

## **Workshop #2 Paralegals as Agents: What Will the Proposed Legislation Mean to Your Tribunal?**

Zeynep Onen

Caveat – because the legislation is new, we are still in the very early days for implementation and it will take time for us to become more expert and defined in how we interpret the new Act.

Three key topics:

The status of new legislation for the regulation of paralegals

Key provisions in the new law

The law society's plan for implementation

Access to Justice Act, 2006

- Schedule C applies to the regulation of paralegals
- Royal assent on Oct 19/06
- In force May 1/07

Key provisions in the legislation:

- Sub 2(1) defines a new licensing scheme
- 2(5) and (6) define legal services

Licensing provisions

A person who is authorized to practice law in ON means,

- A person who is licensed to practice law in ON as a barrister and solicitor
- A person licensed to provide legal services in ON...

Definition of “legal services” will be defined further in bylaw (as provided for by the Act)

Definition of legal services

Subsection 2(5):

For the purposes of this act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Application of legal principles – that's key

Very broad definition (principle + judgment)

More on definition of legal services

- Subsection 2(6) lists specific services which would come under the Act (Documents that affect interest in property, representing a person before an adjudicative body)
- Specific services – for greater certainty

Who is not included - Subsection 2(7)

- A professional regulated under another law (like engineers)
- An employee of a corporation
- A representative of a trade union
- A person otherwise exempted under a Law Society by-law

Professionals (like engineers at drainage tribunal hearings – MAY not require a license – it's still kind of guesswork) who are regulated by something else

Law society can pass bylaw

Next steps

- Appointment of a standing committee of Convocation
- Establishment of the regulatory framework including:
  - Rules of Professional Conduct
  - Application forms
  - Admission standards and assessment

Convocation – board of governors of LSUC

Benchers and Paralegals

Standing committee will approve code of conduct

Time lines – New law is in force on May 1, 2007

- Just because it's in force doesn't mean that will automatically be able to regulate paralegals
- On that date, they will accept applications from grandparent applicants (until Oct 27/07)

The Law Society will review applications under good character criteria (same as with lawyers)

and will announce date at which they will accept complaints some time in winter of 2008

Question: What about employees of law firms?

Answer: If you're employed by a lawyer you wouldn't need a license – need to be supervised by lawyer

Right now we have a process for receiving and dealing with complaints against lawyers (about 5000 complaints for 20,000 practicing lawyers) – most can be solved without formal discipline

Investigations for more serious matters

Thinks process for paralegals will be similar – probably same staff

Question: What is penalty for someone who provides legal services without a license?

Answer: Currently, if someone is engaged in unauthorized practice of law, can be prosecuted by law society (or private prosecution)

There can be a fine, an injunction, contempt of court – escalating series

Question: What about tribunal members and mediators? Are they captured by the definition?

Answer: Under the act there is a provision for bylaw making- that will happen. They don't know yet – she would doubt that adjudicators would require a paralegal license. Having said that, some might be interested in the grandparenting provisions to gain a license

Question: Re: the process to develop bylaws – will there be any further opportunity for consultation with stakeholders?

Answer: These are really early days; they need standing a committee in place first. The Law Society only has 6 months to do a huge amount of work. Any consultation will have to happen very quickly

Question: What about family members who appear before the tribunal to offer assistance (ex: with language barriers)?

Answer: These people won't be caught by the new Act

Carol Kiley - The ON Rental Housing Tribunal  
Paralegals and the Tribunal

She is not an adjudicator; she works on admin side of the Tribunal

Adjudicators have many tools to deal with paralegals that are causing problems (costs, reprimands)

She wants to focus on what happens outside of hearing room

What does the Tribunal do?

- Resolves landlord-tenant disputes
- Uses mediation and adjudication
- Most are for arrears of rent (landlords usually represented by lawyers or agents)
- Tenants – usually represented by paralegals
- This can be difficult

Who participates in ORHT hearing?

- s.10 of SPPA – gives right to participate
- Tenants have access to duty counsel provided by legal aid
- Most Tenants are represented by paralegals with little experience

Problems Encountered

- Failing to appear/abandoning clients
- Soliciting business in T offices
  - using letterhead that looks like T letterhead
- Promising resolutions that are not within the law
- Overcharging
- Incompetence/lack of knowledge
- Loud and attention seeking behavior

- abusive to staff, looking for attention of tenants who feel that this behavior will be beneficial to their case
- They have an enforcement arm for Tenants who feel that they have been the victim of fraud
- Situation most of the time is that tenants are in great trouble with their housing and they can't stick around for the time it would take the case to get to court

#### History of Paralegals and the Tribunal

- Tribunal was brand new in 1989 (used to be handled in the courts) – handed to Tribunal in June of 1998
- Majority of agents were unknown to Tribunal (but known in courts)
- Staff were easily intimidated (at first)
- Did not know the boundaries and solutions available to them
- Most agents are also involved in other kinds of paralegal work (traffic violations, immigration – high risk negotiations)

#### Freedom of Information and Privacy Act

- One of the first Tribunals to be automated
  - (large database – great public interest – some commercial value)
- Some problematic paralegals began to request copies of the hearing dockets, copying attendance sheets, in an attempt to attain tenant names
- Tried to bribe staff to produce data
- Many paralegals share lists of landlords
- In February of 2003, the Privacy Commissioner issued a ruling that Tribunal information should not be available to the public
- In April of 2004, another case led to the production of a weekly list of landlords' names and addresses, but not tenant names

#### Actions taken to remedy problems

- Produced list of dos and don'ts for paralegals
- Supported CSRs in their dealings with paralegals through training and monitoring
- Managers dealt with troublesome paralegals immediately
- Scrutinized mediation agreements very carefully – look for signs of coercion
- Chair can write reprimands in writing – very helpful
- Security staff will remove agents who are behaving inappropriately
- New act in January (Residential Tenancies Act) (doesn't address this – have to rely on Access to Justice Act)

#### Court Case

- October of 2006 – Court rules on a case from 2003
- Ordered a paralegal must reimburse a tenant who paid him \$1,800 to fight an eviction order
- Paralegal promised to delay the eviction indefinitely
- The judge said, “Not only was that morally reprehensible, it was a blatant lie.”

- She also noted that courts have been hamstrung for too long by the difficulty of holding paralegals to a standard of conduct when they have no standards

Paralegals: The FSCO (Financial Services Commission of ON) experience – David Draper, Director of Arbitrators

Participation of Paralegals in DRS (dispute resolution services) at FSCO

- The right to participate was established in *Pelzner and Coseco*
- s.10 of the SPPA applies
- In 2002-2003
  - Paralegals involved in 47% of mediations and 30% of arbitrations

Problems with some paralegals

- Lack of authority
- Conflict of interest
- Incompetence
- Bringing multiple proceedings
- Failing to honour undertakings
- Failing to appear/abandoning clients
- Rude behavior
- Frivolous and unfounded claims

Tools – before November 2003 legislative changes

- Meetings between DRS Managers to provide feedback to problem representatives
  - some people just need to be told their behavior is unacceptable
- Rules of Procedure and Practice Notes
- General authority to control the process
- Negative comments in decisions
- Exclusion in the Proceeding
  - see SPPA s. 23(3)
- General exclusion from DRS
  - see *Rezaei v. Canada*– some comfort that Ts may be able to do general exclusion if someone consistently does problems
- Acknowledgement/Authorization form to make sure that people who are represented by paralegals understand the implications
  - see *R v. Romanowicz*

Expenses

- Against a party, including interim expenses
  - see SPPA s. 17(1)
  - see *Royal and SunAlliance v. Volfson* case
    - paralegal brought a case with no authorization at all; decided that could expenses be ordered without authority to order expenses against anyone but a party

November 2003 Legislative Amendments

- Effective November 1, 2003, the *Insurance Act* (s. 398) prohibits anyone from acting as an advisor, consultant, or representative in an accident benefits claim – not just in DR – unless he or she:
  - Is a lawyer
  - Is employed by and supervised by a lawyer
  - Complies with the terms and conditions established in the regulations (“SABS Representatives”), or
  - Provides representation without compensation

The regulations require SABS Representatives to:

- File information required by the superintendent
- Carry E&O insurance of 1 million dollars
- Not act in cases involving ‘catastrophic’ injuries

The definition of ‘unfair or deceptive acts or practices’ was expanded to include a list of prohibited activities for SABS representatives, including:

- Charging contingency fees
- Paying or accepting referral fees
- Acting contrary to the Superintendent’s Code of Conduct, or
- Failing to disclose a conflict of interest

(*Insurance Act*, s.438 and O.Reg 7/00)

Legislation specific to DR:

- Notwithstanding the *SPPA*, the insured person cannot be represented in DR by someone who is not a lawyer, unless that person is employed and supervised by a lawyer or is a SABS representative (*Insurance Act*, 284.1)
- Arbitration and appeal expenses can now be awarded personally against a representative, including a lawyer in some circumstances (*Insurance Act* s.282(11.2))

Additional legislative change

- Effective September 1, 2004, prohibition introduced by regulation to prohibit anyone convicted of any listed CCC offences from providing advice or representation in accident benefits cases

(O. Reg. 664, s.18)

Observations on the new legislative provisions:

- Consumer focus. Non-lawyers can represent insurers without filing
- This is a filing-plus-enforcement of future bad behavior system. It is not licensing or full regulation. No initial education, experience, or good character requirements
- Enforcer is within FSCO but outside DRS
- New provisions do not remove old tools from DRS

Impact of new legislative provisions

- Initially registration really high – now settled
- New tools have been used
  - complaints have been filed, people have been taken off the list
- Arbitrators have ordered SABS Reps to pay expenses personally
- Some ‘bad actors’ have disappeared
  - Some form relationships with lawyers
    - not clear what those relationships are
    - will have to look more carefully in the future
- Participation of paralegals has gone down
  - Does this mean that people don’t have representation?
  - No – some “marginal players” chose not to bring their claims, some cases are picked up by lawyers

Rick Stevenson

Chair of the Assessment Review Board

Deals with appeals of property assessments (for purposes of municipal taxation)

Four types of cases

- 1) complex, multi-day hearing – parties represented by lawyers and sophisticated agents
- 2) simple residential appeals
- 3) non-residential, not complex
- 4) municipal tax appeals

In last three – usually represented by agents

Where agents appear before board, there is a mixed range of competence and ability (accountants, real estate)

- Interesting to see if these people will be exempted

What arrangements are with clients is beyond scope and supervision of Board

- Board doesn’t find out if there is a contingency fee
- One decision of the Board said that when there was a contingency fee that meant the agent had a pecuniary interest and so couldn’t participate, but that was overturned

Some agents represent in a paralegal manner, even though they have no experience or education in that area

Some question of status with regards to assessors who appear – mixed participation in hearing

In the case of agents, they are often the witness (expert evidence) and agent

Problem of hearsay evidence (agents and assessors)

Assessors – often haven’t examined the property in question

Agents – will file multiple listing agreements; give opinions from real estate agent (who isn’t there to be cross examined)

They can accept less than full corroborated evidence

Because of volume of appeals there’s pressure on the Board and participants to conclude the hearing expeditiously

About 67% of complaints have representation

Some colleges are issuing training sessions for people in the assessment field (bring students to their hearings – training of paralegals) (is a good idea?)

Wenda Woodman – Canadian Society of Immigration Consultants

There's mandatory regulation of their paralegals

Est. Oct 2003

Non-profit, non-share capital corporation

Up to that point, immigration consultants were not regulated

SCC, 2001 – *Law Society of British Columbia v. Mangat*

Sought to prohibit immigration consultant from appearing before Tribunals

Said that while the provincial jurisdiction enabled regulation of professions, because immigration is federal it fell under federal jurisdiction

See Gazette – summary of advisory report

Government accepted recommendations – amended regulations (April 2004)

CSIC is a self-regulating body

To meet mandate they have established measure to regulate members

- stringent membership requires
- E&O insurance
- continuing education program
- discipline process

Membership requirements

To register, applicants have to:

- be graduates of an immigration practitioner program
- provide proof of good character
- pass an English test
- complete competency professional standards exam

Anticipated membership – 950-1000 (exams are still being marked)

Complaints and discipline

- About 12% of societies' members
- One member with multiple complaints said that this was just the cost of doing business – this is not what they perceive
- There should be a more proactive approach to dealing with complaints of clients rather than going through discipline process
- Highest % of complaints come from ON
- Nature of complaints
  - primarily quality of service, fees, advertising
  - A lot of complaints about retainer agreements
  - Provisions concerning money-back guarantees (not followed through with)

Advertising

- Member against member – they have very stringent advertising guidelines
- Guarantees – 100% success, etc

Consultants are responsible for actions of their employees and agents



Immigration consultants are regulated in UK and Australia (in Australia they allowed grandfathering and it caused a lot of problems)

There is a trend towards outsourcing work to other countries – using call centres abroad  
Employees and agents may be in other countries

- But immigration consultants are still responsible for their actions

“Phantom” or ghost consultants – details of agents don’t appear on application forms to CIC

Complaints may be outside Canada while agents are in Canada

Question (for LSUC): It seems like this is going to be a huge job – would the others recommend restrictive licenses (license to appear before this tribunal only)?

A – They aren’t there yet – it will be up for discussion before standing committee

Question: But what about liability – they’re responsible for regulating these people (paralegals)

A – Those that are licensed have to have insurance; there will be a compensation fund for those who suffer financial loss because of dishonesty of member

Question: Doesn’t it already take a lot of time for a complaint to be resolved?

A – They’ve done a lot to improve on their timeliness. They have median targets for case processing that’s published on their website. If there’s a serious issue (multiple complaints for example) that takes time – for minor complaints, they try to do it as quickly as possible. They have been analyzing for about 18 months to figure out how to incorporate paralegals into this.

Question: 1) What about teleconference? What if the agent isn’t in ON? 2) Employees of Tribunal who appear at Tribunals in a non-adversarial capacity – will they be caught by the new legislation?

A – Employees of Tribunals probably won’t require license. Jurisdiction issue – this will have to be decided on a case by case basis to see if they are “practicing” in ON.

“Mobility” – lawyers who are qualified can move between provinces for a certain number of days.