



BY EMAIL

April 20, 2018

The Honourable Ralph Goodale
Minister of Public Safety
House of Commons
Ottawa, Ontario
Canada
K1A 0A6

Re: Bill C-59 and the preservation of solicitor-client privilege

Dear Minister Goodale,

I write to share the concerns held by the Federation of Law Societies of Canada (“the Federation”) about the incursions on solicitor-client privilege in Bill C-59 (“*An Act respecting national security measures*”). While the Federation supports the government’s commitment to national security and the safety of Canadians, we worry that the powers contemplated for two new oversight bodies compromise solicitor-client privilege, which is a principle of fundamental justice and a civil right of supreme importance in Canadian law.

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.

As you are aware, Bill C-59 creates an overarching National Security and Intelligence Review Agency (NSIRA) to monitor the anti-terror activities of various government bodies, and specifically entitles NSIRA to have access to information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege. Bill C-59 similarly strengthens the oversight of the Communications Security Establishment (CSE) and the Canadian Security Intelligence Service (CSIS) by establishing an Intelligence Commissioner with a mandate to review the authorizations issued or amended by these bodies pursuant to the Act. Again, the Intelligence Commissioner is specifically granted access to information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege. Bill C-59 indicates that disclosure to either of these bodies does not constitute a waiver of those privileges or that secrecy.

In explicitly granting NSIRA and the Intelligence Commissioner these review powers, Bill C-59 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-59 fails to do given its sweeping rights of review for both bodies. Contrary to the Supreme Court's jurisprudence, the proposed legislation also fails to demonstrate the absolute necessity for an infringement on solicitor-client privilege.

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 compromises that privilege, even if not disclosed further. The Supreme Court's jurisprudence firmly supports this position.

The Federation is also concerned that the provisions proposed by Bill C-59 will have a detrimental impact on legal advice in the public sector, which has particularly worrisome consequences for national security. In our view this would likely lead government clients and government lawyers and notaries to be circumspect about seeking and giving legal advice in writing. We agree with the testimony of Peter Edelmann, appearing on behalf of the Canadian Bar Association before the Standing Committee on National Security and Public Safety, when he characterized legal advice as a full and frank dialogue between legal counsel and clients on the spectrum of possible actions, and resultant degrees of risk. Especially in regard to national security, it is critical for government actors to obtain transparent and reliable advice about the various implications of a variety of actions, some of which will engage greater risk than others. The chilling effect that may otherwise follow, as contemplated by the Supreme Court when piercing solicitor-client privilege in the manner contemplated by these amendments, may seriously compromise government decision-making.

Solicitor-client privilege is a fundamental right essential to the rule of law. This means that it must be preserved across a wide range of circumstances. In the context of Bill C-59, 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).