

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

BETWEEN:

INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

APPELLANT

and

BOARD OF GOVERNORS OF THE UNIVERSITY OF CALGARY

RESPONDENT

and

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

INTERVENERS

---

**FACTUM OF THE INTERVENER BRITISH COLUMBIA FREEDOM OF  
INFORMATION AND PRIVACY ASSOCIATION**  
(pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

---

**COUNSEL FOR BRITISH COLUMBIA  
FREEDOM OF INFORMATION AND  
PRIVACY ASSOCIATION**

MCCARTHY TÉTRAULT LLP  
Suite 1300, 777 Dunsmuir Street  
Vancouver, BC V7Y 1K2  
Telephone: (604) 643-5983  
Fax: (604) 622-5614  
Email: mfeder@mccarthy.ca

**MICHAEL A. FEDER  
EMILY MacKINNON**

**OTTAWA AGENT FOR BRITISH  
COLUMBIA FREEDOM OF  
INFORMATION AND PRIVACY  
ASSOCIATION**

BORDEN LADNER GERVAIS LLP  
Suite 1100, 100 Queen Street  
Ottawa, ON K1P 1J9  
Telephone: (613) 787-3562  
Fax: (613) 230-8842  
Email: neffendi@blg.com

**NADIA EFFENDI**

**COUNSEL FOR INFORMATION AND  
PRIVACY COMMISSIONER OF  
ALBERTA**

JENSEN SHAWA SOLOMON DUGUID  
HAWKES LLP  
Suite 800, 304 8 Avenue SW  
Calgary, AB T2P 1C2  
Telephone: (403) 571-1520  
Fax: (403) 571-1528  
Email: gsolomon@jssbarristers.ca  
**GLENN SOLOMON, Q.C.**  
**ELIZABETH ASPINALL**

**COUNSEL FOR BOARD OF  
GOVERNORS OF THE UNIVERSITY OF  
CALGARY**

DLA PIPER LLP  
Suite 1000, 250 2<sup>nd</sup> Street SW  
Calgary, AB T2P 0C1  
Telephone: (403) 294-3588  
Fax: (403) 213-4469  
Email: m.ford@dlapiper.com  
**ROBERT CALVERT, Q.C.**  
**MICHAEL D.A. FORD, Q.C.**  
**MONIKA GEHLEN**

**COUNSEL FOR LAW SOCIETY OF  
ALBERTA**

DE VILLARS JONES  
Suite 300, 8540 109 Street NW  
Edmonton, AB T6G 1E6  
Telephone: (780) 433-9000  
Fax: (780) 433-9780  
Email: dpjones@sagecounsel.com  
**DAVID PHILLIP JONES, Q.C.**

**OTTAWA AGENT FOR INFORMATION  
AND PRIVACY COMMISSIONER OF  
ALBERTA**

GOWLING WLG (CANADA) INC.  
2600-160 Elgin Street  
Ottawa, ON K1P 1C3  
Telephone: (613) 786-0171  
Fax: (613) 788-3587  
Email: jeff.beedell@gowlingwlg.com  
**JEFFREY W. BEEDELL**

**OTTAWA AGENT FOR BOARD OF  
GOVERNORS OF THE UNIVERSITY OF  
CALGARY**

CONWAY BAXTER WILSON LLP  
Suite 401, 1111 Prince of Wales Drive  
Ottawa, ON K2C 3T2  
Telephone: (613) 780-2012  
Fax: (613) 688-0271  
Email: CBaxter@conway.pro  
**COLIN S. BAXTER**

**OTTAWA AGENT FOR LAW SOCIETY  
OF ALBERTA**

CONWAY BAXTER WILSON LLP  
Suite 401, 1111 Prince of Wales Drive  
Ottawa, ON K2C 3T2  
Telephone: (613) 780-2012  
Fax: (613) 688-0271  
Email: CBaxter@conway.pro  
**COLIN S. BAXTER**

**COUNSEL FOR INFORMATION AND  
PRIVACY COMMISSIONER OF  
ONTARIO**

INFORMATION AND PRIVACY  
COMMISSIONER/ONTARIO  
Suite 1400, 2 Bloor Street East  
Toronto, ON M4W 1A8  
Telephone: (416) 326-3333  
Fax: (416) 325-9188  
**LAWREN MURRAY**

**COUNSEL FOR INFORMATION AND  
PRIVACY COMMISSIONER FOR  
BRITISH COLUMBIA**

MILLER THOMSON LLP  
Suite 3000, 700 9th Avenue SW  
Calgary, AB T2P 3V4  
Telephone: (403) 298-2425  
Fax: (403) 262-0007  
Email: [ibernardo@millერთhompson.com](mailto:ibernardo@millერთhompson.com)  
**IVAN BERNARDO**  
**JILL W. WILKIE**

**COUNSEL FOR INFORMATION AND  
PRIVACY COMMISSIONER FOR THE  
PROVINCE OF NEWFOUNDLAND AND  
LABRADOR**

LEWIS, SINNOTT, SHORTALL, HURLEY,  
BRUCE  
Suite 300, 140 Water Street  
St-John's, NL A1C 5L7  
Telephone: (709) 753-7810  
Fax: (709) 738-2965  
Email: [afitzgerald@nfld.net](mailto:afitzgerald@nfld.net)  
**ANDREW FITZGERALD**

**OTTAWA AGENT FOR INFORMATION  
AND PRIVACY  
COMMISSIONER OF ONTARIO**

BORDEN LADNER GERVAIS LLP  
Suite 1100, 100 Queen Street  
Ottawa, ON K1P 1J9  
Telephone: (613) 787-3562  
Fax: (613) 230-8842  
Email: [neffendi@blg.com](mailto:neffendi@blg.com)  
**NADIA EFFENDI**

**OTTAWA AGENT FOR INFORMATION  
AND PRIVACY COMMISSIONER FOR  
BRITISH COLUMBIA**

SUPREME ADVOCACY LLP  
Suite 100, 340 Gilmour Street  
Ottawa, ON K2P 0R3  
Telephone: (613) 695-8855 Ext. 101  
Fax: (613) 695-8580  
Email: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)  
**EUGENE MEEHAN, Q.C.**

**OTTAWA AGENT FOR INFORMATION  
AND PRIVACY COMMISSIONER FOR  
THE PROVINCE OF NEWFOUNDLAND  
AND LABRADOR**

BURKE-ROBERTSON  
Suite 200, 441 MacLaren Street  
Ottawa, ON K2P 2H3  
Telephone: (613) 236-9665  
Fax: (613) 235-4430  
Email: [rhouston@burkerobertson.com](mailto:rhouston@burkerobertson.com)  
**ROBERT E. HOUSTON, Q.C.**

**COUNSEL FOR ADVOCATES' SOCIETY**

PEACOCK LINDER & HALT  
Suite 850, 400 3rd Avenue SW  
Calgary, AB T2P 4H2  
Telephone: (403) 296-2280  
Fax: (403) 296-2299  
**EDWARD W. HALT**

**COUNSEL FOR FEDERATION OF LAW  
SOCIETIES OF CANADA**

OSLER, HOSKIN & HARCOURT LLP  
Suite 2100, 1000 de la Gauchetière Street West  
Montréal, QC H3B 4W5  
Telephone: (514) 904-8100  
Fax: (514) 904-8101  
Email: mjamal@osler.com  
**MAHMUD JAMAL**  
**W. DAVID RANKIN**

**COUNSEL FOR CANADIAN BAR  
ASSOCIATION**

DUNPHY BEST BLOCKSOM LLP  
Suite 800, 517-10 Avenue SW  
Calgary, AB T2R 0A8  
Telephone: (403) 265-7777  
Fax: (403) 269-8911  
Email: hollins@dbblaw.com  
**MICHELE H. HOLLINS**  
**JAMES L. LEBO, Q.C.**

**OTTAWA AGENT FOR ADVOCATES'  
SOCIETY**

OSLER, HOSKIN & HARCOURT LLP  
Suite 1900, 340 Albert Street  
Ottawa, ON K1R 7Y6  
Telephone: (613) 787-1009  
Fax: (613) 235-2867  
Email: pwilson@osler.com  
**PATRICIA J. WILSON**

**OTTAWA AGENT FOR FEDERATION  
OF LAW SOCIETIES OF CANADA**

OSLER, HOSKIN & HARCOURT LLP  
Suite 1900, 340 Albert Street  
Ottawa, ON K1R 7Y6  
Telephone: (613) 787-1009  
Fax: (613) 235-2867  
Email: pwilson@osler.com  
**PATRICIA J. WILSON**

**OTTAWA AGENT FOR CANADIAN BAR  
ASSOCIATION**

SUPREME ADVOCACY LLP  
Suite 100, 340 Gilmour Street  
Ottawa, ON K2P 0R3  
Telephone: (613) 695-8855 Ext. 102  
Fax: (613) 695-8580  
Email: emeehan@supremeadvocacy.ca  
**MARIE-FRANCE MAJOR**

**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]**

SACK, GOLDBLATT, MITCHELL LLP  
Box 180, 1100-20 Dundas Street West  
Toronto, ON M5G 2G8  
Telephone: (416) 979-4380  
Fax: (416) 979-4430  
Email: medwardh@sgmlaw.com  
**MARLYS A. EDWARDH  
DANIEL SHEPPARD  
DIANE THERRIEN  
ADITYA RAMACHANDRAN**

**COUNSEL FOR CRIMINAL LAWYERS'  
ASSOCIATION**

STOCKWOODS LLP  
Suite 4130, 77 King Street West  
Toronto, ON M5K 1H1  
Telephone: (416) 593-7200  
Fax: (416) 593-9345  
Email: briang@stockwoods.ca  
**BRIAN GOVER  
JUSTIN SAFAYENI  
CARLO DI CARLO**

**OTTAWA AGENT 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]**

OFFICE OF THE PRIVACY  
COMMISSIONER OF CANADA  
30 Victoria Street  
Gatineau, QC K1A 1H3  
Telephone: (819) 994-5905  
Fax: (819) 994-5424  
Email: Regan.morris@priv.gc.ca  
**REGAN MORRIS**

**OTTAWA AGENT FOR CRIMINAL  
LAWYERS' ASSOCIATION**

POWER LAW  
Suite 1103, 130 Albert Street  
Ottawa, ON K1P 5G4  
Telephone: (613) 702-5563  
Fax: (613) 702-5563  
Email: dtaylor@powerlaw.ca  
**DAVID TAYLOR**

**COUNSEL FOR NUNAVUT  
INFORMATION AND PRIVACY  
COMMISSIONER, SASKATCHEWAN  
INFORMATION AND PRIVACY  
COMMISSIONER AND YUKON  
OMBUDSMAN AND INFORMATION  
AND PRIVACY COMMISSIONER**

SACK, GOLDBLATT, MITCHELL LLP  
Box 180, 1100-20 Dundas Street West  
Toronto, ON M5G 2G8  
Telephone: (416) 979-4380  
Fax: (416) 979-4430  
Email: medwardh@sgmlaw.com  
**MARLYS A. EDWARDH**

**OTTAWA AGENT FOR NUNAVUT  
INFORMATION AND PRIVACY  
COMMISSIONER, SASKATCHEWAN  
INFORMATION AND PRIVACY  
COMMISSIONER AND YUKON  
OMBUDSMAN AND INFORMATION  
AND PRIVACY COMMISSIONER**

OFFICE OF THE PRIVACY  
COMMISSIONER OF CANADA  
30 Victoria Street  
Gatineau, QC K1A 1H3  
Telephone: (819) 994-5905  
Fax: (819) 994-5424  
Email: Regan.morris@priv.gc.ca  
**REGAN MORRIS**

## TABLE OF CONTENTS

PART I – OVERVIEW .....	1
PART II – POSITION ON THE APPELLANT’S QUESTIONS.....	2
PART III – STATEMENT OF ARGUMENT .....	2
A. The <i>Blood Tribe</i> rule should not be applied in the context of public bodies, where its underlying rationale is not engaged .....	2
I. Public bodies must already make full and frank disclosure .....	3
II. Public bodies cannot simply stop seeking legal advice.....	4
III. Other confidentiality rules and privileges ensure secrecy where public bodies need it .....	4
B. Solicitor-client privilege is not infringed when the state reviews its own privilege claims .....	5
C. Preventing information commissioners from verifying solicitor-client privilege claims would undermine the purpose of access-to-information legislation and lead to absurdity .....	6
PART V – ORDER REQUESTED .....	7
PART VI – TABLE OF AUTHORITIES .....	8
PART VII – LEGISLATION AT ISSUE .....	10

**PART I – OVERVIEW**

1. The *Blood Tribe* rule should not be applied to legislation affecting the solicitor-client privilege of only *public bodies*. The basis for the *Blood Tribe* rule—the need to maintain solicitor-client privilege “as close to absolute as possible”<sup>1</sup>—is not engaged by such legislation, because the rationale for solicitor-client privilege is attenuated in the context of public bodies.

2. Solicitor-client privilege’s rationale is that clients will not give their lawyers the information needed to obtain proper legal advice unless assured secrecy. This rationale is attenuated in the context of public bodies because they have no general entitlement to or expectation of secrecy. Where secrecy is appropriate, other privileges (*e.g.*, litigation privilege, cabinet privilege, public interest immunity, and Parliamentary privilege) already afford it. In general, however, public bodies are supposed to be transparent and accountable to the public. Indeed, that is the entire premise of access-to-information legislation.

3. *Blood Tribe*’s restrictive rule of statutory interpretation depends for its existence on the rationale for solicitor-client privilege. When it comes to access-to-information legislation aimed at public bodies, for which the rationale is diminished, the modern rule of statutory interpretation should be applied instead.

4. In any event, solicitor-client privilege is not infringed when an information commissioner seeks to verify a public body’s privilege claim by reviewing the documents in issue. Both the information commissioner and the public body are part of the state apparatus. The review of documents by the information commissioner poses no threat to the privilege.

5. The British Columbia Freedom of Information and Privacy Association (“BC FIPA”) is the only public interest organization in Canada devoted to advancing access-to-information rights, including as an access requester. BC FIPA intervenes in this appeal to ensure that quasi-constitutional rights to access information will not be subverted by erroneous, but unreviewable, solicitor-client privilege claims by public bodies that have a diminished need for the privilege in the first place.

---

<sup>1</sup> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9, quoting *R. v. McClure*, 2001 SCC 14 at para. 35.



## **PART II – POSITION ON THE APPELLANT’S QUESTIONS**

6. BC FIPA intervenes regarding the interpretative approach to s. 56(3) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“Alberta FOIPPA”). The rationale for solicitor-client privilege that underlies the *Blood Tribe* rule is attenuated in the context of legislation aimed at public bodies. Accordingly, the usual, modern rule of statutory interpretation should be applied.

## **PART III – STATEMENT OF ARGUMENT**

### **A. The *Blood Tribe* rule should not be applied in the context of public bodies, where its underlying rationale is not engaged**

7. The *Blood Tribe* rule stems from the need stringently to maintain solicitor-client privilege. The need stringently to maintain solicitor-client privilege stems in turn from this Court’s repeated statements that, without a stringently maintained privilege, clients will not make full and frank disclosure to their lawyers;<sup>2</sup> without full and frank disclosure, lawyers cannot give proper legal advice;<sup>3</sup> and proper legal advice fosters the functioning of the legal system and access to justice.<sup>4</sup>

8. This rationale makes sense in the context of private parties, especially given the threat that the state could use information disclosed by private parties to their lawyers to incriminate them if secrecy were not assured.<sup>5</sup> But as Professor Dodek has observed, “the entire *raison d’être* for solicitor-client privilege is highly problematic in the government context”:<sup>6</sup> actors in the public sphere are supposed to make full and frank disclosure to both the public and each other, and they cannot refrain from seeking legal advice anyway.

---

<sup>2</sup> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at paras. 9-11.

<sup>3</sup> *R. v. McClure*, 2001 SCC 14 at para. 33.

<sup>4</sup> *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 49; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9.

<sup>5</sup> *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18 at para. 42.

<sup>6</sup> Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at 449.

**I. Public bodies must already make full and frank disclosure**

9. The *Blood Tribe* rule is not necessary to ensure full and frank disclosure by public bodies.

10. The public demand for open government has been growing for at least 30 years.<sup>7</sup> Government actors, including public bodies, have duties of openness and candour:

[P]ublic officials are expected to be frank and candid in their communications with each other, whether or not these communications may later be disclosed and these expectations should be the same whether the public official is a lawyer or a non-lawyer.<sup>8</sup>

11. Access-to-information legislation furthers this openness and thereby “facilitate[s] one of the foundations of our society, democracy”:<sup>9</sup>

Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society.<sup>10</sup>

12. Indeed, this Court has recognized access-to-information rights as quasi-constitutional.<sup>11</sup> The public has a right to hold public bodies accountable both for their decisions and for the bases on which those decisions were made.<sup>12</sup> The reach of the open government principle is evident from the array of public bodies made subject to access to information regimes.<sup>13</sup>

13. This is far from the scenario of an individual accused needing to reveal “bad facts” beneath the shield of privilege to permit a full defence against the state. On the contrary, public bodies are already obliged to reveal bad facts. They should not be shielding themselves or those facts from the scrutiny of the public to whom they are accountable. The incentive of solicitor-client privilege is unnecessary.

---

<sup>7</sup> *Carey v. Ontario*, [1986] 2 S.C.R. 637 at 673.

<sup>8</sup> Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at 444; Chris Wheeler, “Rethinking the Legal Advice Privilege in the Public Sector Context” (2006) 50 AIAL Forum 31 at 36; see also *Carey v. Ontario*, [1986] 2 S.C.R. 637 at 673.

<sup>9</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 22.

<sup>10</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 at para. 1; see also *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 1.

<sup>11</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40.

<sup>12</sup> Adam M. Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 Queen’s L.J. 493 at 533, n. 144.

<sup>13</sup> See e.g. *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 at s. 1; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 at Schedule 1.

## II. Public bodies cannot simply stop seeking legal advice

14. Nor is the *Blood Tribe* rule necessary to encourage public bodies to obtain legal advice.

15. Solicitor-client privilege aims to help parties obtain proper legal advice. This is desirable because “[t]he legal system, complicated as it is, calls for professional expertise”.<sup>14</sup> But public bodies are not like private parties, tempted or even inclined to navigate the legal system without the benefit of legal advice. They *administer* that legal system, and are *obliged* to seek that advice.<sup>15</sup>

16. And, indeed, some government lawyers are obliged to give that advice:

It is true that the Minister of Justice, who is *ex officio* the Attorney General of Canada, has a special legislated responsibility to ensure that “the administration of public affairs is in accordance with law”, and in that respect he or she is not subject to the same client direction as private clients: see *Department of Justice Act*, R.S.C., 1985, c. J-2, s. 4.<sup>16</sup>

17. Solicitor-client privilege aims to facilitate proper legal advice. But public bodies are duty-bound to seek proper legal advice, and government lawyers are duty-bound to give it. The rationale for solicitor-client privilege—and hence, the need for its stringent protection by the *Blood Tribe* rule—does not arise in the way it does for private parties.

## III. Other confidentiality rules and privileges ensure secrecy where public bodies need it

18. Public bodies benefit from other privileges and protections that respond to particular needs for secrecy. The attenuated rationale for solicitor-client privilege reflects in part that these other rules—*e.g.*, litigation privilege, public interest immunity, cabinet privilege, Parliamentary privilege, and Crown immunity—already respond to public bodies’ legitimate secrecy needs.<sup>17</sup> Indeed, some of

---

<sup>14</sup> *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 49; see also *R. v. McClure*, 2001 SCC 14 at para. 33.

<sup>15</sup> Adam M. Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 *Queen’s L.J.* 493 at 533; see *e.g. Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 3.

<sup>16</sup> *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 51; see also Patrick Monahan, “‘In the Public Interest’: Understanding the Special Role of the Government Lawyer” (2013) 63 *S.C.L.R.* (2d) 43.

<sup>17</sup> See *e.g.* Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, *The Law of Privilege in Canada* (Toronto: Thomson Reuters, 2015) at 1-4: “Privacy, confidentiality and privilege are overlapping spheres”, and at 1-4.1: “In seeking to protect various confidences, it remains important to ensure that the correct ‘privilege’ is invoked”.

these rules are given stronger protection in access-to-information statutes than solicitor-client privilege, as they are mandatory and cannot be waived.<sup>18</sup>

**B. Solicitor-client privilege is not infringed when the state reviews its own privilege claims**

19. In any event, solicitor-client privilege is not infringed when an information commissioner seeks to access a public body's documents or information for the limited purpose of determining whether the privilege applies. There is no basis to invoke the *Blood Tribe* rule.

20. The offices of information commissioners are part of the state apparatus. Information commissioners are generally officers of their legislatures,<sup>19</sup> and their staff are public servants, required to take oaths of office.<sup>20</sup>

21. The *Blood Tribe* rule for legislation that could infringe or abrogate solicitor-client privilege flowed from the fundamental concern that the state must not be permitted to compel solicitor-client privileged information *from private parties*.<sup>21</sup> The rule crystallized in a case concerning legislation that might have allowed a public body to pierce *private organizations'* privilege.<sup>22</sup>

22. The respondent's argument treats the *Blood Tribe* rule as a mechanical one, divorced from its rationale, that applies no differently to reviews of a public body's privilege claims than to those of a private party.<sup>23</sup> Not so.

23. The rule is entirely unsuited to interpret legislation concerned solely with allowing one part of the state apparatus to verify the privilege claims of other parts of that apparatus. Both parties are

---

<sup>18</sup> See *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 at s. 22 and *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 at s. 12, requiring a public body *not* to disclose cabinet and treasury board confidences. In 2010, the Law Society of British Columbia recommended to the Special Committee to Review the Freedom of Information and Privacy Act that the exemption for solicitor-client privileged information also be made mandatory, so that the privilege could not be waived. The legislature made no such amendment. See British Columbia, Legislative Assembly, Special Committee to Review the Freedom of Information and Privacy Act, *Report of the Special Committee to Review the Freedom of Information and Privacy Act* (May 31, 2010), 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl. at 17.

<sup>19</sup> *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 at s. 45(2); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 at s. 37(2).

<sup>20</sup> *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 at s. 41(1); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 at s. 51(1).

<sup>21</sup> *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 24.

<sup>22</sup> *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 15: "The Privacy Commissioner argues that 'this case is about calling the private sector to account for its claims of privilege over documents containing personal information of others.' ... I agree."

<sup>23</sup> See, particularly, Respondent's Factum at paras. 35-54.

accountable to the public and share a common interest in ensuring compliance with access-to-information legislation. If the privilege is properly claimed, the commissioner will uphold the public body's decision *not* to release the materials. That's it, that's all. And, of course, if the privilege is improperly claimed, then the question of intrusion does not arise.

24. The review of a public body's privilege claim by an information commissioner should not be considered an intrusion on solicitor-client privilege.<sup>24</sup>

**C. Preventing information commissioners from verifying solicitor-client privilege claims would undermine the purpose of access-to-information legislation and lead to absurdity**

25. Once the *Blood Tribe* rule is taken off the table, quasi-constitutional access-to-information rights must be prioritized in the approach to statutory interpretation. Unless information commissioners can verify privilege claims by reviewing allegedly privileged documents, information will likely be wrongly withheld. Access-to-information legislation applies to many public bodies that are smaller and less sophisticated than the respondent, and solicitor-client privilege can be erroneously claimed. Indeed, in British Columbia, such mistakes have been made, and it is the commissioner who has caught them.<sup>25</sup>

26. These errors would often go undiscovered if the information commissioner could not review allegedly privileged documents, unless every requester had the appetite, funds and patience to seek judicial review—and unless one assumes that the court hearing the judicial review could somehow obtain access to the allegedly privileged documents denied to the commissioner. Access to information schemes are already complex,<sup>26</sup> and access requesters should not be required to face the additional hurdle of going to court. The result would be an expensive and cumbersome bifurcation of the review process, far from the low-cost mechanism otherwise provided by information commissioners and promised to requesters. Indeed, this undesirable approach was advocated by the Insurance Corporation of British Columbia to the Special Committee to Review the Freedom of

---

<sup>24</sup> Indeed, s. 44(2.1) of *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 explicitly states that solicitor-client privilege is not lost when the information commissioner reviews a privilege claim.

<sup>25</sup> See e.g. *Re British Columbia (Health)*, 2015 BCIPC 70; *Re Board of Education of School District 39 (Vancouver)*, 2010 BCIPC 29. For a recent example of a questionable solicitor-client privilege claim in Alberta, see CBC News, "Leaked internal documents cast doubt on ethics commissioner's investigation" (November 27, 2015), online: [www.cbc.ca](http://www.cbc.ca).

<sup>26</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 14.

Information and Privacy Act in 2010. The legislature did not respond with such an amendment, or with anything even resembling it.<sup>27</sup>

27. Public bodies' solicitor-client privilege claims must not be made unexaminable and their errors must not become undiscoverable. To deny information commissioners the right to review allegedly privileged documents of public bodies would be to stymie the democratic goals of open government.

**PART V – ORDER REQUESTED**

28. BC FIPA asks that it be granted permission to make oral submissions not exceeding 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16<sup>th</sup> day of March, 2016.

  
MICHAEL A. FEDER

  
EMILY MacKINNON

---

<sup>27</sup> See British Columbia, Legislative Assembly, Special Committee to Review the Freedom of Information and Privacy Act, *Report of the Special Committee to Review the Freedom of Information and Privacy Act* (May 31, 2010), 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl. at 17.

**PART VI – TABLE OF AUTHORITIES**

<b><u>Case law</u></b>	<b><u>Paragraph(s)</u></b>
1. <i>Canada (Privacy Commissioner) v. Blood Tribe Department of Health</i> , 2008 SCC 44	1, 3, 6, 7, 9, 14, 17, 19, 21, 22, 25
2. <i>Canada (Information Commissioner) v. Canada (Minister of National Defence)</i> , 2011 SCC 25	12
3. <i>Carey v. Ontario</i> , [1986] 2 S.C.R. 637	10
4. <i>Descôteaux v. Mierzwinski</i> , [1982] 1 S.C.R. 860	21
5. <i>Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.</i> , 2004 SCC 18	8
6. <i>Lavallee, Rackel &amp; Heintz v. Canada (Attorney General)</i> , 2002 SCC 61	21
7. <i>Merck Frosst Canada Ltd. v. Canada (Health)</i> , 2012 SCC 3	26
8. <i>Ontario (Public Safety and Security) v. Criminal Lawyers' Association</i> , 2010 SCC 23	11
9. <i>R. v. Campbell</i> , [1999] 1 S.C.R. 565	7, 15, 16
10. <i>R. v. McClure</i> , 2001 SCC 14	1, 7, 15
11. <i>Re British Columbia (Health)</i> , 2015 BCIPC 70	25
12. <i>Re Board of Education of School District 39 (Vancouver)</i> , 2010 BCIPC 29	25
<b><u>Legislation</u></b>	
13. <i>Freedom of Information and Protection of Privacy Act</i> , R.S.B.C. 1996, c. 165	12, 18, 20, 24
<b><u>Other Secondary Sources</u></b>	
14. Adam M. Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35 Queen's L.J. 493	12, 15
15. Adam M. Dodek, <i>Solicitor-Client Privilege</i> (Markham: LexisNexis Canada, 2014)	8, 10
16. Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, <i>The Law of Privilege in Canada</i> (Toronto: Thomson Reuters, 2015)	18
17. Chris Wheeler, "Rethinking the Legal Advice Privilege in the Public Sector Context" (2006) 50 AIAL Forum 31	10

18. British Columbia, Legislative Assembly, Special Committee to Review the Freedom of Information and Privacy Act, *Report of the Special Committee to Review the Freedom of Information and Privacy Act* (May 31, 2010), 2<sup>nd</sup> Sess., 39<sup>th</sup> Parl 18, 26
19. Patrick Monahan, “‘In the Public Interest’: Understanding the Special Role of the Government Lawyer” (2013) 63 S.C.L.R. (2d) 43 16



**PART VII – LEGISLATION AT ISSUE**

*Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25*  
*Sections 1, 22(1), 45(1), 51(1), 56(3)*

1. In this Act,

...

(d) “educational body” means

- (i) a university as defined in the *Post-secondary Learning Act*,
- (ii) a technical institute as defined in the *Post-secondary Learning Act*,
- (iii) a public college as defined in the *Post-secondary Learning Act*,
- (iv) Banff Centre as defined in the *Post-secondary Learning Act*,
- (v) a board as defined in the *School Act*,
- (vi) a charter school as defined in the *School Act*, or
- (vii) a Regional authority as defined in the *School Act*;

...

(g) “health care body” means

- (i) the board of an approved hospital as defined in the *Hospitals Act* other than an approved hospital that is
  - (A) owned or operated by a regional health authority under the *Regional Health Authorities Act*, or
  - (B) repealed 2008 cH-4.3 s15,
- (ii) the operator of a nursing home as defined in the *Nursing Homes Act* other than a nursing home that is owned and operated by a regional health authority under the *Regional Health Authorities Act*,
- (ii.i) the *Health Quality Council of Alberta*,
- (iii) a provincial health board established under the *Regional Health Authorities Act*,
- (iv) repealed 2008 cH-4.3 s15,
- (v) a regional health authority under the *Regional Health Authorities Act*,
- (vi) a community health council established under the *Regional Health Authorities Act*, or
- (vii) a subsidiary health corporation as defined in the *Regional Health Authorities Act*;

...

(i) “local government body” means

- (i) a municipality as defined in the *Municipal Government Act*,
- (ii) an improvement district under the *Municipal Government Act*,
- (iii) a special area as defined in the *Special Areas Act*,
- (iv) a regional services commission under Part 15.1 of the *Municipal Government Act*,
- (iv.1) a growth management board under Part 17.1 of the *Municipal Government Act*,
- (v) a board established under the *Drainage Districts Act*,
- (vi) a board established under the *Irrigation Districts Act*,
- (vii) a management body established under the *Alberta Housing Act*,

(viii) a Metis settlement established under the *Metis Settlements Act*,  
 (ix) the Metis Settlements General Council established under the *Metis Settlements Act*,

(x) any

(A) commission,

(B) police service, or

(C) policing committee,

as defined in the Police Act,

(xi) any municipal library board, library system board, federation board or intermunicipal library board continued or established under the *Libraries Act*, or

(xii) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in subclauses (i) to (xi) and all the members or officers of which are appointed or chosen by that body, but does not include EPCOR Utilities Inc. or ENMAX Corporation or any of their respective subsidiaries

(A) that own a gas utility as defined in the *Gas Utilities Act*,

(B) that own a generating unit, transmission facility or electric distribution system as defined in the *Electric Utilities Act*, or

(C) whose primary business activity consists of providing electricity services as defined in the *Electric Utilities Act*;

(j) “local public body” means

(i) an educational body,

(ii) a health care body, or

(iii) a local government body;

...

(p) “public body” means

(i) a department, branch or office of the Government of Alberta,

(ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,

(iii) the Executive Council Office,

(iv) the office of a member of the Executive Council,

(v) the Legislative Assembly Office,

(vi) the office of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner, the Child and Youth Advocate or the Public Interest Commissioner, or

(vii) a local public body,

but does not include

(viii) the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly, or

(ix) the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta or The Provincial Court of Alberta;

...

- 22.** (1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.
- 45.** (1) The Lieutenant Governor in Council, on the recommendation of the Legislative Assembly, must appoint an Information and Privacy Commissioner to carry out the duties and functions set out in this Act.  
(2) The Commissioner is an officer of the Legislature.  
(3) The Commissioner may not be a member of the Legislative Assembly.
- 51.** (1) There may be a part of the public service of Alberta called the Office of the Information and Privacy Commissioner consisting of the Commissioner and those persons employed pursuant to the Public Service Act that are necessary to assist the Commissioner in carrying out the Commissioner's duties and functions under this or any other enactment.
- 56.** (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).