SCC File No.: 36460

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)

APPLICANT'S REPLY TO RESPONSE
(Information and Privacy Commissioner of Alberta, Applicant)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

I. INTRODUCTION

1. The Respondent states that *Blood Tribe* is determinative of this case. *Blood Tribe* is only determinative in that this Court clearly stated in *Blood Tribe* that consideration of a legislative provision that is the same as s. 56(3)[1] of *FOIPP* "must await a case in which it is squarely raised".[2] It is squarely raised in this case.

II. THE RESPONDENT'S ERRORS

2. Building on its erroneous conclusion that *Blood Tribe* determines this case, the Respondent mistakenly asserts that:

(a) Solicitor-client privilege supersedes every other principle, regardless of the foundation and purpose of the legislation affecting the privilege, absent specific language stating that solicitor-client privilege may be abrogated;

(b) A restrictive interpretation of *FOIPP* must consider the provision affecting solicitor-client privilege in isolation, and not contextually or purposively; and,

(c) The issue is incorrectly framed in the Application.

3. The Respondent's submission that the matter is moot is also in error. JR made an access request. That request remains live and extant. *FOIPP*'s provisions are distinct from production for the purposes of litigation.[3] The inquiry is not completed, notwithstanding that some other litigation between JR and the University is.[4] Those are separate processes. The IPC, in the still open inquiry, retains the jurisdiction to order the production of the records in issue on the basis that the University has not met its onus.[5] The preliminary question in the inquiry, which also remains live and extant, is whether the IPC can review the purportedly privileged records to determine whether they are properly withheld.

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[1] At p. 143, Tab 3 of Leave Application

[2] *Blood Tribe Department of Health v Canada (Privacy Commissioner)*, 2008 SCC 44 [*Blood Tribe*] at para 29

[3] S. 3(a) of *FOIPP* provides that it "is in addition to and does not replace existing procedures for access to information or records", at p. 136, Tab 3 Leave Application. S. 3(c) of FOIPP provides that it does not limit information available by law to a party to legal proceedings, at p. 136, Tab 3 of Leave Application. S. 5 of *FOIPP* provides that it is paramount legislation **[Appended]**

[4] S. 72 of *FOIPP* requires the IPC to dispose of the issues in an inquiry by making an Order. That has not yet occurred, at p. 148, Tab 3 Leave Application

[5] S. 71(1) *FOIPP* places the onus on the public body to prove that the person seeking access to a record has no right of access to that record, at p. 148, Tab 3 Leave Application

III. ACCESS RIGHTS ARE A QUASI-CONSTITUTIONAL PRINCIPLE FUNDAMENTAL TO CANADA'S DEMOCRACY: WHEN NECESSARY THEY CAN SUPERSEDE ANY PRIVILEGE

4. The importance and pressing nature of the issues raised in this case are reflected in the Respondent's misinterpretation of *Blood Tribe's* meaning and application. By its express terms, *Blood Tribe* does not determine the meaning of *FOIPP* or similarly worded statutes. Nonetheless, as the extensive Affidavits in this case demonstrate,[6] public bodies apply *Blood Tribe* regardless of the statutory code in question, resulting in a lack of access, transparency in government and fairness to people making access requests.

5. *FOIPP* requires the public body to make the initial determination as to whether a record is subject to an exception – including solicitor-client privilege. The IPC is mandated to review such initial determinations. There is no means by which the IPC can refer a question to a court, as that is not *FOIPP*'s intention. If the IPC were to accept a mere assertion of privilege by a public body in the absence of adequate evidence, the public body would effectively become the final decision maker, and the IPC would be abdicating its legislated duty to conduct a review. The alternative to IPC's accepting inadequate evidence is to order disclosure of information that is possibly subject to privilege, because a public body has not met its statutorily imposed burden of establishing the "privilege" exception. In either case Legislative intent is compromised. Neither transparency in government nor solicitor-client privilege must be sacrificed, if *FOIPP* is properly interpreted and applied to allow the IPC to review the records, make a determination, and issue an Order – which is then subject to judicial review. The statutory words and intent seek the only sensible outcome, one in which neither privilege nor transparency are lost.

6. The statutory language in *FOIPP* is not unique to Alberta. It is akin to the language used in many other jurisdictions.[7]

7. The Respondent's assertion that solicitor-client privilege supersedes any other principle - including the importance of access to information held by public bodies - is common, enticing

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[6] See Footnotes 5 and 6 in the Leave Application

[7] Like the jurisdictions cited in the Leave Application, the New Brunswick and Quebec privacy commissioners interpret their enabling legislation to allow them to review records to confirm the veracity of a claim of solicitor-client privilege: *Boissinot c. McCarthy Tetrault,* [2005] CAI 537. See also Footnotes 5, 6, 23, 26, 49, 52, 68 and 72 in the Leave Application

and wrong. Solicitor-client privilege is indeed "fundamental to the due administration of justice"[8] and should be abrogated only when necessary and only to the extent necessary. But it is not the case that records over which solicitor-client privilege is asserted can **never** be reviewed by a tribunal to determine whether the assertion of privilege is properly made, unless the statute uses the words "solicitor-client privilege". That is not the principle articulated in *Blood Tribe*. A restrictive interpretation of a statutory provision that would interfere with the privilege must consider and give weight to the whole statutory code. A restrictive interpretation does not read a statutory provision in isolation from the entirety of the statute, its foundation and its purpose. The error of the Court below was in not doing so. Moreover, while the Court purported to interpret s. 56(3) restrictively, it instead read down the statute to read solicitor-client privilege *out* of the phrase "any privilege of the law of evidence". This is not a restrictive reading but an illogical one. The issue, then, is very clearly that articulated in the Leave Application: whether solicitor-client privilege may be abrogated when the statutory scheme (a) references "any privilege of the law of evidence" (of which solicitor-client privilege is one), (b) provides the tribunal with full hearing powers, and (c) does not provide a mechanism by which the issue can be referred to a court for determination.

8. In *Solosky,* this Court held that the privilege is "aimed at improper use or disclosure".[9] This Court noted that the only way to determine whether privilege attaches is to review the records.[10] In *Solosky*, this requirement put the records within the Court's jurisdiction because the Judge was tasked with reviewing them. In the present case, the legislative intent is to put the records within the tribunal's jurisdiction to review them. That review does not result in their disclosure, but instead functions to protect two potentially competing and complementary, legislatively protected, public interests: solicitor-client privilege and transparency in government.

9. Transparency is at the heart of the Canadian democratic system on which the judicial system and the principles it codifies (including solicitor-client privilege) depend. Chief Justice

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[8] *Solosky* at p. 833-4; *AG Canada v Federation of Law Societies of Canada,* 2015 SCC 7 at para 82
[9] *Solosky* at p. 836-8
[10] *Solosky* at p. 837

McLachlin has recognized that access to information legislation is "quasi-constitutional" in nature, and is the "capstone" to the *Charter of Rights and Freedoms*:

> [F]or this [Canadian] democracy to function well in the complex context of the modern world, two rights must be safeguarded – the right to access to information and the right to privacy. ...
> [I]nformation itself – or the possibility of information coming to light – acts as a check on abuse of powers. ...
> **The need for information is compounded by the inevitable tendency of governments, and those exercising powers on behalf of the government, to disclose only as much as they deem necessary. Despotic secrecy is the historic norm. Democracy sets its face against this. Yet, unchecked, the tendency is always there. And unchecked, it will inevitably undermine democracy.**[11]

10. The lower Court's decision leaves the inevitable tendency towards the despotic secrecy of governments unchecked. Transparency must not be permitted to give way to mere assertions of privilege by public bodies who, rightly or wrongly, wish to keep information secret.

11. While the Respondent asserts that any interpretation of s. 56(3) except that of the Court below is not *Charter* compliant, an issue not before the courts below, the fact is that it is no more *Charter* compliant to undermine the "capstone" of the *Charter*.

12. The Respondent asserts that known unmeritorious claims of privilege are irrelevant, and only who gets to review documents for privilege is relevant. In consequence of the decision of the Court below, government bodies can and will improperly claim privilege to avoid access requests.[12] They thereby undermine democracy. "There must be some mechanism for verification of authenticity".[13] The Legislature chose that mechanism: the IPC.

13. The Respondent submits that the differences between s. 56(3) and the provision in *Blood Tribe* are "immaterial". This Court has suggested that the differences are material: "The proper interpretation of s. 34(2) [the equivalent of s. 56(3) of *FOIPP*] must await a case in which it is squarely raised. **Its only relevance to the present appeal is its absence from *PIPEDA*".**[14]

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[11] Beverly McLachlin, P.C. Chief Justice of Canada. *Access to Information and Protection of Privacy in Canadian Democracy* at p. 1-2 [emphasis added]
[12] See Footnotes 5 and 6 of the Leave Application
[13] *Solosky* at p. 840
[14] *Blood Tribe* at para 29 [emphasis added]

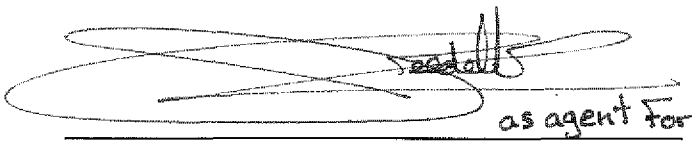
14. The Respondent submits that reliance on decisions of lower Courts and decisions which predate *Blood Tribe* is misleading. This demonstrates why this Court's guidance is needed. The lower Court conflated the statutory code in this case with the one considered in *Blood Tribe*. This has resulted in Privacy Commissioners, whose legislative grants of power are different and broader than those of the Privacy Commissioner of Canada, being unable to exercise those powers. *Blood Tribe* does not apply to that which it expressly did not determine. Decisions which predate *Blood Tribe* remain relevant to the extent that they interpret a different statutory code (like *FOIPP*) which fundamentally differs from the one in *Blood Tribe*.

IV. THE BROADER QUESTION: ABROGATING SOLICITOR-CLIENT PRIVILEGE IN THE ACCESS TO GOVERNMENT INFORMATION CONTEXT

15. *Attorney General of Canada et al. v Chambre des notaires du Quebec et al.* (35892), scheduled to be heard by this Court in late 2015, raises solicitor-client privilege and the constitutionality of record production under the *Income Tax Act*. That case will address what statutory wording is required to abrogate the privilege in the context of Canada Revenue Agency's ability to request accounting records. The present case offers this Court an opportunity to address that question in the access to government information context. Together, then, the two cases offer the Court the opportunity to provide clarity on what is required to abrogate privilege and to clarify *Blood Tribe's* application and limits.

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

Jensen Shawa Solomon Duguid Hawkes LLP



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V. TABLE OF AUTHORITIES (All Cases Available Online)

VI. ADDITIONAL STATUTORY PROVISIONS

STATUTES	Paragraphs
Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25 s. 5	3

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

RSA 2000
Chapter F-25

Relationship to other Acts

5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

1994 cF-18.5 s5;1999 c23 s5