Bill 49, Ontario Immigration Act, 2015

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Submitted to: The Standing Committee on Justice Policy

Submitted by: The OBA, Citizenship and Immigration Section

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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The Ontario Bar Association ("OBA") appreciates the opportunity to make a submission to the Standing Committee on Justice Policy (the "Committee") regarding *Bill 49, Ontario Immigration Act, 2015* (the "Bill").

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 17,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators and other decision-makers with several policy initiatives each year - both in the interest of the profession and in the interest of the public.

This submission was formulated by the OBA's Citizenship and Immigration Law Section, which has approximately 300 members who represent virtually every stakeholder in the immigration system, including: those applying for skilled worker, permanent resident, refugee and citizenship status; spouses of Canadian citizens; and corporations and other Canadian employers who participate in skilled and temporary worker programs.

Introduction

Based on our members' knowledge of the applicable legal principles and their thorough understanding of the sector, we provide below input on the following issues:

1. The inappropriate imposition of penalties for unspecified transgressions on an absolute liability basis;
2. Unconstitutional Searches and Solicitor/Client Privilege;
3. A definition of "representative" that could be interpreted to infringe on the independent regulator's authority to license the practice of law in Ontario; and

4. Inappropriately broad discretion to refuse an application;

1. Absolute Liability for Administrative Monetary Penalties (AMPs)

The Issue

Section 26 of the Bill seeks to impose AMPs of up to $150,000, without a hearing, on an absolute liability basis, for as-yet unspecified infractions.

The section provides:

> **26.** (1) If the director is satisfied that a person or body has contravened or is contravening a prescribed provision of this Act or the regulations, the director may, by order, impose an administrative penalty against the person or body in accordance with this section and the regulations made by the Minister.

...

> (5) The amount of an administrative penalty shall not exceed $150,000 for each contravention on which the order for the penalty is based.
>
> (6) An order made under subsection (1) imposing an administrative penalty against a person or body shall be in the form that the director specifies.
>
> (7) The order shall be served on the person or body in the manner that the director specifies.

Absolute Liability

> (8) An order made under subsection (1) imposing an administrative penalty against a person or body applies even if,

(a) the person or body took all reasonable steps to prevent the contravention on which the order is based; or

(b) at the time of the contravention, the person or body had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent.

No hearing required

(12) Subject to the regulations made by the Minister, the director is not required to hold a hearing or to afford the person or body an opportunity for a hearing before making an order under subsection (1).

(13) The Statutory Powers Procedure Act does not apply to an order of the director made under subsection (1).

This provision raises several issues:

(a) Section 26 creates an absolute liability regime in which acting reasonably, honestly and with all appropriate care will still result in punishment. Absolute liability is rarely appropriate and in the context of the immigration process, it is particularly inappropriate. Several of the parties in the immigration process, such as lawyers, corporate directors and other employers must rely on information provided by third parties, including clients and job applicants. Reasonable care should be taken to ensure the *bona fides* of this information and the propriety of actions based on the information. However, where all reasonable care has been taken, it is contrary to the principles of fundamental justice to hold a lawyer, corporation or other employer, who is acting honestly, liable for mistakes that may have been due to necessary reliance on third parties. This is what the Bill seeks to do.

In addition to the legal implications of the absolute liability provisions, there are also negative practical implications. Based on their extensive experience with the sector, members of our Immigration Section are concerned that the threat of large fines for behaviour that is not intentional, or even culpable, will deter reputable organizations and individuals from participating in labour market immigration programs. Corporate directors will not be willing to take the chance of being fined despite doing everything they could reasonably do to ensure compliance with the legislation. While the provision is unlikely to deter bad actors who count on not being caught, it is likely to deter legitimate individuals and corporations who will no longer be able to count on their due diligence, honesty and reasonable approach to demonstrate their innocence;

(b) Also of concern is the fact that the full set of issues raised by the absolute liability provisions is not yet clear because the transgressions to which this regime will apply have not been specified in the Bill. Again, it would be preferable to have the applicable violations enumerated in the legislation in order to subject the full effect of the regime to legislative scrutiny. If, however, the transgressions are to be enumerated in regulations, there should be further consultation with the sector.

Section 29 of the Bill outlines an offence of misrepresentation (which is not subject to the AMP regime) but it is not clear whether similar transgressions will be prescribed under the AMP regime as well. Given the necessary reliance on third party information, explained above, violations of the legislation that involve misrepresentations of fact (both the offence in section 29 and in any prescribed violation subject to an AMP) should apply only to those who *knowingly* misrepresented facts. At an absolute minimum, a defence of due diligence must be available for those whose role in the immigration system involves relying upon, and passing on,

information provided by clients and other third parties. Incorrect information should also be material if it is to attract penalty; and

(c) As is the essence of AMPs, the right to a hearing and other basic elements of procedural fairness and natural justice outlined in the *Statutory Powers Procedure Act* are explicitly eliminated. The Bill does provide for an internal review process but the details of this process are unspecified. Given the high penalties being contemplated by the Bill, a fair process for an innocent party to exculpate herself should be outlined in the legislation so that the fairness of the process is subject to legislative scrutiny. At a minimum, such a process should be established by regulation after consultation with the sector.

Proposed Solution

In order to remedy the problems outlined above, the following changes to the Bill are recommended:

(a) Subsection 26(8) should be struck. In the case of parties, such as a lawyers and prospective employers, who, by necessity, rely on others to provide the relevant facts, reliance on information that is later determined to be false should only attract penalties (whether AMPS or penalties for breach of section 29) where a misrepresentation was made *knowingly*. At a minimum, the defences of due diligence and honest, reasonable mistaken belief should be preserved to avoid penalty in any circumstance contemplated by the bill.

(b) The transgressions that will attract the monetary penalties should be specifically enumerated in the legislation; and

(c) The process to allow for innocent parties to avoid punishment should be specifically outlined in the Bill. Saving which, consultation with the OBA Immigration Section and others should be undertaken in order to enshrine a fair regulatory process.

2. Warrantless Searches of Law Offices in Violation of Solicitor Client Privilege

The Issue

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[1]. This right, called "solicitor-client privilege" and "litigation" or "work product privilege", exists to protect the public. In fact, it also protects the effective operation of businesses and the justice system. If individuals or organizations cannot be certain that their legal advice will be kept confidential, they may not seek crucial advice and poor decisions will result.

The importance of this privilege is well recognized in the legal rules that set strict parameters around the state's authority to search law firms. Prohibitions and restrictions on the search of law firms are, in fact, more stringent than those applied to searches of a dwelling. Among other limits, a warrant should be required to search a law firm in the contexts contemplated by the Bill and execution of that warrant should be very carefully prescribed. For example, all documents obtained from law firms must be sealed and privileged information cannot be viewed[2].

[1] *Solosky* v. *Canada* (1980), 105 D.L.R. (3d) 745, at 760 (Supreme Court of Canada)
[2] *R. v. Lavallee, Rackel & Heintz* 2002 SCC 61, at para. 49. See further requirements from this decision in Appendix I

Contrary to the law of privilege as it relates to searches in this context, the Bill essentially provides for warrantless searches of law firms and does not provide for any rules on the execution of the search. The relevant provisions are as follows:

> **23.** (1) An inspector may conduct an inspection in accordance with this section for the purpose of ensuring compliance with this Act and the regulations.
>
> Power to enter premises
>
> (2) As part of an inspection, an inspector may, without a warrant or court order but subject to subsection 22 (4), enter and inspect, at any reasonable time, the premises of any of the following persons or bodies for the purpose described in subsection (1), except any premises or part of any premises that is used as a dwelling....
>
> 4. A representative.

A "representative" is defined in sections 1 and 14 of the Bill to clearly include lawyers:

Section 1 provides:

> "representative" means an individual who, for consideration, represents, assists or advises an applicant in connection with an application; ("représentant")

While even this general definition is clearly broad enough to include lawyers, the inclusion is made explicit in section 14, which provides:

> **14.** (1) No individual shall knowingly, directly or indirectly, act as a representative or offer to do so unless the individual is,

> (a) a member in good standing of a law society of a province or territory of Canada who is licensed to practise law as a barrister and solicitor;

In addition to failing to protect solicitor client privilege, the Bill subjects lawyers to significant risk if they exercise their ethical obligation to protect privilege. It is an offence under the Act to:

> (7) ... [obstruct] an inspection authorized by section 23 or an investigation authorized by section 24.....

Admittedly, section 23 of the Bill calls the search an "inspection." This may be a legitimate distinction in some contexts. However, in the context of this Bill and the immigration system generally, the "inspection" of a law office will be more in the nature of a search and will trigger the very concerns that the well-established rules regarding law-office searches are designed to address. In many if not most cases, issues around compliance with the legislation will involve reviewing information contained in client files. Unlike health and safety inspections, for example, where the issue often involves viewing physical operations and other factors in plain sight, inspections under this Bill will usually involve reviewing and even seizing documents pertaining to communications between lawyers and their clients and the work done by lawyers on the clients' behalves. Review of this information by state authorities is not permitted without a strictly tailored warrant. A lawyer would be bound by the Rules of Professional Conduct to refuse to provide an inspector with the documents requested. As a practical matter, there is inefficiency in a regime that sends inspectors to law offices when there is little if anything of relevance they will be permitted to review.

Proposed Solution

The following protections for solicitor client privilege must be added to the Bill:

(a) Subsection 23(2) should be amended to exempt law offices in addition to dwellings from the warrantless search:

(2) As part of an inspection, an inspector may, without a warrant or court order but subject to subsection 22 (4), enter and inspect, at any reasonable time, the premises of any of the following persons or bodies for the purpose described in subsection (1), except any premises or part of any premises that is used as a dwelling or as an office where a lawyer licensee of the Law Society of Upper Canada practices law.

(b) All law office entries by those who enforce this legislation should be with a warrant and should be conducted in accordance with the Law Society of Upper Canada's law office search guidelines and the Supreme Court of Canada's criteria for law office searches outlined in Appendix I.

(c) The Bill should be amended to preserve privilege, as follows:

> Nothing in this Act shall operate so as to require the disclosure of information that is subject to solicitor-client privilege, litigation privilege or settlement privilege.

3. Definition of Representative

The Issue

The Bill's list of permissible representatives appears to have been largely borrowed from federal legislation and has not been tailored for the provincial context. The Bill provides:

14(1) No individual shall knowingly, directly or indirectly, act as a representative or offer to do so unless the individual is,

(a) a member in good standing of a law society of a province or territory of Canada who is licensed to practise law as a barrister and solicitor;

(b) a student-at-law acting under the supervision of an individual described in clause (a) who is acting as a representative or who is offering to do so;

(c) a member in good standing of the Chambre des notaires du Québec who is licensed to practise as a notary;

(d) an individual, other than an individual described in clause (a), (b) or (c), who is a member in good standing of a law society of a province or territory of Canada or the Chambre des notaires du Québec and who is licensed to provide legal services, including a paralegal member of The Law Society of Upper Canada;

(e) a member of a body designated by a regulation made under subsection 91 (5) of the Immigration and Refugee Protection Act (Canada); or

(f) any other individual prescribed by the Minister.

Authorizing and restricting the practice of law in Ontario is the purview of the Law Society of Upper Canada, as the independent regulator. The Law Society has the exclusive jurisdiction to determine, for example, whether lawyers from other jurisdictions can practice here. While subsection 14(1) is not *designed* to interfere with that authority, it may impliedly do so -a person who is listed in the subsection but is not permitted by Law Society By-Laws to practice in Ontario may point to this legislative provision as implied authority to do so.

The subsection also uses language no longer used in Ontario, such as "member".

Solution

Section 14 should be amended to provide:

(1) No individual shall knowingly, directly or indirectly, act as a representative or offer to do so unless the individual is,

(a) ~~a member in good standing of a law society of a province or territory of Canada who is licensed to practise law as a barrister and solicitor~~ a Licensee of the Law Society of Upper Canada permitted by its by-laws to act as a representative in the circumstances;

(b) a student-at-law acting under the supervision of a Lawyer Licensee of the Law Society of Upper Canada ~~individual described in clause (a)~~ who is acting as a representative or who is offering to do so;

~~(c) a member in good standing of another law society who is permitted to act in Ontario by the Law Society By-Laws; the Chambre des notaires du Québec who is licensed to practise as a notary;~~

(c) an individual who is a licensee or member in good standing of a law society of a province or territory other than Ontario or of the Chambre des notaires du Québec and who is permitted to practice in Ontario under the Law Society of Upper Canada's by-laws; and

(e) a member of a body designated by a regulation made under subsection 91 (5) of the Immigration and Refugee Protection Act (Canada~~); or~~

~~(f) any other individual prescribed by the Minister.~~

4. Unlimited Discretion to Refuse Application - Rule of Law and Natural Justice

The Issue

The Bill provides that a director may refuse an application despite the fact that the application complies with the all of the criteria for admission set out in the legislative scheme. Subsection 16(4) provides:

> 16(4) Even if the director determines that an applicant meets the prescribed criteria, the director is not required to grant the application.

The ability to make a decision that is unrelated to legislative criteria is a violation of the rule of law. The director is essentially governed by no law in his or her decision making or, viewed another way, he or she is at liberty to ignore the provisions of the law in making a decision.

Ideally, the legislation should provide the decision makers and applicants with clear direction by enumerating all of the grounds on which an application might be refused. While some grounds for refusal may depend on shifting factors that are not tied to a specific individual, this does not mean the factors themselves cannot be enumerated. For example, Ontario's labour market requirements may need to be considered even where an individual is otherwise qualified for the program. While such requirements shift, it is still possible to enumerate "labour market requirements" as a factor the director is permitted to take into consideration in refusing an application.

The apparently limitless discretion would be somewhat curtailed by the implied requirement to act reasonably in the exercise of a statutory discretion. However, the duty to act reasonably provides only the back-end remedy of judicial review of the director's decision. The exercise of this remedy is costly for the individual and the systematic need to use this remedy adds to costs and delays in the justice system, with an attendant negative impact on access to justice. In addition, our

international reputation depends on the up-front transparency of our programs. The uncertainty yielded by a lack of transparency is inefficient, costly and could deter applications by those workers Ontario is seeking to attract.

Proposed Solution

The grounds on which an application will be determined should be enumerated in the Bill, even if the data to be considered under those grounds shifts from time-to-time. Alternatively, the Bill could refer to regulations and policies that must be followed in this regard. At a minimum, the decision makers should be explicitly directed to exercise their duty to act reasonably and trained in terms of what that duty entails and how it will be interpreted. If there are factors that are not enumerated in the Bill, they should be made readily available to potential applicants and counsel.

Conclusion

Once again, the OBA very much appreciates the opportunity to provide comments to the Committee on the Bill and would be pleased to answer any questions that Committee members may have. We look forward to participating in continued consultations as regulations are drafted and the Bill, if passed, is implemented.

Appendix I

Principles for Law Office Searches Established by the Supreme Court of Canada

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.

2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.

3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a

reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.