Date: 20080718

Docket: A-57-07

Citation: 2008 FCA 243

CORAM: **SEXTON J.A.**
BLAIS J.A
EVANS J.A.

BETWEEN:

THE LAW SOCIETY OF UPPER CANADA

Appellant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE CANADIAN SOCIETY OF IMMIGRATION CONSULTANTS AND
THE ATTORNEY GENERAL OF CANADA

Respondents

and

FEDERATION OF LAW SOCIETIES OF CANADA

Intervener

Heard at Toronto, Ontario, on June 11, 2008.

Judgment delivered at Ottawa, Ontario, on July 18, 2008

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SEXTON J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This appeal concerns the validity of the scheme introduced by the federal government in 2004 to regulate immigration consultants. Does the body created to regulate immigration

consultants lack sufficient independence from the Minister of Citizenship and Immigration (Minister), and does the scheme set up inevitable conflicts between the regimes regulating consultants and lawyers? Or is the self-regulatory regime established by the Regulations a legitimate response to long-standing public concerns about incompetence, the charging of excessive fees, and other unscrupulous practices, among previously unregulated immigration consultants?

[2] These issues come before us on an appeal from a decision of the Federal Court (2006 FC 1489), in which Justice Hughes dismissed an application for judicial review by the Law Society of Upper Canada (LSUC) for a declaration that the *Regulations Amending the Immigration and Refugee Regulations*, SOR/2004-59 (Regulations), which implement the regulatory scheme, are *ultra vires*. LSUC is supported by an intervener, the Federation of Law Societies of Canada (Federation), which is particularly concerned that the scheme puts at risk the confidentiality of privileged communications between lawyers and their clients. The Minister opposes the appeal, as does the Canadian Society of Immigration Consultants (CSIC), the body created to regulate immigration consultants.

[3] In my opinion, the Regulations neither violate the constitution, jeopardise lawyer-client privilege, nor otherwise exceed the broad legislative power delegated to the Governor-in-Council by the *Immigration and Refugee Protection Act*, S.C. 2002, c. 27, section 91 (IRPA). Accordingly, I would dismiss the appeal.

B. FACTUAL AND LEGAL BACKGROUND

(i) Before regulation

[4] No administrative scheme in Canada has a more profound impact upon the lives of individuals than that governing immigration and the determination of refugee status. In order to increase access to the process, it is acknowledged that lawyers should not enjoy a monopoly in advising and representing individuals before administrative decision-makers in immigration and refugee matters.

[5] Although legal aid is available in some proceedings, immigration consultants have a valuable role to play in assisting individuals of limited means to negotiate this complex legal and administrative scheme. Further, the fact that a consultant is of the same ethnic background as the client, and can communicate with the client in her own language, can be both reassuring to the individual caught up in the immigration system, and helpful to the decision-maker.

[6] However, it is also recognized that consultants too often have been incompetent and have preyed unscrupulously upon clients. Some form of regulation has long been thought essential to protect the vulnerable, to assist decision-makers, and to maintain confidence in Canada's immigration system. (See, for example, Law Reform Commission of Canada, Draft Final Report, *The Determination of Refugee Status in Canada: A Review of the Procedure* (1992) (Appeal Book, vol. 10, pp. 2542-2543); Ninth Report, The Standing Committee on Citizenship and Immigration (1995) (Appeal Book, vol. 10, p. 2504); Advisory Committee Report on Regulating Immigration Consultants (2003) (Appeal Book, vol. 1, pp. 86-8)).

[7] An indirect form of regulation is exercised over consultants employed by lawyers, who are responsible to their self-regulatory bodies for their employees' conduct and, if things go wrong, may be disciplined for inadequate supervision. However, law societies have no power to discipline non-lawyers. A law firm may, of course, dismiss an employee for misconduct. From a consumer protection perspective, this is a sanction of limited value, since, in the absence of regulation, dismissed immigration consultants can always seek to continue their practice with other lawyers or immigration consultants, or on their own.

[8] The legal foundation of the role of immigration consultants is found in IRPA, subsection 167(1), which permits those appearing before the Immigration and Refugee Protection Board (Board) to be represented by "a barrister or solicitor or other counsel". In this context, "other counsel" means persons other than barristers or solicitors. Representation by non-lawyers is a common feature of administrative adjudication: see, for example, Ontario's general administrative procedural code, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, section 10.

[9] IRPA, subsection 167(1) does not apply to representation in immigration matters before the Federal Court or the Federal Court of Appeal. Consequently, individuals who are not representing themselves may normally only be represented in judicial review proceedings by a solicitor: *Federal Courts Rules*, SOR/09-106, rule 119.

[10] The validity of the predecessor of IRPA, subsection 167(1), namely, the *Immigration Act*, R.S.C. 1985, c. I-2, section 30 and subsection 69(1), was challenged in *Law Society of British*

Columbia v. Mangat, [2001] 3 S.C.R. 113 (*Mangat*). The Law Society argued that the practice of law is a provincial matter pertaining to property and civil rights, and the administration of justice, in the Province (*Constitution Act, 1867*, section 92(13) and (14)).

[11] The practice of law is defined in section 1 of the *Legal Profession Act,* S.B.C. 1987, c. 225, to include representing individuals as counsel or advocate for a fee, and is restricted by subsection 26(1) to members of the Law Society. Consequently, the Law Society submitted, section 30 and subsection 69(1) of the *Immigration Act* were invalid in so far as they purported to permit non-lawyers to represent clients before the Immigration and Refugee Board (as the Board was then called) in British Columbia, and to give legal advice and to prepare documents for use in those proceedings.

[12] The Supreme Court of Canada disagreed. Writing for the Court, Justice Gonthier held that the "pith and substance" of section 30 and subsection 69(1) was the grant of procedural rights to aliens in the administrative process and, as such, fell within the competence of Parliament with respect to aliens and naturalization under section 91(25) of the *Constitution Act, 1867*. Further, he stated that the regulation of the practice of law in a province falls within section 92(13). Because lawyers play an integral role in the administration of justice, he was inclined to the view that section 92(14) might also be a source of provincial legislative competence, a question which it was not necessary to decide in order to dispose of the appeal: see para. 46.

[13] After finding that section 30 and subsection 69(1) of the *Immigration Act* had a "double aspect", that is, they had both federal and provincial features of equal importance (aliens and naturalization, and property and civil rights), Justice Gonthier applied the paramountcy doctrine to give precedence to the federal legislation over the conflicting provincial legislation. As a result, the *Legal Profession Act*'s prohibition of non-lawyers from practising law was constitutionally inapplicable to persons representing and advising clients pursuant to the *Immigration Act*.

[14] Finally, the Court noted that the Governor-in-Council had statutory authority under paragraph 114(1)(*v*) of the *Immigration Act* to enact regulations to regulate the "other counsel" who may appear before the Board by requiring them to obtain a licence from a prescribed body. However, the Court concluded that, while the regulation of immigration consultants might be desirable, an exercise of the power under paragraph 114(1)(*v*) was not a precondition of the validity of section 30 and subsection 69(1).

[15] I note by way of parenthesis that Ontario's *Law Society Act*, R.S.O. 1990, chap, L.8, does not contain a similar general definition of the practice of law, in which only lawyers may engage. However, the courts have defined the scope of the monopoly in proceedings to determine whether a person has breached section 50 of the Act by acting "as a barrister or solicitor": see, for example, *Law Society of Upper Canada v. Stoangi* (2003), 64 O.R. (3d) 122 (C.A.).

(ii) The regulatory scheme

(a) origins

[16] Partly as a result of the endorsement in *Mangat* of the federal government's legal authority to require immigration consultants to be licensed by a prescribed body, the Minister appointed an external committee in October 2002 to advise him on the regulation of immigration consultants. Its mandate was to identify specific concerns and to recommend how consultants might be made more professional. The committee included immigration and refugee lawyers, legal academics, immigration consultants, representatives of non-governmental organizations, and the Executive Director of the Board. After describing the failed attempts to deal with the persistent concerns about the competence and ethics of immigration consultants, the committee recommended that regulations be enacted to define who may advise and represent clients in the immigration process at the administrative level, and to identify the organizations recognized as regulating them.

[17] After canvassing regulatory models in other jurisdictions, the committee presented a range of options, together with their respective advantages and disadvantages. It was of the view that IRPA, section 91 conferred the legal authority to create "an independent and flexible regulatory body for immigration consultants" and, to this end, recommended that a non-share capital corporation be created under Part II of the *Canada Corporations Act* with the object of regulating immigration consultants.

[18] The committee also made more detailed recommendations about the appointment and composition of the board of directors of the proposed corporation, and its need for broad powers to

make by-laws to establish, among other things: a code of conduct for members; complaints and discipline mechanisms; a compensation fund and liability insurance; and ongoing educational programs. Finally, it recommended that the Minister provide start-up funding to be used to remunerate the directors and staff of the corporation, until it became self-sustaining through members' fees.

(b) implementation

[19] The Minister adopted these recommendations and, in June 2003, set up a departmental Secretariat on Regulating Immigration Consultants to implement them. Accordingly, in October 2003, after discussions with officials from Citizenship and Immigration Canada (CIC), including the Executive Director of the Secretariat, four former members of the Minister's advisory committee incorporated a non-share capital corporation, the Canadian Society of Immigration Consultants, under Part II of the *Corporations Act*. They also became its first directors. The principal purpose of the corporation was

> to regulate in the public interest eligible persons who are members of the corporation and advise or represent individuals, groups and entities in the Canadian immigration process (immigration consultants), as determined in accordance with the policies and procedures published by the corporation from time to time.

[20] It was also agreed that CIC would provide interim funding and seek an amendment to the Regulations to recognize members of CSIC, as well as members of law societies in Canada and notaries in Québec, as authorized to advise, consult with and represent, for a fee, individuals involved in immigration proceedings before administrative decision-makers.

[21] Proposed amendments to the Regulations were pre-published in December 2003 in Part I of the *Canada Gazette*, together with a Regulatory Impact Analysis Statement (RIAS). After public consultations, the amended Regulations came into effect in April 2004. Two points may be made about them at this stage.

[22] First, as a body incorporated under the *Corporations Act*, CSIC has no statutory powers. The Regulations put some teeth into the regulatory scheme by providing that only members of CSIC will be permitted to advise, consult with, and represent, for a fee, individuals who are the subject of proceedings and applications before the Minister, CIC officers, or the Board. According to the RIAS, officers of CIC, Canada Border Security Agency (CBSA), and the Board, will refuse to deal with, or hear, a person, who is representing an individual and is not an "authorized representative". An application to CIC or CBSA officers may be returned to the applicant, or refused, if submitted by a person who is not an "authorized representative". However, there is no sanction against an unauthorized representative in this situation, and anyone can still hold themselves out as an immigration consultant.

[23] Second, as a result of extensive consultations, LSUC, the Federation, and the Canadian Bar Association, persuaded the Minister to amend the final text of the Regulations by including students-at-law working under the supervision of a lawyer or a notary as "authorized representatives". Students-at-law are thus not required to become members of CSIC in order to be able to advise, consult with, and represent clients in immigration and refugee matters.

[24] However, the Minister refused to accede to a demand that the definition of "authorized representative" also include other employees of law firms. Nonetheless, employees of law firms who assist a lawyer acting for a client in an immigration matter are not required to become members of CSIC in order to be able to continue their work, provided that their assistance does not take the form of advising, consulting with, or representing clients in immigration proceedings.

[25] Counsel for LSUC advised the Court that, if the Minister had exempted all employees of lawyers from membership in CSIC, it probably would not have instituted this proceeding. However, having decided to take the litigation path, LSUC's challenge to the validity of the Regulations is not confined to the narrow issue of their impact on law firm employees.

[26] Despite its candour, this admission somewhat detracts from the LSUC's posture as the defender of the independence of immigration consultants at large, the vast majority of whom are not employed by lawyers. No consultant has joined LSUC's challenge to the validity of the regulatory scheme. Indeed, CSIC, the regulatory body to which more than 1,300 immigration consultants belonged in 2006, opposes LSUC in this proceeding.

(c) relationship of CSIC and the Minister

[27] It is not disputed that the Minister has taken an active role in the creation, early nurturing, and monitoring of CSIC. In view of the long history of public concern about the conduct and competence of immigration consultants, and the responsibility of the Minister to respond to them,

ministerial involvement in the creation and implementation of a regulatory scheme is, on its face, neither surprising, nor sinister.

[28] However, in addition to the part played by the Minister in initiating the self-regulatory scheme for immigration consultants, the following aspects of the relationship between the Minister and CSIC are relied upon by LSUC to demonstrate that the regulatory body is subject to control by the Minister, with whom immigration consultants' clients are often in a conflictual relationship.

[29] First, in October 2003, the Minister entered into a "Contribution Agreement" with CSIC. The "contribution" comprised two elements: first, a grant of no more than $700,000 to defray legal costs associated with the incorporation of CSIC, and the "start up" costs that it incurred between December 1, 2003 and March 31, 2004; second, a loan of no more than $500,000 to cover the operational costs of CSIC between April 1, 2004 and March 31, 2005.

[30] In return, CSIC undertook to provide CIC with both a complete set of year-end financial statements, and monthly activity reports giving a list of members and their countries of proposed operation. In addition, CSIC was required to report its progress on the "deliverables", such as: creating public confidence in CSIC and its governance structure; and establishing a code of conduct, complaints and discipline mechanisms, education and training programs, requirements for membership, and errors and omissions insurance.

[31] Second, CIC developed a Results-based Management and Accountability Framework (RMAF) for CSIC, dated December 1, 2003. RMAFs are a Treasury Board tool designed to assist federal public service managers in measuring and reporting on the outcomes of policies, programs, and other government initiatives. The RMAF relevant to CSIC provides information about, among other things: the nature of the problem that CSIC was created to deal with; its objectives and governance structure (including one *ex officio*, non-voting, representative of CIC on CSIC's ten-member board of directors); the financial contributions made by CIC and the activities that they were intended to fund; and CSIC's reporting obligations.

[32] The Contribution Agreement and the RMAF provide that CIC monitoring of CSIC will continue until the $500,000 loan is paid off, which is to be no later than 12 months after CSIC reports to CIC that it has 3,000 registered members.

(d) CSIC in operation

[33] Since its creation, CSIC has made considerable progress on producing its "deliverables". In particular, it has established corporate by-laws, membership standards, rules of professional conduct, complaints and discipline processes, and errors and omissions insurance requirements.

[34] CSIC has also adopted a business plan for the years 2003-2005, which assumes that it will have 3,000 members by April 2004. In fact, it has fallen significantly short in this respect. As of September 2006, its membership was only 1,354, which has caused members of CSIC's board of directors to express concern about the corporation's financial viability. However, the cloud thrown

over the scheme by LSUC's challenge to its validity may explain in part the lower than expected CSIC membership figure.

[35] CSIC has reported to CIC on its activities as required by the Contribution Agreement, and an independent annual audit of CSIC was undertaken in 2005 and 2006. On the other hand, despite the provision of the RMAF, CIC has not had a representative on CSIC's board of directors since April 2005, as a result, it is said, of changed government views about the appropriateness of its participation in the affairs of independent organizations. Previously, CIC officials had attended CSIC board meetings. In March 2005, the CIC Secretariat on Regulating Immigration Consultants was wound up.

C. LEGISLATIVE FRAMEWORK

[36] Subsection 5(1) of IRPA establishes the Governor-in-Council as the repository of the regulation-making powers conferred by the Act, unless otherwise provided.

5.(1) 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 this Act.	5.(1) Le gouverneur en conseil peut, sous réserve des autres dispositions de la présente loi, prendre les règlements d'application de la présente loi et toute autre mesure d'ordre réglementaire qu'elle prévoit.

[37] The regulation-making power relevant to this appeal is contained in IRPA, section 91.

91. The regulations may govern who may or 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	**91.** Les règlements peuvent prévoir qui peut ou ne peut représenter une personne, dans toute affaire devant le ministre, l'agent ou la Commission, ou faire office de conseil.

The “Board” referred to in section 91 is the Immigration and Refugee Protection Board.

[38] Regulations made pursuant to section 91 provide that only “authorized representatives” may “for a fee” represent, consult with or advise clients in connection with immigration matters at the administrative level, and that, apart from lawyers, students-at-law and, in Québec, notaries, a person must be a member of the CSIC in order to be “an authorized representative”.

2. "authorized representative" means a member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003.	**2.** «représentant autorisé» Membre en règle du barreau d’une province, de la Chambre des notaires du Québec ou de la Société canadienne de consultants en immigration constituée aux termes de la partie II de la *Loi sur les corporations canadiennes* le 8 octobre 2003.
…	…
13.1(1) Subject to subsection (2), no person who is not an authorized representative may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board.	13.1(1) Sous réserve du paragraphe (2), il est interdit à quiconque n’est pas un représentant autorisé de représenter une personne dans toute affaire devant le ministre, l’agent ou la Commission, ou de faire office de conseil, contre rémunération.
…	…
(3) A student-at-law shall not be deemed under subsection (1) to be representing, advising or consulting for a fee if the student-at-law is acting under the supervision of a member in good standing of a bar of a province or the Chambre des notaires du Québec who represents, advises or consults with the person who is the subject of the proceeding or application.	(3) Pour l’application du paragraphe (1), un stagiaire en droit n’est pas considéré comme représentant une personne ou faisant office de conseil contre rémunération s’il agit sous la supervision d’un membre en règle du barreau d’une province ou de la Chambre des notaires du Québec qui représente cette personne dans toute affaire ou qui fait office de conseil.

D. DECISION OF THE FEDERAL COURT

[39] Justice Hughes’ reasons can be summarized as follows:

(i) The limited degree of monitoring of the affairs of CSIC by the Minister following the start-up grant and loan appropriately made by the Minister to CSIC was not "excessive or unwarranted" (at para. 16). The Regulations could not be struck down on the ground that they offended the rule of law, an unwritten principle of the Constitution.

(ii) Designating members of an existing corporation, CSIC, as entitled to act as immigration consultants is not an improper sub-delegation by the Governor-in-Council of its power to issue regulations to govern who may represent, advise or consult with those subject to proceedings before the Minister, a visa officer, or the Board.

(iii) The failure of the regulatory scheme to designate those employed by law firms as "authorized representatives" was not discriminatory and does not give rise to situations in which lawyer-client privilege may be required to be breached.

(iv) The regulation-making power is sufficiently broad to authorize the promulgation of regulations to create a regulatory scheme for immigration consultants.

[40] Justice Hughes certified the following question for appeal pursuant to paragraph 74(*d*) of IRPA:

> Are the *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-59, which were enacted pursuant to section 91 of the *Immigration and Refugee Protection Act, ultra vires*?

E. ISSUES AND ANALYSIS

[41] Since this case involves determining the *vires* of the Regulations, on both constitutional and statutory grounds, the applicable standard of review is correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 58 and 59. There was no dispute about this.

Issue 1: Are the Regulations an unconstitutional infringement of the independence of the bar?

[42] LSUC says that the independence of the judiciary is a fundamental element of democratic government under the rule of law. In Canada, the independence of superior court judges is expressly guaranteed by the *Constitution Act, 1867*, sections 96-100. However, the constitutional protection of judicial independence also extends to other judges, as an unwritten principle of the constitution: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R v. Campbell*; *R v. Ekmecic; R v. Wickman*; *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 at paras. 107-109.

[43] The independence of the bar, LSUC argues, is necessarily incidental to the independence of the judiciary because members of the bar play an integral role in the administration of justice. In an adversarial system, judges rely heavily upon counsel to present the best case that they can for their clients. To be able to do this, lawyers must be free from improper extraneous constraints. For this reason, the legal profession is self-governing, and lawyers' regulatory bodies are established by statute and operate independently of government.

[44] Counsel for LSUC further submitted that the unwritten constitutional protection of the independence of the bar applies by extension to immigration consultants. It was established in *Mangat*, at para. 38, that they practise law when, for a fee, they advise and represent clients in immigration matters before administrative tribunals. To support his argument that immigration consultants come within the scope of the protection of the independence of the bar, counsel

emphasized the important rights at stake in immigration and refugee proceedings, including rights under section 7 of the *Canadian Charter of Rights and Freedoms*.

[45] The independence of immigration consultants' regulatory body from Executive influence is also said to be important because the Minister or a CIC official will normally be either a party opposed in interest to an immigration consultant's client, or the decision-maker. Accordingly, counsel argued, the institutional arrangements governing CSIC must establish it as a self-regulatory body that is sufficiently independent of the Minister that no reasonable person would think that it improperly constrains immigration consultants, to the detriment of the quality of service that they provide to their clients.

[46] Counsel submitted that CSIC cannot be regarded as independent, because of the role played by the Minister and his officials in its creation, funding and monitoring. In addition, the legal foundation of the regulatory scheme comprises regulations, enacted and capable of amendment by the Executive alone. Since Parliament has a limited role in the regulation-making process, the independence of CSIC is in jeopardy.

[47] I do not agree. Although counsel was able to provide no supporting authority, I shall assume for present purposes that the independence of the bar is an unwritten principle of the Constitution, largely as an emanation of the constitutional guarantee of judicial independence, which is encompassed by the rule of law. However, if such a principle exists, which I need not decide, there are two significant obstacles to its application to this case.

[48] First, it would have to be extended to include non-lawyers when advising or representing clients for a fee before the Minister, CIC officials, and the Board. In my view, the fact that immigration consultants were said in *Mangat* to be practising law, as defined by the law of British Columbia, does not get the appellant home. Nor is it irrelevant that persons with the necessary means may choose to retain a lawyer to advise and represent them in immigration matters.

[49] Second, since the independence of the bar as an aspect of the rule of law is said to derive largely from the independence of the judiciary, it is difficult to see why it should apply to proceedings before the Minister and CIC officers, even when exercising statutory powers to which the duty of fairness applies. Nor is it clear that such a principle would apply to the Board, an arm's length administrative tribunal whose independence of the Executive may not be constitutionally guaranteed (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch*), [2001] 2 S.C.R. 781), even though some of its decisions implicate Charter rights.

[50] In any event, it is my opinion that a reasonable person who had thought the matter through in a practical manner would not conclude that the regulatory scheme deprives CSIC of independence of the Executive in ways that improperly impinge on the ability of immigration consultants to advise and represent their clients to the best of their ability, without fear of sanction from their regulatory body.

[51] First, it was entirely appropriate for the Minister responsible for the administration of the immigration system to take the initiative in designing and putting in place the legal, financial, and institutional means of tackling the serious public policy issues presented by unregulated immigration consultants.

[52] Second, the ongoing supervision of CSIC by the Minister is largely designed to ensure accountability for the proper expenditure of public funds advanced to it. The matters on which CSIC has been required to report, namely, its governance and other institutional aspects of its operations, do not intrude into its day-to-day operation in such a way as to adversely affect immigration consultants' ability to provide a professional service to their clients.

[53] To support their argument that the receipt of government funding, and the corollary obligations to account for its expenditure, are not incompatible with independent professional regulation, the Minister and CSIC point out that LSUC recently requested $3.3 million from the Government of Ontario to finance its regulation of paralegals, and that it will be required to report to the Attorney General of the Province on the expenditure of the funds and the implementation of its mandate to regulate paralegals.

[54] Third, there is no suggestion that the Minister has sought to exert any influence over CSIC that is calculated to curb the independence that immigration consultants need in order to be effective advocates either before or against the Minister and CIC officials, and before the Board.

[55] In short, assuming that the independence of the bar is constitutionally guaranteed, and that it applies in the present context, it is not infringed. The Regulations leave the responsibility for the day-to-day regulation of immigration consultants to a self-regulatory body incorporated under the *Corporations Act*. CSIC's governance structure satisfies any requirement that immigration consultants not be subject to improper constraints in their representation of clients imposed by their regulatory body. The fact that the Governor-in-Council has the authority to amend the Regulations to remove CSIC's regulatory role, or to enhance the role of the Minister in its affairs, does not, in my opinion, deprive CSIC or immigration consultants of their independence.

Issue 2: Does section 91 authorize the establishment of a scheme to regulate a profession?

[56] LSUC argues that schemes for the regulation of professions normally rest on legislation enacted by the relevant legislature. Because professional self-regulatory bodies are the gatekeepers of important rights and duties connected to the practice of a profession, and the public interest in consumer protection and competition is at stake, the general wording of IRPA, section 91 should not be interpreted as authorizing the making of regulations that create a regime for the regulation of immigration consultants.

[57] I do not agree. For convenience, I set out again the relevant enabling provision in IRPA.

91. The regulations may govern who may or 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	**91.** Les règlements peuvent prévoir qui peut ou ne peut représenter une personne, dans toute affaire devant le ministre, l'agent ou la Commission, ou faire office de conseil.

[58] On a plain reading, the text of section 91 authorizes the making of regulations with the very subject-matter of the Regulations here in dispute. For LSUC to succeed on this issue it is necessary to read into the text of section 91 significant limitations on the power delegated. In my opinion, there is no warrant for so doing. The Governor-in-Council was not pursuing purposes extraneous to IRPA when it enacted the Regulations promoting professional self-regulation in order both to protect individuals with a proceeding before an immigration tribunal from incompetent and unscrupulous immigration consultants, and to maintain the integrity of Canada's immigration system. The framework nature of IRPA is another reason why it would be inappropriate for the Court to read in unexpressed limitations on a broadly worded, yet relatively specific, power.

[59] LSUC argues that the power conferred by section 91 is less specific than the corresponding provision in the *Immigration Act*, which was considered in *Mangat*, but repealed by IRPA.

114.(1) The Governor in Council may make regulations	114.(1) Le gouverneur en conseil peut, par règlement:
…	[…]
(v) requiring any person other than a person who is a member of the bar of any province, to make an application for and obtain a licence from such authority as is prescribed before the person may appear before an adjudicator, the Refugee Division or the Appeal Division as counsel for any fee, reward or other form of remuneration whatever;	*(v)* exiger de quiconque comparaît devant un arbitre, la section du statut ou la section d'appel en qualité de procureur rétribué sans être membre du barreau d'une province, qu'il soit titulaire d'une autorisation délivrée à cet effet par les autorités habilitées à le faire aux termes des règlements;

[60] It is true that this provision expressly contemplates a licensing scheme operated by a "prescribed body", while section 91 speaks, less precisely, of regulations "governing who may or may not" advise and represent someone in an immigration matter before an administrative decision-

maker. However, I am not persuaded that this change in language represents an intention by Parliament to narrow the range of regulatory options available to the Governor-in-Council, and warrants the implication of limiting words.

[61] In the absence of any indication in the legislative record, the power delegated by section 91 should be determined first and foremost by reference to its text and purposes. The broad language of section 91 leaves more regulatory options to the Governor-in-Council than paragraph 114(1)(*v*) of the repealed *Immigration Act*. I do not see why the regulatory model identified by paragraph 114(1)(*v*) should be regarded as impliedly excluded from section 91.

[62] Whether it would have been preferable for the Minister to have rejected the recommendation of his advisory committee, and created a professional self-regulatory scheme that rested on an Act of Parliament, is a policy question and hence beyond the rather limited scope of judicial review of the *vires* of regulations.

Issue 3: Are the Regulations *ultra vires* as authorizing breaches of solicitor-client privilege?

[63] The argument advanced by the Federation is that the Regulations imperil solicitor-client privilege. Parliament cannot be taken, it is said, to have intended the general language of IRPA, section 91 to authorize the making of regulations that weaken such an important pillar of the administration of justice.

[64] The problem is alleged to arise because the Regulations compel non-lawyer employees of a law firm to become members of CSIC if they wish to advise, consult with, and represent clients in immigration matters. If such an employee were investigated by CSIC following a complaint from a client, the employee could be asked by CSIC to disclose confidential information concerning the employee-client relationship, including material covered by solicitor-client privilege.

[65] Section 5.1 of CSIC's *Rules of Conduct* deal with members' duty of confidentiality. It imposes on members a broad duty not to disclose information concerning the personal and business affairs of clients acquired during their professional relationship, "unless disclosure is expressly or impliedly authorized by the client, is required by law, or is otherwise permitted by the Rules." The Commentary to the Rules states that, under this provision, a member being investigated by CSIC, following a complaint by a client, may be required to disclose "confidential information". However, since no such rules have been made, the words of section 5.1 which I have underlined cannot be said to authorize the disclosure of "confidential information", let alone that covered by solicitor-client privilege.

[66] The Federation also points to CSIC By-Law 13 on Professional Competence. In certain circumstances, including an investigation of a member's conduct, By-Law 13.1 empowers CSIC to require members to provide information to it concerning the quality of the member's professional service. This, it is said, may include material covered by solicitor-client privilege.

[67] Whether or not members can be required to disclose to CSIC “confidential information” as defined by section 5.1, they cannot be required to disclose “confidential information” which is also covered by solicitor-client privilege. Neither Rule 5.1 nor By-Law 13 expressly purports to require the disclosure of privileged material. Indeed, a claim by CSIC that it had, or could have, the legal power to require a member to hand over such material would be given short shrift by a court: see *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44.

[68] Nor are lawyers without the practical and legal means of preventing the disclosure to CSIC of privileged material. For instance, a law firm can instruct its employees to refer to the relevant lawyer in the firm any demand by CSIC to disclose information, so that the lawyer can determine if its disclosure should be resisted on the ground of privilege. The fact that By-Law 13.2 provides that CSIC must provide the member with a detailed list of the information required to be produced enables a lawyer to examine the material requested in order to determine whether it might be privileged.

[69] If the law firm instructed the employee not to disclose on the ground of legal privilege, but CSIC persisted, threatening the member with disciplinary sanctions for non-compliance with its demand for information, the firm could ask a court to enjoin CSIC from demanding the disclosure of information to which it was not in law entitled because it was privileged. In *Wilder v. Ontario Securities Commission* (2001), 53 O.R. (3d) 519 (C.A.) at para. 34, Sharpe J.A. said of the Commission:

> … like any other public body exercising statutory authority, [it]must ensure on a case-by-case basis that the substantive legal right to solicitor-client privilege is respected.

This proposition applies *a fortiori* to CSIC, which has no statutory powers.

[70] In addition, as Justice Hughes suggested, it is open to CSIC and LSUC to co-operate when material protected by solicitor-client privilege is relevant to an investigation being conducted by CSIC of one of its members, who is employed by a law firm.

[71] Thus, in my opinion, there is no basis in either fact or law for the Federation's concern that the regulatory scheme jeopardizes the confidentiality of information covered by solicitor-client privilege by subjecting law firm employees to demands for disclosure by CSIC. The Regulations are therefore not invalid on this ground.

Issue 4: Do the Regulations effect an unauthorized sub-delegation of power to CSIC?

[72] LSUC's argument is that the Regulations are invalid because, by defining an "authorized representative" as including a member of CSIC, they sub-delegate to CSIC the Governor-in-Council's statutory power to "govern" who, other than a lawyer, student-at-law or notary, may advise and represent individuals in immigration matters before administrative tribunals.

[73] I accept that, by providing that a member of CSIC in good standing is an "authorized representative", the Regulations sub-delegate the Governor-in-Council's legislative power. The effect of the Regulations is to leave to the rules of CSIC, including those prescribing qualifications

for membership, to define whether a person is a member in good standing of CSIC, and thus an "authorized representative". Similarly, by designating a member in good standing of a provincial bar as an "authorized representative" the Regulations effectively sub-delegate to the governing bodies of the legal profession the power to determine who is eligible to practise as an immigration consultant in administrative proceedings.

[74] However, the presumption against sub-delegation of a statutory power is no more than that, and it may be inferred from the statutory context and objects that sub-delegation is impliedly authorized by the enabling provision: see generally, John Willis, "*Delegatus Non Potest Delegare*", (1943), Can. Bar Rev. 257. In my opinion, section 91 impliedly authorizes the particular sub-delegation effected by the Regulations.

[75] According to LSUC, section 91 should be interpreted as requiring the Governor-in-Council to specify in the Regulations the rules and standards respecting membership in CSIC, and presumably other aspects of the regulatory scheme. However, this is inconsistent with LSUC's contention that the Executive should not be closely involved in the design and operation of the scheme for regulating immigration consultants.

[76] In my view, the desirability of maintaining a distance between the Executive and the regulation of the profession by an independent regulatory body is sufficient to displace the presumption against sub-delegation: compare *Re Peralta and The Queen in Right of Ontario* (1985), 49 O.R. (2d) 705 (C.A.).

[77] It is true that, unlike lawyers' regulatory bodies, the regulatory body for immigration consultants is new and has only recently enacted by-laws dealing with, for example, admission to membership, education programs, and discipline. Nonetheless, CSIC's purposes, by-laws, and relationship to the Minister make it an appropriate body to act as the gatekeeper to the profession of immigration consultant.

[78] LSUC also relies on the wording of section 91 which empowers the making of regulations to "govern who may or may not represent" and advise clients in immigration matters before the Minister, CIC and the Board. Noting the change from paragraph 114(1)(*v*) of the *Immigration Act*, LSUC argues that the word "govern" suggests that the Regulations must themselves prescribe the essential elements of the regulatory scheme.

[79] I do not agree. In my view, the word "govern" cannot bear the weight that LSUC puts on it. In the present context, "govern" has the more general meaning of "respecting", "in relation to" or "regarding", and does not require that regulations contain the details of the regulatory scheme. Nor do the corresponding words of the French text of section 91, «Les règlements peuvent prévoir qui peut ou ne peut pas représenter …. » require that the Regulations themselves specify, among other things, the rules of membership in CSIC. In this context, «prévoir» is best translated as "provide".

[80] In short, the advantages of permitting an independent self-regulatory body to draw up the details of the scheme, which can quickly respond to emerging problems, are sufficiently cogent as to

lead to the conclusion that section 91 implicitly authorizes the sub-delegation to CSIC effected by the Regulations.

F. CONCLUSIONS

[81] For these reasons, I would dismiss the appeal, and answer the certified question as follows:

> The *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-59, enacted pursuant to section 91 of the *Immigration and Refugee Protection Act*, are valid.

"John M. Evans"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
Pierre Blais J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Bryan Finlay, Q.C. Marie-Andrée Vermette Caroline E. Abela	FOR THE APPELLANT
Marianne Zoric Catherine Vasilaros	FOR THE RESPONDENTS

John E. Callaghan Benjamin Na	
Chris G. Paliare Andrew K. Lokan	FOR THE INTERVENOR

SOLICITORS OF RECORD:

WeirFoulds LLP Toronto, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
Gowling Lafleur Henderson LLP Toronto, Ontario	
Paliare Roland Rosenberg Rothstein LLP Toronto, Ontario	FOR THE INTERVENOR