Immigration Consultants of Canada Regulatory Council Could Deal a Serious Blow to Unauthorized Practitioners if Given the Authority!

by Gerd Damitz, MBA, RCIC

It is not surprising that unauthorized practitioners (UAPs) have been identified as a major problem by the Standing Committee on Citizenship and Immigration (CIMM). In my opinion, the Immigration Consultants of Canada Regulatory Council (ICCRC), which oversees Regulated Canadian Immigration Consultants, cannot also be made responsible for UAPs, since it has never been granted the power to pursue them and can only forward related complaints to the Canada Border Services Agency (CBSA). It is important to highlight that the ICCRC was established as a not-for-profit corporation under the *Canada Not-for-profit Corporations Act* (CNCA). IRCC has no regulatory power to pursue unauthorized immigration practitioners or impostors within Canada, a limitation that necessarily harms both the public and the ICCRC itself. In fact, it can only refer such cases to the CBSA. To this end, the fledging regulator just barely 5-year-old is not the problem, but it *can* be part of the solution.

Specifically, a breakthrough in addressing the problem of domestic UAP's effectively could be the grant of the power to pursue and prosecute UAP's to the regulator ICCRC by Federal Statute. A federal statute would also empower the ICCRC to engage with various local and international government bodies to ensure that there is a consistent UAP agenda at all levels of government. According to a legal memo by Professor Peter Hogg[1] –the leading authority on Canadian constitution law- only a federal regulator with a statute can address extraterritorial UAPs; provincial regulators with a statute cannot intervene in either extra-provincial or extraterritorial matters. While the federal government cannot amend foreign laws, it *can* enforce legal consequences once a matter has reached Canadian jurisdiction. Examples abound in federal statutes related to immigration, fishing, pollution, customs, and taxation. For instance, the *Arctic Waters Pollution Prevention Act*[2] imposes liability for actions of ships in water "adjacent" to Canada's arctic waters (but outside of Canada's territorial waters). These claims are brought in Canadian courts and perpetrators can be held liable for the actual damage as well as the cost and expense incurred by the government in repairing or mitigating the damage.' The same could hold true for the prosecution of UAPs. In this piece, I will examine why the grant of this authority be seriously considered. First though, to provide context, it is important to review how we arrived at this point in the evolution of immigration consulting.

1. A Brief History of Canadian Immigration Consulting

The first two non-profit immigration practitioner organizations in Canada were the Association of Immigration Counsel of Canada (AICC) and the Organization of Professional Immigration Consultants (OPIC), founded in 1986 and 1990 respectively.

[1] Legal memo provided to CAPIC
[2] R.S.C. 1985, c. A-12, ss. 3(2), 6(1)(a), 6(2), 6(4).

Although AICC and OPIC operated at arm's length from one another, formal recognition of the right of non-lawyers to act as paid representatives in Canadian immigration matters was central to each organization's plight.

It was not until the British Columbia Law Society brought an application to the Provincial Court seeking a permanent injunction against Jaswant Singh Mangat for practicing law as an immigration consultant, that such recognition began to materialize. Section 26 of the *Legal Profession Act*, which prohibited non-lawyers from practicing law, was eventually deemed constitutionally inoperative to those who abided by the rules and regulations outlined in sections 30 and 69(1) of the former *Immigration Act* of 1976, which allowed non-lawyers to represent clients in immigration matters before the Immigration and Refugee Board of Canada (IRB). From the British Columbia Court of Appeal, the matter eventually reached the Supreme Court of Canada, and in 2001 the Supreme Court ruled that the federal law was upheld under section 91(25) of the Constitution Act, while the provincial law was declared inoperative under the paramountcy doctrine in section 95 of the same Act.[3]

Once this milestone had been achieved, it was only a matter of time before a new one took its place: self-regulation. Following the recommendations of an advisory committee established by the Government of Canada, the Canadian Society of Immigration Consultants (CSIC) was officially recognized as the organization responsible for regulating paid immigration consultants in 2004, shortly after AICC and OPIC had merged into the Canadian Association of Professional Immigration Consultants (CAPIC).

In the years following incorporation, CSIC endured severe criticism from the public and immigration consultants alike due to internal mismanagement, and was eventually considered unable to effectively regulate and discipline Canadian immigration consultants in accordance with its mandate.[4] Following a competitive search for a replacement, on June 30, 2011, CSIC was succeeded by the Immigration Consultants of Canada Regulatory Council (ICCRC), which became the national regulatory authority appointed by the Government of Canada to safeguard consumers who sought and retained the services of RCICs. CAPIC was instrumental to this process in effecting positive industry changes, including the regulation of immigration consulting and the creation of the title "Regulated Canadian Immigration Consultant." CAPIC quickly became Canada's largest non-profit organization of immigration practitioners and the voice of RCICs.[5] Yet the problem of UAPs continuing to dominate headlines and besmirching the work of well intentioned hard working RCICs persisted. In effect, the newly established regulator was, by definition, powerless to stop the unacceptable practices of unscrupulous, unauthorized practitioners, who tarnished the profession.

2. The Missing Link Between UAPs and the ICCRC

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[3] Law Society of British Columbia v. Mangat; 2001 SCC 67

[4] CIMM Report 'Regulating Immigration Consultants', Norman Doyle MP, June 2008

[5] http://www.capic.ca/en/our-history

As noted above, the IRCC can only refer unauthorized immigration practitioners to the CBSA which has limited resources and competing priorities, such as national security. Hence, the CBSA can only pursue major cases, which means that many unregulated agents, who pose a significant threat to consumers, continue to slip through the cracks. To illustrate the porous nature of the ICCRC's authority, the following are disciplinary actions it cannot take:

a) send a cease and desist letter demanding an individual to stop providing legal services they are not licensed to provide;

b) conduct an investigation;

c) ask an individual to sign an undertaking (agreement) to cease the unauthorized activity; and

d) initiate court proceedings to seek an injunction.

In addition, by being subject to CNCA provisions, the regulator's focus on safeguarding consumers can be impacted. Other regulatory bodies, such as the Law Society of Ontario, are exempt from the CNCA because it does not align with the mandate and objectives of a regulatory body; in fact, the exemption is embedded in its statute.

3. Potential Solutions to UAPs: A Patch-Up or Comprehensive Approach?

One solution to address UAPs could be to provide the CBSA with sufficient, dedicated resources to proceed with each complaint, rather than only major cases. It is debatable, however, whether the CBSA would embrace and utilize this option given its many competing priorities, such as national security. In view of these circumstances, this proposal may be of limited utility in battling UAPs.

A comprehensive solution, by contrast, would be to provide the ICCRC with the statutory authority to proceed with complaints against UAPs, in addition to those against licensees. The ICCRC has the existing infrastructure and could add a department or division responsible for UAPs, which a federal statute could enable. Additional resources could be supported by the federal government, which would likely be more cost-efficient than the CBSA option.

This assumption is based on a Cost-Benefit Analysis undertaken by CAPIC in 2017. The result would be a net monetary benefit for the Government of annual ~$700,000 in the first 5 years. The analysis was formulated based on the same model the Government used in previous cases against consultants, information provided by the Law Society of Upper Canada (LSO), and information by former ICCRC complaints investigators.

In terms of staff, it is reasonable to assume that two additional investigators coupled with one part-time, in-house lawyer for judicial, UAP-related work could handle at least 400 files per year. The assumption is based on consultative meetings I had with the Law Society of Ontario (LSO) Complaint & Discipline executives and former ICCRC head

investigators in 2017. Most likely the number of litigations would follow a reverse exponential curve, with litigation tapering off over time the "message" to UAPs was successfully communicated.

4. Benefits and Features of Self-Regulation Under Federal Statute

The key features of this federal statute would include:

- the power to pursue UAPs (which is paramount)
- exemption from the Canada Not-for-profit Corporations Act
- harmonization of federal and provincial interests by addressing provincial needs

For example, under federal statute the regulator's complaints and discipline process would be uniform and harmonized with provincial immigration legislation across Canada and, as with other self-regulated professions, enforcement of both licensed and unlicensed individuals would be feasible. This is because statutory regulation inherently streamlines regulation, enforcement, and effectiveness in each corner of the professional sphere, leading to a clear and comprehensive consumer protection framework that will, in turn, solidify the regulator's core mandate.

With a greatly curtailed, but not nonexistent, role in pursuing and disciplining UAPs, the CBSA could focus instead on national security and other core mandates that are critical to public safety. Additionally, as indicated the Government of Canada could realistically save millions over time, as UAP-related resources previously allocated to the CBSA would be more efficiently utilized by a statutory body with consumer protection as its sole aim (in stark contrast to the competing national security priorities of the CBSA).

As stated in the introduction an added benefit is that statutory power would further provide the opportunity to negotiate agreements with foreign government departments to address UAPs who are handling Canadian immigration files and who operate outside of Canada. This type of international collaboration has previously been successful. For example, a former immigration minister's discussion of this issue triggered a subsequent crackdown in an Indian province where such UAPs were known to be operating.[6]

To tackle international UAPs affiliated with Canada-bound immigrants, the ICCRC could, for example, attempt to forge a strong relationship with official Canadian trading delegations in the top ten source countries for Canadian immigrants (a list that would reflect the countries in which UAPs are the most dangerous). At home, it should strive to gain the support of foreign political bodies in addressing the UAP problem, and lobby the federal government to adequately address the problem with its foreign counterparts, demanding action wherever necessary. At home and abroad, active awareness campaigns could complement these lobbying efforts, and would go a long way in educating the public, especially in more vulnerable countries, about potential fraud.

[6] Press release CIC, January 14, 2013: Minister Kenney Concludes Successful Visit to India

5. Conclusion

To conclude if granted additional power under a federal statute, the ICCRC would possess the necessary authority to pursue unauthorized practitioners within Canada and have reach internationally. The beginning of this new era would likely be marked by a handful of legal proceedings, which would help to instill consumer and public confidence, and dissuade potential criminals. Given the examples of other professional regulators, it is impossible to eradicate all culprits, but it is fair to say that self-regulation under federal statute would significantly reduce the number of complaints and the harm suffered by consumers. Now that is a solution worth pursuing!

About Gerd Damitz:

Gerd is the founding president of the Canadian Association of Professional Immigration Consultants (CAPIC), a founding executive director of the Immigration Consultants of Canada Regulatory Council (ICCRC), and CAPIC's Federal Statute Committee Chair. As one of the industry's pioneers he helped in decisively shaping Canada's immigration consulting profession and has been a practicing Canadian immigration consultant for over 20 years.