

**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-

**INFORMATION COMMISSIONER OF CANADA, THE 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, YUKON
OMBUDSMAN AND INFORMATION AND PRIVACY COMMISSIONER,
CANADIAN BAR ASSOCIATION, FEDERATION OF LAW SOCIETIES OF
CANADA, THE ADVOCATES' SOCIETY, LAW SOCIETY OF ALBERTA,
INFORMATION AND PRIVACY COMMISSIONER OF THE PROVINCE OF
NEWFOUNDLAND AND LABRADOR, INFORMATION AND PRIVACY
COMMISSIONER FOR BRITISH COLUMBIA, INFORMATION AND PRIVACY
COMMISSIONER OF ONTARIO, BRITISH COLUMBIA FREEDOM OF
INFORMATION AND PRIVACY ASSOCIATION AND THE CRIMINAL
LAWYERS' ASSOCIATION**

INTERVENERS

**FACTUM OF THE INTERVENERS,
INFORMATION AND PRIVACY COMMISSIONERS**

GOLDBLATT PARTNERS LLP

20 Dundas Street West, Suite 1100

Toronto, Ontario M5G 2G8

Telephone: (416) 979-4380

Fax: (416) 979-4430

Email: edwardh@goldblattpartners.com

Marlys Edwardh Daniel

Sheppard

Counsel for the Intervener

Office of the Information

Commissioner of Canada

30 Victoria St.

Gatineau, Quebec, K1A 1H3

Telephone: (819) 994-2318

Fax: (819) 994-0311

Email: Diane.Therrien@ci-oic.gc.ca

Diane Therrien

Aditya Ramachandran

Counsel for the Intervener

**Office of the Privacy Commissioner of
Canada**

30 Victoria Street

Gatineau, Quebec, K1A 1H3

Telephone: (819) 994-5905

Fax: (819) 994-5424

Email: Regan.morris@priv.gc.ca

Regan Morris

Counsel for the Intervener

ORIGINAL:

The Registrar
The Supreme Court of Canada 301
Wellington Street
Ottawa, Ontario K1A 0J1 COPY TO:

Jensen Shawa Solomon Duguid Hawkes LLP
800-304 8 Avenue, S.W.
Calgary, Alberta, T2P 1C2

Glenn Solomon, Q.C.

Elizabeth Aspinall

Telephone: (403) 571-1520

Fax: (403) 571-1528

E-mail: gsolomon@jssbarristers.ca

Counsel for the Appellant Information and
Privacy Commissioner of Alberta

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600 Ottawa,
Ontario, K1P 1C3

Jeffrey W. Beedell

Telephone: (613) 786-0171

Fax: (613) 788-3587

E-mail: jeff.beedell@gowlings.com

Agent for the Appellant Information and
Privacy Commissioner of Alberta

DLA Piper LLP
1000 250 - 2nd Street SW Calgary, Alberta,
T2P 0C1

Robert Calvert, Q.C.

Michael D.A. Ford, Q.C.

Telephone: (403) 294-3588

Fax: (403) 213-4469

E-mail: m.ford@dlapiper.com

Counsel for the Respondent Board of
Governors of the University of Calgary

Conway Baxter Wilson LLP
1111 Prince of Wales, Suite 401 Ottawa,
Ontario, K2C 3T2

Colin S. Baxter

Telephone: (613) 780-2012

Fax: (613) 688-0271

E-mail: CBaxter@conway.pro

Agent for the Respondent Board of
Governors of the University of Calgary

David Phillip Jones, Q.C.

Counsel for Law Society of Alberta

De Villars Jones

300 Noble Building

8540 – 109 Street NW

Edmonton, AB T6G 1E6

Telephone No.: (780) 433-9000

Facsimile No.: (780) 433-9780

Email: dpjones@sagecounsel.com

Colin S. Baxter

Agent for the Respondent, Board of
Governors of the University of Calgary, and
Agent for the Proposed Intervener, Law
Society of Alberta

Conway Baxter Wilson LLP

401-1111 Prince of Wales Drive

Ottawa ON K2C 3T2

Telephone No.: (613) 780-2012

Facsimile No.: (613) 688-0271

Email: cbaxter@conway.pro

Michael A. Feder

Counsel for the British Columbia Freedom of Information and Privacy Association
 McCarthy Tétrault LLP
 Suite 1300, 777 Dunsmuir Street, P.O. Box 10424, Pacific Centre
 Vancouver BC V7Y 1K2
 Telephone No.: (604) 643-5983
 Facsimile No.: (604) 622-5614
 Email: mfeder@mccarthy.ca

Lawren Murray**Counsel for the Information and Privacy Commissioner for Ontario**

Information and Privacy Commissioner of Ontario
 Suite 1400 - 2 Bloor Street East
 Toronto, ON M4W 1A8
 Telephone No.: (416) 326-3920
 Facsimile No.: (416) 325-9186
 Email:

Ivan Bernardo

Counsel for the Intervener, Information and Privacy Commissioner for British Columbia
 Miller Thompson LLP
 700 9th Avenue Southwest, Suite 3000
 Calgary, AB T1P 3V4
 Telephone No.: (403) 298-2425
 Facsimile No.: (403) 280-0007
 Email: ibernardo@millerthomson.com

Andrew Fitzgerald

Counsel for Information and Privacy Commissioner for the Province of Newfoundland and Labrador
 Lewis, Sinnott, Shortall, Hurley, Bruce
 P.O. Box 884
 Suite 301, TD Place
 140 Water Street

Nadia Effendi

Agent for the Interveners, Information and Privacy Commissioner of Ontario and British Columbia Freedom of Information and Privacy Association
 Borden Ladner Gervais
 World Exchange Plaza
 100 Queen Street, Suite 1300
 Ottawa, ON K1P 1J9
 Telephone No.: (613) 787-3562
 Facsimile No.: (613) 230-8842
 Email: NEffendi@blg.com

Nadia Effendi

Agent for the Interveners, Information and Privacy Commissioner of Ontario and British Columbia Freedom of Information and Privacy Association
 Borden Ladner Gervais
 World Exchange Plaza
 100 Queen Street, Suite 1300
 Ottawa, ON K1P 1J9
 Telephone No.: (613) 787-3562
 Facsimile No.: (613) 230-8842
 Email: NEffendi@blg.com

Eugene Meehan, Q.C.

Agent for the Interveners, Information and Privacy Commissioner of British Columbia
 Supreme Advocacy LLP
 30 Gilmour Street, Suite 100
 Ottawa, ON K2P 0R3
 Telephone No.: (613) 695-8855
 Facsimile No.: (613) 695-8580
 Email: emeehan@supremeadvocacy.ca

Robert Houston, Q.C.

Agent for the Intervener, Information and Privacy Commissioner of Newfoundland and Labrador
 Burke-Robertson LLP
 441 MacLaren Street, Suite 200
 Ottawa, Ontario K2P 2H3
 Telephone No.: (613) 236-9665

St. John's, NL A1C 5L7
 Telephone No.: (709) 753-7810
 Facsimile No.: (709) 738-2965
 Email: info@lssh.ca

Edward W. Halt

Counsel for the Advocates' Society
 Peacock Linder & Halt
 Suite 4050
 400 – 3rd Avenue SW
 Calgary, AB T2P 4H2
 Telephone No.: (403) 296-2283
 Facsimile No.: (403) 296-2299
 Email: ehalt@plhlaw.ca

Mahmud Jamal

Counsel for the Federation of Law Societies of
 Canada
 Osler, Hoskin & Harcourt LLP
 100 King Street West
 1 First Canadian Place
 Suite 6200, P.O. Box 50
 Toronto ON M5X 1B8
 Telephone No.: (416) 862-6764
 Facsimile No.: (514) 904-8101
 Email: mjamal@osler.com

Michele H. Hollins

Counsel for the Canadian Bar Association
 Dunphy Best Blocksom LLP
 517 10 Avenue SW, Suite 800
 Calgary, Alberta T2R 0A8
 Telephone No.: (403) 750-1117
 Facsimile No.: (403) 269-8911
 Email: hollins@dbblaw.com

Facsimile No.: (613) 235-4430
 Email: rhouston@burkerobertson.com

Patricia J. Wilson

Agent for the Interveners, Advocates'
 Society and Federation of Law Societies of
 Canada
 Osler, Hoskin & Harcourt LLP
 Suite 1900 - 340 Albert Street
 Ottawa ON K1R 7Y6
 Telephone No.: (613) 787-1009
 Facsimile No.: (613) 235-2867
 Email: pwilson@osler.com

Patricia J. Wilson Agent for the Interveners,
 Advocates' Society and Federation of Law
 Societies of Canada

Osler, Hoskin & Harcourt LLP
 Suite 1900 - 340 Albert Street
 Ottawa ON K1R 7Y6
 Telephone No.: (613) 787-1009
 Facsimile No.: (613) 235-2867
 Email: pwilson@osler.com

Marie-France Major

Counsel for the Canada Bar Association
 Supreme Advocacy LLP
 30 Gilmour Street, Suite 100
 Ottawa, ON K2P 0R3
 Telephone No.: (613) 695-8855 ext 102
 Facsimile No.: (613) 695-8580
 Email: mfmajor@supremeadvocacy.ca

TABLE OF CONTENTS

PART I - OVERVIEW 1

PART II - SUBMISSIONS 2

1. The interpretation adopted should take into consideration other public sector access to information and privacy statutes that use similar or identical language 2

2. The modern approach should be applied 3

3. The interpretation of this phrase as including solicitor-client privilege conforms with all aspects of the modern approach 5

 (i) the grammatical and ordinary sense of the words includes solicitor-client privilege 5

 (ii) the objects and schemes of these FOIP Acts confirm the interpretation that “any privilege” includes solicitor-client privilege 5

 (iii) the entire context in which the words appear support an interpretation that includes solicitor-client privilege 10

 (iv) the legislative history supports the inclusion of solicitor-client privilege within this phrase 12

4. The phrase “despite...any privilege of the law of evidence” and similarly-worded phrases in FOIP Acts are sufficiently explicit in their inclusion of solicitor-client privilege 14

PART III - ORDER SOUGHT 15

PART IV - LIST OF AUTHORITIES 16

PART I – OVERVIEW

1. This appeal asks whether the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (“*FOIP*”) authorizes the Alberta Information and Privacy Commissioner (“Alberta Commissioner”) to compel the production of records over which solicitor-client privilege is claimed by a public body, in the course of performing her duties under *FOIP*. The federal, territorial, and several provincial Information and Privacy Commissioners¹ (“Information and Privacy Commissioners” or “the Commissioners”) submit that the phrase “despite... any privilege of the law of evidence”, as it appears in Alberta’s *FOIP* and in similarly worded provisions in other public sector freedom of information and privacy statutes (“*FOIP Acts*”) throughout Canada, can only be properly interpreted as including solicitor-client privilege. The clear wording is reinforced by the explicit purposes of these Acts, which is to provide Canadians with broad, quasi-constitutional rights of access to records held by their governments and other public bodies. To ensure the meaningful exercise of these rights, Parliament and the legislatures have put in place Information and Privacy Commissioners to serve as efficient and effective first-levels of review.

2. The Commissioners submit that (1) the interpretation adopted of the phrase “despite... any privilege of the law of evidence” should take into consideration the *FOIP Acts* that use similar or identical language; (2) the modern approach to statutory interpretation should be applied to interpret this phrase; (3) the interpretation of this phrase as including solicitor-client privilege conforms with all aspects of the modern approach: (i) the grammatical and ordinary sense of the words includes solicitor-client privilege; (ii) the objects and schemes of the *FOIP Acts* indicate that solicitor-client privilege is included within the phrase; (iii) the entire context in which the words appear supports an interpretation that includes solicitor-client privilege; and (iv) the legislative history supports the inclusion of solicitor-client privilege within this phrase; (3) regardless of the statutory approach taken, the phrase is sufficiently explicit in its inclusion of solicitor-client privilege.

¹ 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 [Review Officer], the Nunavut Information and Privacy Commissioner, the Saskatchewan Information and Privacy Commissioner, and the Yukon Ombudsman and Information and Privacy Commissioner.

PART II - SUBMISSIONS

1. The interpretation adopted should take into consideration other public-sector access to information and privacy statutes that use similar or identical language

3. In previous cases interpreting freedom of information legislation, this Honourable Court has indicated that similar words in such statutes should be interpreted consistently throughout the federal, provincial and territorial statutes in which they appear.² Given this preferred approach, it is anticipated that the Court's interpretation of the Alberta Commissioner's statutory powers in the current appeal will likely be applied to the other FOIP Acts throughout Canada that include essentially the same wording.

4. The Commissioners therefore submit that it is necessary to take into account the particular statutory schemes and contexts to which this Court's determination will apply, including the legislative histories of the various FOIP Acts, their purposes, and the statutory schemes that were put in place to achieve their objects.

5. The public sector FOIP Acts pursuant to which the Commissioners have responsibilities contain statutory language that is substantially the same as the language at issue in this appeal. These statutes all include discretionary exemptions allowing public bodies to withhold information in response to access requests on the basis of solicitor-client privilege.³ They also all allow requesters to seek review of public body decisions to refuse to disclose requested records, including those involving claims of solicitor-client privilege. The Commissioners entrusted with this review function are provided with particularly broad statutory powers to perform their mandatory investigations. In conducting such reviews, the Commissioners' role is to arrive at findings about whether public bodies have properly justified any refusal to disclose records to Canadians exercising information and privacy rights.

² *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, para. 195; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, para. 53.

³ *Access to Information Act*, R.S.C. 1985, c. A-1 ("ATIA"), s. 23; *Privacy Act*, R.S.C. 1985, c. P-21 ("PA"), s. 27; *Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175 ("MA FOIP") s. 27(1) [N.B. this Act also includes a mandatory exemption for the solicitor-client privilege of a person other than the public body]; *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20 ("NWT ATIPPA"), s. 15; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("NS FOIP"), s. 16; *Municipal Government Act*, S.N.S. 1998, c. 18, s. 476 ("NS MGA"); *Access to Information and Protection of Privacy Act* S.N.W.T. (Nu) 1994, c. 20 ("NU ATIPPA"), s. 15; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 ("SA FOIP"), s. 22; *Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1 ("SA LAFOIP"), s. 21; *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1 ("YK ATIPPA"), s. 18.

6. The statutes in question thereby all include wording similar to Alberta's *FOIP*:
- The federal Information Commissioner and Privacy Commissioner are both empowered to examine any record under the control of a government institution to which the federal *Access to Information Act* ("ATIA") or the federal *Privacy Act* ("PA") apply "[n]otwithstanding ... any privilege under the law of evidence."⁴
 - Manitoba's Ombudsman may examine any record in the custody or under the control of a public body that she considers relevant to an investigation under the province's *Freedom of Information and Protection of Privacy Act*, and a public body is required to produce the record "despite ... any privilege of the law of evidence." Similarly, pursuant to Yukon's *Access to Information and Protection of Privacy Act*, that Commissioner may examine any record and the public body is required to produce the record "despite ... any privilege under the law of evidence."⁵
 - The Commissioners of the Northwest Territories and of Nunavut can, in conducting their reviews, require the production of and examine any record to which their respective *Access to Information and Protection of Privacy Acts* apply where those records are in the custody or under the control of the public body "[n]otwithstanding ... any privilege available at law."⁶
 - Nova Scotia's Commissioner [Review Officer] and Saskatchewan's Commissioner can require production of and may examine any record that is in the custody or under the control of public bodies or government institutions "[n]otwithstanding ... any privilege that is available at law."⁷

7. While there is some variation in the wording used, these empowering provisions are all effectively equivalent. Whether the wording refers to any privilege "of" or "under" "the law of evidence" or "available at law", solicitor-client privilege is clearly captured.

2. The modern approach should be applied

8. Since 1998, this Court's jurisprudence has been clear that there is "only one principle or approach" to statutory interpretation, namely "the modern approach" by which "the words of an

⁴ *ATIA*, s. 36(2); *PA*, s. 34(2).

⁵ *MA FOIP*, s. 50(2), 50(3); *YK ATIPPA*, s. 53(1), 53(2).

⁶ *NWT ATIPPA*, s. 34(1), *NU ATIPPA*, s. 34(1).

⁷ *NS FOIP*, s. 38(1), *NS MGA*, s. 491(1), *SA FOIP*, s. 54(1), *SA LAFOIP*, s. 43(1).

Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁸ The explicit adoption of this approach postdates the 1982 *Descôteaux* decision in which this Court called for a restrictive interpretation of enabling legislation giving someone the authority to do something which might interfere with the confidentiality of communications between solicitor and client.⁹

9. Since its explicit adoption in 1998, the modern approach has been applied in cases involving the statutory interpretation of solicitor-client privilege. Most importantly, in *Blood Tribe*, this Court introduced the question at issue as being one involving the application of “the appropriate principles of statutory interpretation” to “the general language”¹⁰ of the federal *Personal Information Protection and Electronic Documents Act*¹¹ and went on to apply the modern approach when it considered “[t]he ordinary and grammatical meaning of the words [that were being interpreted]... taken in their full and proper context.” The Court did this while also recognizing the principle “that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively.”¹²

10. The modern approach has also been applied by various courts in the majority of the case law interpreting the phrase “despite... any privilege of the law of evidence” as it appears in FOIP legislation. This approach has led these courts to conclude that this phrase unambiguously includes solicitor-client privilege.¹³

⁸ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21, citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), p. 87.

⁹ *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, p. 875 (“*Descôteaux*”).

¹⁰ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, paras. 1, 26 (“*Blood Tribe*”).

¹¹ S.C. 2000, c. 5, s. 12.

¹² *Blood Tribe*, *supra* note 10, para. 11. See also *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, para. 4, where the Court applied the modern approach to the interpretation of the words “solicitor-client privilege” to determine that these words, in the context of the ATIA, adopted some 25 years prior, included both legal advice privilege and litigation privilege.

¹³ *University of Calgary v. JR*, 2013 ABQB 652, paras. 128-130, 215, 229; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427, paras. 42, 55; *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69, paras. 45 and 84; *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127 (FCA), para. 11. See also, *in obiter*, *British Columbia (Auditor General) v. British Columbia (Attorney General)*, 2013 BCSC 98, paras. 128-129 and *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, 2005 FCA 213, paras. 28-31, 37.

11. The modern approach also conforms with the Interpretation Acts of various jurisdictions, which require statutes to be interpreted to attain their objectives.¹⁴ Moreover, by requiring an examination of the “entire context” of the words being interpreted, the modern approach, when properly applied, takes into account the importance of solicitor-client privilege as part of the relevant context.

3. The interpretation of this phrase as including solicitor-client privilege conforms with all aspects of the modern approach

(i) the grammatical and ordinary sense of the words includes solicitor-client privilege

12. The grammatical and ordinary sense of “privilege under the law of evidence” or “privilege available at law” includes solicitor-client privilege. Even though solicitor-client privilege has evolved to become more than an evidentiary privilege, it has not ceased being such a privilege, and it remains a privilege “available at law” – an ordinary reading of words referring to “any privilege” includes “solicitor-client privilege.”

(ii) the objects and schemes of these FOIP Acts confirm the interpretation that “any privilege” includes solicitor-client privilege

13. All of the FOIP Acts confer fundamental rights to access information in the hands of government institutions and other public bodies. These rights have been described by this Court as “quasi-constitutional” in nature given their importance in preserving a free and democratic society and ensuring that government remains accountable to the citizenry.¹⁵

14. In order to support the exercise of these fundamental rights, most of the FOIP Acts have as an explicit principle that the decisions of public bodies on disclosure of records be reviewed independently of government.¹⁶ Furthermore, all of the statutes establish that the first level of review should be carried out by an independent and impartial commissioner who can provide a timely, informal, expert and low-cost review mechanism for those who exercise their rights of

¹⁴ *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12; *The Interpretation Act*, C.C.S.M. c. I80, s. 6; *Interpretation Act*, R.S.N.W.T. 1988, c I-8, s. 10; *Interpretation Act*, R.S.N.S., c. 235, s. 9(5); *Interpretation Act*, R.S.N.W.T. (Nu) 1988, c I-8, s. 10; *The Interpretation Act*, S.S. 1995, c I-11.2, s. 10; *Interpretation Act*, R.S.Y. 2002, c 125, s. 10.

¹⁵ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] 2 S.C.R. 306, para. 40; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, paras. 24-25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, paras. 59-67 (La Forest J., dissenting, but not on this point).

¹⁶ *ATIA*, s. 2(1); *MA FOIP*, s. 2; *NWT ATIPPA*, s. 1; *NS FOIP*, s. 2; *NS MGA*, s. 462; *NU ATIPPA*, s. 1; *YK ATIPPA* s. 1.

access to information. As such, all the FOIP Acts represent a deliberate choice by the governments that tabled the legislation to, in effect, allow a specialized statutory body to scrutinize their compliance with the legislation.

15. In the case of the FOIP Acts for which the Commissioners are responsible, the legislator chose an ombudsperson role for the Commissioners, whereby the Commissioners investigate complaints and make recommendations to government institutions. While the Commissioners have no power to issue binding orders, their role under the FOIP Acts as a first level review is no less important. As this Court has noted, the Commissioners' important duty is to hold "the government accountable for its information practices."¹⁷

16. The crucial role to be played by the federal Commissioners was an aspect explicitly discussed in Parliament during the legislative process leading to the adoption of the *ATIA* and *PA*. Minister Fox, at second reading of the bill, described the importance of a first-level review by the federal Information Commissioner in the following terms:

The commissioner is the key to making access to information an effective reality for every Canadian, regardless of income, status or knowledge of the law. The procedure for triggering an investigation by the commissioner will be informal, expeditious and free of charge - an entitlement by right of every Canadian. I anticipate that the bulk of complaints will be handled satisfactorily at the commissioner level. I expect the office of the information commissioner to become over time more than an information ombudsman, more than an access advocate. I expect it to be the heart of the system. ...¹⁸

17. Minister Fox also noted that an essential feature of this first level review was that the commissioner would be "responsible to Parliament, not to the government" and that the commissioner would have investigative powers the Minister described as "sweeping." He added:

The use of the commissioner is a uniquely Canadian approach, giving an independent person access to all government documents and a chance to take a position on the matter vis-à-vis the government before it is heard by the court. ...

...I want to make absolutely clear that in all cases the commissioner and the court will have the right to examine any government record.¹⁹

18. In other words, the intent was to ensure that the Commissioners had the powers necessary to act as effective, low-cost first-levels of review for Canadians exercising their quasi-constitutional rights. A first level review by a Commissioner was considered essential to making

¹⁷ *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, para. 34.

¹⁸ *House of Commons Debates*, Vol. VI (29 January 1981), p. 6691 (Hon. Francis Fox) [Emphasis added].

¹⁹ *Ibid.*, pp. 6690-6691 (Hon. Francis Fox) [Emphasis added].

the important rights enshrined by the Act become an “effective reality²⁰” for individuals, who would be entitled to rely on Commissioners to investigate any refusals by government institutions to disclose records to them.

19. The Courts have also recognized the importance of the role to be played by the Commissioners:

The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved. The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review, as provided in sections 41 and 42 of the Act.²¹

More recently, the Federal Court has elaborated on the reasons why its own review role under the *ATIA* can only take place following the Commissioner’s investigation of and report on a complaint about a refusal of access:

There are further reasons why this Court should not judicially review documents that have never been the subject of complaint, review or report. The Act is a statutory scheme containing checks and balances in opening government records to public access. The independent review of complaints is conducted by the Information Commissioner, an Officer of Parliament who reports to Parliament and no one else. The Information Commissioner is therefore independent of departments and entities of the Government of Canada. His or her review is an essential element of the balanced statutory scheme enacted by Parliament. The scheme of the Act entitles this Court to the views of the Information Commissioner on the adequacy of disclosure. This is an important input given the Information Commissioner's considerable expertise and knowledge about access to information issues, which this Court does not possess.²²

20. To accept the Alberta Court of Appeal’s logic in this case would, with great respect, severely undermine the Commissioners’ role as a first-level of review in ensuring government accountability with respect to quasi-constitutional FOIP Acts. In particular, if Commissioners cannot review the records claimed to be privileged, in many cases they will not be able to arrive at a well-informed view on whether the exemption was applicable, and if so, whether it was

²⁰ *Ibid*, p. 6691 (Hon. Francis Fox).

²¹ *Canada (Information Commissioner of Canada) v. Canada (Minister of National Defence)*, (1999) 240 N.R. 244, para. 27. See also *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315, para. 55

²² *Blank v. Canada (Minister of Justice)*, 2015 FC 753, para. 50 [emphasis added]. N.B. this case involved review of claims to solicitor-client privilege.

reasonably claimed²³; the purpose of the first level of review will thereby be thwarted with the resulting effect of impeding the exercise of the rights conferred by the statutes.

21. Reviewing the material first hand is often critical to determining whether all of the criteria for the privilege have been met in the circumstances, which is required to achieve the ends of the FOIP Acts. Determining whether solicitor-client privilege applies is a fact-driven exercise requiring application of the “complex and...constantly evolving” common law of solicitor-client privilege.²⁴ In the public sector context, where in-house lawyers often have multiple responsibilities, the assessment also includes distinguishing between legal advice and policy or operational advice²⁵ and discerning where communications that do not reveal legal advice could nonetheless provide clues about privileged communications.²⁶

22. As well, the various FOIP Acts require the release of information which is not exempted and which can be reasonably severed from a record.²⁷ It is difficult, if not impossible, to envision how an effective determination of the sufficiency of redactions would take place without review of the integral records. This Court recognized the necessity of reviewing the records to perform this function in the *Descôteaux* case where it referred the matter back to the justice of the peace to review the document and verify which portions of it were privileged and which parts were not.²⁸

23. Finally, the Commissioners’ functions also include reviewing the public body’s exercise of discretion in applying the exemption. In order for this type of review to achieve the ends sought by the enabling legislation, it is often critical that the records be reviewed, so that the Commissioners, as ombudspersons, can engage in meaningful dialogue with an institution about the factors that should properly inform its exercise of discretion²⁹.

²³ This was implicitly recognized in the *Blood Tribe* case, where the Court anticipated that without the ability to review the records over which solicitor-client privilege was claimed, the Privacy Commissioner would be required to “report an impasse over privilege” rather than arrive at a finding on whether the privilege was properly claimed. *Blood Tribe*, *supra* note 10, para. 34.

²⁴ *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, para. 82.

²⁵ *R. v. Campbell*, [1999] 1 S.C.R. 565, para. 50.

²⁶ *Canada (Office of the Information Commissioner) v. Canada (Employment and Social Development)*, 2016 FC 36, para. 30.

²⁷ *ATIA*, s. 25; *MA FOIP*, s. 7(2); *NWT ATIPPA*, s. 5(2); *NS FOIP*, s. 5(2); *NS MGA*, s. 465(2); *NU ATIPPA*, s. 5(2); *SA FOIP*, s. 8; *SA LAFOIP*, s. 8; *YK ATIPPA* s. 5(2).

²⁸ *Descôteaux*, *supra* note 9, p. 895-96

²⁹ For a recent example, see a case summary in the Information Commissioner’s 2014-2015 Annual Report to Parliament in which she discusses a historical legal opinion. The Commissioner asked the institution to consider the

24. Absent an effective review by a Commissioner, individual requesters would have to take the matter to court if they wanted to obtain a determination as to whether a government institution or public body had properly applied the exemption. This would effectively negate the intent of the statutory scheme, namely, that the first level review be conducted through an easily accessible administrative mechanism at no cost to the person exercising their rights. Further, there is a real risk in this scenario that many privilege claims made by public bodies would not be subject to any independent review, given the cost and effort for an individual or a Commissioner to take a matter to court.

25. As this Court has noted in the context of *Charter* rights, Canadians should be able to assert their “rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals.”³⁰ Moreover, “[t]he denial of early access to remedies is a denial of an appropriate and just remedy.”³¹ Indeed, this Court’s recent administrative law jurisprudence recognizes the important role that expert administrative bodies can play in protecting important rights conferred by the Constitution or otherwise.³²

26. Also relevant is that the schemes of the FOIP Acts are premised on the Commissioners reviewing a wide range of highly-sensitive government records such as confidences obtained from other governments,³³ information relating to national defence,³⁴ information relating to law enforcement investigations, including investigative techniques and confidential sources,³⁵ and records containing trade secrets and confidential commercial information supplied to government by businesses.³⁶ Many of these are records over which public interest privilege or another privilege could be claimed.³⁷ While solicitor-client privilege is of great importance, the

age and historical significance of the information in its exercise of discretion. Ultimately, the institution agreed to disclose the legal opinion to the requester. (“Records of historical value,” p. 22)

³⁰ *R. v. Conway*, [2010] 1 S.C.R. 765, para. 79 (“*Conway*”).

³¹ *Ibid.*

³² *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 49; *Conway*, *supra* note 30; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, paras. 29-30, 35.

³³ *ATIA*, s. 13; *PA*, s. 19; *MA FOIP*, s. 20; *NWT ATIPPA*, s. 16(1)(c); *NS FOIP*, s. 12(1)(b); *NS MGA*, s. 477; *NU ATIPPA*, s. 16(1)(c); *SA FOIP*, s. 13; *SA LAFOIP*, s. 13; *YK ATIPPA* s. 20(1)(b).

³⁴ *ATIA*, s. 15; *PA*, s. 21; *MA FOIP*, s. 25(1)(b); *NWT ATIPPA*, s. 20(1)(b); *NS FOIP*, s. 15(1)(b); *NS MGA*, s. 475(1)(b); *NU ATIPPA*, s. 20(1)(b); *SA FOIP*, s. 14(b).

³⁵ *ATIA*, s. 16(1); *PA*, s. 22(1); *MA FOIP*, s. 25(1)(c); *NWT ATIPPA*, s. 20(1)(c); *NS FOIP*, s. 15(1)(c); *NS MGA*, s. 475(1)(c); *NU ATIPPA*, s. 20(1)(c); *SA FOIP*, s. 15(1)(e); *SA LAFOIP*, s. 14(1)(e); *YK ATIPPA* s. 19(1)(c).

³⁶ *ATIA*, s. 20(1); *MA FOIP*, s. 18(1); *NWT ATIPPA*, s. 24(1); *NS FOIP*, s. 21(1); *NS MGA*, s. 481(1); *NU ATIPPA*, s. 24(1); *SA FOIP*, s.19(1); *SA LAFOIP*, s. 18(1); *YK ATIPPA* s. 24(1).

³⁷ For example, pursuant to informer privilege, public interest privilege or national interest privilege: see R.W. Hubbard, S. Magotiaux, S.M. Duncan, *The Law of Privilege in Canada* (Canada Law Book, looseleaf), pp. 2-2, 3-2, 3-10 to 3-12, 3-46 to 3-47, 3-51 to 3-58.2, 4-2; *R. v. National Post*, [2010] 1 S.C.R. 477, para. 26.

legislative schemes were premised on the Commissioners reviewing and safeguarding sensitive and privileged information of public bodies, of which solicitor-client privilege is but one type.

27. Furthermore, the limited interference with solicitor-client privilege that is envisaged by the FOIP Acts must be assessed in the specific context of the legislative schemes. The Commissioners, who are public authorities, have been entrusted with the review of privilege claims of other public bodies in the context of administrative schemes put in place to facilitate the exercise of the quasi-constitutional rights conferred by the same statute. This is not a situation where privilege is being pierced for criminal law or penal purposes.³⁸ Commissioners review the records only to verify whether privilege applies as claimed and whether a public body's refusal to exercise its discretion to release the records on this basis was reasonable. The Commissioners review the materials in question on a confidential basis.³⁹

28. Even where a Commissioner forms the view that records ought to be disclosed because the claim of privilege has not been substantiated, such a view is the subject of a recommendation that the institution may decline to follow or may implement in recognition that any initial claim of privilege was overly broad or by voluntarily waiving the privilege. While certain of the Commissioners may initiate litigation against government institutions where their recommendations are not followed, the purpose of such litigation is to seek an adjudication as to whether the records at issue were properly exempted.⁴⁰ Such litigation does not involve privileged material being used "against" a government institution. The only instances a public body is required to disclose records is where a court determines that the information is not subject to solicitor-client privilege or is otherwise not properly exempted from disclosure. Solicitor-client privilege is not abrogated or lost as a result of the review by the Commissioners.

(iii) the entire context in which the words appear supports an interpretation that includes solicitor-client privilege

³⁸ And as such is distinguishable from cases such as: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209 and *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 S.C.R. 401.

³⁹ *ATIA*, s. 62; *PA*, s. 63; *MA FOIP*, s. 55(1); *NWT ATIPPA*, s. 56(1), 56(2); *NU ATIPPA*, s. 56(1), 56(2); *SA FOIP*, s. 46(1), 46(2); *SA LAFOIP*, s. 48; *YK ATIPPA* s. 44(1). While the Nova Scotia Acts do not include explicit confidentiality provision, they allow investigations to take place in private (*NS FOIP*, s. 37(1); *NS MGA*, s. 490) and there is no evidence before the court that the practice of the commissioner in Nova Scotia proceeds on any other basis.

⁴⁰ *ATIA*, s. 42; *PA*, s. 42; *MA FOIP*, s. 66.1.

29. There are also clear indicia in the statutory context that the reference to “privilege” in s. 56(3) of *FOIP* and the equivalent provisions in the other FOIP Acts were meant to include solicitor-client privilege. First, where Parliament or a legislature wanted to exclude specific types of privilege from the scope of a Commissioner’s powers to review privileged material, it used explicit language to that effect. For example, under the federal *Privacy Act*, the provision that empowers the Privacy Commissioner to review records “notwithstanding... any privilege under the law of evidence” expressly excludes Cabinet confidences, a type of Crown privilege.⁴¹

30. Conversely, under Newfoundland and Labrador’s previous *Access to Information and Protection of Privacy Act* the relevant provision expressly provided that the Commissioner’s authority to review records notwithstanding any privilege under the law of evidence did not include “solicitor-client privilege.”⁴² Similarly, Nova Scotia’s legislature has used different statutory wording in its *Personal Health Information Act* than it has in its *FOIP* and the *FOIP* component of its *Municipal Government Act*. While each of these statutes provides that the Commissioner [Review Officer] has the power to review records “despite any privilege available at law,” the *Personal Health Information Act* qualifies this provision as explicitly not including “solicitor-client privilege”⁴³. New Brunswick’s *Right to Information and Protection of Privacy Act* requires public bodies to produce records to the Commissioner “[d]espite...any privilege of the law of evidence” but the Commissioner is expressly prohibited from requiring production of documents containing information that is subject to solicitor-client privilege.⁴⁴ These examples strongly suggest that, absent a similar carve out in s. 56(3) of *FOIP* and the equivalent provisions in other FOIP Acts, the term “any privilege” was meant to encompass solicitor-client privilege.

31. Second, an examination of how the phrase “privilege under the law of evidence” or similar formulations is used elsewhere in the various FOIP Acts reinforces that it was meant to capture solicitor-client privilege. In many FOIP Acts, the same phrase is used to describe both the Commissioners’ and the Court’s power to review records.⁴⁵ There is no question that the Federal Court may, pursuant to this wording in the *PA* and the *ATIA*, review records claimed to be protected by solicitor-client privilege. Indeed, the Federal Court regularly does so when

⁴¹ *PA*, s. 34(2). See *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, para. 17.

⁴² S.N.L. 2002, c A-1.1, s. 52(4)(b), as amended on June 30, 2012 and until repealed on May 31, 2015.

⁴³ *Personal Health Information Act*, S.N.S. 2010, c 41, s. 99(1).

⁴⁴ *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c R-10.6, s 70(1), 70(3).

⁴⁵ *ATIA*, ss. 36(2), 46; *PA*, ss. 34(2), 45; *MA FOIP*, ss. 50(3), 71; *NS FOIP*, ss. 38(1), 42(2); *NS MGA*, ss. 491(1), 495(2); *SA FOIP*, ss. 54(1), 58(2); *SA LAFOIP*, ss. 43(1), 47(2); *YK ATIPPA* ss. 53(2), 60(2).

conducting reviews under the ATIA and the PA.⁴⁶ When the same phrase is used in the same statute, it is presumed to have the same meaning.⁴⁷ By using the same phrase, the legislators demonstrated an intent that both a commissioner and a court be empowered to review records claimed to be privileged.⁴⁸ This being the case, accepting the Respondent’s argument would result in the absurd result that neither the Commissioners nor the relevant court would have the authority to examine the records in question in some jurisdictions, including federally.

32. Finally, the term “privilege”, without any qualifier, has been found in other statutory contexts to include solicitor-client privilege. To give one example, the Ontario *Law Society Act*⁴⁹ has been interpreted as providing the Law Society the authority to require production of solicitor-client privileged documents pursuant to a grant of power that applies “even if ...the documents are privileged”⁵⁰ but does not refer explicitly to solicitor-client privilege.⁵¹ The same conclusion should apply to similarly worded powers in the FOIP Acts.

(iv) the legislative history supports the inclusion of solicitor-client privilege within this phrase

33. While the federal *ATIA* and *PA* were not the first FOIP Acts in Canada⁵², they were the first to create the position of Commissioners with powers over production of records “[n]otwithstanding... any privilege under the law of evidence.”⁵³

34. For the federal Privacy Commissioner, the *PA* represented a significant change in the Commissioner’s enabling legislation. The Privacy Commissioner’s prior enabling statute, Part IV

⁴⁶ See e.g. *Canada (Information Commissioner) v. Canada (Employment and Social Development)*, 2016 FC 36, para. 28; *Blank v. Canada (Minister of Justice)*, 2015 FC 956, para. 57; *Blank v. Canada (Justice)*, 2015 FC 753, para. 63; *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, paras. 39, 130; *Elomari v. Canada (Space Agency)*, 2006 FC 863, para. 37; *Blank v. Canada (Minister of the Environment)*, 2001 FCA 374, para. 17.

⁴⁷ *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, para. 19 (“[g]iving the same words the same meaning throughout a statute is a basic principle of statutory interpretation”); *Sullivan on the Construction of Statutes*, *infra* note 58 at pp. 217 – 218.

⁴⁸ This is especially relevant in the federal legislation, given that the Federal Court, unlike the Superior Courts of the provinces, is a statutory court without inherent jurisdiction and thereby requires statutory authority to review a matter. *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, para. 46; *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 S.C.R. 228, p. 233.

⁴⁹ R.S.O. 1990, c. L.8.

⁵⁰ *Ibid.*, s. 49.8(1).

⁵¹ See *Cusack v. The Lawyers’ Professional Indemnity Co.*, 2013 ONSC 5511, para. 57. See also e.g. *Stewart McKelvey Stirling Scales v. Nova Scotia Barristers’ Society*, 2005 NSSC 258, para. 20; *Law Society of Upper Canada v. Aliamisse Omar Mundulai*, 2008 ONLSAP 4, para. 19.

⁵² *Freedom of Information Act*, S.N.S. 1977, c. 10 (repealed); *Right to Information Act*, S.N.B. 1978, c. R-10.3 (repealed); *Freedom of Information Act*, S.N. 1981, c. 5 (repealed); *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, C.Q.L.R. 1982, c. 30.

⁵³ *ATIA*, s. 36(2); *PA*, s. 34(2).

of the 1977 *Canadian Human Rights Act*, had provided that the Commissioner could not “receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.”⁵⁴

35. Furthermore, a previous version of the Bill that would become the federal *ATIA*⁵⁵ did not envision the Commissioners reviewing records “[n]otwithstanding any other Act of Parliament or any privilege under the law of evidence.” The subsequent addition of this phrase was a meaningful clarification about the intended breadth of the Commissioners’ review powers.

36. Subsequent provincial and territorial FOIP Acts use the same phrase as was found in the *ATIA* and *PA*, with minor variations, in setting out the powers of the Commissioners. This is indicative of an apparent intent to adopt the same approach to privilege as in the federal Acts.

37. At the time of the passage of the *ATIA* and *PA* in July 1982, solicitor-client privilege was viewed primarily, if not exclusively, as an evidentiary privilege. This is demonstrated by this Court’s dispositive pronouncement in *Solosky v. The Queen*, then the leading case on solicitor-client privilege, which read: “Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.”⁵⁶ The substantive rule of solicitor-client privilege was first formulated by this Court in *Descôteaux* on June 23, 1982, only two weeks before the Acts received royal assent on July 7, 1982. There is no indication of Parliament’s awareness of the decision in *Descôteaux* prior to its adoption of the Acts.⁵⁷ While the legislature is presumed to be generally aware of developments in the common law,⁵⁸ this presumption should be displaced in these circumstances where the Acts were not the subject of further substantial debate or study following the relevant development in the common law. Thus, at the time of the adoption of the *ATIA* and *PA*, the reference to “any privilege under the law of evidence” would have undoubtedly been understood as including solicitor-client privilege.

⁵⁴ *Canadian Human Rights Act*, as assented to on July 14, 1977, 25-26 Elizabeth II, Ch. 33, s. 58(5), s. 40(4).

⁵⁵ Bill C-15, *An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada and to amend the Canada Evidence Act, the Federal Court Act and the Statutory Instruments Act*, First Session, Thirty-first Parliament, 28 Elizabeth II, 1979.

⁵⁶ *Solosky v. The Queen*, [1980] 1 S.C.R. 821, p. 837.

⁵⁷ See the absence of discussion in the Debates after June 23, 1982, especially the 2nd reading in the Senate where Bill C-43, was not sent to committee for further study: *Debates of the Senate*, Vol. IV (June 30, 1982), p. 4506 (Hon. Royce Frith), regarding: Bill C-43, *An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof*, First Session, Thirty-second Parliament, 29-30-31-32 Elizabeth II, 1980-81-82-83.

⁵⁸ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (LexisNexis: Markham, 2008), p. 205.

38. Even if Parliament was aware of this Court’s decision in *Descôteaux*, the fact that solicitor-client privilege had evolved beyond a privilege of the law of evidence does not alter the analysis in the present context. Solicitor-client privilege remains a privilege of the law of evidence despite its other attributes. Furthermore, the Commissioners’ power to require production of records over which solicitor-client privilege is claimed in the course of their proceedings clearly engages the evidentiary aspect of the privilege. As such, the phrase “privilege under the law of evidence” or similar variations remain accurate in these contexts to encompass solicitor-client privilege.

4. The phrase “despite...any privilege of the law of evidence” and similarly-worded phrases in FOIP Acts are sufficiently explicit in their inclusion of solicitor-client privilege

39. The Commissioners submit that even if a restrictive reading of the statutory provision is adopted, the phrase “despite [or notwithstanding] ... any privilege of [or under] the law of evidence [or available at law]” is explicit, clear and unambiguous in its inclusion of solicitor-client privilege. As such, these provisions must be interpreted as allowing the Commissioners to compel production of records over which a claim of solicitor-client privilege has been asserted in response to a request under any of these FOIP Acts in order to review the privilege claim to investigate complaints about refusals to disclose records.

40. In *Blood Tribe*, this Court recognized that the words “notwithstanding any privilege under the law of evidence” (as they appear in s. 34(2) of the federal *PA* and s. 36(2) of the federal *ATIA*) are an expression of “explicit language granting access to confidences.”⁵⁹ In the federal case law concerning this wording, the question has not been whether the power to review records claimed to be protected by solicitor-client privilege exists, but the breadth and scope of that power.⁶⁰ Pursuant to this case law, the Federal Court of Appeal has recognized that the Information Commissioner has authority to compel the production of both records requested under the *ATIA* over which a claim of privilege has been made and of ancillary records that are relevant to the existence of requested records.⁶¹

⁵⁹ *Blood Tribe*, *supra* note 10, para. 28.

⁶⁰ *Canada (Information Commissioner) v. Canada (Minister of the Environment)* (2000), 187 D.L.R. (4th) 127 (FCA), paras. 11-12; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673 (FCA), paras. 25-26 (Leave to appeal to SCC refused).

⁶¹ *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673 (FCA), paras. 25-26 (Leave to appeal to SCC refused).

41. Indeed, based on the clear wording of the current FOIP Acts, the Commissioners, in their investigations, regularly review records over which solicitor-client privilege has been claimed.⁶²

42. This interpretation of the phrase as clearly including solicitor-client privilege should be adopted and applied to Canada's FOIP statutes that use the phrase "despite... any privilege of the law of evidence" (or similar words). This interpretation is warranted even if a strict interpretation of the statutory wording is used.

PART III – ORDER SOUGHT

43. The Information and Privacy Commissioners do not seek costs and ask that no costs be awarded against them. Given the number of members participating in this joint intervention and the number of statutory provisions that are proposed to be addressed, the Commissioners seek leave to make oral submissions for up to 15 minutes at the hearing of this appeal.

All of which is respectfully submitted this 16th day of March, 2016

Marlys Edwardh
Daniel Sheppard
Regan Morris
Diane Therrien
Aditya Ramachandran

Counsel for the Intervener, Information and Privacy Commissioners

⁶² See, for example, the following cases:

For the federal Information Commissioner: *Canada (Information Commissioner) v. Canada (Employment and Social Development)*, 2016 FC 36, paras. 7-8; *Blank v. Canada (Minister of Environment)*, 2015 FC 1251, para. 10; *Canada (Information Commissioner) v. Canada (Minister of Health)*, 2015 FC 789, para. 10; *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104, para. 10

For the federal Privacy Commissioner: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, para. 25; *Murchison v. Export Development Canada*, 2009 FC 77, para. 16.

For Manitoba's Ombudsman: Case 2010-0332 (Public Report of Sep 26, 2011 and Response to the recommendation of Sept 19, 2011); Case 2014-0025 (Report of Jun 16, 2014).

For Nova Scotia's Commissioner [Review Officer]: *Nova Scotia (Justice) (Re)*, 2015 CanLII 60916 (NS FOIPOP), para. 25; *Nova Scotia (Community Services) (Re)*, 2010 CanLII 47110 (NS FOIPOP).

For Saskatchewan's Commissioner: Review Report 197-2015, 2016 CanLII 813 (SK IPC), para. 4; (*Saskatchewan Insurance (Re)*, 2014 CanLII 98469 (SK IPC), para. 48; *Saskatoon (City) (Re)*, 2010 CanLII 57955 (SK IPC), paras. 13-15, 60.

For the Northwest Territories' Commissioner: *Northwest Territories (Executive) (Re)*, 1999 CanLII 18623 (NWT IPC); *Financial Management Board Secretariat (Re)*, 1999 CanLII 18627 (NWT IPC); *Deh Cho Health and Social Services Authority (Re)*, 2008 CanLII 77533 (NWT IPC); *Northwest Territories (Industry, Tourism and Investment) (Re)*, 2008 CanLII 77538 (NWT IPC); *Northwest Territories (Transportation, DOT) (Re)*, 2011 CanLII 98613 (NWT IPC).

For Nunavut's Commissioner: see Commissioner's *Annual Report 2013/2014*, pp. 28-29.

For Yukon's Commissioner: see Commissioner's *Annual Report 2009*, p. 3; *Annual Report 2010*, p. 2.

PART IV – LIST OF AUTHORITIES

Cases	Paras Cited
<i>Babcock v. Canada (Attorney General)</i> , [2002] 3 S.C.R. 3	29
<i>Blank v. Canada (Minister of Justice)</i> , 2015 FC 753	19, 31
<i>Blank v. Canada (Minister of Justice)</i> , 2015 FC 956	31
<i>Blank v. Canada (Minister of Environment)</i> , 2015 FC 1251	41
<i>Blank v. Canada (Minister of Justice)</i> , 2006 SCC 39	9
<i>Blank v. Canada (Minister of the Environment)</i> , 2001 FCA 374	31
<i>British Columbia (Auditor General) v. British Columbia (Attorney General)</i> , 2013 BCSC 98	10
<i>Canada (Attorney General) v. Canada (Information Commissioner)</i> , [2005] 4 F.C.R. 673 (FCA)	40
<i>Canada (Attorney General) v. Federation of Law Societies of Canada</i> , [2015] 1 S.C.R. 401	27
<i>Canada (Information Commissioner) v. Canada (Minister of Environment)</i> (2000), 187 D.L.R. (4th) 127 (FCA)	10, 40
<i>Canada (Information Commissioner) v. Canada (Minister of Health)</i> , 2015 FC 789	41
<i>Canada (Information Commissioner) v. Canada (Minister of National Defence)</i> , [2011] 2 S.C.R. 306	13
<i>Canada (Information Commissioner of Canada) v. Canada (Minister of National Defence)</i> (1999), 240 N.R. 244	19
<i>Canada (Office of the Information Commissioner) v. Canada (Employment and Social Development)</i> , 2016 FC 36	21, 31, 41
<i>Canada (Privacy Commissioner) v. Blood Tribe Department of Health</i> , [2008] 2 S.C.R. 574	9, 20, 40
<i>Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)</i> , 2013 FCA 104	41
<i>Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)</i> , 2005 FCA 213	10
<i>Commonwealth of Puerto Rico v. Hernandez</i> , [1975] 1 S.C.R. 228	31
<i>Cusack v. The Lawyers' Professional Indemnity Co.</i> , 2013 ONSC 5511	32
<i>Dagg v. Canada (Minister of Finance)</i> , [1997] 2 S.C.R. 403	13
<i>Descôteaux et al. v. Mierzwinski</i> , [1982] 1 S.C.R. 860	8, 22, 37, 38
<i>Doré v. Barreau du Québec</i> , [2012] 1 S.C.R. 395	25
<i>Dunsmuir v. New Brunswick</i> , [2008] 1 S.C.R. 190	25
<i>Elomari v. Canada (Space Agency)</i> , 2006 FC 863	31
<i>H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)</i> , [2006] 1 S.C.R. 441	15
<i>Lavallee, Rackel & Heintz v. Canada (Attorney General)</i> ; <i>White, Ottenheimer & Baker v. Canada (Attorney General)</i> ; <i>R. v. Fink</i> , [2002] 3 S.C.R. 209	27
<i>Lavigne v. Canada (Office of the Commissioner of Official Languages)</i> , [2002] 2 S.C.R. 773	13
<i>Law Society of Upper Canada v. Aliamisse Omar Mundulai</i> , 2008 ONLSAP 4	32

<i>Leahy v. Canada (Citizenship and Immigration)</i> , 2012 FCA 227	21, 31, 41
<i>Merck Frosst Canada Ltd. v. Canada (Health)</i> , [2012] 1 S.C.R. 23	3
<i>Murchison v. Export Development Canada</i> , 2009 FC 77	41
<i>Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General)</i> , 2011 NLCA 69	10
<i>Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)</i> , [2014] 1 S.C.R. 674	3
<i>Ordon Estate v. Grail</i> , [1998] 3 S.C.R. 437	31
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27	8
<i>R. v. Campbell</i> , [1999] 1 S.C.R. 565	21
<i>R. v. Conway</i> , [2010] 1 S.C.R. 765	25
<i>R. v. National Post</i> , [2010] 1 S.C.R. 477	26
<i>R. v. Zeolkowski</i> , [1989] 1 S.C.R. 1378	31
<i>School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)</i> , 2012 BCSC 427	10
<i>Solosky v. The Queen</i> , [1980] 1 S.C.R. 821	37
<i>Statham v Canadian Broadcasting Corporation</i> , 2010 FCA 315	19
<i>Stewart McKelvey Stirling Scales v. Nova Scotia Barristers' Society</i> , 2005 NSSC 258	32
<i>University of Calgary v. JR</i> , 2013 ABQB 652	10

Doctrine	Paras Cited
R.W. Hubbard, S. Magotiaux, S.M. Duncan, <i>The Law of Privilege in Canada</i> (Canada Law Book, looseleaf)	26
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 5th ed., (LexisNexis: Markham, 2008)	31, 37

Other Publications	Paras Cited
Bill C-15, <i>An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada and to amend the Canada Evidence Act, the Federal Court Act and the Statutory Instruments Act</i> , First Session, Thirty-first Parliament, 28 Elizabeth II, 1979	35
Bill C-43, <i>An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof</i> , First Session, Thirty-second Parliament, 29-30-31-32 Elizabeth II, 1980-81-82-83	37
<i>Deh Cho Health and Social Services Authority (Re)</i> , 2008 CanLII 77533 (NWT IPC)	41
<i>Financial Management Board Secretariat (Re)</i> , 1999 CanLII 18627 (NWT IPC)	41
<i>House of Commons Debates</i> , Vol. VI (29 January 1981)	16, 17, 18

Information Commissioner, <i>2014-2015 Annual Report</i>	23
<i>Manitoba's Ombudsman Case 2010-0332</i> (Public Report of Sep 26, 2011 and Response to the recommendation of Sept 19, 2011)	41
<i>Manitoba's Ombudsman Case 2014-0025</i> (Report of Jun 16, 2014).	41
<i>Northwest Territories (Executive) (Re)</i> , 1999 CanLII 18623 (NWT IPC)	41
<i>Northwest Territories (Industry, Tourism and Investment) (Re)</i> , 2008 CanLII 77538 (NWT IPC)	41
<i>Northwest Territories (Transportation, DOT) (Re)</i> , 2011 CanLII 98613 (NWT IPC).	41
<i>Nova Scotia (Community Services) (Re)</i> , 2010 CanLII 47110 (NS FOIPOP)	41
<i>Nova Scotia (Justice) (Re)</i> , 2015 CanLII 60916 (NS FOIPOP)	41
Nunavut Commissioner, <i>Annual Report 2013/2014</i>	41
<i>Review Report 197-2015</i> , 2016 CanLII 813 (SK IPC)	41
<i>(Saskatchewan) Insurance (Re)</i> , 2014 CanLII 98469 (SK IPC)	41
<i>Saskatoon (City) (Re)</i> , 2010 CanLII 57955 (SK IPC)	41
<i>Senate Debates</i> , Vol. IV (June 30, 1982), p. 4506	37
Yukon Commissioner, <i>Annual Report 2009</i>	41
Yukon Commissioner, <i>Annual Report 2010</i>	41

LIST OF LEGISLATION REFERRED TO IN FACTUM

CANADA

Legislation	Provision	Paras Cited
<i>Access to Information Act</i> , R.S.C. 1985, c. A-1	2(1)	14
	13	26
	15	26
	16(1)	26
	20(1)	26
	23	5
	25	22
	36(2)	6, 31, 33
	42	28
	46	31
62	27	
<i>Canadian Human Rights Act</i> , as assented to on July 14, 1977, 25, 26 Elizabeth II, Ch. 33	58(5)	34
	40(4)	34
<i>Interpretation Act</i> , R.S.C., 1985, c. I-21	12	11
<i>Personal Information Protection and Electronic Documents Act</i> , S.C. 2000, c. 5	12	9
<i>Privacy Act</i> , R.S.C. 1985, c. P-21	19	26
	21	26
	22(1)	26
	27	5
	34(2)	6, 29, 31, 33
	42	28

	45	31
	63	27

MANITOBA

Legislation	Provision	Paras Cited
<i>Freedom of Information and Protection of Privacy Act, C.C.S.M., c. F175</i>	2	14
	7(2)	22
	18(1)	26
	20	26
	25(1)(b)	26
	25(1)(c)	26
	27(1)	5
	50(2)	6
	50(3)	6, 31
	55(1)	27
	66.1	28
71	31	
<i>The Interpretation Act, C.C.S.M. c. I80</i>	6	11

NEW BRUNSWICK

Legislation	Provision	Paras Cited
<i>Right to Information and Protection of Privacy Act, S.N.B. 2009, c R-10.6</i>	70(1)	30
	70(3)	30

NORTHWEST TERRITORIES

Legislation	Provision	Paras Cited
<i>Access to Information and Protection of Privacy Act, S.N.W.T. 1994, c. 20</i>	1	15
	5(2)	22
	15	5
	16(1)(c)	26
	20(1)(b)	26
	20(1)(c)	26
	24(1)	26
	56(1)	27
	56(2)	27
<i>Interpretation Act, R.S.N.W.T. 1988, c I-8</i>	10	11

NOVA SCOTIA

Legislation	Provision	Paras Cited
<i>Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5</i>	2	14
	5(2)	22
	12(1)(b)	26
	15(1)(b)	26

	15(1)(c) 16 21(1) 37(1) 38(1) 42(2)	26 5 26 27 6, 31 31
<i>Interpretation Act, R.S.N.S., c. 235,</i>	9(5)	11
<i>Municipal Government Act, S.N.S 1998, c. 18</i>	462 465(2) 475(1)(b) 475(1)(c) 476 477 481(1) 490 491(1) 495(2)	14 22 26 26 5 26 26 26 6, 31 31
<i>Personal Health Information Act, S.N.S. 2010, c 41</i>	99(1)	30

NUNAVUT

Legislation	Provision	Paras Cited
<i>Access to Information and Protection of Privacy Act S.N.W.T. (Nu) 1994, c. 20</i>	1 5(2) 15 16(1)(c) 20(1)(b) 20(1)(c) 24(1) 56(1) 56(2)	14 22 5 26 26 26 26 27 27
<i>Interpretation Act, R.S.N.W.T. (Nu) 1988, c I-8</i>	10	11

ONTARIO

Legislation	Provision	Paras Cited
<i>Law Society Act, R.S.O. 1990, c. L.8.</i>	49.8(1)	32

SASKATCHEWAN

Legislation	Provision	Paras Cited
<i>Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01</i>	8 13 14(b)	22 26 26

	15(1)(e)	26
	19(1)	26
	22	5
	46(1)	27
	46(2)	27
	54(1)	6, 31
	58(2)	31
<i>The Interpretation Act, S.S. 1995, c I-11.2</i>	10	11
<i>Local Authority Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c L-27.1</i>	8	22
	13	26
	14(1)(e)	26
	18(1)	26
	21	5
	43(1)	6, 31
	47(2)	31
	48	27

YUKON

<i>Access to Information and Protection of Privacy Act, R.S.Y. 2002, c. 1</i>	1	14
	5(2)	22
	18	5
	19(1)(c)	26
	20(1)(b)	26
	24(1)	26
	44(1)	27
	53(1)	6
	53(2)	6, 31
	60(2)	31
<i>Interpretation Act, R.S.Y. 2002, c 125</i>	10	11