

# The Problem of “Shadow” Consultants

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The problem of how to deal with people offering immigration services to the public for a fee, and who are not registered with CSIC, is in my view a multi-faceted problem that does not have an obvious solution. We could likely all agree that grossly fraudulent conduct should be, and indeed sometimes is, investigated by the RCMP and prosecuted under the *Criminal Code*. But what about the non-fraudulent individuals who simply carry on business as immigration consultants who are not members of CSIC?

I have little sense of the specific nature and extent of this activity...in particular, how are these consultants operating? Are they submitting files as representatives stating they are unpaid when they are in fact being paid? Are they hiding behind non-profits or NGOs? Are they doing the work and filing in the name of a lawyer or a CSIC member as the paid representative? Or, are they transparently assisting the public up to the point of filing the application, but not after? It would be helpful to get a better handle in this, as some of this activity may be illegal under IRPA and some may not.

Here are what I see to be the parameters of the problem.

## ***CSIC is not a licensing body***

CSIC is not a professional licensing body in the traditional sense. Such a body is typically is given a mandate by statute, consisting of a governmental objective and a framework for achieving it in the public interest. Along with being given a monopoly to license persons to practice a particular profession, it is typical for the licensing body to be given the statutory ability to enforce their monopoly by prohibiting others from operating without a license and prosecuting where necessary. Sometimes a statutory injunction is available to stop any unlicensed activity until the prosecution occurs.

I am not 100% sure the federal government could establish a licensing body for immigration consultants if it wanted to. The reason is that immigration under s. 95 of the BNA Act is an area of concurrent jurisdiction, ie both Parliament and the provinces can legislate in this area. Moreover, the authority to license professions generally is a matter of *exclusive* provincial jurisdiction under s. 92(13) of the BNA Act, as the courts have held this comes under “property and civil rights in the Province”. Consumer protection is also generally a matter of provincial jurisdiction, coming within property and civil rights.

CSIC has no statutory framework for its operation and is not a licensing body which gives out licenses to immigration consultants generally. It does not emanate from a statutory definition, including, for example a definition of “immigration consulting”. Nor does it have the power to define this term, let alone prohibit non-members from doing it.

## ***Lack of guidance in Mangat***

The Supreme Court of Canada decision in the *Mangat* case in 2001 has served a critically useful purpose in allowing this profession to exist but actually provides no

guidance on the matter of licensing immigration consultants as a separate profession:  
<http://edng.ca/mangat.htm>.

You may recall under the prior *Immigration Act*, Parliament was very specific in stipulating that counsel appearing before the IRB could be non-lawyers. Parliament's right to decide who could appear before its own federal tribunals was upheld to be *intra vires*, i.e. a legitimate exercise of federal jurisdiction, in the *Mangat* case. The decision makes it patently clear that the Court was only ruling on the matter of appearing before these federal tribunals, and not the practice of immigration consulting in a broader sense. The Court went on to say that the provinces have the exclusive jurisdiction to make rules concerning the licensing of professions, one being the legal profession. It took as given (in fact it was conceded) that immigration consulting is considered the practice of law as defined and licensed by the provinces, and that Mr. Mangat clearly ran afoul of that law in BC. In other words, the prohibition in the *Legal Professions Act* of BC against the unauthorized practice of law was also *intra vires* the provincial legislature. A conflict pertained: the federal law said Mr. Mangat could do this, the provincial law said he could not. So what to do when two laws patently conflict with each other? The Court applied the principle of paramountcy in constitutional law, which says that where there is a conflict of law between a valid federal law and a valid provincial law in an area of concurrent jurisdiction, the federal law prevails – hence, Mr. Mangat won and we can still practice as immigration consultants today.

### ***The problem of what specific activity is being regulated***

CSIC is a private non-profit corporation. Its real teeth lies in those parts of the Regulations which restrict CIC, IRB and the CBSA from conducting business with paid representatives who are not lawyers or CSIC members.

This new system enables a far broader scope of lawful activity, namely the activity of representing, advising or consulting with a person who is the subject of an application or proceeding before CIC, IRB and or CBSA, and thus goes beyond Mangat. But note that HRSDC, PNPs and citizenship cases are outside the scope of the scheme. (It is my view that consultants doing this work would not have the “Mangat defence” of saying they are expressly authorized by federal law, and are therefore vulnerable to a law society charge that they are “practicing law without a licence” – however, I have seen no political interest on the part of law societies to tackle the problem at this level.)

It is not patently clear to me what exactly is the scope of the activity the federal government seeks to regulate under R13.1. Consider just those immigration consultants within Canada. Are business people permitted to assist people for a fee with all the forms and the process, but not “represent” them? This would seem to be lawful up until the time of filing, on a literal reading of R13.1. In other words, only advising or representing persons *after* filing or after they have been named in a proceeding gives rise to illegality under IRPA as only then is one “subject to a proceeding or application” – and nothing one does beforehand would give rise to illegality *under IRPA*. The initial guides attempting to explain this did not in fact clarify it.

### ***Lack of will to prosecute violations of IRPA***

The RCMP cannot be looked to as the prosecution wing of the industry, but is available to investigate serious breaches of the *Criminal Code*.

Where consultants likely are in violation of IRPA, this is also a federal offence. It is a breach of R13.1 which is an offence by virtue of A124(1)(a) of IRPA which makes any violation of IRPA an offence. In theory, the federal Crown (Department of Justice) is tasked with prosecuting violations of all federal statutes, not just the Criminal Code. For example, the federal Crown can prosecute fisheries violations, UI violations, forestry offences and other violations of federal law. Like the RCMP, I suspect they would be uninterested except in egregious violations and would see it as a “civil” matter involving commercial interests mostly. But it would be possible for CIC to work with Justice to develop evidence and advocate for vigorous IRPA prosecutions against non-CSIC members violating the law, in the interests of consumer protection.

### ***Lack of aggressive Law Society prosecutions***

As indicated above, some facets of what consultants currently do could be seen as practicing law without a licence and therefore open to prosecution by the law societies, e.g. advising on citizenship, which is not an IRPA matter. This may also be true in respect of all IRPA advice given by immigration consultants *prior to* submitting an application, as this does not appear to be exempted under R13.1. I think that advice outside this limited area may well constitute the “practice of law” as defined in legal professions statutes, i.e. giving advice about legal rights under a statute for a fee – which is prohibited for non-lawyers. *Mangat* would not help here.

Law societies have taken some lawsuits, but I am not aware of charges laid against immigration consultants for routine non-fraudulent work. This is not to say they could not do so any time.

### ***Regulation of paralegals generally***

There has been considerable movement towards the regulation of paralegals generally in various provinces of Canada. This was spurred on in large measure by law society losses in key court cases where non-lawyers were doing work for the public in areas of federal jurisdiction that were lucrative, especially in immigration (*Mangat*) and criminal law (*Romanowicz*). Somewhat stunned by the concept that the “practice of law” was not one in which they had a monopoly in important areas of federal law, lawyers were motivated by their commercial interests to look globally to all areas of entrenchment on what they thought was their turf and to change strategies to lobby for provincial governments to regulate paralegals. [It was the CBA immigration section which lobbied for national regulation of immigration consultants after losing *Mangat*, not the law societies – the law societies have not supported national regulation – in fact they are now challenging CSIC in the courts.] Provincial governments now seem more willing to regulate all paralegals globally as a consumer protection issue, rather than doing this piecemeal and may be willing to see immigration consulting as an area of provincial regulation. Whether this would come under a mega regulatory body (eg. the Ontario Paralegal Regulatory Commission) is one large issue. Different provinces could make different decisions on the ultimate regulator, but, at present, Ontario appears poised to give this responsibility to its Law Society:

[http://www.lsuc.on.ca/news/updates/sept2304\\_paralegal.jsp](http://www.lsuc.on.ca/news/updates/sept2304_paralegal.jsp). The critical point for immigration

consultants, if they are to be deemed to be “paralegals” is not, in my view, so much as who the regulatory body is but whether the professional is **independent** – this is the battle ground. Immigration consultants would need to ensure that, as with CSIC at present, they have the right to conduct business as an independent professional, ie., not under the supervision of a lawyer. This currently exists under CSIC, but it has been a mixed blessing and the manner of CSIC’s carrying out its mandate to date has been a considerable disappointment to the industry.

Without knowing for sure, I believe that the various law societies are all at different stages with the regulation of paralegals. In recent times, the Federation of Law Societies has emerged as the umbrella group for law societies, to tackle national and international issues for lawyers as business people, and it may be expected to get involved in this issue at some point.

### ***CSIC under a legal cloud***

There is the added matter that CSIC is under a legal cloud, and its continued existence is legally vulnerable. Three separate lawsuits have been filed challenging its legal validity. The first was discontinued by the plaintiffs, an immigration consulting organization. An interim injunction was recently denied on the second case, although the merits of the constitutional argument were left wide open and that case appears to still be going ahead. The third one, I believe brought by the Law Society of Upper Canada, is just beginning. These can be presumed to be extensively time-consuming and costly for CIC to defend.

### ***Economic immigration is increasingly provincial***

With the exception of Ontario (which I understand is working on a PN Program), provincial immigration is entrenched and increasingly the better game in town. It is known that larger quotas for skilled workers who can meet the needs of employers notwithstanding their points will continue to devolve to the provinces. Provinces are starting to appoint their own immigration personnel and, as we are seeing with Quebec, cannot be presumed to accept the CSIC designation for who can play in the provincial ball park of immigration consulting. Given the importance of economic immigration to the overall scheme of immigration, and the trend toward provincial control over labour market immigration, their rules may ultimately be more determinative.

A golden opportunity has presented itself, where the provinces are now in a position to negotiate with CIC and CSIC. The LSUC lawsuit, being a constitutional challenge to CSIC’s set-up, has resulted in notice to all provincial Attornies General to intervene (as is typical in constitutional challenges). This is the provinces’ collective opportunity to get a system that works for them. The provinces are more beholden to the powerful provincial law societies when it comes to the practice of law (somewhat like the federal government sees the CBA as its major stakeholder when it comes to immigration practice). We can therefore expect considerable backroom jockeying before the provincial role in regulating immigration consultants is settled. My guess is it will be a system more under the control of law societies than the CSIC model (otherwise they would not likely have sued).

The end result of being provincially regulated may turn out to be positive or negative; it is too soon to tell. CSIC has not shown itself, in my view, to have a vision for the field as a whole, or a sense of accountability to consultants generally. Indeed, by abdicating the concept of a self-regulating body, it has reneged on a primary reason the industry supported federal regulation. If CSIC is to be the model, provincial regulation as an independent profession may be a preferable alternative, even if under law society umbrellas. The standards would not likely be any higher (the current CSIC Code of Professional Conduct involved, according to Mark Davison, cherry picking the most rigorous provisions from all the law society codes.) The fees may even be less; the insurance rates would be an issue, eg. what loss experience they would be tied to? One bonus of provincial regulation is that there would probably be definition of “immigration consulting” and a prohibition against doing it without a licence. Indeed, that would be the whole point, unlike the federal scheme which gets at only some of the issue.

### **What to do??**

- (1) Research the extent, current development and interest of the paralegal movement in each province to include immigration consultants to ascertain what possibilities exist with a view to active participation in this debate with provincial governments and law societies in the way paralegal organizations are active in some provinces. If provincial regulation does not look likely in the foreseeable future, the current situation might be dealt with in other ways, as below.
- (2) The profession could develop the ability to find facts and investigate the nature and extent of the “shadow” problem. Alternative effective remedies may arise in the course of such an exercise. The industry does not have the capacity to do this at the moment, but could through more targeted relations with members of the industry, the complaints unit at CSIC, and the Secretariat to this end.
- (3) The possibility of increased phantom consulting was in fact anticipated by CIC at the time of regulation. It may therefore be possible to enlist the political will of the Minister and the Secretariat to grapple with the problem now as an extension of regulating. A helpful statement of CIC’s willingness to do so is found in the Regulatory Impact Analysis Statement of April 14, 2004 when the rules on authorized representative were implemented:

#### Phantom Consultants

Concerns were also expressed that the new regulations may exacerbate the existing issue of “phantom” consultants, i.e., those consultants, both inland and overseas, whose names and contact details do not appear on the clients’ application forms. CSIC is aware of potential risks and has identified ways in which these may be mitigated. In the same vein of risk mitigation, CIC visa officers overseas are familiar with the regular local consultants. CIC will issue administrative guidelines to officers abroad to ensure that the relationship between the representative is *bona fide*. CIC will closely monitor the situation to determine whether there is avoidance of the regulations, and will identify potential remedies, including expanding the scope of the regulations to require representatives, including NGOs, who represent without a fee, to become members in good standing of CSIC.

- (4) In other contexts where the public Crown resources are not available to prosecute a violation of law, an interested group or individual can and does take a private prosecution to enforce the law. If indeed some of the activities of shadow consultants are likely a breach of R13.1 and A 124(1)(a), the law can be enforced by others. The

maximum punishment is a fine of \$50,000 or two years imprisonment, or both. Any citizen or incorporated group can collect its own evidence and bring a private prosecution. Environmental groups are an example of groups that have made use of private prosecutions. I am not necessarily advocating this, but it may be worth exploring in the interests of the profession. A good place to start is:

<http://canada.justice.gc.ca/en/dept/pub/fps/fpd/ch26.html>.

The Attorney General can always intervene to stop a private prosecution to protect the public interest, but that should be no concern where the group is in fact furthering government policy. Indeed, some statutes have given an incentive to interested private parties, such as environmental groups, to prosecute violators by allowing a portion of the fines collected to go to the group. A serious Minister could do the same, and download the problem to parties with more at stake.

**Caveat:** As always, these are my views and do not represent the views of any organization.....more importantly, they may not even be right! - LG