THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Office of the President
Cabinet de la présidente

December 19, 2017

Via email: president@tbs-sct.gc.ca; mcu@justice.gc.ca

The Honourable Scott Brison, P.C., M.P.
President of the Treasury Board
90 Elgin Street
Ottawa, ON K1A 0R5

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Ministers:

Re: Solicitor-Client Privilege and Bill C-58

I would like to thank your advisors for taking time to meet with representatives of the Canadian Bar Association (CBA) and the Federation of Law Societies of Canada (FLSC) to discuss Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act*. CBA experts wrote to the House of Commons Committee on Access to Information, Privacy and Ethics during its study of Bill C-58. While that submission addressed a range of issues, the purpose of our meetings with your advisors was to discuss solicitor-client privilege.

The CBA has significant concerns about clauses 15 and 50 of Bill C-58, which would allow the Information and Privacy Commissioners, respectively, to review records requested under the *Access to Information Act or Privacy Act*, where the head of a government institution refuses to disclose on the basis that the records are protected by solicitor-client privilege, professional secrecy or litigation privilege. Effectively, where these privileges are claimed, the proposed amendments would allow the Commissioners to pierce those privileges in order to evaluate the privilege claims. We believe this is a regressive step. Our concerns are outlined below.

Undermines proper working of government institutions

The Supreme Court of Canada has stated that:

> The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole….

> Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive. […] It is therefore in the public interest to protect solicitor-client privilege.[1]

This is equally true where a federal government institution is the client. The quality of legal advice obtained by the federal government will inevitably be compromised where the confidentiality of its solicitor-client communications cannot be assured.

The Supreme Court has acknowledged that "certain government functions and activities require privacy. This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions"[2]

In brief, the proposed amendments may have a chilling effect on disclosure by federal institution clients to their legal advisors, which in turn will compromise the quality of legal advice they receive and ultimately, compromise the proper working of government institutions.

Worse, concerns about disclosure of privileged records may encourage situations where advice is sought and received, but undocumented, contrary to the open government values underlying the Act and which the CBA supports.

Legal and policy context for previously granted powers has changed

The Information Commissioner has argued that the proposed amendments to the *Access to Information Act* simply clarify Parliament's earlier intent to grant the Commissioner the power to order the production of records subject to solicitor-client privilege.

Subsection 36(2) of the Act states that the Information Commissioner may examine any record under government control "[n]otwithstanding any other Act of Parliament or any privilege under the law of evidence." However, the Supreme Court of Canada has stated that "the expression 'privilege of the law of evidence' is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege."[3]

This is not merely an issue of statutory interpretation, and solicitor-client privilege is not now a mere privilege under the law of evidence. In jurisprudence developed over the last 20 years, the Supreme Court of Canada has articulated a very different framework for solicitor-client privilege than was understood in 1983, when the *Access to Information Act* came into force. Solicitor-client privilege "has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy."[4]

In other contexts, the Court has noted a presumption of legislative respect for fundamental values (now including solicitor-client privilege) and has signaled that privilege will not be compromised without evidence of absolute necessity and minimal impairment. In brief, more than clear and

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1 *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 at para. 26, 34.

2 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, 2010 SCC 23, at para. 40.

3 *Calgary*, at para. 57

4 *Calgary*, at para. 20.

unambiguous legislative intent is required to establish a modern legal and policy footing for compelled disclosure of privileged records, one that will survive constitutional scrutiny.

Increased delay in resolving contested claims

The CBA believes the proposed amendments will increase rather than simplify the resolution of disputes about disclosure of privileged records. The head of an institution has the statutory discretion to disclose privileged records. In law, the privilege belongs to the client, not their legal advisor. At issue in this instance is the few situations where the head of an institution refuses to disclose privileged records and the Commissioner disputes the claim that the records are privileged. Even if Bill C-58 is enacted, there will be instances where the head of an institution disagrees with a Commissioner's assessment that privilege does not apply. This will force the matter to Federal Court for judicial determination in any event, having only added an extra procedural step along the way.

Undermines privilege beyond the scope of ATIP

If Bill C-58 is enacted, the following scenario is likely to unfold in disputes. Counsel for the head of an institution will be aware of the privileged information, the Information or Privacy Commissioner (and their counsel) will be aware of the privileged information, but the Federal Court justice presiding over the dispute will not. The current practice is that courts rarely order production of privileged documents when assessing whether privilege applies. However, the Federal Court judge faced with two parties who have been privy to the information in dispute may well conclude that the judge should see it as well. What is now considered exceptional will become the norm.

Further, other statutes in criminal, civil and public contexts grapple with powers and procedures relating to privileged information. Bill C-58 will invite legislative efforts to undermine solicitor-client privilege in other contexts and, frankly, result in the re-litigation of what is now settled law.

Disproportionate response to a non-existent problem

The Supreme Court has made it clear that, absent absolute necessity to achieve the end sought by the enabling legislation, records subject to solicitor-client privilege may not be disclosed. Clauses 15 and 50 would give the Information and Privacy Commissioners an unfettered, unbounded power to pierce solicitor-client privilege, and yet there is no evidence that those powers are required.

No case has been made of regular abuses or misunderstanding of the privilege exemption. We are unaware of any guidance that the Commissioners have offered for heads of institutions seeking to claim the exemption. There is simply no policy basis to proceed with the proposed amendments.

The practicalities of privilege claims are not well understood. The courts have noted that it is not enough to simply claim privilege. The head of an institution has discretion to disclose privileged information, and in exercising their discretion must weigh various factors, including the public interest. Where the exemption is claimed, the head is obliged to show that they were properly instructed on the requirements of privilege, that lawyers were involved, and that the records were maintained in confidence. Further, privilege must be claimed document by document. Finally, sufficient detail must be given to support the claim. In a litigation context, this generally includes an affidavit identifying the date, nature of the document, author and recipient. Nothing under current law prevents the Commissioners from establishing procedural guidance for heads of federal institutions, and this information should suffice in all but the most exceptional situations.

The Commissioners are not neutral arbiters

We strongly believe that assessments about privilege claims should be made by the judiciary. There is no requirement that the person who holds the office of Information or Privacy Commissioner has particular expertise on solicitor-client privilege. Further, the Commissioners are not impartial adjudicators, unlike the courts. Bill C-58 would authorize the Information Commissioner to appear in court on behalf of a complainant or in their own right as a party. In effect, the Commissioner can become adverse in interest to a public body. Similar powers are accorded the Privacy Commissioner.

Compelled disclosure of the federal government's privileged information to the Information or Privacy Commissioner, even for the limited purpose of verifying the privilege claim, is a serious intrusion of the privilege. Compelled disclosure to a potential adversary is all the more serious.

Conclusion

The CBA appreciates and supports the federal government's intent to foster a robust open government environment. However, the measures in Bill C-58 respecting solicitor-client privilege will undermine these efforts. We believe the measures are unnecessary, will impair the functioning of government institutions, and will have a negative spillover effect on privilege in other contexts.

We urge you to reconsider your approach.

Yours truly

(original letter signed by Kerry L. Simmons)

Kerry L. Simmons, Q.C.

c.c. Edward Rawlinson, Kelly Murdock, Office of the President of the Treasury Board
Laura Berger, William Horne, Office of the Minister of Justice and Attorney General of Canada
Jonathan Herman, Frederica Wilson, Federation of Law Societies of Canada