THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 2, 2008

Les Linklater, Director General
Citizenship and Immigration Canada
Immigration Branch
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Mr. Linklater:

RE: Information Sharing

I write on behalf of the Citizenship and Immigration Section of the Canadian Bar Association (CBA Section), in response to your letter received by us on June 3rd, 2008.

The CBA wrote to CIC in February 2006 expressing our concerns about the proposed amendments to the *Immigration and Refugee Protection Regulations* that would authorize information sharing between Citizenship and Immigration Canada, the Canadian Border Security Agency (CBSA), the law societies, the Barreau du Québec, the Chambre des notaries du Québec, the Canadian Society of Immigration Consultants (CSIC), and other third parties regarding alleged misconduct by authorized representatives in immigration matters. We attach a copy of our earlier letter for your review. Our concerns, generally speaking, were that the proposal would sanction a systematic disregard of individual privacy for the sake of administrative expediency, and that it placed lawyers and immigration consultants on the same footing without regard to the functional differences between CSIC and the bodies regulating the conduct of lawyers and notaries.

Unfortunately, the revised proposal does not materially address our concerns. On the issue of client privacy, we must review the proposed regulatory amendments to determine whether clients' privacy will be protected by requiring their consent prior to releasing information. We view privacy protection as critical for the amendments to be consistent with s. 8 and the democratic principles underlying the *Canadian Charter of Rights and Freedoms*. We would be pleased to review any proposed regulatory amendments when they become available.

Second, with respect to the discipline of lawyers and notaries, we note two new objectives behind the proposed information sharing (now referred to as "disclosure"): CIC program integrity and consumer protection of CIC's clients. It is not the purpose of law societies to monitor and enforce the government's policy goals. On the contrary, we have a concern that CIC

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could use this process to curb the zealous advocacy of a tenacious lawyer and avoid embarrassment to government officials by making a complaint that the lawyer's actions threaten "program integrity and consumer protection."

If CIC is concerned with the alleged incompetence or misconduct of a lawyer or notary in their representation of a client in an immigration matter, we do not object (subject to the privacy concerns expressed above) to regulatory changes that would enable CIC, CBSA or Immigration and Refugee Board to register a complaint with the appropriate regulatory body where these departments are currently precluded from doing so. However, self-regulatory bodies must remain completely independent from the government, and it would not be appropriate for the government to attempt to constrain how its complaints are treated by these bodies or how they discharge their public protection mandate through negotiated Memoranda of Understanding. Each law society or regulatory body already has sufficient processes in place to accommodate any of concerns CIC may have.

We note an irony in the discussion of regulatory changes aimed at authorized representatives at a time when the department increasingly relies on third party and **unregulated** representatives to assist at Overseas Visa Offices. We submit that CIC should be addressing the lack of regulation and resulting threat to the public posed by overseas consultants and representatives or, at the very least, not actively engaging their services. This problem should be addressed in priority to issues of information sharing with Canadian law societies and the Chambre des notaries, which have a proven record of positive self-regulation.

Finally, it is not the law societies, but rather CSIC, which has failed to establish acceptable standards for the regulation of immigration representatives. The Standing Committee on Citizenship & Immigration's June 2008 report, "Regulating Immigration Consultants," details the many problems that have arisen with immigration consultants and the ability of CSIC to regulate them in the public interest. It proposes eight specific recommendations to deal with issues of program integrity, consumer protection and unacceptable practices by consultants. The report addresses the problem in its larger context, and the proposed regulatory changes should be reconsidered in light of the report's recommendations.

Yours truly,

(Original signed by Kerri A. Froc for Alex Stojicevic)

Alex Stojicevic
Chair, National Citizenship and Immigration Section

OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

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*.

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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

<u>Client Privacy</u>

- 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

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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

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[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