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LEGISLATIVE SUMMARY

Bill C-35:
An Act to amend the Immigration and Refugee Protection Act

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Legislative Summary of Bill C-35

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-35: AN ACT TO AMEND THE IMMIGRATION AND REFUGEE PROTECTION ACT

1 BACKGROUND

1.1 PURPOSE OF BILL AND PRINCIPAL AMENDMENTS

Bill C-35, An Act to amend the Immigration and Refugee Protection Act, was introduced in the House of Commons on 8 June 2010 by the Minister of Citizenship, Immigration and Multiculturalism, the Honourable Jason Kenney. The bill makes a number of changes in the manner of regulating the intervention of third parties (known as immigration consultants) in immigration processes.

While they are not required to do so, potential refugees and immigrants to Canada may seek advice from third parties about the various immigration processes to which they are subject. Such assistance is often costly and varies considerably in quality. Some third parties are not qualified to provide the advice they dispense, and some have exploited immigrants by providing false information, and engaging in fraud. The consequences for prospective immigrants can be severe, ranging from rejected asylum applications to penalties for misrepresentation, such as fines, imprisonment or being barred from entry to Canada for a period of at least two years.

Bill C-35 creates a new offence by extending the prohibition against representing or advising people – or offering to do so – for consideration. This offence applies not only to all stages of a proceeding or application under the *Immigration and Refugee Protection Act* (IRPA), but also to all stages occurring even before an application is made or a proceeding instituted.

Bill C-35 provides an exception to this ban for the members of the bar of a province or the Chambre des notaires du Québec, for articling students acting under their supervision, for the members of a regulatory body designated by the minister and for organizations and persons acting on their behalf pursuant to an agreement or an arrangement with Her Majesty in right of Canada.

Thus, Bill C-35 provides the possibility that the minister may, by regulation, designate a body to be responsible for regulating immigration consultants. This organization will be responsible for providing relevant information to help the minister determine whether the organization is regulating its members in the public interest, and whether the members are providing professional and ethical representation and advice.

Bill C-35 was referred to the House of Commons Standing Committee on Citizenship and Immigration on 23 September 2010. It made a clause-by-clause examination of the bill and reported to the House on 24 November 2010, after making amendments to its content and style. In particular, the committee:

- added to the list of those eligible for an exemption other persons in good standing with the law society of a province, in particular paralegals (new section 91(1)(*b*) of the IRPA);

- made clear that the minister's power to designate a regulatory body for immigration consultants also included the power to revoke such a designation (new section 91(5.1) of the IRPA);
- indicated that the requirements of the *Act respecting immigration to Québec*,[1] applied to consultants who were members of the designated organization operating in Quebec (new section 91(7.1) of the IRPA);
- expressly added to the text of the bill the penalty imposed for the offence of representing or advising for consideration (new section 91(9) of the IRPA); and
- deleted the short title of the bill (Cracking Down on Crooked Consultants Act) because of its pejorative connotation with respect to the profession of immigration consultant.

Bill C-35 was passed by the House of Commons on 7 December 2010 with all the amendments proposed by the committee.

1.2 Chronology

1.2.1 Study of the Issue of Immigration Consultants

On a number of occasions, Parliament has considered the question of immigration consultants, and the federal government has taken steps to regulate their activities and protect immigrants from possible exploitation.

The House of Commons Standing Committee on Citizenship and Immigration studied the issue in 1995 and submitted a report with recommendations.[2]

In October 2002, the Minister of Citizenship and Immigration established an advisory committee to study the issue and provide recommendations. The advisory committee presented its final report in May 2003,[3] recommending that the government create an independent body for the regulation of immigration consultants.

1.2.2 Establishment of the Canadian Society of Immigration Consultants (October 2003)

The Canadian Society of Immigration Consultants (CSIC) was established by the government in the fall of 2003[4] as:

> [a]n independent, federally incorporated not-for-profit body operating at arm's length from the federal government … responsible for regulating the activities of immigration consultants who are members and who provide immigration advice for a fee.[5]

CSIC has a mandate "to protect the consumers of immigration consulting services and ensure the competent and professional conduct of its members," who provide these consumers with immigration services for consideration.[6] In order to become a member of CSIC, an immigration consultant must meet certain criteria and, to maintain membership, must abide by CSIC's rules of professional conduct and meet continuing professional development requirements.

1.2.3 AMENDMENTS TO THE *IMMIGRATION AND REFUGEE PROTECTION REGULATIONS* (APRIL 2004)

In April 2004, the government amended the *Immigration and Refugee Protection Regulations*[7] to prohibit anyone who is not a member of a provincial law society, the Chambre des notaires du Québec or CSIC from representing, advising or consulting, for a fee, with a person who is the subject of a proceeding or application before the minister, an officer responsible for enforcing the Act or the Immigration and Refugee Board (IRB). Individuals and groups who provide immigration services free of charge were excluded from this provision.

1.2.4 REPORT OF THE HOUSE OF COMMONS STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION (JUNE 2008)

Problems persisted despite the measures referred to above, leading the committee to undertake a study of immigration consultants in 2008. The committee's report, *Regulating Immigration Consultants*[8] highlighted a number of areas of concern.

1.2.4.1 CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Governance problems at CSIC were raised repeatedly by witnesses, leading the committee to recommend that CSIC be re-established as a non-share capital corporation so that it could function much like a provincial law society.

In order to improve investigation and enforcement, the committee suggested that the statute re-establishing CSIC identify unauthorized practice as a prohibition and an offence. As a short-term measure, the committee recommended making better use of existing enforcement provisions through better co-ordination between various parties.

1.2.4.2 GHOST CONSULTANTS

"Ghost consultants" were a second significant concern raised in the committee report. A ghost consultant is a consultant who advises about or represents people in immigration cases without being an "authorized representative," that is, without being a member in good standing of a provincial law society, the Chambre des notaires du Québec or CSIC.[9]

To address the problem of ghost consultants, the committee recommended that disclosure of the use of any representative be required and that the scope of the regulations be enlarged so that only authorized representatives could perform pre-submission work or advise or consult with a person who is the subject of a proceeding or application before the minister of Citizenship and Immigration, an immigration officer or the IRB.

1.2.4.3 IMMIGRATION CONSULTANTS WORKING FROM ABROAD

Finally, the committee's report addressed the issue of immigration consultants operating abroad, acknowledging that the federal government has very limited power in this area. Recommendations relating to this question focused on simplifying immigration applications and providing more information to prospective immigrants about those offering immigration consulting services.

It has been widely recognized that regulating immigration consultants remains a problem. In March 2009, the government launched an information campaign to inform prospective immigrants about using a representative and to warn them about unscrupulous consultants.

2 DESCRIPTION AND ANALYSIS

Bill C-35 seeks to address the concerns expressed in the committee report adopted in June 2008.

2.1 AMENDMENTS TO THE RULES GOVERNING REPRESENTATION OF A PERSON UNDER THE *IMMIGRATION AND REFUGEE PROTECTION ACT* (CLAUSE 1)

2.1.1 CURRENT SYSTEM

Section 167(1) of the IRPA specifically provides that any person who is the subject of IRB proceedings may, at his or her own expense, be represented by a barrister or solicitor *or other counsel*. The IRPA, then, allows a claimant to be represented by a representative other than a lawyer.

This provision must be read in conjunction with the text of section 91 of the IRPA, which provides that the regulations made under the IRPA could govern who could or could not represent, advise or consult with a person who was the subject of a proceeding before the minister, an officer or the IRB. This provision allows the minister, by regulation, to make rules that apply to immigration consultants.

As mentioned above, the regulations were amended in April 2004 to stipulate that no person who was not an “authorized representative” could, for a fee, represent, advise or consult with a person who was the subject of any proceeding or application under the IRPA (section 13.1 of the regulations). In these amendments to the regulations, the expression “authorized representative” was defined as “a member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants” (section 2 of the regulations).

As a result, under the rules as set out in the IRPA and the regulations, only members in good standing of a provincial bar, the Chambre des notaires du Québec or CSIC could, for a fee, represent claimants in proceedings before the minister, an officer responsible for enforcing the Act or the IRB. This provision is not found directly in the IRPA, but by reference to the regulations.

2.1.2 SYSTEM PROPOSED UNDER BILL C-35

Clause 1 of Bill C-35 replaces section 91 of the IRPA and imposes specific statutory requirements regarding:

- persons who may provide representation or advice for consideration;
- the power of the minister to designate, by regulation, a body whose members may represent or advise a person for consideration; and

- the scope of the advice or representation services provided or offered that are subject to the IRPA.

Thus, under new section 91(1), an unauthorized person who provides representation or advice for consideration at any stage of the process is committing an offence.

2.1.2.1 Who May Represent or Advise for Consideration

Bill C-35 incorporates into the IRPA the list of persons exempted from the prohibition against representing, advising or consulting with a person for consideration:

- members of a provincial law society or of the Chambre des notaires du Québec;
- other members in good standing of a provincial law society or of the Chambre des notaires du Québec, including paralegals; and
- members in good standing of a body designated by the minister (new section 91(2) of the IRPA).

The bill also exempts the following individuals (or entities) from the prohibition against representing, advising or consulting with a person for consideration:

- a student-at-law acting under the supervision of a member in good standing of a provincial law society or of the Chambre des notaires du Québec (new section 91(3) of the IRPA); or
- an entity, including a person acting on its behalf, offering or providing services to assist persons in connection with an application under the IRPA, if acting in accordance with an authorizing agreement or arrangement with Her Majesty in right of Canada (new section 91(4) of the IRPA).

2.1.2.2 Minister's Power to Designate and Revoke the Designation of a Regulatory Body for Immigration Consultants

The June 2008 committee report recommended:

> 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.[10]

Bill C-35 gives the minister the opportunity to designate, by regulation, a body responsible for regulating representatives in immigration proceedings (new section 91(5) of the IRPA). The body will be self-regulating and be recognized by the government.

Unlike the professional governing bodies in the provinces, the new body will not be established by provincial legislation but by the minister and must therefore report on its activities directly to the minister. Furthermore, the power to designate enjoyed by

the minister also allows him or her to revoke any such designation made under that provision (new section 91(5.1) of the IRPA).

The present CSIC does not have the mandate to investigate, is not authorized to sanction immigration consultants who are not its members and does not have the power to seek judicial enforcement of the disciplinary measures it imposes on its members. Nor do its terms of reference permit it to carry out checks, summon witnesses or seize documents.

Without expressly assigning all of these powers to the designated body, the bill provides that the Governor in Council may, by regulation, require that the designated body provide to the minister information prescribed by regulation, including information concerning its internal management, to permit the minister to determine whether the body is governing its members in the public interest and for any other purpose relating to the preservation of the integrity of the immigration system (new subsection 91(6) of the IRPA).

In a public notice published in the *Canada Gazette* on 12 June 2010, Citizenship and Immigration Canada expressed its intention to:

> establish a public selection process with the objective of identifying a governing body for recognition as the regulator of immigration consultants.[11]

The notice sought public comments by 2 July 2010 on the proposed selection process. On 28 August 2010, the public selection process was officially launched by government notice. Interested bodies had until 29 December 2010 to provide their submissions.[12]

2.1.2.3 Transitional Measures

In its June 2008 report, the committee recommended:

> that the Government of Canada assist in re-establishing the new regulator and remain involved in its affairs until it is fully functioning.[13]

The approach chosen by Bill C-35 is to create a new body by ministerial decision, although new section 91(7) of the IRPA states that the minister may, by regulation, prescribe transitional measures concerning the designation of the new designated body, including measures to enable any member of a body that has ceased to be a designated body to be exempt from the application of new section 91(1) of the IRPA.

Bill C-35 also permits the minister to prescribe by regulation measures relating to any transitional matter that occurs following the designation of a regulatory body (new section 91(7) of the IRPA). This includes the exemption, for a period prescribed by regulation, from the application of new section 91(1) of the IRPA to current members of CSIC (new section 91(7)(*b*) of the IRPA). Until regulations made to designate the regulatory body for immigration consultants come into force (clause 5), the exemption extends to any person who was authorized under regulations made under the IRPA to represent, advise or consult with a person for a fee.

2.1.2.4 Immigration Consultants in Quebec

In its 2008 report, the committee recommended:

> that the Government of Canada stipulate in its laws and regulations that … an immigration consultant from Quebec shall be officially recognized under Quebec laws rather than being required to be a member of the Canadian Society of Immigration Consultants.[14]

New section 91(7.1) of the IRPA expressly provides that the *Act respecting immigration to Québec* applies to every person in Quebec who represents or advises a person for consideration in connection with a proceeding or application under the IRPA. It is understood that this new provision applies to immigration consultants who are:

- members of the body designated under new section 91(5) of the IRPA (new section 91(7.1)(*b*) of the IRPA) or
- members of a body that ceased to be a designated body but who are deemed exempt from the commission of the offence created by new section 91(1) of the IRPA (new section 91(7.1)(*a*) of the IRPA).

The *Regulation respecting immigration consultants*[15] came into force in Quebec on 4 November 2010. It sets out the criteria governing immigration consultants practising in Quebec. Among the requirements set out in the regulation, immigration consultants must:

- have passed the minister's examination on Quebec's immigration rules.[16]
- show a knowledge of French appropriate to the carrying on of their activities.[17]

Consequently, new section 91(7.1) of the IRPA is designed to ensure that the requirements of the *Act respecting immigration to Québec* and the regulations made under it apply to all immigration consultants working in Quebec.

2.1.2.5 Representation or Consultation Services for Consideration that are Subject to the *Immigration and Refugee Protection Act*

Under current section 13.1 of the regulations, only the act of representing a person for consideration before the minister, the officer responsible for the application of the Act or the IRB, or the act of giving advice are regulated.

New section 91(1) of the IRPA requires that all consultation or representation services provided or offered for consideration at all stages of an application or proceeding under the IRPA, both during the period preceding the filing of the claim and when the claim is submitted or the proceeding instituted, be provided or offered by the persons who are permitted by new section 91(2) to represent or advise a person. This addition makes it possible to take action, in the event of an offence, against all forms of representation and advice at any stage whatsoever, including unauthorized consultants acting prior to the filing of an application.

Consequently, the wording of new section 91(1) of the IRPA reflects the recommendation made by the committee in its June 2008 report:

> that only authorized representatives may perform pre-submission work in respect of a person who is subject of a proceeding or application before the Minister of Citizenship and Immigration, an immigration officer or the Immigration and Refugee Board.[18]

2.2 Amendments to Provisions Relating to the Disclosure of Information (Clause 4)

In its June 2008 report, the committee recommended:

> that the relevant federal regulatory and enforcement authorities (Citizenship and Immigration Canada, the Immigration and Refugee Board, Canada Border Services Agency, Royal Canadian Mounted Police, Canadian Society of Immigration Consultants, Canada Revenue Agency) work with provincial partners (provincial governments, law societies) to coordinate investigation, communication and enforcement efforts so as to ensure that unregistered immigration consultants are either referred to provincial law societies for sanction, or are prosecuted under existing federal provisions, depending on the nature of the person's practice.[19]

Consequently, Bill C-35 allows the minister to create rules, through regulation, providing for the disclosure of information relating to a representative's ethical or professional conduct to the following entities:

- the body that is responsible for governing the conduct of the representative
  - the designated regulatory body
  - the law society of the province of which that person is a member or
  - the Chambre des notaires du Québec
- the authorities responsible for investigating that conduct – the federal authorities responsible for regulating the profession and enforcing the IRPA (Citizenship and Immigration Canada, the IRB, the Canada Border Services Agency, the Royal Canadian Mounted Police, the Canada Revenue Agency) (new section 150.1(1)(*c*) of the IRPA).

Consequently, Bill C-35 permits an exchange of information between various levels. The IRPA does not contain any such provision.

2.3 Offence and Penalty (Clause 1)

2.3.1 Offence

In its June 2008 report, the committee expressed its agreement with those witnesses who asked that unauthorized practice should be expressly prohibited and made an offence. New section 91(1) of the IRPA responds to this concern by stating that "no person shall knowingly, directly or indirectly, represent or advise a person for consideration — or offer to do so — in connection with a proceeding or application under this Act."

In its study of the bill, the committee proposed to amend new section 91(1) of the IRPA by adding the act of directly or indirectly advising. The aim was to bring within the application of the new section the actions of representatives who are sometimes asked to act as intermediaries between the applicant and the person retained by the applicant to take steps under the IRPA.

2.3.2 PENALTY

Originally, no penalties were provided in Bill C-35. However, in the version of the bill that was adopted by the House of Commons new section 91(9) has been added to the IRPA specifically providing a penalty associated with the offence of representing or advising a person for consideration, namely:

- on conviction on indictment, a maximum fine of $100,000 or a maximum term of imprisonment of two years, or both; or
- on summary conviction, a maximum fine of $20,000 or a maximum term of imprisonment of six months, or both.

The offence of representing or advising a person for consideration is thus a hybrid offence, giving the Crown prosecutor the ability to elect the method of prosecution: either on indictment (indictable offence) or on summary conviction (summary offence).[20]

By way of comparison, section 787 of the *Criminal Code*[21] provides that "everyone who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both."

The committee urged that the penalty originally provided be augmented to increase attention to the deterrence and punishment aspects and to underline the seriousness of the offence.

2.4 LIMITATION PERIOD FOR SUMMARY CONVICTION PROCEEDINGS (CLAUSE 3)

Bill C-35 increases the limitation period from six months to 10 years for instituting proceedings on summary conviction against individuals charged with:

- the offence of organizing illegal entry into Canada of one or more persons without the documents required by the IRPA (section 117 of the IRPA); or
- the offence of counselling the misrepresentation or withholding of material facts relating to a relevant matter that may lead to an error in the enforcement of the IRPA (sections 126 and 127 of the IRPA).

Such an increase in the limitation period is designed to permit the victims of these offences, whose migration process may take several years before it is resolved, to be able to institute a prosecution without being barred because of the time that has elapsed since the offence in question was committed.

2.5 Co-ordinating Amendments and Coming into Force (Clauses 6 and 7)

Clause 7 of Bill C-35 provides that the provisions of the bill, with the exception of clause 6, shall come into force on the day or days to be fixed by order in council. Clause 6 of the bill co-ordinates the coming into force of the provisions of Bill C-35 with those of Bill C-11, the Balanced Refugee Reform Act, which received Royal Assent on 29 June 2010.

NOTES

1. *An Act respecting immigration to Québec*, R.S,Q., c. I-0.2.
2. House of Commons, Standing Committee on Citizenship and Immigration, *Immigration Consultants: It's Time to Act*, Ninth Report, 1st Session, 35th Parliament, November 1995.
3. Advisory Committee on Regulating Immigration Consultants, *Report of the Advisory Committee on Regulating Immigration Consultants presented to the Minister of Citizenship and Immigration*, Minister of Public Works and Government Services Canada, May 2003.
4. The CSIC was established under Part II of the *Canada Corporations Act*, R.S., 1970, c. C-32, on 8 October 2003.
5. House of Commons, Standing Committee on Citizenship and Immigration [CIMM], *Regulating Immigration Consultants*, Tenth Report, 2nd Session, 39th Parliament, June 2008, p. 1.
6. Ibid.
7. *Immigration and Refugee Protection Regulations*, SOR/2002-227.
8. CIMM, *Regulating Immigration Consultants*, Tenth Report, 2nd Session, 39th Parliament, June 2008.
9. Ibid.
10. Ibid., Recommendation 2, p. 9.
11. Department of Citizenship and Immigration, "Government Notices – Notice requesting comments on a proposal to establish a public selection process with the objective of identifying a governing body for recognition as the regulator of immigration consultants," *Canada Gazette*, 12 June 2010.
12. Department of Citizenship and Immigration, "Government Notices – Notice requesting submissions from candidates interested in becoming the regulator of immigration consultants," *Canada Gazette*, 28 August 2010.
13. CIMM (2008), Recommendation 3, p. 9.
14. Ibid., Recommendation 1, p. 9.
15. *Regulation respecting immigration consultants*, R.R.Q., c. I-0.2, r. 0.1.
16. Ibid., s. 4(4).
17. Ibid., s. 4(5).
18. CIMM (2008), Recommendation 5, pp. 10–11.
19. Ibid., Recommendation 6, p. 11.

20. In the case of offences “punishable on summary conviction,” the accused does not elect the type of trial. The procedure for this type of offence is designed to be simple and more expeditious. Consequently, there is neither a jury nor a preliminary inquiry.

21. *Criminal Code*, R.S., 1985, c. C-46.