



THE ONTARIO IMMIGRANT NOMINEE PROGRAM –
PROGRAM INTEGRITY UNIT: IMPORTANCE OF SOLICITOR-
CLIENT PRIVILEGE AND ACCESS TO COUNSEL

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Unit Branch

Submitted by: Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



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Introduction

The Ontario Bar Association (the “OBA”) appreciates the opportunity to provide this submission on a critical issue concerning investigations conducted by the Ontario Immigrant Nominee Program (OINP)’s Program Integrity Unit (PIU).

The Ontario Bar Association (OBA)

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Citizenship and Immigration Law Section (the “**Section**”), which has approximately 150 lawyers who are leading experts in citizenship and immigration law and who represent virtually every stakeholder in the immigration system. These include those applying for skilled workers, permanent residence, refugee and citizenship status; spouses of Canadian citizens; corporations and other Canadian employers who participate in skilled and temporary worker programs.

Members of the Section often advocate before the Supreme Court of Canada, the Federal Court of Canada, the Immigration and Refugee Board including the Immigration Appeal Division, the Immigration Division and the Refugee Appeal Division as well as all levels of court in the province of Ontario.

Concerns About Interference with Solicitor-Client Relationship

Our members have raised concerns about the following questions being made by the PIU and within the context of an investigation, for information and documents that are, by nature, solicitor-client privileged. Further, these questions have been posed to a client directly by the PIU, despite the client being known to be represented by a lawyer. This includes:



- How the client was introduced to their lawyer;
- The dates the client met with their lawyer;
- What has been communicated between the client and the lawyer, including methods of communication;
- Copies of communication and documents exchanged with the lawyer;
- The types of services provided by the lawyer; and
- Details of a retainer agreement as well as proof of payment.

While we do not have an indication on the pervasiveness of this practice, its occurrence at any point and on any occasion is of substantial concern to the bar. We understand that the Ministry is alive to the fundamental nature of solicitor-client privilege and the importance of having access to counsel, and has integrated education on these rights into the training of its staff members; however, in practice, there appears to be gaps in implementation as evidenced by the practice outlined above.

Solicitor-Client Privilege

Solicitor-client privilege is a substantive right with constitutional implications, and it applies as soon as a potential client takes the first steps to obtain legal advice from a lawyer in their professional capacity.¹ It also applies once a lawyer is given confidential information respecting a legal matter and attaches to all communication made within the framework of the solicitor-client relationship.

Further, solicitor-client privilege protects a client against being compelled to disclose information covered by that privilege. The public's right not to be compelled to reveal communications with, and work done by, their lawyer is considered "a fundamental civil and legal right" in Canada.² An applicant who expressly waives the right to privilege must do so clearly, freely and having been informed of the consequences of waiver.

¹ *Descôteux v. Mierzwinski*, [1982] S.C.J. No. 43, [1982] 1 S.C.R. 860 at 876 (S.C.C.). See also *Rosenstein v. Plant*, [2010] O.J. No. 302 at para. 19, 80 R.F.L. (6th) 211 (Ont. S.C.J.).

² *Solosky v. Canada (1980)*, 105 D.L.R. (3d) 745, at 760 (Supreme Court of Canada)



The information and documents requested by PIU officials (as outlined above) undeniably fall within solicitor-client privilege and ought not to be requested, regardless of whether an individual is known to be represented or not. Any information or documents exchanged with a lawyer in respect to a legal matter, any legal advice sought/received, and the nature of the solicitor-client relationship, including the terms of that relationship, are privileged.

Even in instances where it is not known whether the individual is represented by a lawyer, investigators should proceed cautiously to ensure that their requests do not interfere with solicitor-client privilege. Further, we recommend that such requests include notice that information and communications with a lawyer are protected by solicitor-client privilege and the individual should consider consulting with a lawyer before disclosing information or documents that may be privileged. This is important because many applicants may be vulnerable parties, may be facing cultural or language barriers, or may not have a sophisticated understanding of their legal rights. They are engaged in a complex legal process that will likely have significant implications for their future, and as such may feel compelled to provide privileged information.

Given the importance of solicitor-client privilege, it is essential that PIU officials receive robust training that includes examples clearly setting out what is and what is not protected under that privilege.

Access to Counsel

A second issue emanating from the fact that such requests for information or documents have been posed directly to clients by the PIU, even though they are represented, is the right to access counsel.

Everyone is entitled to retain legal counsel. This permits an individual to not only be informed of their rights and obligations under the law, but more importantly, to obtain advice as to how to defend and exercise their rights (e.g. right to an interpreter). As such, it is crucial to ensure individuals have access to their legal representatives, who can counsel and guide their clients appropriately.

Although the PIU has the statutory authority to conduct investigations, it is inappropriate for investigators to request information and documents directly from an applicant when the official is plainly aware that the person is being represented by counsel. The government should never frustrate a person's choice to be represented or use its investigative powers to thwart access to legal



advice and assistance as it can lead to unnecessary and costly litigation, as well as prejudicial outcomes. Moreover, encouraging applicants to proceed without their lawyer is procedurally unfair and can amount to a breach of fundamental justice.

Therefore, it is critical that where an applicant is known to be represented by counsel, all communication be directed to counsel and not the applicant.

Conclusion

We appreciate that the PIU plays a vital role in maintaining the integrity of the immigration system by deterring fraud and targeting representatives engaged in unethical conduct. However, the right to access counsel and respect for solicitor-client privilege are fundamental and should not, under any circumstances, be compromised.

Given the importance of these principles, we ask that you please confirm that your training for PIU officers will include a comprehensive explanation of these essential elements, comprising not only awareness of the concepts, but a clear application of how they arise in the context of PIU investigations.

Based on the expertise of our members, we also welcome the opportunity to meet and discuss how training can be strengthened to incorporate targeted examples of how these fundamental rights can be breached.