



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

**Submission to the Standing Committee on Justice Policy in  
Respect of Bill 49, *Ontario Immigration Act, 2015***

**Law Society of Upper Canada**

**Toronto, April 16, 2015**

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## **I. INTRODUCTION**

1. Good Morning. My name is Robert Lapper and I'm the CEO of the Law Society of Upper Canada. I'm here today with Ms. Sheena Weir, our Director of Public Affairs, and Ms. Elliot Spears, our General Counsel.
2. The Law Society of Upper Canada is the independent regulator of Ontario's over 47,000 lawyers and 7,000 licensed paralegals. The Law Society appreciates the opportunity to contribute to this Committee's study of Bill 49, the *Ontario Immigration Act, 2015* (the "Bill").

## **II. SUBMISSION HIGHLIGHTS**

3. As you know, the Bill's general purpose is to implement a provincial immigration system that recognizes the important role that immigrants play in Ontario's economic and social fabric. The Bill would establish two classes of persons, recruiters and representatives, to provide services in connection with the programs established by the government to promote the settlement and integration of immigrants and foreign nationals to Ontario.
4. Today, the Law Society wishes to comment on three aspects of the Bill, aspects that relate to the Law Society's mandate to regulate Ontario's lawyers and paralegals in the public interest. These three aspects are as follows:
  - 1) Safeguarding solicitor-client privilege;
  - 2) Ensuring that the Bill's definition of a representative is drafted so as to be consistent with the existing law as to who may act as a representative; and
  - 3) Providing for continued dialogue between the government and the Law Society to ensure that areas of concurrent regulation in the new immigration system are addressed by having our regulatory spheres work in concert.

## **III. SAFEGUARDING SOLICITOR-CLIENT PRIVILEGE**

5. The Law Society's first point relates to safeguarding solicitor-client privilege. The Bill requires representatives and recruiters to disclose information. Applied to lawyers

and paralegals, this requirement is at odds with protections granted to clients through confidentiality and solicitor-client privilege.

6. The Bill as currently drafted grants broad search and investigatory powers to inspectors and investigators. It expressly permits warrantless searches of "representatives" premises in certain circumstances (Bill, s.23.(2)4). As "representatives" includes lawyers and licensed paralegals, this would expressly permit warrantless law and paralegal office searches. Investigators would be permitted to obtain materials which would otherwise be privileged (Bill, s.23.3). These materials could be used in proceedings. It is also possible that they would be shared with other government agencies and the federal government. (Searches may also be conducted with a warrant.) It is an offence under the Bill to obstruct an investigation.
7. There is no exception for lawyers or licensed paralegals with respect to confidential or privileged information. The Bill does not expressly provide any mechanisms to protect privileged information.
8. In 2015, the Supreme Court of Canada stated that it is a "principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes."<sup>1</sup> It has also described solicitor-client privilege as "a principle of fundamental justice and a civil right of supreme importance in Canadian law" and "must remain as close to absolute as possible if it is to retain relevance."<sup>2</sup>
9. These statements from the Supreme Court reflect the fact that our system of justice relies on full and frank communication between clients and their legal representatives. Without it, legal representatives would be unable to protect or advance the legal rights of their clients. As the Supreme Court has also stated, "[i]t is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised."<sup>3</sup>

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<sup>1</sup> *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII).

<sup>2</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61 (CanLII) ["*Lavallee*"].

<sup>3</sup> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII).

10. When applied to lawyers and licensed paralegals, the effect of the investigatory provisions of the Bill is akin to a law office search. The Law Society would expect that these provisions would not require disclosure of privileged information and that the protections set out by the courts to govern such searches would apply.
11. An amendment to the Bill to make the protection of privileged information explicit would be appropriate. Given the importance accorded to solicitor-client privilege, any amendment must be carefully drafted and meet established judicial precedent. For example, in *Lavallee, Rockel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada struck down s.488.1 of the *Criminal Code*, which set out a procedure for searching law offices. It held that the section violated s.8 of the Charter of Rights and Freedoms, the right to be secure against unreasonable search and seizure. The Court set out the features that law office searches are required to ensure solicitor-client privilege is safeguarded.
12. The Law Society has provided guidance in this area by issuing Guidelines for Law Office Searches which were developed in response to the Supreme Court's statements about how law office searches may be conducted. The Law Society would appreciate the opportunity to work with the government to develop an appropriate amendment that would expressly protect privileged information in a manner that would be consistent with the Charter of Rights and Freedoms.

#### **IV. DEFINING THE TERM "REPRESENTATIVE" HAVING REGARD TO CURRENT LAW**

13. Our second point concerns the definition of the term "representative". The Bill defines a "representative" as a person who, for consideration, represents, assists or advises an applicant in connection to an application. The Bill limits who may act (or offer to act) as a representative. As presently drafted, lawyers and licensed paralegals would be able to act as "representatives" (Bill, s.14(1)).
14. The *Law Society Act* grants the Law Society the authority to regulate the practice of law and the provision of legal services in Ontario. The Law Society is authorized to establish classes of licence to practise law and provide legal services, to determine the scope of activities authorized under each class of licence and to impose any terms, conditions, limitations or restrictions on any class of licence (*Law Society Act*,

s. 27 (1)).

15. In exercising its authority to regulate the practice of law and the provision of legal services, the Law Society is guided by a description of its function and a set of principles that are set out in the *Law Society Act*. The Law Society's function (as set out in the *Law Society Act*) includes ensuring that "all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide". The principles that guide the Law Society's activities include a duty to maintain and advance the cause of justice and the rule of law, a duty to act so as to facilitate access to justice for the people of Ontario and a duty to protect the public interest.
16. In Ontario, lawyers and paralegals practise law and provide legal services within the scope of activities defined for them by the Law Society. The Law Society seeks to ensure that the Bill reflects this with respect to immigration law.

## **V. CONCURRENT REGULATION AND THE NEED FOR CONTINUED DIALOGUE**

17. The Law Society's third and final point relates to how issues arise in the context of concurrent regulation and the need for continued dialogue. The Law Society highlights three examples of areas of dual or concurrent regulation which could arise if Ontario enacts the proposed new immigration system. These are:
  - 1) Concurrent regulation of lawyer or paralegal licensees governed by the Law Society who act as "representatives";
  - 2) Concurrent regulation of lawyer or paralegals who act as both "representatives and recruiters"; and
  - 3) Concurrent regulatory responsibility to address unauthorized practice.

### **(1) Regulating Lawyer or Paralegal "Representatives"**

18. The Bill does not contain any specific provisions for the regulation of "representatives", although by creating the new field of "representatives", the Bill appears to anticipate their regulation. The Law Society would be interested in receiving more information about any contemplated regulatory oversight of

representatives. The Law Society would appreciate being consulted in advance of any regulations being developed in this regard, so as to ensure that any regulations regarding “representatives” are developed in a way that recognize and work together with the Law Society’s regulatory authority.

**(2) Regulating Lawyer or Paralegal “Representatives and Recruiters”**

19. The Bill contemplates that an individual may act as both a recruiter and a representative in relation to an applicant (Bill, subsection 1(2)). As noted previously, the Bill contemplates regulation of representatives. Similarly, the Bill contemplates regulation of recruiters.
20. As also noted previously, lawyers and licensed paralegals who act as representatives are already subject to regulation by the Law Society.
21. It is possible that some lawyers and licensed paralegals will act in dual roles, as both representatives and recruiters. This raises questions about regulation. The Law Society believes that further clarification is needed on how the government proposes to regulate persons acting as both recruiters and representatives and, specifically, on how the government proposes to address lawyers and licensed paralegals working as both representatives and recruiters. The Law Society would welcome the opportunity to work with government to ensure any of its licensees who also act as recruiters and representatives are regulated by the appropriate entities in the appropriate circumstances.

**(3) Addressing Unauthorized Practice**

22. Finally, section 29 of the Bill sets out the offence of acting as a representative without the authority to do so. The Law Society similarly acts in the public interest by prosecuting unauthorized practice of law and provision of legal services. It is possible that both the Bill’s offence of acting as a representative without the authority to do so and the Law Society’s unauthorized practice of law and provision of legal services provisions will target the same activities. In such circumstances, it will be important to have a coordinated, collaborative approach to dealing with the unauthorized activities. In the absence of a coordinated, collaborative approach, it is possible that unauthorized activities will go unchecked, resulting in a risk of harm to the public.

The Law Society urges the development of clear frameworks to govern the handling of instances of unauthorized activities when the activities could constitute unauthorized practice in two or more statutes.

23. The three examples demonstrate that continued collaboration will be necessary in order to regulate areas of concurrent regulation in the public interest. The Law Society looks forward to continuing to work in an open and collaborative manner with government to ensure that areas of concurrent regulation are addressed from the outset in a way that protects the public and the public interest.

## **VI. CONCLUDING REMARKS**

24. We again thank the Committee for the opportunity to appear here today. We would be pleased to discuss the issues raised in this submission with you further, and answer any questions.