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 National Security and Defence Committee

An Act respecting national security measures

Ottawa, January 17, 2019

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-59, *An Act respecting national security measures* ("the Act").[1]

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. The Federation has an established history of raising concerns about legislation that purports to intrude on solicitor-client privilege or the professional secrecy of notaries.

3. The Federation supports the government's commitment to national security and the safety of Canadians. However, in explicitly awarding proposed new national security oversight bodies the power to review solicitor-client privileged documents, Bill C-59 disregards the fundamental importance of the 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-59 fails to establish given its sweeping rights of review.

4. The Federation is also very concerned that the legislative scheme contemplated by Bill C-59 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. This issue takes on acute importance in decision-making around national security matters.

5. The Federation raised these concerns in correspondence to the Minister of Public Safety on April 20, 2018. To date our concerns have not been addressed; as a result, 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 government actors, specifically, those of privacy commissioners. The Federation intervened before the Supreme Court in the two authoritative cases described below; on both occasions, the Supreme Court's decision 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")*,[2] the federal Privacy Commissioner asserted an ability to produce of privileged documents

[1] Available online: http://www.parl.ca/DocumentViewer/en/42-1/bill/C-59/third-reading#enH2487
[2] 2008 SCC 44 (CanLII).

from a third party since her enabling legislation authorized 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."[3]

8. In a unanimous decision the Court ruled against the Privacy Commissioner, finding that 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. The Court held that the Information Commissioner's legislative authority was in no way parallel to the court's inherent powers. There was also no clear and explicit statutory language to pierce the veil of solicitor-client privilege.

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. Writing for the Court, Justice Binnie dispensed with this argument, reiterating 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.[4]

10. Similar issues were again before the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary ("University of Calgary")*,[5] where the provincial Information and Privacy Commissioner sought production of solicitor-client privileged records from a third party 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 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 held that despite more intentional legislative language, 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.[6]

12. The decisions of the Supreme Court of Canada in these two cases make it clear that even when statutory language appears to include access to solicitor-client privileged information, the near-absolute character of solicitor-client privilege means any incursions must minimally impair the right and be established through absolute necessity, a threshold that is unlikely to be met where there is recourse to the courts.

[3] *Ibid*, at paras. 7, 12, and 19.
[4] *Ibid* at paras. 2, 21-22.
[5] 2016 SCC 53 (CanLII).
[6] *University of Calgary, ibid* at paras. 36 and 68.

Proposed Investigatory Powers of Government Institutions in Bill C-59

13. Bill C-59 creates an overarching National Security and Intelligence Review Agency (NSIRA) to monitor the anti-terror activities of various government bodies. The mandate of NSIRA is broad, and authorizes the agency to: review any activity carried out by CSIS or CSE; review any activity carried out by a department that relates to national security or intelligence; review any activity carried out by a department, or matter referred by a Minister, relating to national security or intelligence; and to investigate any complaints made by any person with respect to CSIS activity, and complaints made pursuant to specific sections of the *Royal Canadian Mounted Police Act,* the *Citizenship Act*, and the *Canadian Human Rights Act*.[7]

14. The proposed legislation specifically entitles NSIRA to access information in the possession or control of any department that is subject to any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.[8] The proposed legislation indicates that disclosure of solicitor-client privileged information to the agency does not constitute a waiver of those privileges or of professional secrecy.

15. 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. It provides for the appointment of a retired judge of a superior court for a five-year term to review the conclusions on the basis of which certain authorizations are issued or amended, and certain determinations are made, under the *Communications Security Establishment Act* and the *Canadian Security Intelligence Service Act*, and if those conclusions are reasonable, to approve those authorizations, amendments, and determinations.[9]

16. Again, the proposed legislation specifically grants the Commissioner access to information in the possession or control of any department that is subject to any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege, and indicates that disclosure of this sort to the Commissioner does not constitute a waiver of those privileges or that secrecy.[10]

17. 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.

[7] *National Security and Intelligence Review Agency, supra* note 1 at ss. 8 and 1.
[8] *Ibid* at s. 9(2).
[9] *Intelligence Commissioner Act*, *supra* note 1 at ss. 4 and 13.
[10] *Ibid* at ss. 23(2) and 25.

18. In providing an automatic right of review of solicitor-client privileged information to NSIRA and the Intelligence Commissioner, 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-59 do not allow for this determination.

19. The proposed power 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 whenever possible from examining documents that may be privileged.

20. 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.

Impact on Legal Advice within the Federal Government

21. Given the primacy of client confidence, the Federation also believes that the scheme proposed by Bill C-59 may have a detrimental impact on legal advice in the federal government.

22. 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.

23. The proposed legislation would likely lead government clients and government lawyers and notaries working in national security to be wary about seeking and giving legal advice in writing. We agree with the testimony of Peter Edelmann, appearing before the House of Commons Standing Committee on National Security and Public Safety on behalf of the Canadian Bar Association on February 1, 2018, 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.[11]

24. 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.

[11] Evidence of Peter Edelmann, Canadian Bar Association, before the Standing Committee on National Security and Public Safety, February 1, 2018, available online: https://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/meeting-94/evidence#Int-9941446

Conclusion

25. 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 NSIRA and the Intelligence Commissioner have laudable mandates, neither of them can claim as overriding responsibility the preservation of the rule of law, and the independent, fair and effective administration of justice.

26. Solicitor-client privilege is a fundamental right essential to the rule of law and 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 oversight of our courts.

27. We would welcome the opportunity to discuss these matters further and to otherwise assist the Committee in its review of the Act.