



April 27, 2015

Via email: [Communications@irb-cisr.gc.ca](mailto:Communications@irb-cisr.gc.ca)

Aarin Masson  
Director of Communications  
Communications Directorate  
Immigration and Refugee Board of Canada  
344 Slater Street, 14th Floor  
Ottawa, ON K1A 0K1

Dear Mr. Masson:

**Re:** *Policy on Disclosing Information Regarding the Conduct of Authorized Representatives to Regulatory Bodies*

I am writing on behalf of the National Immigration Law Section of the Canadian Bar Association (the CBA Section). The CBA is a national association of over 36,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

The CBA Section appreciates the opportunity to comment on the proposed *Policy on Disclosing Information Regarding the Conduct of Authorized Representatives to Regulatory Bodies*. The CBA Section commends the IRB for establishing this policy to help ensure the integrity of proceedings before the IRB.

We set out comments, recommendations, questions and issues about which the CBA Section seeks clarification. These follow the order of the proposed policy.

### **Section 1: Purpose**

- The CBA Section commends the IRB for seeking to establish a predictable and transparent process.
- The CBA Section agrees with separating this policy from issues regarding unauthorized representatives.

### **Section 2: Context**

- Section 2 could benefit from more inclusive language – i.e., “*Professional, civil and ethical conduct is expected of all parties (authorized representatives) appearing before the IRB.*” Language later employed (see Section 3) about other mechanisms to govern the conduct of counsel for the Minister would be helpful in Section 2. This would make it clear that the policy extends to all parties appearing before the IRB but through different instruments. It

should be noted there are occasions when the Ministers' representatives before the IRB are also lawyers.

- The proposed policy is wide ranging and speaks to potential professional and ethical breaches. Examples of the breaches this policy may target are necessary for those affected by the policy to understand its scope and implementation.

### **Section 3: Application**

- Unpaid representatives could include members of regulatory bodies. For example, this could mean a lawyer or consultant not charging a fee, or a certified accountant. It could also include someone who appears before the Board in another capacity, such as a translator or designated representative. If this policy is aimed at authorized representatives as defined under IRPA section 91, the policy should limit comment to those representatives.
- A definition of NGOs would help to clarify the scope of the intended exception and whether certain representatives of NGOs may be captured by IRPA section 91.
- More inclusive language could be used to make it clear that all parties, including unpaid representatives, are expected to preserve the integrity of the proceedings.

### **Section 5: Definitions**

- The definition of counsel includes "anyone" and is inconsistent with section 3, which limits the application of this policy to authorized representatives receiving a fee.
- If this policy does not apply to unauthorized representatives, why is the definition included?

### **Section 6: Policy Statement**

- The proposed policy is wide ranging and speaks to potential professional and ethical breaches. Again, examples of the conduct this policy seeks to target would be helpful.
- Section 6 uses the term "governing" body rather than "regulatory" body. For consistency, the term "regulatory" should replace "governing."
- A list of the other measures the IRB may employ to address counsel's conduct would clarify the scope and intended application of this policy. For example, a breach of a professional obligation includes actions of counsel that could be deemed incompetent or negligent and that undermine the integrity of a proceeding. What measures are contemplated and how, if intended to do so, would this policy assist?
- As another example, the Federal Court procedural protocol *Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* sets out, in part:

#### 2. Requisite Steps Before Pleading Incompetence

i. Prior to pleading incompetence, negligence or other conduct by the former legal counsel or other authorized representative as a grounds for relief in an application for leave and for judicial review under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, or in an application brought as an appeal under the *Citizenship Act*, current counsel must satisfy him/herself, by means of personal investigations or inquiries, that there is some factual foundation for this allegation. In addition, current counsel must notify the former counsel or authorized representative in writing with sufficient details of the allegations and advise that the matter will be pled in an application described above. The written notice must advise the former counsel or authorized representative that they have seven days from receipt of the notice to respond. Along with this notice,

and in cases where privilege may be applicable, current counsel must provide the former counsel or authorized representative with a signed authorization from the applicant releasing any privilege attached to the former representation along with a copy of this Protocol.

The scope of professional and ethical obligations and the steps IRB personnel would take when those obligations are violated should be clarified, beyond what is in Section 7.1 of this policy. Section 7.1 is discussed below.

### **Section 7: Addressing Possible Breaches of Professional or Ethical Obligations**

- The CBA Section supports the IRB position that this policy should not interfere with the exercise of discretion of IRB decision makers and that the policy recognizes law societies as ultimately the sole regulators of lawyers' conduct.
- The CBA Section encourages the IRB to consult or continue to consult with the law societies about this policy since it touches on matters within their jurisdiction. While lawyers' codes of conduct in Canada have largely been harmonized, there are some differences between jurisdictions.
- Again, there is lack of clarity about the scope of conduct and the reasons for disclosure of improper conduct that the policy seeks to capture.

#### **Section 7.1: Process**

- It is difficult to make specific comments, given the need first for further clarity about the scope and intended application of the policy. However, the issue of notice to counsel prior to reporting may be important, in particular in the context of a hearing.
- The detailed process contemplates notifying authorized representatives when a decision has been made to report the matter to a regulatory body but does not invite participation in advance. This differs from the Federal Court protocol for cases of alleged incompetence.
- Ultimately, because this policy could factor as a procedural protocol in certain instances, including in the context of a hearing, counsel should have some notice and opportunity to respond prior to the IRB reporting the conduct to a regulatory body and after IRB Legal Services has made a recommendation. Consultation with law societies will be important to coordinate what counsel may disclose to the IRB without breaching other obligations to clients (such as confidentiality).
- In *Rezaei v. Canada (Minister of Citizenship and Immigration)*, 2003 3 FCR 421, 2002 FCT 1259, a case footnoted in the policy, notice to counsel about improper conduct was seen as important to respect the rules of natural justice:

[59] In conclusion, the applicant received clear notice of the concerns of the IRB regarding his conduct. To the extent that the applicant did not have an opportunity to present his case to the IRB, it is due to omissions for which he is responsible. Accordingly, I find that there was no breach of procedural fairness.

(64) . . . We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. [Emphasis added.]

**Conclusion**

The CBA Section recommends making the scope of the policy more clear. This will further protect the integrity of proceedings and all parties. It is also important to clarify the types of conduct and the stage of proceedings before the IRB where this policy would apply. It is essential that any disclosure of information include all parties' views to ensure that a full factual and legal basis is being disclosed to regulators and to be true to the stated purpose of the policy – to establish a predictable and transparent process.

The CBA Section supports the IRB position that this policy should not interfere with the exercise of discretion of Board decision makers and that law societies are ultimately the sole regulators of lawyers' conduct. We thank the IRB for the opportunity to comment and will be pleased to discuss the proposed policy further. We will share any responses with Immigration Law Section members to help them better understand the process.

Yours truly,

*(original signed by Eugene Oscapella for Deanna L. Okun-Nachoff)*

Deanna L. Okun-Nachoff  
Chair, Immigration Law Section