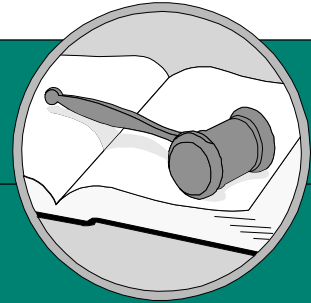


WORKING WITH THE LAW

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Paralegals and immigration: Too hot to handle?

Should independent paralegals be allowed to handle immigration matters? In the absence of a clear message to the contrary from either the courts or from the Bar, the answer, for now, appears to be “yes.” But paralegals should be cautious about hitching their wagons to the immigration star — the road to clarity on this issue promises to be rough.

THE LAW SOCIETY OF UPPER CANADA RECOMMENDATIONS

In 1999, the Ontario government, in the course of its own investigation of the issue, invited the Law Society of Upper Canada to comment on the delivery of legal services for fee by non-lawyers. The Law Society was also asked for its views about the need for regulation of the paralegal industry. The Law Society is the legal profession’s self-regulatory body, and its primary mandate is the protection of public consumers of legal services.

A paralegal task force, which was established by the Law Society to study the paralegal question, completed a process of consultation, including public hearings, informal meetings with paralegals, and an “environmental scan” (survey) conducted by a research firm. The task force’s report exceeded 200 pages and, although not all the recommendations were adopted by the government (which released its own report last year), it was certainly influential.

The results of the Law Society’s survey suggested that there is considerable public demand for the services of paralegals and that the public is generally satisfied with those services. However, the report expressed concern with the risks to the public that are inherent in the unregulated delivery of certain legal services, and recommended that the scope of paralegal practice be carefully limited and that the

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New writs search option through BAR-eX

BAR-eX, a developing Ontario “lawyers portal” has recently advertised the launch of a new service that allows members to perform a search of all 49 Ministry of the Attorney General writs enforcement offices in the province. The new service combines 49 individual searches into a single search, and costs \$30 (performing all 49 searches at \$11 each costs \$539). If the search generates a match, documentation associated with the writ number found can be obtained by performing a search by writ number in the matched jurisdiction for an additional \$7 per match.

The service reduces the cost, both in money and time, of checking out the execution status of both individuals and companies. It should help put thorough

due diligence within the reach of more clients, thereby reducing the risk associated with small corporate acquisitions and other transactions where, for example, a potential defendant’s financial circumstances are in question.

Membership in BAR-eX is free, and the service can be used by law clerks, students, and support staff. Each registering account, however, must have at least one member who belongs to the Law Society of Upper Canada (for example, independent paralegals would not be eligible). BAR-eX is “a joint initiative of Teranet Enterprises Inc., the Law Society of Upper Canada (LSUC), and the Lawyers’ Professional Indemnity Company (LPIC).” It can be found at www.BAR-eX.com. ■

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services delivered within that scope be regulated by the government. The task force was unwilling to “equat[e] public perception of the need for paralegals with actual need for their services” because it concluded that the public demand was influenced by “misleading information from paralegals; ignorance about the qualifications of paralegals; ignorance about the cost and accessibility of lawyers; and most importantly, ignorance about the risks inherent in the provision of [paralegal] services.”

According to the Law Society report, immigration “is probably the area of legal practice that most clearly requires either regulation or prohibition.” The Law Society’s research revealed accounts of “abuses” in the provision of service by paralegals in this area, who often market themselves as “immigration consultants.” The abuses complained of, beyond a general lack of training, included the irresponsible filing of *pro forma* appeals, service providers lacking understanding of the law required to make competent Charter arguments, and the fact that some providers had been convicted of fraud.

But perhaps more important to the Law Society than these specific criticisms was the recognition that “[t]he right of a non-citizen to obtain the right to remain in a country is of utmost significance,” and that protection of those who seek to ob-

tain or exercise that right “is crucial.” The Law Society recognized the special vulnerability of this group, and identified its members as being in need of particular protection:

Aggressive paralegal advertisement techniques . . . suggest that many clients, such as those who are met at the airport on their arrival in Canada by an immigration consultant, are not even aware that any other professionals may be able to assist them. This, coupled with language limitations, makes it extremely difficult to assess the qualifications of paralegals and consultants.

The report also noted that this area of paralegal practice was characterized by exorbitant fees that often exceeded what might be charged by a lawyer for the same work. The report ultimately recommended the following:

1. To the extent that the Supreme Court (in the *Mangat* case, discussed below) determines that the *Immigration Act* permits non-lawyers to represent parties and that the provinces have the constitutional jurisdiction to regulate such representation, Ontario should apply whatever regime is developed for independent paralegal regulation generally to those paralegals who are acting under the *Immigration Act*.
2. To the extent that the Supreme Court determines that the *Immigration Act* permits non-lawyers to represent parties and that the provinces *do not* have the constitutional jurisdiction to regulate such representation, the federal government should implement an appropriate, forum-specific regulatory regime for appearances and other involvement by paralegals and consultants in federal tribunals.

THE CORY REPORT

In the spring of 2000, the Ontario government published its own report on the paralegal issue, “A Framework for Regulating Paralegal Practice In Ontario.” The report, written by the Honourable Peter deC. Cory, recognized the growing role of paralegal practice in Ontario and found that paralegals “have a significant role to play in increasing the public’s access to

legal services.” It also found that many paralegals are able and conscientious, and fill an important need in society. However, this need for enhanced access to legal services needs to be balanced with society’s need to be protected against risky practice, and this balance, according to the report, can be achieved only through the implementation of a regulatory scheme.

The scheme proposed includes an educational/testing aspect, an insurance requirement, and supervision by a governing body. The specific standards and details of the scheme continue to be developed, but the scope of practice that is to be permitted is largely defined in the report (for example, paralegals are allowed to draw certain specified types of simple wills, but are not allowed to take on estate litigation matters). The report also suggested that the services of paralegals should be offered/funded by legal aid, where appropriate.

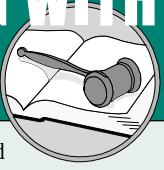
What the report didn’t clarify, however, was the situation with respect to immigration law. The report makes a “suggestion but not a recommendation” that paralegals continue to be permitted to appear before the Immigration and Refugee Board of Canada:

1. Licensed paralegals who are duly qualified, whether by passing a special examination or by holding a secondary licence, should be authorized to appear before the three divisions of the Immigration and Refugee Board of Canada in Ontario: the Convention Refugee Determination Division, the Immigration Appeal Division, and the Adjudication Division.
2. The Immigration and Refugee Board of Canada should require agents who appear before them in Ontario to provide them with the evidence that they are licensed and have passed the special examination for the Immigration and Refugee Board of Canada.

THE MANGAT CASE

Clarity is so elusive in this area primarily because of the *Mangat* case. In *Law Society of British Columbia v. Mangat* (1998), 167 DLR (4th) 723, the British Columbia

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Court of Appeal held that paralegals could represent clients for a fee in BC appearances before the Adjudication Division and the Convention Refugee Division of the Immigration and Refugee Board of Canada. The decision came after the Law Society sought to regulate the practice of an immigration consultant, Mr. Mangat, in that province. The court found that the constitutional doctrine of paramountcy (that is, federal law's precedence over provincial law) ousted the application of the BC *Legal Profession Act* with respect to procedure before the tribunal (which is governed by a federal statute) because the *Immigration Act* contains provisions that permit appearances by non-lawyers. The Act also gives the governor in council the jurisdiction to regulate such appearances, but no regulations restricting paralegal practice have been passed.

The Supreme Court heard the BC Law Society's appeal of the *Mangat* decision on March 21. There has been some suggestion that, although the Law Society probably can't get around the paramountcy issue, it might be able to enjoin (get an injunction against) the practice of paralegals before the Immigration Board. However, most commentators believe that the appeal will preserve a role for paralegals before the tribunal. Whether this role will eventually be limited by federal regulation remains to be seen.

WHAT PARALEGALS CAN DO

As the situation stands, there is nothing to prevent Ontario paralegals from representing clients before the Immigration Board as contemplated by the *Immigration Act*, as long as they comply with any general licensing requirements implemented as a result of the Cory Report. However, both the Cory Report and the Law Society's report might be interpreted as putting paralegals and, in particular, those who practice as immigration consultants "on notice" that the work they are doing will continue to attract the scrutiny of those who are charged with protecting the interests of the Ontario public.

There continues to be public demand for the service of paralegals in this area, and the work continues to be attractive to paralegals. Whether paralegals will continue to enjoy the privilege of working in immigration will depend on whether that practice is (and is perceived to be) responsible and in the interests of the public.

Paralegals who want to hang onto their immigration files can best do so by

1. recognizing the special vulnerability (due to language barriers, work circumstances, etc.) of their immigration clientele;
2. being scrupulously honest and avoiding undue pressure in their methods of advertising to this group and in the manner in which they pursue potential clients, and by being honest in particular about their own qualifications and about the range of professionals available to serve this client group;
3. pursuing good quality, specialized education that will ensure their competence to represent immigration clients to the full extent of the law;
4. being judicious about the steps taken on behalf of clients, having regard for the strength of individual cases and the burden on the system as a whole;
5. setting fair and reasonable fees, with upfront disclosure about the fee basis and without misrepresentation about the fees charged by lawyers for the same work; and
6. adhering to the general standards of ethical practice befitting the provision of critical legal services to a vulnerable group. ■

Small claims grows up

Effective April 2, 2001, the recovery limit for successful suits in Ontario small claims courts will increase to \$10,000. This is the second such increase in eight years – the limit doubled from \$3,000 to \$6,000 in 1993.

The increase in the limit reflects, to some degree, general increases in damage awards in simple cases; however, it seems to have been motivated primarily by a perception that small claims courts provide efficient access to justice. Government research shows that 81 percent of users surveyed are satisfied with the service provided by these busy courts, which process about 85,000 claims each year. Whether the new limit will substantially increase use of the small claims system, and how such an increase might affect service remains to be seen; but the courts seem to have coped well with the 1993 limit increase. Also worth watching is whether the proportion of clients hiring paid non-lawyer agents (independent paralegals) will increase in the light of the higher financial stakes. ■

Diversity is the theme of our second annual conference

On May 10 and 11, 2001 Emond Montgomery will be hosting its second annual professional development conference at Osgoode Hall, York University. Although the conference focuses on issues that stem from police foundations and law and security programs, we would like to extend an invitation to instructors in other law-related programs. Last year's conference was very successful and this year's promises to be even better.

The theme of the conference is diversity and how best to prepare students in these fields to meet the challenges they will face in their careers. Several law professors and prominent lawyers will be speaking, and one of the highlights of the conference will be a panel discussion on youth in conflict with the law. There will also be sessions on sociology and contemporary social issues, public administration, group dynamics, and how to design effective exams. The cost of the conference is only \$100, which includes materials, a networking reception, and a working breakfast.

For more information, contact Marie Maidman at 416-975-3925, or mmaidman@emp.on.ca. ■

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