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Plan to impose administrative penalties threatens immigration lawyers | Sergio R. Karas

By **Sergio R. Karas**

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Law360 Canada (October 1, 2024, 11:00 AM EDT) -- On June 23, 2024, the federal government announced plans to impose a system of administrative penalties "… applicable to those who provide immigration and citizenship advice and/or representation" that will be administered by Immigration, Refugees and Citizenship, Canada (IRCC). These administrative penalties are intended to be a tool of regulatory enforcement, ensuring compliance with the *Immigration Refugees Protection Act* (IRPA) and the *Citizenship Act*.

Along with this new regime of administrative penalties, a set of regulations will be established to define the violations and the penalty amounts. The legal foundation that these regulations are based upon is s. 91.1(1) of the IRPA. According to that section, the regulations may establish a system of administrative penalties, which includes administrative monetary penalties (AMPs) for violations by anyone who represents or advises individuals for a fee regarding expressions of interests under the IRPA.

The "advice and/or representation" language includes immigration lawyers. This imposition of AMPs on lawyers is a harmful measure that threatens solicitor-client privilege and undermines the authority of well-established law societies that regulate the legal profession. While immigration lawyers, like all legal professionals, must be held accountable for their conduct, AMPs are not the appropriate mechanism for ensuring compliance. AMPs are currently applied by IRCC against employers who are found in violation of the terms and conditions of employment of their foreign workers and are assessed administratively according to the seriousness of the conduct involved. However, applying them against lawyers is a clear instance of government overreach.

The new system of AMPs will undermine the common law principle of solicitor-client privilege, a cornerstone of the legal profession. It was affirmed in *Canada (Combines Investigation Act) (Re)*, [1975] F.C. 184, and reiterated by the Supreme Court of Canada in *Smith v. Jones*, [1999] 1 SCR 445, which emphasized the necessity for clients to be "untrammelled" as they communicate openly with their legal advisors without fear of disclosure to third parties. Protecting this privilege is crucial to ensuring that clients receive effective legal guidance as it fosters an environment of trust necessary to allow them to share sensitive information with their lawyers. Introducing AMPs creates a chilling effect on this critical dynamic, severely limiting the communication between lawyer and client.

If lawyers fear the imposition of AMPs, even in situations where they have acted in good faith, they will become overly cautious and hesitant to encourage open dialogue with a client about their case. In turn, clients may withhold crucial details related to their immigration history or even their criminal background out of fear that their lawyer may face repercussions for perceived compliance issues. Withholding and misrepresenting facts are already offences under sections 126 and 127 of the IRPA. Section 126 prohibits anyone who knowingly assists or encourages someone to misrepresent or withhold vital facts, which could lead to errors in the administration of IRPA. Section 127 specifies that individuals who knowingly misrepresent facts or provide false or misleading information at any point during the immigration or citizenship process are guilty of an offence under the IRPA. These offences apply to everyone, lawyers included, so the introduction of AMPs is overkill and smacks of a cash grab.

AMPs will create a barrier to the trust between immigration lawyers and their clients. As a result, clients may be at increased risk of facing the consequences specified under s. 40(1)(a) of the IRPA, which states that permanent residents or foreign nationals will be inadmissible if they provide inaccurate information or withhold relevant facts. The consequences of misrepresentation are severe, as per s. 40(2) of the IRPA, if a person is found inadmissible for misrepresentation they face a ban of five years from re-entering Canada, and under s. 40.1(1), a cessation of refugee protection status. Imposing AMPs will discourage lawyers from giving full advice to clients, who may feel that the lawyer is not an independent party because they will be more concerned with the potential imposition of AMPs against them.

As established in *Canada (Attorney General) v. Law Society of B.C.*, [1982] 2 SCR 307, and reiterated in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, the independence of the legal profession from state influence is essential for a free society. This principle underscores the necessity for lawyers to be regulated by their professional bodies rather than be subject to government-imposed penalties like AMPs. If IRCC were to position itself as the regulator of compliance for immigration lawyers, it would create government interference. The IRCC is responsible for administering immigration law and policies and is not a regulator of the legal profession. To ensure that immigration lawyers can operate free from undue government interference, it is critical to leave the regulation of the profession to the provincial law societies.

Groia v. Law Society of Upper Canada, [2018] 1 SCR 772, affirmed the authority of the law societies and emphasized the importance of deference in regulating the legal profession. As stated in paragraph 214, "… [f]or over 200 years, the Legislature has delegated to the Law Society the authority to determine both the rules of professional conduct for the profession and their interpretation […] [r]ecognizing this expertise, this Court has consistently held that law societies should be afforded deference …" This deference should be respected because unlike the IRCC, whose primary focus and function is the administration of the IRPA and policy implementation, law societies are better positioned to ensure compliance with professional conduct rules. The imposition of AMPs by the IRCC is not only redundant but also undermines the authority and expertise of existing law societies.

According to the Federation of Law Societies, there are fourteen law societies mandated by the provinces and territories to regulate Canada's legal profession in the public interest. These law societies have been well-established for many years and are both equipped and experienced in overseeing professional conduct compliance for all lawyers. The law societies set and continuously update rules and regulations for professional conduct, ensuring better adherence to standards and the preservation of the integrity of the legal profession. They also have committees, investigative departments, and processes, as well as disciplinary hearings and tribunals.

Regulating lawyers requires specific legal expertise and an understanding of the ethical dilemmas encountered in the legal profession. *Groia* recognizes the importance of having legal peers regulating each other, "… Law Society disciplinary panels are composed, in part, of other lawyers, who are aware of the problems and frustrations that confront a practitioner." The area of immigration law is complex and, therefore, immigration lawyers must be regulated by other lawyers who are sensitive to the challenges impacting representation and advice in the field.

The imposition of AMPs on immigration lawyers challenges solicitor-client privilege, undermines key principles of fairness and independence of the bar, and threatens the well-established authority of existing law societies. These principles are fundamental to the legal profession. Like all members of the bar, immigration lawyers must be held accountable for misconduct. However, this accountability must be achieved through the established disciplinary processes, not by AMPs imposed by a federal department. To allow IRCC to apply to lawyers the same penalties that it applies to employers who violate the terms and conditions of employment of foreign workers is a gross overreach of its regulatory power.

The authorities should stay out of professional regulation that is already in the hands of robust provincial regulators.

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