



# IRPA section 91: Assisting people with immigration processes

## Background

Section 91 of the *Immigration and Refugee Protection Act (IRPA)* relates to *Representation or advice for consideration*. It states that representation or advice on immigration processes can only be given “for consideration” (i.e. in exchange for payment) if:

- The person is registered with a regulatory body, such as lawyers and immigration consultants;
- The person is working for an organization which has an agreement with the federal government to provide the services.

A similar provision exists in the *Citizenship Act* (section 21.1).

According to Immigration, Refugees and Citizenship Canada (IRCC), “for consideration” covers anyone who receives a salary for their work, including at an NGO, even if the services offered are free. IRCC states that their goal is to protect people and ensure that they get good immigration advice.

For several years, IRCC has been communicating its views on the s. 91 restrictions in various ways to NGOs across Canada, primarily focusing on NGOs who receive funding from IRCC for settlement services. Messages received by NGOs also seemed to vary by region. Information on the IRCC website was contradictory. Because of the very broad interpretation of “advice” promoted in some contexts by IRCC, some NGOs understood that they should stop offering any immigration-related services.

Since 2014, the CCR has on numerous occasions raised its concerns about the impact on NGOs of s. 91, as interpreted by IRCC.

In November 2018, the CCR surveyed members about their knowledge of, and experiences with, section 91. The responses, from a mix of NGOs funded and not funded by IRCC, confirmed that there was a wide range of understanding of how s. 91 applies to NGOs. About half of respondents said that the restrictions in s. 91 were creating gaps in services, and further respondents said that there would be gaps if NGOs followed a restrictive interpretation of s. 91. A few NGOs had little knowledge of the issue. The following paper is informed by the responses to the survey as well as discussions within the CCR.

IRCC has acknowledged that there has been confusion and that guidelines have not been very clear about what constitutes advice. In early 2019, IRCC therefore provided clarification so that stakeholders could understand what they can and cannot do, and worked to ensure that IRCC officers understand IRCC guidance. According to this new guidance, NGOs:

- May direct people to the IRCC website to find information
- May provide administrative support in completing IRCC application forms
- May provide support with translation of forms and transcription of responses
- May not provide advice on which immigration options to pursue
- May not provide advice on how to fill out forms.

## **CCR concerns**

This paper summarizes the CCR's ongoing concerns about IRCC's interpretation of IRPA s. 91 as it applies to NGO workers.

### **1. Impact on most vulnerable**

Our concerns relate primarily to the impact on the most vulnerable newcomers – those who are low-income and who have no access to legal aid and no money to pay for a lawyer or registered consultant.

If everyone had access to good quality, affordable and comprehensive legal advice and representation, NGOs would not be involved in the same way in supporting people in navigating their immigration issues. However, this is certainly not the case. NGOs play a vital role in filling the gaps for vulnerable people and protecting them from exploitation.

Among the people who regularly rely on NGO assistance are:

- refugee claimants needing assistance with applications for work permits.
- recently resettled refugees who need to apply to reunite with immediate family members through the One Year Window.
- people who have been trafficked in Canada and who need to apply for a Temporary Residence Permit.
- migrant workers renewing their work permits.
- women who have left an abusive relationship.

NGOs regularly assist people with various immigration processes, help them with filling in forms, direct them to reliable legal information and alert them when it would be particularly important to seek legal representation.

### **2. Impact on racialized people, especially women**

Racialized people – and especially women of colour – are over-represented in poverty in Canada and therefore often rely on NGOs for assistance with immigration matters.

Racialized women are thus disproportionately impacted when NGOs withdraw from assisting people with immigration processes.

### **3. Legal aid: inadequate and precarious**

In principle, legal aid should be available for people who do not have the means to pay for a lawyer or registered consultant.

In practice, however, legal aid is often not available for representation and advice in immigration processes. There is a huge variation in what legal aid coverage is available across Canada.

Some provinces have no legal aid coverage at all for immigration matters. Even in the areas with the most expansive coverage, many – if not most – of the services with which NGOs help newcomers are not covered by legal aid.

Generally, legal aid is limited to specific immigration processes, such as refugee claims and detention reviews. Legal services may be available in some situations after a mistake has been made (e.g. a person misses a deadline, forms were improperly filled) – ironically, people who have been assisted by NGOs may have less need for legal interventions.

Even where legal aid is available, the low financial cut-offs mean that people with a very modest income, including the working poor, do not qualify.

Some community legal clinics in Ontario provide immigration and refugee services, but many do not: often NGOs are the only ones in the local area that provide such assistance. Even if a clinic offers immigration services, these may not include the specific services needed. There may also be long delays before a person can be seen by a clinic.

As well as being inadequate, legal aid is precarious, as we have recently seen in Ontario.

#### **4. IRCC is contradictory**

In addition to the contradictory messages on their website and other information, IRCC is contradicting their messaging about s. 91 by repeatedly referring individuals for services at NGOs. For example, IRCC and the Canada Border Services Agency (CBSA) refer refugee claimants to NGOs for help with filling out forms. Similarly, IRCC is fully aware that NGOs are working with migrant workers and caregivers to assist them in their immigration processes. Some NGOs are both referred clients by the CBSA and IRCC, and told by their funding agent at IRCC not to get involved in immigration processes.

#### **5. Need for assistance in navigating the system**

IRCC's proposed distinction between allowable support and impermissible "advice" does not reflect the kind of support people need to navigate the immigration system.

IRCC accepts that NGOs can assist clients by pointing them towards the website and providing help with translation and transcription, as well as administrative support, such as use of a computer. However, the reality of the immigration system is far too complex for this type of assistance to be meaningful in most circumstances. Newcomers need "systems navigation" which includes interpreting the bureaucratic information to the client's context, navigating online portals, and understanding constantly changing forms and the implications of certain questions. This information is often difficult to understand for educated Canadians and those who are fluent in English or French, let alone newcomers with multiple barriers.

For example:

- A person recently resettled as a refugee won't generally know that they can apply for certain family members through the One Year Window: this is information that an NGO worker will regularly provide. Take for example a Government Assisted Refugee (GAR) woman who has had little or no education and is perhaps illiterate in her own language. She comes to an NGO asking how to be

reunited with a family member. In most cases she will never have heard of the One Year Window, and it would be absurd to expect the NGO worker not to point her to this immigration option as the one that would most probably suit her situation. Nor is it realistic to think that she can navigate the One Year Window application on her own, with no more support than someone pointing her to the website and translating things for her. She cannot afford to pay for an immigration consultant or lawyer. We also note the apparent contradiction in messaging from IRCC, given that IRCC expects the settlement agencies it funds to support vulnerable GARs, including with processes that are essential to their successful integration, such as family reunification.

- A person without permanent status in Canada who has left, or is considering leaving, an abusive relationship will generally need someone to tell them about the new Temporary Residence Permit for victims of family violence. She will also need support in gathering and presenting the required evidence of the family violence. Women are over-represented in situations of violence, and women in such situations frequently lack the financial resources to pay for legal advice.
- Applying online for a work permit as a refugee claimant requires knowledge of many workarounds because the form is not adapted for claimants. NGOs have developed specialized knowledge of how to answer certain questions in order for the online application to succeed.
- Youth separated from family members are often particularly vulnerable and need support in navigating immigration processes. Racialized youth are over-represented in poverty.

We note that the need for NGO support with immigration processes has become greater as the government increases its use of technology and places more burden on applicants to complete processes on their own and online. These processes are not designed to facilitate things for the most vulnerable clients.

## **6. Immigration processes do not all need the same level of legal representation**

NGOs make distinctions between complex legal processes where legal representation is crucial (e.g. filling in the Basis of Claim process, or choosing between avenues to achieve permanent residence) and routine form-filling (e.g. work permit applications), where clients often need assistance navigating the complex and ambiguous questions.

This distinction is also made by some lawyers. Some legal clinics do not consider form-filling legal work and refer clients with such needs to NGOs with whom they have a relationship. Similarly, lawyers will often rely on NGOs to help with form-filling or simply tell their clients that it is not part of the services covered by legal aid.

As a result, NGO workers have developed expertise in certain processes. Lawyers in fact often turn to NGOs for advice on how to fill out some forms that they are unfamiliar with.

IRCC itself implicitly recognizes the distinction when they refer people to NGOs for assistance with forms.

## 7. Empowerment

Providing newcomers with full information about their options and exploring the options with them so that they can make a choice is an effective way to empower them. As such, it is a crucial way in which NGO workers support newcomers in their integration process, giving them the tools to navigate Canadian society.

## 8. Settlement and integration objectives

NGOs serving newcomers have a mandate to support their clients' settlement and integration, which includes helping them to navigate Canadian society and institutions. This means helping them navigate government processes related to health services, social assistance, identification, income tax, benefits, etc. If NGOs are prohibited from helping them navigate immigration processes, the goals of settlement and integration are undermined. It is also difficult for newcomers to understand why they should be denied support in this one area (often the most important area).

## 9. Role of NGOs as trusted intermediaries

Even where newcomers do have a lawyer or registered consultant, NGOs often play a crucial role in support of the legal process, by identifying situations where legal advice is necessary, making legal referrals and explaining the process in understandable ways (legal professionals aren't always good at explaining things). Because of their holistic approach, and in some cases because of an established relationship, people may be more comfortable discussing issues with an NGO worker than with the legal representative.

The Law Foundation of Ontario has commissioned research on the role of what they call “trusted intermediaries” (see the report: *Trusted Help: the role of community workers as trusted intermediaries who help people with legal problems*, Part 1 and Part 2.) They recognize that trusted intermediaries, which include NGO workers, “play an important role in helping people access justice and/or legal support.”

The report concludes:

*Community workers do a great deal to support people with legal problems, but they need clarity about the “grey zone” between legal information and legal advice. This is a critical gap in access to justice, and it has caused a chill among some community workers who are afraid to help for fear of falling on the wrong side of that grey zone. It is essential that workers understand the types of help they can provide and the limitations of their role. At the same time, they should be empowered to do what they can do to effectively support people with legal needs. In many cases, the help clients receive from a community worker is the only help they will get for their legal problems.<sup>1</sup>*

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<sup>1</sup> Law Foundation of Ontario, “Trusted Help: The role of community workers as trusted intermediaries who help people with legal problems”, Part 1, pages 4-5.

## **10. Exposing people to exploitation and bad advice**

Restricting NGOs from providing support with immigration processes without ensuring that legal representation is available makes the most vulnerable people, who are often racialized people, even more exposed to incompetent or unscrupulous advice.

NGOs do indeed sometimes make mistakes but declining to offer services doesn't necessarily save clients from errors. Instead, the result is often that more errors are made when newcomers are forced to do the processes by themselves, or when they turn to well-meaning but unqualified friends or community members with no knowledge of the area.

In other cases, newcomers turn to desperate measures to find the money to pay a lawyer or consultant, such as going without food.

These situations of desperation are also exploited by unscrupulous individuals who take money for bad (or no) services.

## **11. Incoherence of restricting NGO workers based on salary**

IRCC's position is that s. 91 exists in order to protect people from getting bad advice. The provision, however, only applies to individuals drawing a salary for their work. Non-salaried individuals are not covered, since they cannot be interpreted to be acting "for consideration". This leads to the perverse situation that trained and experienced paid NGO staff are prohibited from assisting clients, but volunteers and unpaid interns at an NGO can legally provide the services. This contradicts the stated goal of ensuring people get good advice.

## **12. Impact on NGOs**

Many NGOs are struggling with the dilemma created by IRCC's interpretation of s. 91. Do they continue to serve the needs of the clients by (quietly) offering services that probably go beyond the unrealistic limits set out by IRCC? Or do they respect IRCC's guidelines, potentially leaving clients without necessary services?

A few organizations who have stopped offering immigration support say that they can refer their clients to other satisfactory solutions.

But other NGOs report that they are overwhelmed by the demands of people who come to them needing services because NGOs in their region have decided not to offer immigration support. Because IRCC has focused its communications regarding s. 91 on NGOs funded by IRCC, those NGOs have tended to be the ones withdrawing from providing free immigration assistance. This has increased the pressures on other NGOs, most of which have far fewer resources than the IRCC-funded agencies.

For IRCC-funded organizations, they are placed in the uncomfortable position of being funded to support newcomers' settlement and integration, but being told that they must not provide services that they know are crucial to newcomers' settlement and integration.

IRCC has not provided NGOs with the resources to do ongoing professional development for their staff, including legal training to ensure the staff are knowledgeable and current on the many changes in refugee and immigration procedures. If the objective is to ensure newcomers receive good advice on immigration processes, providing resources for training would be an important contribution.

The chill imposed by the s. 91 interpretation also impedes efforts to work towards high quality services. NGOs cannot easily and openly discuss how best to improve the quality of services related to immigration processes when the government is questioning the legality of these services.

### **CCR position**

The CCR takes the position that the words “for consideration” in IRPA s. 91 should be interpreted to refer to the payment of a fee for “representation or advice” rather than to the salary of an employee of an NGO, where the NGO is not taking a fee for the service.

The CCR takes seriously the need to ensure people served by NGOs are not misled: this would be best achieved by NGOs instituting expectations of quality services, and having complaint mechanisms.

