

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

BETWEEN:

The Information and Privacy Commissioner of Alberta

Appellant

- and -

The Board of Governors of the University of Calgary

Respondent

- and -

The Law Society of Alberta, British Columbia Freedom of Information and Privacy Association, Information and Privacy Commissioner of Ontario, Information and Privacy Commissioner for British Columbia, Information and Privacy Commissioner for the Province of Newfoundland and Labrador, Advocate's Society, Federation of Law Societies of Canada, Canadian Bar Association, Information Commissioner of Canada, Privacy Commissioner of Canada, Manitoba Ombudsman, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner [Review Officer], Nunavut Information and Privacy Commissioner, Saskatchewan Information and Privacy Commissioner, Yukon Ombudsman and Information and Privacy Commissioner, and Criminal Lawyers' Association

Interveners

FACTUM OF THE INTERVENER
THE LAW SOCIETY OF ALBERTA
(Rule 42 of the *Rules of the Supreme Court of Canada*)

DE VILLARS JONES LLP
300, 8540 - 109 Street NW
Edmonton, Alberta T6G 1E6

David Phillip Jones, Q.C. and
Victoria A. Jones

Phone: (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, Ontario K2C 3T2

Colin S. Baxter

Phone: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for The Law Society of Alberta

TO: The Registrar

AND TO:

**JENSEN SHAWA SOLOMON DUGUID
HAWKES LLP**

800, 304 - 8th Avenue SW
Calgary, Alberta T2P 1C2

Glenn Solomon, Q.C.
Elizabeth Aspinall

Phone: (403) 571-1507
Fax: (403) 571-1528
Email: gsolomon@jssbarristers.ca

Counsel for the Appellant

DLA PIPER (CANADA) LLP

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

Robert Calvert, Q.C.
Michael D.A. Ford, Q.C.
Monika Gehlen

Phone: (403) 294-3588
Fax: (403) 213-4469
Email: m.ford@dlapiper.com

Counsel for the Respondent

**GOWLING LAFLEUR HENDERSON
LLP**

160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell

Phone: (613) 786-1071
Fax: (613) 788-3587
Email: jeff.beedell@gowlings.com

Ottawa Agent for the Appellant

CONWAY BAXTER WILSON LLP/s.r.l.

401, 1111 Prince of Wales Drive
Ottawa, Ontario K2C 3T2

Colin S. Baxter

Phone: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for the Respondent

MCCARTHY TÉTRAULT LLP

Suite 1300, 777 Dunsmuir Street
Vancouver, British Columbia
V7Y 1K2

Michael A. Feder
Emily MacKinnon

Phone: (604) 643-5983
Fax: (604) 622-5614
Email: mfeder@mccarthy.ca

*Counsel for British Columbia Freedom of
Information and Privacy Association*

**INFORMATION AND PRIVACY
COMMISSIONER OF ONTARIO**

2 Bloor Street East, Suite 1400
Toronto, Ontario M4W 1A8

Lawren Murray

Phone: (416) 326-3333
Fax: (416) 325-9186
Email: lawren.murray@ipc.on.ca

*Counsel for Information and Privacy
Commissioner of Ontario*

MILLER THOMSON LLP

3000, 700 - 9th Avenue SW
Calgary, Alberta T2P 3V4

Ivan Bernardo, Q.C.
Jill W. Wilkie

Phone: (403) 298-2425
Fax: (403) 262-0007
Email: ibernardo@millერთhompson.com

*Counsel for Information and Privacy
Commissioner for British Columbia*

BORDEN LADNER GERVAIS LLP

World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi

Phone: (613) 237-5160
Fax: (603) 230-8842
Email: neffendi@blg.com

*Ottawa Agent for British Columbia Freedom
of Information and Privacy Association*

BORDEN LADNER GERVAIS LLP

World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi

Phone: (613) 237-5160
Fax: (603) 230-8842
Email: neffendi@blg.com

*Ottawa Agent for Information and Privacy
Commissioner of Ontario*

SUPREME ADVOCACY LLP

100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Eugene Meehan, Q.C.

Phone: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

*Ottawa Agent for Information and Privacy
Commissioner for British Columbia*

LEWIS, SINNOTT, SHORTALL
140 Water Street
301 TD Place
St. John's, Newfoundland A1C 5L7

Andrew Fitzgerald

Phone: (709) 753-7810
Fax: (709) 738-2965
Email: afitzgerald@nfld.net

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

**PEACOCK LINDER, HALT & MACK
LLP**

#4050, 400 - 3rd Avenue SW
Calgary, Alberta T2P 4H2

Edward W. Halt, Q.C.

Phone: (403) 296-2280
Fax: (403) 296-2299
Email: ehalt@plhlaw.ca

Counsel for the Advocates' Society

OSLER, HOSKIN & HARCOURT LLP

100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, Ontario M5X 1B8

Mahmud Jamal
W. David Rankin

Phone: (416) 862-6764
Fax: (416) 862-6666
Email: mjamal@osler.com

*Counsel for Federation of Law Societies of
Canada*

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

Robert E. Houston, Q.C.

Phone: (613) 706-0020
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

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

OSLER, HOSKIN & HARCOURT LLP

340 Albert Street, Suite 1900
Ottawa, Ontario
K1R 7Y6

Patricia J. Wilson

Phone: (613) 787-1009
Fax: (613) 235-2867
Email: pwilson@osler.com

Ottawa Agent for the Advocates' Society

OSLER, HOSKIN & HARCOURT LLP

340 Albert Street, Suite 1900
Ottawa, Ontario
K1R 7Y6

Patricia J. Wilson

Phone: (613) 787-1009
Fax: (613) 235-2867
Email: pwilson@osler.com

*Ottawa Agent for Federation of Law Societies
of Canada*

DUNPHY BEST BLOCKSOM LLP

800, 517 - 10 Avenue SW
Calgary, Alberta T2R 0A8

Michele H. Hollins, Q.C.
James L. Lebo, Q.C.

Phone: (403) 265-7777
Fax: (403) 269-8911
Email: hollins@dbblaw.com

Counsel for Canadian Bar Association

SUPREME ADVOCACY LLP

100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Eugene Meehan, Q.C.

Phone: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for Canadian Bar Association

STOCKWOODS LLP

77 King Street West, Suite 4130
Toronto, Ontario M5K 1H1

Brian Gover
Justin Safayeni
Carlo Di Carlo

Phone: (416) 593-7200
Fax: (416) 593-9345
Email: briang@stockwoods.ca

Counsel for Criminal Lawyers' Association

POWER LAW

130 Albert Street, Suite 1103
Ottawa, Ontario K1P 5G4

David Taylor

Phone: (613) 702-5563
Fax: (613) 702-5563
Email: dtaylor@powerlaw.ca

Ottawa Agent for Criminal Lawyers' Association

GOLDBLATT PARTNERS LLP

20 Dundas Street West, Suite 1100
Toronto, Ontario M5G 2G8

Marlys A. Edwardh
Daniel Sheppard

Phone: (416) 979-4380
Fax: (416) 979-4430
Email: medwardh@goldblattpartners.com

**OFFICE OF THE INFORMATION
COMMISSIONER OF CANADA**

Diane Therrien
Aditya Ramachandran

30 Victoria St.
Gatineau, Quebec K1A 1H3

Phone: (819) 994-2318
Fax: (819) 994-0311
Email: diane.therrien@ci-oic.gc.ca

**OFFICE OF THE PRIVACY
COMMISSIONER OF CANADA**

Regan Morris

30 Victoria Street
Gatineau, Quebec K1A 1H3
Phone: (819) 994-5905
Fax: (819) 994-5424
Email: regan.morris@priv.gc.ca

*Counsel for Information Commissioner of
Canada, Privacy Commissioner of Canada,
Manitoba Ombudsman, Northwest Territories
Information and Privacy Commissioner, Nova
Scotia Information and Privacy Commissioner
[Review Officer], Nunavut Information and
Privacy Commissioner, Saskatchewan
Information and Privacy Commissioner and
Yukon Ombudsman and Information and
Privacy Commissioner*

TABLE OF CONTENTS

| PART | | PAGE |
|-----------------|--|-----------------|
| PART I | OVERVIEW OF THE LAW SOCIETY'S POSITION..... | <u>1</u> |
| PART II | THE LAW SOCIETY'S POSITION ON THE APPELLANT'S QUESTIONS. | <u>1</u> |
| PART III | STATEMENT OF ARGUMENT..... | <u>1</u> |
| | A. The Court of Appeal decision is correct. | <u>1</u> |
| | B. Principles. | <u>2</u> |
| | C. The Law Society's concerns. | <u>2</u> |
| | 1. The statutory language is not specific and explicit. | <u>3</u> |
| | 2. The characterization of the Commissioner's function as adjudicative is irrelevant. | <u>3</u> |
| | 3. The interpretation of section 56 in FOIPPA must also apply to section 38 of PIPA. | <u>4</u> |
| | 4. No protection against waiver. | <u>5</u> |
| | 5. Disclosure to prosecuting authorities. | <u>5</u> |
| | 6. No statutory requirement that the production and inspection power be used only when absolutely necessary. | <u>6</u> |
| | 7. No difficulty in having the Court determine privilege. | <u>6</u> |
| | 8. Extraneous issues. | <u>7</u> |
| PART IV | COSTS. | <u>7</u> |
| PART V | REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT..... | <u>8</u> |
| PART VI | TABLE OF AUTHORITIES. | <u>9</u> |
| PART VII | LEGISLATIVE PROVISIONS. | <u>9</u> |

PART I
OVERVIEW OF THE LAW SOCIETY'S POSITION

1. The Law Society of Alberta (the "Law Society") submits that section 56 of the *Freedom of Information and Protection of Privacy Act* ("FOIPPA") does not authorize the Information and Privacy Commissioner (the "Commissioner") to require the production and inspection of records with respect to which solicitor-client privilege is asserted.

PART II
THE LAW SOCIETY'S POSITION ON THE APPELLANT'S QUESTIONS

2. The Law Society submits that the Court of Appeal was correct in holding that section 56(3) does not allow the Commissioner to compel production and inspection of the records in question in order to determine whether they are privileged.

PART III
STATEMENT OF ARGUMENT

A. The Court of Appeal decision is correct

3. The Law Society submits that the unanimous decision of the Court of Appeal is correct in both its analysis and its conclusion that section 56 does not authorize the Commissioner to require production and inspection of records with respect to which solicitor-client privilege has been asserted.

B. Principles

4. Solicitor-client privilege is fundamental to the administration of justice, clients, and the legal profession. Clients must be able to obtain private legal advice from counsel. The secrecy of those communications must be inviolable. Any possibility that the sanctity of solicitor-client communications could be compromised affects the total trust and candour that is essential to obtaining legal advice.
5. Solicitor-client privilege is substantive in nature. It applies in all contexts, including searches and seizures and compulsory production and inspection of records. It is not just an evidentiary rule in court proceedings.
6. General statutory provisions authorizing seizure or production of records do not apply to communications which are protected by solicitor-client privilege. The determination about whether records are privileged must be made by a constitutionally independent judge, not the administrative official having the power to seize or require production.
7. A legislative intention to authorize an administrative official to seize or require production of records protected by solicitor-client privilege must be expressed in clear, specific, and explicit language. Such power cannot be inferred or implied.
8. Even a requirement for records to be produced in order to verify whether they are privileged is a breach of privilege.

C. The Law Society's concerns

9. The Law Society has the following concerns about the Commissioner's position.

1. The statutory language is not specific and explicit

10. The Commissioner is effectively asking the Court to reverse *Blood Tribe*, both with respect to (a) the principles of statutory interpretation applicable in cases involving encroachments on the sanctity of solicitor-client privilege, and (b) the requirement for specific and explicit language referring to solicitor-client privilege. In *Blood Tribe*, this Court held that the fact that the federal Privacy Commissioner was given “all the powers of a superior court” was not sufficiently specific and explicit to authorize that Commissioner to require the production of records with respect to which solicitor-client privilege was asserted. In the case at Bar, the phrase in question is “despite ... any privilege of the law of evidence”—which does not refer specifically and explicitly to solicitor-client privilege, although solicitor-client privilege is specifically and explicitly referred to elsewhere in the Act.

2. The characterization of the Commissioner’s function as adjudicative is irrelevant

11. In distinguishing *Blood Tribe*, the Commissioner suggests that it is relevant that FOIPPA gives her the ability to make determinations of fact and law in exercising an *adjudicative* function.
12. However, section 56 is not limited to adjudications. Section 56 applies not only to circumstances (a) where the Commissioner is *adjudicating* an applicant’s request to access records held by a public body, but also (b) where the Commissioner is conducting an *investigation* (such as about how a particular public body is administering FOIPPA), and (c) where the Commissioner is giving *advice and recommendations*. This means that the characterization of the Commissioner’s function in the case at Bar as *adjudicative* cannot be the basis for distinguishing *Blood Tribe*, because the interpretation of section 56 must apply to these other types of functions as well.

13. The characterization of the administrative official’s power is irrelevant to determining whether that official has clear, specific and explicit legislative authority to breach solicitor-client privilege.

3. The interpretation of section 56 in FOIPPA must also apply to section 38 of PIPA

14. The Law Society is concerned that the Commissioner’s interpretation of section 56 would have a broader application beyond FOIPPA. Virtually identical language is contained in section 38 of the *Personal Information Protection Act* (“PIPA”),¹ which applies to commercial “organizations” in the private sector, including law firms:

- 38 (1) In conducting an investigation under section 36 or an inquiry under section 50, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.
- (2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information, whether or not the record is subject to this Act.
- (3) Notwithstanding any other enactment or any privilege of the law of evidence, an organization must produce to the Commissioner within 10 days any record or copy of any record required under subsection (1) or (2).

...

[Emphasis added.]

The Commissioner’s interpretation would allow her to order the production and inspection of the privileged records of commercial organizations.

1. R.S.A. 1970, c. P-6.5, **TAB 1**.

15. No doubt many other administrative bodies would clamour to have statutory provisions like section 56 if such wording would allow them to seize or require production and inspection of records protected by solicitor-client privilege.

4. No protection against waiver

16. The Law Society is concerned about the possibility of waiver under the Commissioner's interpretation of section 56.

17. FOIPPA does not contain a provision analogous to section 38.1. of PIPA:

38.1 If a legal privilege, including solicitor-client privilege, applies to information disclosed to the Commissioner on the Commissioner's request under section 37.1 or section 38, the legal privilege is not affected by the disclosure.

18. If the Commissioner compels production of records, there is a danger that others might assert that solicitor-client privilege has been waived.

5. Disclosure to prosecuting authorities

19. The Law Society is concerned that section 59(4) of FOIPPA authorizes the Commissioner to disclose information obtained from the compulsory production and inspection of solicitor-client information to the Minister of Justice and Solicitor General:

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

6. No statutory requirement that the production and inspection power be used only when absolutely necessary

20. The Law Society is concerned that the Commissioner's interpretation of section 56 would allow her to order the production of records in every case in order for her to be able to verify whether they are protected by solicitor-client privilege. This Court found that to be objectionable in *Blood Tribe*. In the case at Bar, the Commissioner's Protocol does not have any status in the statute; it is not binding on the Commissioner; and there is no evidence about how frequently the Commissioner has in fact required the production of records with respect to which solicitor-client privilege has been asserted.

7. No difficulty in having the Court determine privilege

21. The Law Society is concerned with the Commissioner's assertion that it would be difficult to have the Court determine whether particular records are protected by solicitor-client privilege.
22. On the one hand, the Commissioner suggests that it is only in rare cases where actual viewing of the records would be required in order to determine whether they are privileged, because privilege can usually be determined by affidavits or statements from counsel. If that is the case, then there would only be an infrequent need to resort to the Court.
23. On the other hand, having the Court make that determination is exactly what this Court ordered in *Lavallee and Rackel*. There was no procedural difficulty in getting the matter in front of the court in *Lavallee and Rackel*, and no procedural difficulty now in doing so.

8. Extraneous issues

24. The Law Society submits that the following are extraneous to the issue at Bar:
- (a) The definition or scope of solicitor-client privilege.
 - (b) The Commissioner's allegation that claims of privilege may sometimes be overly broad. That allegation is not relevant to whether it is the Commissioner or the Court which is to make this determination.
 - (c) The number of times the Commissioner has voluntarily been asked to determine whether particular records are or are not protected by solicitor-client privilege.
25. The issue is whether section 56 authorizes the Commissioner to compel the production and inspection of records with respect to which solicitor-client privilege has been asserted.

**PART IV
COSTS**

26. This Part is inapplicable to the Law Society as an intervener.

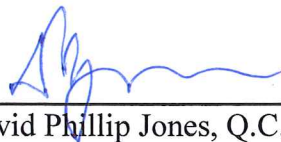
PART V

REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

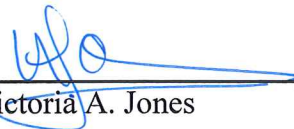
27. The Law Society intervened in both courts below. None of the other interveners in this appeal participated below.

28. The Law Society requests permission to present 15 minutes of oral argument at the hearing of the appeal.

All of which is respectfully submitted on behalf of The Law Society of Alberta on 16 March 2016
by:



David Phillip Jones, Q.C.



Victoria A. Jones

PART VI
TABLE OF AUTHORITIES

No additional authorities, beyond those referred to by the Parties.

PART VII
LEGISLATIVE PROVISIONS

TAB 1: *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5, s. 38 and s. 38.1.

http://www.qp.alberta.ca/1266.cfm?page=P06P5.cfm&leg_type=Acts&isbncln=0779737415

TAB 1

Personal Information Protection Act

R.S.A. 2000, c. P-65, s. 38 and s. 38.1



Province of Alberta

PERSONAL INFORMATION PROTECTION ACT

Statutes of Alberta, 2003
Chapter P-6.5

Current as of December 17, 2014

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
7th Floor, Park Plaza

10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

PERSONAL INFORMATION PROTECTION ACT

Chapter P-6.5

Powers of Commissioner re investigations or inquiries

38(1) In conducting an investigation under section 36 or an inquiry under section 50, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act and the powers given by subsection (2) of this section.

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

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

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

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

(6) The Commissioner may publish any finding or decision in a complete or an abridged form.

Legal privilege not affected

38.1 If a legal privilege, including solicitor-client privilege, applies to information disclosed to the Commissioner on the Commissioner's request under section 37.1 or section 38, the legal privilege is not affected by the disclosure.

2009 c50 s29

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

BETWEEN:

The Information and Privacy Commissioner of Alberta
Appellant
- and -

The Board of Governors of the University of Calgary
Respondent
- and -

The Law Society of Alberta, British Columbia Freedom of Information and Privacy Association, Information and Privacy Commissioner of Ontario, Information and Privacy Commissioner for British Columbia, Information and Privacy Commissioner for the Province of Newfoundland and Labrador, Advocate's Society, Federation of Law Societies of Canada, Canadian Bar Association, Information Commissioner of Canada, Privacy Commissioner of Canada, Manitoba Ombudsman, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner [Review Officer], Nunavut Information and Privacy Commissioner, Saskatchewan Information and Privacy Commissioner, Yukon Ombudsman and Information and Privacy Commissioner, and Criminal Lawyers' Association

Interveners

FACTUM OF THE INTERVENER
THE LAW SOCIETY OF ALBERTA
(Rule 42 of the *Rules of the Supreme Court of Canada*)

DE VILLARS JONES LLP
300, 8540 - 109 Street NW
Edmonton, Alberta T6G 1E6

David Phillip Jones, Q.C. and
Victoria A. Jones

Phone:(780) 433-9000

Fax:(780) 433-9780

Email:dpjones@sagecounsel.com

Counsel for The Law Society of Alberta