



BY EMAIL

December 11, 2017

The Honourable Scott Brison
President of the Treasury Board
House of Commons
Ottawa, Ontario
Canada
K1A 0A6

Re: Bill C-58 and the preservation of solicitor-client privilege

Dear Minister Brison,

I write to provide further detail about the concerns held by the Federation of Law Societies of Canada (“the Federation”) about the incursions on solicitor-client privilege in Bill C-58 (“*An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*”). Representatives of the Federation raised our concerns during a meeting on November 21, 2017 with Edward Rawlinson and Kelly Murdock. We greatly appreciated the opportunity to discuss these issues at that time, and would like to elaborate further on the Federation’s position.

The Federation is the national coordinating body of Canada’s 14 law societies, which are mandated by provincial and territorial statutes to regulate the country’s 117,000 lawyers, Quebec’s 4,500 notaries and Ontario’s nearly 8,000 licensed paralegals in the public interest. Communicating the views of the governing bodies of the legal profession, the Federation is a leading voice on national issues critical to safeguarding the public’s right to an independent legal profession, the protection of solicitor-client privilege and other issues relating to the administration of justice and the rule of law.

The Federation supports the government’s desire to enhance government transparency and build public trust through a modernized access-to-information regime. We are very concerned, however, that the legislative scheme contemplated by Bill C-58 diminishes the meaning and operation of solicitor-client privilege in the federal government context, and thus compromises the ability of federal government institutions to give and receive effective legal advice.

As you are aware, Bill C-58 expands the investigatory powers of the Information and Privacy Commissioners by allowing them to examine any and all government records despite solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege. Such review powers are triggered by a refusal by a government institution to disclose records, and are granted to the Commissioners despite their

continued ability to refer a refusal to produce the documents to the Federal Court. In explicitly granting the Commissioners these review powers, Bill C-58 disregards the fundamental importance of solicitor-client privilege, which the Supreme Court has held must be as close to absolute as possible to ensure that clients communicate openly and confidently with their legal counsel.¹ The sanctity of solicitor-client privilege requires any incursions to minimally impair the privilege, which Bill C-58 fails to do given its sweeping rights of review for both Commissioners. The Supreme Court has also made it eminently clear that any infringement on solicitor-client privilege must be justified by an absolute necessity. Routine review of documents over which solicitor-client privilege is claimed is neither necessary nor appropriate particularly given the recourse to the courts provided for in both the existing and proposed legislation.

The proposed legislation frames the disclosure of such information by a government institution to the Commissioners as not constituting a waiver of privilege. As the Federation has said on other occasions, any infringement must be measured through the eyes of the client. To a client, whether they are public or private sector institutions, compelled disclosure to a party outside the privilege pierces the privilege, even if not disclosed further. The Supreme Court's jurisprudence firmly supports this position.

The Supreme Court has also expressed concern about the potential for the Information and Privacy Commissioners to become adverse in interest in the event of litigation against a public body that refuses to disclose information. The proposed legislation fails to address this. According to the proposed legislation, if a public body denies access to records on the basis of privilege, the Commissioners' ability to order disclosure includes legal advice relating to the public body's conflict with the Commissioners. There is no satisfactory way for a public body, which may be adverse to the Commissioners on a particular issue, to preserve solicitor-client privilege in protecting their own legal advice on the issue.

The Federation is also concerned that the provisions proposed by Bill C-58 may have a detrimental impact on legal advice in the federal government and consequently the quality of government decision making. The Supreme Court has found that piercing solicitor-client privilege in the manner contemplated by these amendments is likely to have a chilling effect. In our view this would likely lead government clients and government lawyers to be circumspect about seeking and giving legal advice in writing.

Granting administrative officers the power to review documents to adjudicate disputes about solicitor-client privilege may also lead to a slippery slope for the protection of the privilege more generally. Without a principled approach to solicitor-client privilege, it is foreseeable that these review powers could be granted to other administrative offices, thus implicating the interests of Canadian citizens in receiving confidential legal advice from counsel.

There remains a marked difference between the investigatory powers of the Information and Privacy Commissioners, and courts' inherent powers to adjudicate disputed claims over legal rights. The Supreme Court has made it clear that the courts are generally best placed to deal with solicitor-client privilege claims. Solicitor-client privilege is a fundamental right essential to the rule of law and the Federation urges you to leave the review and determination of privileged records within the careful hands of our courts.

¹ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), *Canada (Privacy Commissioner) v. Blood Tribe Department*, 2008 SCC 44 (CanLII).

We thank you for taking the time to consider these submissions. The Federation would welcome an opportunity to engage with your ministries further regarding these important matters.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Sheila MacPherson". The signature is fluid and cursive, with a large loop at the end.

Sheila MacPherson
President