Submissions to the Standing Committee on Citizenship and Immigration on Immigration, Refugee, Citizenship and Paralegal Practitioners

by

Metro Toronto Chinese & Southeast Asian Legal Clinic

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I. INTRODUCTION

The Metro Toronto Chinese & Southeast Asian Legal Clinic (MTCSALC) is a not-for-profit community based organization which provides free legal services to low income, non-English speaking members of the Chinese and Southeast Asian communities in the Greater Toronto Area.

Established in 1987, MTCSALC is mandated to provide free legal services, conduct public education activities, and engage in law reform advocacy in order to advance the interests and rights of our constituent communities. Over the years, MTCSALC has served tens of thousands of clients in various areas of law. About one-third of our caseload is in the area of immigration and citizenship law.

MTCSALC has appeared before the Standing Committee on Citizenship and Immigration, other Parliamentary Committees as well as Senate Committees on numerous occasions to present on issues that affect immigrants, refugees and racialized communities.

MTCSALC thanks the Standing Committee for granting it the opportunity to comment on the Committee's study into the legal, regulatory and disciplinary frameworks governing and overseeing immigration, refugee, citizenship and paralegal practitioners in Canada.

The main focus of MTCSALC's submission is in regard to the "prevailing patterns of reported impropriety misconduct, fraud and abuse by practitioners". We will also comment briefly on "the role of oversight bodies in regulating and providing adequate oversight of practitioners".

II. EXPERIENCES OF MTCSALC WITH MISCONDUCT, FRAUD AND ABUSE BY IMMIGRATION CONSULTANTS

As a community legal clinic serving low income, non-English speaking members of the Chinese and Southeast Asian communities, MTCSALC has seen more than its fair share of cases where clients are harmed by unethical and incompetent immigration consultants, both with or without licence.

Immigrants, refugees and people with precarious immigration status are easy prey of unscrupulous consultants for many reasons.

First, many of these individuals do not speak, read or write English or French, and as such, will have to rely on others completely to help them navigate the complex immigration and refugee determination system. Their lack of language proficiency, coupled with their lack of familiarity with the Canadian legal system, mean they are not in a position to assess the legitimacy and/or legality of the advice they receive from their legal representatives.

Second, as newcomers to Canada, many have no understanding of the regulatory framework for legal professionals including lawyers, immigration consultants and paralegals. Many do not know the difference between these categories of legal service providers and have no understanding of the differential training and other requirements for each of these categories of practitioners. Indeed, many do not even know where and how to get legal advice and assistance. So they go to sources that they are most familiar with: referrals from friends and relatives, newspapers ads in first language newspapers, and ads in their neighbourhoods. Many immigration consultants target specific ethno-racial communities in their advertising. In fact, many of the consultants come from the very same communities and know how to market their business to attract clients. Some deliberately lie about their credentials and tell clients that they are lawyers.

Third, a significant number of individuals who are seeking advice and representation in immigration and refugee matters are people who are not only vulnerable but also desperate. For refugees, the outcome of their claims can make a difference between life and death. For people with precarious status, they are using whatever means possible to avoid deportation and to obtain status in Canada. As well, Canadians who are seeking to bring their loved ones to Canada are eager to take any and all measures to bring about family reunification. Their circumstances may not fit within the eligibility requirements set up by Canada's immigration and refugee system. The more challenges they face in accessing the system, the more desperate they become.

Desperate people often take desperate measures. In this context, many end up turning to unscrupulous consultants for help because of the promises the latter make, promises that ethical lawyers and immigration consultants will not deliver.

The following are some examples of actual cases that MTCSALC has dealt with which highlight the harm perpetrated by consultants who are unethical, incompetent or both:

Example 1: A couple came to Canada about 10 years ago to make a refugee claim, which was denied. The couple have three children, two of them Canadian born. They hired an immigration consultant to help them apply for permanent residence on humanitarian and compassionate (H&C) grounds. Their H&C application was denied. The couple and their eldest child were ordered removed from Canada. MTCSALC was contacted by the school principal of the school where two of their children attended to help stop the removal. In the process of assisting the clients, MTCSALC staff obtained the decision regarding the previous H&C application and noticed that the consultant did not put in any documents and submissions addressing the best interests of the child, one of the key

considerations for any H&C application. The Federal Court granted the couple stay of removal, due in part to the problem with their prior legal representation.

Example 2: A Canadian citizen seeks to sponsor her parents and a younger sibling to Canada. She retained an immigration consultant to help her submit the application. Two years after she had already paid the consultant over $2000.00 in retainer and service fee, the sponsor found out that the consultant did not respond to a letter sent to the consultant by then Citizenship and Immigration Canada (CIC) asking for additional information almost a year prior. As a result, her application was delayed for one year. When she decided to terminate the retainer, and asked for her file back, the consultant demanded that she paid another $500 before they would release her file. Not wanting to delay the application any further, the sponsor agreed to pay.

Example 3: A young woman came to Canada as a dependent of her father. But just before she came to Canada, she decided to marry her high school sweet heart without telling her family. At the time, she spoke very little English and did not know that her change in marital status would affect her admission to Canada. She went back to visit her husband a number of times, and they have two Canadian born children. Her husband applied for a visitor visa to come to Canada, which was denied. The young woman went to see a consultant who told her she could not sponsor her husband to Canada due to the fact that she did not declare him when she applied for immigration herself. The consultant advised her to go back to her home country to divorce her husband and marry him again, before submitting a sponsorship application, which she did. As a result, the young woman was investigated by CIC and was given a removal order for misrepresentation. MTCSALC represented the young woman in her appeal before the Immigration Appeal Division. The IAD set aside the removal order. We then helped her husband obtain permanent resident status to Canada. They were finally able to reunite after almost 7 years of separation.

Other community legal clinics have also encountered similar problems with consultants. For instance, at South Asian Legal Clinic of Ontario (SALCO), they recently assisted a young single mother who came to Canada and made a refugee claim. Her claim was rejected; her consultant advised her that she could continue to renew her work permit without paying the requisite fee. He assisted her in doing that and her work permit was denied for lack of payment. The woman found herself out of time to restore her work permit and consequently lost her employment. She is now living in a shelter.

These are but a few examples of the bad advice and poor legal representation that many of the clients that contact MTCSALC and other legal clinics have received from immigration consultants. Routinely, we see myriads of applications that are being delayed or denied because of inaccurate and incomprehensible information that consultants have included in the clients' application forms, be it sponsorship applications for their spouse, or H&C applications for the clients and their children. Because these clients do not read or write English or French, they have no clue what the consultants have put down in the application forms. And yet it is the clients who bear the consequences of the consultants' substandard service.

III. PENALIZING THE WRONG PARTIES

As early as 1981, the Canadian Government has been concerned about the exploitation of vulnerable immigrants and refugees by unlicensed immigration consultants.[1]

Yet notwithstanding its stated concern, the measures taken to date by the Federal Government have failed to protect immigrants (with or without status), refugees and Canadian citizens from such exploitation. Instead, the law as it stands penalizes applicants for having retained the wrong legal representative.

Section 10 of the *Immigration and Refugee Protection Regulations* (*IRPR*) states:

> 10. (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall
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> (a) be made in writing using the form provided by the Department, if any;
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> (b) be signed by the applicant;
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> (c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;
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> (d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and
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> (e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.
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> (2) The application shall, unless otherwise provided by these Regulations,
>
> (a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not, and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;
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> (b) indicate whether they are applying for a visa, permit or authorization;
>
> (c) indicate the class prescribed by these Regulations for which the application is made;
>
> (c.1) if the applicant is represented in connection with the application, include the name, postal address and telephone number, and fax number and electronic mail address, if any, of any person or entity - or a person acting on its behalf - representing the applicant;
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> (c.2) if the applicant is represented, for consideration in connection with the application, by a person referred to in any of paragraphs

[1] National Immigration Law Section of the Canadian Bar Association, "Submission on Immigration Consultants" 1995

> 91(2)(a) to (c) of the Act, include the name of the body of which the person is a member and their membership identification number;
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> (c.3) if the applicant has been advised, for consideration in connection with the application, by a person referred to in any of paragraphs 91(2)(a) to (c) of the Act, include the information referred to in paragraphs (c.1) and (c.2) with respect to that person;
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> (c.4) if the applicant has been advised, for consideration in connection with the application, by an entity - or a person acting on its behalf - referred to in subsection 91(4) of the Act, include the information referred to in paragraph (c.1) with respect to that entity or person; and
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> (d) include a declaration that the information provided is complete and accurate.

Yet as stated above, many of the clients at MTCSALC have no way of assessing the accuracy of the information included in their applications by the consultants, let alone verifying whether the consultant has in fact provided any information about themselves.

The failure of the consultant to do so has led to many applications being denied, as reported recently by the Toronto Star of the decision by Immigration, Refugee and Citizenship Canada (IRCC) to deny all the applications submitted by a "ghost consultant" in China.

At MTCSALC, we have seen all too many clients whose credibility is being attacked on the stand in their appeal before the IAD simply because they have used a consultant who has not put in any information about their service, or has completed the application forms incorrectly.

As the Canadian Council for Refugee (CCR) has stated in its submissions before the above noted regulation came into effect:

> The CCR is concerned that the proposed regulations have the potential for penalizing the applicant if, through no fault of the applicant, the information about the representative is incomplete or inaccurate. By amending IRPR 10(2) to include the name and details of the representative as part of the required information for an application, applicants may be penalized, since processing is delayed if the application is incomplete. Worse, the delay may mean that an applicant misses a deadline and loses an entitlement (for themselves or for a family member).
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> Furthermore, by including the representative's details among the required information, the government is making the applicant responsible for the accuracy of the information. According to the Regulations, the applicant must sign that the information is "complete and accurate" (IRPR 10(2)(d)). Thus the applicant could be found guilty of misrepresentation if the

representative provides false information.

We recommend that the responsibility for the information about the representative lie with the representative, who should sign a declaration as to its accuracy. If the representative is not an authorized representative, the application should not on that account be considered incomplete. Instead the applicant should be informed that the government will not accept that person as their representative, but that the application will still be processed. Any appropriate disciplinary measures should be pursued against the representative, without penalizing the applicant.

We wholeheartedly support the submissions by CCR.

We also believe that the Government of Canada has an obligation to inform applicants and refugee claimants of its requirements regarding licensed consultants and lawyers. Applicants, especially those who have no English/French proficiency and are unfamiliar with the Canadian legal system, cannot be expected to know about these requirements and in any event, should not be penalized for their legal representatives' bad conduct.

Another way that the system penalizes applicants who are defrauded or misled by bad legal representatives lies in the definition of "misrepresentation" under *IRPA*. For instance, s.40 of *IPRA* states in part:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility

Section 127 reads:

127. No person shall knowingly

> (a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
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> (b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or
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> (c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

These provisions have been interpreted by the Federal Court to include situations where the applicant has no knowledge that material facts have been misrepresented or withheld by their legal representative because "directly or indirectly", the applicant is being held responsible for the action of their representative.

Sayedi v Canada (Minister of Citizenship and Immigration), 2012 FC 420, 2012 CarswellNat 1125 (*Sayedi*) summarizes the position of the case law on the matter. In *Sayedi*, *supra*, at paragraph 43, it was decided that applicants cannot shirk their duty of candour on the basis that they were unaware that their immigration consultant had submitted false documents in support of their application:

> ... The applicants in this case chose to rely on their consultant. The principal applicant acknowledges having signed his application. It would be contrary to the applicant's duty of candour to permit the applicant to rely now on his failure to review his own application. It was his responsibility to ensure his application was truthful and complete -- he was negligent in performing this duty.

As for the possibility of relying on a "defence" when there is a finding of misrepresentation on the part of the applicant, the Court established that such a possibility is not open to applicants (*Sayedi*, *supra*, at paragraph 44):

> [44] Furthermore, in order for the applicants to rely on a 'defence' to the finding of misrepresentation**,** that defence must be grounded either in statute or common law. In my view, there is no such defence under the Act: the wording of section 40(1)(a) is broad enough to encompass misrepresentations made by another party, of which the applicant was unaware: Wang, above at paragraphs 55-56. Furthermore, in Haque v Canada (Minister of Citizenship and Immigration), 2011 FC 315, the Court held that the fact that an immigration consultant was to blame for the misrepresentation was no defence. As already discussed, the applicants cannot avail themselves of the exception for an innocent mistake.

Not only is the provision unfair – as it does not require the proof of intent for misrepresentation to be found, it has also led to tragic outcomes for many individuals and families through no fault of their own (other than putting their faith

in the wrong legal representative). Given that the Government does acknowledge the serious problems caused by unscrupulous consultants, it is time to revisit the misrepresentation provisions in IRPA. At the very least, applicants who are duped by their consultant should be given an opportunity to correct any misinformation that may have been provided without any prejudice to their case.

As such, we recommend that:

Recommendation 1: IRCC should continue to process applications that IRCC suspects have been completed by "ghost consultants". IRCC should advise the applicants of its suspicion and provide the applicants with information on how to find consultants or legal representatives who are properly licensed. IRCC should also provide the applicants the opportunity to review the information provided and to correct the errors, if any, made by the "ghost consultants".

Recommendation 2: In cases where if an immigration consultant (or other authorized representative) is found to have made misrepresentation on behalf of an applicant, IRCC should give the applicant an opportunity to correct their application without any prejudice.

Recommendation 3: IRCC should provide first language materials to applicants who have self identified as not fluent in English or French to ensure that they are fully aware of the rules regarding legal representation.

IV. OVERSIGHT OF IMMIGRATION CONSULTANTS

While the Standing Committee's study covers lawyers, consultants and paralegals, our comments deal only with consultants. This is because, in Ontario, both lawyers and paralegals are governed by the Law Society of Upper Canada (LSUC) which has a very comprehensive framework for regulating both classes of licencees, from the requirements on entrance exams and experiential learning, to regulatory requirements and disciplinary actions.

Ontario is the only province that licence paralegals. Also, not all paralegals are licensed immigration consultants. In any event, the scope of practice for paralegals in Ontario does not extend to immigration and refugee law practice. For a non-lawyer to practice in those areas, they must be members of the Immigration Consultants of Canada Regulatory Council (ICCRC).

The current oversight system for immigration consultants has only been around for five years. The previous body, Canadian Society of Immigration Consultants (CSIC) was disbanded due to its complete ineffectiveness.

Many organizations, including the Canadian Bar Association (CBA), have seriously questioned whether consultants are capable of effective self-regulation. We share their concerns.

We are not at all convinced that even with the revamped oversight system, immigration consultants who fail to live up to its professional standard are being taken to task and disciplined for their action. This is not necessarily a reflection of the efficacy of the oversight system, or the lack thereof. Rather, it is the inevitable result of the intersections of all the factors as noted above: the vulnerability and desperation of potential clients, the complexity of the immigration and refugee determination system, and the government's penalizing of the applicants (not their legal representatives) of any alleged wrongdoings.

While the previous government has passed Bill C-35 and amended the *Immigration and Refugee Protection Act* (*IRPR*) to make it an offence for anyone to provide advice and representation without a licence, and to give the Minister the power to designate a regulatory body for consultants and to revoke such designation, these measures did not stop ghost consultants from operating, nor did it lead to improved standard of practice for the licensed consultants.

Section 91(6) of IRPA provides:

> (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.

The onus is thus on the designated body, not the Government, to design the requisite governance structure.

To truly protect vulnerable clients from unlicensed and/or unscrupulous consultants, we urge the Government to adopt the position of the CBA to move towards a comprehensive regulatory system, not unlike the system in United Kingdom. Through legislation, the Government should set up a government oversight body which sets the admission and accreditation requirements for consultants, develops a Code of Standards and Rules, prescribes scope of practice and areas of responsibility, mandates insurance coverage, and designs mechanisms for dealing with complaints and disciplines.

In Ontario, for instance, while lawyers and paralegals are self-regulated, the governance structure is set out under the *Law Society Act*, R.S.O. 1990, c.L.8 which prescribes in details the classes of licencees, the power of the governing body, and many other requirements to ensure that the governing body acts in the public interests when carrying out its mandate.

We believe a similar system needs to be adopted for the regulation of immigration consultants. As such, we recommend:

Recommendation 4: The Government should pass legislation to set up a Government oversight body to regulate immigration consultants. The legislation should contain detailed provisions for the admission and accreditation requirements, Code of Standards and Rules, scope of practice and areas of responsibility, insurance coverage and mechanisms for dealing with complaints and disciplinary matters.

Recommendation 5: In the alternative, should the Government continue to allow self regulation among immigration consultants, it must still adopt legislation prescribing all the requirements to ensure that the consultants' self regulatory body carry out its mandate in the public interests.

Regardless of which model the Government adopts, at the end of the day, protection of potential applicants should be the paramount concern. The responsibility falls on the Government, not the individual applicants themselves, to educate all potential applicants about the regulatory system that we have in place for lawyers and immigration consultants. As such, we recommend:

Recommendation 6: The Government of Canada, through IRCC, must develop a comprehensive strategy to educate all immigrant applicants and refugee claimants about the requirements under *IRPA* about licensed consultants and other practitioners. Information about this requirement must be integrated into the application system and must be available in the applicants' first language.

IV. CONCLUSION

The integrity of our immigration and refugee determination system is strengthened when there is a strong oversight body for the legal practitioners who work within the system. When vulnerable immigrants and refugees get defrauded by unlicensed, unethical and/or incompetent legal practitioners, it undermines the public trust in the system. It also adds cost to the administration of the system.

To protect all immigrant applicants and refugee claimants, the Government must adopt strong legislative oversight measures for immigration consultants. Until then, all applicants, but especially those who are most vulnerable, are at risk.