November 19, 2018

Email: lcjc@sen.parl.gc.ca

The Honourable Serge Joyal PC, OC, OQ, FRSC, Ad. E
Chair, Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Joyal:

Thank you for the opportunity to appear before the Legal and Constitutional Affairs Committee to comment on Bill C-58, *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*. We are writing to correct some small errors in our earlier written submission and to follow up Senators’ questions.

Recommendation #2 in our written submission (on page 3 and in the Summary of Recommendations on page 15) calls to remove “(b) 6.1(1)(b) and 6.1(1)(c) of ATIA set out in clause 6 of Bill C-58.” These subsection references are to the First Reading version of Bill C-58, and not the version that is before the Senate. Recommendation #2 should instead read as follows:

(a) Remove the amendments to section 6 of ATIA set out in clause 6 of Bill C-58; and

(b) remove subsection 6.1(1)(a) and 6.1(1)(b) of ATIA set out in clause 6 of Bill C-58.

Recommendation #6 in our written submission (page 14) states: “remove clauses 15 and 30 of Bill C-58.” The reference to clause 30 should be to clause 50, to ensure that ATIA and the Privacy Act continue to correspond to one another with respect to the treatment of solicitor-client privilege.

Senator Carignan asked a question about section 73 of Bill C-51. The section would require the Minister of Justice to table a statement on the potential effects of a Bill on the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* (Charter statement), to inform Parliament and the public of those potential effects. The Department of Justice website notes that Charter statements are not legal opinions on the constitutionality of a bill, and are an aid to Parliamentary and public debate about proposed legislation.

We had not been informed that the Senate Committee would question us on Bill C-51. However, we offered to consider the question and respond in writing.

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1 CBA Submission on Bill C-58, Access to Information Act and Privacy Act amendments, May 2018.
We have reviewed the Charter statement for Bill C-58. We understand Senator Carignan was asking whether a Charter statement in itself could constitute a waiver of solicitor-client privilege on legal opinions “that would affect the constitutionality of a law.” We do not believe the Charter statement constitutes a waiver of solicitor-client privilege on any legal opinions the Government may have received from its own counsel about the constitutionality of a Bill. Of course, a client – even a government client – has the right to waive solicitor-client privilege in any circumstances they deem appropriate.

Senator Carignan also asked about privileged information belonging to third parties that may be in the hands of federal institutions (for example, legal opinions shared with regulators). Maître Aylwin referenced a situation where legal opinions may have been shared in a particular context but the process was supervised and protections were in place to ensure that sharing the information did not constitute a waiver of the privilege.

It is worth considering whether the compelled production of privileged information, as contemplated by Bill C-58, might (unintentionally or inappropriately) capture records subject to solicitor-client privilege and belong to third parties. This will depend on an assessment of ATIA and the Privacy Act, as well as other legislation. (See, for example, Bill C-86, Budget Implementation Act, 2018, No. 2, PART 4 Various Measures, DIVISION 3 Financial Sector, SUBDIVISION C Privileged information.)

Finally, we offer additional comment about clause 15(2.2) of Bill C-58:

> 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.

Although we have recommended the removal of clause 15, clause 15(2.2) (and by extension Clause 50 (2.2)) could be retained as a stand-alone provision to give additional protection for solicitor-client privilege where the head of an institution voluntarily discloses privileged information to the Commissioner. At common law, the compelled disclosure of privilege information does not constitute a waiver.

We trust this information is helpful.

Sincerely,

*(original letter signed by Tina Head for Alexis Kerr and Darcia Senft)*

Alexis Kerr  
Vice-Chair, Privacy and Access Law Section

Darcia Senft  
Chair, Ethics and Professional Responsibility Subcommittee