Immigration Bar under Attack in Canada: Regulation of 'Consultants' Sets Dangerous Precedent

Sergio R Karas*

Karas & Associates, Toronto

The date 13 April 2004 marked the advent of a new era in Canadian immigration law, ushered by a frontal assault on the immigration Bar. A new regulatory regime legitimises the activities of so-called 'immigration consultants', non-lawyers who were until now unregulated and the subject of much controversy. The new regulations compromise the administration of justice, create unfair competition and allow, with the federal government's blessing, the unauthorised practice of law. They also highlight the failure of the Canadian legal profession to defend its members vigorously, protect the public interest and protect the rights of those most vulnerable.

Dealing with the problem of unlicensed immigration practitioners is certainly a worthwhile goal, but with the new scheme the federal government failed to ensure consumer protection by prohibiting non-lawyers from representing prospective immigrants and refugees, choosing instead to create yet another regulatory body, to legitimise their business activities at home and abroad.

The author can be contacted by e-mail at karas@karas.ca

Background

For the past two decades, industrialised immigrant-receiving countries have grappled with the problem of how to control the growth of unlicensed immigration 'consultants', 'practitioners', 'paralegals' or 'notarios'. The proliferation of non-lawyers has been most pronounced in Canada, the United States, the United Kingdom and Australia, due in part to large numbers of immigrants in need of professional assistance to navigate cumbersome legal systems, and to half-hearted efforts to prosecute the unauthorised practice of law. In the United States, the notorious 'notarios' set up shop in states along the Mexican border, taking advantage of the official connotation given to their title in Spanish, and using it as carte blanche to defraud their victims, who often mistook them for lawyers, to the dismay of consumer protection advocates in California, Arizona and Texas. This prompted calls for legislative action, which finally came in the late 1990s and early 2000s

thanks to a broad coalition of consumer advocates, lawyers and law enforcement officials who came together and pressured politicians to act.[1]

In Canada, however, as immigrant populations grew in number and variety, individuals with community clout first began offering assistance to prospective immigrants on a volunteer basis, but quickly discovered their potential for profit. Others were former immigration officers looking for a more lucrative niche, and even interpreters who thought they had learnt enough to practise law without having to become members of the Provincial Bars.

Immigration consultants began taking advantage of provisions in the previous legislation which allowed applicants to have 'counsel of choice' but did not limit representation to licensed members of the Bar.[2] As a result, hundreds of unqualified individuals began handling immigration matters, travelling abroad, trumpeting political connections and inducing applicants to retain their services, with little or no disclosure that they were not lawyers. Stories from victims' horror files abound describing how unlicensed consultants mishandled applications for qualified individuals. In the worst cases, some consultants encouraged prospects to make bogus refugee claims, presented fraudulent documentation and some even participated in immigrant smuggling rings and visa fraud. Outlandish promises of quick immigration and money back 'guarantees' in the most severely backlogged visa posts overseas were commonly made by some unscrupulous consultants. In a recent case, one Toronto-area consultant advertising heavily in India was ordered by that country's consumer court to repay applicants' fees together with a penalty for having failed to advise them that they would no longer qualify under new immigration regulations, and for promising case resolution in six months, nothing short of lightning speed in a beleaguered visa post like New Delhi, where processing times average three years.[3] In another case, a consultant operating in Toronto was charged with several immigration-related offences by the Royal Canadian Mounted Police (RCMP), including counselling to commit fraud, but continued to claim to have a 'special connection' to a former Cabinet Minister, misleading clients that she would intervene on their behalf.[4] Complaints by lawyers and by some victims, most of whom were too afraid to talk, fell on deaf ears.

Choice to regulate, not prohibit unauthorised practice of law

After 20 years of inaction, the federal government was suddenly awakened from its slumber by the Supreme Court of Canada decision in *Law Society of British Columbia v Mangat*[5] which resolved the constitutional question of federal-provincial jurisdiction over the regulation of immigration consultants. The court ruled that a conflict between the regulation of the legal profession, a provincial matter, and the then Immigration Act, a federal statute giving applicants the right to have 'counsel of choice', was within the federal legislative jurisdiction. After *Mangat*, the federal government could no longer escape its responsibility to deal with non-lawyers involved in the immigration process. The court, however, was careful in its ruling and never prevented the federal government from prohibiting the activities of consultants. Of course, that would require the political courage to do it, something Ottawa was lacking.

Confronted with the need to act, under pressure from the immigration Bar and non-profit organisations advocating on behalf of immigrants, but mindful of the power exercised in Liberal party ranks by some immigration consultants enjoying considerable community clout, former Minister of Citizenship and Immigration Denis Coderre opted for a 'compromise' and created yet another panel, the Advisory Committee on Regulating Immigration Consultants, which produced a report in May 2003.[6] However, the former Minister was careful not to give a mandate to that Committee to examine the question of prohibiting consultant activity, a calculated and no doubt politically motivated decision.[7]

The Advisory Committee was co-chaired by a lawyer, but included heavy consultant representation and individuals sympathetic to them: of its 12 members, three were consultants and one was a lawyer involved in a consultant organisation. The Committee also included another lawyer whose law firm represented a consultant organisation in the *Mangat* case. The Committee's report canvassed regulation of consultants in some jurisdictions including the United Kingdom, Australia and, strangely, China, all of which permit non-lawyers to participate with some limitations in the immigration adjudication process.[8] Astonishingly, however, the Committee chose to ignore the highly developed regulatory schemes of most states in the United States, which without exception prohibit the unauthorised practice of law and allow

prosecution of violators, imposing fines and even prison terms. Against such a backdrop, it is not surprising that the Committee's recommendations crystallised consultants' wishes to create a mechanism for legitimacy and ongoing communication between Citizenship and Immigration Canada, the Minister, and the newly created Canadian Society of Immigration Consultants (CSIC), well within the limitations imposed on the Committee's mandate.

Notably, the initial composition of the CSIC board includes representatives from Citizenship and Immigration.[9] This places the CSIC and that department in a direct conflict of interest, as the latter will now regulate the very individuals who will be allowed to make representations on behalf of clients. Such a cosy arrangement cannot possibly be conducive to independence and arm's-length dealings.

Further, the creation of the CSIC legitimises the role of immigration consultants equating them to lawyers, notwithstanding differences in education, background and regulatory requirements.

What do the new regulations do?

The regulations implementing the new regime are scanty, drafted in broad language and give lawyers cause for concern. The relevant sections of the Immigration and Refugee Protection Regulations[10] have been amended[11] to accommodate the new regime.

Section 2 of the Regulations now defines an 'authorised representative' as a member in good standing of a Bar of a province, the Chambre des notaires du Québec, or the CSIC.

Section 10(2) requires detailed information on representatives, including if payment for services was made, as well as proof of membership in a prescribed regulatory body, which can only be either a provincial Law Society or the CSIC. If the immigration officer discovers that the applicant is paying for the services of an unauthorised representative *while the application is being processed*, the visa office must no longer conduct business with such representative. However, the visa office must continue to process the application, so as not to penalise the applicant.

Further, section 13.1 states:

'**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.

(2) A person who is not an authorized representative may, for a period of four years after the coming into force of this section, continue for a fee to represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the Board, if:

(a) the person was providing any of those services to the person who is the subject of the proceeding or application on the coming into force of this section; and

(b) the proceeding or application is the same proceeding or application that was before the Minister, an officer or the Board on the coming into force of this section.'

Exemptions have been granted for students-at-law, who work under the supervision of a qualified member of a provincial Bar while completing their articling experience as required, and for unpaid representatives such as family members.

In its implementation instructions, the government acknowledges that visa offices will receive applications that appear to have been submitted with third party assistance, but a representative has not been identified in the appropriate form, and the representative may be 'concealed' by an applicant. These applications should be accepted by the visa office and processing should begin. However, after acceptance of the application, the visa office must determine if further follow-up of suspected use of an unidentified paid representative is warranted. Individual cases where third party assistance is suspected, but not proven, may not warrant further follow-up. In theory, where visa offices become aware of a number of applications being submitted by the same unidentified third party, either through evidence of the use of a similar organisation, style of presentation of the application or contact addresses, then a programme integrity review may be required. Other programme integrity issues, such as the use of fraudulent documents, could also be involved. It is unclear, however, who will prosecute unauthorised representatives, how that will be done or what funding, if any, will exist to enforce there provisions overseas, assuming that were possible, which is also in doubt.

Applications indicating the use of a paid representative, who has not yet become authorised, and were submitted before 13 April 2004 allow for a grace period of four years in which the representative has to meet the regulatory provisions. If at the end of the transition period, on 13 April 2008, the applicant is still using the services of an unauthorised representative, the visa office must no

longer communicate with that representative and inform the applicant that the representative is not a member in good standing. The intent is for the visa office to try and avoid dealing with the unauthorised representative. The visa office, however, must continue to process the application.

Problems with the Regulations: a ticking time bomb for lawyers?

The Regulations are based on the report by the Advisory Committee, prepared under the guidelines of its restricted mandate. The Advisory Committee was never allowed to consider prohibition of unauthorised practice of law by immigration 'consultants' as a possible means to deal with the problem.

Among the assumptions made in the new scheme is the fact that the new regulatory body will be self-sufficient and independent. However, this may not be true. The Regulatory Impact Analysis Statement accompanying the Regulations mentions the frightening prospect that the newly created CSIC 'will be self-sustaining once it reaches a membership of 3000' [*sic*]. Since there appear to be only a few hundred consultants who may be authorised in a provisional manner after complying with the initial, relaxed registration standards set out by the CSIC to begin functioning, this worrisome figure can only mean that either standards to become an immigration consultant will be so lax as to attract large numbers of members, or that lawyers who practise immigration law or their staff will eventually be forced to join that body. The government has failed to clarify how it intends to reach a membership of 3,000 in the newly created organisation if standards to be implemented will be similar to those lawyers must comply with under provincial Law Society rules, to provide adequate consular protection and a level playing field.

Possible lawyer membership in the CSIC would mean double regulation and unnecessary registration fees in addition to those already paid to provincial Law Societies, and more importantly, would place lawyers in a conflict of interest and create potential breaches of solicitor–client privilege. The precedent already exists in Australia, a jurisdiction with double regulation of immigration lawyers, both under local law societies and under the Migration Agents Registration Authority (MARA). The issue of conflict of interest was dealt with by the Australian Federal Court of Appeal in *Joel v MARA*,[12] where a lawyer representing immigration clients refused to disclose to MARA information required during an investigation on the grounds that it would violate solicitor–client privilege and the ethical rules of the Law Society of New South Wales. The lawyer in that case found himself in the unfortunate position to have to respond to two different regulatory bodies with different standards.

Do the Regulations protect consumers?

More worrisome, however, is the fact that the Advisory Committee chose to ignore the serious consequences of continuing to allow non-lawyers their unauthorised practice of law; failing to prohibit their activities and ignoring well developed jurisprudence in the United States. Virtually every state in the United States prohibits the unauthorised practice of law. Noting that 'aliens are especially vulnerable to the unauthorized practice of law', the Virginia Supreme Court starkly described its consequences in the immigration context and held that 'such unauthorized practice, which may include incompetent or fraudulent legal services, can cause serious economic harm, may result in the separation of families, and may even result in the death of an individual forcibly repatriated to another country …'.[13]

The Business and Professions Code of the State of California,[14] for example, notes that 'the provision against unauthorized practice of law by non-attorneys is based on public interest in the integrity and competency of those who undertake to render legal advice' and the New York State Bar[15] even imposes on attorneys a positive duty to report unauthorised practice in its Code of Professional Responsibility. This enlightened consumer protection reasoning was best articulated by the Florida Supreme Court in *The Florida Bar v Brumbaugh*,[16] where the court, indicating that non-attorneys are prohibited from practising law within that State, shut down a 'do-it-yourself' legal filing service, citing its previous decision in *State v Sperry*,[17] held:

'if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.'

The regulatory regime of the CSIC amounts to little more than rubber-stamping the activities of immigration consultants. Even the organisation's very name has the connotation of official sanction and the potential to mislead the public. While consultants will go abroad and proclaim their membership in a Canadian national regulatory body with government representatives sitting on its board, lawyers will be handicapped by merely being members of provincial Bars, a concept that will be difficult to grasp by those in developing countries or non-common-law jurisdictions. Lawyers may quickly find themselves forced by market realities to join the CSIC to achieve the same legitimacy that has been sadly granted to non-lawyers without the same background, education, experience or stringent regulatory requirements exercised by law societies across Canada.

Conclusion

The government, in its eagerness to regulate rather than prohibit the activities of unlicensed consultants, was motivated by reasons of political expediency and failed to understand that the practice of immigration also encompasses the broad knowledge that lawyers must have of other areas of law, including tax, family, constitutional, employment and human rights. The notion that a consultant educated superficially for a few days in one area of law can effectively represent a client without such general knowledge is nothing short of naive.

The Canadian legal profession has failed in its duty to protect the public and to defend its members' interests, by failing to insist that the scourge of unauthorised practice of law be treated just as zealously as encroachments on other regulated professions. The ultimate price will be paid by those abroad aspiring to immigrate, who do not have the protection of sophisticated consumer legislation or the ability to distinguish between immigration consultants and lawyers. The new regulation of immigration consultants will no doubt result in increased litigation. If consultants are so anxious to practise law, they can do the unthinkable – go to law school. ■

Notes

* BA, LLB. Sergio R Karas is a Canadian lawyer, practising in the area of immigration law in Toronto. He is a Vice-Chair of the Immigration and Nationality Law Committee.

1 See, eg, 'Texas AG Warns Immigrants about Scam', *El Paso Times*, 13 February 2003, and passage of Arizona Bill HB 2341, forcing 'notarios' clearly to disclose they are not lawyers and making it easier for the Attorney-General to prosecute unauthorised practice.

2 Immigration Act, RSC 1985, c 12, ss 30 and 69(1) which stated:
'30. Every person with respect to whom an inquiry is to be held shall be informed of the person's right to obtain the services of a barrister or solicitor *or other counsel* and to be represented by any such counsel at the inquiry and shall be given a reasonable opportunity, if the person so desires, to obtain such counsel at the person's own expense.
69(1). In any proceedings before the Refugee Division, the Minister may be represented at the proceedings by *counsel or an agent* and the person who is the subject of the proceedings may, at that person's own expense, be represented by a barrister or solicitor or *other counsel*.'
(Emphasis added.)

3 'WWICS to pay Compensation', *The Tires of India*, 18 December 2003, and 'Immigration: Co asked to pay up', *Chardigarh Newsline*, 22 December 2003.

4 'Cheating the System', Canadian Broadcasting Company (CBC) programme 'Disclosure', 16 April 2002

5 [2001] 3 SCR 113.

6 Report of the Advisory Committee on Regulating Immigration Consultants, May 2003.

7 *Ibid*, at 5.

8 *Ibid*, at 17-25.

9 Regulations Amending the Immigration and Refugee Protection Regulations, Canada Gazette Part 1, 13 December 2003, at 3955, 3961.

10 SOR/2002 – 227, effective 28 June 2002.

11 Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2004 – 59, Canada Gazette Part II, 14 April 2004.

12 [2002] FCA 1919, 22 December 2000.

13 Virginia Sup Ct R UPC 9-7.

14 California Business and Professions Code, § 6125 *et seq*.

15 NYCRR § 1200. 16, NY Code of Professional Responsibility, Canon 3, EC 3-1.

16 355 So 2d at 1190.

17 140 So 2d 587, 591 (Fla 1962).