

Bill C-35 and the Notice of Intent: The Facts So Far.....

June 15, 2010

The Backdrop

On June 8, 2010, Minister Jason Kenney introduced Bill C-35, *An Act to amend the Immigration and Refugee Protection Act*.

This legislation is designed to change s. 91 of IRPA, which currently states:

Representation

Regulations

91. The regulations may govern who may or may not represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.

The above is the only provision regarding immigration consultants in the current Act. The details (i.e., who is an authorized rep) are currently found in the regulations, specifically R13.1 and the definition section R2. The fact that the government is enshrining changes in the Act is significant because regulations can be changed by Cabinet, i.e. the Government of the day, with the stroke of a pen, whereas the Act can only be changed by Parliament which will always take longer and be harder to accomplish both politically and logistically.

Legislation often has an official “short title” given to it. The short title for C-35, as stated in s.1, is the “*Cracking Down on Crooked Consultants Act*”. Practically speaking, that is long enough that it will more likely become known as the *Crooked Consultants Act*. The French version is even more pejorative, *consultants vereux*. If IRPA changes as intended by the *Crooked Consultants Act*, we can expect to be living with it for a long time.

A bill, in order to become law, must go through three readings. At the second reading, it is usually examined clause-by-clause by the Standing Committee responsible, in this case the Standing Committee on Citizenship and Immigration. The process is explained here: <http://dsp-psd.pwgsc.gc.ca/Reference/queens-e.html> Even without any opposition from other political parties, given the summer recess and other priorities, the best case scenario for this bill becoming law is late 2010.

In the meantime, Cabinet can make no regulations under this bill until it comes into effect. However, Cabinet can continue to make regulations under the present s. 91 of IRPA as above. The Minister therefore has the choice of keeping the current regulation found in s. 13.1 until a new body is set up, or amending that regulation and the definition of “authorized representative” on some interim basis. But note the scope of the regulatory power given in s. 91 – it is quite narrow and limited to *who* can provide immigration services.

Section 13.1 of the current regulations states:

Representation for a fee

13.1 (1) Subject to subsection (2), no person who is not an authorized representative may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.

Exception

(2) A person who is not an authorized representative may, for a period of four years after the coming into force of this section, continue for a fee to represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board, if

(a) the person was providing any of those services to the person who is the subject of the proceeding or application on the coming into force of this section; and

(b) the proceeding or application is the same proceeding or application that was before the Minister, an officer or the Board on the coming into force of this section.

Students-at-law

(3) A student-at-law shall not be deemed under subsection (1) to be representing, advising or consulting for a fee if the student-at-law is acting under the supervision of a member in good standing of a bar of a province or the *Chambre des notaires du Québec* who represents, advises or consults with the person who is the subject of the proceeding or application.

The definition of “authorized representative” giving meaning to the above is found in R2:

“authorized representative” means a member in good standing of a bar of a province, the *Chambre des notaires du Québec* or the Canadian Society of Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003.

Bill – C35 – Cracking Down on Crooked Consultants Act

Under this bill, s. 91 of IRPA would be significantly enhanced. Enshrined in the new s. 91 would be provisions (identified by square brackets below), several of which are new, that would accomplish the following:

(1) **outlaw a broader scope of activity, i.e.,:**

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 [91.(1)] (emphasis added).

This is much broader than the former s. 91 which only outlawed work done for those who *already had applications in* to CIC, CBSA or the IRB. It means that all pre-submission work can in future only be done by regulated professionals.

- (2) **create an exception, as before, for members of the bar of a province, Quebec notaires, and articling students [91. (2)(a)] and 91.(3)].** As now, they can do the work legally.
- (3) **create an exception for members in good standing of a designated body [91.(2)(b)]** – This is the successor body to CSIC. It would not be named in the Act, making it possible for Cabinet alone to designate and un-designate the regulatory body by regulation.
- (4) **create a new exemption for those who offer services under an Agreement with Her Majesty:**

An entity, including a person acting on its behalf, that offers or provides services to assist persons in connection with an application under this Act, including for a permanent or temporary resident visa, travel documents or a work or study permit, does not contravene subsection (1) if it is acting in accordance with an agreement or arrangement between that entity and Her Majesty in right of Canada that authorizes it to provide those services [91. (4)]

- (5) **permit the Minister to name the “designated body” by regulation:**

The Minister may, by regulation, designate a body whose members in good standing may represent or advise a person for consideration --- or offer to do so – in connection with a proceeding or application under this Act [91. (5)]

- (6) **for the first time, permit Cabinet (“Governor in Council”) to make regulations requiring the designated body to provide certain information on its operations to the Minister:**

The Governor in Council may make regulations requiring the designated body to provide the Minister with any information set out in the regulations for the purpose of assisting the Minister to evaluate whether the designated body governs its members in a manner that is in the public interest so that they provide professional and ethical representation and advice, and for any other purpose related to preserving the integrity of policies and programs for which the Minister is responsible under this Act [91.(6)]

- (7) **for the first time, permit the Minister to make regulations concerning transitional matters** (after this legislation takes effect) regarding those affected by the designation of a different regulatory body . However, such regulations cannot exempt a person from being subject to the rules of their old body regarding suspension or discipline:

The Minister may, by regulation, provide for measures respecting any transitional issues raised by the exercise of his or her power under subsection (5), including measures

(a) making any person or member of a class of persons a member for a specified period of a body that is designated under that subsection; and

(b) providing that members or classes of members of a body that has ceased to be a designated body under that subsection continue for a specified period to be authorized to represent or advise a person for consideration – or offer to do so – in connection with a proceeding or application under this Act without contravening subsection (1) [91.(7)]

For greater certainty, nothing in measures referred to in paragraph (7)(a) exempts a person made a member of a body under the measures from the body's disciplinary rules concerning suspension or revocation of membership for providing — or offering to provide — representation or advice that is not professional or is not ethical [91.(8)]

A new transitional provision is being added by s. 6 of the *Cracking Down on Crooked Consultants Act* that would carry over the authority of an Authorized Representative from the prior Act between the time the new Act takes effect and regulations can be made under the new Act:

TRANSITIONAL PROVISION

6. Despite subsection 91(1) of the *Immigration and Refugee Protection Act*, as enacted by section 2 of this Act, a person —other than a member in good standing of a bar of a province or of the *Chambre des notaires du Québec* — who, immediately before the coming into force of this section, was authorized under regulations made under the *Immigration and Refugee Protection Act* to, for a fee, represent, advise or consult with a person who was the subject of a proceeding or application before the Minister of Citizenship and Immigration, an officer designated under subsection 6(1) of that Act or the Immigration and Refugee Board, may represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under that Act until regulations made under subsection 91(5) of that Act, as enacted by section 2 of this Act, come into force.

In addition to amendments regarding s. 91, this Act also amends the sharing of information provisions found in s. 150.1 of IRPA. They are being amended to add a clause permitting regulations to be made regarding the disclosure of information relating to the professional or ethical conduct of a regulated individual, including lawyers:

[5. The regulations may provide for any matter relating to.....]

(c) the disclosure of information relating to the professional or ethical conduct of a person referred to in paragraph 91(2)(a) or (b) in connection with a proceeding or application under this Act to a body that is responsible for governing or investigating that conduct or to a person who is responsible for investigating that conduct, for the purposes of preserving the integrity of policies and programs for which the Minister is responsible.

As well, a new section is added as s. 133.1 that would extend the time to prosecute certain summary offences from six months to five years. This would apply to offences including misrepresentation (s. 127), counselling misrepresentation (s. 126) and organizing illegal entry into Canada (s. 117).

Finally, this Act also covers a few amendments that will be required to IRPA if C-11, the *Balanced Refugee Reform Act*, becomes law.

Notice of Intent

A notice was published in the *Canada Gazette Part 1* on June 12, 2010 initiating the process of choosing a new regulatory body for immigration consultants.

CIC plans to establish a public selection process to identify a governing body. They are seeking comments on their proposal by July 2, 2010.

The body so identified would be required to show it was best able to demonstrate capacity to regulate immigration consulting activities in the public interest. Selection factors will be established, and CIC will seek external expertise in identifying those factors. The factors will ensure the entity chosen will be able to efficiently and effectively manage its membership in support of the needs of the immigration program and the need for public confidence in the system.

The reason this is being done is a lack of public confidence in the body currently governing immigration consultants. “A lack of public confidence poses a significant threat to the immigration system, given the regulator’s role with respect to the integrity of the system as a whole” says the Gazette. On other words, when the regulatory power is not used properly, program integrity concerns can be raised.

The aim is now to:

- (1) identify a new governing body
- (2) if necessary, remove the reference to CSIC from the regulations (i.e. take away its power to accredit consultants)
- (3) provide transitional measures that may be needed for members in good standing of CSIC to ensure the continuity of service to their clients and to protect CSIC members.

Immigration consultants and other interested parties are invited to provide written comments on this proposal by July 2, 2010.

Commentary on C-35

1. The name of this legislation

The “short title” assigned to this legislation will forever emblazon the term “crooked consultant” in the public mind, linking the two. That means legitimate or licensed consultants will forever be required to distinguish themselves as the “non-crooked consultants”. As this will become the statutory basis of the licensing power itself, we will literally be licensed under the authority of the *Crooked Consultants Act*. This will not help the industry. A change of short title of this legislation is warranted.

Whether that occurs or not, a change of designation given to licensees is required to distance legitimate providers in the new system from the baggage of the past. It should be made problematic for shysters to advertise, not for the legitimate professionals to distinguish themselves from shysters or for the public to tell the difference. For example, we could be called “licensed immigration advisors” or some such title that does not include the term “consultants” at all and that is more descriptive and helpful to the public and would be much harder for the fraudsters to claim they are. If they continue to call themselves “consultants” on immigration matters, an investigation could be triggered.

2. The French term

The French term used is *consultants vereux*. According to Google, *vereux* is an adjective meaning maggoty, wormy, rotten, dubious, shady, twisting, bent, worm-eaten. To have this as the basis of the licensing authority is offensive.

3. The scope of what is regulated

This is the change the industry has been calling for. It expands the work that can be done only by regulated advisors to include all pre-submission work as well. It covers everything *in connection with* an application or proceeding under IRPA, whereas the former Act only included work done after the application was filed. The loophole regarding the scope of work was in the Act itself, s. 91 – hence it needs an amendment to the Act to close the loophole.

Other aspects of the scope of work to be regulated are broadened too. The term “for a fee” is replaced with “for consideration”. Valuable consideration is broader than money; it can include perks, favours, advantages and benefits in lieu of cash. Also the “offer” to provide services will be enough; it is not necessary that the advice actually be given.

Note the term “consult with” is gone. It is probably covered by the term “advises” in any case. The term “knowingly” is added – the advice must be given with the requisite mental intent.

If this passes, Regulation 13.1 would be deleted as the scope of prohibited work described therein has changed, and the regulation is redundant as the Act covers it instead. New provision could be made for a term to describe the persons who are authorized. The current term is *Authorized Representative*. Any new term would have to include other regulated individuals as well, i.e. lawyers. It is also possible to continue with the term “Authorized Representative” which has served us well.

4. How does it solve the “ghost” problem”?

The Minister has stated this bill will criminalize ghost consulting and impose higher fines and jail terms. To be clear, he did not amend the *Criminal Code*, which would make it more obviously a crime. What has happened is that the certain conduct ghost consultants frequently carry on will be made a federal offence under IRPA. There is no change of the penalty section of IRPA in C-35. The general penalty is \$50,000 fine or two years in prison or both (misrepresentation and counselling misrepresentation is \$100,000 fine or five years, or both).

So C-35 makes it illegal to prepare forms, advise potential applicants, provide any services -- or even offer to do so. This will cover many practices of the “ghosts” who charged the public for advising and filling out forms but did not put their name on the paperwork as representatives. We have seen brazen ads offering immigration services. Those offers are now illegal – and the new regulatory body should require the business name of all licensees to be registered as well. In interviews, the Minister indicated he would change the forms to require applicants to state who, if anyone, they paid for help in preparing the application, providing another avenue of information to the authorities and an incentive for the applicant to be truthful.

5. Continuity

There will be no problem with the continuity of former Authorized Representatives and their ability to continue to provide services to existing and new clients.

6. Students at consultancy

They are not mentioned overtly. However, as student members of the regulatory body, they can be seen as “classes of members” about whom transitional rules may be made by regulation under the new s. 91.(7) which reads:

The Minister may, by regulation, provide for measures respecting any transitional issues raised by the exercise of his or her power under subsection (5), including measures

(a) making any person or member of a class of persons a member for a specified period of a body that is designated under that subsection; and

(b) providing that members or classes of members of a body that has ceased to be a designated body under that subsection continue for a specified period to be authorized to represent or advise a person for consideration – or offer to do so – in connection with a proceeding or application under this Act without contravening subsection (1).

Articling students are mentioned in the C-35 itself, but students at consultancy are not. This seems reasonable as the manner of bringing new members into the profession may change. Nor is there any real parallel with articling students who by definition have finished their formal legal education and are working under the supervision of a lawyer.

7. The new entities

This gives an open-ended power to agencies such as VFS, or any non-profit groups such as the Sponsorship Agreement Holders who prepare refugee files, to do the same work as a regulated practitioner, for a fee. This is a significant departure from past practice in at least two respects. First, the VFS-type services that have consistently maintained they are conduits only and do not provide advice, would appear to be enabled to do so. The non-profits who have agreements with the government, such as the SAH groups, appear to be able to charge fees.

8. CIC oversight of the new regulator

It looks like the government will be more hands-on in overseeing the new regulator. This is an interesting way to make the agency more responsive to its public service mandate – people can complain directly to the government. We should look for parallels in other self-regulated professions to see if any work this way. This goes far beyond trying to ensure the public interest is met merely by installing a few individuals on the board, which is the norm, and has not worked well at CSIC. In the new regime, the public and others who feel ill-served by the regulator can take their concerns directly to the government. This also means people complaining to their MPs will give the MPs a more transparent avenue to hold the government accountable for the actions of the regulatory body.

It looks like the government's intention is to create the new body by regulation. Questions arise as to the legal status of that: Would it be a “government institution” for the purposes of the *Access to Information Act*? That would be very helpful for members, as it would likely force a level of transparency that may not be given willingly. Would it be subject to internal federal audits? The legal status of the new body needs to be clarified from the outset – its predecessor CSIC was a legal anomaly that forced its members to face one hurdle after another in gaining any rights from government agencies or courts because of its unfamiliar status in Canadian law.

9. Defining the public interest

This legislation is interesting in its attempt to better define what the public interest consists of. In articulating the members of the regulatory body must act in a manner that is “professional and ethical” it sets a standard for how the government will judge the performance of the regulatory body. We might consider whether “professional” is concrete enough – perhaps the term “competent” is more measurable and a better gauge of what the public is entitled to – advisers that are competent and ethical.

10. Reporting provisions to the regulator

This is part of the new accountability. The Minister will be able to request and obtain information as specified in the regulations to allow the Minister to make sure the regulator is acting in the public interest. Because CSIC was not covered by ATIP, CSIC was able to act in a very secretive manner. The new body will likely have by-laws to prevent that. But the government authority is a safeguard against the “guild mentality” that sometimes seeps into self-

regulated groups. The body can be functioning well from the members' perspective, but still not be adequately serving the public interest, e.g., by having an unreasonable threshold for initiating a complaint.

11. Information sharing from the regulator

There is an express provision permitting CIC to share information on a particular practitioner (lawyer or licensed advisor) with other groups who are “governing or investigating” the practitioner. That would be the law society or the new regulatory body, plus the CSBA, the RCMP etc – it is open-ended regarding who is “investigating” the practitioner. This formalizes the ability to lay complaints to the governing body for behaviour demonstrated to CIC or CBSA. It poses another incentive for civility in our dealings with government officials; but it also raises risks that, as advocates, conduct we see as part of the legitimate advocacy role may now be the subject of investigations against us initiated by government.

12. Program integrity

When the government refers to “program integrity” it means that the immigration program is functioning for its proper purpose, and the integrity of the program is not being subverted or undermined by e.g. illegal elements who are bringing people to Canada or misleading immigration officials with false identities, documents etc. We have had as a situation where even CSIC members are being implicated in fraudulent schemes. This gives rise to program integrity concerns in the accrediting and oversight process used by the regulatory body. The privilege and responsibility of regulating cannot be used/abused to undermine the immigration system as a whole. The government is now taking far more interest in overseeing the regulatory body for immigration consultants due to its potential to be a weak link in the integrity of the immigration program.

13. What's not here: the prosecution function

Most self-regulated professions are given a monopoly over a certain scope of work, as well as the power to prosecute those who do it without a licence. CSIC was never given that power as a non-profit society. It appears the government intends to retain the prosecutorial function necessary to enforce the system, making the conduct an offence under federal law that it would prosecute.

In this sense, it is not the same as “statutory body” which has its own self-standing legislation that includes this power.

Commentary on the June 12, 2010 Gazette Notice

This initiates the process whereby the government will designate a new body to regulate immigration consultants. Obviously, CSIC can apply for their old job back. But this is going to be a transparent public selection process, so if they bid, for the first time they may have to

disclose things like what the directors have actually made from their various sources at CSIC over the years, their expense accounts, contracts, Board minutes, etc.

It is possible that much may surface that could form the basis of future litigation – as one example, it is arguable the Board compensation since July 1, 2006 needed to be authorized by all full members, and it was not. All elections run in the draconian way they are at CSIC, all violations of members' rights, all litigation, etc. are open to scrutiny now. The test is whether CSIC would be deserving of public confidence. Since the Minister has been quoted as saying that requires the respect and confidence of the membership, it should be fairly easy for members to address, individually and collectively, why CSIC has lost the respect and confidence of the membership.

Obviously, huge questions remain as to what the alternative is. In the coming days and weeks, that needs to be fashioned through multiple discussions on many levels in the industry. CAPIC will be leading some of that work to allow members' voices to be heard and ensure the next rendition of a regulatory body does indeed have the respect and confidence of its members.