SCC File No. 36460

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

THE INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

Appellant

- and-

THE BOARD OF GOVERNORS OF THE UNIVERSITY OF CALGARY

Respondent

- and –

THE LAW SOCIETY OF ALBERTA, BRITISH COLUMBIA FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION, INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, INFORMATION AND PRIVACY COMMISSIONER FOR THE PROVINCE OF NEWFOUNDLAND AND LABRADOR, ADVOCATES' SOCIETY, FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN BAR ASSOCIATION, INFORMATION COMMISSIONER OF CANADA, PRIVACY COMMISSIONER OF CANADA, MANITOBA OMBUDSMAN, NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER, NOVA SCOTIA INFORMATION AND PRIVACY COMMISSIONER [REVIEW OFFICER], NUNAVUT INFORMATION AND PRIVACY COMMISSIONER, SASKATCHEWAN INFORMATION AND PRIVACY COMMISSIONER AND YUKON OMBUDSMAN AND INFORMATION AND PRIVACY COMMISSIONER, CRIMINAL LAWYERS' ASSOCIATION

Interveners

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(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada)*

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PART I - OVERVIEW

1. This appeal provides this Court with the opportunity to clarify its decisions regarding the interpretative approach for statutes threatening to infringe solicitor-client privilege – and, if necessary, to reconcile those decisions with the modern approach to statutory interpretation.

2. The provision at issue in this case is s. 56(3) of the *Freedom of Information and Protection of Privacy Act* (**"FOIPPA"**).[1] The Alberta Court of Appeal found that when dealing with statutes that purport to abrogate solicitor-client privilege, the modern approach to statutory interpretation does not apply. Instead, the rule of strict construction must apply and therefore s. 56(3) must be interpreted as not having abrogated solicitor-client privilege.[2]

3. The Criminal Lawyers' Association (**"CLA"**) respectfully submits that the same result would be reached with the modern approach to statutory interpretation. Although the CLA does not oppose a strict construction rule where solicitor-client privilege is at stake, the CLA recognizes that the rule is somewhat at odds with the broader trend towards application of the modern approach. More importantly, the strict construction rule is not necessary to protect solicitor-client privilege.

4. Under the modern approach, the status of solicitor-client privilege as a "principle of fundamental justice and civil right of supreme importance in Canadian law"[3] creates a strong presumption that legislative bodies do ***not*** to intend to abrogate the privilege. Absent clear, unequivocal language to the contrary, courts must interpret statutes in a manner that respects this legislative intention and protects solicitor-client privilege. Rather than support the strict construction rule, this Court's analysis in *Blood Tribe*[4] reflects what is, in essence, the modern approach to statutory interpretation when dealing with potential infringements of solicitor-client privilege. The advantage of using the modern approach in this context is that it properly focuses the analysis on the legislature's respect for – and intention to protect – key constitutional norms and values.

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[1] RSA 2000, Chapter F-25.

[2] *University of Calgary v JR*, [2015] AJ no 348, ¶28, 40 (CA), Appellant's Record (**"AR"**), Tab 5.

[3] *Lavallee, Rackel & Heintz v Canada (Attorney General)*, [2002] 3 SCR 209, ¶36, Respondent's Book of Authorities (**"RBOA"**), Tab 20.

[4] *Canada v Blood Tribe Department of Health*, [2008] 2 SCR 574, RBOA, Tab 5.

PART II - QUESTIONS IN ISSUE

5. The CLA intervenes on the issue of what approach should be taken to the interpretation of s. 56(3) of FOIPPA. The CLA submits that the modern approach to statutory interpretation should apply, and specifically that:

(a) solicitor-client privilege is a constitutional norm of the highest importance;

(b) the modern approach requires that legislation be interpreted harmoniously with constitutional norms;

(c) *Blood Tribe* did not create a separate interpretative test; and

(d) applying the modern approach to s. 56(3) leads to the conclusion that it does not abrogate solicitor-client privilege.

PART III - STATEMENT OF ARGUMENT

A. Solicitor-client privilege is a constitutional norm of the highest importance

6. Solicitor-client privilege is a "constitutional norm"[5], a "principle of fundamental justice and civil right of supreme importance in Canadian law"[6], and a principle that is "fundamentally important to our judicial system".[7] Protection of the privilege is a "constitutional imperative".[8]

7. The rationale for the privilege is clear: without an assurance of confidentiality that is "as close to absolute as possible", clients will not seek counsel or be completely candid with their lawyers, thereby undermining their legal rights and the quality of the advice they deserve.[9] This is especially important for the CLA's members and their clients given the liberty interests at stake in criminal proceedings. In *Lavallee*, this Court was "compelled" to adopt stringent measures to ensure the protection of the privilege.[10]

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[5] *Canada v Federation of Law Societies of Canada*, [2015] 1 SCR 401, ¶120, RBOA, Tab 7 (*per* McLachlin CJC and Moldaver J., concurring but speaking for the Court on this point).

[6] *Lavallee, Rackel & Heintz v Canada (Attorney General), supra*, ¶36, RBOA, Tab 20.

[7] *Smith v Jones*, [1999] 1 SCR 455, ¶45, CLA Book of Authorities (**"CLA BOA"**), Tab 1. See also: *R v McClure*, [2001] 1 SCR 445, ¶32, RBOA, Tab 26; *Solosky v The Queen*, [1980] 1 SCR 821, RBOA, Tab 29.

[8] *Lavallee, Rackel & Heintz v Canada (Attorney General), supra*, ¶42 and 45, RBOA, Tab 20.

[9] *Canada v Blood Tribe Department of Health*, *supra*, ¶9, RBOA, Tab 5. See also: *McClure*, *supra*, ¶35, RBOA, Tab 26.

[10] *Lavallee, Rackel & Heintz v Canada (Attorney General), supra*, ¶36, RBOA, Tab 20.

8. Consequently, the exceptions to solicitor-client privilege that will be tolerated are limited, clearly defined and strictly controlled.[11] Only in very rare circumstances, evaluated on a case-by-case basis, will the privilege yield – either to a greater good, like where the innocence of an accused is at stake, or where the safety of an individual or clearly defined group is at risk, or where solicitor-client communications are being used to advance a criminal purpose.[12]

9. The privilege requires vigilant protection in every context – including investigations or inquiries under the FOIPPA. As this Court affirmed in *FLSC*, the expectation of privacy in relation to solicitor-client privilege is "invariably high, regardless of context". This expectation is rooted in the nature of the solicitor-client relationship, and not the context in which the state seeks to seize privileged material.[13] Nothing about the regulatory or administrative law context diminishes "in any way" the high expectation of privacy in privileged material. [14]

10. Because of its constitutional status, this Court held in *Lavallee* that where there is a risk that legislation will threaten solicitor-client privilege, the legislative regime must carry certain safeguards to ensure such information is "out of reach for the state".[15] This includes a duty on the state to minimize any impairment of solicitor-client privilege to no more than absolutely necessary.[16] The "state" includes administrative bodies and agencies.[17]

B. Modern approach includes presumption of compliance with constitutional norms

11. The modern approach to statutory interpretation requires that legislation potentially infringing solicitor-client privilege – including s. 56(3) of the FOIPPA – be interpreted restrictively, so as to respect the constitutional status of solicitor-client privilege, absent clear and unequivocal legislative text to the contrary.[18]

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[11] *Maranda v Richer*, [2003] 3 SCR 193, ¶12, CLA BOA, Tab 2.

[12] *McClure, supra*, ¶47-56, RBOA, Tab 26; *Smith*, ¶51-58, CLA BOA, Tab 1; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860, at p 881, ABOA, Tab 23.

[13] *Canada v Federation of Law Societies of Canada, supra*, ¶38, RBOA, Tab 7.

[14] *Canada v Federation of Law Societies of Canada, supra*, ¶38, 41, RBOA, Tab 7.

[15] *Lavallee, Rackel & Heintz v Canada (Attorney General), supra*, ¶24, RBOA, Tab 20.

[16] *Ontario (Ministry of the Attorney General) v Law Society of Upper Canada*, [2010] OJ No 2975 (Sup Ct), ¶20-21, CLA BOA, Tab 3; *Maranda v Richer, supra*, ¶10-12, CLA BOA, Tab 2.

[17] *University of Calgary v JR, supra*, ¶26, AR, Tab 5.

[18] If such clear and unequivocal legislative text did exist, then there would still be the question of whether such a law is constitutional. The CLA does not address that question here, as the Court did not state a constitutional question.

12. The CLA respectfully submits that the Court of Appeal's reliance on the "rules of strict construction" [19] in this case was unnecessary. Properly interpreted and applied, the modern approach affords no less protection to solicitor-client privilege. A resort to strict construction is also inconsistent with the broader trend towards a purposive, contextual approach to statutory interpretation. As this Court has noted, there is now "only one principle or approach" [20] to statutory interpretation: what Professor Driedger dubbed the "modern principle of statutory interpretation". This requires a contextual approach that considers a variety of factors, including the intention of Parliament (or the legislature).[21]

13. When it comes to solicitor-client privilege, a key component of the modern approach is the presumption that legislative bodies intend to enact statutes in compliance with constitutional norms and values.[22] In giving effect to this presumption of compliance with constitutional norms, courts often read down legislation to "exclude applications that are grammatically possible, but are considered unacceptable" because they violate a constitutional norm.[23]

14. This Court has repeatedly held that legislation must be interpreted harmoniously with constitutional norms, unless clear and express statutory language requires a different result. In *R v Mabior*, for example, Chief Justice McLachlin found that *Charter* values were an important consideration when determining the meaning of fraud vitiating consent in the *Criminal Code*:

> Courts must interpret legislation harmoniously with the constitutional norms enshrined in the *Charter*: [citations omitted]. Charter values are always relevant to the interpretation of a disputed provision of the *Criminal Code*. ...
>
> Although the Charter is not directly engaged, the values that animate it must be taken into account in interpreting s. 265(3)(c) of the *Criminal Code*.[24]

15. Similarly, in *R v Sharpe*, this Court recognized the legal presumption that Parliament intends to "enact legislation in conformity with the *Charter*", and held that where a statutory provision is open to both a constitutionally compliant and constitutionally subversive

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[19] *University of Calgary v JR, supra*, ¶28, 40, AR, Tab 5.

[20] *Montreal (City) v 2952-1366 Quebec Inc*, [2005] 3 SCR 141, ¶9, CLA BOA, Tab 5.

[21] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, ¶21, CLA BOA, Tab 6; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, ¶26, CLA BOA, Tab 7; *Imperial Oil v Jacques*, 2014 SCC 66, ¶47, CLA BOA, Tab 8; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, ¶48, CLA BOA, Tab 9.

[22] Sullivan (6th) at 524-527, CLA BOA, Tab 4.

[23] *Ibid.* at 531-532, CLA BOA, Tab 4.

[24] *R v Mabior*, 2012 SCC 47, ¶44, 48, CLA BOA, Tab 10.

interpretation, the former should prevail.[25] The presumption of compliance with constitutional norms acknowledges the "centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada".[26]

16. This presumption is directly engaged by legislation threatening solicitor-client privilege, including s. 56(3) of FOIPPA. Given the singular importance of solicitor-client privilege to the administration of justice – and this Court's repeated recognition of its constitutional status – it must be presumed that legislatures intend to respect the privilege, and protect it from incursion by the state. To rebut this presumption and demonstrate an intention to the contrary, it is not enough for the legislature to speak ambiguously, generally or by inference. It must be clear beyond doubt.

17. Ultimately, the modern approach and a rule of strict construction lead to the same conclusion for statutes that risk infringing solicitor-client privilege: only clear, unequivocal legislative text can demonstrate the legislative intention necessary to violate such a foundational constitutional norm. The similarity in the results of the two approaches arises because the significance of solicitor-client privilege – and the legislature's presumed respect for the privilege – is the main contextual factor animating the modern approach in cases like this appeal. The advantage of the modern approach, however, is that its outcome can be analytically justified based on the same broader considerations of context, purpose and (presumed) legislative intention common to all exercises of statutory interpretation.

18. Finally, under the modern approach, clear legislative text, standing alone, may not be sufficient to rebut the presumption of compliance with constitutional norms and support an interpretation infringing solicitor-client privilege. Other considerations can bear upon the analysis of legislative intent, including: the text of other provisions in the statutory scheme; the presence/absence of protections for privileged information; and the potential consequences of disclosing privileged information. Taken individually or together, these factors may demonstrate a lack of any legislative intention to abrogate the privilege, despite what otherwise appears to be "clear" statutory text.

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[25] *R v Sharpe*, 2001 SCC 2, ¶33, CLA BOA, Tab 11.

[26] *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42, ¶34-35, CLA BOA, Tab 12. See also: *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, at page 1078, CLA BOA, Tab 13

C. *Blood Tribe* was animated by constitutional norms and values

19. The Court of Appeal relied heavily on this Court's decision in *Blood Tribe* to support the application of a strict construction rule to statutes that might infringe solicitor-client privilege.[27]

20. In *Blood Tribe*, this Court does not explicitly address whether it was applying the modern approach or the strict construction rule. Certainly, the fact that the Court applied a restrictive interpretation does not establish that it employed a strict construction rule, since a restrictive interpretation can also be appropriate when applying the modern approach.

21. The CLA submits that this Court's analysis in *Blood Tribe* is consistent with the modern approach to statutory interpretation, and does not require application of a strict construction rule.

22. *Blood Tribe* begins by affirming the "fundamental" role that solicitor-client privilege plays in our legal system, and that its protection must be close to absolute as possible.[28] The Court then turns to a key question under the modern approach: whether Parliament could have intended to infringe such a fundamentally important legal principle. Citing a number of other statutes where the same legislative text was used, the Court concludes: "Looking at these provisions in their different statutory contexts shows that it certainly cannot be said in all these instances that Parliament intended to abrogate solicitor-client privilege" (emphasis added).[29]

23. The Court then cites a passage from the Attorney General of Canada's factum with approval: "…Parliament must be mindful of the importance of [solicitor-client] privilege in the administration of justice. Consequently, if Parliament seeks to abrogate solicitor-client privilege it must do so in clear, precise and unequivocal language" (emphasis added).[30]

24. The Court concludes that the words of the provision at issue in *Blood Tribe*, "taken in their full and proper context", do not support the abrogation of privilege.[31] In other words, the generality of the text suggests that Parliament did not turn its attention to the impact of infringing solicitor-client privilege, and did not intend its abrogation. [32]

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[27] *University of Calgary v JR*, *supra*, ¶36, AR, Tab 5. However, nor did the Court in *Blood Tribe* explicitly state that it was applying a strict construction rule.

[28] *Canada v Blood Tribe Department of Health*, *supra*, ¶9, 10, RBOA, Tab 5.

[29] *Canada v Blood Tribe Department of Health*, *supra*, ¶26, RBOA, Tab 5.

[30] *Canada v Blood Tribe Department of Health*, *supra*, ¶26, RBOA, Tab 5 (emphasis added).

[31] *Canada v Blood Tribe Department of Health*, *supra*, ¶26, RBOA, Tab 5.

[32] *Canada v Blood Tribe Department of Health*, *supra*, ¶26, RBOA, Tab 5.

25. These passages are entirely consistent with an analysis under the modern approach to statutory interpretation, and in particular an inquiry into whether the language of a statute can overcome the presumption of compliance with constitutional norms.

D. Using the modern approach, the FOIPPA does not abrogate solicitor-client privilege

26. Applying the modern approach to interpret s. 56(3) of the FOIPPA leads to the same conclusion reached by the Court of Appeal: this provision does not authorize the Commissioner to require the production of solicitor-client privileged materials.

27. Not only does s. 56(3) lack the clear and unequivocal text required to rebut the presumption of compliance with constitutional norms, but a number of additional contextual considerations confirm a lack of any legislative intention to abrogate solicitor-client privilege. These considerations include the explicit reference to "solicitor-client privilege" in the text of s. 27(1)(a) of FOIPPA; the absence of any *Lavallee* protections for the privileged material; and the potential that the Commissioner may compel disclosure of privileged material even where she is adverse in interest to the privilege holder.

i. No clear and unequivocal statutory text

28. As outlined above, under the modern approach, the presumption of compliance with constitutional norms requires courts to interpret legislative text authorizing potential infringements on solicitor-client privilege restrictively to protect the privilege, absent clear and unequivocal language to the contrary.

29. Clear and unequivocal language requires an explicit reference to "solicitor-client privilege". A reference to "privileges", more generally, will not suffice.

30. Section 56(3) does not contain the words "solicitor-client privilege". The provision only refers to "any privilege of the law of evidence". The suggestion that these words should be read to include solicitor-client privilege ignores the fact that this privilege (as opposed to other privileges, *e.g.* settlement privilege) is a substantive rule of law (rather than simply a rule of evidence)[33], and fails to respect the status of solicitor-client privilege as a principle of fundamental justice worthy of constitutionally mandated protections. At best, the language of s.

[33] *Descoteaux v Mierzwinski*, *supra*, p 875, ABOA, Tab 23.

56(3) is unclear as to whether its scope includes solicitor-client privilege – and thus cannot overcome the presumption of compliance with constitutional norms.

ii. FOIPPA uses the phrase "solicitor-client privilege" elsewhere

31. There is a striking contrast between the vague reference to "any privilege" in s. 56(3), and the specific language in s. 27(1)(a) of the FOIPPA. The latter provision, which permits public bodies to refuse to disclose privileged documents, specifically refers to "solicitor-client privilege" and describes it as a "legal privilege" (rather than a privilege of the law of evidence).

32. If the legislature explicitly turned its mind to the use of the phrase "solicitor-client privilege" elsewhere in the FOIPPA – but elected not to use that phrase in drafting s. 56(3) – then this provides further contextual support for concluding that there was never any legislative intention to abrogate the privilege.

iii. No safeguards for when or how privileged material is accessed

33. Another contextual factor that informs the interpretative analysis under the modern approach is the total absence of any *Lavallee* safeguards for the privileged material. Again, this suggests that the legislature did not intend to abrogate solicitor-client privilege.

34. Laws authorizing the review of potentially privileged documents by state actors typically reflect an attempt to meet at least some of the *Lavallee* principles by setting out a protective scheme for when, how and by whom that review is conducted, in order to minimize the degree of intrusion on the privilege.[34] The "core principle" from *Lavallee* is that in order to pass constitutional muster, legislation must not "interfere with the privilege more than absolutely necessary" to achieve its purpose.[35]

35. No such protections or requirements appear anywhere in the FOIPPA. Read together, ss. 56(2) and (3) are extraordinarily broad: they compel a public body to produce "any record" requested by the Commissioner, even if that record is not "subject to the provisions of this Act". At the same time, the statute fails to impose any requirement that the Commissioner's review of the documents be necessary in order to assess the claim of privilege, or to achieve the purposes

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[34] Some examples include the regime set out in s. 488.1 of the *Criminal Code* (found unconstitutional in *Lavallee*) regime set out in s. 232(3.1) of the *Income Tax Act*, and the regime under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (considered and largely struck down by this Court in *FLSC*).

[35] *Canada v Federation of Law Societies, supra*, ¶44, RBOA, Tab 7.

of the FOIPPA.[36] Nor does the FOIPPA establish an independent regime for the review of potentially privileged documents by a neutral and legally trained arbiter, who is not at risk of being in an adversarial relationship with the privilege holder (as discussed further *infra*).[37]

36. Taken together, the FOIPPA's broad compulsion powers, and the lack of any basic protections for the compelled production and review of potentially privileged material, are strong contextual indicators that the legislature did not intend to infringe solicitor-client privilege.

iv. Privileged material may be used by an adversarial arm of the state

37. Although "all information protected by solicitor-client privilege is out of reach for the state"[38], the need for stringent protections is particularly important where the privileged material is in the hands of a state actor who is adverse in interest to the holder of the privilege.[39]

38. The fact that the Commissioner may exercise her compulsion power under s. 56(3) even where she is adverse in interest to the privilege holder is yet another reason to believe that the legislature did not intend for this power to extend to solicitor-client privileged material.

39. Unlike a Superior Court of record – but like the Federal Commissioner described in *Blood Tribe* – the Commissioner has some adjudicative functions, but also investigative and other functions. Pursuant to s. 53(2), for example, the Commissioner can investigate a party if a complainant alleges that party has failed to adequately respond to a request for information (as occurred in this case). In the course of carrying out its non-adjudicative functions, the Commissioner may become adversarial in interest to the privilege holder, including by "the privileged information being made public or used against the person entitled to the privilege."[40]

40. Moreover, s. 59(4) authorizes the Commissioner to disclose information "relating to" the commission of any offence under any law of Alberta or Canada to the Minister of Justice and Solicitor General "if the Commissioner considers there is evidence of an offence."[41] Thus, if s.

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[36] *Lavallee, Rackel & Heintz v Canada (Attorney General), supra*, ¶49, RBOA, Tab 20.

[37] *Lavallee, Rackel & Heintz v Canada (Attorney General), supra*, ¶49, RBOA, Tab 20.

[38] *Canada v Federation of Law Societies, supra*, ¶38, RBOA, Tab 7.

[39] *Canada v Blood Tribe Department of Health, supra*, ¶21, RBOA, Tab 5.

[40] *Canada v Blood Tribe Department of Health, supra*, ¶21, RBOA, Tab 5.

[41] The CLA recognizes that, at common law, the privilege does not attach to communications that are criminal in themselves. However, as this Court noted in *Blood Tribe, supra*, ¶23, the phrase "relating to" is much broader than the common law exception, and thus this provision authorizes disclosure of solicitor-client privileged materials.

56(3) is interpreted to compel a party to produce solicitor-client privileged information, then s. 59(4) would allow for the privileged information being "used against the person entitled to the privilege".[42] In *Blood Tribe*, this concern made compelled production "all the more serious" and was a key factor in its decision to interpret the provision in that matter restrictively.[43]

41. Under the modern approach to statutory interpretation, both of these consequences further undermine the case for including solicitor-client information within the scope of s. 56(3). It beggars belief to suppose that the legislature intended to authorize the Commissioner to compel the production of broad swathes of solicitor-client privileged material, without any kind of statutory protection scheme, and then freely share that information with the Minister of Justice.

42. If the legislature had indeed intended such an extraordinary result, then – at a minimum – the use of clear and unequivocal statutory text was required in order to rebut the presumption of compliance with constitutional norms.

PART IV - SUBMISSIONS ON COSTS

43. The CLA does not seek costs and requests that no order as to costs be made against it.

PART V - ORDER SOUGHT

44. The CLA requests permission to make oral submissions of no more than 10 minutes, and asks that its submissions be taken into account in the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March, 2016

Brian Gover / Justin Safayeni / Carlo Di Carlo

STOCKWOODS LLP
Lawyers for the proposed Intervener, the Criminal Lawyers' Association

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[42] *Canada v Blood Tribe Department of Health*, *supra*, ¶21 and 23, RBOA, Tab 5.

[43] *Canada v Blood Tribe Department of Health*, *supra*, ¶21, 26, RBOA, Tab 5. The appellant's efforts to distinguish *Blood Tribe* must fail. The phrase "privilege of the law of evidence" is as general as the phrase at issue in *Blood Tribe* (*i.e.*, "the same manner and same extent as a superior court of record"). As in *Blood Tribe*, the phrase does not advert to issues raised by solicitor-client privilege, and does not reflect a legislative intention to abrogate.

PART VI - TABLE OF AUTHORITIES

	AUTHORITY	REFERRING PARA
1.	*Application under s 83.28 of the Criminal Code (Re),* 2004 SCC 42	15
2.	*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42	12
3.	*Canada v Blood Tribe Department of Health, [2008]* 2 SCR 574	3, 7, 22, 23, 24, 37, 39, 40
4.	*Canada v Federation of Law Societies of Canada*, [2015] 1 SCR 401	6, 9, 34, 37
5.	*Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57	12
6.	*Descoteaux v. Mierzwinski*, [1982] 1 SCR 860	8, 30
7.	*Goodis v. Ontario*, [2006] 2 SCR 32	34
8.	*Imperial Oil v Jacques*, 2014 SCC 66	12
9.	*Lavallee, Rackel & Heintz v Canada (AG)* 2002 SCC 61	3, 6, 7, 10, 34, 35
10.	*Maranda v Richer*, [2003] 3 SCR 193	8, 10
11.	*Montreal (City) v 2952-1366 Quebec Inc*, [2005] 3 SCR 141	12
12.	*Ontario (Ministry of the Attorney General) v Law Society of Upper Canada*, [2010] OJ No 2975 (Sup Ct)	10
13.	*R v Mabior*, 2012 SCC 47	14
14.	*R v Sharpe*, 2001 SCC 2	15
15.	*R. v. McClure*, [2001] 1 SCR445	6, 8
16.	*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27	12
17.	Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014)	13
18.	*Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038	15
19.	*Smith v Jones*, [1999] 1 SCR 455	6, 8

20.	*Solosky v. The Queen*, [1980] 1 SCR 821	6
21.	*University of Calgary v JR*, [2015] AJ no 348	2, 10, 12, 19

PART VII - STATUTORY PROVISIONS

1. *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25

Privileged information

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for
  (i) the Minister of Justice and Solicitor General,
  (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
  (iii) an agent or lawyer of a public body,
in relation to a matter involving the provision of legal services, or

(c) information in correspondence between
  (i) the Minister of Justice and Solicitor General,
  (ii) an agent or lawyer of the Minister of Justice and Solicitor General, or
  (iii) an agent or lawyer of a public body,
and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

[…]

Powers of Commissioner in conducting investigations or inquiries

56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act and the powers given by subsection (2) of this section.

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

(4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, the head of that public body may require the Commissioner to examine the original at its site.

(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.

[…]

Restrictions on disclosure of information by the Commissioner and staff

59(1) The Commissioner and anyone acting for or under the direction of the Commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).

(2) The Commissioner may disclose, or may authorize anyone acting for or under the direction of the Commissioner to disclose, information that is necessary to

(a) conduct an investigation or inquiry under this Act, or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

(4) The Commissioner may disclose to the Minister of Justice and Solicitor General information relating to the commission of an offence against an enactment of Alberta or Canada if the Commissioner considers there is evidence of an offence.

(5) The Commissioner may disclose, or may authorize anyone acting for or under the direction of the Commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 57.

SCC File No 36460

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N:

THE INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

Appellant

- and-

THE BOARD OF GOVERNORS OF THE UNIVERSITY OF CALGARY

Respondent

FACTUM OF THE INTERVENER, CRIMINAL LAWYERS' ASSOCIATION

(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada)*

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