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."

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
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

TABLE OF CONTENTS

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

TABLE OF CONTENTS

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

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?

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

TABLE OF CONTENTS

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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.
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> **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.
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> 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.
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> 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.
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> **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.