January 24, 2025

The Hon. Marc Miller
Minister of Immigration, Citizenship and Refugees
minister@cic.gc.ca

The Hon. Arif Virani
Minister of Justice and Attorney General of Canada
mcu@justice.gc.ca

Dear Ministers Miller and Virani:

Re: Proposed *Regulations Amending the Immigration and Refugee Protection Regulations (Administrative Penalties and Consequences)* and *Regulations Amending the Citizenship Regulations (Administrative Penalties and Consequences)*

I have been retained by the Canadian Immigration Lawyers Association (**"CILA"**), in relation to the proposed *Regulations Amending the Immigration and Refugee Protection Regulations (Administrative Penalties and Consequences*) and *Regulations Amending the Citizenship Regulations (Administrative Penalties and Consequences)*.

While CILA is currently participating in IRCC's stakeholder consultation process, I am writing you directly on CILA's behalf to advise you that the proposed *Regulations* would be unconstitutional and illegal in their application to lawyers. If promulgated, it is inevitable that they will be challenged in the courts. Moreover, they would contribute to the enormous and growing problem of backlog in the Federal Court. The legally prudent course would be for the *Regulations* to exempt the legal profession from their scope.

The *Regulations* would invade provincial jurisdiction over the legal profession

Federal jurisdiction over legal representation in immigration, refugee and citizenship matters is limited. In *Law Society of British Columbia v. Mangat*, 2001 SCC 67, the Supreme Court held that there was federal jurisdiction to regulate rights of representation before federal tribunals. But *Mangat* affirmed that the provinces have broad jurisdiction over the legal profession and the provision of legal services, including precisely the conduct that the *Regulations* would

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sanction – unauthorized practice and misrepresentation. *Mangat* also held that provincial authority extends to rights of representation before federal tribunals charged with enforcing federal law.

The proposed *Regulations* would create a parallel regulatory process for the legal profession regarding advice on *IRPA*- and *Citizenship Act*-related matters and invade provincial jurisdiction over the legal profession. They would prohibit certain conduct. They would authorize IRCC officials to investigate whether lawyers have engaged in such conduct, to issue notices of preliminary finding and violation, and to impose significant administrative penalties and consequences (APCs), in the form of fines. The proposed review process – which is manifestly deficient – is yet further evidence that the *Regulations* would create a parallel process to regulate lawyers. Moreover, these are public processes. The *Regulations* would require publication of the notices of preliminary finding, violation, and decision (i.e. the results of a review) – making this in substance a form of professional sanction.

The *Regulations* would violate the *Canadian Bill of Rights* and the independence of the bar

The *Regulations* would also violate the *Canadian Bill of Rights*, because they create an insoluble conflict of interest. Lawyers often stand in adversarial positions against IRCC, especially in legal proceedings before the Immigration and Refugee Board and the Federal Court. But under the *Regulations*, IRCC would also regulate lawyers. In particular, IRCC would have the power to assess the conduct of lawyers in proceedings where IRCC itself is a party.

Section 2(e) of the *Canadian Bill of Rights* guarantees the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations. A fundamental principle of procedural fairness is that no one can be a judge in their own cause (*nemo judex in causa sua*). Yet the *Regulations* would vest IRCC officers with the power to issue notices of preliminary finding and violation in relation to the conduct of lawyers vis-à-vis IRCC.

In this context, the contours of *nemo judex in causa sua* must be shaped by the unwritten constitutional principle of the independence of the bar. The self-regulation of the legal profession is required by this principle. As the Supreme Court of Canada explained in the *Jabour decision (Canada (Attorney General) v. Law Society of B.C.*, [1982] 2 SCR 307:

> 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.

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The *Regulations would* violate the *Charter*

The *Regulations* would also violate sections 7 and 8 of the *Charter*, because on their face, they empower IRCC officers to order the production of materials protected by solicitor-client privilege. Solicitor-client privilege protects the communications of lawyers and their clients from disclosure, and is of fundamental importance to effective legal representation and the rule of law. Solicitor-client privilege prohibits lawyers from disclosing sensitive information in their defence unless narrowly justified by recognized exceptions. Indeed, solicitor-client privilege belongs to the client, and the choice to waive it rests with them.

The *Regulations* would authorize IRCC officers investigating lawyers to disclose "any relevant document" and impose an obligation on lawyers to disclose those documents. There is no exception for documents protected by solicitor-client privilege. The lack of such an exception renders them unconstitutional, based on the following decisions.

In *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, the Supreme Court affirmed that solicitor-client privilege is nearly absolute and can only be interfered no more than is necessary. It struck down provisions in anti-money laundering and anti-terrorist financing legislation that imposed duties on lawyers to collect, record, and retain material, including the identity of persons on whose behalf they paid or received money, and authorized searches of law offices, under section 8 of the *Charter*. It also affirmed that a lawyer's duty of commitment to their clients' causes was a principle of fundamental justice under section 7, and that the provisions breached that principle because they could require the disclosure of solicitor-client confidences.

As you are aware, the British Columbia Supreme Court recently applied these principles to issue an injunction against amendments to the *Income Tax Act* that impose reporting obligations regarding certain financial transactions, in *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2023 BCSC 2068. Notably, those amendments exempt material protected by solicitor-client privilege. Nonetheless, the court accepted that the amendments could potentially require the unconstitutional reporting of privileged information, and could also create conflicts of interest between lawyers and their clients. Moreover, like the proposed *Regulations*, the penalties on lawyers were financial, not penal.

The *Regulations* would exacerbate backlog in the Federal Court

It is a matter of public record that the Federal Court faces an enormous and growing backlog of cases, principally under the *IRPA*. Indeed, Chief Justice Crampton has taken the exceptional step of making the case for increased resources publicly, given the urgency of the situation.

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It is inevitable that lawyers will challenge the imposition of any APCs in judicial reviews before the Federal Court. Those challenges will raise many of the constitutional objections set out above. But they will also raise administrative law grounds, especially in relation to the review process, which is procedurally flawed. These cases will add a set of new and complex cases to the Federal Court's docket, which is already past capacity. They will also increase litigation costs for IRCC.

Conclusion

We reiterate that the best course of action would be for the *Regulations* to exempt the legal profession from their scope.

We would welcome the opportunity to meet with you and discuss these issues further.

Sincerely,

cc

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