Subject: RE: LCJC - follow-up to appearance before the Senate Legal Affairs Committee, 2018 10 31

Good Afternoon:

Following our attendance before the Senate Legal Affairs Committee on October 31, I was asked by some Committee members whether I could propose specific amendments to the text of Bill C-58, to give effect to my suggestions to improve the effectiveness of the Commissioner’s order power set out in new s. 36.1(1).

With apologies for the delay, I have done so on a best effort basis in the attached document. I would emphasize, however, I am not expert in legislative drafting, so there would be a benefit in having these suggestions checked by someone who is more so.

Briefly, the attached suggestions follow my comments during testimony on the following points.

- The “de novo” review by the Federal Court in s. 41 is modified to be a statutory appeal to the Federal Court, limited to questions of law and jurisdiction. This is legally equivalent to ordinary “judicial review”, in terms of the discussion during testimony. It is intended to ensure that the Commissioner is the final decision-maker on questions of fact.
- The new subsection 36(1.1) is added to clarify that the Commissioner has full authority to determine all matters of fact and law by an order made under ss. 36(1). This ensures that review of questions of law by the Federal Court will occur on the more deferential “reasonableness standard”, consistent with positions being argued by the Attorney General of Canada in 3 cases currently before the Supreme Court to be argued in early December.
- The revisions to subsections 36(4), 37(4), and 41.1(1) and (2) are intended to ensure that the order is effective unless an appeal is commenced, in which event a stay is imposed automatically pending completion of the appeal proceedings.
- The period for any party to commence an appeal is standardized at 10 business days from receipt of the order, which is two weeks and should be ample time in almost all circumstances: see ss. 41(1.1), (2), (3) and (4). However, I note the Federal Court has broad powers to extend any time prescribed in the event there are appropriate circumstances justifying extension, which is an effective safety net.
- For consistency, the amendments to s. 44 provide for review of a decision by a head to release third party information to be conducted by the Information Commissioner, rather than the Federal Court.
- In s. 42, given that the proceeding in Federal Court will be an appeal from the Commissioner, the power of the Commissioner to appear in that appeal “on behalf of a complainant” seems no longer necessary or appropriate. It is appropriate to retain the right of the Commissioner to appear as a party in their own right, and this is sufficient to ensure all proper arguments are before the Court on an appeal even if the complainant elects not to participate.
- The remaining changes are, I believe, simply consequential.
I trust this will be of assistance to Committee members, and I would ask that you provide all of them with a copy of this email and attachment.

Since I have not had an opportunity to review these suggestions with CAJ or FPJQ, I have copied their representatives, who may have other comments.

Regards to all,

M. Philip Tunley

ST. LAWRENCE BARRISTERS LLP
Power to make order

36.1 (1) If, after investigating a complaint described in any of paragraphs 30(1)(a) to (d.1), the Commissioner finds that the complaint is well-founded, he or she may make any order in respect of a record to which this Part applies that he or she considers appropriate, including requiring the head of the government institution that has control of the record in respect of which the complaint is made

(a) to disclose the record or a part of the record; and
(b) to reconsider their decision to refuse access to the record or a part of the record.

Power to determine law and fact

(1.1) The Information Commissioner has, in all matter within his or her jurisdiction, authority to hear and determine all questions of law or fact by any order made under subsection (1).

Limitation

(2) The Information Commissioner is not authorized to make an order after investigating a complaint that he or she initiates under subsection 30(3).

Condition

(3) The order may include any condition that the Information Commissioner considers appropriate.

Effect

(4) The order takes effect on the day following the last date for service of a notice of appeal under subsections 41(1.1), (2), (3) or (4), as may be applicable, and in the event of such appeal then the effect of the order is governed by section 41.1.

(a) the 31st business day after the day on which the head of the government institution receives a report under subsection 37(2), if only the complainant and the head of the institution are provided with the report; or
(b) the 41st business day after the day on which the head of the government institution receives a report under subsection 37(2), if a third party or the Privacy Commissioner is also provided with the report.

Deemed date of receipt
(5) For the purposes of this section, the head of the government institution is deemed to have received the report on the fifth business day after the day on which the order is made.

[NOTE: no changes proposed to sections 36.2, 36.3, 37(1), (2), (3) or (3.1) as proposed in Bill C-58]

37. …

Limitation

(3.2) However, the Information Commissioner is not to publish the report until the expiry of the periods to apply to the Court for a review of a matter appeal that are referred to in section 41.

Access to be given

(4) If the head of a government institution gives notice to the Information Commissioner under paragraph (1)(c) that access to a record or a part of a record will be given to a complainant, the head of the institution shall, unless an appeal is commenced under section 41, give the complainant access to the record or the part of the record

(a) on receiving the report under subsection (2) or within any period specified in the Commissioner’s order, if only the complainant and the head of the institution are provided with the report; or

(b) on the expiry of the 40th business day after the day on which the head of the government institution receives the report under subsection (2) time for service of a notice of appeal under subsections , or within any period specified in the Commissioner’s order that begins on the expiry of that 40th business day time, if a third party or the Privacy Commissioner are also provided with the report, unless a review is applied for under section 41.

[NOTE: no changes proposed to subsection 40(2) as proposed in Bill C-58]

Review by Appeal to Federal Court — complainant
An appeal lies to the Federal Court upon a question of law or jurisdiction from an order of the Information Commissioner made under subsection 36.1(1), in accordance with this section.

A person who makes a complaint described in any of paragraphs 30(1)(a) to (d.1) and who receives a report under subsection 37(2) in respect of the complaint may, within 30-10 business days after the day on which the head of the government institution—person receives the report, apply appeal to the Court for a review of the matter from any matter that is the subject of an order of the Information Commissioner set out in the report that is the subject of the complaint.

Review by Appeal to Federal Court — government institution

(2) The head of a government institution who receives a report under subsection 37(2) may, within 30-10 business days after the day on which they receive it, apply appeal to the Court for a review of from any matter that is the subject of an order set out in the report.

Review by Appeal to Federal Court — third parties

(3) If neither the person who made the complaint nor the head of the government institution makes an application appeal under this section within the period for doing so, a third party who receives a report under subsection 37(2) may, within 10 business days after the expiry of the period referred to in subsection (1.1), apply appeal to the Court for a review of from the application of any exemption provided for under this Part that may apply to a record that might contain information described in subsection 20(1) and that is the subject of the complaint in respect of which the report is made an order set out in the report.

Review by Appeal to Federal Court — Privacy Commissioner

(4) If neither the person who made the complaint nor the head of the institution makes an application appeal under this section within the period for doing so, the Privacy Commissioner, if he or she receives a report under subsection 37(2), may, within 10 business days after the expiry of the period referred to in subsection (1.1), apply appeal to the Court for a review of from any matter in relation to the disclosure of a record that might contain personal information and that is the subject of the complaint in respect of which the report is made an order set out in the report.

Respondents
(5) The person who applies for a review appeals under subsection (1.1), (3) or (4) may name only the head of the government institution concerned as the respondent to the proceedings. The head of the government institution who applies for a review appeals under subsection (2) may name only the Information Commissioner as the respondent to the proceedings.

Deemed date of receipt

(6) For the purposes of this section, the head of the government institution is deemed to have received the report on the fifth business day after the day on which the order is made.

Operation of order stayed

41.1 (1) Subject to subsection (2), the making of an application appeal under section 41 operates as a stay of any order set out in a report received under subsection 37(2) by the person who made the application appeal until the proceedings are appeal is finally concluded.

Part of order operative

(2) If all of the persons who received the report agree in writing, any part of the order that relates to a matter that is not the subject of the proceedings appeal becomes operative.

Parties to review

41.2 (1) If a person who receives a report under subsection 37(2) applies appeals to the Court for a review under section 41, any other person who received the report under that subsection has the right to appear as a party to the review appeal.

Scope of proceedings

(2) If a complainant, a third party or the Privacy Commissioner files notice of their intention to appear as a party to a review an appeal with the Court within 10 business days after the expiry of the period referred to in subsection 41(1.1), they may raise for determination by the Court any matter in respect of which they may make an application appeal under section 41.

Burden of proof – party

(3) If a third party or the Privacy Commissioner raises a matter for determination by the court under subsection (2), the burden of establishing that the disclosure of a
Information Commissioner’s Order power

record requested under this Part or a part of such a record is not authorized is on the person who raises the matter.

Information Commissioner may appear

42 The Information Commissioner may

(a) appear before the Court on behalf of a complainant; or
(b) appear as a party to any review applied for appeal under section 41 or, with leave of the Court, as a party to any review applied for under section 44.

Service on head of government institution

43 (1) If a complainant, a third party or the Privacy Commissioner makes an application for a review appeal under section 41, he or she shall immediately serve a copy of the originating document on the head of the government institution who received the report under subsection 37(2).

Service or notice

(2) If the head of a government institution makes an application for a review appeal under section 41, he or she shall immediately serve a copy of the originating document on the persons who are entitled to be provided a report under subsection 37(2) and on the Information Commissioner. However, if the head of the institution is served with a copy of an originating document under subsection (1), he or she shall, as soon as possible after being served, give written notice of the application to those persons and to the Information Commissioner, unless any of those persons or the Commissioner has already been served with a copy of the document.

Third party may apply for review

44 (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) to give notice of a decision to disclose a record or a part of a record under this Part may, within 2010 business days after the notice is given, apply to the Information Commissioner Court for a review of the matter.

Notice to person who requested record

(2) The head of a government institution who has given notice under paragraph 28(1)(b) that a record requested under this Part or a part of such a record will be disclosed shall, on being given notice of an application made under subsection (1)
in respect of the disclosure, give written notice of the application to the person who requested access to the record.

**De novo review**

**44.1** For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.

**Hearing in summary way**

**45** An application made under section 41 or 44 is to be heard and determined in a summary way in accordance with any special rules made in respect of such applications under section 46 of the Federal Courts Act by the Information Commissioner.

**Access to records**

**46** 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, the Information Commissioner or the Court may, in the course of any proceedings before them arising from an application under section 41, 42 or 44, 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 Information Commissioner or the Court on any grounds.

**Court to take precautions against disclosing**

**47** (1) In any proceedings before the Information Commissioner or the Court arising from an application under section 41 or 44, the Information Commissioner or the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of

(a) …

**Burden of proof — subsection 41(1) or (2)**

**48** (1) In any proceedings before the Court arising from an application under subsection 41(1) or (2), the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Part or a part of such a record or to make the decision or take the action that is the subject of the proceedings is on the government institution concerned.
Burden of proof—subsection 41(3) or (4)

(2) In any proceedings before the Court arising from an application under subsection 41(3) or (4), the burden of establishing that the head of a government institution is not authorized to disclose a record that is described in that subsection and requested under this Part or a part of such a record is on the person who made that application.