

**Submissions to the Standing Committee on Citizenship and Immigration on
Immigration, Refugee, Citizenship and Paralegal Practitioners**

by

The Inter-Clinic Immigration Working Group

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INTRODUCTION

The Inter Clinic Immigration Working Group (ICIWG) is a network of lawyers and paralegals in Ontario community legal clinics and student legal aid services societies. Clinics are funded by Legal Aid Ontario to provide services to low- income individuals and disadvantaged communities. We serve clients in a variety of ways including summary legal advice, representation, public legal education and law reform activities. There are currently over 30 clinics in Ontario that belong to ICIWG, which has been meeting monthly in Toronto for over 25 years. Members of ICIWG are particularly concerned with immigration law matters, including issues of refugee law, family reunification, migrant worker issues and citizenship matters.

ICIWG is pleased that the CIMM Standing Committee is studying this important issue of the legal, regulatory and disciplinary frameworks governing and overseeing immigration, refugee, and citizenship practitioners in Canada. The main focus of ICIWG's submission is to: a) Highlight for the Committee how we are impacted by the chill placed on newcomer-serving NGOs by the very harsh penalties they potentially face should they contravene the law of authorized representatives; b) Highlight for the Committee the reality as we experience it on the ground, providing immigration services in our communities to low-income clients who cannot afford to pay anyone for their complex legal needs. We note that under-funding of legal aid immigration services in Ontario and across the country puts a big strain on newcomer-serving NGOs. Those NGOs play a key role in the continuum of immigration services for low-income newcomers; c) Highlight our observations that newcomers themselves face the harshest penalties — loss of status, inability to reunite with family, deportation — when representative (authorized or not) makes a mistake. We ask the Committee to consider a pragmatic

approach that does not unduly restrict the good faith work of our key NGO partners who in reality are filling significant gaps in the function of Canada's immigration system.

a) HARSH PENALTIES IN THE LAW CAPTURE NEWCOMER-SERVING NGOs THAT PLAY A KEY ROLE IN THE CONTINUUM OF IMMIGRATION SERVICE FOR LOW-INCOME NEWCOMERS

It is in the context of our partnerships with newcomer-serving NGOs that we approach s. 91 of the *Immigration and Refugee Protection Act*, which provides severe penalties to anyone who, "for consideration" represents or advises a person in connection with a proceeding under the Act:

91 (1) Subject to this section, no person shall knowingly, directly or indirectly, represent or advise a person for consideration — or offer 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.

(2) A person does not contravene subsection (1) if they are

- (a)** a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the *Chambre des notaires du Québec*;
- (b)** any other member in good standing of a law society of a province or the *Chambre des notaires du Québec*, including a paralegal; or
- (c)** a member in good standing of a body designated under subsection (5).the interpretation of which seems to have varied with the political winds. Serious penalties for breaching these provisions.

(9) Every person who contravenes subsection (1) commits an offence and is liable

- (a)** on conviction on indictment, to a fine of not more than \$100,000 or to imprisonment for a term of not more than two years, or to both; or
- (b)** on summary conviction, to a fine of not more than \$20,000 or to imprisonment for a term of not more than six months, or to both.

The *Citizenship Act* has a similarly-worded provision, at s. 21.1:

21.1 (1) Every person commits an offence who knowingly, directly or indirectly, represents or advises a person for consideration — or offers to do so — in connection with a proceeding or application under this Act.

(2) Subsection (1) does not apply to

- (a) a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the Chambre des notaires du Québec;
- (b) any other member in good standing of a law society of a province; or
- (c) a member in good standing of a body designated under subsection (5).

- 29.1** A person who commits an offence under subsection 21.1(1) is liable
- (a) on conviction on indictment, to a fine of not more than \$100,000 or to imprisonment for a term of not more than two years, or to both; or
 - (b) on summary conviction, to a fine of not more than \$20,000 or to imprisonment for a term of not more than six months, or to both.

ICIWG is pleased that the Committee is studying how to ensure an appropriate standard of immigration services is provided to vulnerable newcomers, but we strongly feel that these provisions do not strike the right balance. As long as these legislative provisions remain on the books, our key NGO partners are vulnerable to serious consequences should they mistakenly overstep the line in their work, but who offer free crucial services to some of the most vulnerable people dealing with immigration processes.

To be clear, newcomer-serving NGOs do not charge for their services. They fill a gap and a great need by helping their clients with immigration matters when there is nowhere else to refer. This is discussed further below.

But since the introduction of s. 91 in *IRPA* in June 2011, the Department has varyingly interpreted the meaning of “for consideration”. At first, NGOs were assured that so long as they did not charge for their services, they were exempt from these provisions. Then, about two years ago, we heard from many settlement agency partners that their IRCC representatives has instructed them to cease providing any form-filling or immigration services because that put them in violation of s. 91. This is because the Department now interprets “consideration” as including salaries paid to non-profit newcomer-serving agency staff.

At the legal aid clinics, we felt the chill that directive created. Our agency partners were scared, understandably, of the very serious consequences set out in the law and so all of their form-filling work was referred back to our offices. This frustrated clients and it

frustrated the work and services our partners provide. Plus, we could not and cannot possibly meet the demand on our own. Even if we could, it poses a waste of public resources, because you should not need to retain a lawyer to fill out an Extension of a Work Permit Application, or an Application for Permanent Residence for a Protected Person, for example.

That said, those applications can certainly become complicated legal issues if a mistake is made. If a Work Permit Extension is not completed correctly, and gets sent back, an individual can fall out of status and this can quickly snowball into a much larger legal problem. If, in an Application for Permanent Residence not all dependents are disclosed, this can trigger the excluded family member rule of s. 117(9)(d) of the *Immigration and Refugee Protection Regulations*, forever foreclosing the possibility of family reunification.

Therefore we sympathize with the Ministry in its efforts to strike the right balance. After the disruptive chill sent down about 2 years ago from various IRCC representatives to certain settlement agencies, it appears that more recently the Ministry has attempted (in our respectful opinion, unsuccessfully) to bring clarity to the confusion. On January 26, 2017 the Department published the following guidelines regarding *Family, Friends, Non-Governmental and Religious Organizations as Uncompensated Representatives*, acknowledging that NGOs “play an important role for applicants who need support and advice”, but the enumerated examples of NGOs captured by this Guideline only seems to include international organizations such as the United Nations High Commissioner for Refugees or the International Organization for Migration which have specific service agreements with the Federal Government. Nevertheless, the Guideline was circulated as good news among settlement service provider organizations and other newcomer-serving NGOs, and in particular the following language was noted:

“Family, friends, religious, and other NGOs [later changed on the website to state “Family, friends, international organizations [e.g., United Nations High Commissioner for Refugees, religious organizations and Non-government

Organizations (NGOs)]”] who do not charge fees or receive consideration for providing citizenship or immigration advice or services can advise and represent applicants before Immigration, Refugees and Citizenship Canada (IRCC) or the Canada Border Services Agency (CBSA) without being members of the Immigration Consultants of Canada Regulatory Council (IRCC), a Canadian provincial/territorial law society or the Chamber des notaries du Quebec at any stage of an application.”¹

However, that same day an email was sent to the Ontario Council of Agencies Serving Immigrants, and to others, from the Department indicating that non-profit settlement service provider organizations may **not**, in fact, be captured by the Guidelines as above. That email stated that, **“The interpretation of “consideration for” remains unchanged and includes salaries paid to staff”** and went on to state:

“However, salaried individuals who work for organizations such as non-profit or charitable agencies and receive no other consideration or fee for their services are able to assist by providing clients with general information found on the Department’s website and with completing an electronic form or application. Additionally, they can orally translate questions and information in the application guide for clients who cannot read English or French. **However, such individuals cannot provide personalized advice or represent the client, unless they are an authorized representative. This means, for example, they cannot advise clients about options nor help them determine if they meet the Citizenship residency requirements, nor can they provide any advice pertaining to the immigration of other family members.**”²

In our view, this permission to NGOs to assist with form-filling but nothing more still fails to strike the right balance. The current law and policy framework continues to assume that vulnerable newcomers living in poverty will simply be able to pay a consultant, paralegal, or lawyer to help them when a complicated legal issue arises. This is blind to the access to justice reality for newcomers, and continues to expose newcomer-serving

¹ <http://www.cic.gc.ca/english/resources/tools/service/rep/uncomp.asp>

² Email from IRCC to the Ontario Coalition of Agencies Serving Immigrants, January 26, 2017 - Note that IP9 was also updated on January 26, 2017 to reflect this instruction to newcomer-serving organizations.

agencies, which operate without a profit motive and in good faith in the service of newcomers, to the overly harsh penalties set out in s. 91 of *IRPA* and s. 21.1 of the *Citizenship Act*.

In reality, it is not simply a matter of having real-life human interaction immediately stop once a question on an application form morphs into the grey area of “legal advice”. A settlement agency worker cannot always simply refer the matter off to a lawyer, paralegal, or consultant. We know that is often not possible because there is no money to pay for immigration services, and we know that access to a community legal aid clinic is a privilege unavailable to many.

b) UNDER-FUNDING OF LEGAL AID IMMIGRATION SERVICES PUTS A BIG STRAIN ON NEWCOMER-SERVING NGOS

To be eligible for legal aid services in Ontario, an individual must have an annual income of less than \$13,635.³ Some - but not all - immigration matters are covered through Ontario’s legal aid certificate program (for private bar lawyers who accept legal aid certificates) for those who financially qualify. Where legal aid clinics practice immigration law, they are meant to fill the gaps and provide services for non-certificate covered immigration matters, such as family reunification, regularization of status, and overcoming barriers to citizenship. Of the 76 community legal aid clinics in Ontario, less than half have immigration practitioners on staff. Some specialty clinics and Student Legal Aid Services Societies provide immigration services, but all clinics offering immigration services are overwhelmed by the volume of demand. ICIWG serves thousands of low-income newcomers every year.

Our key partners are settlement agencies and other newcomer-serving NGOs that do a lot of heavy lifting in terms of immigration form-filling and front-line services and referrals. We rely on our cherished partnerships with these agencies in our communities

³ <http://legalaid.on.ca/en/getting/eligibility.asp#amountyouearn>

for cross-referrals; we could not meet the needs of our communities without them. Where immigration services are not provided at a local clinic, we understand that newcomer-serving agencies are really stuck. There is nowhere to refer the clients they see with complex cases, because the clients we mutually serve cannot afford to pay a lawyer or consultant. We understand that this is the norm outside of Ontario, where there are scant refugee and immigration legal aid services or even private practitioners: in other parts of Canada, often the settlement agencies or other newcomer-serving NGOs are the only option for newcomers.

The complex cases we mutually see involve human beings in situations of extraordinary precarious circumstances, desperate for a solution. Families torn apart by war, seeking to reunite. Parents separated from young children, left behind in situations of risk. Accusations of misrepresentation and the threat of loss of status for abused spouses. Long-term residents of Canada who fell through the cracks and seek to regularize their status. Traumatized clients who live with mental health disorders. Refugees who will not experience psychological closure from their trauma and a sense of belonging here until they obtain Canadian citizenship. Too often, it takes many meetings and the development of a relationship of trust before legally relevant disclosure is made. Disclosures such as: I have three children, not two. My spouse refuses to let me talk to anyone, and has hidden my ID documents. I was raped. I have HIV. Newcomer-serving NGOs are often the first point of contact for newcomers, and they see the desperation for legal solutions to complex problems first-hand. We know this because many of our referrals come from these agencies. We hear that when staff cannot refer to a legal aid clinic, their clients become more desperate.

We view this desperation as a key factor in forcing newcomers to borrow money they do not have to pay an unscrupulous adviser to carry out poor quality immigration services that are the subject of your Study.

ICIWG wishes to alert the Committee to the important but overlooked role of front-line newcomer-serving NGO staff who develop real relationships with real people, and play

a key role in the continuum of immigration form-filling, issue-spotting, referrals, and even advocacy. How the work of practitioners is overseen needs to be alert to this practical reality.

c) PRESENTLY THE VULNERABLE NEWCOMER IS THE ONE WHO RECEIVES THE HARSHTEST PENALTY - LOSS OF STATUS, DEPORTATION, INABILITY TO REUNITE WITH FAMILY - WHEN A MISTAKE IS MADE

Where there is a doubt because of a mistaken form completed or application strategy made, the newcomer should be given the benefit of that doubt. We note that the measures taken to date by the Federal government have failed to protect immigrants and precarious status newcomers from the exploitation this Committee is seeking to remedy.

In 2011, Section 10 of the *Immigration and Refugee Protection Regulations* was introduced, which requires that, for an Application to be complete, an applicant must provide the information of any representative who advised “for consideration” on the application, and must declare that the information provided is complete and accurate. If this is not done, various levels of immigration decision-makers have interpreted this Regulation to deem an application not properly made, in rejecting an application or appeal.⁴

The Canadian Council for Refugees, in its submissions made prior to s. 10 of the *Regulations* taking effect, stated the following concern:

“The CCR is concerned that the proposed regulations have the potential for penalizing the applicant if, through no fault of the applicant, the information about the representative is incomplete or inaccurate. By amending IRPR 10(2) to include the name and details of the representative as part of the required information for an application, applicants may be penalized, since processing is

⁴ See, for example, *Lin v. Canada (Minister of Citizenship and Immigration)*, [2014] I.A.D.D. No. 65.

delayed if the application is incomplete. Worse, the delay may mean that an applicant misses a deadline and loses an entitlement (for themselves or a family member).

Furthermore, by including the representative's details among the required information, the government is making the applicant responsible for the accuracy of the information. According to the Regulations, the applicant must sign that the information is "complete and accurate" (IRPR 10(2)(d)). Thus the applicant could be found guilty of misrepresentation if the representative provides false information.

We recommend that the responsibility for the information about the representative lie with the representative, who should sign a declaration as to its accuracy. If the representative is not an authorized representative, the applicant should not on that account be considered incomplete. Instead the applicant should be informed that the government will not accept that person as their representative, but that the application will still be processed. Any appropriate disciplinary measures should be pursued against the representative, without penalizing the applicant."

We endorse the submission of the CCR as above, with the caveat as explained above that settlement sector agencies, who do not operate on a profit motive, be exempted like international NGOs such as UNHCR or the IOM from the harsh penalties of s. 91 of *IRPA* and s. 21.1 of the *Citizenship Act*.

CONCLUSION AND RECOMMENDATIONS

We urge the Committee to recommend a more common sense approach that is alive to the financial reality of newcomers in the context of a lack of adequate publicly-funded legal services like legal aid clinics. Newcomer-serving NGOs may not have the legal know-how to always get it right, but we believe they operate in good faith and are a bedrock of the operation of Canada's immigration system. The better solution, in our view, would be to stabilize long-term funding for that sector, enhance their professional development opportunities, and ensure legal aid funding is adequate to meet the needs on the ground.⁵ We believe that the current atmosphere of fear puts low-income

⁵ See Nicholas Keung, "As refugee number surge, federal legal aid funding shrinks", *The Toronto Star*, March 31, 2017, accessed at: <https://www.thestar.com/news/immigration/2017/03/31/as-refugee->

newcomers desperate for a solution to their problems into the arms of unscrupulous practitioners, borrowing money they do not have to pay for the service. If this atmosphere of fear were removed for newcomer-serving NGOs, and a flexible common sense approach rooted in good faith were taken up instead, this would shed light on where there are legitimate knowledge gaps. This could in turn improve the system as targeted professional development opportunities could be crafted to meet this need. We therefore recommend:

- ▶ **Amend s. 91 of the *IRPA* and s. 21.1 of the *Citizenship Act* to ensure that newcomer-serving NGOs are exempted from the harsh penalties if they are forced, due to practical realities, to engage in work otherwise reserved for authorized representatives.**
- ▶ **Ensure long-term financial security for newcomer-serving NGOs so they can offer secure employment and healthy opportunities for professional development for front-line workers to spot legal issues when they arise and if they can, refer their low-income clients to a legal aid service.**
- ▶ **If there is no available legal aid service, then a common sense approach should prevail. Newcomer-serving agencies should be able to provide the service if there is no other financially feasible alternative, acknowledge it was done to the best of their abilities and in good faith, and if a mistake is made, the newcomer affected by it should be given the opportunity to correct that mistake.**

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[numbers-surge-federal-legal-aid-funding-shrinks.html](https://www.thestar.com/news/immigration/2017/03/22/refugee-boards-plea-for-assistance-with-growing-backlog-ignored.html); and Nicholas Keung, "Refugee Board's plea for assistance with growing backlog ignored", *The Toronto Star*, March 22, 2017, accessed at: <https://www.thestar.com/news/immigration/2017/03/22/refugee-boards-plea-for-assistance-with-growing-backlog-ignored.html>