THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 9, 2012

Via email: david.manicom@cic.gc.ca

Mr. David Manicom
Director General, Immigration Branch
Citizenship and Immigration Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Mr. Manicom:

Re: Disclosure of Paid Advisors and Representatives

I write on behalf of the National Immigration Law Section of the Canadian Bar Association (the CBA Section) to comment on the potential impact of recent amendments to the *Immigration and Refugee Protection Regulations* that compel disclosure of paid advisors and representatives in all immigration applications.

The CBA Section supports the government's goal of prohibiting the use of ghost consultants and unauthorized representatives. However, in our view, sections 10(2)(c.3) and (c.4) of the *Regulations*, which demand similar disclosure of all persons or entities who have provided advice on an immigration application, must be interpreted in a manner consistent with the right to solicitor-client privilege. Moreover, the IMM-5476 Use of Representative form provided by CIC for the purpose of disclosing paid representatives and advisors is deficient for the reasons enumerated in this letter.

1. Solicitor-Client Privilege and Client Confidentiality

The amended *Regulations*, if interpreted broadly by CIC and CBSA officers, could lead to violation of solicitor-client privilege and the lawyer's duty of confidentiality in cases where a lawyer has been consulted or retained to advise.

A longstanding and fundamental principle of Canadian law is that every person has the right to seek advice from a lawyer in absolute confidence. The questions asked of the lawyer and the advice given are confidential. So is the mere fact that advice was sought. This principle must be reconciled with the amended *Regulations*, which purport to oblige applicants to disclose the names of any lawyers they consult in the course of preparing their application or in connection with an immigration proceeding.

The protection of absolute confidentiality in lawyer-client interactions is critical to ensuring that individuals with legal problems provide complete and candid information to their lawyers. The Supreme Court of Canada confirmed this principle in the case of *R. v. McClure,* holding that "[s]olicitor-client privilege should be set aside only in the most unusual cases. Unless individuals can be certain that their communications with their solicitors will remain entirely confidential, their ability to speak freely will be undermined[1] ".

It is in the public interest for CIC and CBSA to assist in putting individuals out of business who provide immigration advice without being appropriately trained, regulated or insured. However, government efforts in achieving this objective cannot justify an unrestricted waiver of the right to solicitor-client privilege.

Advice provided by a lawyer must be distinguished from advice provided by a paid consultant. This differential treatment is endorsed by Canadian jurisprudence, which recognizes the unique and privileged nature of the relationship between client and solicitor.

2. Obligation to Disclose Both Paid Representatives and Advisors

Sections 10(2)(c.3) and (c.4) of the amended *Regulations* oblige applicants to disclose the name, postal address, telephone, fax and email address of any person or entity who has advised them for a fee in an immigration application. The *Regulations* do not define "advice", nor do they specify what is encompassed by the phrase "in connection with an application". However, since Bill C-35 came into effect, the IMM-5476 Use of Representative form and its accompanying guide have been amended. Both documents now use the terms representative and advisor interchangeably. They equate representation with any advice or guidance on any immigration application or proceeding, and both infer that applicants are obligated to list every person from whom they have sought guidance, regardless of whether they followed that advice. The amended guide for the IMM-5476 form reads as follows:

> A **representative** is someone who has provided advice, consultation, or guidance to you at any stage of the immigration application process, or in an immigration proceeding. If someone represented or advised you to help you submit your application, then that person is your representative.
>
> A representative is also someone who has your permission to conduct business on your behalf with Citizenship and Immigration Canada (CIC) and the Canada Border Services Agency (CBSA).

It is not uncommon for applicants to pay for advice or consult with several individuals both prior to and after an application has been filed. For example, individuals may seek a second opinion or try to find a representative with whom they feel comfortable. Where a Canadian employer has retained counsel to assist in an application, employees may seek independent legal advice to review their options. Applicants may pay to attend a seminar on Canadian immigration law and receive advice or guidance from a number of speakers, all of whom might inform the decisions in their immigration matters. The applicant may not remember the names of the various lecturers. Conversely, the lecturers may never be aware of applications filed or the identity of the applicants.

An applicant who retains an immigration lawyer may also get guidance from others in the lawyer's firm, including paralegals and clerical staff. CIC would probably agree that they need not know the names of all the lawyers or paralegals in a firm with whom a person might have consulted, provided the designated representative has been properly disclosed.

---

[1] *R. v. McClure* (2001), 151 C.C.C. (3d) 321

In these circumstances, it would be absurd to find an applicant inadmissible for non-compliance with a condition of the *Act* or *Regulations* for failing to disclose all past advisors. However, if sections 10(2)(c.3) and (c.4) are interpreted in the broad manner suggested by the Department's published materials, this could well be the result.

The CBA Section believes there is no utility in obliging applicants to disclose that they have sought advice from a lawyer they have not actively engaged to prepare or assist in preparing an immigration application or proceeding, particularly if a paid representative is on file. Failure by an applicant to disclose this information will not impede the Department's capacity to regulate ghost consultants.

3. Limitations with the Imm-5476 Use of Representative Form

If the Department's intent is to have applicants disclose every person with whom they have consulted in connection with their application, IMM-5476 will need to be amended. In its current form, it allows and instructs applicants to designate only a single representative or advisor and also stipulates that an appointed representative will not be authorized to conduct business on the applicant's behalf if a subsequent representative is designated.

Another limitation with the IMM-5476 form not specifically linked to the recent amendment is that it provides applicants no opportunity to authorize release of information by CBSA and CIC to other lawyers or support staff at their designated representative's firm. We recommend amending the form so applicants can designate a single representative to conduct business on their behalf while also authorizing release of information by CBSA and CIC to that representative's support team, to facilitate timely communication.

4. Conclusion

CIC has a legitimate interest in protecting immigration applicants by putting ghost consultants out of business. However, to the extent that the *Regulations* require applicants to disclose legal advice sought or received from a lawyer, they go beyond this legitimate purpose and constitute an unjustifiable infringement on an applicant's right to seek legal advice in confidence.

The CBA Section asks that directions be issued to ensure that the *Regulations* are interpreted in a manner consistent with the applicant's right to solicitor-client privilege. These directions must make clear that no person will be liable for non-compliance with s. 10(2)(c.3) and (c.4) of the *Regulations* for failing to disclose advice sought from any lawyer where that lawyer was not retained as a representative in an immigration application or proceeding.

We ask that the IMM-5476 form, its accompanying guide, the FAQ section on the CIC website[2], and Operational Bulletin 317 be similarly amended.

We would welcome the opportunity to discuss this with you in further detail and look forward to receiving your reply.

Sincerely,

(original signed by Tamra L. Thomson for Joshua Sohn)

Joshua Sohn
Chair, National Immigration Law Section

---

[2] Online at www.cic.gc.ca/english/information/representative/faq.asp