



BY EMAIL

April 20, 2018

The Honourable Navdeep Singh Bains
Minister of Innovation, Science, and Economic Development
House of Commons
Ottawa, Ontario
Canada
K1A 0A6

Re: PIPEDA and the preservation of solicitor-client privilege

Dear Minister Bains,

I write on behalf of the Federation of Law Societies of Canada (the “Federation”) to express concerns about possible incursions on solicitor-client privilege in anticipated reform to PIPEDA (“*Personal Information Protection and Electronic Documents Act*”).

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 120,000 lawyers, Quebec’s 3,800 notaries and Ontario’s nearly 9,000 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.

We understand that pursuant to their scheduled review of PIPEDA, the Standing Committee on Access to Information, Privacy and Ethics recently tabled its report, *Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act*, before the House of Commons. The Standing Committee recommends that PIPEDA be amended to give the Privacy Commissioner enforcement powers, including the power to make orders and impose fines for non-compliance, and similarly, that PIPEDA be amended to give the Privacy Commissioner broad audit powers, including the ability to choose which complaints to investigate.

In arriving at their recommendations, the Standing Committee heard testimony from the former Privacy Commissioner of Canada, Jennifer Stoddart, who argued for clearer powers to conduct investigations. Speaking directly to solicitor-client privileged records, Ms. Stoddart argued her belief that “privilege no longer has any reason to exist with regard to complaints or allegations of inappropriate use of personal information.” The Federation takes issue with these remarks, and seeks here to emphasize the foundational importance of solicitor-client privilege in an open and democratic society.

As unequivocally stated on many occasions by the Supreme Court of Canada, solicitor-client privilege is a principle of fundamental justice that 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, and the Supreme Court has also made it eminently clear that any infringement on solicitor-client privilege must be justified by an absolute necessity, which the Court has characterized as a test that falls just short of absolute prohibition.² The Supreme Court viewed recourse to the courts as the appropriate resolution to disputes over solicitor-client privilege, and expressed concern about the potential for the Privacy Commissioner to become adverse in interest in the event of litigation against a public body that refuses to disclose information. The Federation notes as well that there is no satisfactory way for a private body, which may be adverse to the Commissioner on a particular issue, to preserve solicitor-client privilege in protecting their own legal advice about anticipated litigation against the Commissioner.

There remains a marked difference between the investigatory powers of the Privacy Commissioner, and the inherent powers of the courts 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 in the context of any proposed reform to PIPEDA, the Federation urges you to leave the review and determination of privileged records within the careful hands of our courts.

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

Yours sincerely,



Sheila MacPherson
President

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).

² *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32 at para. 20.