File No. 36460

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

BETWEEN:

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

REPLY FACTUM OF THE APPELLANT, INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

(Pursuant to the Order of Gascon J. dated February 12, 2016)

Glenn Solomon, QC / Elizabeth Aspinall
Jensen Shawa Solomon Duguid Hawkes LLP
800, 304 8th Avenue SW
Calgary AB T2P 1C2
Phone: (403) 571-1507
Fax: (403) 571-1528
Email: gsolomon@jssbarristers.ca
aspinalle@jssbarristers.ca
Counsel for the Appellant, Information and Privacy Commissioner of Alberta

Jeffrey W. Beedell
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Phone: (613) 786-1071
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Appellant, Information and Privacy Commissioner of Alberta

Robert Calvert, QC / Michael Ford, QC / Monika Gehlen
DLA Piper (Canada) LLP
1000, 250 - 2nd Street SW
Calgary, AB T2P OCI
Phone: (403) 294-2588
Fax: (403) 213-4469
Email: m.ford@dlapiper.com

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

Colin S. Baxter
Conway Baxter Wilson LLP
401, 1111 Prince of Wales Drive
Ottawa, ON K2C 3T2
Phone: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for Counsel for the Respondent: Board of Governors of the University of Calgary

David Phillip Jones, QC I Victoria Jones
De Villars Jones
300 - 8540, 109th Street NW
Edmonton, AB T6G lE6
Phone: (780) 433-9000
Fax: (418) 43309780
Email: dpjones@sagecounsel.com

Counsel for the Intervener, The Law Society of Alberta

Colin S. Baxter
Conway Baxter Wilson LLP
401, 1111 Prince of Wales Drive
Ottawa, ON K2C 3T2
Phone: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for Counsel for Intervener, The Law Society of Alberta

Michael A. Feder I Emily MacKinnon
McCarthy Tetrault LLP
Suite 1300, 777 Dunsmuir Street
Vancouver, BC V7Y lK2
Phone: (604) 643-5983
Fax: (604) 622-5614
Email: mfeder@mccarthy.ca

Counsel for the Intervener, British Columbia Freedom of Information and Privacy Association

Nadia Effendi
Borden Ladner Gervais LLP
100 Queen Street, suite 1300
Ottawa, On K1P 1J9
Tel.: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, British Columbia Freedom of Information and Privacy Association

Lawren Murray
Information and Privacy Commissioner of Ontario
2 Bloor Street East, Suite 1400
Toronto, ON M4W 1A8
Tel.: (416) 326-3333
Fax: (416) 325-9188

Counsel for the Intervener, Information and Privacy Commissioner of Ontario

Nadia Effendi
Borden Ladner Gervais LLP
100 Queen Street, suite 1300
Ottawa, On K1P 1J9
Tel.: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, Information and Privacy Commissioner of Ontario

Ivan Bernardo / Jill W. Wilkie
Miller Thomson LLP
700 9th Avenue Southwest, Suite 3000
Calgary, AB T2P 3V4
Tel. (403) 298-2425
Fax: (403) 262-0007
Email: ibernardo@millerthomson.com

Counsel for the Intervener, Information and Privacy Commissioner for British Columbia

Eugene Meehan, Q.C.
Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel.: (613) 695-8855 Ext: 101
Fax: (613) 695-8580
E-mail: emeehan@supremeadvocacy.ca
Ottawa Agent for Counsel for the Intervener, Information and Privacy Commissioner for British Columbia

Andrew Fitzgerald
Lewis, Sinnott, Shortall, Hurley, Bruce
140 Water Street, Suite 300
St-John's, NL A1C 5L7
Tel.: (709) 753-7810
Fax: (709) 738-2965
E-mail: afitzgerald@nfld.net

Counsel for the Intervener, Information and Privacy Commissioner for the Province of Newfoundland and Labrador

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa, ON K2P 2H3
Tel.: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for Counsel for the Intervener, Information and Privacy Commissioner for the Province of Newfoundland and Labrador

Edward W. Halt
Peacock Linder & Halt
#4050, 400 - 3rd Avenue S.W.
Calgary, AB T2P 4H2
Phone: (403) 296-2280
Fax: (403) 296-2299
Email:: ehalt@plhlaw.ca

Counsel for the Intervener, Advocates' Society

Patricia J. Wilson
Osler, Hoskin & Harcourt LLP
340 Albert Street, Suite 1900
Ottawa, ON K1R 7Y6
Tel.: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com

Ottawa Agent for Counsel for the Intervener, Advocates Society

Mahmud Jamal / W. David Rankin
Osler, Hoskin & Harcourt LLP
1000 de la Gauchetière Street West, Suite 2100
Montréal, QC H3B 4W5
Tel. (514) 904-8100
Fax: (514) 904-8101
Email: mjamal@osler.com

Counsel for the Intervener, The Federation of Law Societies of Canada

Patricia J. Wilson
Osler, Hoskin & Harcourt LLP
340 Albert Street, Suite 1900
Ottawa, ON K1R 7Y6
Tel.: (613) 787-1009
Fax: (613) 235-2867
E-mail: pwilson@osler.com

Ottawa Agent for Counsel for the Intervener, The Federation of Law Societies of Canada

Michele H. Hollins / James L. Lebo, Q.C.
Dunphy Best Blocksom LLP
800, 517-10 Avenue S.W.
Calgary, AB T2R 0A8
Tel. (403) 265-7777
Fax: (403) 269-8911
Email: hollins@dbblaw.com

Counsel for the Intervener, The Canadian Bar Association

Marie-France Major
Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3
Tel.: (613) 695-8855 Ext: 102
Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca
Ottawa Agent for Counsel for the Intervener, The Canadian Bar Association

Marlys A. Edwardh / Daniel Sheppard / Diane Therrien, Aditya Ramachandran
Sack, Goldblatt, Mitchell LLP
1100-20 Dundas Street West
Toronto, ON M5G 2G8
Tel.: (416) 979-4380
Fax: (416) 979-4430
Email: medwardh@sgmlaw.com

Counsel for the Interveners, Information Commissioner of Canada, Privacy Commissioner of Canada, Manitoba Ombudsman, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner [Review Officer]

Regan Morris
Office of the Privacy Commissioner of Canada
30 Victoria Street
Gatineau, QC K1A 1H3
Tel.: (819) 994-5905
Fax: (819) 994-5424
Email: Regan.morris@priv.gc.ca

Agent for Counsel for the Interveners, Information Commissioner of Canada, Privacy Commissioner of Canada, Manitoba Ombudsman, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner [Review Officer]

Brian Gover / Justin Safayeni / Carlo Di Carlo
Stockwoods LLP
77 King Street West, Suite 4130
Toronto, ON M5K 1H1
Tel.: (416) 593-7200
Fax: (416) 593-9345
Email: briang@stockwoods.ca

Counsel for the Intervener, Criminal Lawyers' Association

David Taylor
Power Law
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Tel.: (613) 702-5563
Fax: (613) 702-5563
Email: dtaylor@powerlaw.ca

Ottawa Agent for Counsel for the Intervener, Criminal Lawyers' Association

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APPELLANT'S REPLY FACTUM

A. Introduction

1. This Reply Factum to the Interveners' Facta is submitted on behalf of the Commissioner, pursuant to the Order of Gascon J. pronounced on February 12, 2016.[1]

B. Standard of Review

2. A number of the Interveners assume that the correctness standard of review applies. The Commissioner is "established in the public interest"[2] with "full authority and exclusive jurisdiction over evidence and procedure in [her] process". That supports the application of the reasonableness standard of review.[3] The issue is the meaning of "any privilege of the law of evidence" within the particular context of the statutory code for access to information held by public bodies, which is within the Commissioner's home statute and purview.

3. The Commissioner's interpretation of her home statute has no broader impact beyond the Commissioner's home statute and as such reasonableness is the applicable standard of review. A desire to attribute an excessive scope to the Commissioner's decision in this case does not transform this appeal into a determination of a question of law that is of central importance to the legal system and outside the Commissioner's area of expertise.[4]

4. Many of the Interveners argue that the Commissioner is not well-suited to review privileged records, or assert why it would be inappropriate for the Commissioner to have this power. While legislative intent can be derived to an extent from whether a legislative provision is sound,[5] these arguments are not tied to legislative intention at all. Rather, they assert that the Commissioner's having this power is a bad idea. This matter arises by way of a judicial review of the Commissioner's decision. Whether the Legislature ought to have given her the powers in question is not in issue. Whether the Legislature did so is a matter for the Commissioner. Whether the Commissioner's interpretation of her powers is reasonable is a matter for the Court.

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[1] The abbreviations used in the Commissioner's Factum are continued herein.
[2] *Commission scolaire de Laval v Syndicat de l'enseignement*, 2016 SCC 8 [*Syndicat*] at para. 7 [Appellant's Reply Authorities ("ARA"), Tab 2]
[3] *Syndicat* at paras. 30 – 31[ARA, Tab 2]
[4] *Syndicat* at para. 30 [ARA, Tab 2]
[5] Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham: Butterworths, 2002) at pp. 235 – 257 [ARA, Tab 4]

C. The True Nature and Scope of the Substantive Rule of Solicitor-Client Privilege

5. As many of the Interveners point out,[6] the confidentiality of solicitor-client communications is a substantive rule, not a rule of evidence. It does not follow from this, as some of the Interveners suggest,[7] that a statutory abrogation of solicitor-client privilege *as a rule of evidence* (as by s. 56(3) of *FOIP*) is inadequate to empower the Commissioner to compel records for which solicitor-client privilege is claimed.

6. The substantive rule extends the privilege to contexts beyond the evidentiary context in a proceeding.[8] That does not arise in this case. The substantive rule also contemplates specifically that the law can provide for an interference with the privilege.[9] Where there is a law that allows the abrogation of solicitor-client privilege, the substantive rule guides how that law is to be interpreted and exercised.

7. Where "the law gives someone authority to do something which… might interfere with" solicitor-client privilege, the substantive rule requires that (1) "the decision to do so", and (2) "the choice of means of exercising that authority should be determined with a view not to interfere with" the privilege "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation".[10]

8. Section 56(3) of *FOIP* interferes with the privilege as a rule of evidence, and is intended to do so. The approach taken by the Commissioner in this case (which is the approach that the Commissioner has explained in her Protocol) reflects that the decision to exercise the authority was made in light of the admonition to do so only to the extent necessary to achieve the ends of *FOIP*.

9. The substantive rule further directs that where a provision may or may not pierce the privilege, depending on whether it is interpreted restrictively or broadly, it is to be interpreted

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[6] Canadian Bar Association ("CBA") Factum, paras 12-18; Law Society of Alberta ("LSA") Factum, para. 5; Advocates' Society Factum, paras. 10-12, 16, 18; Criminal Lawyers' Association ("CLA") Factum, para. 30; Federation of Law Societies ("Federation") Factum, para. 6

[7] Federation Factum, para. 21

[8] *Descôteaux v Mierzwinski,* [1982] 1 S.C.R. 860 at p. 875 [*Descôteaux*] [Appellant's Book of Authorities ("BOA"), Tab 23], rule 1

[9] *Descôteaux* at p. 875, rule 2 [BOA, Tab 23]

[10] *Descôteaux* at p. 875, rule 3 [BOA, Tab 23]

restrictively.[11] Thus, s. 56(3) of *FOIP* is to be interpreted restrictively to decide whether its language pierces the privilege. If it does, the power it confers is to be understood restrictively and is to be exercised only as necessary to achieve the ends of *FOIP*. Section 56(3) of *FOIP* and the substantive rule do not conflict. The submission that a statute must be crafted to overcome the substantive rule before it can abrogate privilege in a proceeding is erroneous.

D. The Significance in this Appeal of Solicitor-Client Privilege "As a Rule of Evidence"

10. The CBA asserts that "this particular case involved no question of admissibility of the material as evidence but rather its disclosure to the Commissioner and to the FOIP applicant."[12] The Commissioner compels records over which solicitor-client privilege is claimed (on an *in camera* basis for her own review only) only when she absolutely requires them for evidence in her proceeding. She uses them as evidence in making the determination that is the purpose of her proceeding: in this instance in determining whether they fall within s. 27(1)(a) of *FOIP*, and can therefore be withheld from the requestor.

11. The barrier which the legislation must overcome to enable this process is the rule of evidence which stipulates that records subject to solicitor-client privilege cannot be compelled as evidence in a proceeding. The legislative purpose is overcoming the privilege *as a rule of evidence*. The substantive rule recognizes that precise eventuality. The legislation need not overcome any other aspect of the broader substantive rule, particularly solicitor-client privilege operating as a "fundamental principle". The substantive rule applies only to when and how the decision is made to exercise the power to review the record over which privilege is claimed.

12. This Court approached the substantive rule in this way in *Blood Tribe*. It considered whether a rule which purportedly allowed the federal Commissioner to compel privileged records (*i.e.* overcoming the evidentiary privilege against compulsion of such records) did so in fact. The Court held that express and unequivocal language is required.[13] The Facta submitted in this matter that argue that abrogation of solicitor-client privilege *as a rule of evidence* is not the issue fail to appreciate the distinctions and relationships between solicitor-client privilege as a substantive rule, evidentiary rule, and a fundamental principle of the justice system.

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[11] *Canada (Privacy Commissioner) v Blood Tribe*, 2008 SCC 44 at para. 11 [*Blood Tribe*] [BOA, Tab 17]
[12] CBA Factum, para. 3
[13] *Blood Tribe* at para. 2 [BOA, Tab 17]

E. The Significance of Solicitor-Client Privilege as a Fundamental Principle of the Justice System or a Constitutional Principle

13. The Interveners who oppose the Commissioner's position in this proceeding cite the *Lavallee* case[14] in support of their opposition, emphasizing that, as this Court declared in that case, solicitor-client privilege is a principle of fundamental justice, and that this elevated status makes documents subject to solicitor-client privilege completely out of reach of the state.[15]

14. The Commissioner agrees that solicitor-client privilege is a fundamental principle of the justice system with constitutional dimensions.[16] However, as a fundamental principle that operates in an absolute sense (placing privileged records beyond the reach of state), the confidentiality of solicitor-client communications arose in, and is meant to operate in, situations where a concern arises that the state may obtain records subject to solicitor-client privilege to use the privileged information against the privilege-holder.[17] The records here are held by a public body, not, as in the *Lavallee* case, by the lawyer of a person facing potential criminal conviction.

15. Citing the *Lavallee* decision to oppose the Commissioner's ability to review records for which solicitor-client privilege has been claimed suggests a parallel between the Commissioner and the criminal prosecution service in *Lavallee*. There is no basis for drawing any such parallel. When the Commissioner reviews records over which a public body has claimed privilege, she has no interest in, or purpose for knowing about, the matters regarding which the claim for privilege has been made, such as advice the public body received relative to a contractual matter or a civil action. Her only purpose in reviewing the content is when it is necessary for her to do this to determine if the information is privileged or not (so that it may be withheld from a requestor if it is).

16. Thus, for example, if the records consisted of a conversation among public body employees about what information should be provided to counsel for obtaining advice about a legal matter, or about advice which had been received from its counsel about a legal matter, this

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[14] *Lavallee Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R. v Fink*, [2002] 3 SCR 209 at paras. 23 and 24 [*Lavallee*] [BOA, Tab 28]
[15] CBA Factum, paras. 12-18; CLA Factum, paras. 10, 37
[16] In this case the Respondent, the University of Calgary, as a public body, is in the benefactive role of protecting quasi-constitutional access rights.
[17] *Lavallee* at paras. 23 and 24 [BOA, Tab 28]

would enable the Commissioner to determine it should be withheld because such information falls within the scope of the privilege; however, the specific subject matter of the advice would be irrelevant to that determination. This is in sharp contrast to the purpose for which the prosecutorial arm of the state, as in the *Lavallee* case, may want to use the kind of information that may be in privileged records.

17. Further, the Commissioner does not disclose records she finds not to be subject to privilege, but only orders that they be disclosed, so that if the public body disagrees with the reasons for her decision, it may request a judicial determination through judicial review.

18. Though the Commissioner is not a court, she is an impartial decision-maker. Her statutory role is thus more akin to the Judge in *Lavallee* than to the Crown as the prosecutorial arm of the state in that case.[18] Her duty is to make impartial decisions as to whether records are privileged under the common law so that privileged ones are not disclosed to the applicant seeking access (and her decision in this regard is reviewable by the courts in accordance with the same legal principles). Unlike in *Lavallee*, no one adverse to the public body has an opportunity to access the records before the Commissioner makes her determination (or after she determines the privilege was properly claimed). The idea she may pass such records on to prosecutorial authorities is discussed further below.

19. Abrogating solicitor-client privilege does not require statutory language that could overcome the "fundamental principle". The "fundamental principle" does not exist in addition to solicitor-client privilege, but is an attribute of it in some contexts, such as where a *Charter* right is available to the person asserting the privilege. Statutory abrogation can be achieved if the words used abrogate the privilege explicitly, clearly and unequivocally. Reference to the privilege as a fundamental principle under the *Charter* that keeps privileged records out of the state's reach merely confuses the question to be determined in this case. The records at issue start out in the state's hands. The Commissioner's role is to ensure that those subject to solicitor-client privilege do not need to be disclosed to access requestors.

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[18] *Lavallee* [BOA, Tab 28]

F. Misconceptions of the Commissioner's Role and Exercise of Powers

20. The CBA states that the Commissioner is unqualified to determine solicitor-client privilege because her expertise is in the area of privacy. They say she is not a lawyer, and that when she or her delegated adjudicators are making this decision, they "balance privacy interests against privilege".[19] The Advocates' Society states the Commissioner's role is not purely independent (*i.e.* adjudicative), she may be removed from office, and she has a duty to promote the purposes of *FOIP*.[20] The CLA suggests the Commissioner may become adverse in interest to the privilege holder.[21]

21. These ideas reflect a serious misunderstanding of the Commissioner's function. The Commissioner is bound by her oath of office to serve Her Majesty according to law and to be impartial (*FOIP* s. 50). In her adjudicative role, the Commissioner has access to, and is bound by, all applicable statute law and common law precedents, as much as any other tribunal. In deciding when she may compel records and whether records are subject to privilege, these laws determine the outcome, not ideas about the significance of privacy, or carry-overs from her function as an oversight body for the administrative/executive branches of government. Court oversight of her decisions determines not whether she has followed some set of idiosyncratic rules of her own creation, but whether she has properly applied the statutes she administers and the general laws of the land.

22. The contrary suggestion - because she is a tribunal rather than a court, or a tribunal that also has non-adjudicative functions, she exempts herself from the normal legal rules - applies to every tribunal. This allegation suggests the entire system of adjudicative administrative law is not really a legal system.

23. Some Interveners also express misconceptions about the limits of the Commissioner's authority. The CBA asserts the Commissioner seeks a "blanket authority" for compelling records, while a court would review disputed records "as a last resort only", and would recognize privilege and exercise discretion appropriately.[22] The CLA states that no rules constrain the

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[19] CBA Factum, para. 19
[20] Advocates' Society Factum, paras. 26-28
[21] CLA Factum, para. 27
[22] CBA Factum, paras. 21-22

Commissioner as to the circumstances under which she may compel records.[23] The Advocates' Society says no statutory provision "minimiz[es] the impact" of s 56(3) of *FOIP*.[24]

24. These submissions presume the Commissioner would operate outside the confines of the rules, "freely sharing" information,[25] blithely unaware and therefore heedless of the important and powerful constraints and principles relating to these matters imposed by the general law. These submissions overlook that the Commissioner is bound by the substantive rule of the confidentiality of solicitor-client communications to the same degree as any other tribunal and court. She is bound to observe the law in every statutory step she takes.

25. The Commissioner's awareness of the content and dimensions of the substantive rule of solicitor-client confidentiality led her office to create, publish, and abide by the Solicitor-Client Adjudication Protocol. This Protocol ensures that records for which solicitor-client privilege is claimed will be required, as happened in this case, only as a last resort, after all alternatives have been pursued and have failed. This reflects the exercise of the power to review records in her adjudication in a manner and through a means that respects the substantive rule.

26. Some Interveners argue the Protocol lacks the force of law, so the Commissioner may discount it.[26] While the Protocol is not binding at law, it is an internal codification of the substantive rule of solicitor-client privilege. It addresses precisely the effect of the substantive rule in terms of how and when statutory powers to abrogate privilege will be exercised in the Commissioner's proceedings. Formalizing and disclosing that process in advance, and then applying it as was done in this case, demonstrates an intention to honour the substantive rule, and the actual honouring of the substantive rule.

27. The CBA addresses the notion that solicitor-client privilege is frequently claimed improperly as an "affront to the justice system". This presumes that the person within the public body making the assertion of solicitor-client privilege is infallible. The Legislature saw fit to provide review by the Commissioner instead.

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[23] CLA Factum, paras. 33-36
[24] Advocates' Society Factum, para. 24
[25] CLA Factum, para. 41
[26] *e.g.* Advocates' Society Factum, para. 24 and LSA Factum, para. 20

G. An Inference is not Required to Include Solicitor-Client Privilege in "Any privilege of the Law of Evidence" and the Words "Solicitor-Client Privilege" are Not Required to Abrogate the Privilege

28. Some Interveners assert that reading s. 56(3) of *FOIP* to abrogate solicitor-client privilege involves drawing an inference, which is not sufficient to pierce the privilege.[27]

29. The Commissioner expounds[28] that "any privilege of the law of evidence", as an inclusive class, embraces all of the privileges of the law of evidence that exist in law. Subject to a statutory exception, information subject to this privilege need not be given in evidence for the purposes of a legal proceeding, without the consent of the privilege holder; solicitor-client privilege is a privilege of the law of evidence and necessarily falls within the class referenced in s. 56(3) of *FOIP*. No impermissible inference is drawn to reach this conclusion.

30. These same principles address the Interveners' contention that the "express, clear, unequivocal and explicit" language required by *Blood Tribe* to pierce the privilege means that the very words "solicitor-client privilege" have to be used.[29] That is not what *Blood Tribe* says. Rather, it described very similar language in the federal *Privacy Act* as "explicit language granting access to confidences".[30] This Court did not hold that the particular words are required. That would have been a straightforward answer to the issue before it.

31. Some Interveners state that it is not onerous for the Legislature to use express words, and that had the Legislature intended to overcome privilege, it would have used express words.[31] The Legislature did use express words. The Interveners' submission is that different express words could have been used. That is true, but does not determine whether the Legislature intended to capture solicitor-client privilege by the words it actually used.

H. A Purposive Analysis Applies Where Solicitor-Client Privilege is Claimed

32. Some Interveners adopt the Court of Appeal's holding that a purposive interpretation of the provision is inappropriate where solicitor-client privilege is raised.[32] The Commissioner

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[27] See *Blood Tribe* at para. 26 [BOA, Tab17]
[28] At paras. 41- 50 of her Factum
[29] CBA Factum, paras. 9 and 10; CLA Factum, para. 30; LSA Factum, para. 10
[30] *Blood Tribe* at para. 28 [BOA, Tab 17]
[31] See, for *e.g.*, CBA Factum, para. 9
[32] See, for *e.g.*, Federation Factum, paras. 7-12

addressed this in her Factum. While her statutory language is express in the way the Court in *Blood Tribe* says is required, she undertook a purposive analysis because this Court in *Blood Tribe* undertook one to answer the question before it, despite its pronouncement that abrogation cannot be achieved by inference.

I. Ambiguity is Required Before Legislative Language can be Read Restrictively

33. Some Interveners refer to an excerpt from Sullivan on the *Construction of Statutes* where, in speaking of *Blood Tribe*, the author states: "In effect, [the Court] treated the presumption of non-interference with solicitor-client privilege as a strong presumption the application of which does not depend on ambiguity."[33]

34. The Federation argues that this means the words of a statute do not need to be ambiguous before being interpreted strictly.[34] The Advocates' Society states ambiguity is not a precondition to restrictive interpretation.[35]

35. Both the sentence that precedes this excerpt, as well as the case referenced at the end of the sentence in a footnote, establish that the author was discussing not whether ambiguity is a precondition to restrictive interpretation, but whether, before a restrictive interpretation is to be done, a purposive analysis is first to be done to see if the ambiguity can be resolved contextually (she references two views on this question).[36]

J. The Absence in the Act of a Protection Against Waiver, and the Potential for the Commissioner to Become Adverse in Interest to Parties

36. The LSA points to the fact that *FOIP* has no clause analogous to s 38.1 of *PIPA,*[37] which provides that legal privilege, including solicitor-client privilege, is not affected by disclosure. Section 38.1 of *PIPA* states:

> 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 disclosure.

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[33] Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Markham: LexisNexis Canada, 2014) [*Sullivan*] at p. 500 [ARA, Tab 5]
[34] Federation Factum, para. 11
[35] Advocates' Society Factum, para. 19
[36] *Sullivan* at p. 500 [ARA, Tab 5]
[37] *Personal Information Protection Act,* SA 2003, c. P-6.5, s. 38.1 [ARA, Tab 8]

37. Clearly the Legislature contemplated that when the Commissioner requests records under s. 38 of *PIPA*, this could include records to which solicitor-client privilege applies. Accordingly, s. 38 of *PIPA* must be interpreted as having been intended by the Legislature to include the power to require records subject to the privilege.

38. If, as the LSA contends, s. 56(3) of *FOIP* and s. 38(3) of *PIPA* have the same meaning across the statutes, s. 56(3) of *FOIP*, which uses the same wording as s. 38(3) of *PIPA*, must be interpreted as intending to enable the Commissioner to pierce the privilege.

39. As to the absence of a waiver under s. 56 of *FOIP*, s. 38.1 of *PIPA* is a clarification and does not change the existing position that compulsory disclosure to a regulatory body is not a waiver to the world. [38] While disclosure to the Commissioner does infringe the privilege,[39] the Commissioner remains bound by her duties under *FOIP* not to disclose information she has received beyond any disclosures required to achieve her purposes.[40]

40. The Commissioner may not disclose solicitor-client privileged records any further at all, including to prosecuting authorities: she is bound by the substantive rule of the confidentiality of solicitor-client communications[41] and must interpret her own legislative power restrictively. The provision authorizing the sharing of information with prosecutorial authorities (s. 59(4)) does not authorize her to disclose records containing confidential solicitor-client communications. The Interveners are asking this Court to find that the presence of those words in s. 56(3) has no effect, and that s. 59(4) abrogates the privilege despite the absence of words that would have such effect.[42] That interpretative inconsistency was rejected in *Blood Tribe*.[43]

41. The Advocates' Society also argues that the Commissioner may become adverse in interest under ss. 82 and 92 of *FOIP*. It is unclear how s. 82 is any different in terms of this

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[38] Adam Dodek, *Solicitor-client Privilege* (Markham: Lexis Nexis, 2014) pp. 223 – 224 [ARA, Tab 3]; See also *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, (1983), 45 BCLR 218 (SC) at paras. 6-12 [ARA, Tab 1]
[39] *Blood Tribe* at paras. 10-11 [BOA, Tab 17]
[40] Sections 59(1) to 59(3) of *FOIP*
[41] See the Commissioner's Factum, para. 84
[42] The Federal Court has the same powers under the *Access to Information Act*, R.S.C., 1985, c. A-1, s. 47 and the *Privacy Act*, R.S.C., 1985, c. P-21, s. 46.
[43] *Blood Tribe* at paras. 24-25 [BOA, Tab 17]

potential than any other complaint under the *Act*. Further, the Commissioner has no powers to conduct prosecutions under *FOIP*.[44]

42. The CLA asserts that the Commissioner becomes adverse in interest to public bodies when she conducts investigations under s. 53(2) of *FOIP* to ensure that they comply with their duties under *FOIP*. The Commissioner, in her oversight role as an officer of the Legislature, may conduct an investigation about a public body's practices regarding records and information; that she has done so does not make her a party to the proceedings over which she presides, or one that is adverse in interest.

K. The Comparison Between s. 12 of *PIPEDA* and s. 56(3) of *FOIP* is Mistaken

43. The CBA asserts that the legislative language that did not pierce the privilege in *Blood Tribe* was only "marginally different" from the power for compelling documents under s. 56(3) of *FOIP*, such that this Court should reach the same conclusion for s. 56(3) of *FOIP* as it did for s. 12 of *PIPEDA*.[45] The CBA states:[46]

> [T]he 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 a superior court of record" regardless of "whether or not it would be admissible in a court of law".

44. The two excerpts quoted by the CBA are from different subsections of s. 12 of *PIPEDA*: (a) and (c). The first deals with the power to compel records, and the second with the power to receive them. Indeed, *Blood Tribe* rejected the federal Commissioner's argument that her power under subsection (c) to receive records regardless of their admissibility before a court lent any force to her arguments about which records she could compel under s. 12(a), for the very reason that the latter subsection dealt with receipt rather than with compulsion. The Court said:

> The authority to *receive* a broad range of evidence cannot be read to empower the Privacy Commissioner to *compel production* of solicitor-client records from an unwilling

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[44] Provincial offences are tried in the provincial court of Alberta and prosecuted by the Minister of Justice and Attorney General or a prosecutor under the *Provincial Offences Procedures Act*, RSA 2000, c. P-34 [not reproduced]

[45] CBA Factum, para. 6

[46] CBA Factum, para. 6

respondent. The language of s. 12 is simply incapable of carrying the Privacy Commissioner to her desired conclusion.[47]

45. Since the words "despite … any privilege of the law of evidence" apply to the Alberta Commissioner's power to compel records (not to receive them), no useful parallel can be drawn between this case and *Blood Tribe*. The aspect of this Court's decision in *Blood Tribe* that rejected the Commissioner's argument based on her power to receive evidence whether or not admissible in a court of law has no application to the present case.

L. The Jurisdiction of the Court to Decide Whether Records are Subject to s. 27(1)(a) of *FOIP*

46. The CBA argues that "the Commissioner could have the issue determined by the court under the Alberta *Rules of Court,* AR 124/2010 ("Alberta *Rules of Court*"), by judicial review, or the inherent jurisdiction of the court."[48]

47. The Commissioner's decisions as to whether records are subject to solicitor-client privilege are subject to judicial review, but this presumes that she has reviewed the necessary evidence and made the decision. The Court's sole function on judicial review is to determine whether a decision made by the Commissioner is, depending on the appropriate standard of review, reasonable or correct.[49]

48. Moreover, as set out in the Ontario Commissioner's factum (at para 15), the Court would be unable to decide the matter on judicial review as the Court may review only the records that were before the Commissioner. If the records were not before the Commissioner, they will likewise not be before the Court.

49. The CBA also cites Rule 3.2(1) of the Alberta *Rules of Court* as authorizing the Court to decide whether s. 27(1)(a) of *FOIP* has been properly applied by a public body.[50] That Rule addresses how an action may be started by statement of claim, originating application or notice of appeal. It does not vest the Court with authority to apply *FOIP* in the first instance, and does not vest the Commissioner with authority to sue public bodies for opinions or on reference

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[47] *Blood Tribe* at para. 21[BOA, Tab 17]
[48] CBA Factum, para. 27
[49] See para. 79 of the Commissioner's Factum
[50] CBA Factum, para. 27

questions. An inquiry under *FOIP* - legislation that is paramount[51] to the Rules of Court - is determined by the Commissioner under *FOIP*, not the Court under the Alberta *Rules of Court*.

50. The General Jurisdiction of the Court of Queen's Bench to grant remedies lies in s. 8 of the *Judicature Act*[52] which applies to its "exercise of its jurisdiction in every proceeding pending before it". This stated power does not include making determinations under *FOIP* in the first instance.[53] Inquiries under *FOIP* are not proceedings before the Court.

51. In the absence of a decision by the Commissioner regarding solicitor-client privilege, the Court cannot make any determination under *FOIP*.

52. The LSA argues: "On the other hand, having the Court make that determination is exactly what this Court ordered in *Lavallee*. There was no procedural difficulty in getting the matter in front of the court in *Lavallee*, and no procedural difficulty now in doing so."[54] The provision of the *Criminal Code* at issue in *Lavallee* related to what is to be done in a situation in which records are seized from a law office. The Court determined that the legislatively created procedure was inadequate because it did not provide for an impartial judicial determination as to whether the records were privileged in every circumstance. The procedure that the Court contemplated would be substituted for the one that was struck would presumably create a new process for judicial determination that covered all necessary contingencies. The Commissioner has no similar kind of process for accessing the courts available to her and, indeed, it is she who makes the impartial determination.

M. The Commissioner's Powers in her Supervisory Role Over Public Bodies are not Inimical to Finding that s. 56(3) of *FOIP* Authorizes the Production of Compelled Records

53. The LSA submits that the power under s. 56(3) of *FOIP* extends to the Commissioner's supervisory functions and her ability to give advice and recommendations, such that s. 56(3) of *FOIP* must be read as not abrogating the privilege. It bases this argument on the fact that, in that context, she is merely investigating or giving advice and recommendations rather than

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[51] *FOIP*, s. 5
[52] *Judicature Act*, , RSA 2000, c. J-2 [ARA, Tab 7]; emphasis added
[53] Except in the limited circumstances set out in Part 5 Division 2 of *FOIP*
[54] LSA Factum, para. 23

adjudicating. The LSA here seeks to refute the Commissioner's argument for a purposive interpretation that depends on the Commissioner's final decision-making powers. This argument does not address the Commissioner's primary point that the language of s. 56(3) of *FOIP* is explicit in conferring the power to pierce solicitor-client privilege.

54. Further, the Commissioner's ability to conduct investigations in aid of her general supervisory powers under s. 53 of *FOIP* confers the same powers to make final orders requiring public bodies to carry out their duties as the Commissioner is empowered to make when she adjudicates (s. 53 (1)(b)). The power to give advice and recommendations under s. 54 of *FOIP* is exercised at a public body's request. It is unlikely the materials the Commissioner relies on would be compelled. If they were, this would constitute an investigation with the commensurate order-making powers under s. 53(1)(b) of *FOIP*.

55. The power to compel records in aid of the Commissioner's supervisory function (under s. 53) is essentially a delegation of the Legislature's power to oversee the executive/administrative branches. In its general supervisory role, the Legislature unquestionably possesses the power to compel solicitor-client privileged records. From a purposive perspective, the Legislature reasonably regarded it as suitable and necessary to equip the Commissioner with the powers necessary to perform this oversight function effectively.

N. The Same Language Under *FOIP* and *PIPA* has Differing Impacts

56. The LSA seeks to draw a comparison between *FOIP* and *PIPA* to conclude the privilege is abrogated: it says the same words in PIPA would allow the Commissioner to order the production and inspection of privileged records of commercial organizations.[55]

57. *PIPA* is not in issue in this case.

58. Even had it been raised, it is notable that under *FOIP* an access request can be made for any information. Under *PIPA* only one's "personal information" (*i.e.* information "about the person") can be requested.[56] "Personal information" does not include information merely relating to an applicant, such as discussions others are having about his or her employment, or strategies

[55] LSA Factum, para. 14
[56] *PIPA*, s. 24(1)(a) [ARA, Tab 8]

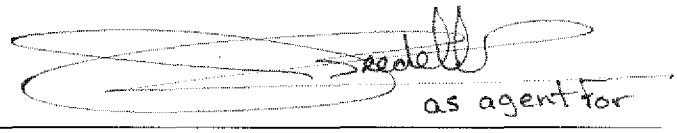
in which others are discussing how to deal with him or her as an opposing litigant. Such information may relate to an applicant, but is not "about" them in the strict sense. An applicant under *PIPA* is not entitled to any general information in an organization's files which is not specifically his or her personal information.

59. Very few of "the privileged records of commercial organizations" are responsive to an access request - only those parts of records that are actually "about an applicant" in the limited sense described above. Only those limited portions of records would be records at issue before the Commissioner in the access request. Information to which applicants are actually entitled under *PIPA* (that which is strictly "about" themselves), is typically information they already know, and therefore is usually of little interest to them anyway.

60. Even if both provisions are understood as having the very same meaning, therefore, the impact of the same language in the two different statutes in terms of the kind of information that the Commissioner may require for her review is very different. As noted, however, the impact of the language in *PIPA* is not at issue before the Court today.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of March, 2016.

Jensen Shawa Solomon Duguid Hawkes LLP



Glenn Solomon, QC / Elizabeth Aspinall
Counsel for the Appellant, Information and Privacy Commissioner of Alberta

TABLE OF AUTHORITIES

STATUTES RELIED ON

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Chapter F-25

Table of Contents

(3) An acting Commissioner holds office until

(a) a person is appointed under section 45(1),

(b) the suspension of the Commissioner ends, or

(c) the Commissioner returns to office after a temporary absence.

1994 cF-18.5 s46

Remuneration

49 The Commissioner must be remunerated as determined by the Standing Committee, and it must review that remuneration at least once a year.

1994 cF-18.5 s47

Oath

50(1) Before beginning the duties of office, the Commissioner must take an oath to faithfully and impartially perform the duties of the office and not to disclose any information received by the Office of the Information and Privacy Commissioner under this Act except as provided in this Act.

(2) The oath must be administered by the Speaker of the Legislative Assembly or the Clerk of the Legislative Assembly.

1994 cF-18.5 s48

Office of the Commissioner

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.

(2) The Commissioner may engage the services of any persons necessary to assist the Commissioner in carrying out the Commissioner's duties and functions.

(3) On the recommendation of the Commissioner, the Standing Committee may order that

(a) any regulation, order or directive made under the *Financial Administration Act*,

(b) any regulation, order, directive, rule, procedure, direction, allocation, designation or other decision under the *Public Service Act*, or

(6) An order made by an adjudicator under this Act is final.

RSA 2000 cF-25 s81;RSA 2000 cH-5 s114

Division 3
Disclosure to Commissioner

Disclosure to Commissioner

82(1) An employee of a public body may disclose to the Commissioner any information that the employee is required to keep confidential and that the employee, acting in good faith, believes

(a) ought to be disclosed by a head under section 32, or

(b) is being collected, used or disclosed in contravention of Part 2.

(2) The Commissioner must investigate and review any disclosure made under subsection (1).

(3) If an employee makes a disclosure under subsection (1), the Commissioner must not disclose the identity of the employee to any person without the employee's consent.

(4) An employee is not liable to a prosecution for an offence under any Act

(a) for copying a record or disclosing it to the Commissioner, or

(b) for disclosing information to the Commissioner

unless the employee acted in bad faith.

(5) A public body or person acting on behalf of a public body must not take any adverse employment action against an employee because the employee, acting in good faith,

(a) has disclosed information to the Commissioner under this section, or

(b) has exercised or may exercise a right under this section.

(6) A person who contravenes subsection (5) is guilty of an offence and liable to a fine of not more than $10 000.

(7) In carrying out an investigation and review under this section, the Commissioner has all of the powers and duties set out in sections 56, 59, 68, 69 and 72(1) to (5), and sections 57, 58, 60 and 62 apply.

RSA 2000 cF-25 s82;RSA 2000 cH-5 s114

Access to manuals

89(1) The head of every public body must provide facilities at

(a) the headquarters of the public body, and

(b) any offices of the public body that, in the opinion of the head, are reasonably practicable,

where the public may inspect any manual, handbook or other guideline used in decision-making processes that affect the public by employees of the public body in administering or carrying out programs or activities of the public body.

(2) Any information in a record that the head of a public body would be authorized to refuse to give access to pursuant to this Act may be excluded from the manuals, handbooks or guidelines that may be inspected pursuant to subsection (1).

RSA 2000 cF-25 s89;2003 c21 s19

Protection of public body from legal suit

90 No action lies and no proceeding may be brought against the Crown, a public body, the head of a public body, an elected official of a local public body or any person acting for or under the direction of the head of a public body for damages resulting from

(a) the disclosure of or failure to disclose, in good faith, all or part of a record or information under this Act or any consequences of that disclosure or failure to disclose, or

(b) the failure to give a notice required under this Act if reasonable care is taken to give the required notice.

1994 cF-18.5 s85

Protection of employee

91(1) A public body or person acting on behalf of a public body must not take any adverse employment action against an employee as a result of the employee properly disclosing information in accordance with this Act.

(2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine of not more than $10 000.

1999 c23 s41

Offences and penalties

92(1) A person must not wilfully

(a) collect, use or disclose personal information in contravention of Part 2,

(b) attempt to gain or gain access to personal information in contravention of this Act,

(c) make a false statement to, or mislead or attempt to mislead, the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,

(d) obstruct the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,

(e) alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access to the record,

(f) fail to comply with an order made by the Commissioner under section 72 or by an adjudicator under section 81(2), or

(g) destroy any records subject to this Act, or direct another person to do so, with the intent to evade a request for access to the records.

(2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine of not more than $10 000.

(3) A person must not wilfully disclose personal information to which this Act applies pursuant to a subpoena, warrant or order issued or made by a court, person or body having no jurisdiction in Alberta to compel the production of information or pursuant to a rule of court that is not binding in Alberta.

(4) A person who contravenes subsection (3) is guilty of an offence and liable

(a) in the case of an individual, to a fine of not less than $2000 and not more than $10 000, and

(b) in the case of any other person, to a fine of not less than $200 000 and not more than $500 000.

(5) A prosecution under this Act may be commenced within 2 years after the commission of the alleged offence, but not afterwards.

RSA 2000 cF-25 s92;RSA 2000 cH-5 s114;2006 c17 s8

Fees

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.