



February 3, 2025

Via email: Minister@cic.gc.ca, harpreet.kochhar@cic.gc.ca

The Honourable Marc Miller, P.C., M.P.
Minister of Immigration, Refugees and Citizenship
Immigration, Refugees and Citizenship Canada
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Dr. Harpreet S. Kochhar
Deputy Minister of Immigration, Refugees and Citizenship
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Dear Minister Miller and Dr. Kochhar:

Re: Proposed Regulations on Administrative Penalties and Consequences

I write on behalf of the Canadian Bar Association (CBA) to raise serious concerns with the proposed Administrative Penalties and Consequences framework (APC framework) under the *Immigration and Refugee Protection Act* (IRPA) and the *Citizenship Act*, pre-published in the *Canada Gazette, Part I*, on December 21, 2024.¹

The CBA represents over 40,000 lawyers, judges, law professors and students across Canada. Our mandate includes advocating for fair and effective legal frameworks that uphold the rule of law and the independence of the legal profession.

The CBA is deeply concerned by several aspects of the proposed regulations as they relate to lawyers and their clients. We also wish to express our disappointment with the lack of any meaningful consultation and with the misrepresentation of the discussions with the Federation of Law Societies of Canada (FLSC).

The proposed regulations must be amended to clearly exempt lawyers

We strongly endorse the concerns raised by the FLSC in their letters of December 22, 2024 and January 21, 2025.² The regulations should be amended to remove lawyers or withdrawn because they are inconsistent with established constitutional and common law principles of solicitor-client privilege and confidentiality, interfere with exclusive provincial jurisdiction over the regulation of lawyers and undermine the independence of the bar.

¹ Canada, *Proposed Regulations Amending the Immigration and Refugee Protection Regulations*, (2024) C Gaz I, [online](#).

² Available on demand.

The inclusion of lawyers in the APC framework is also inconsistent with principles 16, 18 and 20 of the United Nations' Principles on the Role of Lawyers:

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.³

Further, the immigration lawyer's role involves advocating for clients, often in opposition to IRCC and its counsel. Granting that same entity the authority to discipline the very lawyers who challenge it creates a glaring conflict of interest—comparable to allowing Crown Counsel to oversee the discipline of criminal defence lawyers.

The APC framework interferes with exclusive provincial jurisdiction over regulation of lawyers

The inclusion of lawyers in the APC framework is redundant and infringes on the exclusive jurisdiction of provincial and territorial law societies to regulate the legal profession. Law societies are mandated and empowered to investigate and discipline their members for professional misconduct, including trust audits, disciplinary hearings, suspensions and fines. There is no evidence that these regimes are deficient, and the unnecessary duplication of oversight raises more issues than it purports to resolve. The penalties contemplated under the APC framework appear disproportionate when applied to lawyers, given the stringent and effective regulatory and disciplinary mechanisms already in the purview of law societies.

This duplication risks inefficiencies, conflicting decisions, and undue interference with established regulatory frameworks. The proposed regulations fail to clarify which regime—law society disciplinary processes or the APC framework—will take precedence in cases of overlap. This uncertainty raises critical questions about how conflicts between findings, penalties, or remedial measures issued under each regime will be resolved. Without clear guidance, the coexistence of these frameworks risks creating a regulatory vacuum or leaving lawyers subject to competing, and potentially contradictory, obligations.

The APC framework interferes inappropriately with constitutionally guaranteed principles of solicitor-client privilege and confidentiality

Lawyers are bound by professional confidentiality obligations and by solicitor-client privilege, which impede their ability to fully respond to allegations under the APC framework. The broad powers for inspection and document demands conflict with well-established principles of solicitor-client confidentiality affirmed by the Supreme Court of Canada in *Lavallee, Rackel & Heintz v. Canada (Attorney General)* (2002 SCC 61) and *Descôteaux v. Mierzwinski* ([1982] 1 S.C.R. 860).⁴ IRCC's

³ United Nations, Office of the High Commissioner for Human Rights, *Basic Principles on the Role of Lawyers* (New York: United Nations, 1990), [online](#).

⁴ In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, the Supreme Court struck down s. 488.1 of the Criminal Code for violating s. 8 Charter protections against unreasonable searches and seizures of lawyers' offices. The Court established guidelines for future legislation, including: (1) requiring warrants and restricting their issuance for documents known to be protected by solicitor-client privilege; (2) limiting law office search warrants to situations where no reasonable alternative

reassurance that solicitor client privilege will not be breached remains concerning in the absence of any mechanism in the proposed regulations to allow lawyers to defend themselves effectively without breaching that privilege. Lawyers will be left making a choice between breaching one of their fundamental obligations to clients, or facing a \$10,000 fine.

Unlike other types of representatives, lawyers who are not knowingly engaged in misrepresentation will be unfairly prevented from fully defending themselves from allegations of wilful misrepresentation or failure to produce documents related to a client's application. The inspection regime under s. 315.49(3) creates an inherent unfairness by providing unregulated individuals and regulated consultants greater latitude to respond to IRCC demands and accusations than lawyers.

Sections 315.49(1) and (2) appear to authorize warrantless inspections of business premises without prior notice, judicial oversight, or specificity regarding the suspected violation. The threshold for conducting the inspection is very low, requiring only "reasonable grounds to suspect" a violation. IRCC states that its intention is to limit inspections to request for documents and that there is no intention to conduct physical searches. However, the legislation as drafted is vague and could easily be interpreted to authorize an officer to conduct physical searches of premises, property and electronic devices. If s.315.49(1) is not intended to authorize warrantless inspections of premises, files, electronic devices, etc., it should say so clearly.

Warrantless searches of lawyers' offices and demands for documents without safeguards to protect client confidentiality are fundamentally at odds with established common law principles, which are essential for maintaining the integrity of the legal system and the relationships between lawyers, clients, the courts and the state.

Attempting to solve the wrong problem

The APC regime affects three groups of representatives: unauthorized representatives, licensed consultants, and lawyers. The 2017 report of the House of Commons Citizenship and Immigration Committee identified unlicensed representatives as the primary source of misconduct, with problematic licensed consultants as the second most significant concern.⁵ Lawyers, by contrast, have never been cited as a major contributor to these problems.⁶ However, the proposed regulations disproportionately impact these groups in reverse order, imposing the most severe consequences on lawyers while largely insulating unauthorized representatives from the penalties outlined in the regulations.

exists; (3) ensuring warrants provide maximum protection for solicitor-client confidentiality, such as sealing documents under the supervision of a lawyer or referee; and (4) mandating that, without privilege-holder consent and third-party confirmation of privilege, documents must not be examined, used, or retained and must be returned to the client or counsel.

⁵ House of Commons Standing Committee on Citizenship and Immigration, *Starting Again: Improving Government Oversight of Immigration Consultants*, 42nd Parliament, 1st Session, June 2017, pp. 8-12. In its first six years as the regulating body overseeing immigration consultants, the ICCRC reported receiving a total of 1,710 complaints against consultants – an average of approximately 300 complaints a year. In 2010 there were 1,600 licenced consultants, which grew to 3,600 consultants by 2017. From 2011 to 2016, the CBSA also opened 217 investigations into the activities of "unscrupulous consultants" (encompassing both authorized and ghost consultants). 52 of these cases (24%) were referred to the Public Prosecution Service of Canada, and 44 (20%) resulted in charges being laid.

⁶ A comprehensive review of all reported case law involving prosecutions of misrepresentation offences under the *Immigration and Refugee Protection Act* (i.e. sections 126 and 127) reveals that there have been only two prosecutions of lawyers under these provisions – *R. v Zaher*, 2017 ONSC 582 and *R. v. Bhatti*, 2022 BCPC 151. Meanwhile, there have been multiple cases of prosecutions against unauthorized practitioners and problematic immigration consultants. The case law reveals that unauthorized practitioners in particular have been frequently involved in lucrative schemes involving hundreds of clients. Unauthorized practitioners and problematic consultants have also been more likely to be involved in predatory behaviour, whereas no reported cases provide evidence of any such conduct involving lawyers.

Other Issues with the APC framework

Even if lawyers are exempted, the APC framework lacks procedural protections and accountability:

Inspection Authority

The regulations fail to define what constitutes an “inspection” or to limit its scope, leaving the determination solely to the discretion of the officer based on “reasonable grounds to suspect” a violation. At the officer’s discretion, such inspections may encompass invasive measures, including searches of computers, desk drawers, filing cabinets, cell phones, and personal belongings such as briefcases. The officer may also interview staff and colleagues, broadening the potential for overreach.

Disclosure of Specifics

The inspection powers under s. 315.49 lack safeguards requiring officers to disclose the specifics of suspected violations during the investigative stage. Officers may demand “any relevant documents” without disclosing details of the investigation, such as the name of the individual concerned, the file in question, or the nature of the alleged violation.

Notice of Preliminary Findings, Notices of Violation and Review

The CBA is concerned with deemed services of Notices of Preliminary Findings and Notices of Violation, with the limited opportunity for submissions in reply to such notices, and with the lack of opportunity to make submissions when requesting a review of a Notice of Violation.

Electronic service must require acknowledgment by the recipient. If unable to obtain an electronic acknowledgment, IRCC must effect service through secure and trackable methods, such as courier or registered mail.

The review mechanism under s. 315.58 prohibiting the admission of new evidence during a review denies investigated individuals the opportunity to present relevant evidence that may arise after the initial investigation. Given the severe financial and reputational consequences of a Notice of Violation determination, a comprehensive and fair review process is essential.

Publication of penalized representatives’ names

IRCC has indicated that lawyers found liable of a violation would see their name, employer, violation type, penalty amount and payment status made public on a public website indefinitely. In the event IRCC were unable to prove on a balance of probabilities that the allegations are true, publishing a representative’s name could be defamatory and expose IRCC to liability.

If publishing the name on the website impacted a lawyers’ ability to practice law, this would cross the line into interfering with a lawyer’s ability to practice law, which is the exclusive domain of provincial and territorial Law Societies.

Recommendations

- The proposed regulations must be amended to clearly exempt lawyers.
- The scope of inspections intended in the regulations must be clearly defined and limited to requesting documents.
- Officers conducting inspections or demanding documents under s.315.49 must be required to disclose information, including the name of the individual concerned, the file in question, and the nature of the alleged violation.

- Section 315.49(3) must be amended to ensure officers give a reasonable period of time for the production of documents requested and to allow investigated persons the ability to request an extension of time, which must be reasonably considered.
- Notices of Preliminary Findings under s.315.5(1) must include all information relied upon by the officers, including evidence obtained outside the inspection process, to allow the investigated individual to fully understand the case against them and prepare an informed response.
- Avoid deeming notices as received electronically without acknowledgment. We recommend amending s. 315.51 to require service through secure and trackable methods, such as courier or registered mail.
- Individuals must be able to submit evidence along with submissions when replying to a Notice of Preliminary Finding.
- Section 315.58 must be amended to allow the admission of new evidence when requesting a review and allow individuals to make submissions needed to prevent significant financial and reputational consequences.

These amendments are necessary to align the APC framework with principles of fairness, transparency, and due process.

The CBA remains committed to supporting measures that uphold the integrity of Canada's immigration and citizenship systems. However, we strongly urge the government to reconsider the inclusion of lawyers in the APC framework and to adopt the recommendations outlined above. If the regulations cannot be amended to exclude lawyers, they should be withdrawn in their entirety.

We welcome the opportunity to discuss these concerns further and to collaborate on drafting a regulatory framework that achieves compliance objectives without undermining the independence of the legal profession.

Sincerely,

(original letter signed by Lynne M.J. Vicars)

Lynne M.J. Vicars

cc: Jonathan G. Herman

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