

May 7, 2010

Mr. David Tilson  
Chair of the Standing Committee on Citizenship and Immigration  
131 Queen St., 6th floor  
House of Commons  
Ottawa, Ontario K1A 0A6

**Subject: Bill C-11 - An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act**  
**Our file: 26450-D005 147391**

Dear Mr. Tilson:

The Barreau du Québec wishes to submit its main comments on Bill C-11, An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act. The proposed reform of the refugee determination system is important because it would affect tens of thousands of refugee protection claimants every year.

The huge backlog of refugee protection claims and the average waiting time of 19 months before a claim is heard by the Immigration and Refugee Board are extremely problematic. On the question of the backlog, it is important to note that it is not solely the result of a high number of claims, it is also a result of the fact that there are not enough Board members. As pointed out by the Auditor General of Canada in her March 2009 report, “[t]he high number of Board member vacancies at the IRB had a significant impact on the Board’s capacity to process cases on a timely basis.”<sup>1</sup>

The Barreau du Québec wishes to point out that this bill proposes positive measures in terms of a needed reform of the refugee determination process and that it expedites the processing of refugees and provides an appeal mechanism for refugee protection claims. The Barreau is pleased to see the major effort being made to try to achieve a balance between greater speed in processing and fair treatment of these refugees. However, this bill still raises some major concerns. Some aspects of it need to be reviewed to avoid the possibility that it will have harmful effects on a vulnerable population.

---

<sup>1</sup> Report of the Auditor General of Canada, March 2009, paragraph 2.102.  
[http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200903\\_02\\_e\\_32289.html#hd5p](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_02_e_32289.html#hd5p)

- Expedited processing

The Barreau du Québec is particularly concerned about some of the time limits proposed in the bill. In the government's proposal, the interview before the Immigration and Refugee Board would be held within eight days, and the hearing would be 60 days later.

The Barreau proposes four weeks rather than eight days, for the information-gathering process. Four weeks is the present deadline for the personal information form, and that allows for a more reasonable time to retain counsel and instruct counsel properly in order to obtain the necessary advice. There has to be enough time to enable refugees to find competent counsel, obtain evidence from their country of origin, apply for legal aid, and so on. The lawyers then have to prepare so they can advise and represent their clients properly, by reviewing the files and assembling the relevant evidence.

The bill also provides that the first hearing before the Refugee Protection Division will take place in two months. That deadline is certainly not an acceptable solution to the Barreau, which would advocate four months instead. That time would allow for proper preparation and representation, in addition to making judicious use of judicial resources, by avoiding repeated adjournments. If there are flaws in the first hearing, the entire system could be derailed.

The Barreau firmly believes that the system will not function effectively if there are no competent lawyers on the case from the start, and given the situation refugees are in, it is imperative that time be allowed for finding and instructing competent counsel, which will facilitate the conduct of the case.

- Decision-makers

Under the bill, decisions in the first instance will be made by public servants. The Barreau du Québec is of the opinion that these first instance decisions should at no time be the exclusive purview of public servants. First, the Barreau is of the opinion that appointments should be based on competence and merit only, the pool of potential candidates should not be limited to individuals who have worked in the public service, and there should be no political interference. Every position should therefore be open to everyone, both in the public and among people working in various government departments. Second, independence and impartiality must be guaranteed.

The impartiality, independence and competence of the people who make the decisions are fundamental if the proposed system is to work. Accordingly, to guarantee the quality of the decisions at first instance, it is essential that the government provide more specific details concerning the guarantees of the independence, impartiality and competence of the front-line decision-makers proposed.

- Appeal mechanism

The Barreau du Québec is very pleased to see an appeal mechanism instituted for refugees, in the form of the new Refugee Appeal Division. Refugees would then have access to a genuine appeal mechanism based on the merits of the case, and the ability to hear fresh evidence that was not available at the original hearing, something the Barreau has been calling for for some time. Obviously, the Appeal Division will have to abide by procedural fairness and fundamental justice.

One major advantage of the Refugee Appeal Division is that it would develop expertise that the Federal Court does not have in determining refugee status. A body of case law could be built up that would provide uniformity and consistency in the decisions, in terms of analyzing the facts and interpreting the legal concepts in this area of law. This would certainly mean improvement in the justice system, and progress in the law. We might even consider that by building up a *corpus* of decisions, by bringing guidance and discipline to the process, the decisions of the first-level decision-makers might be sounder and be made more speedily, and the result might be a reduction in the number of cases in the Refugee Appeal Division and perhaps even in the Federal Court, since claimants would have less incentive to take their cases there.

The Barreau notes that appointments to the Refugee Appeal Division would be made by Cabinet. The Barreau reiterates that all partisan appointments must be avoided and appointments must be based on competence, if the proposed reform is to work. The Barreau suggests an appointment process organized as follows. The necessary competencies and qualifications would have to be included in the legislation. On that point, we propose that at least 50% of members be lawyers who have been members of a law society for at least 10 years. For the other 50%, candidates should at least be able to demonstrate knowledge and experience that is relevant to refugee status determination.

The selection and appointment procedure could be described as follows:

- (a) A public call for submission of applications listing the competencies and qualifications required;
- (b) Formation of a committee (a member from the government, the Chairperson of the IRB and a lawyer who is a member of the provincial bar) to review applications from candidates and select candidates to be interviewed;
- (c) A list drawn up by the committee with the names of individuals who are suitable for appointment as members of the Refugee Appeal Division;
- (d) Appointment of members by Cabinet from the names on the list only;
- (e) Members appointed for a five-year term with possibility of reappointment;
- (f) Reappointment on recommendation of a committee that reviews the files of members who request reappointment;
- (g) An opportunity for any member not recommended for reappointment to be heard on the reasons.

- Designated countries of origin

The Barreau du Québec is seriously concerned about the creation of a list of designated countries of origin, the criteria for the list, its objective, and the possibility that it will jeopardize protection for legitimate refugees. Bill C-11 allows the Minister to designate countries whose nationals would not have access to the appeal process. At first blush, the criterion of country of nationality is a shock in terms of access to justice and equality before the law, and the Barreau disagrees with this two-level appeal scheme.

The Barreau also wonders about the wording of the provision of the bill, which refers to “designated countries of origin” rather than “safe third countries”. The present wording seems to give the Minister too much discretion in relation to designation of countries.

However, to achieve the balance between speed and justice that is so much desired, if the proposed solution is to be considered, we should nonetheless be sure there are guarantees in place.

It is therefore crucial to ensure that there is a fair and transparent process for designating these countries. The committee advising the Minister on the designation of countries whose nationals do not have a right of appeal to the Refugee Appeal Division must at a minimum include independent experts with extensive expertise in human rights and humanitarian law, and representatives of the public. In addition, senior public servants should at no time have the last word on designating a country. They might be part of the committee, but without the right to decide regardless of the committee’s opinion to the contrary. The criterion used must be based solely on refugees’ human rights and be subject to no political considerations.

There should also be a clear statement in the legislation, and not by order-in-council or regulations, of the criteria that will guide the process of designating safe countries. The Barreau believes that once the criteria are known, they should be open to comment, since they are key to the process.

- Humanitarian and compassionate applications

The Barreau du Québec has serious concerns about the one-year prohibition on humanitarian and compassionate applications.

Under the bill, refugee protection claimants would be unable to make a humanitarian and compassionate application while the claim was pending and for 12 months afterward. In addition, factors relating to risks in the country of origin could not be raised in a humanitarian and compassionate application.

The Barreau wishes to point out that humanitarian and compassionate considerations exist to allow clemency to be applied in cases not provided for by the law. For example, an orphan arrives in Canada and their refugee protection claim is rejected. Should the child wait a year,

under this bill, before applying? Certainly that is not in the best interests of the child. We can think of another example: a child who is rejected and whose parent is accepted and is already a permanent resident. Under current Canadian law, the only way for the child to obtain permanent residence is by way of an application for permanent residence on humanitarian and compassionate grounds. Under the bill, would the child have to wait a year before making that application, when it takes two years to get an exemption and one year for residence? Certainly it is not necessary to have an additional one-year waiting period under the bill, since the waiting time is already long enough as it is. Once again, contrary to what the government is suggesting, humanitarian and compassionate grounds do not delay removal, since there is no regulatory stay. The stay comes in after the R233 visa exemption is granted. The Barreau therefore has serious questions about this prohibition on making humanitarian and compassionate applications.

The Barreau is of the opinion that humanitarian and compassionate applications are a necessary remedy, so that issues of human rights, children's best interests and potential risks to individuals can be examined.

In conclusion, the Barreau welcomes the important improvements to the existing system for refugees and the attention to striking a balance between faster and fair processing. However, this bill does raise some serious concerns.

We hope that these comments will be useful.

Sincerely yours,

[signed]

Pierre Chagnon  
Le Bâtonnier du Québec

/0209

Cc.: Hugues Langlais, Chair of the immigration and citizenship law committee of the Barreau du Québec  
Andrew Bartholomew Chaplin, Clerk of the House of Commons Standing Committee on Citizenship and Immigration