



LE PROTECTEUR DU CITOYEN

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BRIEF PRESENTED BY THE QUÉBEC OMBUDSMAN
BEFORE THE COMMITTEE ON INSTITUTIONS
AS PART OF THE SPECIAL CONSULTATIONS AND PUBLIC HEARINGS
ON BILL 64: AN ACT TO PROMOTE ACCESS TO JUSTICE IN FAMILY MATTERS

Québec, May 22, 2012

THE QUÉBEC OMBUDSMAN – Status, mission and action

The Québec Ombudsman ensures that the rights of citizens are upheld by intervening with departments or agencies of the Government of Québec, or the different institutions in the health and social services network, to seek corrective action in situations that cause – or could cause – harm to individuals or groups. Appointed by elected members from all political parties and reporting to the National Assembly, the Ombudsperson acts independently and impartially, whether in dealing with complaints or on his or her own initiative.

Under section 27.3 of the *Public Protector Act*, the Ombudsman is authorized to draw the attention of the chief executive officer of a public body or the Government to the necessity of such legislative, regulatory or administrative reform as it deems to be in the public interest. In this context, the Québec Ombudsman not only reviews all bills and regulations tabled before the National Assembly or published in the *Gazette officielle du Québec*, but notices of consultation issued by National Assembly committees.

It was from this perspective that the Québec Ombudsman reviewed Bill 64, *An Act to promote access to justice in family matters*, tabled on April 4, 2012 by the Minister of Justice.

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INTRODUCTION – Support for a long-awaited bill

The Québec Ombudsman has been bringing forth ideas about the review of support payments and calling for amendments in the area for many years. A special report submitted to the Minister of Justice in 1993 expressed a concern for streamlining the procedure for child support review or cancellation.¹ Over the last 15 years, the Ombudsman has submitted reports, briefs and letters reiterating the importance of simplifying the process for making child support changes, from the viewpoint of improving access to justice.² Several solutions were proposed, including the paths of legal aid, mediation and administrative review. The matter has been addressed in each annual report since 2006 of the Québec Ombudsman.³

During the past few months, the Québec Ombudsman has exchanged views on several occasions with representatives of the Ministère de la Justice (MJQ) and of Revenu Québec about desirable mechanisms other than using the courts to have support payments changed.

The tabling of Bill 64 currently under study is to be heralded, coming as it does partly in response to representations made by the Québec Ombudsman, and is a necessary, long-expected advance. The Québec Ombudsman is fully aware of the efforts that authorities and those in charge of the file at the Ministère de la Justice had to make to persuade people at different levels, most of them outside the Government. Their perseverance is noteworthy, as well as the priority given to the subject during the past year, not just in terms of speech but action as well.

Once the bill becomes law, Québec will have made up for lost time in simplifying access to justice in family matters. The possibility of setting up a service for adjusting child support similar to the one now proposed has in fact existed since 1997 under the *Divorce Act*.⁴ To date, there are six other provinces in Canada that provide this type of annual adjustment.⁵

It is worth remembering that the bill comes in a series of other advances in support obligations. The establishment in 1995 of a support payment collection system under the *Act to facilitate the payment of support*⁶ (AFPS), the defiscalization of support payments and the coming into force of the *Regulation respecting the determination of child support payments*

¹ QUÉBEC OMBUDSMAN, *Les enfants et la pension alimentaire – Propositions de réforme*, November 4, 1993.

² QUÉBEC OMBUDSMAN, *Le régime de perception des pensions alimentaires : Des problèmes maintenant réglés, des problèmes qui perdurent*, August 31, 1997; QUÉBEC OMBUDSMAN, *Commentaires sur le projet de loi n° 21 – Loi modifiant le Code civil du Québec et le Code de procédure civile en matière de fixation de pensions alimentaires pour enfants*, March 23, 2004.

³ 2006-2007 Annual Report, p. 70; 2007-2008 Annual Report, p. 61; 2008-2009 Annual Report, p. 129; 2009-2010 Annual Report, p. 50; 2010-2011 Annual Report, p. 43.

⁴ R.S.C., c. D.-3.4, amended by the Act to amend the *Divorce Act*, the *Family Orders and Agreements Enforcement Assistance Act*, the *Garnishment, Attachment and Pension Diversion Act* and the *Canada Shipping Act*, 1997, c. 1, s. 10.

⁵ Newfoundland, Prince Edward Island, Manitoba, Alberta, British Columbia (pilot project) and Nova Scotia (pilot project).

⁶ R.S.Q., c. P-2.2

and the Child Support Payments Table, on May 1, 1997,⁷ and the provision of family mediation since September 1, 1997, are all reforms that have helped make life easier for former spouses, in the best interest of their relationship with their children.

That being said, access to justice remains a real issue, particularly in family matters. Year after year, the Québec Ombudsman receives numerous complaints concerning the obligation of systematically having recourse to the court in order to have support payments reviewed or cancelled.⁸ Bill 64 brings a solution for some of those difficulties; however, in the opinion of the Québec Ombudsman, some provisions ought to be made more specific or explained, which is what this brief addresses.

1. Problems faced by citizens

New social realities have led to procedures in family matters becoming increasingly litigious over the last several years, to an alarming degree. Parents change jobs, become self-employed, resume studies and opt for shared custody. There are many reasons for having support payments reviewed. According to data from Revenu Québec, the Direction principale des pensions alimentaires was notified of 31,832 rulings for changes during the 2011-2012 fiscal year alone.

The judicial review of a support payment entails great costs, both for the debtor and the creditor, not to mention the lengthy wait in many cases. In the interim, Revenu Québec cannot suspend, reduce or cancel a support payment as it must carry out the court's decision. Many support review situations are nonetheless straightforward and do not really require the court's appraisal.

The current system's rigidity and great complexity have significant impacts on both citizens and the public administration, as can be seen from the following illustrations.

1.1 Income changes affecting the debtor or the creditor

Each time a debtor or creditor of support undergoes a change in income following a promotion, change of job or loss of employment, a drop in work time, a strike or lockout, the amount intended for child support may warrant modification. In the present state of affairs, the parties facing such a situation must submit a motion before the Superior Court to have the amount of support that was set and usually collected by Revenu Québec amended. By instituting an administrative procedure for recalculating child support in certain situations, Bill 64 makes revising payments easier. This is a considerable improvement that will make justice in family matters speedier and more accessible.

⁷ Under the *Act to amend the Civil code of Québec and the Code of Civil Procedure as regards the determination of child support payments*, 1996, c. 68. Assented to December 23, 1996. The Act and its implementing regulation came into force on May 1, 1997.

⁸ More than 65 complaints have been filed since 2005 on the subject.

1.2 Child custody and other consensual changes

For various reasons, a child or adolescent may go live with the parent who does not have legal custody. When this parent is the one required to pay support for the benefit of the child, he or she must return before the court to put an end to the obligation, even if the creditor agrees that the payments should stop. Revenu Québec must currently maintain the withholding or garnishing of the debtor's income until a new court decision is issued.

The situation seems even more unreasonable when the court grants temporary custody of a child under the *Youth Protection Act* to a third party such as a foster family or a specialized centre. In this event, not only must the debtor continue to pay support to the creditor who no longer provides care to the child, but the requirement extends to assuming the cost of lodging for that child. In the absence of a new Superior Court ruling, Revenu Québec will not suspend the withholding.

There are also huge obstacles where the Ministère de l'Emploi et de la Solidarité sociale (MESS) is subrogated to the rights of the support creditor. A debtor who wants to petition the court to update his or her child support obligation must get MESS consent to temporarily suspend the collection of arrears, which, in the case of low-income people who do not qualify for legal aid, may prove essential in order to be in a position to pay the necessary lawyer's fees to undertake the procedure.

Bill 64 proposes to provide parents with the service of a lawyer, on payment of certain fees, to draft a final settlement covering child custody or support obligations. The possibility of having access to a lawyer's services would be a significant advance for parents who are not currently financially eligible for legal aid.

1.3 Inheritance

When a child support debtor dies leaving arrears as inheritance, Revenu Québec claims these from the estate, under current law. A creditor sometimes might want to relinquish the arrears in light of being the eventual beneficiary of money from the estate. Such beneficiary would, however, need a court ruling to cancel the arrears.

1.4 Recovery of security

People who have been exempted under the *Act to facilitate the payment of support* are also required to have recourse to the court.

To recover the amount deposited as security on applying for an exemption, a debtor must get a judgment that cancels the support. Considering that the average monthly support paid is currently \$443 in Québec, not many debtors will ever recover their deposit, with fees and costs higher than the amount of security that could be returned.

Bill 64 allows Revenu Québec to remit the full amount of security to the debtor with the sole consent of the support creditor, on condition the exemption was awarded at least two years beforehand. This addition settles part of the question, without going so far as to cancel the support obligation.

The seemingly endless complexity of these examples points to the diversity of existing cases and the need to take the fact into account. Once Bill 64 becomes law, amending child support should be possible at a lower cost, both for citizens and for authorities, by taking streamlined steps that produce results within a timeframe the Québec Ombudsman hopes will prove reasonable.

2. Comments of the Québec Ombudsman

The comments of the Québec Ombudsman on Bill 64 concern the following five aspects:

- Regulatory powers;
- SARPA's power to act and administrative justice;
- Bringing SARPA under the jurisdiction of the Québec Ombudsman;
- Cancellation of support for a financially independent adult child;
- Fees.

2.1 Regulatory powers

Several elements in the Bill 64 remain to be specified by Government regulation. These are the main ones, some of which concern the administrative framework of the *Service administratif de rajustement des pensions alimentaires pour enfants* (SARPA):

- Situations eligible for SARPA services (s. 2);
- Information that may be required from parents (s. 4, 1st par.);
- SARPA's determination of a parent's income in the event of refusal or neglect to provide information or a document that would establish his or her annual income (s. 4, 3rd par.);
- Information that SARPA can check with another person or a department or organization (s. 7);
- Recalculation retroactive to the date of an application (s. 9);
- The form of the recalculation notice and attached documents (s. 10);
- Fees payable for an application for recalculation and the cases where the fees may be reimbursed (s. 18);
- The manner in which legal aid applications must be presented for legal services described in paragraph 1.1 of section 4.7 of the *Act respecting legal aid and the provision of certain other legal services* (s. 33);
- The extent of legal aid costs for legal assistance for the review of a judgment and when they become payable (s.36).

At the outset, it must be emphasized that the working document distributed by the Ministère de la Justice to participants in these special consultations is a draft of what Bill 64's implementing regulation could look like. While the Québec Ombudsman is aware that the document has yet to be completed, it wishes to emphasize that such initiatives should take place more often, as the transparency allows National Assembly committee members, participants in those committees and, finally, MNAs to make a more in-depth analysis of the legislation brought before them for approval.

The Québec Ombudsman's analysis is that certain aspects currently slated to be dealt with in regulations should rather be part of the bill's text. More specifically, these matters concern situations of eligibility for SARPA services, and the conditions that must then be met (s. 2 of the bill), the kinds of situations where SARPA could, without parental consent, conduct checks with persons, departments and organizations of the accuracy of information or documents provided before recalculating child support (s. 7), and the cases and terms under which a SARPA recalculation could apply retroactively (s. 9).

While recognizing the relevance of granting SARPA the authority to seek information from third parties in the name of effectiveness and due diligence in respect of the applications that the service will be called upon to process, the Québec Ombudsman's view is that the nature and impact of these aspects on people affected warrant a stability and clarity that a statute can better guarantee than a regulatory text can.

Sections 3 and 84 of the *Act respecting parental insurance* (R.S.Q., c. A-29.011), for which there is an enabling regulation, could serve as inspiration for legislators, with regard to the possible inclusion of elements provided in sections 2 and 7 in Bill 64 rather than in an enabling regulation.

Considering the foregoing, the Québec Ombudsman recommends:

Recommendation 1

That the aspects covered by sections 4, 7 and 9 of Bill 64 be incorporated into the statutory text of the bill rather than in an enabling regulation.

2.2 SARPA's power to act and administrative justice

As SARPA's creation introduces an administrative procedure for the recalculation of support payments, the principles of procedural fairness must apply in order to ensure citizens of the effectiveness and quality of a service which will be respectful of their rights. The bill assigns certain powers to the officials who will be processing the applications for support recalculation. In certain respects, these powers could be strengthened so that SARPA acts in a truly effective way. In addition, the exercise of those powers must be clearly delineated to protect the rights of the parties.

Since SARPA's administrative service will be made available to citizens, and since the Commission des services juridiques, the entity responsible for its operation, is not subject to the *Act respecting administrative justice*,⁹ the Québec Ombudsman holds the view that SARPA should be made subject to sections 1 to 8 of the *Act respecting administrative justice*, which would ensure respect for the principles of procedural fairness. This covers in particular the duty to act fairly [s.2], as well as ensuring that procedures are conducted according to flexible rules devoid of formalism [s. 4 (1)], that citizens have the opportunity to provide information and complete their files [s. 4 (2)], that diligence applies in the processing of applications and decisions are clearly conveyed [s. 4 (3)], that reasons are given for all unfavourable decisions and that non-judicial recourse available under the law is indicated [s. 8]. In the opinion of the Québec Ombudsman, making SARPA subject to these sections would better guarantee citizens have the benefit of a service that is effective, accessible and respectful of their rights.

More precisely, whereas section 3 of the bill states that "SARPA must diligently examine all applications," the Ministère de la Justice has already explained to the Québec Ombudsman that a specific timeframe was not set since officials will be awaiting the receipt of information to come from parents, other persons or organizations. The Québec Ombudsman believes on the contrary that a time limit should be prescribed for making a decision on an application for recalculation, once the necessary information has been obtained.

It must be emphasized that time limits are very important in the recalculation of support, as the new amount of a payment will apply retroactively as of the application date, or even as of a prior date not more than one year earlier (sections 9 and 38 of the bill). Therefore, each time support is recalculated, arrears due the creditor or a recoverable overpayment for the debtor will automatically come into being. For this reason, the length of time allowed for making a decision must be kept to a strict minimum.

Certain other measures could be taken to ensure the effectiveness and promptness of the administrative service, among them the reinforcement of SARPA's power to require information it needs to examine an application for recalculation and impose penalties for failure to abide by the requirement.

Under the bill, SARPA will be able to demand that parents provide information or documents.¹⁰ A consequence of a parent's refusal or neglect to provide information or a document, within 25 days of a request, SARPA will have the authority to establish the

⁹ R.S.Q., c. J-3.

¹⁰ S. 4, par. 1 of the bill: "If an application for recalculation is made by only one parent, SARPA may, as part of its examination, require the other parent to provide any information or document determined by government regulation, in accordance with the prescribed procedures."

amount of annual income.¹¹ The intent of the Ministère de la Justice is, in effect, to use the regulatory power under the last paragraph of section 4 to allow SARPA to index the income of the delinquent parent by 15%.

Nothing, however, in the bill makes provision for requiring a third party – the debtor’s employer, for example – to convey information needed by SARPA within a given period, or any penalty for failure to comply. In the opinion of the Québec Ombudsman, this obligation to provide SARPA with the documentation demanded, under penalty for failure to do so, should be included in the bill.

There is provision for verifying the accuracy of information with the persons, departments and organizations determined by regulation.¹² This verification authority does not set a response time limit on the person, department or organization. Moreover, there is no consequence prescribed for failure to respond, on the part of an employer, for instance.¹³

Accordingly, provisions should be incorporated in the text of the bill to strengthen SARPA powers to require that information be provided within a prescribed amount of time and penalties to ensure compliance. Further, so as to ensuring a parent’s right to being notified of a recalculation, sections 1 to 8 of the *Act respecting administrative justice* should be made to apply to SARPA. Finally, section 3 of the bill should set a time limit for SARPA to notify a parent of a recalculation.

Considering the foregoing, the Québec Ombudsman recommends:

Recommendation 2:

That Chapter I of Title I of the *Act respecting administrative justice* (R.S.Q., c. J-3) apply to the Service administratif de rajustement des pensions alimentaires pour enfants (SARPA).

Recommendation 3:

That section 3 of Bill 64 be amended to prescribe a maximum amount of time allowed for the examination of an application for child support recalculation once SARPA has received all the information it requires.

¹¹ S. 4, par. 3 of the bill: “If the parent refuses or neglects to provide, within 25 days following receipt of SARPA’s request, information or a document that would allow his or her annual income to be determined, that income is determined, for the purposes of this Act, in accordance with the rules prescribed by government regulation.”

¹² S. 7 of the bill: “SARPA may, without the parent’s consent, verify with the persons, departments and organizations determined by government regulation the accuracy of the information or documents that parent provided for the purposes of child support recalculation.”

¹³ S. 19 and s. 20 of the bill do provide for penalties, but in the view of the Québec Ombudsman, the fines (from \$500 to a maximum of \$5,000) prescribed in those sections cover only fraudulent or misleading statements and documents.

Recommendation 4:

That SARPA be given the power to demand that a third party provide information within a prescribed amount of time for the examination of an application for child support recalculation, under penalty in the event of failure to comply with this obligation.

The Québec Ombudsman underlines the importance of making provision for the necessary means and resources in instituting the new service and the effective exercise of its mission. The Québec Ombudsman sees on a daily basis the real impact of organizations taking unreasonable time to respond to citizens. Those delays are often caused by short staffing or transitions that have not been sufficiently prepared at various levels. SARPA must put in place the teams needed to handle the volume of cases and provide adequate training to staff before the start of operations. Lengthy processing times may also be due to the unsuitability of certain procedures or shortfalls in computer systems. Planning must take these dimensions into account, along with the appropriate prioritization of support files which, because of their effects on families, demand prompt settlement.

2.3 Québec Ombudsman jurisdiction

The point of SARPA as an administrative service, it must be remembered, is to improve access to justice in family matters for a good number of citizens. In that sense, it will have considerable impact on people availing themselves of the service. Given the powers assigned to the entity, in particular that of deciding support recalculation on the application of only one of the parties involved and setting the annual income of a support debtor who fails to provide information, SARPA's notices can have significant consequences on the individuals covered. An independent, external body must have oversight to ensure that the rights of those citizens are upheld, and more generally, see to the appropriate settlement of administrative disputes that might arise between citizens and SARPA.

Since this entity will be part of the Commission des services juridiques, it would be outside the scope of the Québec Ombudsman's intervention. Commission staff are not appointed under the *Public Service Act*,¹⁴ and so, they would not be subject, unless an exception is made to the rule.

Through its very role and mission, the Québec Ombudsman would help guarantee the quality of this new administrative service and respect for the principles of administrative justice, with a right of oversight on its operations, its interactions with citizens, the time taken to make decisions, and its compliance with the *Act respecting administrative justice*, among other things. The Ombudsman's intervention could, moreover, prevent cases initially submitted to SARPA from becoming litigious.

¹⁴ R.S.Q., c. F-3.1.1.

Being non-judicial and independent, the Québec Ombudsman plays a different but complementary role to the courts, and contributes to improving the public services of departments and agencies, such that its expertise in the area would surely be of value in instituting SARPA.

Considering the foregoing, the Québec Ombudsman recommends:

Recommendation 5:

That section 15 of the *Public Protector Act*¹⁵ be amended by adding the following paragraph:

“(9) the Service administratif de rajustement des pensions alimentaires pour enfants covered by Chapters I to VII of the Act to *promote access to justice in family matters (c. ...)*.”

2.4 Cancellation of child support for a financially independent adult

In *Droit de la famille – 10860*,¹⁶ the Québec Superior Court ruled that Revenu Québec could in a very specific circumstance end its child support collection obligation without having to go to court for a decision. The judgment allowed Revenu Québec, when the facts are not challenged, to stop collecting child support on behalf of someone who has become a financially independent adult.¹⁷

After having applied the principles of this ruling, Revenu Québec suspended the practice at the end of May 2011. Revenu Québec stated in January 2012 that it would no longer be applying the judgment’s principles.

We should applaud the efforts made by the Ministère de la Justice in setting up a streamlined procedure that allows the parents of a child who has become a financially independent adult to put an end to the obligation of support. If they do not want to apply for legal aid to have a court review a support obligation (sections 24 to 36 of Bill 64), the parents of a child who has become a financially independent adult should have access by autumn 2012 to an online procedure with an accompanying guide in order to apply for child support cancellation without having to enlist the services of a lawyer or even going to a courthouse. Access to the procedure will be free of charge, although there is a charge of \$124 for the court’s seal (agreement sanctioned by a special clerk).

¹⁵ R.S.Q., c. P-32.

¹⁶ 2010 QCCS 1582.

¹⁷ The Québec Superior Court states (in French) in paragraphs 30 and 31 of its judgment:

[TRANSLATION] “[30] In this case, the Court is solely concerned with examining an actual situation recognized by both parties, neither of whom is challenging a fact or relinquishing a right in the name of the children.

[31] The Court is therefore of the view that the present case is a rare instance in which the Ministère du Revenu could put an end to its obligation to collect support payments from the debtor without requiring either parent to petition a court for a decision that cancels the support payment. The Act to *facilitate the payment of support* makes no provision for how the Ministère’s support collection obligation ends. Support payments for the benefit of children lose their evident purpose once the children have become adults and where the situation is clearly described by both parents under oath.”

For the benefit of the reflection of the Committee on Institutions on this streamlined procedure, the Québec Ombudsman would like to recall certain advantages of the procedure instituted by Revenu Québec to implement the decision in the case *Droit de la famille – 10860*. Not only was the procedure free of charge, Revenu Québec officers were applying it assiduously, making sure that the consent of the parties was valid. In addition, Revenu Québec has access to the full collection record, and so can detect possible cases of undue pressure being applied to end the support obligation.

The special clerk who will be called upon to deal with the procedure proposed by the Ministère de la Justice will not have this information available. However, the special clerk may refer the application to the judge “if he considers that the agreement between the parties does not provide sufficient protection for the interests of the children or that a party’s consent was obtained under duress” (s. 45, par. 2 of the *Code of Civil Procedure*). To do this, the parties can be summoned and heard. These possibilities remain theoretical, however, where the consent of the independent adult child is included in the procedures, as the special clerk’s approval is then automatic.

Must it be pointed out that the majority of support obligations should cease once the child has come of age and is financially independent? For the Québec Ombudsman, a procedure for cancelling the obligation of paying support in those situations should not entail additional expenses for parents. This is an aspect to consider in the current examination of Bill 64.

2.5 Fees

SARPA will provide citizens with a speedy and accessible way to have child support amounts changed where the exercise of a court’s discretion is not required. The fees stated (\$275) seem reasonable when compared to the costs of legal action, which according to a Ministère de la Justice survey in 2007 averaged some \$2,100.¹⁸ The procedure will allow updating child support more effectively and respond better to the needs of citizens.

Bill 64 also makes provision for parents usually not eligible for legal aid to avail themselves of a lawyer’s services for a fee of \$524 to submit their agreement with a view to obtain the judicial review of the court’s order in connection with child custody or support. While the total cost does not in itself appear unreasonable, the Québec Ombudsman questions the relevance of charging the legal fee of \$124 in such circumstance when the procedure will most always be limited to communication of an agreement to the court clerk for a decision without a hearing by a special clerk.

¹⁸ MINISTÈRE DE LA JUSTICE. *Étude sur la qualité de la prestation de services et la satisfaction des parents séparés à l’égard du processus actuel de révision des pensions alimentaires pour enfant*. Léger Marketing, December 2007, p. 15.

The possibility of full recovery in some circumstances of security deposited with Revenu Québec marks significant progress, in the interest of former spouses and the public administration in the collection of child support by Revenu Québec.

In summary, Bill 64 proposes solutions to make the current system less rigid, more accessible and above all less costly.

CONCLUSION – An openness to preserve

Bill 64 marks an important advance in terms of access to justice in family matters by circumventing the need to resort to court action in certain situations for the recalculation of child support and by making available the services of an attorney in having a judgment concerning children amended on the parents' consent.

From the perspective of making SARPA's administrative service more efficient, its powers should be strengthened and its action be given a better framework. SARPA will have to be made subject to the procedural fairness requirements under the *Act respecting administrative justice* in order to guarantee the rights of individuals who either avail themselves of the service or are covered by a support recalculation notice.

SARPA should also be brought under the jurisdiction of the Québec Ombudsman to ensure that the rights of citizens are upheld and see to the settlement of administrative disputes that might arise.

Beyond these specific considerations, the Québec Ombudsman insists on the need to keep in mind the bill's underlying goal, access to justice. Bill 64's openness to alternatives for judicial action must not be hindered by administrative rigidity and requirements or by the specific interests of certain parties.