hand is CIC and CBSA's concerns with CSIC and immigration consultants, which the Canadian Bar Association shares. Regulatory change under IRPA is not the appropriate forum to address this problem. The federal government should squarely address this issue by taking responsibility to ensure that CSIC performs its intended role as regulator.

We look forward to further consultation with your office on the Discussion Paper and any future draft regulations. Thank you for the opportunity to provide you with our preliminary comments at this early consultative stage.

Yours truly,

(Original signed by Brian Tabor)

Brian A Tabor, Q.C.

cc. Dawn Edlund
Senior General Counsel, Citizenship and Immigration Canada
Jessica Menchions