Court File No: 36460

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

B E T W E E N :

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, 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], NUNAVUT INFORMATION AND PRIVACY COMMISSIONER, SASKATCHEWAN INFORMATION AND PRIVACY COMMISSIONER AND YUKON OMBUDSMAN AND INFORMATION AND PRIVACY COMMISSIONER, CRIMINAL LAWYERS' ASSOCIATION

Interveners

RESPONDENT'S REPLY FACTUM RE: INTERVENERS' FACTUMS

(Pursuant to the Order of The Honourable Mr. Justice Gascon dated March 14, 2016)

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SUBMISSIONS

1. Most of the arguments of the interveners supporting the Commissioner's order to produce mirror the Commissioner's errors and have already been addressed in the main factum of the Respondent University. This reply discusses only additional flaws in these interveners' arguments.

A. Irrelevance

2. Several interveners direct their arguments at issues unrelated to the case at bar. This is not helpful in resolving the real issue before the Court. To the contrary, it takes the case away from the parties.

3. The Information and Privacy Commissioners argue that it is "necessary" for a proper resolution of this case to engage in a wide-ranging comparative review of all FOIP legislation throughout Canada they say is similar to s. 56, including a close examination of each statute's legislative history, purpose, and overall scheme.[1] At best, this is redundant. At worst, it is misfocused: it asks for an interpretation of legislation not before the Court.

4. The assumption that similar language in other statutes must mean the same thing is in any event difficult to reconcile with the contextual interpretation of s. 56 of *FOIPPA* urged by the Commissioners and other interveners. By definition, under a contextual interpretation the unique context of a provision is crucial to its meaning. Indeed, there are significant differences between *FOIPPA* and other Acts. By way of example:

- unlike *FOIPPA,* the B.C. Act explicitly protects solicitor-client privileged records disclosed to the B.C. Commissioner;[2]
- unlike s. 56 of *FOIPPA,* which has never been amended, the Newfoundland Act has had an unusual legislative history;[3]

[1] Factum of Information and Privacy Commissioners, e.g., paras.1-5
[2] Factum of B.C. Commissioner, para. 28

- unlike *FOIPPA,* the Ontario Act expressly says that the duty to produce applies despite "Parts II and III of this Act"; Part II contains s. 19, which exempts solicitor-client privileged records from disclosure;[4]
- according to the Ontario Commissioner, "in the federal and some provincial jurisdictions, the adjudication of exception claims is the responsibility of the courts".[5]

5. Comparisons to provisions in other jurisdictions are thus not just unhelpful, they deflect from the real issue.

6. The B.C. Freedom of Information and Privacy Association misses the mark in a different respect. It argues that because the University is a public body, it should not be entitled to rely on solicitor-client privilege at all.[6] Quite simply, this defies the intent of the legislature: s. 27(1)(a) of *FOIPPA* expressly confirms the right of Alberta's public bodies to claim solicitor-client privilege.

7. Moreover, the Association conjures up a scenario – public bodies involved in "administering the legal system" and shielding "bad facts" from the scrutiny of the public[7] – that bears no resemblance to the actual facts. The University's consultations with its lawyers in this case had nothing to do with governmental functions as such. Rather, they arose solely from the University's status as an employer being sued for constructive dismissal. Nothing in this setting lessens the need of the University, as a client, to protect the confidentiality of its communications with its solicitors.

8. The broad definition of "public body" in s. 1(p) of *FOIPPA* – which encompasses many entities not part of central government – further highlights the inappropriateness of the Association's one-size-fits-all approach to solicitor-client privilege claims by public bodies.

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[3] Factum of Newfoundland and Labrador Commissioner, paras. 10-13
[4] Factum of Ontario Commissioner, para. 5, fn. 1
[5] Factum of Ontario Commissioner, paras. 13, 24, 27
[6] Factum of B.C. Freedom of Information and Privacy Association, e.g., paras. 1-3, 6-18
[7] Factum of B.C. Freedom of Information and Privacy Association, e.g., paras. 13, 15-16

9. This Court has, in any event, already firmly closed the door on the suggestion that legal advice (as opposed to policy advice) given to public entities should not be fully protected by solicitor-client privilege.[8]

10. Nor does the theory on which the Association relies for its argument support its position. The Association quotes Professor Dodek out of context.[9] The full quote is this:[10]

> … [T]he entire *raison d'être* for solicitor-client privilege is highly problematic in the government context. If the dominant rationale for this privilege is to facilitate full and frank communication between lawyer and client, **this rationale has far less application in the case of <u>policy formulation</u> than in the case of <u>advice relating to a specific live matter</u>.** [emphasis added]

B. Reliance on new evidence

11. Several interveners rely on new evidence that was not before the courts below:

- a CBC online newscast [B.C. Freedom of Information and Privacy Association];[11]
- a report of a special committee reviewing the B.C. legislation [B.C. Freedom of Information and Privacy Association];[12]
- a report to a committee reviewing the Newfoundland legislation [Newfoundland Commissioner];[13]
- public reports, review reports, and annual reports of various commissioners [Information and Privacy Commissioners];[14]
- legislative debates [Information and Privacy Commissioners].[15]

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[8] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, paras. 19-21 [RBOA, Tab 25]
[9] Factum of B.C. Freedom of Information and Privacy Association, para. 8
[10] Adam M. Dodek, *Solicitor-Client Privilege* (Markham, Ont.: LexisNexis Canada Inc., 2014), p. 449 [RSBOA, Tab 5]
[11] Factum of B.C. Information and Privacy Association, para. 25, fn. 25
[12] Factum of B.C. Information and Privacy Association, para. 26, fn. 27
[13] Factum of Newfoundland Commissioner, para. 10
[14] Factum of Information and Privacy Commissioners, para. 41, fn. 62, para. 23 fn. 29
[15] Factum of Information and Privacy Commissioners, paras. 16-18, fns. 18-20;

12. This is not proper evidence to be first introduced at this stage of the litigation – especially by interveners. The University was not given notice of the new evidence and has not had sufficient time to verify it or to evaluate its context. While the test for the admission of some types of "legislative" evidence (such as Hansard) may be lower than that for fresh evidence,[16] the order of Gascon J. granting the interveners leave to intervene explicitly prohibited them from adducing *any* further evidence or otherwise supplementing the parties' record.

13. The University asks that all arguments based on such evidence be disregarded.

C. Errors regarding the risk of further disclosure

14. The B.C. Commissioner contends that *FOIPPA* provides "meaningful" protection against the risk of further disclosure of solicitor-client privileged records by the Commissioner. It relies in this respect on the express protection against loss of the privilege under s. 44(2.1) of the B.C. Act. But that protection is markedly absent in *FOIPPA.*[17]

15. The argument that such protection could perhaps arise by implication is small comfort indeed to a public body in the University's situation, faced with the very real risk that the Commissioner's misconceptions about solicitor-client privilege will ultimately result in the disclosure of confidential communications with its lawyers to an access requester. In fact, as the Ontario Commissioner indirectly admits, public disclosure is a significant risk of producing solicitor-client privileged records to the Commissioner.[18]

D. Errors regarding the Commissioner's adjudicative function

16. Several interveners take aim at the refusal of *Blood Tribe* to draw an analogy between the functions of a commissioner and of a court. The Alberta Commissioner, they insist, has an adjudicative function just like a statutory court to determine disputed claims for solicitor-client

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[16] *Kennedy v. Leeds, Grenville and Lanark District Health Unit*, 2009 ONCA 685, paras. 19-25 [RSBOA, Tab 1]

[17] Factum of B.C. Commissioner, paras. 28-31

[18] Factum of Ontario Commissioner, para. 17

privilege. Indeed, they argue that if the Commissioner does not have that power under the language of *FOIPPA*, neither do courts like the Federal Court or the Provincial Court.[19] (Taken to its logical end, that argument would also include this Court and other appellate courts.)

17. This ignores the fundamental difference between administrative officials and courts of law. *Blood Tribe* makes it clear that the courts' power to review a privileged document in order to determine a disputed privilege claim derives from a source the Commissioner lacks, namely, from the courts' "power to adjudicate disputed claims over legal rights."[20] Binnie J. referred in this respect to *Goodis* (where the Court said that judges are "well equipped in the ordinary case to determine whether a record is subject to privilege"),[21] to *Lavallee* (where the Court rejected the argument that the Crown was in a better position than the court to determine whether privilege existed, given the risks associated with disclosure to the Crown),[22] and to *Pocklington Foods Inc. v. Alberta*, where Côté J.A. explained that the courts have the power to review privileged documents only because this is safe:[23]

> Why do we let a Chambers judge or Master inspect documents whose privilege is disputed? We do not allow it because of the privilege but in spite of it. The inspection is theoretically wrong. We allow it for pragmatic reasons, **because in practice it can do no harm.** The judge inspecting it will not be the trial judge.
>
> [emphasis added]

18. In stark contrast, the Commissioner has neither the mandate nor the power to adjudicate general legal disputes, and disclosure of privileged records to her creates real harm – the serious risk that the privilege will be lost.

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[19] Factum of Ontario Commissioner, paras. 28-36; Factum of B.C. Commissioner, paras. 11-18; Factum of Information and Privacy Commissioners, para. 31
[20] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, paras. 21-22 [RBOA, Tab 11]
[21] *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, para. 21 [RBOA, Tab 15]
[22] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, para. 44 [RBOA, Tab 20]
[23] *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, 1993 ABCA 69, para. 22 [RSBOA, Tab 2]

19. Another important distinction in this respect is that the courts also have a long-standing general power to determine disputed claims for solicitor-client privilege, a power they exercise on an *ad hoc* basis whenever necessary. This is commonplace in our courts: records that are seized from a law office for any reason will be sealed in response to the lawyer's claim for solicitor-client privilege, and are then put before the court for determination of the privilege claim. *FOIPPA* gives the Commissioner no analogous adjudicative function.

20. It makes no difference in this regard that the Federal Court and the Provincial Court are statutory rather than superior courts. As this Court explained in *R. v. Cunningham,*[24] "in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law." Determining disputed claims for solicitor-client privilege is exactly the type of matter falling within the necessarily implied authority of a court.

21. The analogy the interveners would draw between a court of law and the Commissioner also overlooks the fact that s. 56 deals not only with inquiries (such as in the present case) but also with "investigations" and "giving advice and recommendations" by the Commissioner. These functions differ sharply from adjudicative functions – and yet, if the interveners were right, permitting the Commissioner to determine contested claims for solicitor-client privilege under s. 56(3) would also, necessarily, permit her to pierce the privilege during investigations and for the purpose of giving advice and recommendations.

E. Errors regarding the absolute necessity test

22. The interveners do not agree on whether the Commissioner should have a routine power to pierce solicitor-client privilege or whether it should be limited to exceptional situations. Some interveners – presumably in a nod to the absolute necessity test – claim that infringement of the privilege would be kept "to a minimum"[25] and would be invoked "only where necessary".[26]

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[24] *R. v. Cunningham*, [2010] 1 S.C.R. 331, paras. 19-20 [RSBOA, Tab 3]
[25] Factum of B.C. Commissioner, paras. 25-27
[26] Factum of Ontario Commissioner, para. 38

Others effectively admit that they contend for a routine infringement power to be exercised as a "first-level review". They justify this as "timely, informal, low-cost" and "efficient".[27]

23. None of these arguments meets the absolute necessity test. There are numerous reasons for this.

24. First, as a matter of both principle and logic the routine violation of solicitor-client privilege is irreconcilable with the absolute necessity test.[28]

25. Second, concerns with efficiency, cost, speed, and informality cannot possibly satisfy "as restrictive a test as can be formulated short of an absolute prohibition."[29]

26. Third, the interveners' assumption that a court application would be more cumbersome and expensive than review by the Commissioner is just that, an unfounded assumption. (That it took one judge a long time to evaluate a privilege claim in one particular case, relied on by the Newfoundland Commissioner, is hardly a sound basis for such a generalization.[30]) An originating application under the Alberta Rules is a summary proceeding by way of a simple claim and supporting affidavit [Rule 3.8]. Within a mere 10 days of serving the other parties, it can be heard by the court [Rule 3.9]. A foundational purpose of the Rules is to facilitate the quickest means of resolving a claim at the least expense, and in a timely and cost-effective way [Rules 1.2(1) and (2)(b)].[31] Hearings can be expedited if necessary [Rules 13.5(2) and 1.4(1)] These factors should make a court application at least equivalent to a review by the Commissioner in speed, efficiency and cost.

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[27] Factum of Information and Privacy Commissioners, para. 14-15, 18; Factum of Newfoundland Commissioner, paras. 10, 14
[28] *Blood Tribe,* para. 31 [RBOA, Tab 11]
[29] *Goodis*, para. 20 [RBOA, Tab 15]
[30] Factum of Newfoundland Commissioner, paras. 15-16
[31] *Alberta Rules of Court*, AR 124/2010 [RSBOA, Tab 4]

27. Fourth, the additional fact of judicial expertise in determining disputed claims for solicitor-client privilege makes a court application the far superior method for resolving such disputes.

28. Fifth, as for some interveners' concerns with erroneous or dishonest claims for solicitor-client privilege,[32] the simple fact is that the courts not only weed out such claims but – unlike the Commissioner – they can and do award costs against the parties making them [Rule 10. 29(1)].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of March, 2016.

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[32] E.g., Factum of B.C. Freedom of Information and Privacy Association, para. 25; Factum of Ontario Commissioner, para. 23

TABLE OF AUTHORITIES

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