Canadian Immigration Lawyers Association
Association canadienne des avocats et avocates en immigration

September 19, 2024

By email: Tina.Matos@cic.gc.ca

Ms. Tina Matos
Director General, Admissibility
Immigration, Refugees and Citizenship Canada

Dear Ms. Matos:

I am writing further to your correspondence with my colleague, Mr. Randy Hahn, dated June 19, 2024, on behalf of the Canadian Immigration Lawyers Association ("CILA"). Mr. Hahn wrote you regarding IRCC's *Forward Regulatory Plan: 2024-2026 - Governor in Council regulations to establish a new system of Administrative Penalties and Consequences related to the provision of immigration representation and/or advice* (posted on-line here). It is our understanding that these regulations will be published in the *Canada Gazette* by the end of 2024.

CILA represents nearly five hundred immigration lawyers from across the country. CILA takes great pride in advancing immigration law, policy, and practice in Canada. We actively engage in discussions in various forums to provide our insights and perspectives. For example, CILA's board members have testified at the House of Commons Standing Committee on Citizenship and Immigration, and the Standing Senate Committee on Social Affairs, Science, and Technology, to share our expertise and insights on immigration matters.

As you may recall, we requested a meeting to discuss the *Forward Regulatory Plan*, but IRCC advised us this was not possible. Since the Treasury Board guidelines referenced in our earlier correspondence suggest that early consultation with stakeholders regarding proposed regulatory measures is desirable, we remain hopeful that a meeting can still be arranged. In the meantime, we thought it prudent to share some of our initial concerns regarding the *Forward Regulatory Plan* based on the limited information published thus far.

CILA is concerned that any proposed measures that aim to regulate lawyers to protect the public would exceed federal jurisdiction. In addition, vesting authority with IRCC over these matters would violate the unwritten constitutional principle of the independence of the bar. Finally, the proposed measures may

be unnecessary and duplicative because they overlap with the well-established regulatory authority of provincial law societies over the legal profession, including lawyers who practice in the areas of immigration and citizenship.

***Forward Regulatory Plan* regarding provision of immigration representation and/or advice**

For the sake of convenience, I set out the relevant excerpt from the *Forward Regulatory Plan* (emphasis added):

> Regulations are being developed based on amendments to the *Immigration and Refugee Protection Act (IRPA)* and the *Citizenship Act* to enable a new regime of administrative penalties and consequences, **applicable to those who provide immigration and citizenship advice and/or representation**. This new regime is intended to ensure compliance to the *IRPA* and *Citizenship Act* and will be administered by IRCC. **Regulations will define the violations for which those who provide immigration and citizenship advice and/or representation may be subject to an administrative penalty and/or consequence, provide parameters for determination of penalty amounts, processes required to issue penalties and rules around the review of penalties and consequences issued**.

It is our understanding that the legal basis for these new regulations would be section 91.1(1) of the *Immigration and Refugee Protection Act* ("*IRPA*"), which provides in relevant part:

> (1) The regulations may
>
> (a) establish a system of administrative penalties and consequences — including of administrative monetary penalties — applicable to the violations designated in regulations made under paragraph (b) and set the amounts of those administrative monetary penalties.
>
> (b) designate as a violation the contravention — including a contravention committed outside Canada — of any specified provision of this Act or of the regulations by any person who, directly or indirectly, represents or advises a person for consideration — or offers to do so — in connection with the submission of an expression of interest under subsection 10.1(3) or a proceeding or application under this Act;
>
> (c) prohibit acts in relation to the activity of representing or advising — or offering to do so — described in paragraph (b); …

We make three observations about the *Forward Regulatory Plan* and section 91.1(1)(a).

First, section 91.1(1)(a) defines "administrative penalties" to include "administrative monetary penalties" ("AMPs"). At present, the sole system of AMPs under the *IRPA* exists in relation to employers, as set out in Division 6 of the *Immigration and Refugee Protection Regulations* ("*IRPR*"), which have been promulgated pursuant to section 32(d.4) of the *IRPA*. The *Forward Regulatory Plan*, which refers to "penalty amounts, clearly contemplates the extension of AMPs to immigration and citizenship "advice" and "representation".

Second, section 91.1(1)(a) confers the power to impose "consequences". The *Forward Regulatory Plan* also refers to "consequences" but does not specify what they are. On its face, however, the term would be broad enough to encompass the removal of the right to provide advice and representation for immigration and citizenship matters – including by lawyers.

Third, section 91.1(1)(b) authorizes the creation of AMPs not just for violations of *existing* provisions of the *IRPA*, but also for *new* prohibitions that may be added to the *IRPR* pursuant to section 91.91(1)(c). At present, the main offences under *IRPA* for advice and representation are counselling misrepresentation (section 126) and misrepresentation (section 127). The *Forward Regulatory Plan* is silent on whether the *IRPR* will be amended to add new prohibitions regarding advice and representation.

Federal jurisdiction over immigration and citizenship

Our concern is that the proposed measures may exceed federal jurisdiction over immigration and citizenship and invade provincial jurisdiction over the legal profession, based on the Supreme Court of Canada's decision in *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113.

In *Mangat*, the Supreme Court considered a constitutional challenge to sections 30 and 69(1) of the former *Immigration Act*, which conferred rights on persons to be *represented* before the Adjudication and Refugee Divisions of the Immigration and Refugee Board by a lawyer or other counsel.

The Court held that the constitutional basis for these provisions was federal jurisdiction over aliens and naturalization under section 91(25) of the *Constitution Act, 1867*. As the Court explained (para. 34, emphasis added):

> Flowing from this jurisdiction over aliens and naturalization is the authority to establish a tribunal to determine immigration rights in individual cases as part of the administration of these rights.

> Also flowing from this jurisdiction is the authority to provide for the powers of such a tribunal **and its procedure including that of appearance before it**.

In short, *Mangat* established that federal jurisdiction over immigration and citizenship only extends to rights of representation before federal tribunals created by Parliament to address these topics.

But *Mangat* also held that federal authority does *not* extend to the regulation of the legal profession itself, which squarely falls under provincial authority. As *Mangat* explained, the provinces had "legislative authority to regulate the practice of law under section 92(13) as part of the provinces' jurisdiction over professional regulation" (para. 38). The Court also suggested that provinces had jurisdiction to regulate the legal profession under section 91(24) of the *Constitution Act, 1867*, the administration of justice (paras. 42, 46).

On *Mangat*, if the federal government were to create a parallel regulatory process for the legal profession regarding advice and representation on immigration and citizenship, that scheme would be unconstitutional.

Based on the information that is publicly available, the *Forward Regulatory Plan* poses the risk of creating such a parallel regulatory process for lawyers. It contemplates prohibited conduct and a variety of consequences for that conduct. Both may invade provincial jurisdiction. If the prohibited conduct is a consumer protection scheme designed to serve the public, it overlaps in purpose with the essence of provincial regulation of the legal profession. If the consequences for lawyers include the loss – even temporary – of the right to provide advice and representation on immigration and citizenship, that would also overlap with the sanctions issued by provincial law societies and bars.

The unwritten constitutional principle of the independence of the bar

If the *Forward Regulatory Plan* enters the field of consumer protection and regulates lawyers who provide legal services for immigration and citizenship matters, it will also violate the unwritten constitutional principle of the independence of the bar.

As *Mangat* explained, the provinces had exercised their authority to regulate the legal profession through a system self-regulation that protects the public (para. 41, emphasis added):

> Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of

> protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce them, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds. In this context, the bar is entrusted with policing the illegal practice of law both to enforce its monopoly and to protect the public from imposters.

The self-regulation of the legal profession is required by the unwritten constitutional principle of the independence of the bar. As the Supreme Court of Canada explained in the *Jabour* decision (*Canada (Attorney General) v. Law Society of B.C.*, [1982] 2 SCR 307 at 335-6):

> 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.

This rationale for self-regulation applies with particular force to lawyers who practice immigration and citizenship law. In these cases, the respondent in the IRB and the Federal Courts is IRCC. Yet under the *Forward Regulatory Plan*, IRCC would set itself up as the regulator of the very lawyers with whom it is often in an adversarial relationship. This directly threatens the independence of the bar. Indeed, it places IRCC in an insoluble conflict of interest.

Overlap with provincial law societies

Finally, the proposed measures may be unnecessary and duplicative because they overlap with the well-established regulatory authority of provincial law societies over the legal profession, including lawyers who practice in the areas of immigration and citizenship.

Provincial law societies have devoted significant resources to the creation of elaborate systems to investigate and adjudicate complaints against lawyers brought by members of the public for professional misconduct. This system includes investigators, prosecutors, and disciplinary tribunals (including, in some cases, appellate tribunals) with specialized expertise. This system has generated an extensive body of jurisprudence and institutional practice. Moreover, this system is subject to judicial review based on both administrative law and the *Charter*, to protect the right to procedural fairness for members of the legal profession.

It would be an enormous undertaking for the federal government to create from scratch, as the *Forward Regulatory Plan* puts it, "processes required to issue penalties and rules around the review of penalties and consequences issued." Moreover, it is inevitable that many decisions taken by IRCC would be challenged on judicial review before the Federal Court. It would be more prudent for IRCC to lodge any complaints it has regarding lawyers with their provincial law societies.

Conclusion

We reiterate our request for a meeting to discuss the *Forward Regulatory Plan* at your earliest convenience.

Thank you for your consideration.

Sincerely,

Barbara Jo Caruso
Co-President, CILA

cc The Hon. Marc Miller, Minister of Immigration, Refugees and Citizenship

cc Dr. Harpreet Kochhar, Deputy Minister of Immigration, Refugees and Citizenship