



## BY EMAIL

June 7, 2017

The Honourable Jody Wilson-Raybould  
Minister of Justice  
House of Commons  
Ottawa, Ontario  
K1A 0A6

### Re: Bills C-39 and C-51

Dear Minister,

The Federation of Law Societies of Canada (“the Federation”), on behalf of its member law societies, would like to take this opportunity to comment on the Federal Government’s Bill C-39, *“An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts”* and Bill C-51 *“An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act.”*

The Federation supports the government’s ongoing review of the criminal justice system and its commitment to clean up the *Criminal Code of Canada (Criminal Code)* to ensure its accuracy and currency. Ensuring that the law “on the books” reflects the actual state of law in Canada is essential to furthering the proper administration of justice. While the Federation recognizes that neither Bill C-39 nor Bill C-51 provides a comprehensive list of every provision in need of repeal or amendment, we strongly encourage you to consider adding section 488.1 (law office searches). In the alternative, we seek a commitment to include section 488.1 in future amending legislation.

### The Federation of Law Societies of Canada

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. Among other activities, the Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures, and undertakes national initiatives as directed by its members. The Federation also speaks out on 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.

## Section 488.1: Background

Section 488.1 was enacted in 1985 to establish a procedure to govern claims of solicitor-client privilege in the execution of search warrants for the offices of lawyers and Quebec notaries (see **Appendix A** for the complete s. 488.1 scheme). The provision was officially struck down by the Supreme Court of Canada in 2002 in *Lavallee, Rackel & Heinz v Canada (Attorney General)* (*Lavallee*)<sup>1</sup>. After declaring the section unconstitutional, the Court set out ten principles to govern law office searches at common law until Parliament saw fit to re-enact legislation<sup>2</sup> (See **Appendix B** for list). As the Court made clear, these guidelines were not intended to be a substitute for carefully crafted legislation, but were rather a stop gap measure. However, in the 15 years since the *Lavallee* decision there has been no move by the government to introduce an appropriate legislative response to the decision of the Court. In the view of the Federation, a legislative change would bring important clarity to this issue.

## The Need to Amend Section 488.1

While it generally appears that courts subsequent to *Lavallee* have referenced and applied the ten guiding principles, the imperative of protecting solicitor-client privilege requires absolute clarity in the law. The continued presence of s. 488.1 in the Criminal Code creates an ongoing potential for confusion and potential violations of the privilege. A legislated change would bring greater clarity to this issue.

The potential for confusion is evident from the case of *R v. Stewart McKelvey and Dee*.<sup>3</sup> The law office of Stewart McKelvey Stirling and Scales was served a production order from the Canada Revenue Agency (CRA) for the release of estate documents belonging to their client, John Dee. The firm delivered documents to the CRA, who immediately turned them over to a Sheriff to determine whether solicitor-client privilege applied. At the hearing, Counsel for the executor of John Dee's estate argued the documents were subject to privilege. In his decision, the application judge held that, "pursuant to section 488.1(4)(d)"<sup>4</sup> a number of the documents should be released to the respondent. There was no reference in his decision to *Lavallee* or the guiding principles. On appeal,<sup>5</sup> the Appeal Court clarified that while the judge appeared to have relied on section 488.1, he did not actually apply it to his analysis. At paragraph 15, the Appeal Court stated:

Although the application judge stated that he was disposing of the matter pursuant to s. 488.1(d)(i) and (ii), the Crown's application in fact complied with the guidelines Arbour J. had articulated in *Lavallee* and the judge's disposition respected items 9 and 10 of those guidelines.

<sup>1</sup> 2002 SCC 61 (CanLII)

<sup>2</sup> At para 49

<sup>3</sup> 2007 NBQB 081 (CanLII)

<sup>4</sup> At para 11

<sup>5</sup> *Dee v Her Majesty the Queen in Right of Canada*, 2008 NBCA 10 (CanLII)

It was the Crown's application that highlighted the unconstitutionality of the provision and which principles the court should rely on for its analysis. This was not clear from the language of the decision. Without the benefit of the Appeal Court's ruling, this case could have set a precedent for a misinterpretation of the state of law.

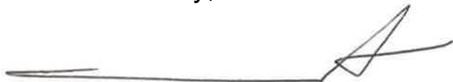
In *Lavallee* the Court noted that in developing new legislation to replace s. 488.1 there would be value in consulting "with those charged or affected by its interpretation and application." We urge the government to do just that in drafting a replacement for s. 488.1. Following the Court's decision in *Lavallee*, the Federation developed a protocol for law office searches that has been relied upon by a number of law societies in developing resources to educate members of the legal profession on how to protect their clients' solicitor-client privileged information when facing a search of their office. While it will be for the Minister to craft the language of a new provision, we would welcome the opportunity to share this protocol with the government in the context of a consultation on the amendment of s. 488.1.

### **Recommendation**

It is unclear what criteria the government used to determine which provisions to address in Bills C-39 and C-51. The Courts have repeatedly emphasized the importance of protecting solicitor-client privilege both as a matter of public interest as well as the administration of justice. As such, the Federation recommends that Bill C-39 or Bill C-51 be modified to repeal or amend s. 488.1. In the alternative, the Federation seeks a commitment that this section will be included in future amending legislation; preferably the next grouping of targeted provisions.

If you have any questions concerning the Federation's comments please do not hesitate to contact me. Thank you.

Yours sincerely,



Maurice Piette  
President

**APPENDIX A:  
Criminal Code provision 488.1**

**488.1** (1) In this section,

“custodian” means a person in whose custody a package is placed pursuant to subsection (2);

“document”, for the purposes of this section, has the same meaning as in section 321;

“judge” means a judge of a superior court of criminal jurisdiction of the province where the seizure was made;

“lawyer” means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor;

“officer” means a peace officer or public officer.

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(a) seize the document and place it in a package and suitably seal and identify the package; and

(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(a) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order

(i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(b) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(c) if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the question.

(4) On an application under paragraph (3)(c), the judge

(a) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(b) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect the document;

(c) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(d) shall determine the question summarily and,

(i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who claimed the solicitor-client privilege or to the client, or

(ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) Where the judge determines pursuant to paragraph (4)(d) that a solicitor-client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(b), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(a) or that following such an application no further application has been made under paragraph (3)(c), the judge shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

(7) Where the judge to whom an application has been made under paragraph (3)(c) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.

(8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9) At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and the package is resealed without alteration or damage.

(10) An application under paragraph (3)(c) shall be heard in private.

(11) This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*.



## Appendix B:

### *Lavallee principles*

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.