Federal Court  Cour fédérale

Date: 20111208

Docket: IMM-5039-11

Citation: 2011 FC 1435

Ottawa, Ontario, December 8, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application invites the Court to address the scope of judicial review of regulations dealing with immigration consultants in light of such fundamental principles and Canadian values, as the rule of law and the separation of powers.

I. INTRODUCTION

[2] The Canadian Society of Immigration Consultants (CSIC), the applicant in this judicial review, is a corporation without share capital constituted on October 8, 2003 under *Part II* of the

Canada Corporations Act, RSC 1970, c C-32 to fulfill the role of an independent self-regulating body and which operates at arm's length from the Government.

[3] The letters patent of the applicant provide that it shall regulate immigration consultants in the public interest and in so doing shall establish a code of conduct, a complaint and disciplinary procedure, an educational program, and a compensation fund with respect to acts and omissions of its members.

[4] From April 13, 2004 to June 30, 2011, the applicant has acted as the sole regulatory body of immigration consultants in Canada whose members are legally authorized to advise, consult with, and represent individuals involved in proceedings under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) and its regulations: sections 2 and 13.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), as modified by SOR/2004-59 (the 2004 Regulations).

[5] The applicant challenges the legality of the following enactments:

(a) The *Order Fixing June 30, 2011 as the Day on which Chapter 8 of the Statutes of Canada Comes into Force* (SI/2011-731) (GIC Order);

(b) The *Regulations Amending the Immigration and Refugee Protection Regulations* (SOR/2011-129) (2011 Regulations); and

(c) The *Regulations Designating a Body for the Purposes of Paragraph 91(2)(c) of the Immigration and Refugee Protection Act* (SOR/2011-142) (Ministerial Regulations).

[6] As of June 30, 2011, concurrently with the coming into force (the GIC Order) of *An Act to Amend the Immigration and Refugee Protection Act*, SC 2011, c 27, previously known as Bill C-35, the applicant's designation as the regulator of the immigration consultants is revoked (the 2011 Regulations) and the Immigration Consultants of Canada Regulatory Council (ICCRC) is designated as the new regulator (the Ministerial Regulations).

[7] Although the applicant treats the impugned enactments as a single "decision", formally speaking, the GIC Order and the 2011 Regulations are made by the Governor in Council (Cabinet), while the Ministerial Regulations are made by the Minister of Citizenship and Immigration (the Minister), the present respondent. More particularly, the impugned enactments are respectively made under the purported authority of section 7 of Bill C-35 (the GIC Order); subsection 5(1), section 14 and former section 91 of the Act (the 2011 Regulations); and new subsections 91(5) and (7) of the Act, as amended by section 1 of Bill C-35 (the Ministerial Regulations).

[8] Both the GIC Order and the 2011 Regulations were published in *Part II* of the *Canada Gazette* on July 6, 2011. The Ministerial Regulations along with the Regulatory Impact Analysis Statement (RIAS) were published in *Part II* of the *Canada Gazette* on July 20, 2011 (the July RIAS). There was no prepublication of any of the impugned enactments (SI/2011-731, SOR/2011-129 and SOR/2011-142). That said, on March 19, 2011, regulatory amendments to the IRPR that would have substantially the same effect as the 2011 Regulations and the Ministerial Regulations were pre-published in *Part I* of the *Canada Gazette* along with a Regulatory Impact Analysis Statement (the March RIAS).

[9] The applicant submits that the enactments revoking the CSIC's designation (the 2011 Regulations) and designating the ICCRC as the new regulator (the Ministerial Regulations) are *ultra vires* and exceed the regulation-making authority under (former or new) section 91 of the Act on the grounds of abuse of discretion, bad faith, and reliance upon irrelevant considerations. The applicant also submits that the making of both the 2011 Regulations and the Ministerial Regulations is contrary to the applicant's legitimate expectations and right to be heard, while the conduct by the Minister and his staff at Citizenship and Immigration Canada (CIC) raises a reasonable apprehension of bias. Finally, the enactment of the GIC Order violates the procedural requirements of section 9 of the *Statutory Instruments Act*, RSC 1985, c S-22 (the SIA), and the Ministerial Regulations are otherwise invalid in law because they were made prior to the coming into force of Bill C-35.

[10] To the contrary, the respondent submits that the impugned enactments are authorized by Parliament and it is not the function of the Court to examine the reasonableness of regulatory enactments or to criticise policy choices made by Parliament or the Government. In any event, there is no proof of bad faith, improper motive or actual bias. Moreover, rules of procedural fairness do not apply to legislation-making and whatever participatory rights the applicant might have had, they have been amply satisfied. Finally, all procedural requirements found in the SIA were followed and section 7 of the *Interpretation Act*, RSC 1985, c I-21 permits the making of regulations prior to the coming into force of legislation. Thus, the impugned enactments are valid in law.

[11] Having considered the totality of the evidence, the applicable law and relevant case law, the present application must fail. The Court finds that the impugned enactments are authorized by statute and validly came into force on June 30, 2011. In principle, regulations or policy decisions are not reviewable, except in cases of excess of jurisdiction or failure to comply with legislative or regulatory requirements. As far as any duty to consult is concerned, it has been satisfied in this case. The process of selecting a new regulatory body, in which the applicant was allowed to participate, was fair and transparent. This is not "an egregious case" where the intervention of the Court is warranted to uphold the rule of law.

II. FACTUAL AND CONTEXTUAL BACKGROUND

[12] The present application is somewhat a continuation of the litigation that commenced in spring 2011 when the Government announced its intention to remove the reference to the applicant from the definition of "authorized representative" in section 2 of the IRPR, as modified by the 2004 Regulations, and replace it with the ICCRC. But before examining the spring and summer of 2011 events, it is necessary to go back to the early 2000s when it was decided to federally regulate the occupation of immigration consultant.

The 2004 Regulations

[13] Self-governing professions have a long history in Canada – legal and medical professions were already established in the pre-Confederation era – but until the turn of the century, the idea that immigration consultants constituted a group of professionals who should be legally allowed to compete with members of the legal profession and to regulate themselves in the best interests of the public had not yet emerged.

[14] The background leading to the creation of a self-regulatory body governing the activities of immigration consultants in Canada and the making of the 2004 Regulations is largely uncontested and supported by the evidence filed, and by relevant case law: *International Assn of Immigration Practitioners v Canada*, 2004 FC 630 at paras 3-10; *Law Society of Upper Canada v Canada (Citizenship and Immigration)*, 2008 FCA 243 at paras 4-35 (*Law Society of Upper Canada*); and *Onuschak v Canadian Society of Immigration Consultants*, 2009 FC 1135 at paras 11-19 (*Onuschak*).

[15] In October 2002, the Minister appointed a committee of experts to advise him on the regulation of immigration consultants (the Advisory Committee). Following their recommendations made in May 2003, the Minister accepted that a self-regulatory body be created since this required no legislative changes.

[16] Although there were already two existing associations, the Minister (or Cabinet) preferred the creation of a new body as the regulator of the immigration consultants. Apparently, the Association of Immigration Counsel of Canada (AICC) and the Organization of Professional Immigration Consultants (OPIC) had not been able to effectively enforce membership or high professional standards. Moreover, they both supported the creation of the CSIC as the new regulator.

[17] The Minister rejected the Advisory Committee's recommendation that the new regulatory body be constituted by the Government and that it be composed of a board of directors composed

of CIC representatives, immigration consultants, and members of the public. Instead, the regulatory body would simply be a non-share capital corporation under the *Canada Corporations Act*, RSC 1970, c C-32, and the directors would be chosen by the members of the corporation. That said, financial support (by way of contribution agreements) and some external guidance would be provided by CIC in the setting up of the corporation during its early years of operation.

[18] Self-government of the new regulatory body had two essential aspects – the authority to licence and the ability to discipline. However, concerns were expressed that this may not cure the problem of "phantom" or "ghost" consultants. Because its jurisdiction only extended to members, this gray area of practice could not be effectively regulated by the newly created self-regulated body. Be that as it may, CIC promised to "closely monitor the situation", but over time, this proved to be insufficient as will be explained below.

[19] The Government was also cognisant that a subsequent board of directors of the newly created regulatory body could modify the code of conduct and by-laws so as to reduce their professional standards thereby impacting consumers' protection. Indeed, the Government vowed to stakeholders that should the CSIC fail to fulfil its central task of protecting consumers and maintaining professional standards, the Government would take action to remove its recognition.

[20] In March 2005, one year after the applicant was designated as the regulator of immigration consultants, governmental authorities were supportive of the steps taken by the applicant: "Overall, CSIC has been operating with success and is meeting the Canadian government's objective of protecting vulnerable people involved in the immigration process."

[21] Over time, however, there was a gradual erosion of confidence from part of the applicant's membership, the public and the Government, and this whether or not partisan views may have also been at work, as suggested by the applicant. Apparently, there were external pressures in 2010 to have Mr. John Ryan, appointed years before, removed as Chief Executive Officer of the applicant. There were also pressures for the removal of Mr. Imran Qayyum from the Board of directors of the applicant and the Canadian Migration Institute (CMI), a wholly owned subsidiary of CSIC.

[22] Be that as it may, as early as 2007, a Toronto Star investigation suggested that the regulatory scheme for immigration consultants continued to fail the public, and the Canadian Bar Association (CBA), unaware at that time of any disciplinary hearings against CSIC members, had expressed similar concerns to the Minister. Indeed, the CBA was encouraging "the government to conduct a broader assessment of whether CSIC is meeting its mandate for the regulation of consultants, particularly given the persistent allegations of fiscal mismanagement made by past directors of CSIC's own Board".

Standing Committee inquiry and recommendations

[23] In April 2008, responding to the complaints and discontent from the public and from within the profession regarding unacceptable practices by immigration consultants, the Parliamentary Standing Committee on Citizenship and Immigration (the Standing Committee) undertook to study the issues in the field and to recommend measures to properly regulate the profession. The Standing Committee did not conduct a formal investigation of the complaints

made against the CSIC, whose representatives were nevertheless offered the opportunity to testify and comment on recommendations made afterwards. This was entirely within the prerogative of a Parliamentary Standing Committee.

[24] In June 2008, the Standing Committee issued its report, entitled "Regulating Immigration Consultants". It notably recommended that the Government introduce stand-alone legislation to Parliament to re-establish the CSIC as a non-share capital corporation, to assist in re-establishing the new regulator, and to remain involved in its affairs until it is fully functioning. In its report, the Standing Committee noted that a number of immigration consultants were dissatisfied because CSIC's membership fees were too high, it had failed to develop an industry plan, there was a lack of transparency and accountability, and compensation and spending were extravagant.

[25] While the Standing Committee did not make any specific finding of fact (to which the Minister's representative admitted in this proceeding), it generally identified a number of shortcomings that should nevertheless be addressed by Parliament:

> These grievances stem from various issues, and no doubt many arise because CSIC is a relatively new organization struggling to strike the right balance to regulate previously unregulated professionals. However, the Committee believes that problems at CSIC are attributable to more than just growing pains. Fundamentally, the Society is not being given the tools it needs to succeed as a regulator. As a federally-incorporated body, CSIC has no power to sanction immigration consultants who are not members of the Society, and it cannot seek judicial enforcement of the disciplinary consequences it imposes on those who are members. Further, because CSIC's jurisdiction is not governed by statute, there is no possibility for dissatisfied members and others to influence the Society's internal functioning though [sic] judicial review. In the view of the Committee, these shortcomings should be addressed by new legislation.

[26] The Standing Committee's recommendation that the CSIC be "re-established" under stand-alone legislation was however not carried out by the Government, who would instead decide two years later to introduce Bill C-35 to Parliament as explained below.

Ministerial Response

[27] Before proposing to Parliament legislative amendments to the Act, different options were considered by CIC and the Minister.

[28] In 2009, Les Linklater, Director General of CIC Immigration Branch (now Assistant Deputy Minister, Strategic and Program Policy of CIC) retained a consulting group, Sussex Circle to, *inter alia*, conduct a review and provide "an analysis and assessment of the threshold required to conclusively determine when the level of governance in a not for profit organization has deteriorated to a point that the mandate of the board of directors could be revoked by the government with minimal legal risk".

[29] Sussex Circle reviewed CSIC's governance and accountability arrangements. They found same to be inadequate in important aspects and proposed a number of options ranging from doing nothing and winding up the CSIC, notably through an amendment to the IRPR that would name another body to replace CSIC (the regulatory option). Other options would be to amend the Act or the regulations in order to give the power to appoint "public interest directors" and compel the CSIC (or another designated body) to produce information as requested by the Minister for consideration and approval, or to set out prescriptive governance and accountability requirements in return for the retaining (or the granting) of monopoly in this area.

[30] The regulatory option had some attractive features (notably because it did not require legislative amendments), but it was apparently not the option favoured by Sussex Circle because of its high transitional costs. Sussex Circle thought that a minimally regulatory approach was highly dependent on the cooperation of the CSIC, while a more comprehensive and prescriptive approach could be a fall back position. However, in the long term, it would be far preferable to make just one set of legislative changes to deal with the governance and accountability issues identified in its report.

[31] The self-regulatory model chosen in 2004 did not prevent (and still does not prevent in 2011) immigration consultants in Canada and elsewhere from belonging to other professional associations. At the epoch CSIC became the regulator of immigration consultants, the Canadian Association of Professional Immigration Consultants (CAPIC) was created by the amalgamation of two aforementioned immigration industry organizations, the OPIC and the AICC, who had previously supported the establishment of the CSIC's self-regulatory body.

[32] The CAPIC is a voluntary immigration practitioner association that, among other things, lobbies and advocates on issues concerning immigration practitioners. The relationship between the CAPIC and the CSIC have been the cause of much friction between the two organizations and have been particularly strained since 2007 when Mr. Philip Mooney became president of the CAPIC as explained in the affidavit of Keith Frank and judicially noted by the Court in *Mooney v Canadian Society for Immigration Consultants*, 2011 FC 496 (*Mooney*). The evidence

on record clearly establishes that the CAPIC, notably Mr. Mooney himself, campaigned against the CSIC and actively advocated for its replacement.

[33] Apparently, CAPIC directors, although not registered lobbyists, met in 2008 and 2009 with Mr. Les Linklater – then Director General of CIC Immigration Branch – and other members of the Minister's staff to lobby for the replacement of the CSIC or its Board of Directors. In this respect, these unnamed CAPIC directors allegedly acted in an "advisory capacity to the Minister in "offering alternatives" to the CSIC.

[34] Indeed, some immigration consultants heard in 2008 by the Standing Committee were directors of the CAPIC (or even "ghost consultants" as alleged by the applicant). Be that as it may, in *Mooney*, above, at para 113, this Court noted in 2011 that "[t]he Standing Committee Report and its principal recommendations are obviously a legitimate and thoughtful attempt to suggest ways in which CSIC could; and should, be reformed so that it might better fulfill its mandate and governing principles".

Bill C-35

[35] On June 8, 2010, Bill C-35, referred to by the Government as the *Cracking Down on Crooked Consultants Act*, was introduced to the House of Commons by Immigration and Multiculturalism Minister Jason Kenney.

[36] In the news release and speaking notes of the Minister, one can read:

> While most immigration consultants working in Canada are legitimate and ethical, it is clear that immigration fraud remains a

> widespread threat to the integrity of Canada's immigration system, said Minister Kenney. The *Cracking Down on Crooked Consultants Act* will better protect prospective immigrants from crooked consultants and help safeguard our immigration system against fraud and abuse.
> […]
> The proposed legislation implements unanimous recommendations of the House of Commons Standing Committee on Immigration which were arrived at following extensive consultations….

[37] In passing, the applicant contends that in a television interview on June 12, 2010, the Minister misstated the recommendations of the Parliamentary Standing Committee when declaring that "there have been a lot of concerns expressed, including the Parliamentary Standing Committee on immigration, unanimously said the government should set up a new regulatory body". Also, when questioned about Bill C-35 in a CPAC interview, on June 8, 2010, the Minister's answer implied his objective to have "it done by the end of 2011."

[38] As will be explained below, the Court has found that the allegations of bias against the Minister are not determinative as far as the legality of the impugned enactments is concerned. The Court accepts the respondent's submission that the Minister's statements or comments have been taken out of context. In the CPAC interview, Minister Kenney was apparently referring to the coming into effect of Bill C-35 that he wished was done by the end of 2011, and not the designation of a new regulatory body.

[39] That said, despite the Minister's statements, it is apparent that the Government chose not to follow the Standing Committee's recommendation that "the Government of Canada introduce stand-alone legislation to re-establish the Canadian Society of Immigration Consultants as a non-share capital corporation" and that "[s]uch 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".

[40] In effect, once adopted by Parliament and proclaimed in force, Bill C-35 would significantly amend the manner of regulating third parties in immigration processes. Among other things Bill C-35:

- Creates a new offence by extending the prohibition against representing or advising persons for consideration – or offering to do so – to all stages in connection with a proceeding or application under the Act, including before a proceeding has been commenced or an application has been made, and provides for penalties in case of contravention;
- Exempts from the prohibition:
    - Members of a provincial law society or notaries of the Chambre des notaires du Québec, and students-at-law acting under their supervision,
    - Any other members of a provincial law society or the Chambre des notaires du Québec, including a paralegal,
    - Members of a body designated by the Minister, and
    - Entities, and persons acting on behalf of the entities, acting in accordance with an agreement or arrangement with Her Majesty in right of Canada;
- Extends the time for instituting certain proceedings by way of summary conviction from six months to 10 years;

- Gives the Minister the power to make transitional regulations in relation to the designation or revocation by the Minister of a body;
- Provides for oversight by the Minister of a designated body through regulations made by the Governor in Council requiring the body to provide information to allow the Minister to determine whether it governs its members in the public interest; and,
- Facilitates information sharing with regulatory bodies regarding the professional and ethical conduct of their members.

[41] On September 23, 2010, Bill C-35 received second reading at the House of Commons and was referred to the Standing Committee. The latter presented its report on November 24, 2010, with a concurrence on December 6, 2010. It received third reading on December 7, 2010.

[42] The same day, at the Senate level, Bill C-35 received first reading. It received second reading and was referred to the Standing Senate Committee on Social Affairs, Science and Technology on March 1, 2011. The latter presented its report (with observations) on March 10, 2011. Finally, it received third reading on March 21, 2011.

[43] Bill C-35 received Royal Assent on March 23, 2011.

Public selection process

[44] On June 8, 2010, concurrently with the tabling at the House of Commons of Bill C-35, the Minister announced that it was also taking immediate steps to address "a lack of public confidence in the regulation of immigration consultants" and that a Notice of intent would be

published announcing CIC's intention to "launch a transparent public selection process to identify a governing body for recognition as the regulator of immigration consultants, under current authority".

[45] Explaining the decision to launch a public selection process, Minister Jason Kenney stated:

> […] According to the [House of Commons Standing Committee], complaints were heard from a number of consultants across the country, many of whom have expressed great dissatisfaction with the way that the Canadian Society of Immigration Consultants, or CSIC, is currently governed. That's why I'm taking immediate steps to address this problem, a problem that poses a significant threat to the immigration system and has created a lack of public confidence in the regulation of consultants.
> […]
> The Notice of intent will request comments from the public on the proposed selection process. A transparent selection process will then identify the body best able to effectively regulate consultants in support of Canada's public confidence in the immigration system.
> […]
> The regulatory body must regulate effectively and must be held accountable for ensuring their membership provides services in a professional and ethical manner and that real sanctions are taken if their members do otherwise.

[46] Effectively, on June 12, 2010, a Notice of intent was published in *Part I* of the *Canada Gazette* requesting comments from the public on its proposal to establish a public selection process with the objective of identifying a governing body for recognition as the regulator of immigration consultants. More particularly, such "a competitive public selection will be pursued in order to identify the entity best able to demonstrate capacity to effectively regulate immigration consultants. Selection factors will be established to ensure that the entity identified

for recognition as the regulator of immigration consultants has the capacity to effectively regulate."

[47] According to the applicant, prior to the launch of the public selection process, Mr. Linklater allegedly requested Mr. Mooney – who later became the President and CEO of the ICCRC – to provide a list of 19-20 individuals who could take over the CSIC in its regulatory functions. In this respect, the Court finds the evidence on record inconclusive and further notes that there is no credible evidence allowing the Court to conclude on a balance of probabilities that the public selection process was not fair and transparent.

[48] Further to the Notice of intent published on June 12, 2010, after considering comments received by the public, selection factors were developed "to ensure that any entity serving as the regulator of immigration consultants has or will have the capacity to support Canada's immediate and long term immigration objectives as well as maintain public confidence in the immigration system". As it appears from the Government Notice published in *Part I* of the *Canada Gazette* on August 28, 2010 (the Call for Submissions), five selection factors were identified by CIC – competence, integrity, accountability, viability and good governance – however, there could be "other relevant factors" that the Selection Committee or the Minister may want to consider.

[49] In the Call for Submissions, the Minister invited interested candidate entities to make submissions which "set out, in detail, how they respond to the selection factors", but this "does not obligate the Minister, the Department of Citizenship and Immigration or the Government of

Canada in any way, or to take any action". That said, the Call for Submissions indicates that "[a]n agreement or arrangement may be entered into between the successful entity and the Government of Canada". The deadline for submissions was December 29, 2010.

[50] To that effect, a Selection Committee (comprised of four external experts and three senior public servants) was charged with examining the submissions received in response to the Call for Submissions and making recommendations to the Minister after having considered the submissions in light of the selection factors and "other relevant factors".

[51] In its final report dated September 24, 2010, Mr. John Scratch, an external consultant whose services were retained in spring 2010 by CIC, reiterated what he had already written in his interim report of July 2010, that the selection process of the regulator chosen by the Minister "must be open, transparent and competitive and must be seen to be so". In her cross-examination, the Minister's representative confirmed that the chosen selection process would have all those characteristics. Moreover, the report prepared by the external consultant "was a policy tool for the Minister to make a decision on who he was going to recommend". It must be remembered that the selection process undertaken in the summer of 2010 was under the provisions of the Act, as they read at the time, and which conferred the authority to maintain or change the regulator of immigration consultants to the Governor in Council (Cabinet).

[52] Apart from the fact that the chosen organization must have, among other things, a code of conduct, a complaint and discipline mechanism, liability insurance, a compensation fund, bilingual services to members and the public, continuing education requirements and programs

for members, Mr. Scratch notes that "[m]any of the problems identified with the current regulator are governance issues – democracy, accountability and transparency. Therefore, applicants should be required to demonstrate that they are capable of establishing an organization that will address these issues and that will provide for effective control of the Board of directors by the membership of the organization".

[53] In its final report, Mr. Scratch also found it difficult to provide specific advice on an implementation plan because it was unclear – the selection process still not completed – what the issues would be until a decision had been made on a successful applicant and until there had been discussions with that applicant. Be that as it may, the following options were mentioned by the external consultant:

> […]
> When the decision is made on the applicant CIC will need to begin negotiations with the applicant on the agreement to determine when the applicant can assume the duties of the regulator. If the current regulator is not selected CIC will also need to have discussions with CSIC to determine if they will act as regulator until the successful applicant is prepared to assume the duties. Ideally CIC should bring CSIC and the successful applicant together to arrange for an orderly transfer of authority.
>
> CIC will also have to enter into negotiations with the body chosen as regulator for the agreement between the two parties. CIC should being preparing itself for these negotiations by determining what it wants in this agreement.
> […]
>
> During any transitional period CIC may have to deal with the following issues in order to avoid disruption in the operations of the regulator:
>
> - Will existing authorized immigration consultants continue to be authorized during the transitional period? Bill C-35 gives the Minister authority to provide for this by way of regulation.

> The transitional provision in section 6 of Bill C-35 also deals with this issue.
>
> - Will members of CSIC in good standing automatically become members of the body chosen as the regulator? The new section 91(7) in Bill C-35 would appear to deal with this issue.
>
> - Will there continue to be a Code of Conduct, liability insurance, a compensation fund and a complaints and disciplinary system during the transitional period? If there is who will pay for them? This is a particularly difficult issue which could arise if the current regulator is not the successful applicant. The negotiations with CSIC will have to try and resolve these issues. Legal Services will need to be consulted on this point.
>
> - If the successful applicant is not the current regulator what will happen to cases in the complaints and disciplinary system? Again CIC will have to try and resolve this issue with CSIC and the successful applicant. Some sort of interim complaints and disciplinary system may need to be established.
>
> - There may also be issues relating to the winding up of the current regulator during a transitional period. CIC needs to consult Legal Services on its authority to wind up the current regulator and its ability to preserve the liability insurance and the compensation fund currently in operation.

[54] Four submissions were considered in January 2011 by the Selection Committee, including proposals made by the applicant and the Institute of Chartered Canadian Immigration Practitioners (ICCIP). The bid of the ICCIP was actually prepared by the CAPIC (notably Phil Mooney, Lynn Gaudet, and Christopher Daw). The CAPIC had publicly announced that it was not interested in becoming the regulator itself, but would nevertheless lead a "Consortium of interested parties". This strategic move – from the CAPIC, who is an activist interest group – is not surprising considering that in its final report of September 2010, the external consultant had already noted that "[t]he Regulator should be limited to a regulatory function and should not act as a representative organization for immigration consultants".

[55] In their report delivered to the Minister's attention on January 27, 2011, the Selection Committee came to the conclusion that the ICCIP and the applicant both met the previously announced selection factors (integrity, competence, good governance, accountability and viability). However, the applicant had missed the opportunity to demonstrate how it would address areas of concern that were expressed by the Standing Committee in their report of June 2008 to the House of Commons. On the other hand, the ICCIP had made a concerted effort to demonstrate how it would fully address these areas of concern.

[56] The Minister accepted the recommendation of the Selection Committee that the ICCIP, later incorporated under the name of the ICCPC (on February 18, 2011), be designated as the new regulator of immigration consultants. On March 14, 2011, CIC entered into a Non-Disclosure Agreement with the ICCRC with respect to the possibility of the proposed regulations being enacted. On March 16, 2011, a further Contribution Agreement was concluded with the ICCRC.

[57] On March 18, 2011, the Minister issued a news release announcing the publication of a Notice proposing to amend the 2004 Regulations so that the applicant would be replaced by the ICCRC who would then be recognized as the regulator of immigration consultants. The following day, on March 19, 2011, the proposed regulatory text amending the definition of "authorized representative" (section 2 of IRPR) was published in *Part I* of the *Canada Gazette*. Moreover, a transitional provision (subsection 13.1(2) of the IRPR) would permit persons who are members in good standing of the CSIC to be able to continue to act as authorized

representatives for a period of 120 days following the coming into force of the proposed regulations. Same will come into force on the day on which they are registered.

[58] In the Regulatory Impact Analysis Statement (the March RIAS), it is explained that the intent of the proposed amendments "is to better protect applicants to immigration processes and enhance public confidence in the immigration system by recognizing a regulator of immigration consultants that has demonstrated that it meets the necessary organizational competencies to effectively regulate immigration consultants". Interested persons were invited to make comments concerning the proposals within 30 days after the date of publication of the Notice in *Part I* of the *Canada Gazette*.

[59] On March 23, 2011, a few days before the dissolution of the Houses, Bill C-35 received Royal Assent, now providing specific authority to the Minister himself to revoke or designate the regulatory body for immigration consultants (new section 91 of the Act), but still, to have force of law, an order of the Governor in Council had to be made. However, no such order was made during spring 2011 (the writs for the 41st Canadian general election to be held on May 2, 2011 were issued by the Governor General on March 26, 2011).

III. PRESENT LITIGATION

[60] On April 4, 2011, the applicant commenced an application for leave and judicial review seeking an order of *certiorari* to set aside any purported action to revoke the applicant's designation, together with interlocutory relief to maintain the status quo until final determination by the Court (Docket IMM-2244-11).

Stay motion

[61] Along with the serving and filing of its application for leave and judicial review, the applicant sought an order of the Court to stay the decision of the Minister to revoke the CSIC's designation as the regulator of immigration consultants.

[62] As of April 12, 2011, the applicant counted around 1,910 full members. Moreover, 137 students had completed the requisite immigration practitioner program and had applied to become full members. In practice, some 38 employees were fulfilling the regulatory tasks delegated to the applicant. The applicant was currently handling over 99 complaints and 155 open investigations from the public regarding immigration consultants. There were currently 21 on-going disciplinary proceedings.

[63] The stay motion was heard on June 7, 2011 and refused by Madam Justice Snider of this Court (the Motions Judge) on June 9, 2011. Essentially, she found that the applicant's allegation of irreparable harm was "speculative", noting *inter alia* that "[t]here is no timeline for the enactment [of the proposed regulatory amendments] of which anyone is aware (other than perhaps the Minister and the GIC)" (*Canadian Society of Immigration Consultants v Canada (Minister of Citizenship and Immigration)*, 2011 FC 669 at para 28).

[64] The Motions Judge apparently accepted the following statement made by Mrs. Mary Coulter, the Minister's representative in her affidavit, dated May 20, 2011:

> Any decision to enact regulations and to change the regulator of immigration consultants must be made at the executive level, either

> by the Minister (pursuant to the coming into force of Bill C-35) or by the Governor-in-Council under the present legislative scheme. It cannot be determined at this point when, or even if, such enactments will be made. [My emphasis]

[65] Undisclosed to the Motions Judge and only discovered subsequently in the present proceeding, the process of revoking the applicant's designation and designating the ICCRC as the new regulator was well underway:

(a) By May 19, 2011, the 2011 Regulations had been drafted;

(b) By May 25, 2011, the GIC Order had been drafted; and,

(c) By May 31, 2011, the Minister had signed the recommendation to the Governor in Council (GIC) to repeal the applicant's recognition as the regulator and to have Bill C-35 come into force on June 30, 2011.

[66] Indeed, days after the dismissal of the stay motion, the Government moved rapidly and the impugned enactments were made and registered so that they could become law on the coming into force of Bill C-35 on June 30, 2011.

[67] The Court pauses to mention that during the course of argument on the merit of the present judicial review application, applicant's counsel stressed that the conduct of the Minister or its representatives in the stay motion was evidence of bad faith on the part of the Minister or its representatives who omitted to disclose key information in the respondent's evidence (the affidavit of Mrs. Coulter dated May 20, 2011) and at the hearing of stay motion on June 7, 2011.

[68] The Court will not make any specific finding of fact in this regard, considering that the allegations made by the applicant are serious and directly pose the question whether the alleged acts or omissions constitute an interference with the orderly administration of justice or have impaired the authority or dignity of the Court. As the case may be, it is preferable in the interest of justice and of all parties that such litigious side issues be raised and examined in a separate proceeding in the manner provided by Rules 466 to 472 of the *Federal Court Rules*, SOR/98-106, if the applicant (or perhaps the Motions Judge) wishes to pursue the matter further, as the case may be.

Effect of the impugned regulations

[69] The 2011 Regulations which have put an end to the regulatory role earlier exercised by the applicant are viewed by the Government as "technical coordinating amendments" that have "low to no impact" on the applicant. That said, the Ministerial Regulations are made under the authority conferred to the Minister by new subsections 91(5) and (7) of the Act:

- First, as the designated body, the regulatory role over immigration consultants shall be exercised by the ICCRC (this is subject to any concurrent regulatory regime in the province of Québec: new subsection 91(7.1) of the Act and paragraphs 3.3(k) to (q) of *An Act respecting immigration to Québec*, RSQ, c I-0.2).
- Second, as a transitional measure, members of the applicant are members of the ICCRC and are not required to pay membership fees for a period of 120 days following the coming into force of the Act (June 30, 2011).

[70] In practice, this means that members of the CSIC who have regularized their membership and paid the fees to the ICCRC by October 29, 2011 (the expiry of 120 day period) are not allowed to act or continue to act as "authorized representatives" in connection with a proceeding or application under the Act. Otherwise, they could be found in contravention of section 91 of the Act, and if found guilty, would be liable to a fine, to imprisonment, or to both. However, the transitional measures do not settle a number of unresolved issues.

[71] For instance, what happens to cases currently under investigation and disciplinary proceedings undertaken by the applicant? Is there a transfer of the list of members and files to the ICCRC? Are suspended or expelled members of the applicant entitled to be accepted in the membership of the ICCRC? Who controls the ICCRC and who are its first directors and officers? When is the first general assembly of members of the ICCRC?

[72] In the case at bar, the Minister and CIC have preferred to enter into direct negotiations with the ICCRC and to conclude an agreement prior to the coming into force of the impugned enactments. Conversely, prior to the coming into force of the impugned enactments, the Minister and CIC have preferred not to enter into discussions with the applicant with respect to ongoing issues which are not resolved by the Ministerial Regulations (e.g. winding up, transfer of files, disciplinary matters and financial aspects).

New stay motion and new judicial review applications

[73] On June 30, 2011, the applicant served and filed a new stay motion alleging that the impugned enactments would cause its demise in the short term, having in the meantime served

and filed three other new notices of application (Dockets T-1021-11, T-1068-11 and IMM-4256-11) seeking to set aside decisions of the Minister or Cabinet made prior to the coming into force of the impugned enactments.

[74] On July 13, 2011, the stay motion came before the undersigned Judge. I noted at the hearing that no notice of application served and filed since April 2011 directly challenged the legality of the impugned enactments and that, perhaps, it may be academic to review past "decisions" of the Minister or Cabinet. Rather than proceeding with the stay motion, counsel agreed that it was preferable to proceed rapidly on the merit once the applicant had discontinued its previous applications and had served and filed a new application seeking to set aside the impugned enactments.

[75] Following the discontinuance of the existing applications (Dockets IMM-2244-11, IMM-4256-11, T-1021-11 and T-1068-11) on August 4, 2011, upon consent, leave to make the present judicial review application was granted (Docket IMM-5039-11). On October 6 and 7, 2011, the matter was heard in Toronto before the undersigned Judge.

Applicant's challenge on the legality of the impugned enactments

[76] The applicant challenges the decisions of the Governor in Council and the Minister, implemented by the above-described regulatory enactments, on both substantive and procedural grounds.

[77] Substantively, the applicant contends that the Governor in Council and Minister exceeded their jurisdiction and acted *ultra vires* their regulation-making authority under the Act for abuse of statutory discretion because the impugned decisions were not made in good faith and with impartiality, but rather were based on irrelevant grounds and factors other than those outlined in the Call for Submissions.

[78] The applicant also submits that the Minister's decision to revoke CSIC's designation, as well as the regulatory enactments which implemented this decision (including the regulation designating ICCRC as the new regulator), are invalid as they are vitiated for breach of procedural fairness, the Minister having failed to follow the selection process as outlined in the Call for Submissions and thus legitimately expected by the CSIC.

[79] The applicant also asserts that the doctrine of legitimate expectations applies to delegated legislative powers creating participatory rights. The Minister is therefore estopped from not complying with the selection process previously determined in governmental policy guidelines. In this respect, the applicant asserts that the Minister was not entitled to consider factors other than those previously considered by the Selection Committee. The fact that the Selection Committee was not satisfied with the responses provided to the concerns set out in the Parliamentary Standing Committee report in 2008 was not relevant either.

[80] Moreover, the applicant says the Minister selected the ICCRC as regulator despite the fact that it had not responded to the Call for Submissions under the selection process. According to the applicant, even the ICCIP (which was incorporated only a month before its designation

under the name ICCRC) was not really the body making the bid. Instead, the CAPIC filed submissions under the name of ICCIP, which was not a legal entity and had no legal status.

[81] The applicant also alleges that the Minister's actions and comments prior to, during, and following the selection process, as well as those of members of his staff, raise a reasonable apprehension of bias. The applicant contends that the current directors, president and CEO of the ICCRC are CAPIC members who lobbied the Minister and CIC before the introduction of Bill C-35 to have the CSIC replaced.

[82] The applicant also stresses that it is Mr. Linklater who retained Sussex Circle in 2009 to conduct a review and provide "an analysis and assessment of the threshold required to conclusively determine when the level of governance in a not for profit organization had deteriorated to a point that the mandate of the board of directors could be revoked by the government with minimal legal risk". The applicant contends that the Sussex Circle was instructed by Mr. Linklater to obtain information about the applicant from CIC officials from Immigration Branch (and not from the applicant itself), and that, in any event, its recommendation not to wind down the applicant was disregarded by CIC.

[83] As for the second set of procedural issues raised by the applicant, it is submitted that the Governor in Council's Order fixing June 30, 2011 as the coming into force date of Bill C-35 is of no force and effect because it was not registered within seven days after it was made and thereby fails to comply with section 9 of the SIA. Furthermore, the applicant argues that even if the order is valid, the Ministerial Regulations remain invalid as they were made three days prior to the date

on which Bill C-35 granting the Minister statutory authority to make such regulations came into effect.

[84] For the reasons expressed hereunder, the applicant's arguments must be dismissed by the Court.

IV. LIMITED SCOPE OF JUDICIAL REVIEW

[85] In reference to the constitutional role of the superior courts in maintaining the rule of law, speaking for the Supreme Court of Canada in *Union des employés de service, local 298 v Bibeault* [1988] 2 SCR 1048 at para 127, Justice Beetz eloquently expressed the singular nature of judicial review and its paradox:

> [...] When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning.

[86] Naturally, in cases involving the exercise of powers granted by Parliament to the Executive, this judicial review role is performed by the Federal Courts under sections 18 and 28 of the *Federal Courts Act*, RSC 1985, c F-7 and this jurisdiction is plenary in principle (*Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at paras 35-36). In the case at bar, the applicant submits that the impugned enactments are *ultra vires*, violate the duty of procedural fairness, and were made contrary to the SIA and without statutory authority.

Rule of law

[87] Access to the courts is a fundamental tenet of democracy and by extension of the principle of separation of powers. Judicial review is essentially concerned with legality, whether from a constitutional, statutory or administrative point of view. At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs; it provides a shield for individuals from arbitrary state action (*Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 70).

[88] As far as the legality of a piece of legislation adopted by Parliament or a Legislature is concerned, the reviewing role of the Court is limited to examining its conformity with the Constitution, including the *Canadian Charter of Rights and Freedoms* (the Charter) and unwritten constitutional principles. A breach of the rule of law cannot lead to the invalidity of a statute, except in cases where a statute has not been enacted in the correct manner and form: *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 58-60 (*Imperial Tobacco*).

Divided Constitutional powers over the regulation of immigration consultants

[89] In our Canadian system of responsible government, there is no separation of powers between the two political branches (legislative and executive), and subject to the limitation found in section 96 of the *Constitutional Act 1867* applicable to the Legislatures, there may be laws or regulations conferring legislative, quasi-judicial or administrative and regulatory powers to bodies invested of the functions of regulating an occupation and licensing members of a

profession, trade or other activity, subject to the constitutional division of powers between Parliament and the Legislatures.

[90] In this respect, Parliament and the Legislatures both possess under section 95 of the *Constitutional Act of 1867* a shared jurisdiction in immigration matters, while the regulation of professions rests in the exclusive legislative power of the provinces. Nevertheless, Parliament has constitutional authority to notably allow immigration consultants to give advice or represent people who are subject to a proceeding or application under the Act.

[91] Indeed, it has been held that the Governor in Council could legally establish "a licensing system" in the area of persons wishing to act as representatives in an immigration or refugee proceeding, including immigration consultants, pursuant to paragraph 114(1)(v) of the former *Immigration Act*, RSC 1985, c I-2. See *Law Society of British Columbia v Mangat*, 2001 SCC 67 (*Mangat*). That said, this is not a case where this Court is asked to revisit aspects of the *Mangat* decision.

The present attack

[92] To a large extent, the applicant has challenged the wisdom and effectiveness of the legislative amendments introduced by Bill C-35, notably reproaching the Minister for not having carried out the Standing Committee's recommendation that the CSIC be "re-established" under stand-alone legislation, while repeatedly and deliberately taking the comments of the Standing Committee out of context. However, the judiciary's role "is not…to apply only the law of which

it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent" (Imperial Tobacco, above, at para 52).

[93] Clearly, the Executive made a policy decision, which was ultimately endorsed by Parliament, in choosing not to follow the Standing Committee recommendation that the Government introduce stand-alone legislation to re-establish the applicant as a non-share capital corporation. Whether this was the result of CAPIC's lobby has no bearing with the legality of Bill C-35, which clearly falls within the purview of Parliament's legislative powers and is not contrary to the Constitution, including the Charter and unwritten constitutional principles.

[94] That said, the applicant contends that Bill C-35 did not legally come into force June 30, 2011 and is not the law of Canada today. This assertion is based on the assumption that the requirements set out in section 9 of the SIA have not been respected in the case of the making and registration of the GIC Order; consequently, new section 91 of the Act and the Ministerial Regulations can have no force and effect. Subsidiarily, the Ministerial Regulations which are purportedly made under the authority of new section 91 of the Act are otherwise invalid because they were made and registered prior to the coming into force of Bill C-35.

[95] Moreover, the applicant submits that the enactments revoking the 2011 Regulations and the Ministerial Regulations are *ultra vires* and exceed the regulation-making authority under (former or new) section 91 of the Act on the grounds of abuse of discretion, bad faith and reliance upon irrelevant considerations. The applicant also submits that the making of both the 2011 Regulations and the Ministerial Regulations is contrary to the applicant's legitimate

expectations and right to be heard, while the conduct by the Minister and his staff at CIC raises a reasonable apprehension of bias.

What is jurisdictional?

[96] Jurisdictional issues such as the scope of the powers conferred to the Governor in Council and the Minister, issues of procedural fairness (including allegations of bad faith and bias), and compliance with the procedural requirements found in the SIA, are to be reviewed on a standard of correctness. Be that as it may, the pragmatic and functional approach does not apply to legislative acts; such an enquiry is only required where an adjudicative or policy-making function is being exercised: *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 5.

[97] In order to be the law of Canada, the amendments introduced by Bill C-35 and the corollary regulatory enactments must be legally in force, which supposes that all procedural requirements found in the SIA must have been respected. However, where it comes to the exercise of statutory powers granted to the Governor in Council and the Minister, it is debatable whether the applicant's *vires* argument raises a "true question of *vires*" as described in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59.

[98] What is truly challenged here is the exercise of a discretionary decision-making power by "regulation", which the applicant submits is reviewable by the Court at least in case of bad faith or improper purpose. Since the impugned enactments affected its rights, privileges or interests, the applicant further submits that there was a duty to act fairly in the process of revoking its

designation and in selecting a new regulator. How should these issues be reviewed by the Court, if they are indeed reviewable?

[99] First, judicial review over executive decision-making requires a consideration of both the form of the decision and the nature of the decision-maker's functions in light of the enabling legislation when determining whether a duty of procedural fairness is imposed to the decision-maker. It is understood that the qualification of an action or decision made by the Government or one of its Ministers as legislative, quasi-judicial or administrative will naturally have some bearing on the scope of judicial review, but in practice it may be difficult to draw a line.

[100] Second, as suggested by Ms. Sara Blake in her book *Administrative Law in Canada* 4th ed. (Butterworths, 2006) at page 217, "[i]t would be more sensible to draw the line between adjudicative on one side and policy and legislative decisions on the other". True policy decisions will usually be dictated by financial, economic, social and political factors or constraints. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. See *Brown v British Columbia (Minister of Transportation and Highways)*, [1994] 1 SCR 420 at para 38 and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 72-91.

[101] Third, the Governor in Council (Cabinet) and the Minister are known to make policy decisions at the highest level of Government and are accountable to Parliament. However, where they are exercising a statutory power (including a legislative one) derived by an Act of

Parliament, the legality of their actions is not automatically immune from judicial review (*Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735 at page 748). The Government must always comply with the rule of law which is "a fundamental postulate of our constitutional structure" (*Roncarelli v Duplessis*, [1959] SCR 121 at page 142). Indeed, courts will always be allowed to intervene in "an egregious case or where there is proof of an absence of good faith" (*Canada (Canadian Wheat Board) v Canada (Attorney General)*, 2009 FCA 214 at para 37; *Thorne's Hardware Ltd v Canada*, [1983] 1 SCR 106 at page 111).

[102] Four, assuming that the rule of law applies to the making of regulations – in principle it does not apply to the passing of legislation by Parliament or a legislature – this could explain why such a regulation-making power may not be used for a completely irrelevant purpose, so as to make a particular regulation *ultra vires* of the powers delegated by Parliament to the Governor in Council or the Minister. Naturally, it is up to the party attacking the regulation to prove bad faith or demonstrate what that illicit purpose might be: *Canadian Assn of Regulated Importers v Canada (Attorney General)*, [1994] 2 FC 247 at paras 11-24; *Jafari v Canada (Minister of Employment and Immigration)*, [1995] 2 FC 595 at page 602.

[103] Five, regulations or policies of the Governor in Council or the Minister are not reviewable, except in cases of excess of jurisdiction, failure to comply with legislative or regulatory requirements. In other words, it is not open to a court to determine the wisdom of the regulation or policy and to assess their validity on the basis of the court's preferences. See *Canadian Council for Refugees v Canada*, 2008 FCA 229 at para 57 and *Canada (Attorney General) v Mercier*, 2010 FCA 167 at paras 78 and 80. Such approach is entirely consistent with

the treatment reserved in case of legislations passed by Parliament or a Legislature (*Imperial Tobacco*, above, at paras 58-60).

[104] Six, regulatory exercise becomes perilous in cases where individual rights may be at stake or an entity has been singled out for adverse treatment. Simply stated, one cannot label an act as a "regulation" to abrogate or diminish a citizen's right to procedural protection. This could be the case of municipal by-laws affecting property rights of land owners on the territory of a municipality, where there may be a right to be "heard" by the municipal Council (*Homex Realty & Development Co v Wyoming (Village)*, [1980] 2 SCR 1011 at pages 1026, 1030 and 1050).

[105] Another example concerns the revocation of citizenship by the Executive. The fact that citizenship is granted to an individual by legislation (an Act of Parliament) and that same can be subsequently revoked by an order in council (delegated legislation) does not prevent the Court from examining the legality of any such order and treating it as a "decision", considering that it will adversely affect the rights of the individual in question and that the Governor in Council must be satisfied that the citizenship was obtained by "false representation or fraud or by knowingly concealing material circumstances" (*Oberlander v Canada (Attorney General)*, 2004 FCA 213).

[106] Closer to the above examples are decisions, policies and regulations which may directly affect the status of immigration consultants acting as "authorized representatives" under the Act. It is useful to begin by recalling that licensing is essentially the authority of a regulator to decide who shall be permitted to earn their living by the pursuit of a particular calling: *Ontario, Royal*

Commission Inquiry into Civil Rights, (Report No 1, vol 3) Commissioner James Chalmer McRuer (Toronto Queen's Printer, 1968-1971) 1163 (The McRuer Report). In this regard, the Supreme Court of Canada has stated in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at page 368, that "[w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in Society".

[107] In practice, licensing in connection with a proceeding or application under the Act has been sub-delegated to the body designated by regulation. Such sub-delegation has been held to be valid by the Federal Court of Appeal (*Law Society of Upper Canada*, above, at paras 72-80). In turn, the decisions made in membership and discipline matters by the CSIC (or the ICCRC) are judicially reviewable by this Court (*Onuschak*, above, at paras 33-34 and *Mooney*, above, at para 83). The decisions of the regulatory body must pass the test of reasonableness and respect rules of fairness. This is not surprising since the power of a self-governing body to discipline its members is clearly a "judicial power" and that "no element of policy should be present in the exercise of this power" (The McRuer Report at 1181).

And the present case…

[108] What about policy decisions and regulations revoking the power of a regulatory body to licence individuals and transferring same to another regulatory body selected by the Executive after a Call for Submissions?

[109] In this case, the applicant contends that the Government's decision to revoke its designation as a regulator and the enactments which implemented the decision are subject to the duty of fairness, as the applicant is singled out and adversely affected by these. The alleged grounds are legitimate expectations and bias.

[110] The duty to act fairly and the doctrine of legitimate expectations are not applicable in the circumstances of this case, at least not in the ways suggested by the applicant. The applicant seems to assimilate the revocation of its regulatory designation as if it was some sort of "decision" made by the Government adversely affecting the rights of an individual who makes a living (or a corporation who pursues economic activities), but this is not the case here:

- The applicant does not act in any representative capacity (like a professional association or a trade union), but as the designated regulator of immigration consultants;
- As of June 30, 2011, members in good standing of the applicant are deemed by the Ministerial Regulations to be members of the ICCRC and are accordingly not deprived of their capacity "to earn their living by the pursuit of a particular calling", so long as they maintain their membership, pay the fees and are not expelled by the ICCRC;
- As a corporation without share capital constituted under the *Canada Corporations Act*, the applicant has no regulatory power over any profession;
- Any regulatory monopoly granted to the applicant (or the ICCRC) is a power exclusively derived and conferred to the body designated in the regulations of the Governor in Council or the Minister. Thus, any such monopoly can always be taken

away by its grantor in the same manner, here by the 2011 Regulations in the case of the applicant; and,

- Apart from improper purpose or bad faith (none has been proven in the Court's opinion), the fact that the Minister or CIC have pre-conceived opinions or expressed a preference is normal in the case of policy oriented decisions. This should not attract the Court's attention on the ground of reasonable apprehension of bias (*Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170).

[111] It must be remembered that Parliament has full plenary power to create federal boards, commissions, tribunals or other bodies invested with the quasi-judicial or regulatory powers conferred to them by legislation. Such administrative bodies or tribunals are not courts and by contrast, lack this constitutional distinction from the executive. It is properly the role and responsibility of Parliament to determine the composition and structure required to discharge the responsibilities bestowed upon them (*Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781 at paras 23-24).

[112] As stated by learned authors, "[a]n essential task of democratic societies is to establish a proper balance between freedom and order", and thus, from this general principle of democratic governments, "[t]he issue of regulation [of occupations] involves the role of government in reconciling the special interests of the members of the occupation with the general concerns of the public" (Alex Bryson and Morris M. Kleiner, "The Regulation of Occupations" (2010) 48 British Journal of Industrial Relations 670-675 at page 670). In the case of immigration consultants, the desirability of allowing by a regulation made by the Governor in Council (the

2004 Regulations) the self-regulating mode over direct licensing by a board created by statute was clearly a policy choice made by the Government. Whether it would have been preferable to have created a professional self-regulatory scheme that rested instead on an Act of Parliament was purely a policy question which was not judicially reviewable (*Law Society of Upper Canada*, above, at para 62).

[113] The Court finds that the decision to terminate the regulatory mandate over immigration consultants given to the CSIC (the 2011 Regulations) by a regulation of the Governor in Council, and to designate in lieu and place the ICCRC by way of a regulation of the Minister (the Ministerial Regulations), is essentially a "legislative" action (whether it results from an Act of Parliament or from a regulation made by the Executive branch). That said, while the duty of fairness and the doctrine of legitimate expectations have no application to the exercise of legislative powers, it is debatable whether subordinate legislation can lawfully be made in breach of categorical and specific assurance of prior consultation (*Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at pages 557-560 (*Canada Assistance Plan*); *Apotex Inc v Canada (Attorney General)*, [2000] 4 FC 264 at paras 22-24 (majority), and 100, 102, 105 and 115 (minority) (*Apotex*)).

[114] As a final note on the limited scope of the judicial review, our acceptance of the rule of law, whose content may vary from one Society to another, supposes that state action will be consistent with fundamental values of its Society, such as, equality, fairness, transparency, accountability, consistency and predictability. Assuming that the rule of law applies to the making of regulations (which may be debatable), the issue is whether the process which led to

the impugned enactments was fair and transparent. For the reasons hereunder, the Court finds that the impugned enactments are authorized by statute, that the conditions for their enactment have been respected and that there were no improper purposes or motives in revoking the designation of the applicant as the regulator of immigration consultants and in designating the ICCRC as the new regulator. Moreover, this is not "an egregious case" where the intervention of the Court is warranted to uphold the rule of law, and as far as any duty to consult is concerned, it has been satisfied in this case.

V. IMPUGNED ENACTMENTS AUTHORIZED BY STATUTE AND FOR NO IMPROPER PURPOSES OR MOTIVES

[115] The "perspective within which a statute is intended to operate" is the starting point of any court analysis of an allegation that a decision-maker took into account irrelevant considerations or acted for an improper purpose; in other words, the "perspective" is another way of describing the policy and objects of the statute, and as the case may be, of a particular set of regulations (*CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at paras 92-95).

[116] For the reasons below, the Court finds that the impugned enactments are authorized by statute and that they have been enacted for no improper purposes or motives.

Framework legislation and regulatory scheme

[117] The Act is "framework legislation", that is to say, the Act contains the core principles and policies of the statutory scheme and, in view of the complexity and breadth of the subject matter, is relatively concise. Framework legislation contemplates broad delegations of legislative power. As observed by the Federal Court of Appeal in *De Guzman v Canada (Minister of Citizenship*

and Immigration), 2005 FCA 436 at para 23, "[t]he creation of secondary policies and principles, the implementation of core policy and principles, including exemptions, and the elaboration of crucial operational detail, are left to regulations, which can be amended comparatively quickly in response to new problems and other developments."

[118] Sections 4 and 5 of the Act provide the enabling authority of both the Minister and the Governor in Council. Except as otherwise provided in section 4 of the Act, the Minister is responsible for the administration of the Act. On the other hand, except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in the Act. That said, there are multiple ways in which the activities of immigration consultants under the Act can be regulated by Parliament, and by extension, the Governor in Council or the Minister.

[119] Direct licensing by the federal authority is one option. For example, a trustee appointed in bankruptcy matters under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, must hold a licence issued by the Superintendant, whether or not he or she is already a member of a self-regulated body (e.g. certified accountants). Likewise, an immigration consultant who wishes to advise or represent a person in an application made under *An Act respecting immigration to Québec*, RSQ, c I-0.2 must make an application for recognition and pay the prescribed fees (*Regulation respecting immigration consultants*, RRQ, c I-0.2, r 0.1).

[120] Another option is to allow members of a particular trade, profession or occupation, such as lawyers, paralegals and immigration consultants, to advise or represent a person if they are

members of a designated self-regulated body. This was the option chosen in 2004 by the federal authorities. Likewise, the (Québec) Minister of Immigration and Cultural Communities notably recognizes as an immigration consultant a member in good standing of a body, other than the bar of the province or the Chambre des notaires du Québec, designated as an "authorized representative" under the federal regulations (section 4 of the *Regulation respecting the immigration consultants*).

Former section 91 of the Act and regulations

[121] Former section 91 of the Act specifically provided that "[t]he regulations may govern who may or who 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". These regulations were made by the Governor in Council and allowed the members of the CSIC to act as "authorized representatives" (section 2 of the IRPR, as amended by the 2004 Regulations).

[122] The basic objective of the 2004 Regulations made pursuant to former section 91 of the Act was to prevent unqualified and unethical immigration consultants from representing clients and to enhance public confidence in Canada's immigration and refugee system. Bill C-35 which amends section 91 of the Act, the 2011 Regulations and the Ministerial Regulations, which all have to be read together, have been made for the very same stated purposes.

[123] As of June 30, 2011, the 2011 Regulations made by the Governor in Council repealed the former regulatory provisions which defined the persons authorized to act in immigration and refugee proceedings and conferred monopoly to the applicant with respect to the regulation of

immigration consultants acting as "authorized representatives" under the Act and its regulations. The 2011 Regulations were made pursuant to the authority conferred to the Governor in Council by subsection 5(1), section 14 and former section 91 of the Act.

[124] Section 4 of the 2011 Regulations provides:

4. These Regulations come into force on the day on which section 1 of An Act to amend the Immigration and Refugee Protection Act, chapter 8 of the Statutes of Canada, 2011, comes into force, but if they are registered after that day, they come into force on the day on which they are registered.	4. Le présent règlement entre en vigueur à la date d'entrée en vigueur de l'article 1 de la Loi modifiant la Loi sur l'immigration et la protection des réfugiés, chapitre 8 des Lois du Canada (2011), ou, si elle est postérieure, à la date de son enregistrement.

[125] As explained below, some of the regulatory powers conferred to the Governor in Council by former section 91 of the Act were transferred to the Minister following the enactment of section 1 of Bill C-35. By the effect of the making and registration of the GIC Order, Bill C-35 has purportedly come into force on June 30, 2011.

New section 91 of the Act

[126] Most relevant for this application are new subsections 91(1), (2), (5), (5.1) and (7) of the Act which read:

91. (1) Subject to this section, 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.

91. (1) Sous réserve des autres dispositions du présent article, commet une infraction quiconque sciemment, de façon directe ou indirecte, représente ou conseille une personne, moyennant rétribution, relativement à une demande ou à une instance prévue par la présente loi, ou offre de le faire.

(2) A person does not contravene subsection (1) if they are:

(2) Sont soustraites à l'application du paragraphe (1) les personnes suivantes :

(*a*) a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the Chambre des Notaries du Québec;

a) les avocats qui sont membres en règle du barreau d'une province et les notaires qui sont membres en règle de la Chambre des notaires du Québec ;

(*b*) any other member in good standing of a law society of a province or the Chambre des Notaries du Québec, including a paralegal; or

b) les autres membres en règle du barreau d'une province ou de la Chambre des notaires du Québec, notamment les parajuristes ;

(c) a member in good standing of a body designated under subsection (5).

c) les membres en règle d'un organisme désigné en vertu du paragraphe (5).

[…]

[…]

(5) 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

(5) Le ministre peut, par règlement, désigner un organisme dont les membres en règle peuvent représenter ou conseiller une personne, moyennant rétribution, relativement à une demande ou à une instance prévue par la

under this Act.

(5.1) For greater certainty, subsection (5) authorizes the Minister to revoke, by regulation, a designation made under that subsection.

[…]

(7) 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).

présente loi, ou offrir de le faire.

(5.1) Il est entendu que le paragraphe (5) autorise le ministre à révoquer, par règlement, toute désignation faite sous son régime.

[…]

(7) Le ministre peut, par règlement, prévoir des mesures à l'égard de toute question transitoire soulevée par l'exercice du pouvoir que lui confère le paragraphe (5), notamment des mesures :

a) donnant à toute personne — individuellement ou au titre de son appartenance à une catégorie déterminée — le statut de membre d'un organisme désigné en vertu de ce paragraphe pour la période prévue par règlement ;

b) permettant à tout membre — individuellement ou au titre de son appartenance à une catégorie déterminée — d'un organisme qui a cessé d'être un organisme désigné visé au même paragraphe de continuer d'être soustrait à l'application du paragraphe (1) pour la période prévue par règlement.

[My underlinings]

[127] Moreover, in addition to the regulatory powers already granted by subsection 5(1) and section 14 of the Act, the Governor in Council is given the power to make "regulations" requiring the body designated by the Minister to provide certain key information regarding its membership and activities under new subsection 91(6) of the Act which reads as follows:

(6) The Governor in Council may make regulations requiring the designated body to provide the Minister with any information set out in the regulations, including information relating to its governance and information to assist 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.	(6) Le gouverneur en conseil peut, par règlement, exiger que l'organisme désigné fournisse au ministre les renseignements réglementaires, notamment des renseignements relatifs à sa régie interne et des renseignements visant à aider le ministre à vérifier si l'organisme régit ses membres dans l'intérêt public de manière que ces derniers représentent ou conseillent les personnes en conformité avec les règles de leur profession et les règles d'éthique.

[My underlinings]

[128] Regulations pursuant to new subsection 91(6) of the Act have not yet been made by the Governor in Council. Therefore, how can the Minister evaluate if a designated body governs its members in a manner that is in the public interest, or conversely, how can a designated body effectively regulate its members if it is unaware of the rules upon which the Minister may base itself to evaluate its governance?

[129] Be that as it may, the question above need not be answered in this proceeding since legally speaking, the Minister was not called to exercise the power to revoke a designation pursuant to new subsections 91(5) and (5.1) of the Act. It was the Governor in Council that

effectively revoked, pursuant to former section 91 of the Act, the designation of the applicant as the regulating body of the immigration consultants. There was nothing illegal or objectionable in proceeding in this manner, nor is there any evidence of improper purpose.

The 2011 Regulations are technical coordinating amendments

[130] The Court accepts that it was necessary to amend provisions of the IRPR in view of the coming into force of new section 91 of the Act.

[131] According to the July RIAS, the 2011 Regulations amend the IRPR in order to facilitate application processing and enhance program integrity by providing CIC officers with the applicable membership number and the contact information of a person who is advising or representing an immigration applicant for consideration at any stage, including leading up to the application or proceeding before the Minister or the Immigration and Refugee Board of Canada.

[132] The amendments introduced by the 2011 Regulations also ensure that the wording of the IRPR is consistent with the Act. More particularly, technical coordinating amendments have been undertaken:

- Repeal the definition of "authorized representative" in section 2 of the IRPR. The entities authorized in that definition are now contained in the exception to the general prohibition as set out in subsection 91(2) of the Act, as amended;
- Repeal Part 2, Division 4 of the IRPR regarding the prohibition against "representation for a fee" and its exceptions. Similar provisions are now contained in subsections 91(1) and 91(3) of the Act, as amended;

- Replace paragraphs 10(2)(c.1) and 10(2)(c.2) of the IRPR regarding application requirements for persons using a representative, and replace with the requirements that the application include:
    - the name, postal address, telephone number, fax number and electronic mail address, if any, of any person or entity – or a person acting on its behalf – representing the applicant, whether for consideration or not;
    - the name of the body and the membership identification number of any person that has provided advice or is representing the applicant for consideration under subsection 91(2) of the Act, including members of a body of the Chambre des notaires du Québec, members of a body designated by the Minister or members of a provincial law society, which include members of the bar and paralegals; and,
    - the name, postal address, telephone number, fax number and electronic mail address, if any, of any entity – or a person acting on its behalf – that has provided advice for consideration under subsection 91(4) of the Act.

[133] Alternatives prior to the making of the impugned regulations were considered by the Government. Indeed, the March RIAS explains that "[a] legislative approach to reconstitute CSIC as a statutory body, as suggested by the House of Commons Standing Committee, was rejected due to concerns about a lengthy and resource intensive implementation process. While CIC has not initiated such changes as recommended by the Standing Committee, it seeks to move forward with the legislative changes to [the Act] found in Bill C-35, which would strengthen government oversight of the regulator and should improve discipline of its members through the information sharing provision."

No improper purpose or motive

[134] This now brings us to examine the legality of the Minister's exercise of his new regulatory power under subsection 91(5) of the Act to 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.

[135] According to the evidence on file, the GIC Order, the 2011 Regulations and the Ministerial Regulations were coordinated together to implement the Minister's earlier public announcement of March 18, 2011 to replace the applicant with the ICCRC as the regulator. As affirmed at the cross-examination of the Minister's representative:

> These regulatory amendments would be considered together in the context of the previously prepublished proposed regulatory amendments that dealt substantively with the same issue of changing the regulator of immigration consultants […]
>
> These regulatory changes […] were meant to coordinate and work together.

[136] As a preliminary remark, self-regulation is a privilege granted to the members of a recognized body of professionals, tradesmen or other occupational groups. It places important obligations on the regulatory body. Being the designated regulatory body of the immigration consultants, to use the metaphor borrowed in James T. Casey, *The Regulation of Professions of Canada* (Carswell, Toronto, 1994), at pages 1-3, the applicant had a clear interest in "ridding the profession of the incompetent and the unethical" and in "the proper functioning of their organization".

[137] Moreover, as cautioned by the Supreme Court of Canada in *Pharmascience Inc v Binet*, 2006 SCC 48 at para 36:

> The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public. *Finney* confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so.

[138] Bill C-35, as mentioned earlier, was tabled at the House of Commons by Minister Kenney on June 8, 2010. Concurrently with its tabling, the Minister announced that it was also taking immediate steps to address "a lack of public confidence in the regulation of immigration consultants". The resultant was the publication in *Part I* of the *Canada Gazette* of the Notice of intent (June 12, 2010) and the Call for Submission (August 28, 2010). This was clearly a policy decision made by the Minister. Despite the allegations made by the applicant, there is no evidence of improper purposes or motives.

[139] The use of the RIAS to determine both the purpose and intended application of a regulation has been frequent in this Court and others, and this across a wide range of interpretive settings: *Brystol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at para 157 and *Saputo Inc v Canada (Attorney General)*, 2009 FC 1016 at para 31, confirmed by 2011 FCA 69 (leave to appeal to the Supreme Court of Canada denied). In the case at bar, the Court finds the RIAS a credible and reliable source of information with respect to the intentions of the Minister.

[140] Both the March and July RIAS note that the complaints made to the Standing Committee in 2008 appear to indicate that the current governance and accountability framework within

which the CSIC operates does not ensure that immigration consultants are being adequately regulated in the public's interest with respect to the provision of professional and ethical counselling, representation and advice. The fact that these complaints were unsubstantiated in the applicant's opinion is irrelevant. What counts here is the perception that the Government had; legislative or regulatory exercise is not conditioned by court rules, as if a person is accused of a crime, but largely by political discourse and debate in Parliament, in the media and other public forums.

[141] According to the July RIAS, the Minister's decision to designate the ICCRC as the new regulator is based on the results of the public selection process initiated through the publication of a Notice of intent on June 12, 2010, followed by the publication of a Call for Submissions on August 28, 2010, whereas all stakeholders and the public were allowed to participate and comment.

[142] Following the invitation of March 2011 for public comments, of the 207 comments received, 149 were supportive of the Government's proposed amendment to remove the CSIC's recognition and 39 were opposed. One of the submissions received also included a petition signed by 479 CSIC members that were supportive of the naming of the ICCRC. Based on the results of the Selection Committee review, the ICCRC has been proposed and retained by the Minister as the regulator to govern immigration consultants.

[143] After the completion of the Selection process and pre-publication in March 2011 of its intention to replace the CSIC by the ICCRC, was the Minister ill-advised in putting its

confidence in an inexperienced player whose directorship may not be truly independent from the CAPIC and whose membership may accept "ghost consultants" as alleged by the applicant?

[144] Questions are also raised by the applicant with respect to the contribution agreement concluded with the ICCRC prior to the registration and publication of the impugned enactments. In passing, this clearly falls within the realm of departmental and ministerial discretion. Indeed, a similar type of agreement had been concluded with the CSIC in 2003 prior to the registration and publication of the 2004 Regulations. The fact that CIC's cost benefit analysis presume without any basis that CAPIC/ICCRC would assume CSIC's infrastructure, staff and services is completely irrelevant as far as the legality of the Ministerial Regulations is concerned.

[145] As decided by the Supreme Court of Canada, "[t]he independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law" (*AG Can v Law Society of BC*, [1982] 2 SCR 307 at pages 335-336). A corollary issue raised by the applicant is whether the body regulating the conduct of the immigration consultants should enjoy the same independence the Bars of the provinces enjoy from state interference.

[146] In this respect, the applicant notes that according to the ICCRC's by-laws, three public interest directors should be appointed by CIC. This seems to be in direct correlation with one of

the supervisory options discussed by Sussex Circle, the consultants hired in 2009, in ensuring that the new regulatory body acts in the public interest and remains accountable to the Minister. Whether the designation of public interest directors is contrary to the warnings expressed both by the Advisory Committee (2003) and the Selection Committee (2010) that the regulator be at arms-length from the Government, is another side issue that the Court should refrain from examining today. Such consideration has no bearing with respect to the selection of the body chosen by the Minister and it is preferable that any challenge on the institutional independence of the ICCRC be disputed and decided in a separate judicial proceeding.

[147] As far as the reasons for choosing the ICCRC as the new regulator of immigration consultants, the following rationale is provided in the July RIAS:

> Focusing on membership, competence and compliance, complaints and investigations, and discipline, the ICCRC has demonstrated that is has the capacity to meet established organizational competencies that serve as selection factors for this process. The ICCRC has also demonstrated an understanding of its public protection role and of the vulnerability of its primary constituency, the would-be-users of Canada's immigration programs.

[148] The maintenance of public confidence in the immigration system was a valid consideration and suffices to dispose of the allegations of improper purposes or motives. Again, it is debatable whether the applicant can challenge before the Court the policy reasons which led to the designation of the ICCRC as the new regulator of the immigration consultants and it is irrelevant whether the Minister was also motivated by public opinion or other considerations (*Begg v Canada (Minister of Agriculture)*, 2005 FCA 362 at para 37). In the long term, both the Minister and the Government will be held accountable to Parliament, and ultimately to the

Canadian electorate, for the purported benefits and effectiveness of the impugned enactments, or any failure or drawback flowing from their policy choices.

VI. FAIR AND TRANSPARENT PROCESS OF SELECTION

[149] The applicant also asserts that the doctrine of legitimate expectations applies in principle to delegated legislative powers creating participatory rights. The applicant argues that the Minister has failed to follow the selection process as outlined in the Call for Submissions and thus legitimately expected by the CSIC, and is therefore estopped from not complying with the selection process previously determined in governmental policy guidelines.

[150] In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, [2001] 2 SCR 281, the Supreme Court expressly rejected the argument that the doctrine of legitimate expectations can give rise to legally enforceable substantive rights, and it is debatable whether, as stated above, subordinate legislation can lawfully be made in breach of categorical and specific assurance of prior consultation (see *Canada Assistance Plan*, above, and *Apotex*, above). That said, in *Canadian Pacific Railway Co v Vancouver (City)*, [2006] 1 SCR 227, the Supreme Court decided that a decision-maker might have to treat a legitimate expectation as a factor that had to be taken into account in the exercise of a discretionary power.

[151] In any event, the Court finds that there has been no breach of the applicant's legitimate expectation and that this is not "an egregious case" where the intervention of the Court is warranted to uphold the rule of law. As far as any duty to consult is concerned, it has been satisfied in this case.

[152] To that effect, a Selection Committee (comprised of four external experts and three senior public servants) was charged with examining the submissions received in response to the Call for Submissions and making recommendations to the Minister after having considered the submissions in light of the selection factors and "other relevant factors". While the Selection Committee was asked to examine the submissions in light of five selection factors, namely competence, integrity, accountability, viability, and good governance, it was also made clear that "this Call for Submissions does not obligate the Minister, the Department of Citizenship and Immigration or the Government of Canada in any way, or to take any action".

[153] Four submissions were considered by the Selection Committee, including a proposal made by the applicant to continue being the regulator. In a report delivered to the Minister's attention on January 27, 2011, the Selection Committee came to the conclusion that the ICCIP (later incorporated under the name ICCRC on February 18, 2011) and the applicant both met the previously announced selection factors. However, the Committee further observed that the applicant "missed the opportunity to demonstrate how the CSIC would address areas of concern that were expressed by the Standing Committee on Citizenship and Immigration in their report of June 2008; and that gave impetus to the Notice in Canada Gazette" while the ICCIP proponents "made a concerted effort to demonstrate how the ICCIP would fully address areas of concern that were expressed by the Standing Committee". These were certainly valid considerations in the Court's opinion.

[154] On February 7, 2011, the Minister was provided a briefing memorandum from the Deputy Minister, which recommended proceeding with a proposal to the Governor in Council that the Regulations be amended so as to recognize the ICCRC as the new regulatory body for immigration consultants. Another option (not recommended) was to maintain the *status quo* by keeping the CSIC as the regulatory body. The Deputy Minister further noted that the Minister, being the final decision-maker, was also entitled to take into consideration relevant and valid factors other than those previously considered and assessed by the Selection Committee or the Parliamentary Standing Committee. The Court is in agreement.

[155] With respect to bias, the applicant refers to Ms. Sandra Harder, the Minister's Acting Director General, stating in the Notice of intent dated June 12, 2010, that the Parliamentary Standing Committee's "report, supported by a 2009 report titled *Migrant Workers and Ghost Consultants*, points to the 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 whole." The applicant takes issue with the fact that notwithstanding a clearly biased opinion against the CSIC, Ms. Harder was later appointed to sit on the Selection Committee.

[156] The Court finds that a person who is well informed would not come to the conclusion that a reasonable apprehension of bias on the part of Ms. Harder existed. In the Notice of intent, Ms. Harder simply stated that there was evidence in the Standing Committee report that invoked a lack of public confidence in the regulator and that such lack of public confidence would pose a serious threat to the immigration system. Perhaps CIC could have attempted to ascertain whether

the complaints about the applicant were valid but for policy reasons it was determined not to enter into a direct oversight relationship with the regulatory body and to proceed with its replacement.

[157] The applicant raises a number of other irrelevant issues as far as the legality of the impugned enactments is concerned. For example, the applicant refers to a National Post article, published on May 26, 2010 and titled "cleaning the sleaze out of immigration consulting", arguing that CIC's posting of this article on its website, and its refusal to remove it despite CSIC's request, raises a reasonable apprehension of bias. However, according to the evidence, no content from the National Post article was published on the CIC website. Rather, it appeared in a section containing links related to Bill C-35, where numerous other articles and stories from different journals and websites appeared as well.

[158] In the final analysis, the Court finds that the selection of a single regulator of immigration consultants undertaken according to merit-based or other selection criteria was a legitimate policy choice based on a delegated legislative authority when the Ministerial Regulations were enacted in June 2011. Public materials such as the Standing Committee report could also legitimately be consulted during the selection process. In any event, on several occasions, the applicant had the opportunity to put its position forward and to provide input regarding the policy making process that led to its replacement. The applicant notably appeared before the Standing Committee, participated in the selection process established by CIC, and responded to the pre-publication of the proposed regulatory amendment. This suffices to dismiss the allegations of breach of procedural fairness made by the applicant.

VII. BILL C-35 AND IMPUGNED ENACTMENTS VALIDLY ENACTED

[159] As stated by the Federal Court of Appeal in *Canadian Council for Refugees v Canada*, 2008 FCA 229 at para 56:

> An attack on the legality of subordinate legislation, on the ground that the conditions precedent prescribed by Parliament were not met at the time of the promulgation, remains what it has always been; an attack on the impugned regulation *per se* and not on the "decision" to promulgate it.

[160] On March 23, 2011, Bill C-35 received Royal Assent. The amendments introduced to section 91 of the Act by section 1 of Bill C-35 have purportedly come into force as a result of the enactment of the *Order Fixing June 30, 2011 as the Day on which Chapter 8 of the Statutes of Canada Comes into Force* (SI/2011-731) (the GIC Order).

[161] As mentioned by Professor Ruth Sullivan in her book *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis, 2008) at page 644:

> Legislatures may choose to delay the commencement of legislation for one reason or another: to await events, to allow time to prepare administrative machinery, to give fair warning to the public, to achieve a political goal. In such cases, the time chosen for commencement is set out or described in the Act or a power is given to the executive branch, usually the Governor General or Lieutenant Governor in Council, to bring the Act into force on a day within its discretion.

[162] The GIC Order sets as June 30, 2011 the coming into force of Bill C-35 (other than section 6, which came into force on Assent). The GIC Order was effectively made on June 23, 2011 and registered on July 6, 2011. The 2011 Regulations were made and registered on June 23, 2011. The Ministerial Regulations were made and registered on June 27, 2011.

[163] Like any other power conferred by Parliament, the power of the Governor in Council to fix the day on which legislation is to come into force is subject to judicial review (*Reference re Criminal Law Amendment Act*, [1970] SCR 777). The GIC Order was purportedly taken under the authority of section 7 of Bill C-35 which reads as follows:

7. The provisions of this Act, other than section 6, come into force on a day to be fixed by order of the Governor in Council.	7. Les dispositions de la présente loi, à l'exception de l'article 6, entrent en vigueur à la date fixée par décret.

[164] The applicant submits that the GIC Order is of no force and effect because it was not registered within seven days after it was made, and thereby fails to comply with section 9 of the SIA which reads as follows:

9. (1) No regulation shall come into force on a day earlier than the day on which it is registered unless	**9.** (1) L'entrée en vigueur d'un règlement ne peut précéder la date de son enregistrement sauf s'il s'agit:
(a) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or	a) d'un règlement comportant une disposition à cet effet et enregistré dans les sept jours suivant sa prise;
(b) it is a regulation of a class that, pursuant to paragraph 20(b), is exempted from the application of subsection 5(1), in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is	b) d'un règlement appartenant à la catégorie soustraite à l'application du paragraphe 5(1) aux termes de l'alinéa 20b). Sauf autorisation ou disposition contraire figurant dans sa loi habilitante ou édictée sous le régime de celle-ci, il entre alors en vigueur à la

made, on the day on which it is made or on such later day as may be stated in the regulation.	date de sa prise ou à la date ultérieure qui y est indiquée.

[My underlinings]

[165] The respondent answers that the requirements in section 9 of the SIA do not apply to an order of the Governor in Council which simply brings legislation into force because it is not a "regulation". That said, both the applicant and the respondent agree that the GIC Order constitutes a "statutory instrument" within the meaning of section 2 of the SIA:

"statutory instrument"	« texte réglementaire »
(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established	a) Règlement, décret, ordonnance, proclamation, arrêté, règle, règlement administratif, résolution, instruction ou directive, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat ou autre texte pris :
(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or	(i) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale, avec autorisation expresse de prise du texte et non par simple attribution à quiconque — personne ou organisme — de pouvoirs ou fonctions liés à une question qui fait l'objet du texte,
(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,	(ii) soit par le gouverneur en conseil ou sous son autorité, mais non dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;
but	

(b) does not include	b) la présente définition exclut :
[…]	[...]

[My underlinings]

[166] Thus, the issue is whether the GIC Order falls within the definition of "regulation" found in section 2 of the SIA:

"regulation" means a statutory instrument	« règlement » Texte réglementaire :
(a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or	a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
…	...
and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;	Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale.

[My underlinings]

[167] The interpretation exposed in the two paragraphs below is the correct one in the Court's opinion.

[168] First, the GIC Order does not establish a "rule of conduct". Thus, the respondent submits that it cannot be "legislative". Albeit not rendered in the context of the SIA, the respondent relies by analogy on the criteria identified in *Reference Re Manitoba Language Rights*, [1992] 1 SCR 212 at paras 19-20, to determine whether orders in council were "of a legislative nature" (so that the constitutional bilingualism requirement would apply): the instrument embodies a rule of conduct; the instrument has the force of law; and the instrument applies to an undetermined number of persons.

[169] Second, pursuant to paragraph 6(b) of the SIA, the Clerk of the Privy Council shall register "every statutory instrument, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published." (My underlinings). Paragraph 11(3)(g) of the *Statutory Instruments Regulations*, CRC, c 1509, requires that "Orders fixing the day or days on which an Act or any provision thereof shall come into force" be published in *Part II* of the *Canada Gazette*. Therefore, in order to be registered, the GIC Order, as a "statutory instrument, other than a regulation" had to be published first, which was done in this case on July 6, 2011, as submitted by the respondent.

[170] Accordingly, the Court finds that contrary to the applicant's contention, the procedural requirements provided for in the SIA were complied with in the case of the GIC Order made on June 23, 2011, the latter having been published and accordingly registered on July 6, 2011.

[171] Subsidiarily, the applicant argues that even if the GIC Order is valid, the Ministerial Regulations remain invalid as they were made and registered on June 27, 2011; that is three days

prior to the date on which Bill C-35, which now grants the Minister statutory authority to make "regulations", came into effect.

[172] With respect to the Ministerial Regulations, the respondent submits that section 7 of the *Interpretation Act*, permits regulation making powers conferred under an Act to be exercised before the enabling provisions of the act come into force, insofar as it is necessary to make "the enactment effective on its commencement date". This is challenged here by the applicant who submits that, as the Minister's power pursuant to new subsection 91(5) of the Act to designate a new regulator is a discretionary one, it is not necessary that the Ministerial Regulations be made prior to the coming into force of the Act to give effect to "the enactment" on its commencement date.

[173] Section 7 of the *Interpretation Act* reads as follows:

7. Where an enactment is not in force and it contains provisions conferring power to make regulations or do any other thing, that power may, for the purpose of making the enactment effective on its commencement, be exercised at any time before its commencement, but a regulation so made or a thing so done has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective on its commencement.	**7.** Le pouvoir d'agir, notamment de prendre un règlement, peut s'exercer avant l'entrée en vigueur du texte habilitant; dans l'intervalle, il n'est toutefois opérant que dans la mesure nécessaire pour permettre au texte de produire ses effets dès l'entrée en vigueur.

[My underlinings]

[174] Section 7 of the *Interpretation Act* obliges the Court to determine whether the power to make regulations was exercised by the Minister prior to the coming into force of section 91 "for the purpose of making the enactment effective on its commencement".

[175] The Court agrees with the respondent that the power given to the Minister by new section 91 of the Act could be exercised prior to the coming into force of the Act for the purpose of making the Ministerial Regulations effective at the commencement date. In fact, a careful reading of both the English and French versions of section 7 of the *Interpretation Act* shows that what is intended by the word "enactment" in this section is not necessarily the enabling statute in its entirety, but also the provisions conferring power to make regulations, which includes the purported regulations themselves.

[176] While the designation of the ICCRC was certainly a discretionary decision of the Minister, it remains that the Ministerial Regulations were made on the purported authority of new subsections 91(5) and (7) of the Act in order to make the designation of the ICCRC and transitional measures applicable to members of the CSIC effective on the coming into force of Bill C-35. Thus, the Court finds that the Ministerial Regulations are authorized by section 7 of the *Interpretation Act*, and are not otherwise invalid as submitted by the applicant.

VIII. CONCLUSION

[177] For the reasons above, the Court finds that there are no reasons to quash the impugned enactments. Accordingly, the present judicial review application shall be dismissed. The matter

of certification of a question shall be reserved and both parties are invited to submit in writing, within 10 days of the present reasons, any question of general importance they wish to propose to the Court. Any objection or observations with respect of same by the other party can be submitted to the Court in writing within 10 days of filing of same.

JUDGMENT

THIS COURT ADJUGES that the present application for judicial review is dismissed.

THIS COURT FURTHER ADJUGES that the issue of a certified question is reserved pending further submissions from the parties, if any. Both parties are invited to submit in writing, within 10 days of the present reasons, any question of general importance they wish to propose to the Court. Any objection or observations with respect of same by the other party can be submitted to the Court in writing within 10 days of filing of same.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5039-11
STYLE OF CAUSE:	**THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 6, 2011
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	December 8, 2011

APPEARANCES:

John Callaghan Benjamin Na Guy Regimbald	FOR THE APPLICANT
Marianne Zoric Catherine Vasilaros Neal Samson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling Lafleur Henderson Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT