S.C.C. FILE NUMBER No. 36460

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

B E T W E E N:

THE INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

APPELLANT

-and-

THE BOARD OF GOVERNORS OF THE UNIVERSITY OF CALGARY

RESPONDENT

-and-

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

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PART I - OVERVIEW and STATEMENT OF FACTS

1. The issue on this appeal is whether s. 56(3) of the *Freedom of Information and Protection of Privacy Act*[1] ("**FOIP**") empowers the Alberta Information and Privacy Commissioner (the "Commissioner") to compel the production of documents claimed to be protected by solicitor-client privilege in order to assess that claim of privilege in the course of an inquiry. As the national voice of approximately 35,000 lawyers across Canada, the Canadian Bar Association ("**CBA**") has intervened to urge the Supreme Court of Canada to continue its rigorous protection of solicitor-client privilege.

PARTS II and III - STATEMENT OF ISSUES and STATEMENT OF ARGUMENT

A. General Language Describing Privilege Will Not Suffice

2. Section 56 of FOIP grants the Commissioner certain general powers to compel the production of records during the course of an investigation or inquiry by her office. These powers are granted by FOIP itself (s. 56(2) FOIP) and by the statutory incorporation of powers granted under the *Public Inquiries Act* (Alberta)[2] (s. 56(1) FOIP). Section 56(3) clarifies that power:

> s. 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).

3. The CBA submits that this wording does not authorize the Commissioner to compel production of records claimed to be protected by solicitor-client privilege. Solicitor-client communications are not protected merely by a law of evidence. Indeed this particular case involved no question of admissibility of the material as evidence but rather its disclosure to the Commissioner and the FOIP applicant.

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1 *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [Book of Authorities of the Intervener, Canadian Bar Association ("BA") Tab 13].

2 *Public Inquiries Act*, RSA 2000, c P-39 [BA Tab 17].

4. This Court's decision in *Privacy Commissioner of Canada v. Blood Tribe Department of Health*[3] laid down clear principles for all cases of statutory abrogation of solicitor-client privilege, which the Alberta Court of Appeal correctly applied: first to identify the only proper approach to interpretation as restrictive and then to apply that restrictive interpretation to s. 56(3) of FOIP so as not to include solicitor-client privilege as a "law of evidence" by inference.[4]

5. In *Blood Tribe* this Court held:

> It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 PIPEDA, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a regulator or other statutory official to "pierce the privilege".[5]

6. The *Personal Information Protection and Electronic Documents Act*, the law at issue in *Blood Tribe*, gave the Federal Commissioner the power to compel the production of records for the purpose of investigation "in the same manner and to the same extent as a superior court of record" regardless of "whether or not it is or would be admissible in a court of law".[6] This is just a marginally different way of describing a general power to compel documents notwithstanding any law of evidence, as in s. 56(3) of FOIP.

7. It is well settled that legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively, as this Court recognized in *Blood Tribe* and in preceding cases as well:

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3 *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*] [BA Tab 3].

4 *University of Calgary v. R(J)*, 2015 ABCA 118 at para 40 [BA Tab 11]:

> *Blood Tribe's* direction is categorical: because of the central importance of solicitor-client privilege to our legal system and to the preservation of a relationship which is integral to the administration of justice, where statutory language might be interpreted as authorizing an infringement of solicitor-client privilege, the rule of strict construction – and only the rule of strict construction – is to be applied *ab initio*.

5 *Blood Tribe*, *supra* note 3 at para 2 [BA Tab 3].

6 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 s 12(1). [PIPEDA] [BA Tab 16]

> To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open textured language governing production of documents will be read not to include solicitor-client documents: *Lavallee*, at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle.[7]

8. Section 12(1) of PIPEDA did not "advert to issues raised by solicitor-client privilege"[8] and so did not clearly and unambiguously overcome the prohibition against abrogation by inference. Similarly, s. 10 of the *Judicial Review Procedure Act,*[9] at issue in *Pritchard* (cited above in *Blood Tribe*), did not expressly include in-house legal opinions in its definition of "record of the proceedings," without which this Court would not infer that intent.[10]

9. Section 56(3) of FOIP has no express reference to solicitor-client privilege. Although no case has yet said that legislation must use the words themselves to limit or deny the privilege, it would not be onerous to so require.[11] Moreover, given this Court's pronouncements on this subject over the past decades, it is surprising that any legislature would not do so to clearly indicate that as its intent.

10. The Alberta legislature did just that in s. 27 of FOIP, which allows a public body to refuse to disclose to an applicant "information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege."[12] If the legislature had intended to give the Commissioner the power to compel disclosure of solicitor-client privileged records, it could easily have used the same language in s. 56(3).

11. The requirement for clear, unequivocal and unambiguous language is founded on the special place that solicitor-client privilege holds in our legal system, not just among other

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7 *Blood Tribe*, *supra* note 3 at para 11 [BA Tab 3].

8 *Blood Tribe, supra* note 3 at para 26 [BA Tab 3].

9 *Judicial Review Procedure Act*, RSO 1990, c J 1 [BA Tab 15].

10 *Pritchard v. Human Rights Commission (Ontario),* 2004 SCC 31 at para 33 [*Pritchard*] [BA Tab 6].

11 Such legislation could conceivably still be the proper subject of a *Charter* challenge but the drafters' intent would be clear (see *Pritchard, supra* note 10 at para 34 [BA Tab 6]).

12 FOIP *supra* note 1 s 27(1)(a) [BA Tab 13].

evidentiary principles but as a principle of fundamental justice. No other privilege is described thus.

B. Solicitor-Client Privilege is Paramount

12. In *Blood Tribe*, Justice Binnie stated:

> While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance….[13]

13. The origins of solicitor-client privilege as a rule of evidence, its evolution into a substantive rule and then its emergence as a principle of fundamental justice can be traced to the pre-*Charter* jurisprudence of this Court. In *Solosky v. The Queen*, this Court referred to the traditional doctrine of solicitor-client privilege as being "placed on a new plane" no longer to be regarded as "merely a rule of evidence…".[14]

14. In *Descôteaux v. Mierzwinski*, Justice Lamer (as he then was) fleshed out the substantive rule of solicitor-client privilege, paraphrased as follows:

(a) The privilege may be asserted in any circumstances where disclosure of solicitor-client communications is threatened;

(b) Unless the law provides otherwise, any conflict between solicitor-client privilege and the exercise of another legitimate right should be resolved in favour of the former;

(c) Even when the law does authorize interference with solicitor-client privilege, that power should be exercised only when absolutely necessary and only to the extent absolutely necessary; and

(d) Any laws which authorize interference with solicitor-client privilege must be interpreted restrictively.[15]

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[13] *Blood Tribe*, *supra* note 3 at para 10 [BA Tab 3].

[14] *Solosky v. The Queen*, [1980] 1 SCR 821 at 836 [*Solosky*] [BA Tab 10]. Although the Court recognized the application of solicitor-client privilege as a rule of evidence, it declined to characterize it as a "fundamental principle" and appears to have authorized the limited infringement of privilege in this case expressly on the basis that there was no intent to use the communications between a prisoner and his lawyer "as evidence in any proceeding of any kind."(at 837)

[15] *Descôteaux et al v. Mierzwinski*, [1982] 1 SCR 860 at 875 [*Descôteaux*] [BA Tab 4].

15. In *Smith v. Jones,*[16] this Court considered the accused's psychiatric report, which disclosed his detailed plans to rape and murder prostitutes. Even then the court was willing to recognize only a limited "public safety" exception to solicitor-client privilege, characterizing the privilege as a "principle of fundamental importance to the administration of justice".[17]

16. In numerous post-*Charter* cases, this Court has recognized that solicitor-client privilege is also a constitutionally-protected right.[18]

17. Although in *obiter*, this Court has said:

> This is said to be the only absolute privilege known to the law. Not only may the solicitor decline to disclose solicitor and client communications, the courts will not permit him to do so. This is a privilege against all comers, including the Crown, save where the disclosure of a crime would be involved.[19]

18. Because solicitor-client privilege is a substantive rule, a principle of fundamental justice and a constitutional right under Canadian law, the CBA submits that issues pertaining to solicitor-client privilege are beyond the expertise and jurisdiction of the Commissioner and should be reserved for the courts.

C. The Office of the Privacy Commissioner is not a Court of Law

19. To allow the Commissioner, whose expertise is in the area of privacy and who may not be a lawyer, to rule on solicitor-client privilege by balancing privacy interests against privilege undermines the substantive, fundamental and civil rights aspect of solicitor-client privilege. Further, one or more delegated adjudicators may do so. In either

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16 *Smith v. Jones*, [1999] 1 SCR 455 [*Smith*] [BA Tab 9].

17 *Smith, supra* note 16 at para 50 [BA Tab 9].

18 *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R v. Fink*, 2002 SCC 61 [*Lavallee*] at para 39 [BA Tab 5]; *Smith, supra* note 16 at para 7 [BA Tab 9]; and *Attorney General (Canada) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para 6 [BA Tab 2].

19 *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 188 [BA Tab 1].

case, there is the real risk of varied interpretations and applications of the law on solicitor-client privilege.[20]

20. Lawyers understand their obligation of disclosure and its importance to a functioning legal system. They are governed by their law societies and have sworn not to pervert the law to favour or prejudice anyone and to conduct themselves truly and with integrity in all things.[21] To imply that lawyers are misunderstanding or purposely misrepresenting their clients' rights is an affront to the justice system. To then say that a person must divulge information their lawyer considers to be privileged to the Commissioner and she might recognize the right to solicitor-client privilege after-the-fact is not reassuring.

21. If any evidence suggests that the claim of solicitor-client privilege is not founded, a court should make that independent determination. In *McClure,*[22] where the accused sought disclosure of solicitor-client privileged material to make full answer and defence (another fundamental principle of justice), this Court said the test for infringing privilege had to be stringent. The court would review the disputed records as a last resort only if satisfied the material might assist the accused's defence *and* that there was no other way to obtain it. This is different than the blanket authority sought by the Commissioner.

22. In *Lavallee*, this Court found that the absence of judicial discretion in the determination of an asserted claim of privilege was a fatal flaw to the statutory scheme for seizure of material from a lawyer's office.

> [It] amounts to an unjustifiable vindication of form over substance, and it creates a real possibility that the state may obtain privileged information that a court could very well have recognized as such.[23]

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[20] These apprehensions are not quieted by the Commissioner's "Protocol" or the correspondence in this case, all of which predicate that office's analysis of solicitor-client privilege on *Solosky*, a pre-*Charter* case that declined to characterize solicitor-client privilege as a principal of fundamental justice, which has now been the law since at least 1999.

[21] The lawyers' oath of office varies between provinces and territories but this wording is consistent.

[22] *R. v. McClure*, 2001 SCC 14 at para 46 [BA Tab 8].

[23] *Lavallee, supra* note 18 at para 44 [BA Tab 5].

Investigator and Adjudicator

23. Unlike PIPEDA, FOIP authorizes the Commissioner to adjudicate. She also has investigative functions. The potential for conflict between those roles is a fundamental and inescapable distinction between her office and a court of law. The independence of the arbiter is also a principle of fundamental justice. Unlike a court of law, the Commissioner may become adverse in interest to the party whose records are sought.

24. The Commissioner says that she will not use or disclose material she obtains. However, as Justice Arbour said in *Lavallee*:

> However in my opinion and as Southey J. recognized in the *Borden & Elliot* case, "[i]t would be small comfort indeed" for the privilege holder that the law prevents the introduction of his or her confidential documents into evidence when their contents have already been disclosed to the prosecuting authority.[24]

25. Not only may the Commissioner take the resisting organization to court, she may decide to share compelled information with prosecutorial authorities without a court order or consent of the party from whom the information was compelled (s. 59(4) of FOIP).

26. The danger of self-incrimination was a significant concern to this Court in *Blood Tribe* and to the Chambers Judge in the present case.[25] If s. 56(2) does not grant the Commissioner access to solicitor-client records in the first place, the disclosure allowed under s. 59(4) would not be a concern. The legislative scheme, thus interpreted, meets the objectives of FOIP while preserving solicitor-client privilege "as close to absolute as possible to ensure public confidence and retain relevance".[26]

Disclosure to the Commissioner is Not Absolutely Necessary

27. The Commissioner says that this Court must recognize her blanket right to view solicitor-client privileged materials or she cannot fulfill her legislative mandate and her only option, absent this power, is to order the release of solicitor-client privileged records

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[24] *Lavallee, supra* note 18 at para 44 [BA Tab 5].

[25] *University of Calgary v. JR,* 2013 ABQB 652 at paras 218-219 [BA Tab 11].

[26] *Blood Tribe, supra* note 3 at paras 9-10 [BA Tab 3].

directly to the FOIP applicant. She could, of course, respect the claim of privilege. If there were reason to believe the privilege claim was not founded, the Commissioner could have the issue determined by the court under the Alberta *Rules of Court*[27], by judicial review,[28] or the inherent jurisdiction of the court.

28. A court application might delay an applicant's request for information and result in increased costs, but neither is justification for putting solicitor-client privilege at risk. Exceptions to solicitor-client privilege have been found to be "absolutely necessary" only for communications to facilitate a crime or fraud,[29] where there is a "compelling public interest"[30] or where innocence is at stake.[31]

29. Access to information is important, but administrative bodies must exercise their authority in accordance with the principles of natural justice and the common law:[32]

> 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. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.[33]

30. Allowing the Commissioner to review such records creates another danger; namely, undermining the trial process. Here, the FOIP applicant and the public body were engaged in litigation. A determination of privilege claims outside the litigation process encourages litigants to bypass well-established rules and laws that govern disclosure of information in litigation. Further, it conceivably allows for different decisions on the same issue.[34]

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27 Alberta *Rules of Court*, Rule 3.2 [BA Tab 12].

28 *Judicature Act*, RSA 2000, c J-2, s 8 [BA Tab 14].

29 *Descôteaux, supra* note 15 at 873 [BA Tab 4].

30 *Smith, supra* note 16 at para 74 [BA Tab 9].

31 *R v. McClure, supra* at para 46 [BA Tab 8].

32 *Pritchard, supra* note 10 at para 33 [BA Tab 6].

33 *Public Safety & Security (Ontario) v. Criminal Lawyers Association*, 2010 SCC 23 at para 1 [BA Tab 7].

34 A plain reading of FOIP section 3 (c), (d) suggests that FOIP is not intended to encroach upon document production in the course of legal proceedings or affect the power of a court to compel

Chilling Effect on Solicitor-Client Relationship

31. From the perspective of the CBA, unlimited authority to review privileged records by an agency like the Office of Commissioner would have a detrimental effect on all types of solicitor-client relationships:

> Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges…Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.[35]

32. To properly serve and protect our clients' interests, we must have all their relevant information:

> … a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible".[36]

33. As lawyers, it is difficult to imagine how we can properly and effectively advise our clients and uphold our duties to them and as officers of the court without an assurance that communications with our clients will remain confidential. The public we serve expects this privilege to be observed by the profession and by the justice system.

CONCLUSION

34. Section 56(3) of FOIP does not give the Commissioner the power to view the records over which solicitor-client privilege has been asserted because:

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production of documents, which would include the power to review documents over which solicitor-client privilege is claimed.

35 *Smith, supra* note 16 at para 46 [BA Tab 9].

36 *Blood Tribe, supra* at para 9 [BA Tab 3].

(a) solicitor-client privilege is not merely a "privilege of the law of evidence" but a substantive rule and a principle of fundamental justice which does not fall within the language used in s. 56(3) of FOIP;

(b) in the event of a dispute, an independent court of law should determine whether or not privilege has been properly claimed; and

(c) if solicitor-client privilege is eroded, so too are the rights and the trust of the public.

PARTS IV and V – COSTS SUBMISSION and ORDER SOUGHT

35. The CBA takes no position on the disposition of this Appeal.

36. The CBA requests the right to make oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14 day of March, 2016.

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PART VI - TABLE OF AUTHORITIES

	Case	Paragraph Referred To
1.	*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 188	17
2.	*Attorney General (Canada) v. Federation of Law Societies of Canada*, 2015 SCC 7	16
3.	*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44	4, 5, 6, 7, 8, 12, 26, 32
4.	*Descôteaux et al v. Mierzwinski*, [1982] 1 SCR 860 at 875	14, 28
5.	*Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R v. Fink*, 2002 SCC 61	7, 16, 22, 24
6.	*Pritchard v. Human Rights Commission (Ontario)*, 2004 SCC 31	7, 8, 9, 29
7.	*Public Safety & Security (Ontario) v. Criminal Lawyers Association*, 2010 SCC 23	29
8.	*R v. McClure*, 2001 SCC 14	21, 28
9.	*Smith v. Jones*, [1999] 1 SCR 455	15, 28, 31
10.	*Solosky v. The Queen*, [1980] 1 SCR 821 at 836	13, 19
11.	*University of Calgary v. R(J)*, 2015 ABCA 118; *University of Calgary v. JR*, 2013 ABQB 652	4, 26

PART VII - STATUTORY PROVISIONS

	Statute	Paragraph Referred To
12.	*Alberta Rules of Court*, Rule 3.2	27
13.	*Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25	1, 2, 3, 4, 6, 9, 10, 23, 25, 26, 27, 30, 34
14.	*Judicature Act*, RSA 2000, c J-2, s 8	27
15.	*Judicial Review Procedure Act*, RSO 1990, c J 1	8
16.	*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 s 12(1)	5, 6, 8, 23
17.	*Public Inquiries Act*, RSA 2000, c P-39	2