



**Community Legal Services of Ottawa**  
**Services juridiques communautaires d'Ottawa**

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# Advocacy and incompetence of lawyer allegations in refugee and immigration matters

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# Introduction – about the clinic

- ▶ The purpose of Community Legal Services of Ottawa is to:

*“Provide access to justice for low-income individuals in the City of Ottawa so they can achieve solutions to injustice and poverty”.*

# Goals

- ▶ Learn applicable legal test(s)
- ▶ Professional and insurance obligations
- ▶ Identify applicable procedural protocols at the IRB and FC
- ▶ Type of evidence to support / defend the case
- ▶ Responding to the allegations
- ▶ Trends from a sample of reported cases

# Introduction on incompetence

- ▶ Everyone makes mistakes, including lawyers.

# Importance to the client to acting competently

Case law consistently holds: clients will be held to the consequences of their choice of advisor, even when that advisor is a lawyer.

Examples:

- Choice of strategy or tactics in a representative's wide range of possible choices
- Counsel's representations made on client's behalf

See: *Williams v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J No. 258, (1994) 74 F.T.R. 34 at para 20 (Reed J.)

# Incompetent representation may cause a breach of natural justice

Leading Supreme Court of Canada authority: *R v GDB*, [2000] 1 SCR 520, 2000 SCC 22:

Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice.

[emphasis added]

# Where can a client use them?

1. **Reopen or reinstate refugee claim or appeal** at the RPD or RAD
2. **Extension of time** to do something before the RPD, RAD, ID and IAD (but 'natural justice' not specifically mentioned in these regulations)

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Where incompetence of counsel allegations may be used  
(continued)

- 3. At IAD, to allow or reopen an appeal, to reinstate a withdrawn appeal**
- 4. At ID, reinstate Minister's withdrawn request for inadmissibility hearing**

# Limits on RAD/RPD powers

- **RPD:** reopen not possible where RAD or FC made final determination; RAD appeal denied, leave for JR dismissed, JR dismissed, and applies to refugee claims, vacation, or cessation
- **RAD:** reopen not possible where FC made final determination; leave for JR dismissed, JR dismissed

# Practical consequences of same allegations

- ▶ Concurrent applications at IRB and/or proceedings at the Federal Court

Where IA may be used (continued)

**5. Reconsideration applications to the IRCC/CBSA:**

H&Cs, PRRAs, danger opinions based on breaches of natural justice:

*See: Canada (Citizenship and Immigration) v Kurukkal,*  
2010 FCA 230 at para 8

# Where IA may be used (continued)

**6. Application for judicial review (and other relief)** of immigration and refugee government decisions to the Federal Court of Canada.

See also: **application for extension of time** to file and serve application for leave, s. 6 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22)

# Test in the immigration context at the FC

The leading case (at least, oft-cited) is: *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 (Russell J.); **three components** (applies GDB):

- (i) **Notice**
- (ii) **Performance**
- (iii) **Prejudice**

# FC Test (continued)

## (i) Notice

- standardized requirements in FC's notice to the profession [new Federal Court website link: [https://www.fct-cf.gc.ca/content/assets/pdf/base/procedural-protocol\\_7march2014.pdf](https://www.fct-cf.gc.ca/content/assets/pdf/base/procedural-protocol_7march2014.pdf) ]

## (ii) Performance

- constituted incompetence
- high threshold, "extraordinary circumstances"
- without the benefit of hindsight
- "strong presumption conduct fell within range of reasonable prof. assist."  
(GDB)

## (iii) Prejudice: "Revisionist history"

- outcome would have been different but for incompetence

# FC Test (continued)

- ▶ *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 (FCA) (Denault J., single-judge panel sitting in review of CRDD decision):
  - ▶ Distinction between (1) counsel completely denying client opportunity for a hearing and (2) where a hearing occurs, extraordinary circumstances required, sufficient evidence establishing dimensions of problem, review on a precise factual foundation.
  - ▶ (1) opportunity for hearing based on s. 7 Charter right (*Singh* [1985] 1 SCR 177).

# FC standard of review

- ▶ FC judge's review of IA competence in the proceeding below is reviewed on correctness (engages a breach of procedural fairness),
- ▶ Though some discord at FCA as to whether it is correctness or evaluated outside of the standard of review altogether:

*Canadian Pacific Railway Co v Canada (Attorney General)*  
2018 FCA 69

# Test at IRB

- ▶ “Choose your own adventure” re: NJ
- ▶ No statutory test of definition
- ▶ RAD often applies the *R v GDP* test, see for example: Member Pettinella’s decision in *X (Re)*, 2016 CanLII 151493 (CA IRB) (RAD File No. TB6-08258, August 23, 2016), and *Galyas* 2013.

# Test at IRB

- (i) **2018 practice notice applies to IRB proceedings:**  
<https://irb-cisr.gc.ca/en/legal-policy/procedures/Pages/allegations-former-counsel.aspx>
- (ii) **Who it applies to:** representatives that are lawyers, immigration consultants and others
- (iii) **What kind of assistance it applies to:** introduces potentially broader language than the FC test, encompassing “professional incompetence, negligence, and other improper conduct”.

# Red flags - case assessment stage

- ▶ Asked about previous lawyer based on anything below, client avoids topic (red flag – may also be a difficult client who will complain against you, too!)
- ▶ For a refugee claim before RPD:
  - ▶ skeleton Basis of Claim form
  - ▶ BOC not reviewed with an interpreter (or poor interpretation – Somali instead of Arabic needed)
  - ▶ BOC filled with utter nonsense or **rife with spilling errors**
  - ▶ no evidence disclosed to RPD, or not yet asked for overseas or not translated into French or English
  - ▶ impending hearing date
  - ▶ client dissatisfied with time previous lawyer put in on any stage
  - ▶ Lawyer declined to add an relevant ground of persecution

# Red flags - case assessment stage

- ▶ For an appeal to the Refugee Appeal Division:
  - ▶ Notice of appeal not filed with the RAD registry or not filed on time
  - ▶ Former Counsel retained for only the Legal Aid Ontario merit opinion (they used to get 4 hours of billing) then client could/would not pay retainer to perfect the RAD appeal
  - ▶ New evidence not provided and/or translated into English or French
  - ▶ Short timeline to file RAD notice of appeal or perfect appeal
  - ▶ Former counsel did not make objections to violations of procedural fairness at the RPD hearing
  - ▶ Former counsel did not submit relevant/any disclosure to the RPD
  - ▶ Former counsel did not prepare client (or prep. much) for the RPD hearing
  - ▶ **Many (preventable) negative credibility inferences that a proper hearing preparation would have pre-empted** (ex. 1 - plausibility based on generally-accepted country evidence; ex. 2- little or no preparation of testimony with witness).

# Considerations – counsel/alleging

- ▶ **Client's self-interest / securing advantage?**
- ▶ **Professional obligations to client**
- ▶ **Prof. obligations to tribunal and court**
- ▶ **Counsel's reputation**

# Considerations for counsel making...(cont'd)

- ▶ **Additional time and energy required to:**
  - ▶ Increased client meetings to review, vet and defend the allegation (including searching for evidence – email in ‘foreign’ language; Hearing audio CD revision);
  - ▶ respond to Former Counsel’s reply to the allegations;
  - ▶ notice provisions require additional time and expense;
  - ▶ be patient and courteous and professional with an adversarial former counsel.

# Practical tips

- ▶ **Manage client expectations at meetings**
- ▶ **Take time to fairly assess allegation(s)**
- ▶ **Contact the Former Counsel before finally deciding and making allegations**
- ▶ **Ensure your client is committed to participating**
- ▶ **Document your file**

# Evidence / support of allegations

- ▶ **Affidavit from client**
- ▶ **Affidavit from former counsel or immigration consultant or representative**
- ▶ **Supporting corroborative objective documentation**

# Evidentiary / support of allegations – complaint to Regulator required?

- ▶ No procedural requirement to file a complaint
- ▶ If it is done, both protocols require a copy to be filed with IRB & FC
- ▶ **BUT**: Appeal authority in *Canada (Citizenship and Immigration) v Singh*, [2016] 4 FCR 230, 2016 FCA 96 at paras 66-8: complaint to regulator or the Professional's personally-issued explanation.

# Complaint required? (cont'd)

- ▶ **Concords with the FC's comments** in the case law that Court does not take the place of the regulator (ex: law society, or ICCRC).
- ▶ **Leading test** and Federal Court jurisprudence does not require evidence of a complaint to the regulator.
- ▶ **Requiring a complaint to a Regulator would be inefficient** (now) given the existence of the Protocols and the legal test; and in practice the IRB proceeding or Federal Court leave and JR process would be completed long before the complaint was adjudicated (see: *Farkas - Law Society of Upper Canada v Farkas*, 2016 ONLSTH 149; *Law Society of Upper Canada v Farkas*, 2018 ONLSTA 2, **which extended from before 2014 to 2018.**
- ▶ **Recent case clarifies the IRB process does not require a decision from a regulator to prove a BONJ in the IRB process:** *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at para 34 (Norris J.)

# Considerations / accused counsel

- ▶ **Defend yourself?**
- ▶ **Were you wrong or not competent or ineffective?**
- ▶ **Do you need to contact your professional insurer?**

# Considerations / defending

- ▶ Follow IRB and FC protocols for participation
- ▶ Former client required to waive privilege to make allegations

## **BUT**

- ▶ Rule 7.8-4 of Ontario RPC: “shall not take unfair advantage that would defeat or impair the client’s claim”;
- ▶ Rule 3.3-4 “[...] the lawyer may disclose confidential information in order to defend against the allegations, but shall not disclose more information than is required”.

# Evidence / defending counsel

- ▶ **Evidence not previously submitted** in client's file
- ▶ **Emails of timing of advice; contemporaneous notes to file about relevant issues; tribunal or court stamps of filing of documents, appeal records; fax receipts related to issues of procedural fairness**
- ▶ **Affidavit evidence** from F. Counsel refuting allegations made (not required)

## AVOID:

- ▶ **New research or irrelevant extrinsic evidence from Google to destroy client's credibility**
- ▶ **Responses which unfairly demean the former client or self-discredit counsel**

# Considerations / defending

▶ Example:

*Durdevic v Canada (Citizenship and Immigration)*, 2018 FC 427 (Brown J.)

# Considerations for avoiding allegations (Fmr. Counsel)

- ▶ Document important events, advice given, meetings in client's file
- ▶ Be clear in your written retainer and advice to clients in the first place:
  - ▶ **Ex.: do they understand the whole RPD/RAD/FC/etc. process?**
  - ▶ **Ex.: is filing the notice of appeal to the RAD the client's responsibility?** Put it in the retainer and speak to the client personally and if they require an interpreter use one who the client is sure to understand. Make sure the client understands.
  - ▶ **Ex.: if Legal Aid Ontario does not or may not fund part of the process, does Client know they may have to pay a non-LAO retainer to secure the remainder of the service?** Indicate how much at the beginning of the relationship. Make sure they understand the exact time limits for filing a notice of appeal; perfecting the RAD appeal record; the Federal Court notice of application.
- ▶ **Others:** Continuing professional development and engagement with peers (see CARL, RLA, CBA, and the Junior Refugee Lawyers Network); seek advice from mentors ("phone a friend")

# Recent case at the Court of Appeal

- ▶ *Mediatube Corp v Bell Canada*, 2018 FCA 127 (Stratas J., single-judge panel)
  - ▶ Motion to amend pleadings in IP matter
  - ▶ Useful statement of the matter of ineffective counsel: paras 27-35
  - ▶ Limited impact of pleading ineffective counsel in civil matters: paras 36-44
  - ▶ Policy reasons: finality of decisions; remedy against former solicitor in civil damages

# Recent trends

## Federal Court of Canada

- ▶ **Where Court is not conducting a first-level analysis of a former counsel's incompetence** - for example, at a RPD or RAD reopening application, the natural justice argument was already made and the former counsel had an opportunity to reply to the allegations. The Federal Court is then not conducting a first-level analysis of the previous lawyer's incompetence. Thus the Court is reviewing the RAD's decision on reasonableness, not correctness.
  - ▶ ***Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 34-5 (Diner J.);** JR of an application to reopen to the RAD on basis of incompetence of counsel.
  - ▶ ***Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 (Norris J.)**
  - ▶ ***Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 (Norris J.)**

# Recent trends – FC

- ▶ Must follow Protocol or FC will not review
- ▶ **No compliance** - *Semykin v Canada (Citizenship and Immigration)*, 2019 FC 496 at paras 25-6 (Diner J.) – JR of RAD appeal; *Désir v Canada (Immigration, Refugees and Citizenship)\**, 2019 FC 50, PRRA decision; *Singh v. Canada (Citizenship and Immigration)*, 2019 FC 91 at paras 17-8 (Barnes J.) – JR of IAD reconsideration of abandonment;
- ▶ **Partial compliance doesn't cut it** - *Shabuddin v Canada (Citizenship and Immigration)*, 2017 FC 428 at para 20 (Gleeson J.) – JR of citizenship appeal
- ▶ **No, then compliance = overlooked:** *Pacheco v Canada (Citizenship and Immigration)*, 2018 FC 617 JR of ID inadmissibility.

# Recent trends

***Pacheco v Canada (Citizenship and Immigration), 2018 FC 617;*** JR of ID inadmissibility due to org. criminality; ICA allegations dismissed on Perf & Prej.

***A cursory case law search finds two decisions where all elements of test reviewable and relief granted:***

*Yang v Canada (Citizenship and Immigration), 2019 FC 402;*

***Miah v Canada (Citizenship and Immigration), 2015 FC 36 (Annis J.)*** – JR and mandamus of in-Canada spousal sponsorship decision; applicant and whether still married to ex-husband at time of marriage to Sponsor. Counsel had told an officer that divorce for husband 1 was not done properly and wait for Ontario court to finalize the divorce to process file, then Sponsorship refused. All components met.

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**Questions (usually) make us better. Ask away.**



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