

Federation of Law Societies  
of Canada



Fédération des ordres professionnels  
de juristes du Canada

**Submission of the  
Federation of Law Societies of Canada  
to Immigration, Refugees, and Citizenship Canada (IRCC)**

***Amendments to the Immigration and Refugee Protection Act  
and Citizenship Act, and new College of Immigration and  
Citizenship Consultants Act.***

**August 26, 2019**

## Introduction

1. The Federation of Law Societies of Canada (“the Federation”), on behalf of its member law societies, would like to take this opportunity to comment on the Government of Canada’s new regulation making powers under recent amendments to the *Immigration and Refugee Protection Act* (“IRPA”) and the *Citizenship Act*, and the enactment of the *College of Immigration and Citizenship Consultants Act*.
2. The Federation is the national coordinating body of Canada’s 14 law societies, which are mandated by provincial and territorial statutes to regulate the country’s 125,000 lawyers, Quebec’s 3,800 notaries and Ontario’s nearly 10,500 licensed paralegals in the public interest. Among other activities, the Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members. The Federation also speaks out on issues critical to safeguarding the public’s right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.
3. As you are aware, the amendments to the IRPA and the *Citizenship Act* expand the federal government’s regulation-making powers to create new administrative penalty regimes applicable to persons who provide representation or advice, or offer to do so, in immigration or citizenship matters.<sup>1</sup> The regulations would create new monetary and non-monetary penalties that apply to these persons for violations of the IRPA and the *Citizenship Act*. The amendments also allow for new broad investigative powers. The *College of Immigration and Citizenship Consultants Act* establishes a new regulatory regime for immigration and citizenship consultants, which (once in force) will replace the existing regulatory structure. The new legislation will also create broad investigative powers for the regulatory body to monitor compliance of member consultants.
4. Immigration, Refugees and Citizenship Canada (“IRCC”) officials have advised that the federal government is in the process of developing regulations arising from the amendments to the *Citizenship Act* and IRPA. In particular, they advised of regulations to implement the administrative penalty regimes under those statutes applicable to legal professionals and regulated consultants.
5. The Federation supports the government’s efforts to improve compliance with Canada’s immigration, refugee and citizenship legislative regimes. However, the Federation is concerned that the potential regulations could infringe on the law societies’ exclusive authority to govern their members and could also have implications for protecting solicitor-client privilege. The Federation and the law societies raised these concerns in briefing sessions with IRCC officials in July 2019.

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<sup>1</sup> *Citizenship Act*, s. 27(1) (k.6)-(k.9); *Immigration and Refugee Protection Act*, s. 91.1(1)(a)-(d).

6. In light of these concerns, the Federation would like to highlight key considerations for the government to take into account in developing the regulations, namely (1) the role and powers of the law societies to ensure their members comply with their professional duties, and (2) the near absolute protection of solicitor-client privilege as recognized by the Supreme Court of Canada.

### **Administrative penalty regimes and law society regulatory autonomy**

7. The purpose of the proposed new administrative penalty regimes, as confirmed by IRCC officials<sup>2</sup>, is to enhance compliance with these laws through the use of monetary and non-monetary penalties, including publishing names of non-compliant persons and the possibility of temporarily barring representatives from filing applications.

8. Administrative penalties of general application that apply equally to all persons, including legal professionals, are not uncommon. What distinguishes the proposed regimes under the *Citizenship Act* and IRPA is the fact that they will apply uniquely to a specified category of persons: immigration and citizenship advisors, i.e. legal professionals and regulated consultants.

9. Legal professionals in Canada are regulated by the provincial and territorial law societies. A central feature of Canada's legal system is that the public has the right to obtain legal advice from, and be represented by, a legal profession that is independent of the government. For that reason, our laws provide for the self-regulation of the legal profession. The function of law societies is to regulate the legal profession in the public interest.

10. To fulfill their public interest mandate, law societies set the standards for admission to the profession and rules governing the conduct of members in their province or territory. The law societies audit and monitor the use of trust funds held by members of the profession. They also investigate complaints and discipline members of the profession who violate the professional conduct standards.

11. In order to conduct investigations, the law societies have extensive powers to inspect documents and compel disclosure of information, including those covered by solicitor-client privilege.<sup>3</sup> This ability to inspect solicitor-client privileged information is exceptional given the protection afforded this type of privilege and relates specifically to the role that law societies have in regulating the profession in the public interest.

12. Law societies are experienced, well equipped and adept at conducting investigations of their members. Members are required under their rules to cooperate with and respond to the law societies while under investigation. The courts have also recognized as an overriding principle that members of law societies are required to make full disclosure of their activities as

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<sup>2</sup> Teleconference between Federation policy staff and IRCC officials (July 18, 2019).

<sup>3</sup> These powers can be found in the provincial and territorial statutes establishing the law societies. For example, see Ontario's *Law Society Act*, RSO 1990, c L.8, ss. 49.3 and 49.8(1).

legal professionals when under investigation by the relevant law society. If an investigation finds that a legal professional is guilty of violating their legal or ethical duties, the law society can take disciplinary measures, including temporary license suspensions, imposing conditions on the professional's licence, and in extreme cases disbarment. Law societies also publish names of legal professionals who have been sanctioned.

13. The law societies have an interest in allegations that a legal professional has committed a violation of the *Citizenship Act* and IRPA, or their regulations. To the extent that the proposed penalty regimes might impact the practice rights of legal professionals (e.g. barring an individual from filing immigration applications) the compliance regimes could result in duplication of investigations and disciplinary proceedings, with both the government agency and the law society spending time and resources over the same alleged misconduct. In addition, applying consequences or imposing conditions on the ability of legal professionals to practise law would infringe on the law societies' authority over self-regulation established by provincial and territorial law. Further, such measures could effectively deprive an affected legal professional of their right to be heard on behalf of their client, and interfere with a client's important right to choose their counsel.

14. Careful consideration must be given to how these regimes will operate to achieve the goal of promoting compliance without interfering with the law societies' role and authority to regulate the legal profession, or resulting in unnecessary regulatory duplication. The measures created by the regulations must not infringe on the law societies' authority over self-regulation to govern its members. We are not suggesting that lawyers ought to be immune from all enforcement and penalty powers for violating the statutory provisions or regulations simply because they are lawyers. However, to the extent that the regimes may prohibit a lawyer from providing legal services it would amount to a sanction that only the law societies may impose, which have the jurisdiction and expertise to determine what constitutes professional misconduct or conduct unbecoming a lawyer.

### **Issues relating to solicitor-client privilege**

#### *Investigative powers under the Citizenship Act and IRPA amendments*

15. The amendments to the *Citizenship Act* and IRPA provide for broad powers under the new administrative penalty regimes to enact regulations permitting the inspection of documents to verify compliance with the legislation.<sup>4</sup> In the submission of the Federation such powers are in conflict with the law of solicitor-client privilege in Canada.

16. The Supreme Court of Canada has described solicitor-client privilege as "a principle of fundamental justice and a civil right of supreme importance in Canadian law" that "must remain as close to absolute as possible if it is to retain relevance."<sup>5</sup> These statements reflect the fact

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<sup>4</sup> *Citizenship Act*, s. 27(1)(k.9); IRPA, 91.1(1)(d).

<sup>5</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61 (CanLII) at para. 36.

that our justice system relies on full and frank communication between clients and their legal representatives. Without it, legal counsel would be unable to protect or advance the legal rights of their clients. Further, it is important to note that solicitor-client privilege belongs to the client, not the legal professional, and the privilege is maintained in the client's interest.

17. The principles of solicitor-client privilege were reaffirmed in the Supreme Court's decision in *Canada (Privacy Commissioner) v. Blood Tribe Department ("Blood Tribe")*<sup>6</sup> and more recently in *Alberta (Information and Privacy Commissioner) v. University of Calgary*.<sup>7</sup> In *Blood Tribe* the Court held that solicitor-client privilege can only be interfered with when "absolutely necessary". The Court further held that compelled disclosure to an administrative agency or officer would, in the eyes of a client as owner of the privilege, constitute an infringement of the privilege. Where other, less intrusive measures exist, the absolute necessity test is unlikely to be met. In addition, the Court has made it clear that any infringement on solicitor-client privilege must impair the privilege as minimally as possible.

#### Unique challenge for legal professionals in responding to allegations of violations

18. Obligations relating to solicitor-client privilege also create a unique challenge for lawyers and Quebec notaries in relation to administrative penalty regimes that purport to govern their professional conduct.

19. Lawyers and Quebec notaries are prohibited from disclosing information protected by solicitor-client privilege. This includes information that might be relevant to their defence of an alleged violation of the *Citizenship Act* or IRPA, or their regulations. The issue is not unique to the proposed administrative penalty regimes. With limited exceptions, lawyers and Quebec notaries face the same restriction in relation to defending themselves in other contexts of general application, including *Criminal Code* charges.

20. The administrative penalty regimes under the *Citizenship Act* and IRPA would, however, apply to a specific category of persons only: immigration and citizenship advisors, i.e. legal professionals and regulated consultants. There would be a fundamental unfairness in establishing a regime that would compromise the ability of the lawyer and Quebec notaries to defend themselves, but not that of the only other category of individuals authorized to represent individuals under the *Citizenship Act* or IRPA: consultants.

#### Investigatory powers under the College of Immigration and Citizenship Consultants Act

21. As noted above, the *College of Immigration and Citizenship Consultants Act* creates a new regulatory regime for immigration and citizenship consultants. Lawyers, Quebec notaries and Ontario paralegals are not included in the definition of immigration and citizenship consultant under the Act, but the Act nonetheless raises some concerns for the Federation and its members.

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<sup>6</sup> 2008 SCC 44 (CanLII).

<sup>7</sup> 2016 SCC 53 (CanLII).

22. The Act provides for powers to inspect, collect, use, and disclose information and documents from “any person” for the purpose of regulating immigration consultants.<sup>8</sup> Although the Act includes clear protections for “privileged information”, including those covered by solicitor-client privilege, and establishes – as a default – that inspection powers do not apply to “privileged information”, the Act allows the government to make regulations to “obtain and use” privileged information.

23. To the extent that any regulations are contemplated that would purport to authorize access to solicitor-client privileged information, the Federation reiterates the points above regarding the strict limitations set by the Supreme Court of Canada on this fundamental principle of the justice system.<sup>9</sup> In particular, the protection of solicitor-client privilege “must remain as close to absolute as possible” and the need to access that information must be shown to be “absolutely necessary”.

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<sup>8</sup> *College of Immigration and Citizenship Consultants Act*, ss. 35(1), 51(1) and (3), and 66.

<sup>9</sup> Adam M. Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014) at 253, n 379. Professor Dodek refers to solicitor-client privilege as a “substantive right of quasi-constitutional status.”