

COMMENTS AND OBSERVATIONS BARREAU DU QUÉBEC

Bill C-58 — An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts

Submitted to the Standing Senate Committee on
Legal and Constitutional Affairs

June 22, 2018

Mission of the Barreau du Québec

To ensure the protection of the public, the Barreau du Québec oversees professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

Acknowledgments

The Barreau du Québec would like to thank the Barreau du Québec's Secrétariat de l'Ordre et Affaires juridiques for drafting this brief:

Nicolas Le Grand Alary

INTRODUCTION

On June 19, 2017, Scott Brison, President of the Treasury Board, introduced Bill C-58 *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts* (hereafter "the bill") in the House of Commons.

This bill seeks to make several amendments to the *Access to Information Act*¹ as well as to the *Privacy Act*², in order to undertake a significant reform the federal access to information system.

The primary mission of the Barreau du Québec is to protect the public³, leading it to assume a key social role in promoting the rule of law with a particular focus on compliance with the fundamental principles guaranteed by the *Canadian Charter of Rights and Freedoms*,⁴ especially solicitor-client privilege and judicial independence.

It is in that vein that we reviewed the bill and are sharing our comments.

NEW EXCEPTION TO SOLICITOR-CLIENT PRIVILEGE

New section 36 of the *Access to Information Act* proposed under clause 15 of the bill

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.

¹ R.S.C. 1985, c. A-1.

² R.S.C. 1985, c. P-21.

³ Professional Code, CQLR, c. C-26, s. 23.

⁴ Part I of the *Constitution Act, 1982* [Schedule B of *The Canada Act 1982*, 1982, c. 11 (U.-K.)] (hereafter "Canadian Charter").

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.

The bill proposes to clarify the powers of the Information Commissioner to examine all documents that are protected by the professional secrecy of advocates and notaries or litigation privilege in the course of their investigations. The Barreau du Québec understands that this change is in response to the Supreme Court of Canada ruling in *Alberta (Information and Privacy Commissioner) v. University of Calgary*⁵.

In that case, the Supreme Court interpreted Alberta's access legislation (similar to federal legislation), as not having a clear and unequivocal intention by the legislator to deny solicitor-client privilege. Legislation which would limit or deny solicitor-client privilege must be interpreted restrictively⁶ and cannot be abrogated by inference⁷. As the Supreme Court confirms in *Canada (National Revenue) v. Thompson*⁸:

[...] it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history [...].⁹

While we understand that the federal legislator might deny solicitor-client privilege under certain circumstances, the Barreau du Québec is against the proposed changes to the *Access to Information Act* for the following reasons.

First, the Barreau du Québec would like to reiterate the special status of professional secrecy of advocates and notaries, which has been recognized many times by the Supreme Court of Canada and just recently in *Canada (Attorney General) v. Chambre des notaires du Québec*¹⁰. Indeed, professional secrecy of advocates and notaries is a fundamental principle of justice within the meaning of section 7 of the Canadian Charter¹¹ and is generally seen as a "fundamental and substantive rule of law"¹².

⁵ 2016 SCC 53.

⁶ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, par. 33

⁷ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, par. 11

⁸ 2016 SCC 21.

⁹ *Id.*, par. 25.

¹⁰ 2016 SCC 20.

¹¹ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61.

¹² *R v. National Post*, 2010 SCC 16.

The Supreme Court ruled that solicitor-client privilege must be jealously guarded and should only be set aside in the most unusual circumstances¹³. Solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance and can be protected by labeling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary¹⁴. The Supreme Court has reiterated this principle on many occasions¹⁵.

In our view, the proposed changes do not meet the high threshold set by the Supreme Court for denying solicitor-client privilege through a legislative provision.

There is no evidence to suggest that there is a real and urgent problem requiring the intervention of the legislator. The federal departments and agencies subject to the legislation do not seem to invoke solicitor-client litigation privilege for denying access to records that should be accessible.

On the contrary, records protected by solicitor-client privilege represent only 3.07% of all records for which requests for access have been declined¹⁶.

POTENTIAL IMPACT OF PROACTIVE PUBLICATION OF INFORMATION ON JUDICIAL INDEPENDENCE

New sections 90.01 to 90.25 of the *Access to Information Act* proposed under clause 15 of the bill

[...]

Incidental expenditures — judges

90.18 Within 30 days after the end of the quarter in which any incidental expenditure incurred by a judge is reimbursed under subsection 27(1) of the *Judges Act*, the Commissioner shall cause to be published in electronic form the following information:

- (a) the judge's name;
- (b) a description of the incidental expenditure;
- (c) the date on which the incidental expenditure was incurred; and
- (d) the total amount of the incidental expenditure.

¹³ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, par. 17

¹⁴ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, par. 36

¹⁵ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, par. 43; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, par. 28; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, par. 15; *R. v. Brown*, 2002 SCC 32, par. 27; *R. v. McClure*, 2001 SCC 14, par. 35.

¹⁶ Office of the Information Commissioner of Canada, *Observations on the health of the system 2014-2015*, Figure 17, online: <http://bit.ly/2shPmKP>.

Representational allowances — judges

90.19 Within 30 days after the end of the quarter in which any incidental expenditure incurred by a judge is reimbursed under subsection 27(1) of the Judges Act, the Commissioner shall cause to be published in electronic form the following information:

- a) the judge's name;
- b) a description of the expenses;
- c) the dates on which the expenses were incurred; and
- d) the total amount of the expenses.

Travel allowances — judges

90.2 Within 30 days after the end of the quarter in which any moving, transportation, travel or other expenses incurred by a judge are reimbursed under section 34 of the Judges Act as a travel allowance, the Commissioner shall cause to be published in electronic form the following information:

- a) the judge's name;
- b) a description of the expenses;
- c) the dates on which the expenses were incurred; and
- d) the total amount of the expenses.

Conference allowances — judges

90.21 Within 30 days after the end of the quarter in which any travel or other expenses incurred by a judge are reimbursed under section 41 of the Judges Act as a conference allowance, the Commissioner shall cause to be published in electronic form the following information:

- a) the judge's name;
- b) a description of the expenses;
- c) the dates on which the expenses were incurred; and
- d) the total amount of the expenses.

Judicial Independence, Protected Information, Security of Persons, Infrastructure and Goods and Canadian Judicial Council

Judicial independence

90.22 Sections 90.03 to 90.09, 90.11 to 90.13 and 90.15 to 90.21 do not apply to any of the information or any part of the information referred to in those sections if the Registrar, the Chief Administrator or the Commissioner, as applicable, determines that the publication could interfere with judicial independence.

Protected information and security

90.23 The Registrar, the Chief Administrator or the Commissioner, as applicable, is not required to cause to be published any of the information or any part of the information referred to in any of sections 90.03 to 90.09, 90.11 to 90.13 and 90.15 to 90.21 if he or she determines that:

- a) the information or the part of the information is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege; or
- b) the publication could compromise the security of persons, infrastructure or goods.

Final decision

90.24 A determination by the Registrar, the Chief Administrator or the Commissioner that a publication could interfere with judicial independence or could compromise the security of persons, infrastructure or goods or that any information or part of any information is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege is final.

[...]

The bill proposes introducing an obligation for all court administrative bodies such as the Office of the Registrar of the Supreme Court of Canada, Courts Administration Service and Office of the Commissioner for Federal Judicial Affairs to proactively publish information.

More specifically, all the representational allowances and travel or conference allowances incurred by federally appointed judges will have to be made public within 30 days after the end of the quarter in which the expenses were reimbursed.

The published information shall include the judge's name, the amount of the expenses, the date and the reasons for which the expenses were incurred. However, that information may not be published if it is determined that such publication interferes with judicial independence. That determination is made by the administrative bodies of the courts.

The Barreau du Québec feels that these changes could indirectly interfere with the principle of judicial independence. Section 11(d) of the Canadian Charter guarantees the right of any person charged with an offence to be judged by an independent and impartial tribunal. Judicial independence and impartiality are the cornerstone of the Canadian judicial system. As the Supreme Court of Canada states in *Valente v. The Queen*¹⁷:

[...] Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

¹⁷ [1985] 2 S.C.R. 673.

The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees

In this case, the Supreme Court identifies the three components of judicial independence, which includes administrative or institutional independence:

The third essential condition of judicial independence for purposes of section 11 (d) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today.¹⁹ (Our emphasis)

The Barreau du Québec believes that the proposed changes in the bill may create some glitches in this component of judicial independence. Given their particular constitutional status, judges cannot be considered government officials or elected representatives and cannot be subject, mutatis mutandis, to the same rules as all federal agencies or departments. Some deference is called for.

What is more, leaving it to the administrative bodies of the courts to determine whether judicial independence is at play in itself leaves room for glitches regarding the administrative independence of the courts. The Barreau du Québec does not believe that matters of access to information affecting the judiciary should be determined by government officials, but rather by the chief justice of each court affected or the person to whom the chief justice agrees to delegate these duties.

Neither should judges stop attending conferences or events out of concern for their public image or fear that their expenses, albeit reasonable, will be scrutinized by certain people. They must maintain full independence, provided that there is compliance with the rules and policies in place.

Finally, the Barreau du Québec believes that it is possible to achieve the government's transparency objectives in other ways. This could be done under the watch of the chief justices by requiring the courts to produce reports including the total amounts for incidental expenditures, representational allowances, or travel or conference allowances.

These reports would help inform the public about the expenses incurred without specifically identifying the judges involved, by avoiding any potential interference in the fundamental principle of judicial independence.

¹⁸ *Valente v. The Queen*, [1985] 2 S.C.R. 673, par. 22

¹⁹ *Id.*, par. 47