



COMMENTS ON THE PUBLIC SELECTION PROCESS FOR A NEW REGULATOR FOR IMMIGRATION CONSULTANTS

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TOWARDS A BETTER REGULATOR

Comments on the Public Selection Process for a New Regulator for Immigration Consultants from the *Canadian Association of Professional Immigration Consultants* [CAPIC]

PREAMBLE

Some six years after the federal government began restricting who was allowed to represent applicants before Citizenship and Immigration Canada, we find ourselves in the unique situation where the Minister responsible has decided to change the Regulator of Immigration Consultants. To be in such an extraordinary situation, so soon, is likely unprecedented in Canadian regulatory history. Perhaps the one benefit we can take from this experience is that many lessons have been learned which can now be incorporated into the selection criteria for a new, and better, regulator.

CAPIC is pleased to present our ideas on this process at this time.

CAPIC's position on the public selection process

CAPIC supports the intent to conduct a transparent public selection process to identify a body best able to regulate immigration consultants in the public interest. It is essential that any regulatory body have the respect and confidence of its members. We request that CIC not assign any future regulatory role to CSIC under its current structure, governance practices or leadership at the Board and management levels.

CAPIC is also in general support of intent of Bill C-35, namely to expand the scope of regulated activity to include all activities “in connection with” immigration and refugee applications. This will create a stronger legal mechanism to prosecute “ghost consultants”. However, depending on the results of this public selection process, we ask the Minister to also keep alive the prospect that it may be necessary in the public interest to further amend IRPA to permit the creation of a statutory body to regulate immigration consultants as was recommended by the Standing Committee on Citizenship and Immigration in 2008. We would welcome the opportunity to present reasons why such an approach may be the preferred alternative to creating a governing body for this industry.

Finally, it is apparent in the Canadian regulatory framework that few existing organizations may

have the legal mandate necessary to take on this function as well. It is possible there will be none, or one, or very few bidders. The selection process should state that CIC reserves the right not to accept any bid, and to use an alternative approach in future. As well, the selection factors should not make it impossible for a newly incorporated (or yet to be incorporated) regulator to be the successful bidder.

BACKGROUND

Realities of regulating immigration consultants

Regulation of the Immigration Consulting profession shares some similarities with other self-governing professions. It is most often compared to law societies, and involves many of the same basic functions: accrediting, providing incentives to maintain competency, and disciplining members.

But there are some fundamental differences that pose unique challenges to this profession as well:

Legal mandate – Under current legislation, the regulatory body does not have the power to prosecute those who do the work outside the scheme. Bill C-35 goes some way to enlarging the scope of activities that may be prosecuted; but the power to do so remains with the federal government. Therefore, the need exists for the federal government to support the new regulatory body by:

- 1) aggressive prosecutions for fraud-related IRPA offenses;
- 2) the establishment of an advisory council with representatives from the industry and the regulator to share information, advise on prosecution strategies and maximize resources available for prosecutions; and
- 3) the effective use of CIC's public information materials and the media to educate the public, discourage use of unauthorized persons, and publicize high profile prosecutions.

Numbers and locations of fraudulent operators - Whereas law societies may see isolated individuals in certain locales offering legal advice for a fee in their jurisdiction, or a larger scam in one field or geographic area, unregulated immigration consultants operate around the world, beyond the reach of Canadian law. Most of the potential clientele is abroad as well, unlike in other Canadian professions. Fraudulent operators have advantageous access to ethnic communities, are often well organized to deal in volume, can operate fly-by-night businesses and may be connected to organized crime – all formidable and unique challenges.

Group to be regulated – The group to be regulated is very diverse in education, ethnic backgrounds, language ability and life experience. The current preparation and training is minimal relative to the scope of work permitted. The vast majority of certified consultants work as sole practitioners from the time they are qualified throughout their careers. Many face financial pressures to take on work above their level, especially at the start-up of their business, given the costs of their education, exam fees, and membership fees. There is no formal mentoring or articling program. Experienced consultants are usually sole practitioners as well. They face many practical barriers to mentoring others, including cost, liability and time.

No natural limits on intake numbers – Intake in other professions is limited by factors such as length of in-class schooling, costs, caps on placements in professional schools, and intense competition. One cannot train to be dentist, optometrist or lawyer in Canada solely online. In this field, however, education providers have an incentive to offer programs to the maximum number of students, at the lowest cost to the provider. They currently have wide berth to do so. We recently saw an on-line only Immigration Practitioner program developed by the current regulator, bringing potentially thousands of new entrants into the system, with no transparent strategic plan. Numbers of accredited members must reflect the ability of the Profession to absorb, properly monitor and acculturate new members – this is critical in the public interest.

Languages of operation – Being a federal regulatory body, all aspects of the regulatory system must be conducted in both English and French. In dealing with messages to the public, the regulator will be more effective if information is provided in several languages.

MAIN SUBMISSION

The public selection process

CIC has requested input on the proposed public selection process with the objective of identifying a governing body for recognition as the regulator of immigration consultants to ensure integrity in the immigration program through the provision of ethical and professional services by its membership.

As this is a process, we wish to address the following:

Setting the criteria

Inviting bids

Peer review
Stakeholder review
Regulations in place
Transition period

We also wish to make some comments on how a regulatory body in our field might better approach ensuring that all members are competent and ethical, especially in light of the unique features of this profession identified above. These are contained in **Appendix 3**.

A pre-condition for success

The short unsuccessful history of CSIC clearly illustrates that what was missing in the first effort was initial, sustained direction from experts in regulation, who could have set in place a governance plan designed to foster and nurture self-regulation, until such time as the members themselves determined they no longer needed it. This was a fundamental flaw in our view. Instead, the Initial Directors were left on their own, with the only constraints being those imposed by the *Canada Corporations Act* (which relate to operating non-profits and businesses, but not specifically self-regulating professions), and the Contribution Agreement with CIC. These were not adequate. The nine Initial Directors took it upon themselves to set in place By-laws and Rules which allowed a small group of individuals to operate the Society indefinitely with virtually no oversight by the members themselves. Although solely funded by the members, the membership was not given the normal tools to hold the Board accountable, such as calling Special Meetings, removing directors, or bringing motions to the AGM.

We therefore recommend that one of the Selection Factors be a firm and non-negotiable condition that:

The successful bidder must agree contractually to implement the Governance System that has been designed by CIC and/or its team of designated experts.

Minimum selection criteria

General principles

CIC might outline in their call for bids the objectives they expect to be met in the future. CIC may, at their discretion, identify where the previous regulator failed to meet objectives leading to a loss of public confidence. Expected objectives might include consumer protection, competency, ethical

practice, compensation fund, adequate initial and on-going education for members initially through accredited educational institutions and professional organizations.

Bidding criteria

Existing organizations

1. Be national in scope
2. Be non-profit
3. Have a lawful mandate capable of performing this regulatory function
4. Have experience with similar or related functions
5. Have a solid reputation for integrity
6. Demonstrate past governance practices acceptable to its own membership
7. Have the endorsement of the majority of its own members for the bid
8. Have a plan for a legal structure, including its status as a federal board or tribunal and the federal laws, e.g. Charter of Rights and Freedoms, ATIP, to which it would or would not be subject
9. Have a credible business plan for 3 years including financing, identification of key personnel and skill sets needed in key positions
10. Have a plan to ensure all regulated immigration consultants provide ethical and competent services (**Appendix 3**)
11. Have a credible outline of transition plan
12. Appear before Peer Review Panel to answer questions on the bid

New organizations

If any newly-created organization or an organization which is yet to be established is considered as a bidder, they must find ways to indicate that they are in agreement with the principles above, and indicate how the objectives will be realized in a new organization.

The suggested role of CIC in the bidding process

1. The bid process should be overseen by CIC
2. CIC defines the precise scope of services to be regulated, e.g. in accordance with s.91 of IRPA, Citizenship Act, etc.
3. CIC provides points they wish to see addressed in the bids and specifies the amount of detail they prefer under each point (i.e. outline, detailed proposal, etc.).
4. CIC specifies the background information they will require of the bidder, e.g. membership lists, financial information, etc. (see “Inviting bids” below).
5. CIC identifies if they will contribute any funding towards the establishment of a new regulator.

6. CIC identifies that the new regulator must have a culture of transparency in the organizational documents, and a plan to maintain members' confidence as well as public confidence into the future.
7. CIC identifies that the new regulator will be subject to regulatory review every 10 years.
8. CIC specifies that the new regulator will not engage in activities outside its core mandate of consumer protection through competent, professional, and ethical practice by its members.
9. CIC provides information on the probable outcome of proposed legislation in terms of the impact on the new regulator with regard to pursuing and prosecuting unauthorized consultants. This may have a large financial impact on the new regulator and CIC may take that into account in providing this information.
10. CIC specifies that bidders will be expected to include plans on how to bring at least some unauthorized consultants in from their ghost practices, give them the chance to become members in good standing without harsh punitive measures, and how the consequences of not becoming members in good standing will be conveyed to the unauthorized consultants.
11. CIC specifies whether the new regulator is to try to establish any type of membership for international agents of authorized representatives so that regulated members may work in legal harmony with those who might otherwise practice as unauthorized representatives abroad – thus extending consumer protection.
12. CIC specifies the new organization is to create a strategic plan for the organization within two years.

Selection process

Setting criteria - Inviting bids – 30 days – by August 2, 2010

1. The bid process must be transparent
2. Bids should be posted on the CIC website with a comment period provided for the public, while peer and stakeholder reviews are being conducted
3. Financial accounts from any bidder to be open to CIC auditors and an unqualified opinion obtained from CIC's auditors on the most recent financial statement
4. Bidders to provide complete membership list with current contact information to CIC; if the bidder is incorporated under the CCA, to also provide the current membership list and complete contact information, including email addresses, to any party upon request in accordance with s. 111.1 of the CCA
5. Bidders to provide a complete list of litigation against it or any entities under its control commenced within the past 10 years specifying the litigants, precise matters in issue, resolution if any, or current stage in the legal system

6. Bidders to provide statutory declarations from all current directors and top management officials, including those whose terms expired within the past three years, itemizing the amounts and reasons for all funds they have received from the organization, or entities under the control of the organization.

Submission of bids – 30 days – by September 2, 2010

Peer Review – 30 days – by October 2, 2010

In addition to CIC overseeing the bid process, the process should include the selection of a Peer Review Panel to review bids. Representation to include: CIC, CBSA, IRB, CSIC (if not bidding), CAPIC (if not bidding), CBA, CCR, governance experts, as well as legal experts in self-regulated professions and constitutional law. The Peer Review Panel will consider submissions from bidders and comments received, and make recommendations to CIC who will make the final decision.

An excellent proposal can represent the fresh start the profession truly needs, or it can be merely words on paper. Immigration officials, regulated consultants and the public must have faith in the new regulator. Consequently, there must be confidence that the bid as presented will be followed through in both operation and spirit.

There needs to be a filter through which all the bids are poured. We suggest the Peer Review Panel should use the following principles and guidelines to determine if a bid is suitable. The bid must disclose a plan that is:

- **Focused**
- **Transparent**
- **Accountable**
- **Proactive**
- **Credible**

Focused

- Is the mandate clearly defined?
- Is the concept of “Public Interest” clear and sufficiently defined?
- Is the concept of “Consumer Protection” clear and sufficiently defined?
- How are these concepts carried through every aspect of the plan?
- Are all activities and operations directed to the defined mandate?

- Are complaints policies designed to address complaints in a timely, effective way? Are educational policies focused on creating competent members in their areas of practice?

Transparent

- Is the requirement to operate transparently enshrined? Is it operational? Are there effective checks against non-transparency?
- How is transparency built into the by-laws?
- Are any exceptions to transparency clear and justifiable?
- Is input and consultation with members required?
- Are Board meetings open to members? Are Minutes made available?
- Are major Board decisions and policies made openly after consultations with the membership?
- Is the complaints process transparent to complainants?
- Are the regulator's finances transparent to the membership in a meaningful way?
- Is all directors' compensation from all sources, and their expenses, required to be disclosed?
- Are members permitted to voice opinions, dissent and concerns about internal matters without professional repercussions?
- Are fair elections held, that allow for meaningful debate about the challenges facing the profession? How is impartiality of the election process guaranteed?
- Is there a Whistleblower policy in place to support open, ethical and accountable governance by providing a process to report suspected acts of waste or wrongdoing and have them investigated impartially?
- Is there a whistleblower policy?

Proactive

- Does the regulator promote prevention of problems?
- Is the method of oversight designed to create, share and promote best practices?
- Is there an independent resource, avenue or person to handle members' grievances with administration?
- Are practice advisors in place to assist members with best practices and avoiding practice problems?
- Are members treated as professionals and given tools to provide better services to clients – such as suitable retainers, agent / 3rd party agreements?
- Does the regulator anticipate the tools and supports needed by new members to provide competent, ethical services and facilitate them?

Accountable

- Are the members genuinely able to hold their leadership accountable?

- What are the precise mechanisms in the by-laws? Are tools guaranteed to members such as in-person members meetings, a process for removing directors, placing motions on the AGM?
- Do members have the right to approve the annual Financial Statements? What happens if they are not approved?
- Do members have a Finance Committee representing them for ongoing input, review and recommendations on budgets and financial matters?
- Do the members set directors' compensation?
- How will the regulator report its progress to the Government?
- If the Government has concerns about the regulator what is the protocol for Ministerial action?
- What checks and balances prevent any small group from operating the organization for self-serving purposes?
- Will CIC maintain temporary oversight until members are surveyed to obtain their assent to the withdrawal of oversight?
- Are decisions made by the regulator enforceable under law?
- Are decisions made by the regulator accountable to independent review?
- What remedies (besides courts) do members have if the regulators operates counter to its own bylaws?
- Is the membership collectively accountable to the Minister for meeting the mandate?

Credible

- Do the parties presenting the bid have experience with regulation? If so, do they have a history of being credible, trustworthy, transparent and accountable?
- Do they have a track record of observing their own rules and regulations?
- Are the bidders known publicly? Do they have a good reputation in the media, the public arena?
- Do the leaders of the organization have the respect and confidence of their own members?

Stakeholder Review- 60 days – by December 2, 2010

The recommendations of the Peer Review Panel ought permit comments by stakeholders directly affected. This would include relevant officials within CIC, CBSA, and IRB.

It is also important that immigration consultants are part of the process and that widespread support exists for the new regulatory body. Thus, there is the need for a process to inform current CSIC members of the preferred bidder and governance plan, and establish a means of obtaining their support. We believe that the vast majority of CCIC's look forward to a better regulator and will be more than willing to assist in advancing the profession as a proper self-regulatory organization that all will be proud to belong to.

Regulations in Place – by December 31, 2010

CSIC fiscal year ends on October 31, and new fees and renewal questionnaire become mandatory on November 1, 2010. Members would appreciate some preliminary communication from CIC by mid-October as to the status of this process.

Regulations under S.91 of IRPA do not need to be placed before Parliament. Therefore, it is a matter of:

1. Naming the new designated body
2. Establishing, setting-up the new designated body, if necessary
3. Identification of the plan for the transitional period.

Transition period – up to June 30, 2011

1. Current CSIC members as of a certain date grandfathered in
2. Provisions for students at every stage of the certification process
3. An interim regulator may be needed or some functions taken by CIC for the short term
4. CIC materials and websites updated to reflect changes
5. Approval of new designation in the trademark system if necessary.

APPENDICES

APPENDIX ONE:

What current Certified Canadian Immigration Consultants want

APPENDIX TWO

About CAPIC

APPENDIX THREE

Ensuring competent and ethical services

APPENDIX FOUR

CAPIC Letters Patent

APPENDIX FIVE

CAPIC bulletins to CSIC members since June 8, 2010

APPENDIX SIX

Need for quick action