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-

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

INTERVENERS

FACTUM OF THE INTERVENER INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

MILLER THOMSON LLP
3000, 700 – 9 Avenue S.W.
Calgary AB T2P 3V4

Ivan Bernardo, Q.C.
Jill W. Wilkie
Tel.: (403) 298-2400
Fax: (403) 262-0007
Email ibernardo@millerthomson.com
jwilkie@millerthomson.com

Counsel for the Intervener

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP
800, 304 – 8th Avenue S.W.
Calgary AB T2P 1C2

Glenn Solomon, Q.C.
Elizabeth Aspinal
Tel.: (403) 571-1507
Fax: (403) 571-1528
Email: gsolomon@jssbarristers.ca

Counsel for the Information and Privacy Commissioner of Alberta

GOWLINGS WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Jeffery W. Beedell
Tel.: (613) 786-1071
Fax: (613) 788-3587
Email: jeff.beedell@gowlings.com

Ottawa Agent for Counsel for the Information and Privacy Commissioner of Alberta

DLA PIPER LLP
1000, 250 – 2nd Street S.W.
Calgary AB T2P 0C1

Robert Calvert, Q.C.
Michael D. A. Ford
Tel.: (403) 294-3588
Fax: (403) 213-4469
Email: m.ford@dlapiper.com

Counsel for the Board of Governors of the University of Calgary

CONWAY BAXTER WILSON LLP/S.R.L.
401 – 1111 Prince of Wales Drive
Ottawa ON K2C 3T2

Colin S. Baxter
Tel.: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for Counsel for the Board of Governors of the University of Calgary

DE VILLARS JONES LLP
300, 8540 – 109 Street N.W.
Edmonton AB T6G 1E6

David Phillip Jones, Q.C.
Tel.: (780) 433-9000
Fax: (780) 433-9780
Email: dpjones@sagecounsel.com

Counsel for the Law Society of Alberta

CONWAY BAXTER WILSON LLP/S.R.L.
401 – 1111 Prince of Wales Drive
Ottawa ON K2C 3T2

Colin S. Baxter
Tel.: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for Counsel for the Law Society of Alberta

STOCKWOODS LLP
TD North Tower
4130, 77 King Street West
P.O. Box 140, Toronto Dominion Centre
Toronto ON M5K 1H1

Brian Gover
Justin Safayeni
Carlo Di Carlo
Tel.: (416) 593-2485
Fax: (416) 593-9345
Email: briang@stockwoods.ca

Counsel for the Criminal Lawyers' Association

POWER LAW
1103, 130 Albert Street
Ottawa ON K1P 5G4

David A. Taylor
Tel.: (613) 702-5563
Fax: (613) 702-5563
Email: dtaylor@juristespower.ca

Ottawa Agent for Counsel for the Criminal Lawyers' Association

OSLER HOSKIN HARCOUT LLP
100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto ON M5X 1B8

Mahmud Jamal
W. David Rankin
Tel.: (416) 862-6764
Fax: (416) 862-6666
Email: mjamal@osler.com

Counsel for the Federation of Law Societies of Canada

PEACOCK LINDER HALT & MACK LLP
4050, 400 – 3 AVENUE S.W.
CALGARY AB T2P 4H2

Edward W. Halt, Q.C.
Tel.: (403) 296-2283
Fax: (403) 296-2299
Email: ehalt@plhlaw.ca

Ottawa Agent for Counsel for the Federation of Law Societies of Canada

OSLER HOSKIN HARCOUT LLP
Suite 1900, 340 Albert Street
Ottawa ON K1R 7Y6

Patricia J. Wilson
Tel.: (613) 235-7234
Fax: (613) 235-2867
Email: pwilson@osler.com

Counsel for the Advocates Society

Ottawa Agent for Counsel for the Advocates Society

OSLER HOSKIN HARCOUT LLP
Suite 1900, 340 Albert Street
Ottawa ON K1R 7Y6

Patricia J. Wilson
Tel.: (613) 235-7234
Fax: (613) 235-2867
Email: pwilson@osler.com

LEWIS SINNOTT SHORTALL
301 TD Place
St. John's NL A1C 6H6

Andrew A. Fitzgerald
Tel.: (709) 753-7810
Fax: (709) 738-2965
Email: afitzgerald@nfld.net

Counsel for the Information and Privacy Commissioner for the Province of Newfoundland and Labrador

BURKE-ROBERTSON LLP
441 MacLaren Street, Suite 200
Ottawa ON K2P 2H3

Robert Houston, Q.C.
Tel.: (613) 706-0020
Fax: (613) 235-4430
Email:rhouston@burkerobertson.com

Ottawa Agent for Counsel for the Information and Privacy Commissioner for the Province of Newfoundland and Labrador

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO
1400, 2 Bloor Street East
Toronto ON M4W 1A8

Lawren Murray
Tel.: (416) 326 – 3920
Fax: (416) 325-9186
Email: lawren.murray@ipc.on.ca

Counsel for the Information and Privacy Commissioner of Ontario

BORDEN LADNER GERVAIS LLP
1300, 100 Queen Street
Ottawa ON K1P 1J9

Nadia Effendi
Tel.: (613) 237-5160
Fax: (613) 230-8842
Email: NEffendi@blg.com

Ottawa Agent for Counsel for the Information and Privacy Commissioner of Ontario

MCCARTHY TETRAULT LLP
1300, 777 Dunsmuir Street
Vancouver BC V7Y 1K2

Michael A. Feder
Emily MacKinnon
Tel.: (604) 643-5983
Fax: (604) 622-5614
Email: mfeder@mccarthy.ca

Counsel for the British Columbia Freedom of Information and Privacy Association

BORDEN LADNER GERVAIS LLP
1300, 100 Queen Street
Ottawa ON K1P 1J9

Nadia Effendi
Tel.: (613) 237-5160
Fax: (613) 230-8842
Email: NEffendi@blg.com

Ottawa Agent for Counsel for the British Columbia Freedom of Information and Privacy Association

GOLDBLATT PARTNERS LLP
500, 30 Metcalfe Street
Ottawa ON K1P 5L4

Marlys Edwardh
Daniel Sheppard
Tel.: (613) 235-5327
Fax: (613) 235-3041
Email:medwardh@goldblattpartners.com
dsheppard@goldblattpartners.com

Counsel for the Information and Privacy Commissioners of Canada

OFFICE OF THE INFORMATION COMMISSIONER OF CANADA
7th Flr, 30 Victoria St.
Gatineau, Québec K1A 1H3

Diane Therrien
Aditya Ramachandran
Tel.: (819) 994-2285
Fax: (819) 994-0311
Email:Aditya.Ramachandran@oic-ci.gc.ca

Counsel for the Information and Privacy Commissioners of Canada

OFFICE OF THE PRIVACY COMMISSIONER OF CANADA
112 Kent Street, 3rd Floor
Ottawa, ON K1A 1H3

Regan Morris
Tel.: (613) 996-0086
Fax: (613) 947-4192
Email: Regan.Morris@priv.gc.ca

Counsel for the Information and Privacy Commissioners of Canada

DUNPHY BEST BLOCKSOM LLP
800, 517 – 10 Avenue S.W.
Calgary, AB T2R 0A8
Michele H. Hollins, Q.C.
Tel: (403) 265-7777
Fax: (403) 269-8911
Email: hollins@dbblaw.com

MCLENNAN ROSS LLP
1000, 350 - 7th Avenue SW
Calgary, AB T2P 3N9
James L. Lebo, Q.C.
Tel: (403) 303-9111
Fax: (403) 303-1669
Email: jlebo@mross.com

Counsel for the Intervener, The Canadian Bar Association

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email:emeehan@supremeadvocacy.ca

Ottawa Agent for Counsel for the The Canadian Bar Association

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PART I. STATEMENT OF FACTS AND OVERVIEW OF APPEAL

A. Statement of Facts

1. The Information and Privacy Commissioner of British Columbia ("BC Commissioner") is an officer of the legislature of British Columbia and is responsible for administering the British Columbia *Freedom of Information and Protection of Privacy Act*[1] ("BC FOIPP"). BC FOIPP establishes a regulatory regime that is very similar to the regime established by the Alberta *Freedom of Information and Protection of Privacy Act*[2] ("AB FOIPP") administered by the Information and Privacy Commissioner of Alberta ("AB Commissioner").

2. BC FOIPP provides the public with a right of access to records within the custody and control of a public body, with certain exceptions. Section 14 of BC FOIPP provides that a public body may refuse to disclose a record that is subject to solicitor-client privilege. Section 44 of BC FOIPP provides the BC Commissioner with authority to request production of records, including records containing information subject to solicitor-client privilege.[3]

B. Overview of Appeal

3. The question in this Appeal is whether the statement in AB FOIPP that a public body must turn over records, "despite any privilege of the law of evidence," authorized the AB Commissioner to make a determination of whether a claim of solicitor-client privilege was valid.

4. The BC Commissioner agrees with the AB Commissioner's interpretation of her legislation. However, it is the position of the BC Commissioner that the AB Commissioner's review of records to determine whether a valid claim of solicitor-client privilege has been asserted does not pierce, abrogate, interfere with or infringe the privilege; nor does such a review constitute an incursion upon or waiver of the privilege in any manner.

PART II. STATEMENT OF QUESTIONS IN ISSUE

(a) Is there an abrogation of privilege?

(b) If there is an abrogation of privilege, is it permitted?

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[1] RSBC 1996, c 165 [Book of Authorities of BC Commissioner ("BA") Tab 6].
[2] RSA 2000, c F-25 [BA Tab 5].
[3] *Supra*, note 1.

PART III. STATEMENT OF ARGUMENT

A. There is no Abrogation of Privilege

5. The Respondent claims that the issue in the within Appeal involves "compelled disclosure to the state."[4] This is a mischaracterization of the issue. A review of records by the AB Commissioner is not an abrogation of privilege, as there is no external third party disclosure of privileged documents. The AB Commissioner is an independent officer of the legislature that assists other public bodies in decision making with respect to the collection, use and disclosure of records. To the extent that there is any disclosure, it is only an internal sharing of documents, from a division of the state, a public body, to another public body, an independent public official appointed by the legislature to provide direction to that public body.

6. To abrogate, as defined in Black's Law Dictionary, means "to annul, cancel, revoke, repeal or destroy." The provision of documents from a public body to the BC Commissioner or the AB Commissioner does none of those things to any privilege claimed by a public body.

7. BC FOIPP, like AB FOIPP and all access and privacy legislation, deals with the collection, use and disclosure of records. Unlike a disclosure of records to an external third party, the provision of records to the BC or AB Commissioner is an internal use of records; it is not a disclosure and as such does not abrogate solicitor-client privilege.

8. The Respondent also claims, with reference to *Canada (Attorney General) v Federation of Law Societies of Canada*[5] ("Federation of Law Societies"), that "the expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context."[6] However, the reduction of a reasonable expectation of privacy in the regulatory context was in fact confirmed in *Federation of Law Societies*, where Justice Cromwell, writing for the majority, held:

> I accept, of course, that when a search provision is part of a regulatory scheme, the target's reasonable expectation of privacy may be reduced: *Thomson Newspapers Ltd. v Canada* (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at p. 507; *R. v Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 49.

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[4] Factum of the Respondent, paragraph 34.
[5] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, at para. 36 [Book of Authorities of the Appellant ("BAA") Tab 14].
[6] Factum of the Respondent, paragraph 42.

9. Given the regime created by each of BC FOIPP and AB FOIPP ("Regime"), there should be no expectation of privacy as between public bodies and the AB or BC Commissioner, as the Regime makes it clear that the Commissioner is entitled to review all records, including those that are solicitor-client privileged.

10. The Respondent argues that "even on a purely contextual reading of [AB FOIPP] it is obvious that the legislature did not intend the Commissioner to have the intrusive power she seeks,"[7] and "the legislature was well aware of the unique status of solicitor-client privilege among other privileges and demonstrated its willingness to address it where it saw fit do so."[8] A review of Alberta legislation does not bear this out.

11. The BC Commissioner agrees with the AB Commissioner that section 56(3) of AB FOIPP contains the clear and express language required by this Court to allow a review of records where solicitor-client privilege is claimed, for the limited purpose of determining if the privilege is properly claimed. Contrary to the claim of the Respondent, where the Alberta legislature wishes to expressly authorize the review of documents to determine if solicitor-client privilege is validly claimed, it uses the same words to achieve this legislative objective.

12. Section 36(2) of the Alberta *Provincial Court Act*[9] states:

> 36(2) Nothing is admissible in evidence at a hearing
>
> (a) that would be inadmissible by reason of any privilege under the law of evidence, or
>
> (b) that is inadmissible by any Act.

This is the same language contained in AB FOIPP and BC FOIPP.

13. By statute, the Provincial Court of Alberta:

(a) is a court of record;

(b) is a summary conviction court pursuant to the *Criminal Code of Canada*;

(c) has jurisdiction to try, determine and adjudge proceedings; and

(d) has the authority to determine if any evidence is "inadmissible by reason of any privilege under the law of law."[10]

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[7] Factum of the Respondent, paragraph 3.
[8] Factum of the Respondent, paragraph 81.
[9] RSA 2000, c P-31 [BA Tab 7].
[10] *Provincial Court Act*, RSA 2000, c P-31 at section 11 [BA Tab 7]; *Youth Criminal Justice Act*, SC 2000, c 1 at sections 13(4) and 14(6) [BA Tab 8]; *Criminal Code of Canada*, RSA 1985, c C-46.

14. There are no other provisions in the *Provincial Court Act* that deal with the ability of the court to view a document to determine whether or not the document is inadmissible by reason of solicitor-client privilege. The Alberta legislature (with the passage of the *Provincial Court Act*) and the Parliament of Canada (with the passage of the *Criminal Code of Canada*) intended to allow judges of the Provincial Court of Alberta to review and determine issues of solicitor-client privilege, without this review amounting to an abrogation of privilege.

15. Based on the above, where the Alberta legislature uses the words "any privilege of the law of evidence" or "any privilege under the law of evidence" the intention is to include solicitor-client privilege, not exclude it.

16. The critical role of statutory courts was discussed by this Court in *Reference re Remuneration of Judges of the Provincial Court (PEI),*[11] where Chief Justice Lamer held as follows, writing for the majority:

> ... The institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.
>
> ...
>
> It is worth noting that the increased role of provincial courts in enforcing the provisions and protecting the values of the Constitution is in part a function of a legislative policy of granting greater jurisdiction to these courts …

17. In *R v Cunningham*[12] this Court considered whether a statutory court had the jurisdiction to adjudicate solicitor-client privilege. Justice Rothstein, writing for a unanimous Court, considered the issue and held as follows:

> However, lawyers are presumed to know and respect their professional obligations. Judges are presumed to know the law (*R. v Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, at p. 664, per McLachlin J. (as she then was)). The integrity of the administration of justice rests on these assumptions. Delicate matters frequently come before courts. For example, although the initial decision not to produce a potentially privileged document is that of counsel, a judge may have to decide whether the document is in fact privileged. The remote possibility

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[11] *Reference re Remuneration of Judges of the Provincial Court (PEI),* [1997] 3 SCR 3, at paras. 126, 130 [Emphasis added] [BA Tab 3].
[12] *R v Cunningham,* 2010 SCC 10, at para. 34 [Emphasis added] [BA Tab 2].

> that a judge will inappropriately attempt to elicit privileged information in hearing the application does not justify leaving the decision to withdraw exclusively to counsel …

18. The Respondent suggests that "the omission of the words 'including solicitor-client privilege' from s. 56(3) was deliberate."[13] However, in light of the same omission in the *Provincial Court Act* and this Court's conclusion that judges of the Provincial Court may determine whether solicitor-client privilege applies, the omission of "including solicitor-client privilege" cannot be interpreted as a direction that the AB Commissioner or Provincial Court judges may not make decisions regarding privilege.

B. If Solicitor-Client Privilege is Abrogated, Such Abrogation is Permitted

19. If this Court finds that AB FOIPP does abrogate solicitor-client privilege, the interference with the privilege is consistent with the principles identified by this Court in *Federation of Law Societies*. In *Federation of Law Societies*, Justice Cromwell held as follows:

> However, I do not foreclose the possibility that Parliament could devise a constitutionally compliant inspection regime without a judicial pre-authorization requirement.[14]

20. In *Federation of Law Societies*, this Court determined that a constitutionally compliant regime for the inspection of records where solicitor-client privilege is claimed, without a judicial pre-authorization requirement, would include the following elements:

(a) the regime must be part of a regulatory scheme, not a criminal law scheme;

(b) the regime must provide adequate protection for solicitor-client privilege; and

(c) there must be meaningful derivative use immunity.

i. The Regime is regulatory in nature, not criminal

21. The objects and purposes of AB FOIPP were set out by Justice Jones in the Court below, at paragraphs 35-36:

> Section 2 sets out the purposes of FOIPP:
>
> 2 The purposes of this *Act* are:

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[13] Factum of the Appellant, paragraph 81.
[14] *Federation of Law Societies*, *supra*, at para. 56 [BAA Tab 14].

> (a) to allow any person a right of access to the records in the custody or under the control of a public body **subject to limited and specific exceptions as set out in this *Act***,
>
> …
>
> (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this *Act*.

Section 2 identifies the competing goals of providing access to information, on the one hand, and limiting access to that information in exceptional cases, on the other. The exceptions are said to be "limited" and "specific". This section also states that FOIPP seeks to provide a mechanism by which decisions of public bodies, such as the University's decision not to disclose records in respect of which it asserts solicitor-client privilege, may be reviewed and disputes resolved.

22. Justice Jones went on to discuss these purposes at paragraph 233:

> … It must be remembered that FOIPP, unlike the legislation under consideration in *Lavallee* and *Federation of Law Societies of Canada v Attorney General (Canada)*, 2013 BCCA 147, 359 DLR (4th) 1, affirming 2011 BCSC 1270, 339 DLR (4th) 48, does not authorize the seizure, under warrant or otherwise, of potentially privileged documents from lawyers' offices without notice to the client for possible use in a criminal investigation.

23. Unlike the scheme examined in *Federation of Law Societies*, the Regime does not facilitate the investigation and prosecution of offences and no penal sanctions are imposed by the Regime. A review of records of a public body by the AB Commissioner under AB FOIPP, or the BC Commissioner under BC FOIPP, does not involve or engage the exercise of law enforcement powers of the state over private citizens, nor does it involve disclosure of records between adverse parties in civil litigation. The Regime is clearly regulatory in nature, and not criminal.

ii. The Regime provides adequate protection for solicitor-client privilege

24. Justice Jones addressed protections for privilege under the Regime at paragraphs 187-188:

> The British Columbia Supreme Court's decision in *Central Coast*[15] also provides some guidance in interpreting FOIPP, given the similarity between the Alberta and BC FOIPP regimes. After conducting an inquiry into the validity of solicitor-client privilege claims, the Acting Commissioner affirmed the school board's decision to withhold the records, but required the school board to dis-close some

[15] As first cited by the Court below at paragraph 110: *Central Coast School District No 49 v British Columbia* (*Information and Privacy Commissioner*), 2012 BCSC 427("Central Coast") [BA Tab 1].

> of the other allegedly privileged records. The school board sought judicial review of the decision requiring them to disclose those records.
>
> The purpose of BC FOIPP is similar to the stated purpose of Alberta FOIPP: to make public bodies more accountable to the public and to protect personal privacy by giving the public a right of access to records, specifying limited exceptions to the rights of access and providing for an independent review of decisions made under the Act. Among the legislated exceptions is that a public body may refuse to disclose information subject to solicitor-client privilege.

25. Justice Jones correctly found that the AB Commissioner does not routinely compel or review records where solicitor-client privilege is claimed:

> I have examined the Commissioner's Solicitor-Client Privilege Adjudication Protocol, developed by her office in response to the Blood Tribe case. The preamble to the Protocol clarifies that the Commissioner does not routinely compel production:
>
> > ... the Commissioner does not routinely compel production of information over which solicitor-client privilege is claimed; rather, he does so only on a case-by-case basis, when the party claiming the privilege fails to present adequate evidence of it and/or when opposing, persuasive evidence or argument has been presented to him that, in either circumstances, necessitates production in order for him to fairly decide the issue. Importantly, **the Commissioner only compels production to the extent absolutely necessary in exceptional cases**.[16]

26. The review of records where solicitor-client privilege is claimed is a last resort:

> The [Solicitor-Client Privilege Adjudication] Protocol provides details as to how claims of solicitor-client privilege can be substantiated without revealing the details of the communication. The Protocol expresses a preference for affidavit evidence and attaches a Record Form that can be used to provide the necessary details of each record. In essence, the Protocol provides a means by which the party claiming privilege can establish the necessary requirements of solicitor-client privilege. In a flow chart setting out the Protocol process, it is clear production to the Commissioner or Adjudicator is the last resort.
>
> …
>
> Together, the preamble, the Protocol, the Notes and Record Form reflect a reasoned, cautioned and sensitive approach. They establish a framework that interferes with the confidentiality and privilege only to the extent absolutely necessary… The compelled production of allegedly privileged records to the

[16] *University of Calgary v JR*, 2013 ABQB 652, at para. 147 [BA Tab 4].

> Commissioner is a procedure of last resort, when all other means of verifying the solicitor-client privilege claim have failed.[17]

27. The Regime provides adequate protection of solicitor-client privilege by keeping intrusions into solicitor-client privilege to a minimum, by not routinely requiring the disclosure of records where solicitor-client privilege is claimed, and by maintaining privilege notwithstanding any review by the AB Commissioner.

iii. The Regime contains meaningful derivative use immunity

28. Continued protection of solicitor-client privilege when records are reviewed by the BC Commissioner is explicitly legislated in section 44(2.1) of BC FOIPP. This protection is implicit in all freedom of information legislation, as an internal review of records over which solicitor-client privilege is claimed is simply an administrative task arranged by the state to allow for an efficient review, with no resulting waiver of solicitor-client privilege. This was the view of Justice Jones in the Court below, at paragraphs 199-200 and 218-221, referencing Central Coast (emphasis added, bold in the original):

> The judge found the incursion on solicitor-client privilege is kept to a minimum by ss 44(2.1) and 59 of BC FOIPP. Section 59 gives the public body 30 days to seek judicial review of the Acting Commissioner's decision and the operation of the order is stayed until further court order. In this way, "the extent of the incursion into the privilege is limited and the right to have the question of solicitor-client privilege reviewed by the court is preserved" (at para 56). The same statutory protection of a stay pending judicial review is found at s 74 of the Alberta Act.
>
> Butler J also relied on s 44(2.1):
>
> > 44(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), **the solicitor client privilege of the record is not affected by the disclosure.**
>
> …
>
> FOIPP in its current form contains some ambiguity regarding the status of solicitor-client privilege of records reviewed by the Commissioner. <u>It would help if the legislature provided more certainty on this point. Conversely, it is arguable that clauses such as s 55 of ATIPPA, s 38.1 of PIPA and s 44(2.1) of BC FOIPP do not change the law regarding the status of solicitor-client privileged documents; they merely confirm it</u>. This view is supported by the Supreme Court of Canada's comments in *Lavallee*. The court stated that information protected by solicitor-client privilege is out of reach of the state at para 24:

[17] *Ibid*, paragraphs 148 and 233 [BA Tab 4].

> ... all information protected by the solicitor-client privilege is out of reach for the state. **It cannot be forcibly discovered or disclosed and it is inadmissible in court.** It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, **any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.**
>
> …
>
> De Montigny J of the Federal Court Trial Division concluded in **Blank v Canada (Minister of Justice)**, 2009 FC 1221 at para 47, 373 FTR 1, aff'd 2010 FCA 183, 409 NR 152 that solicitor-client privilege is not waived simply as a result of an access to information request …
>
> De Montigny J suggests that, even when a document is released to an applicant, the privilege in that document is not waived in relation to future requests. It would appear then that when production of a privileged record is compelled, privilege is abrogated for a narrow purpose only. In other words, where permitted by an enabling statute, records to which solicitor-client privilege is claimed may have their privileged status partially abrogated to the extent necessary for an administrative body to fulfil its purpose.
>
> In the circumstances of the case at bar, the privilege would be abrogated for the purpose of having the Commissioner review the legitimacy of the claim of solicitor-client privilege; I find disclosure of a record for this narrow purpose does not abrogate solicitor-client privilege generally.
>
> …
>
> I remain somewhat troubled by the scope of s 59(4) of FOIPP, which authorizes the Commissioner to disclose information to the Attorney General, when viewed in conjunction with the absence of language specifically preserving solicitor-client privilege …

29. Section 56 of AB FOIPP authorizes the collection and review of records by the AB Commissioner. In essence, section 56 deals with how the information comes through the "front door" of the Regime. Justice Jones and the Court of Appeal, below, were both "troubled" by section 59(4) of AB FOIPP, which is essentially the "back door" of the Regime.

30. There is no reason for concern; the back door is indeed strong. Section 59(4) of AB FOIPP simply provides that "information" relating to the commission of an offence may be disclosed to the Minister of Justice or the Solicitor General, if the AB Commissioner considers that there is evidence of an offence. Section 59(4) does not operate "notwithstanding any privilege of the rule of evidence" and certainly does not operate "notwithstanding any privilege of the rule of evidence, including solicitor-client privilege." Section 59(4) does not even refer to "all" or "any" information, such as other general open-textured language governing production

of documents. Section 59(4) cannot be interpreted as allowing the disclosure of records where solicitor-client privilege is claimed. The back door will not allow this breach.

31. However, even if the back door is found to be weak, it is submitted that the appropriate judicial approach is to interpret section 59(4) of AB FOIPP in a manner that provides meaningful derivative use immunity. Put another way, the Court should not eliminate the front door as a result of a concern that the back door is weak. Instead, if necessary, the Court should make it clear that the back door is solid and does not allow records covered by solicitor-client privilege to be disclosed to the Minster of Justice or the Solicitor General.

C. Summary and Conclusion

32. The Alberta legislature has given to the judges of the Provincial Court of Alberta and to the AB Commissioner the same authority to review and rule on the existence of the solicitor-client privilege when asserted. The language utilized in the *Provincial Court Act* and AB FOIPP are virtually identical. Public policy considerations also support an interpretation of AB FOIPP that bestows upon the AB Commissioner the role of adjudicator concerning solicitor-client privilege. There is no reasonable risk that solicitor-client privilege will be abrogated if the AB Commissioner discharges the authority delegated under AB FOIPP.

PART IV. COSTS SUBMISSIONS

33. The BC Commissioner asks that no costs be ordered for or against her.

PART V. NATURE OF ORDER SOUGHT

34. The BC Commissioner takes not position on the disposition of the Appeal and seeks leave to present 15 minutes of oral argument at the hearing.

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

MILLER THOMSON LLP

Ivan Bernardo, Q.C. and Jill W. Wilkie
Counsel for the Intervener,
Information and Privacy Commissioner of British Columbia

PART VI. TABLE OF AUTHORITIES

AT PARA.

Cases

PART VII. STATUTES RELIED UPON

Criminal Code of Canada, RSA 1985, c C-46

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

6. *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165

7. *Provincial Court Act*, RSA 2000 c P-31

8. *Youth Criminal Justice Act*, SC 2000, c 1