SCC File No.:

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

BETWEEN:

THE INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA

APPLICANT
(Respondent)

-and-

THE BOARD OF GOVERNORS OF THE UNIVERSITY OF CALGARY

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(THE INFORMATION AND PRIVACY COMMISSIONER, APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act* R.S.C. 1985, c. S-26)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview of Position on Public Importance

1. Solicitor-client privilege plays a central role in the administration of justice and is integral to the proper functioning of the Canadian legal system.[1] As this Court determined in *Blood Tribe,*[2] a board, commission or tribunal may be authorized by clear and express statutory language to review records over which solicitor-client privilege is claimed for the purpose of determining whether the claim of solicitor-client privilege is properly asserted. The issue in this case is what "magic words" are required to provide that clear statutory authority. Is it enough to say "any privilege of the law of evidence", or must a statute say "any privilege including solicitor-client privilege", as the Court below held?

2. In this case a request for information was denied by an assertion of solicitor-client privilege. The Information and Privacy Commissioner of Alberta ("IPC") was asked to determine whether solicitor-client privilege was properly asserted over certain records. The issue is whether her statutory language empowers her to compel the records for review. In *Blood Tribe* this Court stated that this issue would be determined another day: it is now another day.

3. While solicitor-client privilege is a keystone of the Canadian judicial system, access rights enjoy a "privileged, foundational position … in our social and legal culture." The protection of such interests is a central value in Canadian society.[3]

4. The Legislature granted the IPC a set of powers to enable her to ensure that *FOIPP's*[4] objectives are achieved. For example, in the course of an investigation or inquiry, or in giving advice and recommendations, the IPC can require public bodies to produce records to her. The University of Calgary (the "Public Body" or "University") attacks those powers of production in this matter.

5. The IPC was established, *inter alia,* to ensure that public bodies do not improperly withhold information about the workings of government. Her functions include ensuring transparency and accountability in government. Essential to the discharge of that function is

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[1] *Blood Tribe Department of Health v Canada (Privacy Commissioner)*, 2008 SCC 44 at para. 9 [*Blood Tribe*]
[2] *Blood Tribe*
[3] *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 paras. 23-25
[4] *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 [*FOIPP*]

the IPC's ability to review records over which **any** privilege has been claimed, but not substantiated. The IPC determines the propriety of the claim of privilege. *FOIPP* includes clear language permitting such a review. Consistent with similar findings of the British Columbia Superior Court and the Newfoundland Court of Appeal, the Alberta Court of Queen's Bench in this case agreed that the IPC could review records to determine the validity of a claim of solicitor-client privilege. The Alberta Court of Appeal found otherwise.

6. As demonstrated by the evidence submitted by Commissioners (or equivalent) from various jurisdictions,[5] the decision of the Court below has created uncertainty in the law across Canada. It brings into question the authority of Commissioners in various jurisdictions to review records over which solicitor-client privilege is claimed. At present, many interpret their home statutes as authorizing such reviews.[6]

7. *FOIPP* places the burden on the public body to justify its refusal to disclose a record to an access requester, and the responsibility on the IPC to decide whether the refusal is justified. *FOIPP* includes no mechanism to refer the matter to any decision-maker other than the IPC. Where a public body claims solicitor-client privilege to refuse disclosure, absent a voluntary production of the record to the IPC, there is now no substantiation. The IPC cannot simply take a public body's word that the assertion of privilege is valid. The only option for the IPC is to order disclosure of the record on the basis that the burden of establishing privilege has not been met, thereby ordering the disclosure of potentially privileged records.

B. Concise Statement of the Facts

8. The IPC is appointed by the Lieutenant Governor in Council on the recommendation of the Legislative Assembly of Alberta pursuant to Part 4 of *FOIPP*. The IPC is an "Officer of the Legislature", is independent of government and reports to the Legislative Assembly of Alberta.[7]

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[5] Affidavit of E. Denham, sworn May 28, 2015 [BC Affidavit].; Affidavit of Brian Beamish, sworn May 26, 2015 [Ontario Affidavit]; Affidavit of Daniel Therrien sworn May 26, 2015 [Federal Privacy Affidavit]; Affidavit of Charlene Paquin, sworn May 27, 2015 [Manitoba Affidavit]; Affidavit of Maria C. MacDonald, sworn May 26, 2015 [PEI Affidavit]; Affidavit of Catherine Tully, sworn May 27, 2015 [Nova Scotia Affidavit]; Affidavit of Edward P. Ring, sworn May 28, 2015 [Newfoundland Affidavit]; Affidavit of Suzanne Legault, sworn May 28, 2015 [ICC Affidavit] **[Tab 4]**

[6] Ontario Affidavit at paras. 2-4, 8-11, 26-27 **[Tab 4A]**; BC Affidavit at paras 3, 8-10 **[Tab 4G]**; Nova Scotia Affidavit at paras. 2, 4-5, 15, 32-33 **[Tab 4C]**; PEI Affidavit at paras. 14, 18 **[Tab 4E]**; Manitoba Affidavit at para.s 3-5, 8, 14-16, 19-20 **[Tab 4F]**; Newfoundland Affidavit at paras. 3, 20, 25 **[Tab 4D]**; ICC Affidavit at paras. 11-13 **[Tab 4H]**

[7] *FOIPP*, ss. 45(1), 45(2) and 63(1)

9. The IPC ensures that the important public policy objectives of the statutes under her jurisdiction, including *FOIPP*, are achieved. Such objectives include "[allowing] any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act" and "[providing] for independent reviews of decisions made by public bodies under this Act and the resolution of complaints …." [8]

(i) Events Giving Rise to the Complaint

10. The Complainant commenced employment with the University in 2007. In 2008 the Complainant commenced a constructive dismissal action against the University. She also made a Request to Access Information to the University. The University provided some documentation pursuant to this request. The Complainant requested a review of the University's response pursuant to *FOIPP*, particularly in respect of the University's claims of solicitor-client privilege over a number of undisclosed records. [9]

11. After a failed mediation, the IPC directed an inquiry into the access request.[10] The Notice of Inquiry referred the parties to the IPC's Solicitor-Client Privilege Adjudication Protocol (the "Protocol"), which provides, *inter alia*:

> [T]he Commissioner does not routinely compel production of information over which solicitor-client privilege is claimed; rather, he does so only on a case-by-case basis, when the party claiming the privilege fails to present adequate evidence of it and/or when opposing, persuasive evidence or argument has been presented to him that, in either circumstance, necessitates production in order for him to fairly decide the issue. [11]

12. The only evidence submitted by the University respecting its claim of privilege was an Affidavit of the University's Access and Privacy Co-ordinator which stated that she had been advised by the University's counsel "that solicitor/client privilege has been asserted over the communications given and received by the University's lawyers in respect to [*sic*] this matter."[12]

13. The delegate appointed by the IPC for the inquiry (the "Adjudicator") initially requested additional information - **not** production of the documents in question - to make a

[8] *FOIPP*, ss. 53, 2
[9] Court of Queen's Bench of Alberta Judgment at para. 17 [**Tab 2B**]
[10] Court of Queen's Bench of Alberta Judgment at para. 17 [**Tab 2B**]
[11] Court of Queen's Bench of Alberta Judgment at para. 147 **[Tab 2B]**
[12] Court of Appeal of Alberta Judgment at para. 5 **[Tab 2D]**

determination on the issue of privilege.[13] In response, the Provost and Vice-President (Academic) of the University advised that privilege would not be waived.[14] It was only then the Adjudicator issued a Notice to Produce the subject records to the IPC for review, and for determination of the validity of the claim of privilege, pursuant to s. 56 of *FOIPP*, on the basis that the University failed to present adequate evidence of its claim of solicitor-client privilege. The only remaining alternative would have been to find that the University failed to meet its onus of proving privilege, and to order the documents produced to the Complainant. The University sought judicial review of the Adjudicator's decision to issue the Notice to Produce.[15]

(ii) The Judicial Review

14. Dismissing the University's Application, the Court of Queen's Bench determined that *FOIPP* "grants the [IPC] and her delegates authority to compel production of disputed records to verify claims of solicitor-client privilege." The Court further held that the "Adjudicator properly invoked his authority in this case after the University refused to substantiate in any other way its claims of solicitor-client privilege."[16]

(iii) The Court of Appeal

15. The Court of Appeal overturned the decision of the Court of Queen's Bench and held that the "[IPC] does not have statutory authority to compel production of records over which a public body such as the University has asserted solicitor-client privilege."[17] The Court held that "where statutory language might be interpreted as authorizing an infringement of solicitor-client privilege, the rule of strict construction" applies. In such cases, the Court held, the modern approach to statutory interpretation has no application.[18] The Court further held that in order to authorize an infringement of solicitor-client privilege, statutory language must possess "the highest degree of clarity, explicitness and specificity in order to support a conclusion that it was intended to authorize" such an infringement. This, the Court held, "requires specific reference to solicitor-client privilege" and not merely "statutory language

[13] Court of Queen's Bench of Alberta Judgment at para. 17 **[Tab 2B]**
[14] Court of Appeal of Alberta Judgment at para. 8 **[Tab 2D]**
[15] Notice to Produce of the IPC **[Tab 2A]**
[16] Court of Queen's Bench of Alberta Judgment at para. 237 **[Tab 2B]**
[17] Court of Appeal of Alberta Judgment at para. 2 **[Tab 2D]**
[18] Court of Appeal of Alberta Judgment at para. 40 **[Tab 2D]**

which might, owing to its generality, **reasonably bear more than one interpretation**". The central issue for courts is "whether the posited infringement of solicitor-client privilege was clearly intended". [19]

16. The Court held that s. 56(3) of *FOIPP* "does not clearly, explicitly and specifically authorize infringement of solicitor-client privilege" but rather "merely provides that a public body must turn over records, despite **any** privilege of the law of evidence that exists". As such, in order for s. 56(3) to be read as authorizing an infringement of solicitor-client privilege, "an impermissible inference must be drawn, premised upon solicitor-client privilege having been implicitly captured by the general language negating '**any** privilege of the law of evidence'". [20] According to the Court of Appeal, then, "any privilege of the law of evidence" can bear an interpretation which does not include solicitor-client privilege. The key question for this Court is whether this is so.

PART II - CONCISE STATEMENT OF THE QUESTIONS IN ISSUE

17. The issue is whether the decisions below raise an issue of national importance that this Court ought to address. The IPC submits the decisions below raise the following question that warrants this Court's consideration and guidance:

> What words must a statute employ to empower a tribunal to review records to determine whether a claim of privilege is valid?

PART III - CONCISE STATEMENT OF ARGUMENT

A. This Issue was Explicitly Left Open in *Blood Tribe*

18. In *Blood Tribe*, this Court determined that *PIPEDA*[21] did not grant authority to the Federal Privacy Commissioner to review documents over which solicitor-client privilege was asserted, even for the limited purpose of assessing the validity of the claim of privilege.[22] However, *Blood Tribe* did not impose a blanket prohibition against all Information and Privacy Commissioners reviewing potentially privileged records to verify whether a claim of privilege has been properly asserted regardless of the wording of their enabling legislation.

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[19] Court of Appeal of Alberta Judgment at para. 48 emphasis added **[Tab 2D]**
[20] Court of Appeal of Alberta Judgment at para. 49 **[Tab 2D]**
[21] *Personal Information Protection and Electronic Disclosure Act*, SC 2000, c 5 [*PIPEDA*]; *PIPEDA* is the federal privacy legislation that applies to the private sector
[22] *Blood Tribe*

19. *PIPEDA* provides that the Federal Privacy Commissioner may compel production of records that she considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record."[23] This Court held that this language did not permit the Commissioner to compel records over which solicitor-client privilege was claimed. Rather, this was a "general production provision" that did not expressly indicate that production must include records over which solicitor-client privilege is asserted.[24] This Court held that "[e]xpress words are necessary to permit a regulator or other statutory official to 'pierce' the privilege."[25]

20. The Federal Privacy Commissioner in *Blood Tribe* argued that the scope of her powers under *PIPEDA* should be understood in the context of her powers under s. 34(2) of the *Privacy Act*, a different piece of legislation, which provides:

> **Notwithstanding any other Act of Parliament or any privilege under the law of evidence**, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, … and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.[26]

The Federal Privacy Commissioner argued that "Parliament could not have intended that the Commissioner's virtually identical powers of investigation be contradictory as between these constituent pieces of legislation."[27]

21. This Court held that "the powers of the Privacy Commissioner under *PIPEDA* and the *Privacy Act* **are not the same**" and that it was "sufficient to note that *PIPEDA* does not contain explicit language granting access to confidences such as is found in s. 34(2) of the *Privacy Act*."[28] The Court held:

> The scope of the Privacy Commissioner's powers under s. 34(2) in relation to solicitor-client confidences has been the subject of divergent interpretations by the Federal Court of Appeal [citations omitted]. Its scope is not in issue here. There is no equivalent of s. 34(2) in *PIPEDA*. … **The proper interpretation of s. 34(2) must await a case in which it is squarely raised.** Its only relevance to the present appeal is its absence from *PIPEDA*, an absence from which we may draw an adverse inference. It is not there because Parliament either did not put its collective mind to the solicitor-client issue or

[23] *PIPEDA*, s. 12
[24] *Blood Tribe* at para. 21
[25] *Blood Tribe* at para. 2
[26] *Privacy Act* RSC 1985, c P-21; emphasis added
[27] *Blood* Tribe at para. 27
[28] *Blood Tribe* at para. 28

> because Parliament had no intention of giving the Privacy Commissioner the power she now claims.[29]

22. The question this Court left open in *Blood Tribe* is squarely raised by the present matter.

23. Section 56 of *FOIPP* reflects the wording of s. 34(2) of the *Privacy Act*. Section 56 of *FOIPP* states:

> (1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.
>
> (2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.
>
> (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).[30]

24. Section 56(3) of *FOIPP* specifically refers to "any privilege of the law of evidence", authorizing the IPC to compel the production of records to her for her review and determination of a claim of privilege, notwithstanding any such privilege. Solicitor-client privilege is a privilege of the law of evidence.[31] On its face, s. 56(3) includes the express language necessary to permit the IPC to "pierce" solicitor-client privilege, granting the IPC the statutory authority to review documents over which a claim of privilege has been asserted. Such express language was not present in the legislation at issue in *Blood Tribe.*

25. While the Court below purported to apply *Blood Tribe,* it failed to address the significant differences between the statutory schemes in each case, and in particular, the differences between s. 56(3) of *FOIPP* and s. 12 of *PIPEDA*. It did so despite this Court's express acknowledgement and warning in *Blood Tribe* that its interpretation did not apply to a provision substantially similar to the one at issue here.

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[29] *Blood Tribe* at para. 29; emphasis added

[30] *FOIPP* s. 56; emphasis added

[31] *Blood Tribe* at para. 10; *Newfoundland Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General)*, 2011 NLCA 69 [*Newfoundland Privacy*] at paras. 37 and 52

26. Moreover, the Court of Appeal did not address the fundamental differences in the role of the Federal Privacy Commissioner under *PIPEDA* (at issue in *Blood Tribe*) and the IPC under *FOIPP*. Both the Federal Commissioner and the IPC are independent of government and may have investigative roles. However, unlike the Federal Commissioner, the IPC has adjudicative functions under *FOIPP.*[32]

27. This Court in *Blood* Tribe concluded that s. 12 of *PIPEDA* does not enable the Federal Privacy Commissioner, in performing her investigative function, to compel production of solicitor-client privileged records "in the same manner and to the same extent as a court of record," because "the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights." The Federal Privacy Commissioner "has no such power."[33] That is, because the Federal Commissioner does not have the power to finally adjudicate the disputed claim, she cannot derive the associated power to compel from the general statutory grant of power. The general words are given specific content by the nature of the function being performed. Conversely, under *FOIPP*, the IPC has the power to adjudicate claims over legal rights and that adjudicative power forms a fundamental and integral part of her mandate.[34]

28. Further, in *Blood Tribe,* this Court noted that the Federal Commissioner is able to refer a question of solicitor-client privilege to the court for determination. Conversely, *FOIPP* requires that all rights and obligations be determined by the IPC and provides no mechanism for a court to consider them except by way of judicial review of the order which the IPC ultimately issues.[35] If the IPC cannot review a record to verify an unsubstantiated claim of privilege, the public body would be subject to no oversight whatsoever in respect of such claims. *FOIPP* contains no mechanism for the IPC to bring such questions before a court.

29. Given the express wording of s. 56(3) of *FOIPP* (absent in *PIPEDA*), the adjudicative functions performed by the IPC under *FOIPP*, and the lack of any mechanism in *FOIPP* to refer issues to a court for determination, *Blood Tribe* is dispositive of **this** case only to the extent that

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[32] *FOIPP,* Part 5; *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2010 FC 954, at para. 18; *Blood Tribe* at paras. 12 and 22
[33] *Blood Tribe* at para. 22
[34] *FOIPP* ss. 2, 27, 69
[35] *FOIPP*, Part 5 Division 1 and s. 74

it acknowledges that a statutory power **can** be granted to allow a review of solicitor-client privilege claims.

B. Section 56(3) is Sufficiently Clear, Precise and Unequivocal to Grant the IPC the Power to Review Records over which Any Claim of Privilege is Made

30. It is now well recognized that "the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[36] This modern approach to statutory interpretation requires courts to go beyond the plain meaning of the words used to a contextual and purposive interpretation.[37] Further, "only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretative provisions such as 'strict construction'".[38]

31. This Court held in *Blood Tribe* that, unlike courts, regulators or other statutory officials must have an express grant of power to abrogate solicitor-client privilege; statutory language which abrogates privilege must be "clear, precise and unequivocal".[39] This Court held that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively" and that solicitor-client privilege "cannot be abrogated by inference."[40]

32. In error, the Court below interpreted this Court's direction in *Blood Tribe* as ousting completely the modern approach to statutory interpretation for provisions purporting to abrogate solicitor-client privilege:

> *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*.[41]

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[36] Elmer A. Driedger, *Construction of Statutes,* 2nd ed. (Toronto: Butterworths, 1983) at p. 87 **[Tab 5C]** cited with approval in *Bell ExpressVu Ltd. Partnership v Rex,* 2002 SCC 42 at para. 26
[37] *Interpretation Act*, RSA 2000, c I-8 at s. 16; *Newfoundland Privacy* at para 124
[38] *NAV Canada v Wilmington Trust Co*, 2006 SCC 24 at para. 84
[39] *Blood Tribe* at para. 2
[40] *Blood Tribe* at para. 11
[41] Court of Appeal Judgment at para. 40 **[Tab 2D]**

33. According to the Court below "strict construction" entails a requirement that the words "solicitor-client privilege" be used. In its view, the words "**any** privilege of the law of evidence," are not sufficiently clear, precise and unequivocal to enable the IPC to review records over which solicitor-client privilege has been asserted.[42]

34. However, s. 56(3) contains no ambiguity. It cannot be interpreted to deprive the IPC of the statutory power it grants. In purportedly applying the rule of strict construction, the Court below failed to give the ordinary and well-understood meaning to the words in s. 56(3), and in particular, to the word "any". Words that are not ambiguous cannot be deprived of their clear meaning in order to achieve a "strict construction". The Court below did not apply the rule of strict construction or the modern approach to statutory interpretation.

35. The words "any privilege of the law of evidence" in s. 56(3) are exceptionally clear. Records can be compelled by the IPC despite **any** privilege of the law of evidence: "any" includes solicitor-client privilege. *FOIPP* abrogates solicitor-client privilege in clear and precise terms for a clear and limited purpose. Based on the ordinary and well-understood meaning of the words themselves, s. 56(3) cannot be interpreted (strictly or otherwise) to exclude solicitor-client privilege.

36. The Court below held that for s. 56(3) to be read as including solicitor-client privilege, "an impermissible inference must be drawn, premised upon solicitor-client privilege having been implicitly captured by the general language negating 'any privilege of the law of evidence'."[43] Language which encompasses **any** subset within a certain set necessarily includes **all** subsets within that set. The finding of the Court below is akin to finding that an inference must be drawn to determine that blue is a colour, or that a carrot is a vegetable. These are not inferences, but definitional truths.

37. The approach of the Court below begs the question: if the words "any privilege of the law of evidence" are not clear enough to include solicitor-client privilege, what do they include? The privileges of the law of evidence are all of fundamental importance in the Canadian legal system. In order for s. 56(3) to apply to "any privilege of the law of evidence," must the

[42] Court of Appeal Judgment at para. 48 **[Tab 2D]**
[43] Court of Appeal Judgment at para. 49 **[Tab 2D]**

legislature list each privilege individually? What privilege, then, does the word "any" encompass?

38. The interpretation of s. 56(3) by the Court below fails to give credence to the wording of the provision and to the statutory scheme as a whole. Indeed, the decision of the Court below leads to the absurdity that a public body's assertion of solicitor-client privilege cannot effectively be reviewed. This result was not the intent of the Legislature in enacting *FOIPP*.

39. The lower Court erred in failing to give meaning to all of the words in s. 56(3). Contrary to the decision of the Court below, s. 56(3) is sufficiently clear, precise and unequivocal to grant the IPC the power to review records over which any claim of privilege is made.

C. Under s. 56(3), Solicitor-Client Privileged Records are Confidential but Not Admissible

40. Section 56(3) of *FOIPP* engages two principles respecting privilege: privilege of the law of evidence, and privilege as a substantive rule. As a rule of evidence, solicitor-client privilege means that absent clear and valid statutory authority to the contrary, records shielded by the privilege cannot be compelled for evidentiary purposes in a legal process. The law of evidence protects the records' **admissibility**.[44]

41. The substantive rule exists regardless of whether there is a proceeding before a court or tribunal, and is engaged for a purpose outside of such a hearing. For example, in *Solosky*, the issue was whether corrections officers could review communications between inmates and their counsel. Abrogation of the privilege served to protect inmates and officers, not as evidence in a proceeding.[45]

42. This distinction was noted in *Newfoundland Privacy*:

> The DOJ on this application is relying on solicitor-client privilege *qua* rule of evidence. It is objecting to the production of the requested records in a quasi-judicial, administrative proceeding, the goal of which is to determine whether the DOJ has properly asserted a claim to solicitor-client privilege. Thus, while solicitor-client privilege has evolved into a rule of substance, in this context where the rule is being relied upon in an attempt to exclude evidence from a legal proceeding, the words "notwithstanding . . . a privilege under the law of evidence" must be interpreted to abrogate the privilege.[46]

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[44] *Solosky v The Queen*, [1980] 1 SCR 821 at 836 [*Solosky*]; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 [*Descôteaux*] at 876

[45] *Solosky*

[46] *Newfoundland Privacy* at para. 52

43. The substantive rule maintains confidentiality over privileged records. It applies to resolve conflicts with confidentiality in favour of confidentiality "unless the law provides otherwise". Such laws must be interpreted restrictively. Where the law allows an interference with the confidentiality, "the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation".[47] Section 56(3) makes records compellable for inspection by the IPC in clear, unequivocal language, for a limited purpose. In this case the decision to interfere with the claimed privilege, and the choice of means of exercising that statutory authority, were determined with a view to doing so only to the extent necessary to achieve the ends of *FOIPP*, in light of a promulgated procedure seeking expressly to interfere only to that extent, and only after all other alternatives were frustrated.[48]

D. The Court of Appeal's Decision Contradicts Other Canadian Courts

44. A number of Canadian courts have interpreted provisions substantially similar to s. 56(3) of *FOIPP*. With the exception of the decision of the Court below, such provisions have been interpreted as providing statutory authority to compel records over which solicitor-client privilege has been asserted to determine the validity of the privilege claim.

(a) Newfoundland

45. Newfoundland's *ATIPPA*[49] has been the subject of significant scrutiny and upheaval in recent years. In *Newfoundland Privacy*, the Court of Appeal of Newfoundland and Labrador considered s. 52(3) of *ATIPPA,* which was similarly worded to s. 56(3) of *FOIPP.* The Court concluded that s. 52(3) authorized the Commissioner to compel production of records over which solicitor-client privilege had been asserted by the Department of Justice:

> The relevant portions of section 52 of *ATIPPA* read, "The commissioner may require any record . . . to be produced . . . notwithstanding . . . a privilege under the law of evidence". The words "notwithstanding . . . **any** privilege under the law of evidence" are

[47] Descôteaux at p. 875
[48] *Newfoundland Privacy* at para. 37
[49] *Access to Information and Protection of Privacy Act*, SN 2002, c A-1.1 [*ATIPPA*]

sufficiently clear to abrogate solicitor-client privilege, as this is a privilege recognized under the law of evidence.[50]

46. The Court determined that s. 52(3) of *ATTIPA* was "unambiguous and explicitly permits the Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate."[51]

47. *ATIPPA* underwent significant amendments subsequent to *Newfoundland Privacy.* Bill 29[52] included a number of amendments to *ATIPPA*, including key changes to s. 52.[53] Prior to the amendments, s. 52(3) read:

> 52 (3) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, **notwithstanding another Act or regulations or a privilege under the law of evidence**.[54]

48. Bill 29 amended s. 52 of *ATIPPA* to expressly exclude solicitor-client privilege:

> 52 (3) The commissioner may examine information in a record that he or she may require under subsection (2) including personal information.
>
> (4) The head of a public body shall produce to the commissioner a record or copy of a record required under this section within 14 days notwithstanding
> (a) another Act or regulation; or
> (b) **a privilege under the law of evidence, except a privilege referred to in subsection (5).**
>
> (5) **Subsection (4) does not apply to records which are solicitor and client privileged.**[55]

Bill 29 also amended *ATIPPA* such that a challenge to a public body's assertion of solicitor-client privilege could not be heard by the Commissioner, but only by the Court.[56]

49. Bill 29 was highly controversial, attracting a great deal of media attention and public protests outside the House of Assembly.[57] After an opposition filibuster in the House of

[50] *Newfoundland Privacy* at para. 45; emphasis added
[51] *Newfoundland Privacy* at para. 84
[52] *Access to Information and Protection of Privacy (Amendment) Act*, SNL 2012, c. 25 [Bill 29]
[53] Newfoundland and Labrador, House of Assembly, Proceedings (Hansard) 47th General Assembly, 1st Sess (11 June 2012) at 23-24
[54] *ATIPPA*, s 52(3); emphasis added
[55] Bill 29 s 28; emphasis added
[56] Bill 29 s 30; emphasis added

Assembly that lasted more than 70 hours, the government invoked closure in respect of Bill 29.[58] Bill 29 received royal assent. [59] Since Bill 29 came into force, only 3 appeals of a claim of solicitor-client privilege have proceeded through the Court process, a dramatic reduction from appeals under *ATIPPA* prior to Bill 29. This demonstrates "that the time and expense involved in an appeal to the court has had a deterrent effect on citizens who would otherwise seek to avail of their right of appeal" if that process was available through the Commissioner's office.[60]

50. Although *ATIPPA* (both as amended by and prior to Bill 29) required a review of the legislation every five years,[61] a statutory review of *ATIPPA* was conducted in 2014. The review committee was chaired by Clyde K. Wells. The ATIPPA Report posited that "the review was called before the five-year requirement because of widely expressed concern about amendments" to *ATIPPA*.[62]

51. The ATIPPA Report noted that in his submissions to the review committee, the Newfoundland Privacy Commissioner advised:

> [D]uring the period when the issue was before the Court of Appeal [in *Newfoundland Privacy*], some 15 requests for information were refused on the basis of solicitor-client privilege. The requests for review on these files were all held in abeyance pending the decision of the Court of Appeal. After the Court of Appeal decision, the OIPC saw the 15 files that had been held. They discovered that 80 percent of them "had nothing to do with solicitor-client privilege whatsoever and only 20 percent of the records were properly claimed." When questioned as to whether this was "unmistakably clear," the Commissioner confirmed that to be the case, and expressed the view that it was "very disturbing" and "there was concern about abuse of that particular section." […]
>
> Sean Murray, the Director of Special Projects in the OIPC, described a particular event:
>
> > And during that time we had the occasion that somebody came to us with a request for a review and as we normally do one of our analysts will contact the public body and say look we've got a request for review. I notice one of the exceptions you've claimed is solicitor-client privilege. **Just mention that and the**

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[57] "Protest at Confederation Building targets Bill 29", Canadian Broadcasting Corporation (16 June 2012) online: Canadian Broadcasting Corporation **[Tab 5E]**

[58] Newfoundland and Labrador, House of Assembly, Proceedings (Hansard) 47th General Assembly, 1st Sess (11-14 June 2012)

[59] The Newfoundland and Labrador Gazette, Vol 87 No 26 (29 June 2012) at 3 **[Tab 5D]**

[60] Newfoundland Affidavit at para 18 **[Tab 4D]**.

[61] *ATIPPA* at s. 74

[62] Clyde K. Wells, Doug Letto & Jennifer Stoddart, Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act (March 2015) p. 1 [*ATIPPA Report*] **[Tab 5B]**

> **person said yes we thought we'd claim that because we just heard about this court decision and we heard that you can't review claims of solicitor-client privilege so we thought we'd claim it**. That is—we were flabbergasted but it's a fact that a head of a public body actually admitted to us that the reason they claim that section of the Act solicitor-client privilege was because we couldn't review it.[63]

52. The ATIPPA Report recommended a wide variety of amendments to *ATIPPA* (as amended by Bill 29), including changes related to claims of solicitor-client privilege:

> The Committee concludes that the powers of the Commissioner to deal with complaints about refusal to provide access on the basis that the records involved are subject to solicitor-client privilege should be revised to restore the Commissioner's ability to determine the validity of such a claim.[64]

53. Further to the recommendations set out in the ATIPPA Report, the Government of Newfoundland and Labrador introduced Bill 1 into the House of Assembly on April 21, 2015.[65] Bill 1 is expected to receive royal assent on June 1, 2015.[66] Bill 1 restores the Commissioner's ability to review documents over which solicitor-client privilege is asserted in order to determine the validity of the claim. [67] It does so by using language almost identical to Alberta's *FOIPP*.

(b) British Columbia

54. In *Central Coast,* the British Columbia Supreme Court dealt with s. 44(3) in the *BC FOIPP*[68] which is substantially the same as s. 56(3) of *FOIPP*. An access to information request was made in respect of the expenditure by the Applicant Board of public funds on legal fees. The Board brought an application for judicial review of the Acting B.C. Commissioner's determination that solicitor-client privilege had not been properly asserted over certain records the Board sought to withhold.[69]

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[63] ATIPPA Report, p. 115; emphasis added **[Tab 5B]**; See also: Newfoundland Affidavit at paras 12-14 **[Tab 4D]**
[64] ATIPPA Report, p. 119 **[Tab 5B]**
[65] Bill 1, An Act to Provide the Public with Access To Information And Protection Of Privacy, 1st Sess, 47th General Assembly, Newfoundland and Labrador, 2015 [Bill 1] **[Tab 5A]**; Newfoundland and Labrador, House of Assembly, Proceedings (Hansard) 47th General Assembly, 4th Sess (22 April 2015) at 12
[66] Newfoundland Affidavit at para. 20 **[Tab 4D]**
[67] Bill 1, s. 97 **[Tab 5A]**
[68] *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165 [*BC FOIPP*] at s 44
[69] *School District No. 49 (Central Coast) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 [*Central Coast*] at paras: 49-50 and 55; emphasis added

55. The B.C. Supreme Court overturned the Acting B.C. Commissioner's decision in respect of the records at issue. However, the Court held that the words "despite any other enactment or any privilege of the law of evidence" in s. 44(3) of the *BC FOIPP* (words substantially similar to s. 56(3) of *FOIPP*) were sufficient to grant authority to the B.C. Commissioner to review records over which solicitor-client privilege had been asserted:

> [T]he first step is to consider whether a purposive, remedial construction of the express provisions of the Act gives rise to more than one possible interpretation. If the Act is capable of two interpretations, one involving the abrogation of solicitor-client privilege and the other not, the court must favour the interpretation that respects the privilege. If, however, there is only one possible interpretation, and that interpretation allows an incursion on solicitor-client privilege, then the court must be satisfied that the incursion is necessary to achieve the objects of the legislation. A restrictive interpretation is only necessary where the provisions of an Act are ambiguous and the court is required by the substantive rule to prevent an incursion into solicitor-client privilege.
>
> **Applying those principles to the relevant sections of the Act, I conclude there is only one possible interpretation. The legislature intended to give the Commissioner the power to adjudicate questions of solicitor-client privilege to facilitate resolution of these issues without the cost and formality of court proceedings. The legislative scheme necessarily creates an incursion on solicitor-client privilege. . . .**
>
> The scheme and objects of the Act strengthen the conclusion that the legislature intended the Commissioner to adjudicate questions of solicitor-client privilege raised by a public body claiming an exemption from disclosure under s. 14 of the Act [which relates to solicitor client privilege]. The objects include giving the public a right of access to records held by public bodies and providing for an independent review of access decisions made under the Act. The objects are furthered by a legislative scheme that puts in place an independent review officer who can, as an alternative to the courts, undertake a timely **and** affordable first level review of public body denials of information requests. This is the same conclusion arrived at in the Newfoundland Appeal at para. 65. However, the conclusion is fortified here where the legislation includes both a power to demand production of documents as well as a power to adjudicate.[70]

56. In her Affidavit in support of this Application, the Information and Privacy Commissioner of British Columbia noted that *Central Coast* provides the basis upon which her office conducts inquiries into claims of solicitor-client privilege. Because the lower Court's decision suggests that *Central Coast* was wrongly decided, she is very concerned that participants in the B.C.

[70] *Central Coast* at paras. 49-50 and 55, emphasis added

inquiry process will now be reluctant to comply with production requirements related to records over which solicitor-client privilege is claimed. Such a result would "significantly impair the ability" of her office to achieve the purposes of the statutes under her jurisdiction.[71]

(c) Federal Court

57. In *Minister of Environment*, the Federal Court considered two provisions similar to s. 56 of *FOIPP* in the *Access to Information Act*[72]:

> 36(2) Notwithstanding any other Act of Parliament or **any privilege under the law of evidence**, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.
>
> 46 Notwithstanding any other Act of Parliament or **any privilege under the law of evidence**, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.[73]

58. The Court concluded that the explicit language of s. 46 permits the Court to review documents over which solicitor-client privilege is claimed:

> The reviewing Court must examine the material in which solicitor-client privilege is claimed to see if the privilege was properly invoked. Indeed, section 46 expressly states that "notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may . . . examine any record to which this Act applies and that is under the control of a government institution, and no such record may be withheld from the Court on any ground." **The Act clearly gives the Court authority to interfere with solicitor-client confidentiality. This is consistent with the purposes of the Act** stated in subsection 2(1), namely "that decisions on the disclosure of government information should be reviewed independently of government.[74]

59. The interpretation of the Court of Appeal was conceded by the parties in a subsequent Federal Court of Appeal case dealing with s. 36(2) of the *Access to Information Act*:

> [T]he appellants do not dispute that subsection 36(2) would defeat any claim of solicitor-client privilege under section 23 of the Act relating to records sought under the

[71] BC Affidavit at para. 3 **[Tab 4G]**.
[72] *Access to Information Act*, RSC 1985, c A-1 [*Access to Information Act*].
[73] *Canada (Information Commissioner) v Canada (Minister of Environment)*, [2000] FCJ No. 480 (CA) [*Minister of Environment*]; emphasis added; leave to appeal denied: [2000] SCCA No. 275
[74] *Canada (Minister of Environment)* at para. 11, emphasis added

> Act. The appellants accept that the Commissioner, when confronted with a refusal to disclose a record requested under the Act based on a section 23 exemption, must be able to review the record and verify that the exemption is properly claimed, and that subsection 36(2) provides the Commissioner with the authority to do so.[75]

60. The Court ultimately decided that s. 36(2) was not broad enough to afford the Commissioner the power to review **ancillary documents, unrelated to the access request, over which privilege is claimed**. However, the relevant principle for the present case is that the Commissioner must be able to review documents that are the subject of a *FOIPP* request in order to ascertain whether a claim of privilege asserted by the public body is valid. [76]

61. The decision of the Court below in the present matter is inconsistent with the decisions of the Court of Appeal of Newfoundland and Labrador, the B.C. Supreme Court and the Federal Court of Appeal. The Court below did not acknowledge that its decision was a departure from other Canadian jurisprudence, apart from its assertion that *Newfoundland Privacy* and *Central Coast* incorrectly applied the modern approach to statutory interpretation.[77] As noted above, the Court of Appeal's statements in respect of statutory interpretation, and its understanding of this Court's decision in *Blood Tribe,* are simply untenable.

62. Unmeritorious claims of solicitor-client privilege are common in jurisdictions across Canada.[78] Such unmeritorious claims can only be discovered through an incremental process of seeking substantiating information, asking questions, and if still unresolved then undertaking a review of the records over which the privilege is asserted. The decision of the Court below is expected to give rise to more refusals to produce records in jurisdictions across Canada.[79] In fact, an organization in British Columbia already used the decision below as the basis for refusing to produce records.[80] The Freedom of Information and Protection of Privacy Review Officer of Nova Scotia is aware "of legal counsel who has been publically advising public bodies

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[75] *Access to Information Act*; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] FCJ No 926 (CA) at para. 14
[76] *Ibid*
[77] Court of Appeal of Alberta Judgment at para. 31 **[Tab 2D]**
[78] PEI Affidavit at para. 16 **[Tab 4E]**; Ontario Affidavit at para. 19 **[Tab 4A]**, BC Affidavit at paras 9-10 **[Tab 4G]**; Nova Scotia Affidavit at paras 25-26 **[Tab 4C]**; Newfoundland Affidavit at para. 14 **[Tab 4D]**; ICC Affidavit at para. 13 **[Tab 4H)**
[79] Ontario Affidavit at para. 20 **[Tab 4A]**; Manitoba Affidavit at para. 18 **[Tab 4F]**; BC Affidavit at paras 3, 18 **[Tab 4G]**; PEI Affidavit at para. 17 **[Tab 4E]**; Nova Scotia Affidavit at para. 26 **[Tab 4C]**; ICC Affidavit at para. 18 **[Tab 4H)**
[80] BC Affidavit at para. 19 **[Tab 4G]**.

to conduct all negotiations in the presence of legal counsel so as to insulate public records from disclosure." [81]

E. Conclusion

63. Contrary to the findings of the Court below, *Blood Tribe* does not require that a statutory piercing of solicitor-client privilege include the words "solicitor-client privilege".[82] Rather, *Blood Tribe* requires that statutory language piercing solicitor-client privilege be "clear, precise and unequivocal".[83]

64. By granting leave, this Court can settle whether the wording in s. 56(3) of *FOIPP* clearly, precisely and unequivocally grants the IPC the statutory authority to compel production of records over which a public body has asserted solicitor-client privilege. Do the words "**any** privilege of the law of evidence" in s. 56(3) necessarily include **any** privilege of the law of evidence, including solicitor-client privilege?

65. In its exercise of "strict construction," the Court below in fact read down s. 56(3), such that the provision now effectively provides that a public body must produce records to the IPC despite "any privilege of the law of evidence, except solicitor-client privilege." This creates a complete lack of effective oversight that frustrates the Legislature's intent in enacting *FOIPP*.

66. The decision of the Court below introduced an inconsistency in the law as between Canadian jurisdictions. If leave is granted in the present matter, a number of Commissioners (or equivalent) from jurisdictions across Canada will seek leave to intervene.[84] The question in this appeal was expressly left open by this Court in *Blood Tribe.* The Applicant asks this Honourable Court to provide guidance to ensure that the IPC, and her counterparts in other jurisdictions, have some oversight in respect of assertions of solicitor-client privilege by public bodies. If public bodies can effectively circumvent compliance with privacy legislation (such as *FOIPP*) by merely asserting solicitor-client privilege, rightly or wrongly and without any review, the important interests protected by privacy and access legislation would be thwarted.

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[81] Nova Scotia Affidavit at para. 26 **[Tab 4C]**.
[82] Court of Appeal of Alberta Judgment at para. 48 **[Tab 2D]**
[83] *Blood Tribe* at para. 2
[84] Ontario Affidavit at para. 30 **[Tab 4A]**; BC Affidavit at para. 22 **[Tab 4G]**; Federal Privacy Affidavit at para. 3 **[Tab 4B]**; Newfoundland Affidavit at para. 27 **[Tab 4D]**; ICC Affidavit at para. 19 **[Tab 4H)**

PART IV - SUBMISSION ON COSTS

67. The Applicant requests costs of this application in the cause.

PART V - ORDER REQUESTED

68. The Applicant requests that leave to appeal be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of May, 2015.

Jensen Shawa Solomon Duguid Hawkes LLP

Glenn Solomon, Q.C.
Elizabeth Aspinall
Counsel for the Applicant

PART VI - TABLE OF AUTHORITIES

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