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Federation of Law Societies  
of Canada



Fédération des ordres professionnels  
de juristes du Canada

**Submission of the  
Federation of Law Societies of Canada  
to the  
Senate of Canada's Legal and Constitutional  
Affairs Committee**

***An Act to amend the Access to Information  
Act and the Privacy Act and to make  
consequential amendments to other Acts***

**July 19, 2018**

## Introduction

1. The Federation of Law Societies of Canada (“the Federation”) appreciates the opportunity to provide comments to the Committee on the occasion of its review of Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts* (“the Act”).
2. The Federation is the coordinating body of the 14 governing bodies of the legal profession in Canada. Our member law societies are statutorily charged by legislation in each province and territory with the responsibility for regulating more than 120,000 lawyers, 3,800 notaries in Quebec and Ontario’s nearly 9,000 licensed paralegals in the public interest. An important role of the Federation is to express the views of the governing bodies of the legal profession on national and international issues relating to the administration of justice and the rule of law. This has resulted in the Federation developing an established history of contesting privacy commissioners’ purported powers to access to documents subject to solicitor-client privilege.
3. The Federation supports the government’s desire to enhance government transparency and build public trust through a modernized access-to-information regime. However, in explicitly awarding the Commissioners powers to review solicitor-client privileged documents, 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. The sanctity of solicitor-client privilege requires any incursions to minimally impair the privilege and to be justified by an absolute necessity, which Bill C-58 fails to establish given its sweeping rights of review for both Commissioners.
4. The Federation is also very concerned 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 federal government institutions’ abilities to give and receive effective legal advice.
5. The Federation raised these concerns in a meeting with representatives from the Department of Justice on November 21, 2017, and again in correspondence to the Minister of Justice on December 11, 2017. In a letter received on June 14, 2018, the Minister of Justice thanked the Federation for our correspondence and expressed her confidence in the proposed legislation. Given her response, we hope that this Committee will be responsive to the issues raised below.

## The Law on Solicitor-Client Privilege in Canada

6. The Supreme Court has been vigilant about protecting solicitor-client privilege in its past jurisprudence on the statutory powers of privacy commissioners. The Federation acted as intervenor before the Supreme Court in the two authoritative cases described below; on both occasions, the Supreme Court aligned with the Federation’s position on the sanctity of solicitor-client privileged materials.
7. In *Canada (Privacy Commissioner) v. Blood Tribe Department (“Blood Tribe”)*,<sup>1</sup> a former employee of the Blood Tribe Department of Health filed a complaint with the federal

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<sup>1</sup> 2008 SCC 44 (CanLII).

Privacy Commissioner seeking access to her personal information records. In response, the employer provided some documents but withheld materials over which they claimed solicitor-client privilege. The Privacy Commissioner took the position that her office could order production of the privileged documents since *PIPEDA* authorised her to exercise her investigatory powers “in the same manner and to the same extent as a superior court of record” and to “receive and accept any evidence and other information... whether or not it is or would be admissible in a court of law.”<sup>2</sup>

8. In *Blood Tribe*, Justice Binnie, for the Court, ruled against the Privacy Commissioner, finding that there was no clear and explicit statutory language to pierce the veil of solicitor-client privilege. He found that the Privacy Commissioner did not possess the same independence and authority as a court, noting that a court’s power to review a privileged document derives from its power to adjudicate disputed claims over legal rights. In Justice Binnie’s view, the Information Commissioner’s legislative authority was in no way parallel to the court’s inherent powers.
9. The Privacy Commissioner had argued in *Blood Tribe* that her review of solicitor-client documents was routinely necessary for all cases in which solicitor-client privilege is claimed. This argument was dispensed with by Justice Binnie, who reiterated that solicitor-client privilege can only be interfered with when absolutely necessary. Other less intrusive remedies were available to the Privacy Commissioner, including the referral of a question of solicitor-client privilege or an application for relief to the Federal Court. Justice Binnie held that compelled disclosure to an administrative officer would, in the eyes of a client, constitute an infringement of the confidentiality, and the objection is made all the more serious where there is a possibility of the privileged information being made public or used against the person entitled to the privilege.<sup>3</sup>
10. Similar issues were again before the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary (“University of Calgary”)*,<sup>4</sup> where an employee’s personnel records were refused on the ground of solicitor-client privilege. The provincial Information and Privacy Commissioner sought production of the records pursuant to a statutory authority to compel disclosure despite “any privilege of the law of evidence.”
11. The majority judgment in *University of Calgary* was authored by Justice Coté. She refused to read solicitor-client privilege into the statutory category of “privilege of the law of evidence,” as it was not sufficiently clear and precise enough to permit an infringement of a fundamental, substantive right. Justice Coté also emphasized the potentially adverse role of the Information Commissioner if it were to become a party in litigation against a public body that refuses to disclose information, further indication, in her view, that disclosure to the Commissioner is itself an infringement of solicitor-client privilege. Justice Coté concluded that even if there was clear and unambiguous legislative intent, this was not an appropriate case to order disclosure since the Information Commissioner had failed to establish the necessity of reviewing the documents to fairly decide whether solicitor-client privilege had been properly claimed.<sup>5</sup>

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<sup>2</sup> *Ibid*, at paras. 7, 12, and 19.

<sup>3</sup> *Blood Tribe*, *supra* note 9 at paras. 2, 21-22.

<sup>4</sup> 2016 SCC 53 (CanLII).

<sup>5</sup> *University of Calgary*, *supra* note 16 at paras. 36 and 68.

12. The Supreme Court of Canada has thus clearly held on two occasions that the sanctity of solicitor-client privilege, as a principle of fundamental justice, means that it cannot be infringed upon by ambiguous language. Even if statutory language is clear, the near-absolute character of solicitor-client privilege means any incursions must minimally impair the right and be established through absolute necessity. Finally, absolute necessity for a review is unlikely where there is recourse to the courts.

### **Proposed Investigatory Powers of Government Institutions in Bill C-58**

13. Bill C-58 purports to expand 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 awarded to the Commissioners despite their continued ability to refer a refusal to produce the documents to the Federal Court.
14. The proposed legislation expands the Information Commissioner's investigatory powers by amending section 36 of the existing Access to Information Act, where underlined, as:

**(2)** Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, and subject to subsection (2.1), the Information Commissioner may, during the investigation of any complaint under this Part, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

15. The Commissioner's ability to review solicitor-client protected information would be triggered by any refusal to disclose the records, as per the following addition to section 36 of the *Access to Information Act*:

**(2.1)** The Information Commissioner may examine a record that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege only if the head of a government institution refuses to disclose the record under section 23.

16. The proposed legislation also addresses the issue of waiver of privilege by the final addition to section 36 of the *Access to Information Act*:

**(2.2)** For greater certainty, the disclosure by the head of a government institution to the Information Commissioner of a record that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that professional secrecy.

17. Bill C-58 also amends the processes for referral of complaints to the Federal Court for review, clarifying who may appear before the Court, what timelines must be adhered to, and how to treat orders from the Information Commissioner pending the Court's review. The Court's access to records in section 46 of the *Access to Information Act* is amended as follows:

**46** Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, the Court may, in the course of any proceedings before it arising from an application under section 41, 42 or 44, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

18. The same amendments are proposed for the Office of the Privacy Commissioner, authorizing its power to examine materials subject to solicitor-client and litigation privilege, characterising such review as an extension of the privilege, and clarifying the Court's ability to review the same.<sup>6</sup>
19. Bill C-58 appears to be a legislative response to the Supreme Court's jurisprudence in *Blood Tribe* and *University of Calgary*, employing express language to authorize the Information and Privacy Commissioners to order and review information covered by solicitor-client privilege in their initial investigations, without referral to a court. Express language is not, however, a remedy to the constitutional defects otherwise contained in the bill.
20. In the Federation's view, the draft legislation fails to provide sufficient protection for solicitor-client privilege. It also fails to recognize that, as held by the Supreme Court of Canada, solicitor-client privilege must be as near absolute as possible, any legislation purporting to infringe on the privilege must impair the privilege as minimally as possible, and the infringement must be absolutely necessary to accomplish legislative goals.
21. In awarding an automatic right of review of solicitor-client privileged information to the Information and Privacy Commissioners, the government fails to establish any necessity for either individual reviews, or for the grant of review power more broadly. The need to examine the privileged communications must be made on a document-by-document basis; the sweeping powers contemplated by C-58 do not allow for this determination. Further, the Federation believes it arguable that necessity can be established in any event given the Commissioners' legislated recourse to the courts.
22. The sweeping powers to compel production of and to review any documents over which solicitor-client privilege is claimed also is inconsistent with the approach of the courts to determining whether privilege has been properly claimed. Courts typically refrain from examining documents that may be privileged whenever possible.
23. In both *Blood Tribe* and *University of Calgary*, the Supreme Court took issue with determinations of solicitor-client privilege being made by administrative office-holders, particularly where they may become adverse in interest to the body from who they seek the original disclosure. This is precisely the situation that would be created by the proposed legislation: a party to a dispute with the Privacy or Information Commissioner may be forced to turn over legal advice about that very dispute.

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<sup>6</sup> Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 2017 at sections 49 – 51.

24. The Federation firmly believes that client confidence is the underlying basis for solicitor-client privilege, and any infringement must be measured through the eyes of the client. To a client, compelled disclosure to an adjudicator, even if not disclosed further, still constitutes an infringement on the privilege.

### **Endangerment of Legal Advice within the Federal Government**

25. Given the primacy of client confidence, the Federation also believes that the scheme proposed by Bill C-58 may have a detrimental impact on legal advice in the federal government.
26. The Supreme Court has found that piercing solicitor-client privilege in the manner contemplated by these amendments is likely to have a chilling effect, leading clients and lawyers to be circumspect about seeking and obtaining legal advice in writing. This concern is as applicable to the government as client as it is to clients in the private sector.
27. Presumably, the federal government remains interested in obtaining full and frank legal advice despite a modernized access to information regime. Characterizing administrative officers as adjudicators of 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 extend beyond the Information and Privacy Commissioners to other administrative offices, and thus implicate the interests of Canadian citizens in receiving confidential legal advice from counsel.

### **Conclusion**

28. As successfully advanced before the Supreme Court of Canada, the Federation's position is that administrative entities must be constrained from compelling the production of privileged communications. While not monolithic as a class, none of them can claim as overriding responsibility the preservation of the rule of law, and the independent, fair and effective administration of justice.
29. 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. Repeatedly, the Supreme Court has indicated that the most minimally intrusive institutional option for any examination of privileged communications is the constitutionally independent judiciary. To the extent that solicitor-client privilege is a fundamental right essential to the rule of law, the Federation urges this Committee to leave the review and determination of privileged records within the careful hands of our courts.
30. We would welcome the opportunity to discuss these matters further and to otherwise assist the Committee in its review of the Act.