Submission on behalf of the Canadian Superior Courts Judges Association to the Standing Committee on Access to Information, Privacy and Ethics In relation to Bill C-58: *An Act to amend the Access to Information Act and the Privacy Act*

Introduction

Thank you for inviting the Canadian Superior Courts Judges Association to give its views on Bill C-58. My name is Pierre Bienvenu. I am a lawyer in private practice at Norton Rose Fulbright, and I have long represented the Association in relation to judicial compensation and benefits and other constitutional law issues.

The Association is composed of judges appointed by the federal government to the various levels of courts across the country. It has around 1000 members, representing approximately 95% of all federally appointed judges, including judges of the superior courts, appellate courts, the Tax Court and the Federal Courts.

Members of the Committee, the provisions of Bill C-58 that cover judges are of grave concern to the Association. The judiciary was not consulted prior to the Bill being tabled in Parliament and the Association therefore welcomes the opportunity to address this Committee on questions that it considers fundamental. The Association has shared the submission I am presenting to you today with the Canadian Judicial Council, and the Council has indicated that it endorses this submission.

Let me say at the outset that the judiciary acknowledges that Bill C-58 is pursuing important objectives of transparency and accountability, including on the part of individuals who are paid out of the public purse and who incur reimbursable expenses in discharging their functions. However, there are compelling reasons why these objectives in the case of judges must be pursued by means that differ from the means adopted for elected officials and members of the bureaucracy.

The part of the Bill relating to judges starts with proposed s. 90.01 and goes to s. 90.25. The essence of these provisions is to impose the requirement to publish individualized information regarding judges' expenses. What would be published would be the judge's name, a description of the expense, the date on which the expense was incurred, and the total amount of the expense.[1] The Registrar of the Supreme Court of Canada would be required to publish the

[1] *See* ss. 90.06-90.09, 90.18-90.21

expense information of Supreme Court justices, and the Commissioner of Federal Judicial Affairs would be required to publish the expense information of all of the other federally appointed judges.

The expenses in question are expenses reimbursable under the *Judges Act* as so-called allowances : travel allowance, conference allowance, incidental allowance, and representational allowance.

There are provisions in the Bill proposing to allow the Registrar and the Commissioner to withhold publication if publication could interfere with judicial independence, or could compromise security, or contains information that is subject to privilege or professional secrecy.

Overview of the Position of the Association

There are 3 basic points I would like to make today:

1. Bill C-58 proposes to apply to judicial expenses a regime that, insofar as accountability is concerned, is duplicative of control mechanisms that already exist in relation to reimbursable judicial expenses.

2. The proposed expense publication regime is unsuitable for judicial expenses, and raises profound concerns for all judges, and particularly for judges on national courts who are required to travel.

3. The important objectives of the Bill can be achieved by other means that do not violate judicial independence. The Association urges this Committee to recommend that these other means be substituted to those proposed in this Bill.

I. The Adequacy of Existing Control Mechanisms

Bill C-58 is duplicative in relation to federally appointed judges because there are robust measures already in place to ensure that judicial expenses are legitimate, reasonable and subject to independent verification.

The *Judges Act* defines the categories of expenses that judges may incur in performing their functions. Judges cannot seek reimbursement of any expense falling outside of these defined categories. In addition, there is a federal official, assisted by his own staff, whose responsibility is to review all judicial expense claims to determine whether submitted expenses fall within a category set out in the *Judges Act*, and whether they were properly incurred and are

reasonable. That person is the Commissioner of Federal Judicial Affairs and, for the judges of the Supreme Court of Canada, it is the Registrar of the Supreme Court of Canada.

Members of the Committee, the fact that the allowances for judicial expenses are set out in detail in a statute, namely the *Judges Act*, speaks to the differences between the judiciary and the other branches of government. The same reason lies behind the very existence of the offices of the Commissioner and the Registrar, both of which are meant to act as a buffer between the Government and the judiciary, in recognition of the demands of judicial independence.

It should be made clear that judicial expenses are generally not in the nature of discretionary expenses. For example, the travel allowance under the *Judges Act*, s. 34, (which includes expenses for accommodation and meals) is for a specific purpose: travel outside the vicinity of a judge's residence to perform a function or duty as a judge. Whether, when, and where a judge travels for judicial duties is determined by his or her chief justice. On top of that, the Commissioner determines whether the travel expenses were appropriately incurred, are reasonable and are in accordance with published guidelines.

The same is true for conference allowance, another category of expenses provided for in the *Judges Act*, s. 41. Any judicial education programme or conference that a judge is invited to or desires to attend must be approved by the chief justice of the court on which the judge serves. On top of this prior approval, the Commissioner must approve any and all expense claims submitted in relation to that conference.

It might correctly be said that some form of discretion exists in respect of two expense categories provided for under the *Judges Act*: the representational allowance (s. 27(6)) for chief justices and associate chief justices (which is for expenses incurred "in discharging the special extra-judicial obligations and responsibilities" of these justices) and the so-called incidental allowance (s. 27(1)) (for expenditures for "the fit and proper execution of the office of judge"). Both categories are subject to relatively modest annual caps. For example, the incidental allowance is subject to an annual cap of $5,000. Even in relation to those two expense categories, the Commissioner must approve any and all expenses claimed. He does so based on guidelines prepared by his office so that judges know in advance what types of expense are reimbursable and in what amount.

II. The Proposed Publication Regime Raises Concerns About Judicial Independence

There are two fundamental problems with the proposed regime as it would apply to judges. The first is the granularity of the information required to be published, tying named individual judges to identifiable judicial expenses; the second is the designation of a member of the executive to make a final decision as to whether the publication required by the Bill could interfere with judicial independence.

Allow me to articulate the first concern by reference to expenses incurred by judges of Canada's national courts, such as the Federal Court, the Federal Court of Appeal and the Tax Court of Canada. National courts are a service to Canadians and an expression of our commitment to our country. Judges of these courts are required to reside in the National Capital Region,[2] yet they sit on cases across the country. So they must travel extensively. When these judges travel, the expenses they incur are covered by the travel allowance provided for under s. 34 of the *Judges Act.* Now there are two points to consider. First, judges of national courts who are required to travel across the country will obviously have significantly higher expenses than their colleagues at courts that do not require such extensive travel, like the judges of provincial superior courts and courts of appeal. The reason for the difference in levels of expense will not be obvious when looking at the published information on expenses.

Even among judges of national courts, some will travel more than others because of how their respective chief justices have decided to administer the assignment of judges. It may also be that a given judge is more free to travel while another judge has temporary family constraints that make it preferable to have that judge hear cases in the National Capital Region. A difference in levels of expense when looking at the published information of these two judges will not be accompanied with an explanation for the difference.

The point is this. The total expenses of a judge may stand out for the reasons just given. Those expenses would have been incurred not by choice but as a result of service on a national court and the assignment decisions of the judge's chief justice. It is grossly unfair, indeed it is unacceptable, that the burden of standing out from the lot by reason of high traveling expenses be borne by an individual judge, as opposed to the court to which he or she belongs.

Let’s look at conference allowances. These are reimbursed under s. 41 of the *Judges Act*. If a given judge attends a judicial education programme in a certain area of the law, and another

[2] *Federal Courts Act*, s.7(1); *Tax Court of Canada Act*, s.6(1)

judge does not, how will that be used when the expense information is made public? Will the judge who took the course be seen as admitting that he or she did not have enough expertise in a certain area of the law, and will the colleague who did not take the course be reproached for not taking part in continuing education?

The work of judges involves emotionally fraught issues of criminal conviction and sentencing, custody of children, disputes over wills and estates, and bankruptcy matters, to give a few examples. By definition, the judicial function results in at least one party being dissatisfied with the result. The potential for mischief in the use of publicly available individualized expense information is enormous. And unlike persons working in other branches of government, judges may not defend themselves publicly when they stand attacked. Moreover, there are real concerns about the security of individual judges if it were publicly disclosed where they stay and eat while travelling on judicial duties, or where they gather for judicial education conferences.

I turn now to the safeguard clause at s. 90.22 of the Bill. That section says that the Commissioner (or the Registrar for Supreme Court judges) decides whether publication could interfere with judicial independence. Pursuant to s. 90.24 of the Bill, this determination is supposed to be final.

This is a glaring, fundamental constitutional defect. 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.

I note as well that the regime as currently proposed does not even provide a process for judges or chief justices to make submissions to the Registrar or the Commissioner as to why the publication of a given expense could undermine judicial independence. Nor does the Bill provide for judges to be given notice that, in spite of an objection, the Commissioner or Registrar intends nevertheless to proceed with the publication.

III. Third Point: The Way Forward

I have presented the problems, I now turn to solutions.

There are ways of balancing the Bill's important objectives against the constitutional requirements of judicial independence, taking into account the fact that there already exists an

official responsible for supervising the appropriateness and reasonableness of expenses incurred by judges.

The Commissioner could be required to publish expense information according to the categories of reimbursable allowances set out in the *Judges Act*, and according to each court. For example, judges of the Ontario Superior Court of Justice spent **X** amount as a whole on conferences during the period, and judges of the Federal Court spent **X** amount as a whole on travel. It will be easy for the public, based on that information, to derive per judge, per court and per expense category figures, which will attain the Bill's transparency objective all the while preserving judicial independence and not compromising the security of individual judges.

As regards the safeguard clause, the decision of whether judicial independence could be undermined by publication could be made to reside with the chief justice of the court concerned.

I note that should this approach be adopted, the objective of the Bill as set out in the "Summary" section would be attained. This summary calls for the proactive publication of information related to "institutions that support superior courts". That expression refers to the Commissioner, the Registrar and the Courts Administration Services; it does not on its face encompass individual judges.

Members of the Committee, I conclude by repeating that Bill C-58 is of profound concern to the judiciary. The publication regime as it would apply to judges is constitutionally defective and it undermines important constitutional principles. I would urge you carefully to consider the points I have made today and to make the changes I have suggested to the proposed regime.

Thank you for your attention and remain available to address any questions you might have.

October 30, 2017