

Innocent Misrepresentations

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Who Knows if evil lurks in the hearts of men? The Visa Officer and Federal Court don't really care!

Misrepresentation can result in denial of entry, refusal of applications, loss of visitor or permanent resident status, revocation of citizenship and prosecution.

Misrepresentation

- **40.** (1) A permanent resident or a foreign national is inadmissible for misrepresentation
 - (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
 - (b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;
 - (c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or
 - (d) on ceasing to be a citizen under [paragraph 10\(1\)\(a\)](#) of the [Citizenship Act](#), in the circumstances set out in subsection 10(2) of that Act.

- **Application**

(2) The following provisions govern subsection (1):

- (a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and
- (b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

Misrepresentation

127. No person shall knowingly

- (a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
- (b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or
- (c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

Penalties

128. A person who contravenes a provision of [section 126](#) or [127](#) is guilty of an offence and liable

- (a) on conviction on indictment, to a fine of not more than \$100,000 or to imprisonment for a term of not more than five years, or to both; or
- (b) on summary conviction, to a fine of not more than \$50,000 or to imprisonment for a term of not more than two years, or to both.

Male fides v Bone fides

Deliberately lying or providing false documents are obviously wrong. Deliberate withholding of information can also be misrepresentation. Those are topics for another paper.

This paper is going to deal with innocent misrepresentations. That is, the applicant has provided to CIC or CBSA, to the best of her or his knowledge entirely accurate and complete information but which turns out to be incorrect or incomplete.

Given the current state of law and the complexity of immigration forms and requirements, and being extremely careful and attempting to be honest, applicants and their representatives can easily make innocent misrepresentations.

We will discuss how innocent misrepresentations are dealt with by the courts, CBSA and CIC and what you can do to fix a misrepresentation once the true facts become known.

Materiality & Relevancy

Just because if a question is answered incorrectly, of falsely or with incomplete information, it doesn't mean that misrepresentation will or can result in a problem. That depends on whether the information was "**material**" and "**relating to a relevant matter that induces or could induce an error in the administration of this Act.**" To be material, a misrepresentation need not be decisive or determinative but it will be material if it is important enough to affect the process.

For this session we will assume the misrepresentations are relevant and material.

Failure to Disclose

Innocent misrepresentations include statements that are not accurate. More problematic are those cases where, although not asked, one fails to disclose information that which is relevant and material.

Basis of IRPA Misrepresentation

Gordon Maynard did a very good paper on this topic some years ago in which he discussed Brooks [1974] S.C.R. 850 where he said:

The Brooks case is very important authority for a number of basic principles respecting misrepresentation inadmissibility. For instance:

- that it is not necessary to have intent to mislead or misrepresent, an innocent misrepresentation is still a misrepresentation;
- the misrepresentation does need to have masked a ground for refusal. It is not necessary to show that the hidden information would have made the individual inadmissible, and;
- the misrepresentation is material simply if it averts or discourages a line of inquiry. “

These principles from the Brooks case have formed the basis of our current legislation and in particular section 40.

40(1) (a) a foreign national or permanent resident...is inadmissible for...directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.

But how far does this go? As we will see, this includes just about everything including who you had sex with 30 years ago!

Origin of the Misrepresentation

Innocent misrepresentations can arise from:

- information provided by the applicant
- change in circumstances which are not disclosed by the applicant
- information provided by someone on behalf of the applicant including accompanying family members, employers and counsel.
- information provided at the behest of CIC, for example designated physicians, police and other agencies of foreign governments and employers

Who Makes the Misrepresentation and When?

The applicant is obviously responsible for his or her own misrepresentations.

Changes in Circumstances

When relevant circumstances change, the applicant must disclose the changes. There is a duty to disclose a material change in circumstances – even if no question is specifically asked.

Minister of Employment and Immigration v. Guidino, [1982] 2 F.C. 40 FCA wherein applicant failed to disclose on landing his recent loss of employment which was relevant to his permanent resident application.

The courts have long held that a “change of circumstances” gives rise to a duty to disclose. Without any requirement of questions being asked, immigrants must inform CIC at the time of landing of changes in circumstances or facts not previously disclosed. This obligation for immigrants at the Port of Entry is specifically included in regulation 51.

A foreign national who holds a permanent resident visa and is seeking to become a permanent resident must, at the time of their examination,

- (a) inform the officer if ...
 - (ii) material facts relevant to the issuance of a visa have changed since the visa was issued or were not divulged when it was issued ; and
- (b) establish that they and their family members, whether accompanying or not, meet the requirements of the Act and these Regulations.

Innocence Is Not Generally A Defence to Misrepresentation

An innocent and unintentional failure to disclose a change of circumstances is still misrepresentation *Mohammed v. Canada (Minister of Citizenship and Immigration)* (T.D.) [1997] 3 F.C. 299

Mohammed is an example of an all too familiar story. Mohammed, immigrating as a dependent son, married after visa issuance but before landing. He did not disclose his change of marital status at the Port of Entry. The Application form had instructions that changes to marital or family status must be reported to Immigration before coming to Canada. Family members didn't speak English or French and no interpreter was at the border. The applications were completed by someone in the town who knew how to speak English.

It was accepted that the misrepresentation was innocent and unintentional. Mohammed did not know of the requirement to report a change of marital status, did not know what he was signing at the POE and was not asked about any change of status.

Misrepresentation does not require intention, and “innocence” does not protect from misrepresentation. The application form required the applicant to report the change of marital status.

Mohammad was found inadmissible for misrepresentation.

Where Innocent Misrepresentations are Not Misrepresentations - The Medel and Osisanwo Exceptions

An exception arises where applicants can show that they **honestly** and **reasonably** believed that they were not withholding material information: *Medel v. Canada* (Minister of Employment and Immigration), [1990] 2 F.C. 345, [1990] F.C.J. No. 318 (F.C.A.) This is sometimes described as “subjective unawareness”

Medel was a citizen of Honduras and spoke no English. She was sponsored by her husband but unbeknownst to her, her husband withdrew his sponsorship after her permanent resident visa had been issued but before she got landed. The visa office sent her a telegram asking her to return her visa “because it has an error and if we do not correct it you will not be able to use it.” This was a lie. The visa office did not tell the applicant the real reason for its request but implied that there had been a clerical error and that her visa would be issued again once corrected. The applicant and her uncle and a friend, both fluent in English, checked it for errors and advised that it contained no errors on its face. She then proceeded to Canada and was landed. At an immigration inquiry the allegation was not upheld but CIC proceeded to the Immigration Appeal Division where in a 2 to 1 decision based on *Brooks*, she was determined to have been granted landing by fraudulent or improper means. The Federal Court of Appeal per MacGuigan J.A. held

Clearly, the appellant was subjectively unaware that she was holding anything back.

It seems to me that the same factors, looked at objectively, lead to the conclusion that she reasonably believed that at the border she was withholding nothing relevant to her admission.

Osisanwo v. Canada (Citizenship and Immigration), 2011 FC 1126 (CanLII)

Osisanwo is the high water mark for saying that a misrepresentation must involve mens rea.

A Nigerian couple married for 42 years were sponsored by their Canadian son. Included in the application was child who both husband and wife thought was their child. It turned out after DNA testing that the child was fathered by another man some 28 years

previously. Neither applicant ever had any reason to believe the child was not their joint child until the DNA testing.

Hughes J. stated:

8] The essential question is whether one takes an “objective” or “subjective” view as to whether what was done was “misleading”. Stated another way, is *mens rea* an essential ingredient?

[10] This statement carries with it the implication of “withholding” and “providing”, which is to say, *mens rea* is involved.

And cites Mendel (sic Medel) and some other less relevant cases where mens rea was involved.

He does state quite reasonably:

History is replete with children born to and raised by a married couple, believing it to be their own. Must an applicant seeking entry into Canada disclose every extra-marital relationship conducted at a time where there is any possibility that a child might have been fathered by someone other than the husband? **Surely our society has not found itself at that point.**

[15] Here, the husband and wife believed the child to be theirs; a birth certificate attests to that fact. There was no reasonable basis for concluding that there was any *mens rea* to mislead.

A question was certified but no appeal was filed by the Minister

The case has been cited 18 times and frequently distinguished. Insofar as it states mens rea is required to find a misrepresentation it runs counter to Brooks.

Retreat From Medel

The Federal Court has retreated from the Medel exception and tried to limit its use. This is interesting because Medel was a Federal Court of Appeal case and the federal Court should be bound by it until the Federal Court of Appeal or the Supreme Court of Canada reject the ratio of the case.

Mohammed v MCI [1997]3 FC299, 1997 CanLII 5084 (FC)

MacKay J. strives mightily and in my opinion not very persuasively to argue the misrepresentation in Medel was not material because the information that Mrs. Medel failed to disclose, (that her husband had withdrawn his sponsorship) was not “material” in the sense that it was not ‘by reason of’ which the applicant was granted landing although he does also distinguish “Medel on the basis that the information which the

applicant failed to disclose was not information regarding which he was truly subjectively unaware”.

Singh v. Canada (Citizenship and Immigration), 2010 FC 378

The court asked, What is truth? It really meant, How far must one go into past sexual experiences?

Mr. Singh was found inadmissible for misrepresenting or withholding a material fact when he immigrated to Canada in 1993. At that time he did not disclose that he had fathered a child who remained in India. His defence is that he did not know he had fathered a child, the product of a long standing affair he had with a married woman, until a DNA test was done as part of his attempt to sponsor. He attempted to sponsor them after the mother divorced and married Mr. Singh. He adopted her daughter.

Harrington J. found the Panel’s assessment of the facts was not unreasonable and held that Mr. Singh was inadmissible for misrepresentation.

Even if he did not actually know he was Shilpa’s father, the circumstances, i.e. his long sexual relationship with Shilpa’s mother, while her husband was out of India, should, at the very least, have put him on inquiry. He had a duty of candour which required him to disclose, upon his arrival in Canada in 1993, the strong possibility that he had fathered a child. The court stated:

[22] This section catches misrepresentations that may be fraudulent, negligent or innocent (*Singh v Canada (Minister of Citizenship and Immigration)*, [2010 FC 378 \(CanLII\)](#), 2010 FC 378, 89 Imm LR (3d) 36 at paras 16 and 18). As such, the fact that Ms. Bashir claims to have been unaware that the documents were fraudulent does not bring to light a reviewable error on the part of the Officer.

I suggest this is a case where the court and IAD just did not believe Mr. Singh was unaware he was the father.

Baro v. Canada (Citizenship and Immigration), 2007 FC 1299

Baro was sponsored by his second wife. His first wife had been declared dead. He did not disclose the existence of his first marriage on his application. When requested to provide the marriage check from the Philippine government, he provided it in a sealed envelope. But that check, in typical Philippine style, did not disclose the existence of the first marriage.

The second wife discovered the existence of the alive and well first wife.

The Federal Court held that Baro did not know what the marriage check stated. However it upheld the removal order on the basis that merely requesting the marriage check should have prompted Baro to disclose the existence of the first marriage.

The court cites with approval at paragraph 15 Medel which creates an exception where applicants can show that they honestly and reasonably believed that they were not withholding material information.

And O'Reilly J states:

[17] Of course, applicants cannot be expected to anticipate the kinds of information that immigration officials might be interested in receiving. As the IAD noted here, "there is no onus on the person to disclose all information that might possibly be relevant". One must look at the surrounding circumstances to decide whether the applicant has failed to comply with s. 40(1)(a).

But the request alerted Mr. Baro to the fact officials wanted to know if he had been married before. In these circumstances, Mr. Baro was obliged to disclose his marital history.

Sayed v MCI 2012 FC 420

There can still be truly exceptional circumstances where the applicant honestly and reasonably believed they are not making a misrepresentation and in those circumstances there is no misrepresentation.

[33] I find that the decision in *Osisanwo* is not of assistance to the applicants in this case. That decision was dependent on a highly unusual set of facts, and cannot be relied upon for the general proposition that a misrepresentation must always require subjective knowledge. Rather, the general rule is that a misrepresentation can occur without the applicant's knowledge, as noted by Justice Russell in *Jiang*, above, at paragraph 35:

[35] With respect to inadmissibility based on misrepresentation, this Court has already given section 40 a broad and robust interpretation. In *Khan*, above, Justice O'Keefe held that the wording of the Act must be respected and section 40 should be given the broad interpretation that its wording demands. He went on to hold that section 40 applies where an applicant adopts a misrepresentation but then clarifies it prior to a decision. **In *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 (CanLII), 2005 FC 1059, this Court held that section 40 applies to an applicant where the misrepresentation was made by another party to the application and the applicant had no knowledge of it.** The Court stated that an initial reading of section 40 would not support this interpretation but that the section should

be interpreted in this manner to prevent an absurd result.
(Emphasis added.)

A few cases have carved out a narrow exception to this rule, but this will only apply for truly exceptional circumstances, where the applicant **honestly** and **reasonably** believed they were not misrepresenting a material fact.

If representations or documents are provided by someone else on behalf of the applicant, the applicant is stuck with them.

Tofangchi v. Canada (Citizenship and Immigration), 2012 FC 427 (CanLII) is one of a series of cases in which an unlicensed immigration consultant submitted false IELTS test results in support of skilled worker applications. The applicants denied knowledge of falsity of tests and their inclusion in their applications. The court did not have any sympathy for them and said that they should be held responsible for whatever is included in their applications.

Madam Justice Tremblay-Lamer states

[24] Section 40(1)(a) is to be given a broad interpretation in order to promote its underlying purpose: *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 (CanLII), 2008 FC 512 at paragraph 25. The objective of this provision is to deter misrepresentation and maintain the integrity of the immigration process— to accomplish this objective the onus is placed on the applicant to ensure the completeness and accuracy of his or her application. Section 40(1)(a) is broadly worded to encompass misrepresentations even if made by another party, without the knowledge of the applicant: *Jiang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 942 (CanLII), 2011 FC 942, at paragraph 35; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 (CanLII), 2005 FC 1059 at paragraphs 55-56. The applicant cannot misrepresent or withhold any material facts that could induce an error in the administration of the Act.

This is the rationale behind the act

To deter misrepresentations

Therefore there should be an exception for misrepresentations that are innocent and about which the applicant had could not have had knowledge.

How to Avoid Unfortunate Consequences of Misrepresentations

What if a misrepresentation is discovered before a determination is made has been made? Is it still a misrepresentation? Is it material?

Does it matter if the misrepresentation is caught before a decision is made?

According to *Sayed v MCI* 2012 FC 420

[27] The fact that the misrepresentation was caught before the final assessment of the application does not assist the applicants. The materiality analysis is not limited to a particular point in time in the processing of the application—the fact that the principal applicant had submitted more recent language test results does not render the earlier misrepresentation immaterial. Such a result would reflect a narrow understanding of materiality that is contrary to the wording and purpose of [section 40\(1\)\(a\)](#) of the [Act](#). The False Document was submitted and it was material.

Credibility of the applicant is essential to overcome a misrepresentation

The applicant must honestly and reasonably believe he or she was not making any misrepresentation.

The applicant must be believed and must not have been negligent or lacking in due diligence.

Sayed v MCI 2012 FC 420 at 33.

[40] In keeping with this duty of candour, there is, in my opinion, a duty for an applicant to make sure that when making an application, the documents are complete and accurate. It is too easy to later claim innocence and blame a third party when, as in the present case, the application form clearly stated that language results were to be attached, and the form was signed by the applicants

[43]... It would be contrary to the applicant's duty of candour to permit the applicant to rely now on his failure to review his own application. It was his responsibility to ensure his application was truthful and complete—he was negligent in performing this duty.

WHAT SHOULD COUNSEL DO?

What do you do if you discover an error or come into possession of new information?

How do you disclose the error?

How do you correct it without being accused of a misrepresentation?

How do you argue it should not be held against the applicant?

Do you ever get an applicant to sign a blank application form?

Do you ever submit an application without first providing a complete copy of it for review? Should you?

QUESTIONS FOR CBSA

How do you deal with cases of misrepresentation where the misrepresentation is

- a) Disclosed by the applicant
- b) Found by CIC but admitted to by the applicant
- c) Made by someone other than the applicant on his/her behalf
- d) Made by someone other than the applicant but on behalf of CIC?

How do you assess the degree of materiality v. the degree of misrepresentation as contemplated by ENF 2 s. 9.3?

Examples

An applicant provides accurate information including a letter from the employer which in itself is accurate. CIC calls the employer who then, unbeknownst to the applicant, provides inaccurate information perhaps exaggerating the employee's qualifications.

Has there been a misrepresentation? Yes

Has it been made by or on behalf of the applicant? No.

CIC & CBSA Discretion

ENF Manual 2 s 9.3

Fairness and Fairness Letters

Sohrabi v. Canada (Citizenship and Immigration), 2012 FC 501

Investor applicant included his overage daughter on the basis that she was in full-time attendance at school. Unbeknownst to the applicant, his daughter submitted a false document saying that she was still in school.

A "Fairness letter" was sent. The principal applicant was given 30 days to submit new information, **failing which he would be inadmissible to Canada for**

misrepresentation. In a letter the principal applicant explained that he had no knowledge that the documents submitted by his daughter were fraudulent. (The visa officer seems not to have put much credence in this statement). His daughter had belatedly admitted to him that she was no longer attending an educational institution full-time. That situation was also confirmed by the institution. Accordingly, he had had no knowledge of the situation until he received the letter requesting an explanation.

The result of replying to this “fairness letter” was that he was found inadmissible for misrepresentation.

How fair is that? You might think he might as well have not replied.

Counsel for the Minister relied upon the Enforcement Manual

Shore J. Thinks CIC & CBSA will use discretion in dealing with misrepresentations. He stated:

[19] The IRPA is therefore not applied blindly. The Manual [Enf 2 s 9.3] seems to allow visa officers a degree of latitude in deciding whether a person is inadmissible for misrepresentation.

At [18] he quotes Enf Manual 2 s. 9.2

It must be recognized that honest errors and misunderstandings sometimes occur in completing application forms and responding to questions. While in many cases it may be argued that a misrepresentation has technically been made, reasonableness and fairness are to be applied in assessing these situations.

- Material facts are not restricted to facts directly leading to inadmissible grounds. However, there are varying degrees of materiality and again, fairness should be applied in assessing each situation. [Emphasis added]