



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

Bill C-58 – *Access to Information Act* and *Privacy Act* amendments

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Privacy and Access Law Section, the Ethics and Professional Responsibility Subcommittee and the Judicial Issues Subcommittee, with input from the CBA members of the Federal Courts Bench and Bar Committee and the Tax Court Bench and Bar Committee, and assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA.

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Bill C-58 – Access to Information Act and Privacy Act amendments

I. INTRODUCTION

The Canadian Bar Association is pleased to comment on Bill C-58 and the proposed amendments to the *Access to Information Act* (ATIA or the Act) and the *Privacy Act*.

The CBA has long been a supporter of improving access to information laws. In October 2017, the CBA Privacy and Access Law Section, Ethics and Professional Responsibility Subcommittee and Judicial Issues Subcommittee wrote to the House of Commons Access to Information, Privacy and Ethics Committee as part of its study of Bill C-58.

Unfortunately, many of our recommendations have not been adopted, and we urge further amendments to Bill C-58 to protect the quasi-constitutional access to information rights of Canadians. These amendments must balance the Bill's important objectives of transparency and accountability, with other fundamental rights such as judicial independence and solicitor-client privilege.

II. ACCESS RIGHTS

Scope of ATIA

The Supreme Court of Canada has stated that access to information legislation “can increase transparency in government, contribute to an informed public, and enhance and open and democratic society.”¹ Given the age of ATIA, legislative reform of ATIA is overdue to address perceived weaknesses and gaps. Expanding ATIA's scope is vital for the proper functioning of Canadians' access to information rights. We recommend that Bill C-58 amend ATIA to include organizations that support Parliament (subject to Parliamentary privilege).

The House Committee's comprehensive 2016 study of ATIA similarly recommended expanding the Act's scope to include the Prime Minister's Office, offices of ministers and parliamentary

¹ *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 1.

secretaries.² The Information Commissioner made this recommendation in her written report on Bill C-58. While Part 2 of the Bill – proactive publication – covers these organizations, proactive disclosure is not a substitute for access rights. It is already standard practice to release information on many of the categories listed in Part 2, including travel and hospitality expenses, contracts over \$10,000, grants and contributions, and reclassification of positions. We welcome expanding the scope of ATIA to further strengthen access rights of Canadians.

RECOMMENDATION

1. Expand the scope of ATIA to include organizations that support Parliament, subject to Parliamentary privilege.

Administrative Barriers

The CBA recommends amending the Bill to remove the existing administrative barriers to Canadians' right to know. Clause 6 of Bill C-58 imposes additional obligations on citizens making access requests. The three enumerated requirements in clause 6 of the Bill (specific subject matter, type of record and period of the request) are not necessary for the proper functioning of ATIA. Imposing these strict requirements as a threshold to obtain access may effectively undermine the Act's very purpose. For example, people may be deterred from making a request because they do not know the period of the request or do not want to reveal the subject matter of a request. The expanded criteria proposed in Bill C-58 could mean that less sophisticated or experienced applicants simply do not make requests.

ATIA serves as a central tool for citizen engagement. Understanding the operations of government and the administrative barriers in clause 6 inhibits a comprehensive access to information regime. The CBA recommends removing the amendments to section 6 of ATIA, set out in clause 6 of Bill C-58. Instead, the Information Commissioner's Office could offer additional guidance, encouraging requestors to include details similar to those articulated in clause 6 if known. This would serve to simplify and streamline the process of responding to access requests.

Notwithstanding these concerns, we welcome the removal of clause 6.1(1)(a), which will ensure that a government institution cannot decline to act because an applicant did not meet

² House of Commons, *Review of the Access to Information Act: Report of the Standing Committee on Access to Information, Privacy and Ethics*, 42nd Parl, 1st Sess, (June 2016), available [online](https://bit.ly/2Ha7mvU) (<https://bit.ly/2Ha7mvU>).

the requirements of section 6. However, subsections 6.1(1)(b) and 6(1)(c) of clause 6 are broad and vague and could be easily abused, and we recommend their removal.

The CBA is encouraged by the amendment in clause 6.1(1) of the Bill requiring the Information Commissioner's written approval for a government institution to refuse to act on a request. As we have previously stated³, an oversight role for the Information Commissioner is an important "check and balance" on government discretion. British Columbia and Alberta have similar requirements in their access to information legislation for requests that, in the opinion of a government institution, are vexatious or made in bad faith.

RECOMMENDATION

2. a) **Remove the amendments to section 6 of ATIA set out in clause 6 of Bill C-58; and (b) Remove subsections 6.1(1) and 6.1(1)(c) of ATIA set out in clause 6 of Bill C-58.**

Application Fee

The CBA continues to oppose an application fee for requests (clause 7(1) of Bill C-58). We recommend that this requirement be eliminated. Fees for access are inconsistent with the principles of open government, and the administrative cost of processing these fees likely outweighs the income generated.⁴ We continue to question why the interim decision of the Treasury Board Secretariat not to impose an application fee has been reversed.

Should there continue to be a fee, the CBA continues to support the fee waiver in clause 7(4) of the Bill and recommends adopting fee waiver criteria, similar to BC's *Freedom of Information and Protection of Privacy Act*. A robust access to information scheme should include criteria so access requests of critical importance to the values underlying the legislation are not obstructed.⁵ Examples of criteria include where applicants cannot afford payment, where it would be fair to waive the fees, and where the request relates to a matter of public interest.

³ See Canadian Bar Association, *Modernization of the Access to Information Act* (Ottawa: January 2013), [online](https://bit.ly/2qamLof) (<https://bit.ly/2qamLof>).

⁴ In a 2009 appearance before the House of Commons Access to Information, Privacy and Ethics Committee, former Information Commissioner Robert Marleau estimated that it cost the government \$55 to process the \$5 cheque required from requesters. See House of Commons *Standing Committee on Access to Information, Privacy and Ethics*, 40th Parl, 2nd Sess., Evidence (May 27, 2009), [online](https://bit.ly/2GCIEDI) (<https://bit.ly/2GCIEDI>).

⁵ *Supra* note 3.

RECOMMENDATION

- 3. Remove clause 7 of Bill C-58, or include fee waiver criteria in clause 7(4) of Bill C-58.**

Parliamentary Review

The CBA supports the five-year time period for a statutory review of ATIA (clause 37 of Bill C-58). The quasi-constitutional nature of access rights necessitates a rigorous parliamentary review process, as opposed to a Ministerial review. We recommend that a Parliamentary committee conduct the mandatory statutory review, and that Bill C-58 be amended to reflect this requirement. We also encourage a public consultation process as part of the statutory review.

RECOMMENDATION

- 4. Amend clause 37 of Bill C-58 and proposed subsection 93(1) of ATIA to require a review by a Parliamentary committee, rather than a Ministerial review.**

III. PROACTIVE PUBLICATION AND JUDICIAL INDEPENDENCE**Proactive Publication**

The CBA generally supports proactive publication as it applies to Parliamentary entities and government institutions. In our view, it is a significant part of modernization of the ATIA. We continue to caution, however, that proactive publication is not a replacement for access rights. We recommend⁶ that the federal government adopt a policy on proactive disclosure as a means of being more transparent and accountable, while also saving significant resources.

We welcome the amendment in clause 37, adding new subsection 91(2), which clarifies the Information Commissioner's powers with respect to a record which, although subject to Part 2, is subject to an access request under Part 1. As we have previously stated, the Information Commissioner serves an important oversight role and this helps to ensure that access requests are not frustrated by the existence of Part 2 of the Act.

⁶ *Ibid.*

Judicial Independence

The CBA continues to have grave concerns with the application of the proactive publication requirements in Bill C-58 to the judiciary. We recommend that the judiciary and the courts be exempt from ATIA.

The courts and federally appointed judges fill a unique role under the Canadian Constitution. They serve as the arbiters on issues that arise between individuals and the state and are the protectors of the rights and liberties of individuals as against state intrusion, whether by legislative action or the application of criminal law. This balance safeguards the rule of law, a fundamental pillar of democracy, and one which Canada has championed at home and throughout the world.⁷

An independent judiciary is a key aspect of the rule of law. As put by Justice Canada:

Judicial independence is a cornerstone of the Canadian judicial system. That is why, under the Constitution, the judiciary is separate and independent of the other two branches of Government, the Executive and the Legislature. Judicial independence guarantees that judges will be able to make decisions free of influence and based solely on fact and law.⁸

However, the foundation of judicial independence can be easily eroded. One of the three recognized components of judicial independence is administrative independence.⁹ Section 38 of Bill C-58 will have the unintended consequence of eroding judicial independence.

In 2002, the Access to Information Review Task Force advised that “[c]overage of the courts and the judiciary under the Act would not be appropriate.”¹⁰ A 2012 overview of reform proposals commented that “[t]here is general consensus that the judiciary should not be

⁷ Canadian Judicial Council, *Why is Judicial Independence Important to You?* (Ottawa: Canadian Judicial Council, May 2016).

⁸ [Justice Canada, Canada's System of Justice, online \(http://ow.ly/diZS30gfrjI\)](http://ow.ly/diZS30gfrjI) (referenced October 23, 2017).

⁹ *Judicial Independence in Canada*, a paper submitted to the World Conference on Constitutional Justice by Justice Ian Binnie in the Supreme Court of Canada; Rio de Janeiro, 2011; *Maintaining a Strong Judiciary: The View from Canada*, a presentation by Chief Justice John D. Richard of the Federal Court of Canada to the Fifth Worldwide Common Law Judiciary Conference, Sydney, Australia 2015.

¹⁰ See: [online \(https://bit.ly/2ItzTfE\)](https://bit.ly/2ItzTfE) at page 41. The then Information Commissioner agreed: Since the judicial branch of government has such an important role in enforcing the right of access, it could compromise the neutrality of judges with respect to access issues, if these bodies were also subject to the Act. That being said, the Task Force appropriately encourages the federal judiciary to adopt practices which contribute to their transparency, [online \(https://bit.ly/2q73yUY\)](https://bit.ly/2q73yUY).

subject to the right of access.”¹¹ In 2015, the Information Commissioner recommended extending coverage of the Act to the bodies that provide administrative support to the courts, with some exceptions.¹² In her recent testimony before the House Committee, the Information Commissioner clarified:

When I tabled my report “Striking the Right Balance for Transparency” in 2015, suggesting amendments to modernize the act, I recommended extending coverage of the act to the bodies that provide administrative support to the courts, not to the judges themselves. I recognized that judicial independence is a cornerstone of our judicial system and that certain records should be excluded from the purview of the act.¹³

Bill C-58 requires proactive disclosure of the incidental expenditures, representational allowances, travel allowances and conference allowances of every federally appointed judge. This is unprecedented in Canada, and has been proposed without benefit of consultation with the judiciary.¹⁴ These measures undermine the independence of the judiciary and risk putting the security of individual judges at risk.

Judicial compensation (including allowances) is reviewed every four years by an independent commission that makes recommendations to the Minister of Justice. The process is unique and responds to constitutional principles of judicial independence established by the Supreme Court of Canada. The Commission’s recommendations and the Minister’s response are public. The annual amounts for individual incidental expenditures and representational allowances, and the aggregate annual conference allowance budget are specified in the *Judges Act*. The Chief Justice of each court is responsible for the approval of conference allowances. The Office of the Commissioner for Federal Judicial Affairs provides administrative support for matters relating to salary, allowances and benefits, including an audit function.¹⁵ In brief, a delicately-balanced system designed to reconcile judicial independence with accountability for the expenditure of public funds is already in place. Bill C-58 will disrupt that system.

¹¹ Kristen Douglas, Élise Hurtubise-Loranger and Dara Lithwick, *The Access to Information Act and Proposals for Reform*, Library of Parliament, Publication No. 2005-55-E, Revised 6 June 2012, at page 19, [online \(https://bit.ly/2H7OYDW\)](https://bit.ly/2H7OYDW).

¹² *Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act* (March 2015), at page 13, [online \(https://bit.ly/1SiQ1vg\)](https://bit.ly/1SiQ1vg).

¹³ Evidence, November 1, 2017, [online \(https://bit.ly/2q5UsXR\)](https://bit.ly/2q5UsXR).

¹⁴ In her 2015 report, the Information Commissioner referred to laws in British Columbia, Alberta, Nova Scotia and Prince Edward Island. These statutes capture some court administration files, but there are clear exemptions for the judiciary.

¹⁵ See: [online \(https://bit.ly/2q4asIW\)](https://bit.ly/2q4asIW).

Regarding travel allowances, individual judges are not responsible for their case assignments and scheduling. Judges of the Federal Court, Federal Court of Appeal and Tax Court, in particular, are required to reside in the National Capital Region. However, these are national courts whose judges constantly travel throughout Canada. Although the Bill would not require details other than a description, dates, and total amounts of expenses, it may be possible to determine additional details from patterns of expenditure or in combination with the more detailed reporting required of court administrators. All of this information, in the public domain, puts the security of individual judges at risk.

The personal security of judges cannot be taken lightly. Judges often deal with highly emotional parties.¹⁶ All levels of courts deal with frustrated vexatious litigants, whose access to the courts may be ordered to be restricted. Security challenges in the courts are not often in the public eye, but, the courts must regularly be attentive to them. As the Canadian Superior Courts Judges Association (CSCJA) has commented, “[t]he potential for mischief in the use of publicly available individualized expense information is enormous.”¹⁷

We appreciate that the Bill provides an opportunity to protect against disclosure of information that could compromise security. However, we anticipate that this will be a more than occasional requirement and will likely generate concern about the overall purpose and efficacy of the proactive disclosure requirement for judges.

The CBA believes that the prudent course of action would be to exempt the judiciary and the courts from ATIA. As noted in a research report commissioned by the 2002 Task Force, there is concern about “including the judiciary at all, particularly since it is not clear where a line can be drawn between the judicial function and administrative matters.”¹⁸

In the alternative, we support the recommendation of the CSCJA that the Office of the Commissioner of Federal Judicial Affairs publish, by court, in aggregate amounts only, the expenditures for each category of expense allowed under the *Judges Act*.

The CBA agrees with the CSCJA that section 90.22 of the Bill is “a glaring, fundamental constitutional defect.” As the CSCJA has explained:

¹⁶ In 2007 federal Tax Court Judge Garon, his wife and a friend were murdered by a dissatisfied litigant, [online](https://bit.ly/2GAXWsz) (<https://bit.ly/2GAXWsz>).

¹⁷ Submission on behalf of the Canadian Superior Courts Judges Association to the Access to Information, Privacy and Ethics Committee in relation to Bill C-58: An Act to amend the Access to Information Act and the Privacy Act (Ottawa: October 2017), [online](https://bit.ly/2Ehkgp2) (<https://bit.ly/2Ehkgp2>).

¹⁸ *Supra* note 10.

The Registrar and the Commissioner are members of the executive branch. They are not judges. Judicial independence is a fundamental constitutional principle. It is not acceptable from a constitutional perspective to seek to give members of the executive branch final say on the question of whether the principle of judicial independence could be undermined.¹⁹

The CBA agrees that these decisions should be made by the chief justice of each court, or their designate.

In summary, our concerns are as follows:

- Federally appointed judges are distinct from members of the public service or elected officials because of the unique and distinct constitutional role of the courts.
- The preferred approach would be to exempt the judiciary and the courts because of the difficulty in drawing bright lines between the judicial function and administrative matters.
- An alternative approach, consistent with the overall objectives of transparency, is public and periodic reporting in the aggregate by each court.
- It is unconstitutional to place decision-making authority about judicial independence exemptions with members of the executive branch. To preserve judicial independence, these decisions should be made by the Chief Justice of each court, or their designate.

RECOMMENDATION

5. a) **Exempt the judiciary and the courts from ATIA. Alternatively, public and periodic reporting by each court should be in the aggregate.**
- b) **Decisions about judicial independence exemptions should be made by the judicial branch, that is, by the Chief Justice of each court or their designate.**

IV. SOLICITOR-CLIENT PRIVILEGE AND PROFESSIONAL SECRECY

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 withheld by the head of a government institution on the basis that they are protected by solicitor-client privilege, professional secrecy or litigation privilege.

¹⁹ *Ibid.*

Clause 15 states:

15 Subsection 36(2) of the Act is replaced by the following:

Access to records

(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.

Protected information — solicitors, advocates and notaries

(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.

For greater certainty

(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.

Clause 50 introduces similar amendments to the *Privacy Act*.

The purpose of solicitor-client privilege

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.²⁰

This is equally true where a federal government institution is the client. The Supreme Court has acknowledged that:

[C]ertain 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.²¹

²⁰ Alberta (Information and Privacy Commissioner) v. University of Calgary, [2016] 2 SCR 555, 2016 SCC 53 at para. 26, 34. (University of Calgary).

²¹ Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR 815, 2010 SCC 23, at para. 40.

Solicitor-client privilege in practice

The practicalities of privilege claims are not well understood. It is not enough to simply claim solicitor-client privilege. In the government context, 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 exception is claimed, the head is obliged to show that they were properly instructed on the requirements of privilege, that legal advice was sought, and that the records were maintained in confidence. Privilege must be claimed document by document, and sufficient detail must be given to support the claim.

In a litigation context, solicitor-client privilege is usually established by supplying an affidavit identifying the date, nature of the document, author and recipient. Parties are encouraged to give sufficient detail about privileged records so they can resolve the discovery process themselves without use of judicial resources. Even where disputes about privilege are presented to a judge – and judges are the traditional arbiters of solicitor-client privilege – it is extremely rare for a judge to review the privileged records. Where uncertain, a judge is more likely to order further details by affidavit than to review the actual documents in question.

Solicitor-client privilege and access to information

The importance of solicitor-client privilege is recognized in access to information and privacy laws across Canada, including federal legislation. At the heart of an active debate across Canada is whether an information or privacy commissioner can, or should, have authority to review withheld records for the purpose of verifying a claim of solicitor-client privilege by the head of a public body. It has been suggested that the amendments proposed in Bill C-58 would merely restore the status quo in the wake of recent jurisprudence. Subsection 36(2) of ATIA 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.” In *University of Calgary*, the Supreme Court of Canada stated:

The expression ‘privilege of the law of evidence’ is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege.²²

We are aware that the Information Commissioner wrote to the President of the Treasury Board and the Minister of Justice stating that this decision (and *Lizotte v. Aviva Insurance Company*,

²² *Supra* note 19 at para. 44.

which addressed litigation privilege)²³ called into question the Commissioner's authority to review records claimed by federal institutions to be subject to solicitor-client privilege.²⁴ The Commissioner argued this was contrary to Parliament's original intention and to longstanding practices at the federal level.²⁵

Whatever Parliament's original intention, 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 ATIA 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."²⁶

The Supreme Court of Canada has stated that solicitor-client privilege can only be set aside by legislation that is clear, explicit and unequivocal. In addition, the Court has noted a presumption of legislative respect for fundamental values (now including solicitor-client privilege) and has ruled that privilege will not be compromised without evidence of absolute necessity and minimal impairment. In brief, more than clear and unambiguous legislative intent is required to establish a modern legal and policy footing for compelled disclosure of privileged records. The legislation must also survive constitutional scrutiny.

Further, federal practice is more contested than has been suggested. For example, in 2004, the Federal Court of Canada considered a dispute about the Commissioner's authority to require production of documents claimed to be subject to solicitor-client privilege.²⁷ The Attorney General of Canada took the position that the Commissioner had *prima facie* jurisdiction to compel the production of all documents, privileged or not, which were relevant to an investigation, but argued that the Commissioner could not invade solicitor-client privilege unless absolutely necessary. In effect, the Attorney General argued that subsection 36(2) of ATIA should be read restrictively in the context of evolving jurisprudence on solicitor-client privilege.

²³ 2016 SCC 52.

²⁴ See: [online \(https://bit.ly/2EiGZB2\)](https://bit.ly/2EiGZB2).

²⁵ We also acknowledge that Information and Privacy Commissioners across Canada are strongly advocating that their oversight function "fundamentally depends on their ability to examine responsive records over which public bodies claim exemptions, including the exemption for solicitor-client privilege."

²⁶ *Supra* note 19 at para. 20

²⁷ Canada (Attorney General) v. Canada (Information Commissioner), [2004] 4 FC 181, 2004 FC 431.

On appeal, the Federal Court of Appeal was asked only to consider whether subsection 36(2) of the Act empowered the Commissioner to compel disclosure of legal advice prepared in response to an access to information request. The Attorney General again argued that subsection 36(2) should be read restrictively and permit interference with privilege only to the extent absolutely necessary in order to achieve the ends sought by the Act (emphasis added). The Federal Court of Appeal agreed.

In the present context, a strong expectation of confidentiality with respect to the legal advice memorandum remains, despite subsection 36(2). In my view, Parliament did not intend that a government institution be without the benefit of legal advice, provided in confidence, in deciding how to properly respond to an information request. To allow the Commissioner to have unrestricted access to a document such as the legal advice memorandum would have the chilling effect warned of by Binnie J. in *R. v. Campbell*, [1999] 1 S.C.R. 565 at paragraph 49, and would discourage access to legal advice by government decision makers in similar circumstances.²⁸

The Supreme Court of Canada refused leave to appeal.²⁹

In summary, legislation compelling disclosure of privileged records requires all of the following:

- clear, explicit and unequivocal statutory language;
- evidence that the disclosure is absolutely necessary to achieve the purposes of the legislation (often stated as a means of last resort); and
- an approach that minimizes the impairment of the privilege.

Further, clients must be given a meaningful opportunity to assert and protect their claim of privilege.

The CBA does not believe the amendments proposed in Bill C-58 meet this standard.

Clause 15 of Bill C-58 replaces subsection 36(2) of ATIA with three subsections that, collectively, give the Information Commissioner an unfettered right to examine any record subject to solicitor-client privilege that the head of a government institution refuses to disclose, and clarify that disclosure in these circumstances does not constitute a waiver of privilege. Under current law, compelled disclosure of privileged documents does not constitute a waiver. The Supreme Court has flagged that this is an important safeguard, but the CBA does not believe it is a complete one. Clause 50 of the Bill proposes similar changes to the *Privacy Act*.

²⁸ Canada (Attorney General) v. Canada (Information Commissioner), 2005 FCA 199, at paras. 24-25.

²⁹ No. 31065, November 17, 2005. Major, Fish and Abella JJ.

In effect, Bill C-58 simply adds solicitor-client privilege to the existing language of the Act.

Nothing proposed would:

1. acknowledge the status of privilege as a highly protected substantive right and principle of fundamental justice (as distinct, for example, from “any privilege under the law of evidence”)
2. support the absolute necessity of allowing the Commissioner to review privileged records, or
3. provide adequate safeguards to ensure that privileged records are not disclosed in a manner that compromises the substantive right.³⁰

Potential impact on the proper functioning of government

There are important practical consequences to these proposed amendments. Today, legal advice is developed as part of a dynamic exchange between lawyer and client, and the advice given provides calculations of risk reflecting the complex, strategic considerations appropriate to the public sector context. It is essential that clients feel comfortable exploring a wide range of scenarios with their legal advisors, to be fully informed of the legal dimensions of their decisions. If they cannot be confident about the protections of solicitor-client privilege, there will invariably be a chilling effect in seeking frank legal advice, to the detriment of the proper functioning of government.

Who should adjudicate solicitor-client privilege disputes?

The prudent course in this context is to ensure that assessments of disputed privilege claims are made by the judiciary. If the heads of government institutions follow best practices for discovery of privileged records, these disputes should be rare and constitute an appropriate use of judicial resources.

There is no requirement that the person who holds the office of Information or Privacy Commissioner have particular expertise on solicitor-client privilege. Further, unlike the courts, the Commissioners are not impartial adjudicators. 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. As such, the Commissioner can become adverse in interest to a public body. Similar powers are accorded the Privacy Commissioner.

³⁰ In *University of Calgary*, at para. 58, the SCC set an expectation that such safeguards would be enacted *in addition to* addressing the issue of waiver.

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 on the privilege. Compelled disclosure to a potential adversary is all the more serious.

If the Commissioner believes an improper claim has been made, the Act authorizes review by the Federal Court. The CBA supports this approach.

If the Commissioner is concerned that there is systemic abuse of any exemption under the Act, including solicitor-client privilege, there are other avenues available to the Commissioner to address those concerns, including reports to Parliament. Lawyers who encourage clients to misuse claims of privilege are subject to disciplinary action by law societies, and the Act itself provides serious penalties for any person who obstructs the Commissioner in the performance of their duties. However, we do not believe that abuse of section 23 of the Act has been a justification of the Information Commissioner in requesting amendments to subsection 36(2) of the Act.

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.

RECOMMENDATION

6. Remove clauses 15 and 50 of Bill C-58.

V. CONCLUSION

The CBA appreciates the opportunity to comment on Bill C-58. We would be pleased to provide any further clarification and welcome the opportunity to appear before your Committee.

VI. SUMMARY OF RECOMMENDATIONS

The CBA recommends:

- 1. Expand the scope of ATIA to include organizations that support Parliament, subject to Parliamentary privilege.**
- 2. a) Remove the amendments to section 6 of ATIA set out in clause 6 of Bill C-58; and**
b) Remove subsections 6.1(1)(b) and 6.1(1)(c) of ATIA set out in clause 6 of Bill C-58.
- 3. Remove clause 7 of Bill C-58, or include fee waiver criteria in clause 7(4) of Bill C-58.**
- 4. Amend clause 37 of Bill C-58 and proposed subsection 93(1) of ATIA to require a review by a Parliamentary committee, rather than a Ministerial review.**
- 5. a) Exempt the judiciary and the courts from ATIA. Alternatively, public and periodic reporting by each court should be in the aggregate.**
b) That decisions about judicial independence exemptions be made by the judicial branch, that is, by the Chief Justice of each court or their designate.
- 6. Remove clauses 15 and 50 of Bill C-58.**