Bill C-35, the *Cracking Down on Crooked Consultants Act*

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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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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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;
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> (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.