

February 3, 2025

Sent via email: Minister@cic.gc.ca

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The Honourable Marc Miller, MP
Minister of Immigration, Refugees and Citizenship Canada
365 Laurier Avenue West
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Dear Minister Miller:

Re: Immigration, Refugees and Citizenship Canada: Regulations to establish an Administrative Penalties and Consequences (APC) regime

We write to identify the concerns that the Law Society of British Columbia (the Law Society) has in relation to the proposed regulations to establish an APC regime that were published in Part I of the *Canada Gazette* on December 21, 2024 titled *Regulations Amending the Citizenship Regulations (Administrative Penalties and Consequences)*.

The Law Society is the governing body of lawyers in the province of British Columbia. We regulate the legal profession in BC, protecting the public interest in the administration of justice by setting and enforcing standards of professional conduct for lawyers.

The mandate of the Law Society, set out in s. 3 of the *Legal Profession Act* S.B.C. 1998 c.9 requires the Law Society to act to protect the public interest in the administration of justice, including preserving and protecting the rights and freedoms of all persons by, amongst other things, ensuring the independence of lawyers.

Background

Immigration, Refugees and Citizenship Canada (IRCC)'s intends for the introduction of certain regulations to enable the IRCC to directly respond to and sanction those who commit misrepresentation and unauthorized practice while providing paid immigration and citizenship advice and representation through the introduction of administrative monetary penalties.

It is our understanding that the regulations are targeted at all providers of immigration services, which would include lawyers regulated by the law societies in Canada, including the Law Society of British Columbia.

The draft "Administrative Penalties and Consequences" regulations were published in The Canada Gazette on December 20, 2024 to solicit input from stakeholders and the public.

These are our submissions regarding our concerns about the proposal and the intended regulations.

General Comments

The Law Society supports efforts by the federal government to ensure the proper regulation of the providers of immigration services. The decision of the Supreme Court of Canada in *Law Society of British Columbia v. Mangat* [2001] 3 SCR 113, recognized that the federal government is permitted to regulate the provision of immigration and citizenship related legal services through individuals who are not lawyers.

Proper regulation of non-lawyer service providers is very much in the public interest in order to prevent abuses to the system.

Lawyers, of course, are already regulated in regard to the immigration related legal services they provide in the course of their practice of law. Immigration consultants are not regulated by law societies, and therefore the efforts of the federal government to ensure that they are nevertheless regulated in an effective manner are important and necessary.

Consequently, while we support government efforts to regulate immigration consultants, we are opposed to extending those regulatory provisions to lawyers who are already regulated by law societies. Regulation of lawyers must remain entirely independent from the state in order to preserve the public

interest in the administration of justice, the rights of clients, and the rule of law.

Federation of Law Societies

We have reviewed the submissions made by the Federation of Law Societies of Canada dated August 26, 2019 and February 3, 2025. We support and adopt those submissions.

Independence of the Legal Profession

We believe it is especially important to focus on how the proposed regulatory regime imperils the independence of the legal profession, which is a fundamental underpinning of the rule of law. The Law Society is concerned that the proposed regulations tread on substantive principles of importance to the preservation of the public interest in the administration of justice. The Law Society further believes that there are simple solutions to address these important concerns.

The rule of law is a fundamental postulate of the Canadian constitutional structure (*Roncarelli v. DuPlessis* [1959] S.C.R. 121). The independence of lawyers is necessary to maintain the rule of law because independent lawyers – individuals who do not owe their ability to practise law to the state or to other powerful interests - preserve the ability of a client to access a lawyer whose responsibility is to advise that client, and no-one else, in order to achieve an outcome for the client that is consistent with the law and in the best interests of the client.

Lawyer independence is protected in Canada by independent, self-regulating law societies, which set out and enforce the duties and responsibilities of lawyers. The identification and enforcement of duties and responsibilities in the context of the practice of law must not be undertaken in any way by the state or any other party who may have an interest in the outcome of legal matters on which a lawyer may be retained to act. The client is thereby assured that the lawyer has no duty or personal interest to outside bodies in the discharge of his or her advice, and thus has no duty other than to the client. The lawyer is also assured that the state cannot sanction the lawyer for conduct in the discharge of the lawyer's retainer where the state is unhappy with the position advanced by the lawyer on behalf of the client, who may often be at odds with government policy preferences or interests.

These critical premises were recognized by the Supreme Court of Canada in *A.G. Canada v. Law Society of B.C.* [1982] 2 SCR 307 (“*Jabour*”) as follows:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.

(Emphasis added.)

The proposed regulations are intended to apply to lawyers. In the result, the IRCC, an agency of the state, will purport to regulate and sanction the conduct of lawyers delivering legal services to clients on matters where the federal government is a party adverse in interest to lawyers’ clients. The outcome of such a scheme is clearly contrary to the decision of the Supreme Court in *Jabour*, and demonstrably interferes with the independence of the bar. The proposed scheme is contrary to the principle of an independent bar, thus undermining the rule of law and the hallmarks of a free society.

Moreover, the proposed scheme will undermine the public’s confidence in the availability of truly independent counsel, and therefore, undermines confidence in the rule of law.

The Law Society believes that such significant concerns can be avoided simply by recognizing that the application of the regulations does not apply to lawyers, thereby leaving the regulation of the conduct of lawyers who provide immigration related services to the law societies, where it has always resided. Law society regulation will maintain standards of conduct and professionalism required of all lawyers, and will sanction lawyers who fail to meet the standards established by the Bar.

Law Societies in Canada, including the Law Society of British Columbia, have a robust complaints process which the IRCC can utilize and rely on in terms of ensuring licensees of the Law Society are supervised and disciplined, where appropriate, by an effective and independent regulator.

Solicitor-client Privilege

Solicitor-client privilege is a principle of fundamental justice and a civil right of supreme importance in Canadian law. Protection of solicitor-client privilege must remain as close to absolute as possible to retain its relevance, and thus stringent norms must be adopted to ensure its protection (see *Lavallee, Rackel & Heintz v. Canada (Attorney General)* [2002] 3 S.C.R. 209).

The regulations appear to give no recognition of the fact that an investigation relating to a lawyer is bound to require access to information that is protected by solicitor-client privilege. It is, of course, not necessary to do so insofar as immigration consultants are concerned, as solicitor-client privilege does not arise between immigration consultants and their clients. Such privilege does, however, arise between a lawyer and the lawyer's client, and can only be waived by the client. This means that investigations into lawyer conduct would, absent client waiver of the privilege, be unable to access information that may be important either to establishing misconduct, or to the lawyer's defence against allegations of misconduct. While the regulations allow an officer to require the production of documents, privilege of course cannot be abrogated implicitly in legislation. A general power of production does not extend to a power to require production of privileged information.

Law societies, uniquely, are able to access third-party privileged information in order to be able to investigate lawyer conduct. Proper regulation of the competence and integrity of lawyers requires access to confidential, and occasionally, privileged information, such as client instructions, but access to such information by a state agency would make privilege a hollow right, particularly where the state may be adverse in interest to the client (see, for example, *Skogstad v. The Law Society of British Columbia* 2007 BCCA 310).

Independent, self-regulating law societies have, therefore, been established to ensure that full and proper investigation of the conduct and competence of lawyers can be undertaken by accessing privileged information where necessary. The law societies are imbued with the same obligations to maintain that privilege as is the lawyer being investigated. This protects solicitor-client privilege, the independence of the bar, and the rule of law in ways other regulators cannot.

While legislation can, in theory, abrogate privilege, the Supreme Court of Canada's requirements that privilege be maintained as absolutely as possible in order to maintain its relevance and that legislative abrogation is permissible only where access to the privileged information is "absolutely necessary"

(*Goodis v. Ontario (Ministry of Correctional Services)* [2006] 2 S.C.R. 32) and no more than minimally impairs the privilege, these are very difficult requirements to overcome (*Lavallee*). “Absolute necessity” is a test just short of absolute prohibition (*Goodis*).

In the Law Society’s submission, any legislative efforts to permit IRCC to access privileged information during the course of an investigation under the regulations relating to a lawyer could not be absolutely necessary, because the investigation of the conduct of immigration lawyers can be done by law societies. Moreover, access to privileged information by an agent of the state like IRCC would more than minimally impair the privilege of the lawyer’s client who is likely in an adverse relationship with the state. In fact, access to privileged information in such circumstances would absolutely impair the privilege, as the information of a party adverse in interest to the government would come into the hands of an agent of the state.

The Supreme Court of Canada has also held in *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] 1 S.C.R. 401 that the lawyer’s duty of commitment to the client’s cause is essential to maintaining confidence in the integrity of the administration of justice, and 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. The validity of legislation requiring a lawyer to divulge to a state agency information of a client that is the subject of solicitor-client privilege must thus be seriously questioned.

The solution to these issues with respect to privilege and investigation is, again, for lawyers to be excluded from the application of the regulations, and for the IRCC to rely on the existing and robust regulatory regime operated by Canada’s law societies.

Conclusion

In order to preserve solicitor client privilege – a principle of fundamental justice – and to preserve and maintain the independence of the Bar – a principle that underlies the fundamental constitutional postulate of the rule of law – the Law Society urges the government to reconsider the purported

application to lawyers of the regulations at issue, and to accept our proposed solutions to these matters instead.

Yours truly,



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