Submission on Immigration Consulting Industry

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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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:
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> 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.