

May 21, 2019

By email: soci@sen.parl.gc.ca

The Honourable Chantal Petitclerc, Senator
Chair of the Standing Senate Committee on Social Affairs,
Science and Technology
The Senate of Canada
Ottawa, Ontario K1A 0A4

Dear Senator:

Subject: Bill C-97, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures

On April 8, 2019, the Honourable Bill Morneau, Minister of Finance (Canada), introduced Bill C-97, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures (“the bill”), in the House of Commons. The Barreau du Québec has read the bill with interest and is submitting its comments on the proposed legislation governing immigration and citizenship consultants, the new ground of ineligibility for refugee claims, and the omnibus legislation.

1. Creation of the College of Immigration and Citizenship Consultants

Division 15 of Part 4 of the bill proposes to enact the *College of Immigration and Citizenship Consultants Act* in order to “maintain the integrity of Canada’s immigration and citizenship system.”¹ This legislation provides for a new self-regulatory regime for immigration and citizenship consultants. It provides that the mission of the College of Immigration and Citizenship Consultants is to regulate immigration and citizenship consultants in the public interest and to protect the public.

The Barreau du Québec notes that this is the third attempt to regulate immigration and citizenship consultants. For this reason, we find it useful to provide a brief history of regulatory efforts in this area. The debate surrounding the regulation of consultants goes back more than 20 years. The Barreau du Québec has regularly expressed its views on this issue, particularly since the establishment of the Advisory Committee on

¹ Clause 291.

Immigration Consultants in 2002,² which led to the creation of the Canadian Society of Immigration Consultants (CSIC) in 2003. Despite CSIC's creation, the public continued to lodge complaints about unacceptable practices by immigration consultants.

Noting that the regulatory regime for immigration consultants governed by CSIC fell short of CSIC's mandate to protect the public, in 2008,³ the Barreau du Québec intervened in a second study by the Standing Committee on Citizenship and Immigration to identify existing problems, particularly with respect to inadequate controls for immigration consultants. The Barreau du Québec then reiterated its recommendation that only lawyers be authorized to act as representatives in immigration cases in order to protect the public from the unscrupulous actions of certain immigration consultants.

In 2011, CSIC was replaced by the Immigration Consultants of Canada Regulatory Council (ICCRC), the national regulatory body designated by the Government of Canada to govern individuals who provide immigration, citizenship and international student advisory services. This was the second attempt to regulate consultants. ICCRC's mandate is to "protect consumers of immigration services through effective regulation of immigration and citizenship consultants and promotion of the benefits of using only authorized immigration representatives."⁴

Once again faced with a failure to oversee the work of consultants, the House of Commons Standing Committee on Citizenship and Immigration agreed to study the legal, regulatory and disciplinary frameworks governing and overseeing immigration consultants. In its June 2017 report,⁵ the Committee noted that there are a number of issues with the current framework and more remains to be done to ensure that individuals coming or immigrating to Canada do not fall victim to the abuses of unscrupulous consultants, and that the integrity of our immigration system is not diminished. The Committee recommended creating a new regulatory framework governing immigration and citizenship consultants and paralegals.

Clearly, the mechanisms put in place to date have not resolved the persistent problems and the public is still not adequately protected. The two successive self-regulatory organizations (CSIC and ICCRC) failed in their mission of protecting the public. However, the bill proposes essentially the same regulatory framework that has failed twice. The Barreau du Québec therefore reiterates the position it submitted to the Standing

² Brief from the Barreau du Québec to the Advisory Committee on Regulating Immigration Consultants, January 2003, online: <https://www.barreau.qc.ca/pdf/medias/positions/2003/200301-comiteimmigration.pdf> [IN FRENCH ONLY].

³ Letters from the Barreau du Québec to the Minister of Citizenship, Immigration and Multiculturalism and to the Standing Committee on Citizenship and Immigration, July 15, 2010, and April 9, 2008, online: <https://www.barreau.qc.ca/pdf/medias/positions/2010/20100715-consultants.pdf> [IN FRENCH ONLY].

⁴ ICCRC website, online: <https://icrc-crcic.ca/about-us/>.

⁵ Standing Committee on Citizenship and Immigration, *Starting Again: Improving Government Oversight of Immigration Consultants*, June 2017, online: <https://www.ourcommons.ca/Content/Committee/421/CIMM/Reports/RP9054995/cimmrp11/cimmrp11-e.pdf>.

Committee on Citizenship and Immigration⁶ that lawyers are in a very good position to act in immigration matters given their legal training, Code of Professional Conduct,⁷ trust accounts, professional liability insurance, Compensation Fund and the Syndic.

In addition, any breach of the duties and obligations of lawyers may be inspected and investigated by the Syndic, whether in Quebec or elsewhere in the world, and may result in various sanctions, depending on the seriousness of the offences found, ranging from a reprimand to the permanent suspension of the right to practice. These mechanisms have been in place since the introduction of the Quebec *Professional Code*⁸ and have proven their effectiveness in protecting members of the public who have dealings with members of the Barreau du Québec or the Chambre des notaires.

With regard to prevention, the Barreau du Québec has made some 60 hours of training courses available to its members practising immigration law as well as a guide to best practices in immigration law.⁹ As well, the Service de la qualité de la profession oversees the profession, such as by assessing lawyers' knowledge and skills as well as all aspects of practice.

The Barreau du Québec believes it is imperative that everything possible be done to protect the public interest. Immigration consultants deal with vulnerable clients, and the competence and integrity of those who represent them are critical. Furthermore, immigration law is vast and complex. In the absence of rules restricting the practice of immigration law to lawyers and notaries, the Barreau du Québec recommends placing anyone practising in this area under the authority of legislation governing the profession. Although this would require legislative amendments, it is entirely feasible for the Barreau du Québec and other provincial law societies to regulate immigration consultants, as is actually the case for paralegals in Ontario.¹⁰

2. New ground of ineligibility for refugee claims

Clause 306 proposes amending subsection 101(1) of the *Immigration and Refugee Protection Act*¹¹ (IRPA) to provide that if an asylum seeker previously made a claim for refugee protection to another country, this is a new ground of ineligibility:

“306 Subsection 101(1) of the Act is amended by adding the following after paragraph (c):

⁶ Letter from the Barreau du Québec to the Chair of the Standing Committee on Citizenship and Immigration, June 1, 2017, online:

<https://www.barreau.qc.ca/pdf/medias/positions/2017/20170601-encadrement-consultants-immigration.pdf> [IN FRENCH ONLY].

⁷ *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1.

⁸ CQLR, c. C-26.

⁹ Online: <https://www.barreau.qc.ca/media/1329/guide-droit-immigration.pdf> [IN FRENCH ONLY].

¹⁰ As of 2006, the *Law Society Act*, R.S.O. 1990, c. L.8, includes legal services provided by paralegals working independently, and the Law Society of Ontario regulates the training, competence and licensing of paralegals. Licensed persons are qualified as paralegal members of the Law Society; they must pay annual fees and take out liability insurance.

¹¹ S.C. 2001, c. 27.

(c.1) the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws; ...”

The Barreau du Québec is concerned about this change to the refugee determination system. IRPA already includes several grounds of ineligibility, such as where refugee status has been recognized by a country to which the applicant can be returned or where a previous claim has been rejected by the Immigration and Refugee Board (IRB).¹² The addition of this ground of ineligibility makes it impossible for a refugee claimant, who may be in need of Canada’s protection, to make a claim there once they have made a claim in one of the countries concerned. Currently, Canada has information sharing agreements with Australia, New Zealand, the United Kingdom and the United States.¹³

The Barreau du Québec is of the opinion that the proposed amendment could contravene the principle of non-refoulement provided for in the *Convention relating to the Status of Refugees*, to which Canada acceded in 1969¹⁴:

“Article 33. Prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

This general principle of international law applies to all, therefore to persons officially recognized as refugees as well as to those who are not. Apart from security requirements, it obliges states to provide protection to persons entitled to be recognized as refugees and aims to avoid their expulsion. Therefore, Canada must process any claim for protection made in Canada.

The persons affected by the proposed amendments will only have access to a Pre-Removal Risk Assessment (PRRA) application¹⁵ seeking protection from the Minister, meaning that they will not benefit from a hearing before a quasi-judicial tribunal. The PRRA process is outside of the IRB. In addition, persons who are not first-time applicants and late applicants will not be able to obtain a work permit while their applications are

¹² IRPA, s. 101(1).

¹³ James Cox, *Canada and the Five Eyes Intelligence Community*, Canadian Defence & Foreign Affairs Institute, December 2012, online: <https://rinj.press/wp-content/uploads/2018/12/Canada-and-the-Five-Eyes-Intelligence-Community.pdf>.

¹⁴ July 28, 1951, 189 U.N.T.S. 137 (entry into force: April 22, 1954), online: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx>.

¹⁵ IRPA, ss. 112-114.

being processed.¹⁶ Persons whose PRRA applications are approved will be able to remain in Canada, but the acceptance rate for these applications is very low.¹⁷

The Barreau du Québec is concerned that Canada may end up delegating its responsibility to a third-party government even though refugee determination processes are not the same from one country to the next. Even if the system may be essentially the same from one country to another in some cases, this does not mean that the courts will have the same interpretation of the applicable acts and regulations. Canada has developed expertise and detailed analysis in certain sectors over the years. There is an understanding by Canadian institutions of the dangers in some countries of origin. This way of analysing cases is not necessarily shared by the authorities in other countries. This particular expertise in refugee matters cannot be drawn upon in the cases in question.

In addition, even if an individual has their claim rejected by the third country, they will not be able to make a claim in Canada. The asylum process in Canada will not be open to an applicant who makes a claim to one of the third countries, regardless of the outcome of that claim. At a minimum, an applicant whose claim is rejected by a third country should be able to make a claim in Canada.

3. Clauses 302 and 303

The Barreau du Québec believes that the wording of clauses 302 and 303, which deal respectively with restrictions on applications for temporary residence permits and on humanitarian and compassionate considerations, should be amended. Proposed IRPA paragraph 24(4)(a) and subparagraph 25(1.2)c(i) should be amended to replace “and” with “or” since there are situations where “and” does not apply. There is not always an application for judicial review. The “or” includes the “and” in this kind of sentence:

“302 ...

(2) Subsection 24(4) of the Act is replaced by the following:

Restriction

(4) A foreign national whose claim for refugee protection has not been allowed may not request a temporary resident permit if less than 12 months have passed since

(a) the day on which their claim was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review; or...

¹⁶ Immigration and Citizenship, *Guide 5523 – Applying for a Pre-Removal Risk Assessment*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5523-applying-removal-risk-assessment.html>.

¹⁷ Acceptance rates for the PRRA Program between 2007 and 2014 ranged between 1.4% and 3.1% : Immigration, Refugees and Citizenship Canada, *Evaluation of the Pre-Removal Risk Assessment Program*, April 22, 2016, online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/removal-risk-assessment-program/prra.html#f4-6>.

303 Subsection 25(1.2) of the Act is amended by striking out “or” at the end of paragraph (b) and by replacing paragraph (c) with the following:

(c) subject to subsection (1.21), less than 12 months have passed since

(i) the day on which the foreign national’s claim for refugee protection was rejected or determined to be withdrawn – after substantive evidence was heard – or abandoned by the Refugee Protection Division, in the case where no appeal was made and no application was made to the Federal Court for leave to commence an application for judicial review, or ...”

4. Major amendments to corporate law

The bill proposes several major amendments to the *Canada Business Corporations Act*,¹⁸ including an attempt to codify the principles that allow directors, when discharging their duty to act “with a view to the best interests of the corporation” pursuant to paragraph 122(1)(a) of the CBCA, to consider a number of factors, including the interests of shareholders, employees, retirees and pensioners, creditors, consumers and governments; the environment; and the long-term interests of the corporation.

The factors identified by the bill are taken from those identified by the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise*,¹⁹ while adding new ones. The Barreau du Québec wonders whether there is any intention to modify the applicable criteria, since “the legislator does not speak in vain.”²⁰ These amendments are likely to give rise to difficulties in their interpretation and to raise legal issues.

Although introducing the proposed measures into the CBCA may be desirable, this requires extensive analysis to assess all the impacts on the corporations involved. Given some complex measures, this requires appropriate consultations that are not possible in an omnibus bill. The Barreau du Québec is therefore concerned to see this part of the bill move forward without any consideration essential to a proper understanding of all the issues and impacts.

If Parliament’s intent is to have the CBCA, as is the case in many U.S. states (including New York²¹ and Pennsylvania²²) or in the UK with the *Companies Act 2006*,²³ include a constituency statute expressly conferring on directors the right to take into account the interests of “stakeholders” other than shareholders in their decision-making, it would be appropriate to conduct a thorough comparative analysis of the various precedents offered by these jurisdictions before proposing the text of the new subsection 122(1.1) of the CBCA.

¹⁸ R.S.C., 1985, c. C-44 (“the CBCA”).

¹⁹ [2004] 3 S.C.R. 461.

²⁰ This principle of statutory interpretation was recognized for the first time by the Supreme Court of Canada in *A.G. (Que.) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831 and restated a number of times in various areas of law such as bankruptcy and insolvency (*Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375) or recently in criminal law (*R. v. D.L.W.*, 2016 SCC 22).

²¹ N.Y. CONS. LAWS BSC § 717.

²² PA STAT. tit. 15, § 1715.

²³ 2006, c. 46 (U.K.).

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Given the size and complexity of omnibus bills and their impact on several existing laws, studying them poses a major challenge for stakeholders. However useful they may be in terms of legislative technique, omnibus bills can have the practical effect of bypassing the usual legislative process and diverting the attention of MPs, and civil society, from certain measures, thereby reducing the possibility of genuine democratic debate on them.

Yours sincerely,



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