

## Does “Privilege of the Law of Evidence” Include Solicitor-Client Documents?

A recent appellate case holds freedom of information rulings cannot override a party’s claim of solicitor-client privilege.<sup>1</sup> The Supreme Court of Canada has granted leave to appeal.<sup>2</sup> Will the Supreme Court empower Alberta’s Information and Privacy Commissioner or, instead, buttress protections of privilege?

### The Facts

The facts in *University of Calgary v R. (J.)* relate to an access request made by an individual to the University of Calgary under Alberta’s *Freedom of Information and Protection of Privacy Act* (“FOIPPA”). The requester sought records in the University’s possession which related to her while she was involved in a civil action against the University.

The University withheld certain records from the requester on the basis of solicitor-client privilege. The requester asked Alberta’s Information and Privacy Commissioner to review the University’s response. Ultimately, the Commissioner’s delegate<sup>3</sup> sought to compel the records over which the University asserted solicitor-client privilege.

The Commissioner argued that it had authority to compel such production pursuant to 56(3) of *FOIPPA*, which states:

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).

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<sup>1</sup> *University of Calgary v R. (J.)*, 2015 ABCA 118 [*University of Calgary*].

<sup>2</sup> 2015 CarswellAlta 2011.

<sup>3</sup> The court disapproved of reference to the Commissioner’s delegate as an “adjudicator” due to a conflict with a defined term in *FOIPPA*. Parties who deal with access requests in other provinces will be familiar with the reference to delegates of the Commissioner’s office as “adjudicators”.

## The Alberta Court of the Queen's Bench Decision

A Chambers Judge of the Alberta Court of the Queen's Bench was satisfied using a "modern approach" to interpretation of *FOIPPA* that the records should be released to the requester.<sup>4</sup> The modern approach requires consideration of both a contextual and purposive analysis to determine the Legislature's intent.<sup>5</sup> The Chambers Judge reasoned that section 56(3) unambiguously authorizes the Commissioner to compel production of any records, including those subject to solicitor-client privilege. The Chambers Judge also held that a strict approach to statutory intrusions into solicitor-client privilege should not be applied at first instance, unless there is ambiguity.<sup>6</sup> Lastly, the Chambers Judge held that the ordinary meaning of section 56(3) was that the Commissioner had the power to compel the production of records subject to an assertion of solicitor-client privilege.<sup>7</sup>

## The Alberta Court of Appeal Grants the Appeal

The University appealed the order forcing them to produce documents it alleged were solicitor-client privileged to the Court of Appeal.

The principal issue in the Court of Appeal's decision was whether to interpret section 56(3) using a modern approach or by adopting the rule of strict construction. The Court of Appeal disagreed with the Chamber Judge's approach to interpretation of *FOIPPA*. It permitted the University to withhold the records from the Commissioner's delegate.

The Court of Appeal was persuaded by the Supreme Court's decision in *Blood Tribe Department of Health v Canada (Privacy Commissioner)*.<sup>8</sup> In *Blood Tribe*, Justice Binnie held that section 12 of the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") (now section 12.1), was not specific enough to authorize the Commissioner to access solicitor-client communications. That provision authorizes the Commissioner to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information... whether or not it is or would be

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<sup>4</sup> See also the Chamber Judge's explanation of statutory interpretation *University of Calgary v JR*, 2013 ABQB 652 at paras 122-132.

<sup>5</sup> *University of Calgary* at para 12.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* at para.13.

<sup>8</sup> 2008 SCC 44 [*Bloodtribe*].

admissible in a court of law.”<sup>9</sup> The Supreme Court held that compelling production as a result of this language would essentially be foregoing privilege by inference.<sup>10</sup> The Supreme Court emphasized that a “general production” provision which does not specifically indicate that parties are to produce solicitor-client communications will not be sufficient to compel production.<sup>11</sup>

On the basis of *Blood Tribe*, the Court of Appeal held that the starting point is that government is not presumptively entitled to solicitor-client information. The Court of Appeal held that any legislation displacing this presumption must have the “highest degree of clarity” in doing so.<sup>12</sup> In the Court of Appeal’s view, specific reference to solicitor-client privilege is required in order for subsection 56(3) to authorize the Commissioner to compel records over which solicitor-client privilege has been asserted.<sup>13</sup> Such specific reference did not exist in *FOIPPA* and, as noted above, the University was not compelled to release the records.

## Implications

The Court of Appeal’s analysis was limited to interpretation of 56(3) of Alberta’s *FOIPPA*. However, it is possible that the Court of Appeal’s interpretation of *FOIPPA* may be followed by courts in other jurisdictions. Various access to information legislation in jurisdictions across Canada provide that provincial administrative actors may review claims of privilege by institutions. Some provincial legislation uses the phrase “privilege of the law of evidence” as Alberta’s *FOIPPA* does. Other legislation uses different language. For reference, section 56(3) of the Alberta *FOIPPA* and the similar provisions from other Canadian jurisdictions are copied in the chart below. As a consequence, the Supreme Court’s hearing of *University of Calgary* could have importance in many Canadian jurisdictions.

The Supreme Court has previously considered the ability of Ontario’s Privacy Commissioner to review the exercise of discretion by Ontario’s institutions when claiming privilege in *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*.<sup>14</sup> There, the Supreme Court upheld an institution’s claim of privilege without the institution articulating what discretionary

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<sup>9</sup> *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 at subsections 12(1)(a) and (c).

<sup>10</sup> *Blood Tribe* at para 11.

<sup>11</sup> *Ibid* at para 21.

<sup>12</sup> *University of Calgary* at paras 26 and 48.

<sup>13</sup> *Ibid* at para 48.

<sup>14</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 [*Ontario (Public Safety and Security)*].

factors it relied on when claiming privilege. The Supreme Court said that “solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.”<sup>15</sup> In *Ontario (Public Safety and Security)*, the Supreme Court did not consider the issue specifically of whether Ontario’s *Freedom of Information and Protection of Privacy Act*<sup>16</sup> is sufficiently specific to force production of solicitor-client privileged communications.

Interestingly, the Court of Appeal considered the lack of legal training by the Commissioner’s delegates in Alberta.<sup>17</sup> This was relied upon as “affirmation” of the Court of Appeal’s reasoning.<sup>18</sup> Are determinations of privilege more legally difficult to tackle than other forms of matters decided by administrative actors?<sup>19</sup> Is any tribunal whose jurisdiction could be in opposition to claims of privilege required to have lawyers review those determinations? It is possible that this is one issue the Supreme Court intends to address when ruling on the *University of Calgary* appeal.

Jurisdiction	Act	Provision	Language
Alberta	<i>Freedom of Information and Protection of Privacy Act</i> , RSA 2000, c F-25	56(3)	Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).
Alberta	<i>Personal Information Protection Act</i> , SA 2003, c P-6.5	38(1)	Notwithstanding any other enactment or any privilege of the law of evidence, an organization must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

<sup>15</sup> *Ibid* at para 75.

<sup>16</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, cF 31.

<sup>17</sup> *Ibid* at para 21.

<sup>18</sup> *Ibid* at para. 50(1): “Neither the Commissioner nor her delegate need be a lawyer, and therefore may lack the formal legal training necessary to appreciating fully the central importance of solicitor-client privilege to the legal system, or to assessing whether solicitor-client privilege has been properly asserted over a communication.”

<sup>19</sup> Certainly solicitor-client privilege has been described as being a principal of fundamental justice and associated with constitutional rights.

British Columbia	<i>Freedom of Information and Protection of Privacy Act</i> , RSBC 1996, c 165	44(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).
British Columbia	<i>Personal Information Protection Act</i> , SBC 2003, c 63	38(5)	Despite any other enactment or any privilege afforded by the law of evidence, an organization must provide to the commissioner any document, or a copy of any document, required under subsection (1) or (2) (a)
Canada	<i>Access to Information Act</i> , RSC 1985, c A-1	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.
Canada	<i>Privacy Act</i> , RSC 1985, c P-21	34(2)	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, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

Canada	<i>Personal Information Protection and Electronic Documents Act, SC 2000, c 5</i>	12.1(1)(a) and (c)	In the conduct of an investigation of a complaint, the Commissioner may (a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record; (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law.
Manitoba	<i>The Freedom of Information and Protection of Privacy Act, CCSM c F175</i>	50(3)	A public body shall produce to the Ombudsman within 14 days any record or a copy of a record required under this section, despite any other enactment or any privilege of the law of evidence.
New Brunswick	<i>Right to Information and Protection of Privacy Act, SNB 2009, c R-10.6</i>	70(3)	Despite any other Act of the Legislature or any privilege of the law of evidence, a public body shall produce to the Commissioner within 14 days any record or a copy of a record required under this section.
New Brunswick	<i>Personal Health Information Privacy and Access Act, SNB 2009, c P-7.05</i>	71(3)	Despite any other Act of the Legislature or any privilege of the law of evidence, a custodian shall produce to the Commissioner within 14 days after a request by the Commissioner a record or a copy of a record required under this section.
Newfoundland	<i>Access to Information and Protection</i>	97(5)(a)	The head of a public body may require the commissioner to examine the original record at a site determined by the head

	<i>of Privacy Act, 2015, SNL 2015, c A-1.2</i>		where... the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege.
Northwest Territories	<i>Access to Information and Protection of Privacy Act, SNWT 1994, c 20</i>	34(1)	Notwithstanding any other Act or any privilege available at law, the Information and Privacy Commissioner may, in conducting a review under this Division, require the production of and examine any record to which this Act applies that is in the custody or under the control of the public body concerned.
Nova Scotia	<i>Freedom of Information and Protection of Privacy Act, SNS 1993, c 5</i>	38(1)(a)	Notwithstanding any other Act or any privilege that is available at law, the Review Officer may, in a review... require to be produced and examine any record that is in the custody or under the control of the public body named in the request made pursuant to subsection (1) of Section 6.
Nunavut	<i>Access to Information and Protection of Privacy Act, SNWT (Nu) 1994, c 20</i>	34	Despite any other Act or any privilege available at law, the Information and Privacy Commissioner may, after receiving a request for a review, require the production of and examine any record to which this Act applies that is in the custody or under the control of the public body concerned.
Ontario	<i>Freedom of Information and Protection of Privacy Act,</i>	52(4)	In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the

	RSO 1990, c F.31		control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.
Ontario	<i>Municipal Freedom of Information and Protection of Privacy Act</i> , RSO 1990	41(4)	In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts I and II of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.
Ontario	<i>Personal Health Information Protection Act</i> , 2004, SO 2004, c 3, Sch A	9(2)(b)	Nothing in this Act shall be construed to interfere with... any legal privilege, including solicitor-client privilege;
Prince Edward Island	<i>Freedom of Information and Protection of Privacy Act</i> , RSPEI 1988, c F-15.01	53(3)	Despite any other enactment or any privilege of the law of evidence, a public body shall produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).
Quebec	<i>An Act respecting the Protection of Personal Information in the Private Sector</i> , CQLR c P-39.1	51	Every person must furnish to the Commission any information it requires for the examination of a disagreement.
Quebec	<i>An Act respecting Access to</i>	137.3	The Commission must make rules of procedure and proof by regulation.

	<p><i>Documents Held by Public Bodies and the Protection of Personal Information, CQLR c A-2.1</i></p>		<p>The regulation must include provisions to ensure the accessibility of the Commission and the quality and promptness of its decision-making process. To that end, the regulation must specify the time allotted to proceedings, from the time the application for review is filed until the hearing, if applicable.</p> <p>The regulation must be submitted to the Government for approval.</p>
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#### [a cautionary note](#)

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