Yukon Information and Privacy Commissioner

INQUIRY REPORT

File ATP18-63R

Pursuant to section 52 of the

Access to Information and Protection of Privacy Act

Diane McLeod-McKay, B.A., J.D.

Information and Privacy Commissioner (IPC)

Department of Justice

May 21, 2021

Summary

The Applicant made an access request to the Department of Justice (Department) for "[a]ny training and supplementary materials, including written instructions, copies of presentations, etc., provided to staff in relation to processing/handling of ATIPP requests" (Access Request). The Department responded by providing the Applicant with access to numerous records and refused portions of one record citing as its authority subsection 18 (a) (Record). This subsection authorizes a public body to refuse to provide an applicant with access to information that is subject to solicitor-client privilege. The Department submitted that the Record contained the legal advice of one of its lawyers in the Legal Services Branch of the Department. Specifically, the Record was described by the lawyer as an internal guidance document for LSB lawyers that contained legal advice for the lawyers about how to respond to an access to information request under the ATIPP Act for access to a record containing solicitor-client privileged information. The IPC determined that the information separated or obliterated from the Record is subject to solicitor-client privilege but that the privilege was waived by the Department because the Record was stored on Yukon government's intranet and was thereby accessible by any employee in any Yukon government department with a YNET account and other third parties. The conclusion reached by the IPC was that the Department did not meet its burden of proving that subsection 18 (a) applied to the information separated or obliterated from the Record. She recommended that the Department provide the Applicant with access to the Record in full.

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Statutes Cited

Access to Information and Protection of Privacy Act, RSY 2002, C.1.

Cases Cited

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Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 (CanLII)

Pritchard v. Ontario (Human Rights Commissioner), 20014 SCC 31

R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 SCR 565

Solosky v. The Queen, 1979 CanLII 9, SCC [1980] 1 S.C.R. 821

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British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner), 2021 BCSC 266

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Explanatory Note

All sections, subsections, paragraphs and the like referenced in this Inquiry Report are to the *Access to Information and Protection of Privacy Act* (ATIPP Act) unless otherwise stated.

I BACKGROUND

[1] On November 7, 2018, the Applicant requested the following information from the Department of Justice (Department).

> *Any training and supplementary materials, including written instructions, copies of presentations, etc., provided to staff in relation to processing/handling of ATIPP requests.* (Access Request)

[2] On December 6, 2018, the Records Manager informed the Applicant that the Department granted access to 224 pages that it identified were responsive to the Access Request.[1]

[3] On December 7, 2018, the Applicant requested a review of information severed from the pages.

[4] Settlement was attempted between December 7, 2018, and February 27, 2019. Settlement was partially successful. No settlement could be achieved in respect of four pages, from which the Department severed information citing subsection 18 (a) as its authority to do so.

II INQUIRY PROCESS

[5] On March 1, 2019, the Applicant requested the Information and Privacy Commissioner (IPC) conduct an Inquiry in regard to the severed information from the four pages.

[6] The IPC agreed to conduct an Inquiry and issued a Notice of Written Inquiry to the parties dated March 4, 2019. Due to a lack of clarity in regard to the records at issue as indicated in the Notice, the IPC issued a second Notice of Written Inquiry dated March 13, 2019 (March 13 Notice).

[7] The Department provided its submissions for the Inquiry on March 29, 2019. The Applicant provided its submission on April 12, 2019. Neither party made a reply submission.

III ISSUES

[8] There are two issues in this Inquiry. They are as follows.

Issue One: Is the Department authorized by subsection 18 (a) of the ATIPP Act to separate or obliterate information from the four pages?

Issue Two: Did the Department exercise its discretion in accordance with subsection 18 (a) of the ATIPP Act when the Department refused access to the information in the Record?

[1] Notice of Written Inquiry, at p. 1.

IV RECORDS AT ISSUE

[9] As indicated, there were four pages from which the Department separated or obliterated information. They are identified in the March 13 Notice as follows.

Record #	Page #	Type of Record	Date of Record	Severed (S) or Refused (R)	Exceptions Claimed
15	156	Paper Record	March 12, 2015	S	s. 18 (a)
15	157	Paper Record	March 12, 2015	S	s. 18 (a)
15	158	Paper Record	March 12, 2015	S	s. 18 (a)
15	159	Paper Record	March 12, 2015	S	s. 18 (a)

(Record)

V JURISDICTION

[10] My authority to review the Department's decision to separate or obliterate information from a record is set out below.

> *48(1) A person who makes a request under section 6 for access to a record may request the commissioner to review*
>
> *(a)…*
>
> *(b) a decision by the public body to separate or obliterate information from the record;*

VI BURDEN OF PROOF

[11] Paragraphs 54 (1)(a) and (b) set out the burden of proof relevant to this Inquiry and identify that the burden is on the Department to prove that an applicant has no right to the information separated or obliterated from the Record.

> *54(1) In a review resulting from a request under section 48, it is up to the public body to prove*
>
> *(a) that the applicant has no right of access to the record or the part of it in question,…*

VII SUBMISSION OF THE PARTIES

[12] The submissions of the parties are set out in the Analysis section of this Inquiry Report.

VIII ANALYSIS

Issue One: Is the Department authorized by subsection 18 (a) of the ATIPP Act to separate or obliterate information from the four pages?

[13] The Department submitted the following in relation to issue one.

1. *Section 18 (a) of the ATIPP Act provides:*

   18 A public body may refuse to disclose to an applicant a record

   (a) that is subject to solicitor client privilege; or…

2. *Following clarification from the Office of the Information and Privacy Commissioner, it has been confirmed that the record in question in this Written Inquiry is Record 15 identified on the Public Body's Schedule of Records of January 29, 2019, and in particular those redactions referred to at pages 156 through 159, namely:*

   a. p. 154, para 12;
   b. p. 156, para 26 to 28;
   c. p. 157, para 29-31 and para 33;
   d. p. 158, para 33 continued; and
   e. p. 159, para 42 and 43

3. *A statutory declaration, of Sarah Overington, sworn January 30, 2019, was provided in respect of the above-noted materials under cover of a letter of the same date. Same is re-submitted with these submissions.*

4. *In her statutory declaration, Ms. Overington provides the following critical evidence in respect of each of the redactions in question:*

   a. she is a lawyer with Legal Services Branch;

   b. lawyers in Legal Services Branch provide legal advice and serves to the entire Government of Yukon;

   c. she prepared each of the redacted paragraphs;

d. she did so in response to a request from the Assistant Deputy Minister, Legal Services Branch, for legal advice about the application of the ATIPP Act to the files of Legal Services Branch lawyers;

e. the requested legal advice was, in her opinion, expected to remain confidential; and

f. there has been, to the best of her knowledge, no disclosure of the same outside of Government of Yukon.

5. *A further statutory declaration from Amanda MacDonald, sworn March 27, 2019, is provided herewith.*

6. *In that statutory declaration, Ms. MacDonald confirms that the document that is the subject of this review is normally kept in electronic format in a location that is not publicly accessible.*

7. *In Inquiry Report File ATP17-031AR, the Information and Privacy Commissioner (IPC) said as follows.*

[292] In Inquiry Report ATP11-029AR,[] *I set out the Solosky test identified by the Supreme Court of Canada in Canada v. Solosky for determining if subsection 18 (a) applies to the records. In that Inquiry, I determined that the public body was required to meet all three parts (below) of the Solosky test for subsection 18 (a) to apply to the records.*

a. The information severed from the records must involve a communication between a solicitor and a client.

b. The nature of the communication between the solicitor and client was the seeking or giving of legal advice.

c. The communication was intended to be confidential.

[293] I also stated that subsection 18 (a) applies to legal advice given by an in-house lawyer but that the subsection cannot be applied to communications between an in-house lawyer and a client that are not considered to be legal advice, such as business advice or communications that are purely social in nature.

8. *The Department has no quarrel with the above statements, and it respectfully submits that the evidence set out in Ms. Overington's statutory declaration provides the factual basis showing that the Solosky test has been met in this case for each severed portion of the record in question:*

a. the statutory declaration established that the severed material involves a communication between a lawyer and a client;

b. the statutory declaration establishes that the nature of the communication was the seeking or giving of legal advice; and

c. the statutory declaration states the opinion of the lawyer giving the advice that same was intended to remain confidential.

9. *The Department further respectfully submits that the evidence of Ms. MacDonald indicates a specific intention to keep the document confidential.*

10. *Further, the case-law makes it clear that legal advice is essentially presumed to have been made in confidence, unless there is evidence suggesting otherwise. As stated in R. v. McClure, [2001] 1 S.C.R. 445, at para. 2:*

> *Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.*

11. *It is the concept of being able to speak candidly with one's lawyer underlying the concept of solicitor-client privilege that makes for an effective, but rebuttable, presumption of confidentiality in circumstances where legal advice is sought and given. As determined by the majority of the Supreme Court of Canada in Blank v. Canada (Minister of Justice) [2006] 2 SCR 319:*

> *26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and clients is a necessary and essential condition of the effective administration of justice.*

12. *In this case, there is no basis suggesting that the communications in issue were not intended to remain in confidence.*

13. *In R. v Campbell [1999] SCJ No. 16, the Supreme Court of Canada held that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, then such advice would be privileged.*

14. *In this case, the "client department" is the lawyer's home department, namely the Department of Justice.*

15. *In Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness), [2013] F.C.J. No. 439, the Federal Court of Appeal accepted that a portion of an internal protocol document of the RCMP could contain legal advice and that such portion was not subject to disclosure under an access to information request.*

16. *Accordingly, the Department submits that it is entitled per s. 18 (a) of the ATIPP Act to withhold the redacted paragraphs.*

17. [Redacted by Registrar]

18. [Redacted by Registrar]

19. [Redacted by Registrar]

20. *Solicitor-client privilege is a class privilege – R. v. McClure [2001] 1 SCR 445.*

21. *It applies equally to the public sector as to the private sector – R. v. Campbell [1999] SCJ No. 16.*

22. *A class privilege entails a presumption of non-disclosure once the conditions for its application are met – Lizotte v. Aviva Insurance Co., 2016 SCJ No. 52.*

23. *Any legislative provisions capable of interfering with solicitor-client privilege must be read narrowly and a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language – Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] SCJ No. 45.*

24. *In Goodis v. Ontario (Ministry of Correctional Services), [2006] 2 S.C.R. 32, the Supreme Court of Canada reaffirmed the rule from Desoteaux v. Mierzwinski, [1982] 1 S.C.R. 860 as follows.*

> *14 In a series of cases, this Court has dealt with the question of the circumstances in which communications between solicitor and client may not be disclosed. In*

Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860 at p. 875, Lamer J., on behalf of a unanimous Court, formulated a substantive rule to apply when communications between solicitor and client are likely to be disclosed without a client's consent:

> *1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communication are likely to be disclosed without the client's consent.*
>
> *2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.*
>
> *3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that 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 extend absolutely necessary in order to achieve the ends sought by the enabling legislation.*
>
> *4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.*

15 The substantive rule laid down in Descouteaux is that a judge must not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation".

25. *The privilege claim would be meaningless if the party who claims privilege with respect to a certain class of documents was required to provide details that would, in essence, reveal the contents of the document – NB v. Enbridge Gas [2016] NBJ No. 70 (NBCA), Baird, J.*

26. *As was the case in Blood Tribe,* [redacted by Registrar]. *As was further stated in that case:*

> *17…Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue: see e.g. Ansell Canada Inc. v. Ions World Corp. (1988), 28 C.P.C. (4th) 60 (Ont. Ct (Gen. Div.)), at para. 20. …*

> *22 In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the courts power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.*

27. *The majority of the SCC also held in Alberta (Information and Privacy Commissioner) v. University of Calgary, [2016] S.C.J. No. 53 that the delegate of the Alberta IPC erred in concluding that the University's claim of solicitor-client privilege needed to be reviewed to fairly decide the question in circumstances where an affidavit had been provided asserting the claim of privilege. As stated in that case:*

> *1 … At the heart of this appeal is whether s. 56 (3) of FOIPP, which requires a public body to produce required records to the Commissioner "[d]espite … any privilege of the law of evidence", allows the Commissioner and her delegates to review documents over which solicitor-client privilege is claimed.*
>
> *2 I conclude that s. 56(3) does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44, [2008 2 S.C.R. 574, solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal. In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection. Therefore, I am of the view that solicitor-client privilege is not captured by the expression "privilege[s] of the law of evidence". Moreover, a reading of s. 56 (3) in the context of the statute as a whole also supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. Further, even if s.56(3) could be construed as authorizing the Commissioner to review documents over which privilege is claimed, this was not an appropriate case in which to order production of the documents for review. Consequently, I would dismiss the appeal.*

28. *The Department respectfully submits that nothing in the ATIPP Act would suggest any intention on the part of the legislature to empower the IPC to review documents for claims of privilege. The relevant provision in the ATIPP Act (s. 53 (2)) speaks to "privilege under the law of evidence", which the Supreme Court of Canada has explicitly held does not encompass solicitor-client privilege.*

29. [Redacted by Registrar]

30. [Redacted by Registrar]

31. [Redacted by Registrar]

[14] The Applicant made the following submissions in regard to the issues. The submissions are not divided into the issues. As such, they are repeated here in their entirety.

Please consider this my formal reply to the Department of Justice's initial submissions.

Firstly, it is my understanding that the privilege noted in solicitor-client privilege is held solely by the client, regardless of the opinion of views of the lawyer in that legal relationship.

I also take issue with portions of both Overington and Amanda MacDonald's declarations, in which they emphasize, respectively, that the record in question "have not be (sic) disclosed outside the Government of Yukon," and that the record is "normally kept in electronic format on the Department of Justice's intranet" which is "only accessible by persons with access to Government of Yukon's internal network and is not intended for public access."

I don't understand how these statements are relevant and would submit that the majority, if not all, of the records requested under the ATIPP Act are not publicly accessible – in fact, s. 23 (a) allows a public body to refuse to disclose records that are already "published and available for purchase by the public."

I am unsure if the department is implying that because the record in question has never been publicly accessible, there is no need to make it public. If that is the case, I suggest that the approach defeats the entire "access to information" portion of the Access to Information and Protection of Privacy Act (ATIPP).

I take no issue, overall, with the validity and importance of solicitor-client privilege in the Canadian justice system.

Instead, I challenge whether solicitor-client privilege is relevant at all to the records at hand.

I believe that the department is arbitrarily invoking privilege and frivolously drawing a cloak around portions of the record simply because, at some point, a lawyer was involved.

I draw this conclusion based on the specific portion of the record the redactions occurred (pages 153 to 160). The document itself is entitled as an "overview" and, as Overington notes in her declaration, an "internal guidance document for responding to ATIPP requests.

I do not believe that the document in and of itself, can be considered a communication between a lawyer and client. It is an overview providing general advice and best-practice methods for the Department of Justice's legal services branch (LSB).

Overington's declaration states that the redacted paragraphs "describe the legal status of solicitor client privilege in Canada generally and the Yukon specifically. Further, the [sic] *provide legal advice about the interaction between ATIPP and solicitor client privilege."*

I question the classification of the contents of the paragraph as "legal advice" and, at the very least, find how the department classifies "legal advice" arbitrary and inconsistent. For example, the same overview explicitly states that lawyers should always use the privileged signature block even on communications that aren't privileged – does this not count as legal advice?

In its submission, the department, in part, quotes from the decision in R. v. McClure which states that "at the heart of (solicitor-client privilege) lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented."

I question what was so "candid" about the redacted paragraphs in this apparently general educational document that could be accessed by anyone who was on the Yukon government's intranet system.

The department also quotes Blank v. Canada (Minister of Justice), which reads, in part, that the "resulting confidential relationships between solicitor and client is a necessary and essential condition of the effective administration of justice."

I would submit that the "effective administration of justice" in our great nation would not be drastically affected, if at all, by the release of whatever was contained in the redacted paragraphs and that unlike, for example, RCMP protocols, educational documents intended for a small group of Yukon lawyers does not compromise public safety or security in any way.

And although perhaps not as relevant to the central issue, I would also like to note that I found it comical how significant portions of a document discussing s. 18(a) have been redacted under s. 18(a).

In the alternative, I submit that even if the portion of the record is covered by solicitor-client privilege, that the department of justice should err on the side of transparency and openness and waive its privilege.

Separately, I note the department's reliance on the Supreme Court of Canada's decision in Alberta (Information and Privacy Commissioner) v. University of Calgary. Although I am in no position to question the judgement of the country's learned judiciary, I would like to note the special report that the office of the information and privacy commissioner of Alberta made to the province's legislative assembly following the decision.

Jill Clayton wrote that it was clear the intention, when drafting the province's access-to-information legislation, was to allow the information and privacy commissioner to review privileged documents as necessary. However, the portion of the legislation was worded in such a way that ultimately led the Supreme Court to find she did not have the power to order the production of privileged documents.

Clayton urged the legislative assembly to amend the act to clarify the language around when her office could order the production of privileged documents. Given that the department is taking advantage of the Yukon legislation's use of the terms "privilege under the law of evidence" instead of, for example, "legal privilege" to deny access to the redacted portions of the record, I would urge the Yukon IPC to do the same.

[15] It is the view of the Department, in reliance on the aforementioned cases, that it is not required to produce unredacted copies of the Records for the IPC's review and it did not do so in this case. Instead, the Department provided two statutory declarations sworn by two employees in support of its position that subsection 18 (a) applies to the information that was separated or obliterated from the Records.

[16] This office, like the Alberta Information and Privacy Commissioner's office, adopted a practice some years ago of allowing, as a first step, a public body who is claiming that information separated or obliterated from a record qualifies as solicitor-client privilege to provide affidavit evidence, or a sworn statutory declaration as was provided here, in regard to the application of subsection 18 (a). This practice was adopted in recognition of the importance of solicitor-client privilege. If the IPC is not satisfied on review of the affidavit evidence that subsection 18 (a) applies, the next step in the practice is to compel the production of the records subject to the review.

Does subsection 18 (a) apply to the information separated or obliterated from the Record?

[17] Before moving on with my analysis of this question, I must address what appears to be an error in the Department's submission. In the submission, the Department identifies the Record to include "p.154, para 12." Page 154 is not at issue in this Inquiry. As indicated, the Record at issue in this Inquiry consist of pages 156 through 159.

[18] Subsection 18 (a) states as follows.

A public body may refuse to disclose to an applicant a record

(a) that is subject to solicitor client privilege;

[19] In order to meet its burden of proof in this case, the Department must establish that the information separated or obliterated from the Record is subject to solicitor-client privilege and that it exercised its discretion in deciding not to disclose this information to the Applicant.

[20] As indicated by the Department, in two of my prior Inquiry Reports, ATP11-29AR and ATP16-31AR, I identified that the Solosky test[2] is relevant to determining whether information is subject to solicitor-client privilege. The Solosky test is as follows.

Information will be subject to solicitor-client privilege where:

a. it involves a communication between a solicitor and a client;

b. the nature of the communication between the solicitor and client was the seeking or giving of legal advice; and

c. the communication was intended to be confidential.

[21] All parts of the test must be met for the information that was separated or obliterated by the Department to qualify as information that is subject to solicitor-client privilege. I will address part a and b of the Solosky test together.

Does the information involve a communication between a solicitor and a client that qualifies as legal advice?

[22] The Department's position is that this part of the test is met based on the evidence of Ms. Overington. The Applicant disagrees on the basis that it is their view that the Record is a general educational document that does not contain legal advice.

[2] As set out in *Solosky v. The Queen,* 1979 CanLII 9, SCC [1980] 1 S.C.R. 821, at para 19.

[23] In the statutory declaration sworn by Ms. Overington, she describes the Record as "the Legal Services Branch ("LSB") internal guidance document for responding to ATIPP requests".[3] She goes on to state the following about the nature of the information that was separated or obliterated from the Records.

> *While 18(a) allows a public body to refuse access to an entire record which is subject to s.18(a), only portions of the Record are subject to the legal exception for solicitor client privilege, which is: a communication between a lawyer and a client for the purpose of seeking legal advice which is intended to be kept confidential. The remainder of the record is not covered by solicitor client privilege because it represents policy or practical advice and not legal advice.*[4]
>
> *The Department of Justice, through the Attorney General, the Deputy Attorney-General, and through lawyers employed by the Department of Justice through Legal Services Branch (LSB), provides legal advice and services to the entire Government of Yukon.*[5]
>
> *I, an employee of the Department of Justice LSB, prepared these paragraphs on or about March 2015, in response to a request from the Assistant Deputy Minister of LSB for legal advice about the application of ATIPP to LSB lawyer's files.*[6]
>
> *The Paragraphs in the Record describe the legal status of solicitor client privilege in Canada generally and the Yukon specifically. Further, they provide legal advice about the interaction between ATIPP and solicitor client privilege.*[7]

[24] In Ms. Overington's statutory declaration, she states that she is a lawyer employed by the Department and was asked in her capacity as a Department' lawyer by the Assistant Deputy Minister of the Legal Services Branch (LSB) of the Department to provide legal advice to the Department about the application of the ATIPP Act to the LSB' lawyer files. She states further that this advice is contained in the paragraphs of the Record that were separated or obliterated. Ms. Overington describes the nature of the information in these paragraphs as information about "the legal status of solicitor client privilege in Canada generally and the Yukon specifically" and as containing "legal advice about the interaction between ATIPP and solicitor client privilege".[8]

[25] In Inquiry Report ATP11-29AR, I recognized that solicitor-client privilege will apply to communications between a lawyer employed by the Department and any Yukon government

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[3] Overington Statutory Declaration, on pg. 1, at para. 7.
[4] *Ibid.* on pg. 1, at para 6.
[5] *Ibid.* on pg. 2, at para 8.
[6] *Ibid.* on pg. 2, at para 9.
[7] *Ibid.* on pg. 2, at para 10.
[8] *Ibid.*, on pg. 2, at para 10.

(YG) department client that involve the giving and receiving of legal advice. I also recognized that not all communications made by a YG lawyer will be considered to be subject to solicitor-client privilege including communications that qualify purely as business advice or social interactions.[9]

[26] Pages 155 through 160 of the Record were provided for the Review. Having reviewed the pages provided, I have determined the following.

a. There is no title on the Record. The schedule of records provided by the Department indicates that the title is "Responding to an ATIPP Request: Overview for Legal Services Branch". The statutory declaration of Ms. Overington states "[t]he Record is the Legal Services Branch ("LSB") internal guidance document for responding to ATIPP requests.[10]

b. The contents of the Record indicate that the purpose of the document is to inform LSB lawyers about how to respond to an access to information request received under the ATIPP Act for records containing legal advice provided by LSB lawyers to YG Departments or that contain litigation privilege information. Pages 155 to 159 provide information about the subsection 18 (a) (legal advice) exception to the right of access to information under the ATIPP Act. The information on these pages is as follows:

    i. paragraph 23 sets out the section 18 exception;

    ii. paragraph 24 explains that the exception is discretionary and what this means;

    iii. paragraph 25 explains that YG is the client and that only the client can decide whether to provide access to information that is subject to solicitor-client privilege;

    iv. paragraphs 26 to 31 were separated or obliterated;

    v. paragraph 32 highlights that there are differences between solicitor-client privilege and litigation privilege under subsection 18 (a) and the subsection 18 (b) litigation privilege exception;

    vi. paragraphs 33 to 36 were separated or obliterated;

[9] Inquiry Report ATP11-29R, Energy, Mines and Resources, August 14, 2013, at para. 20.
[10] Overington Statutory Declaration, at para. 7.

vii. paragraphs 37 and 38 explain who is responsible in the Department or other YG departments to decide about whether to release information that is subject to solicitor-client privilege to an applicant;

viii. paragraphs 39 to 41 provide information about when to use a "privileged" versus a "confidential" email signature;

ix. paragraphs 42 and 43 were separated or obliterated;

x. the remaining paragraphs provide additional details about processing an access to information request including the process of providing access, notifying third parties, clarification requests by the applicant, payment of fees, the role of the ATIPP coordinator and information about requestors.

c. At the bottom of each page are the words "[d]raft 3" and the date "March 12th, 2015".

[27] I am satisfied from the evidence that Ms. Overington is a LSB lawyer who works in the Department and that the information in the Record was provided by her to assist LSB lawyers in responding to a request for access to information. I am also satisfied that the information she provided is contained within the paragraphs that were separated or obliterated from the Records.

[28] If the information provided by Ms. Overington in the Record qualifies as legal advice, then the first and second part of the Solosky test will be made out.

Does the information that was separated or obliterated from the Records qualify as legal advice?

[29] As indicated, advice from a lawyer to a client, including advice from a government lawyer to their government-clients, that is purely business advice or a social interaction will not qualify as legal advice.

[30] It is clear from the evidence that the Records do not contain information that would qualify as a social interaction.

[31] The Supreme Court of Canada (SCC) in *R. v. Campbell*[11] identified that information that is made up of policy or other advice given by a lawyer to their client that has nothing to do with their legal training or expertise but draws on departmental know-how or other business

[11] 1999 CanLII 676 (SCC), [1999] 1 SCR 565, at para. 50.

acumen is purely business information and that this information is not protected by solicitor-client privilege.

[32] In *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*,[12] the Federal Court of Appeal set out the following general principles to be applied when determining whether a document which may be used for operational purposes, such as a memorandum of understanding, as was the case before the Federal Court of Appeal, contains information that is subject to solicitor-client privilege.

> *The parties broadly agree on the general principles to be applied. Indeed, the Ministers conceded that at paragraphs 15-22 of its reasons the Federal Court correctly stated the general principles.*
>
> *Throughout their submissions in this Court, the Ministers stressed the importance of solicitor-client privilege, relying upon broad statements in cases such as Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; Descôteaux v. Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31, [2004] 1 S.C.R. 809, and Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44, [2008] 2 S.C.R. 574.*
>
> *However "fundamental," "all-encompassing" and "nearly absolute" the privilege may be, these cases confirm that not everything uttered by a lawyer to a client is privileged: see, e.g., Pritchard, supra, at paragraph 20; Blood Tribe, supra, at paragraph 10. Before us, counsel for the Ministers quite properly conceded that comments by lawyers to clients about matters wholly unrelated to their solicitor-client relationship are not privileged.*
>
> *Rather, communications must be viewed in light of the context surrounding the solicitor-client relationship and the relationship itself: Pritchard, supra at paragraph 20; Miranda v. Richer, 2003 SCC 67, [2003] 3 S.C.R. 193 at paragraph 32. In particular, heed must be paid to the nature of the relationship, the subject-matter of what is said to be advice, and the circumstances of the document in issue: R. v. Campbell, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 at paragraph 50.*
>
> *All communications between a solicitor and a client directly related to the seeking, formulating or giving of legal advice are privileged, along with communications within the continuum in which the solicitor tenders advice. See Samson Indian Nation and Band v. Canada, 1995 CanLII 3602 (FCA), [1995] 2 F.C. 762 at paragraph 8.*
>
> *Part of the continuum protected by privilege includes "matters great and small at various stages…includ[ing] advice as to what should prudently and sensibly be done in the relevant*

[12] 2013 FCA 104 (CanLII).

legal context" and other matters "directly related to the performance by the solicitor of his professional duty as legal advisor to the client." See Balabel v. Air India, [1988] 2 W.L.R. 1036 at page 1046 per Taylor L.J.; Three Rivers District Council v. Governor and Company of the Bank of England, [2004] UKHL 48 at paragraph 111.

In determining where the protected continuum ends, one good question is whether a communication forms "part of that necessary exchange of information of which the object is the giving of legal advice": Balabel, supra at page 1048. If so, it is within the protected continuum. Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?

For example, where a Director of a government department receives legal advice on how certain proceedings should be conducted and the director so instructs those conducting proceedings, the instructions, essentially cribbed from the legal advice, form part of the continuum and are protected: Minister of Community and Social Services v. Cropley (2004), 2004 CanLII 11694 (ON SCDC), 70 O.R. (3d) 680 (Div. Ct.). Disclosing such a communication would undercut the ability of the director to freely and candidly seek legal advice.

In some circumstances, however, the end products of legal advice do not fall within the continuum and are not privileged. For example, many organizations develop document management and document retention policies and circulate them to personnel within the organization. Often these are shaped by the advice of counsel. However, such policies are usually disclosed, without objection, because they do not form part of an exchange of information with the object of giving legal advice. Rather, they are operational in nature and relate to the conduct of the general business of the organization.

Similarly, an organization might receive plenty of legal advice about how to draft a policy against sexual harassment in the workplace. But the operational implementation of that advice – the policy and its circulation to personnel within the organization for the purpose of ensuring the organization functions in an acceptable, professional and business-like manner – is not privileged, except to the extent that the policy communicates the very legal advice given by counsel.[13] [My emphasis]

[33] The Applicant submitted that the document is for general use by the Department in its operations and cannot, therefore, contain information that is subject to solicitor-client privilege. The foregoing cases demonstrate that this is not the case. It is clear from these cases

[13] *Ibid.*, at paras. 22 to 31.

that where a document, including one used for operational purposes, contains legal advice, that it will be privileged so long as all aspects of the Solosky test are met in regard to the advice.

[34] Based on my review of the Records and in applying the foregoing principles, I am satisfied that the evidence provided by the Department and Ms. Overington in her statutory declaration confirms that, although the Record is used for operational purposes to assist LSB lawyers in responding to an access to information request containing privileged information, the advice is not purely business advice as it contains the very legal advice communicated by her to LSB lawyers in the Department. Given this, I find that the Department has made out the first and second part of the Solosky test.

[35] The third part of the Solosky test is that for the solicitor-client privilege to attach to communication involving legal advice given by a lawyer to their client, the communication must have been intended to be confidential.

Was it the intent of the Department to keep confidential the information that was separated or obliterated from the Records?

[36] The Department in its submissions suggests that due to the significant importance of protecting the confidentiality of solicitor-client privilege, that the confidentiality of the privilege is presumed unless there is evidence indicating that the communication was not intended to be confidential. I agree with the Department that there is a presumption in favour of a claim for privileged communication that arises in certain circumstances. The presumption is set out in a decision of the Supreme Court of Canada in *Blood Tribe*.[14]

> *[16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered prima facie confidential in nature" (Foster Wheeler [2004 SCC 18], at para. 42).*

[37] According to the evidence, it is clear that the legal advice that is contained in the Record is Ms. Overington's legal advice that is communicated, via the Record, to the Department.

a. The schedule of records submitted by the Department contains the title of the Record. It is "Responding to an ATIPP Request: Overview for Legal Services Branch".

b. It is clear from the Record that the legal advice provided therein is to advise LSB lawyers in the Department about how to respond to an access to information request under the ATIPP Act for records that contain privileged information.

[14] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* 2008 SCC 44 (CanLII) (*Blood Tribe*).

c. In her statutory declaration, Ms. Overington states that "[t]he Record is the Legal Services Branch ("LSB") internal guidance document for responding to ATIPP Requests" and that "I, an employee of the Department of Justice LSB, prepared these paragraphs…in response to a request from the Assistant Deputy Minister of LSB for legal advice about the application of ATIPP to LSB lawyer's files" and "[t]he Paragraphs in the Record describe the legal status of solicitor-client privilege in Canada generally and the Yukon specifically. Further, they provide legal advice about the interaction between ATIPP and solicitor client privilege".[15]

[38] A very recent case that was brought to my attention by the Department from the British Columbia Supreme Court (BCSC) in *Ministry of Finance v. BC IPC*,[16] heard by the Hon. Mr. Justice Steeves, sheds some light on how the BC IPC should address claims of solicitor-client privilege as an exception to the right of access under British Columbia's *Freedom of Information and Protection of Privacy Act* (FIPPA). The matter before Justice Steeves was a judicial review of a decision by an adjudicator with the Office of the BC IPC who found that solicitor-client privilege did not attach to certain records of the Government of British Columbia's (BC Gov) Ministry of Finance (Ministry). Given the relevance of Justice Steeves' decision to the task before me, I refer below to his decision at length

Ministry of Finance v. BC IPC

[39] The Ministry of Finance sought an order from the BCSC setting aside portions of the adjudicator's decision, namely the portions where the adjudicator found that solicitor-client privilege did not attach to certain records subject to an access request made for the records under FIPPA. The Ministry claimed that solicitor-client privilege attached to an email attachment, emails involving employees of ministries other than the Ministry, an email copied to counsel for the Assistant Deputy Attorney General, and emails involving counsel for tax and revenue issues.

[40] The submissions made by the Ministry to the adjudicator for the Inquiry under FIPPA in respect of the records, included affidavit evidence in support of the Ministry's claims for solicitor-client privilege.

[41] During the course of the Inquiry, the adjudicator sought additional evidence from the Ministry in respect of the records and the Ministry provided some but not all of the information requested. As indicated, the adjudicator's decision was that some records were subject to

[15] Overington Statutory Declaration, at paras. 7, 9 and 10.
[16] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 (*Ministry of Finance v. BC IPC*).

solicitor-client privilege and could be withheld from the applicant and others were not. She ordered that the latter records be provided to the applicant.

[42] Justice Steeves noted at the outset that "the onus to demonstrate privilege lies with [the Ministry]" and "it is for the IPC to decide if the claim has been made out".[17] Justice Steeves then went on to address the leading cases in Canada about solicitor-client privilege including some about access to information, specifically referencing the Pritchard,[18] Blood Tribe,[19] and University of Calgary[20] cases that are mentioned above by me and referenced in the Department in its submissions. I will not repeat them here.

[43] After reviewing the case law, Justice Steeves went on to identify what is needed to establish a claim for solicitor-client privilege under section 14 of FIPPA. Below are his statements that are, in my view, relevant to the matter before me.

> *The authorities are somewhat helpful in demonstrating what is required to demonstrate a claim for solicitor-client privilege although they are not consistent (Keefer Laundry, at para. 65). They do demonstrate that there is considerable latitude in how much information is required to demonstrate solicitor-client privilege for specific documents.*[21]
>
> *…The court does not generally review the document itself and that also appears to be the practice of the IPC… In general, the information that must be included about a document over which privilege is claimed "will vary depending on the document, but it must be sufficiently described so that if a claim is challenged it can be considered by a judge in chambers" (Stone v. Ellerman, 2009 BCCA 294 [Stone], at para. 23).*[22]
>
> *…Perhaps as a result, it is accepted that it is for the judgement of counsel to determine how much information will be provided to justify a claim of privilege without actually revealing the privileged information. Justice Pearlman usefully summarized the approach in a previous judgment (Gardner v. Virdis Energy Inc., 2013 BCSC 580):*
>
> > *[40] For those documents for which solicitor-client or legal advice privilege is claimed, defendant's counsel as officers of the court will have to determine how much description may be provided without revealing privileged information. However, the defendant has adduced no evidence to suggest only a generic description will ensure that privilege is protected in this case. In most, if not all, instances it should be possible to include, in addition to the date and nature of*

[17] *Ibid*, at para. 43.
[18] *Pritchard v. Ontario (Human Rights Commissioner),* 20014 SCC 31 (Pritchard).
[19] *Supra,* note 14 at *44.* (*Blood Tribe*).
[20] *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 53 (University of Calgary).
[21] *Ibid.,* at para. 77.
[22] *Ibid.,* at para. 78.

> *the document, the identities of the author and recipient. However, that will be a matter for defendant's counsel to determine.*[23]

In my view, it would be an unusual situation where the date of the document and the names of the sender and recipient are not disclosed for each document. It seems to me that some information is required to understand the document. It also seems to me that indicating whether the sender or the recipient is a lawyer could be helpful and even necessary. Certainly an explanation would be required if this information cannot be provided. Security or privacy concerns can be dealt with by other means such as sealed files.[24]

In my view an affidavit from counsel is the preferred approach and that appears to be the approach of the parties here. There are sharp disagreements about whether the petitioner has made out its claims of solicitor-client privilege but the use of affidavits for that purpose is accepted. The question here is what has to be in the affidavit.[25]

As can be seen, the use of affidavits from lawyers (without the actual document being available) means that some weight has to be given to the judgement of counsel when the IPC is adjudicating claims of solicitor-client privilege. Put another way, it is not open to the IPC to treat a claim of privilege as they would any other claim of an exception to disclosure. The task before an adjudicator is not to get to the bottom of the matter and some deference is owed to the lawyer claiming the privilege. As to the reliability of a lawyer's claim it first of all needs to be recognized that the lawyer's conduct is subject to the standards of the Law Society. It would be a professional error for a lawyer to misrepresent the nature of solicitor-client communications to an agency like the IPC (or to anyone). The corollary of this is that a claim of solicitor-client privilege should be made by counsel only after careful consideration. A claim that cannot be justified, and certainly a spurious one, is a reason for the IPC to request more information and submissions.[26]

As to what is required in the affidavit, that is more complicated. It is clear enough that "absolutely no evidence" will not establish a claim for privilege (Nanaimo Shipyard Ltd. v. Keith, 2007 BCSC 9, at para. 15). Beyond that, every case is different and within each case different documents may require different explanations and different levels of explanation. An additional complicating factor is that a claim for solicitor-client privilege may require more protection and, therefore, require the disclosure of less information to

[23] *Ibid.,* at para. 79.
[24] *Ibid.,* at para. 81.
[25] *Ibid.,* at para. 85.
[26] *Ibid.,* at para. 86.

demonstrate that privilege than one for litigation privilege (Stone, at para. 27; citing Hetherington, at paras. 8-10)…[27]

It follows from the above that, if the parties are expecting a specific roadmap about how to make and how to decide a claim of solicitor-client privilege, that is not possible. Each case and perhaps each document will require different levels of disclosure by public bodies and different degrees of intervention by the IPC.[28]

With the above general comments in mind a review of the parties' legal submissions is useful. According to the petitioner there is a presumption in favour of a claim for privilege when counsel assert that claim in an affidavit. They rely on the following stated by the Supreme Court of Canada in Blood Tribe:

> *[16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered prima facie confidential in nature" (Foster Wheeler [2004 SCC 18], at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer did, not about the legal advice (if any) upon which the employer did it.*[29]

[44] Justice Steeves went on to review the evidence before the Supreme Court of Canada (SCC) in *Blood Tribe* that was contained in the Blood Tribe Department of Health's (BT DOH) submissions and in affidavit evidence of one of its employees in support of its claim of solicitor-client privilege over a "bundle of letters". Justice Steeves identified that the BT DOH submissions described the affidavit as addressing the "bundle of letters"; specifically, they were letters written by their legal advisors who were named, the communications were confidential, and the communication involved the giving and receiving of legal advice from the legal advisors to the BT DOH. In reference to this evidence, Justice Steeves stated "[f]rom *Blood Tribe* it is apparent that if affidavit evidence is relied upon to support a claim for solicitor-client privilege, the evidence should specifically address the documents subject to the privilege claim".[30]

[27] *Ibid.,* at para. 87.
[28] *Ibid.,* at para. 88.
[29] *Ibid.,* at para. 89.
[30] *Ibid,* at paras. 90 and 91.

[45] The Ministry argued that "once counsel has filed an affidavit supporting the claim for solicitor-client privilege it is not for the IPC to go further and request more information". Justice Steeves' response to this argument follows.

> *According to the petitioner that is the effect of the presumption described in Blood Tribe. In my view, that may be true when counsel's affidavit adequately sets out the particulars of the claim for the specific document. However, it likely would not be the case where the affidavit is inadequate. It is for the IPC to decide whether the affidavit is adequate (not counsel for the applicant), subject to judicial review on a correctness standard. I add that I do not agree with the petitioner that in all cases simply providing the date of the record and the names of sender and recipient is enough to create a presumption in every case.*
>
> *I emphasize that the length of the affidavit is not necessarily determinative (the adjudicator in the subject petition at one point raised the number of pages as relevant to the claim for privilege). An affidavit that briefly explains that a specific document contains counsel's opinion to the client about the merits of the underlying action would require very careful consideration by the IPC (and the courts) before deciding it did not support a claim of privilege. Affidavits about claims over other documents will require more explanation. Moreover, a global claim of privilege over a number of documents may justify a claim of solicitor-client privilege for all of the documents. But something more is required than the assertion that the fact of one privileged attachment in a group of attachments means that all the attachments in the group are privileged. Documents about specific issues require specific claims of privilege. This may be onerous in document-heavy cases but, in my view, solicitor-client privilege is that important.*[31]

[46] After setting out the foregoing legal framework, Justice Steeves reviewed the affidavits provided to the adjudicator for her review. Regarding the affidavits, Justice Steeves indicated that "[s]ome of the affidavit evidence is general in nature (for example, explaining the process of preparing legislation) and some of it is specific to the documents in dispute". He added that "[t]he generality of the information for some documents is an issue."[32]

[47] Justice Steeves then reviewed the records in dispute and noted the following, as summarized by me, about the records and the adjudicator's findings.

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[31] *Ibid.,* at paras. 92 and 93.
[32] *Ibid.*, at para. 99.

Email chain and attachment

The adjudicator found an email chain to contain information that qualifies as solicitor-client privilege. The adjudicator found the attachment to the email did not contain solicitor-client privilege information because the contents of the attachment, described as draft correspondence prepared by the Ministry of Justice to respond to the applicant, was not prepared by lawyers for the Ministry of Justice and did not, in her view, reveal legal advice that was given. The adjudicator indicated that the Ministry's claim is based on its position that attachments to a privileged communication are always privileged. She further indicated that the Ministry did not provide her with sufficient evidence to establish that the draft correspondence contained solicitor-client privileged information.[33]

In reviewing the submissions about the email chain and attachment, Justice Steeves examined the affidavit evidence contained therein. He noted that the affidavit was from a lawyer with the Ministry of Justice's legal services branch (LSB) who indicated that she provides legal advice to employees of the BC Gov. Justice Steeves determined that there was no evidence in the affidavit about the email attachment and that "there is no discussion of the issue of privilege specific to those documents other than that legal advice was provided to the Ministry".[34] On this basis, he found the adjudicator was correct in her findings.[35]

Emails involving employees in other ministries

The emails reviewed by the adjudicator were described by the Ministry as between Ministry employees and a LSB lawyer and included communications with employees from other government Ministries. The adjudicator requested additional information about the involvement of these other employees because their role in the communications raised issues about the confidentiality of the communications and the Ministry declined to provide it. On this point, the adjudicator stated that "[c]ommunications that include individuals outside the solicitor client relationship do not typically attract privilege as their presence defeats the necessary requirement of confidentiality". She added "I have no evidence about the identity of these unidentified government employees, what role they played in the solicitor client relationship or what interest they had in the matters being discussed in the emails. In the records table, the Ministry only identified the Policy Analyst and DP as the email participants; there was no mention of any government employees from another ministry. There was also no

[33] *Ibid.,* at para. 105.
[34] *Ibid.*, at para 117.
[35] *Ibid.,* at para. 119.

affidavit evidence that adequately described these records."[36] She added further "[t]he Ministry also argues that privilege applies to these communications because the "Province is one indivisible legal entity" and cites several authorities to support its position. However, I do not find the authorities cited by the Ministry to be applicable or persuasive at this point because they deal with the waiver of solicitor client communications. The initial issue for these communications that include non-Ministry employees is not waiver, but whether they are privileged in the first place. Waiver involves the disclosure of already privileged information which the Ministry has not established applies to these records".[37] The adjudicator found that these emails do not contain information to which solicitor-client privilege applies.[38]

Justice Steeves identified that in the Ministry's submissions on the petition, the Ministry, among other things, "emphasizes that all ministries are part of the same entity, the Government of British Columbia" and "[i]t is agreed that the issue was privilege itself and not waiver but the evidence before the adjudicator nonetheless supports a claim of privilege".

After reviewing the records and submissions, Justice Steeves determined that there is no reference to other employees or ministries in the summary of the documents provided to the BCSC. He goes on to identify that a person "PF", who is part of the email chain, may be an employee of another Ministry "but that is not explained". Adding "[t]here is a reference in the petitioner's submission…that its claim of privilege includes "government employees from outside of the Ministry…But there is no connection made to any of the emails at issue. [39] He then identifies that the summary contains a reference in the "affidavit of DP to providing legal advice to the Ministry of Finance and "other Province employees" as being "confidential in nature" and identifies that the statement has no significant bearing on the documents at issue. Regarding the statement, Justice Steeves states "[i]t is very general, it does not reference the documents and, therefore, it is difficult to find how it provides any basis for a claim of solicitor-client privilege for those documents". Adding "DP also deposes that he provides legal advice to "employees of Her Majesty the Queen in Right of the Province of British Columbia. That is more general and less helpful".[40]

Referring to another affidavit by RF, Justice Steeves identifies that there is some information referencing another ministry, but again finds that the explanation is

[36] *Ibid,* at para. 125.
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.,* at para. 128.
[40] *Ibid.* at para. 129.

insufficient to explain how it relates to the claim of solicitor-client privilege to the emails.

In finding that the evidence of the Ministry was insufficient to establish a claim of solicitor-client privilege over the emails,[41] Justice Steeves stated the following.

> *It is true, as suggested by the petitioner, that the summary of the documents in this category contains the name of the sender, the name of the recipient, the date and a brief description of the documents. But, again, the summary does not reference other ministries or other employees. As well, the affidavit evidence relied on by the petitioner is in the most general terms and does not identify the specific documents at issue. In my view a global assertion of privilege that applies to legal counsel across government does not support a claim of solicitor-client privilege for individual documents.*
>
> *The petitioner also submits that the adjudicator "fundamentally misunderstood" the legal nature of legal advice within government and this "led her to an incorrect finding on the confidentiality aspect of the Pritchard test" (para. 90). The affidavit of DP is relied on as establishing the need for confidentiality within government. I do not doubt the need for confidentiality at many levels of government but in order to demonstrate a claim of solicitor-client privilege over specific documents some evidence is required specifically addressing those documents.*
>
> *This is true whether the Government of British Columbia as a whole or some other entity is the client. I add that it seems to me that, given the complexities of modern government, there can be interests that are adverse within government. In that circumstance separate and independent legal advice may be required and some information would not be shared between those interests. For example, I note the confidentiality and trust required by the province's Indigenous Tax unit of the Tax Policy Branch, Policy and the Legislation Division of the Ministry of Finance when developing indigenous tax policy, as explained in Affidavit #1 of AK, its director. I take it that some protection of that confidentiality and trust within government is necessary.*
>
> *I conclude that the evidence in this petition does not support a presumption that the documents at issue are subject to solicitor-client privilege.*[42]

[41] *Ibid.,* at para 131.
[42] *Ibid.,* at paras. 132 to 135.

[48] As indicated, Justice Steeves found that the adjudicator was correct in finding that the emails involving employees in other Ministries in BC Gov were not subject to solicitor-client privilege.

ADAG counsel email

The adjudicator determined that the email is between a policy analyst and LSB's correspondence coordinator/writer, and KC, a LSB lawyer, is copied on the email. The adjudicator indicates there are numerous attachments to the email noting that the Ministry describes them as draft correspondence that the Ministry sent to KC to obtain her legal advice with other related correspondence that led to the creation of the draft correspondence. In KC's affidavit, she says the entire record is "confidential written communication" that was provided to her to keep her informed on a file she gave legal advice on. In its submissions, the Ministry claims that disclosure of the email and attachments would reveal the legal advice and that the record was part of the continuum of communication between lawyer and client. The adjudicator found the email is not a communication between a lawyer and their client and that copying the lawyer does not make the communication privileged. She adds that the Ministry did not explain how the record fits within a continuum of communications between KC and the Ministry and that from the contents of the email, the legal advice in the draft correspondence cannot be inferred. The adjudicator determined that the attachments were forwarded to KC to obtain her legal advice together with the other attachments used to provide her legal advice and that disclosure of them would allow someone to infer the advice. The adjudicator concludes that email is not subject to solicitor-client privilege, but the attachments are. [43]

On evaluation of KC's affidavit evidence, Justice Steeves identifies that KC specifically refers to the email and attachments. In her affidavit, KC indicated:

a. she reviewed the email and attachments, including the draft correspondence that she gave legal advice on;

b. the attachments provided context to the creation of the draft correspondence which includes her legal advice;

c. the email and attachments are in entirety a confidential written communication to keep her informed on a file she gave legal advice on; and

[43] *Ibid.,* at para. 137.

d. the scope of the access requests, any disclosure of the details of the attachments, would allow the applicant to infer the issue being dealt with and the nature of the attachments.[44]

[49] He then identifies that:

a. KC's evidence is specific and provides detail that supports the Ministry's claim of solicitor-client privilege;[45]

b. the adjudicator's reasons for not accepting the email as privileged is because the communication was between two employees who were not lawyers, and the only lawyer involvement was KC who was copied;[46]

c. simply sending the email to the lawyer is not enough to establish privilege, there must be something in the email that warrants protection by means of solicitor-client privilege;[47]

d. the evidence of KC is that disclosing "the entirety" of the documents would allow an outside party to accurately infer the legal advice given;[48]

e. the basis on which the adjudicator determined that the email was copied to KC "just for the purpose of providing information" is unclear given that copying someone on an email may be just for their information or some other purpose "including being part of a continuum of communications related to legal advice"; [49] and

f. the attachments that were copied to KC are privileged, they were not copied to her just for providing her with information and there is no basis for treating the email differently.[50]

[50] In reference to the conclusion drawn by the adjudicator about the purpose of the email as being just for the purpose of informing KC, Justice Steeves states:

> *I do not agree that it is the role of the adjudicator to go behind the evidence of counsel in the circumstances here (unlike the circumstances in the above two categories of documents). If there is some evidence to support a conclusion that the email was for a*

[44] *Ibid.* at para. 140.
[45] *Ibid.* at para. 142
[46] *Ibid.,* at para 143.
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.,* at para. 144.
[50] *Ibid.*

> *purpose that does not justify protection by solicitor-client privilege (like the attachments) then that evidence should be stated clearly and considered. In my view it is not for the adjudicator to pose alternative explanations without that evidence in an exercise to get to the bottom of the issue. In a situation like this deference to counsel is required.*[51]

[51] He adds:

> *Counsel's statement that disclosure of the documents (email and attachments) would permit an accurate inference of the legal advice given is an appropriate basis for a presumption of privilege in the circumstances here. Something more than the adjudicator's suggestion that there is another explanation is required to rebut that presumption.*[52]

[52] He concludes that "[o]n the basis of the information in the record before me I accept the sworn evidence of counsel that the email and attachments are a piece".[53]

[53] Justice Steeves went on to evaluate the last category of records, the RevTax Emails. I have not included his analysis and findings about these records as, in my view, they do not add any more than what is already provided herein to addressing the matter before me.

[54] The legal framework set out in the *Ministry of Finance v. BC IPC* decision by Justice Steeves about the evidence required to establish a claim of solicitor-client privilege by a public body and the role of an IPC under access to information law is as follows.

> <u>Evidence required to establish a claim of solicitor-client privilege</u>
>
> a. There is considerable latitude about how much information is required to demonstrate solicitor-client privilege for specific documents.
>
> b. The amount of information required will vary depending on the document, but the document must be sufficiently described.
>
> c. It will be up to the public body, preferably its lawyers, to determine how much description to provide without revealing the privilege.
>
> d. An affidavit from the public body's lawyer is preferred and some weight is to be given to the judgement of the lawyer when an IPC is adjudicating claims of privilege.

[51] *Ibid.,* at para 145.
[52] *Ibid.,* at para. 146.
[53] *Ibid.,* at para. 147.

e. The affidavit should specifically address the document subject to the privilege claim and generalities should be avoided.

    i. The evidence will not be sufficient where there is no evidence in the affidavit about the specific document.

    ii. General evidence will not suffice to make out a claim of privilege. For example, it is not enough to generalize that legal advice was provided to the public body.

f. Where there is evidence that third parties were privy to the communications between solicitor and client, the affidavit must explain how this involvement applies to the claim of privilege.

    i. It is not enough for a lawyer to assert in their affidavit that the provision of legal advice to a public body, or for government lawyers to government as a whole, is confidential in nature.

    ii. It is not enough for government lawyers to make a global assertion of privilege that applies to legal advice across government because the complexities of modern governments mean there may be adverse interests within government that require separate and independent legal advice and result in some information not being shared between those interests.

<u>Role of the IPC</u>

g. When a lawyer is claiming solicitor-client privilege over documents, the IPC owes some deference to a lawyer claiming the privilege because:

    i. a lawyer's conduct is subject to the standard of their Law Society;

    ii. it would be a professional error for the lawyer to misrepresent the nature of solicitor-client communications to anyone, including the IPC; and

    iii. a solicitor-client privilege claim will only be made by a lawyer after careful consideration.

h. It is open to the IPC to request more information and submissions where the claim of privilege cannot be justified on the evidence.

i. Where affidavit evidence is sufficiently detailed such that it is specific to the documents over which privilege is claimed and there is explanation about how

privilege attaches to the documents, it is not open to the adjudicator to go behind the evidence to pose alternate explanations without such evidence.

j. Where there is evidence in an affidavit to support a conclusion that the legal advice does not justify protection by solicitor-client privilege, then that evidence should be stated clearly and considered.

[55] The evidence provided in Ms. Overington's statutory declaration is specific to the legal advice that is contained in the Record.

a. She identifies the Record and the paragraphs that were separated or obliterated.

b. She describes the access request made by the Applicant and indicates that she reviewed the Record in its entirety to determine whether subsection 18 (a) applies.

c. She states that "[t]he paragraphs are in my opinion, subject to s. 18 (a) of ATIPP".

d. She identifies that some of the information in the Record is not covered by solicitor-client privilege because it is policy or practical advice.

e. She identifies that the Record is the LSB internal guidance document for responding to ATIPP requests.

f. She identifies that she is an employee of the Department in the LSB and that she prepared these paragraphs based on a request from her Assistant Deputy Minister of LSB for legal advice about the application of the ATIPP Act to LSB lawyers' files.

g. She describes the contents of the paragraphs as "the legal status of solicitor client privilege in Canada generally and Yukon specifically" adding that "they provide legal advice about the interaction between ATIPP and solicitor client privilege".

[56] The evidence she provides about the confidentiality of the advice is as follows.

a. "[t]he Department of Justice, through the Attorney General, The Deputy Attorney General, and through lawyers employed in the Department of Justice through Legal Services Branch (LSB), provides legal advice and services to the entire Government of Yukon".

b. "[t]his legal advice was in my opinion, intended to be kept confidential. To the best of my knowledge these paragraphs have not be [sic] disclosed outside the Government of Yukon"; and

c. "[t]hese Paragraphs, are in my opinion, subject to s. 18(a) of ATIPP."

[57] Some of the evidence provided by Ms. Overington about the confidentiality of the Record is general and unhelpful. She does, however, specifically state that it is her "opinion" that the advice was intended to be confidential but provides nothing more about how she formed this opinion. Having reviewed the Record, there is nothing on it to suggest that it is confidential.

[58] It would have been useful for Ms. Overington to provide more detail about why she believes the advice was intended to be confidential given that there is nothing on the Record to suggest that it is confidential and the fact that the Record was stored in a location that is accessible to all YG departments and third parties (see discussion below). According to the framework established by Justice Steeves, whose decision is not binding on me but is persuasive, I owe deference to the evidence put forth by Ms. Overington in her statutory declaration wherein she declares that the Record was intended to be kept confidential. Based on this evidence and the deference owed, it is not open to me to go behind this evidence to presume some other alternative than what is before me.

[59] Given the foregoing, I find that the Department has met the third part of the Solosky test and that the information that was separated or obliterated from the Record does qualify as information that is subject to solicitor-client privilege.

[60] Before going on to Issue Two, I must determine if the Department waived its privilege given that there is evidence in the statutory declarations to suggest that waiver may have occurred.

Did the Department waive the privilege?

[61] In Ms. MacDonald's statutory declaration, she stated the following.

> *The record in question is normally kept in electronic format on the Department of Justice's intranet at http://internal.gov.yk.ca/depts/jus/411.html;*
>
> *That intranet location is not accessible from the internet and is only accessible by persons with access to Government of Yukon's internal network and is not* intended for public access;[54]

[62] Ms. Overington stated the following in her statutory declaration.

> *"To the best of my knowledge these paragraphs have not been disclosed outside the Government of Yukon;"*[55]

[54] MacDonald Statutory Declaration, at paras 2 and 3.
[55] Overington Statutory Declaration, on pg. 2, at para. 11.

[63] The intranet referenced by Ms. MacDonald is operated by YG. Each department operates its own section of the intranet, *i.e.*, a separate site as part of one web application.

[64] YG's collection of these sites is called Yukonnect. A shared front-page for Yukonnect provides for navigation, indexing and search across the separate departments' operated intranet sites. Any person or organization with a YNet account can by default access Yukonnect. As of the date of writing this Inquiry Report, there are many thousands[56] of YNet accounts in existence, in addition to XNET and YESNET accounts with access. Many of these accounts are attached not just to YG employees but also to organizations and individuals that are not part of YG, including legislative officers' offices, and the Legislative Assembly.

[65] Yukonnect, which is an instance of a SharePoint web application, functions for departments as a document sharing and management system. It provides employees and other account holders (*e.g.*, contractors) with the ability to store documents and share them with those who have access. Yukonnect enables those with access to search and locate documents. Yukonnect provides the ability to restrict access to documents based on the discretion of the document owner. The default is open access unless the restrictions are applied by the document owner.[57] Any YNet account holder can access documents stored in SharePoint via the Yukonnect portal if access to the document is not restricted.

[66] The Department did not provide any submissions on waiver in its initial submissions. It did, however, provide the following information in response to a letter I wrote to the Department requesting additional evidence about the storage of the Record on Yukonnect.

> *So far as I can gather from my review of this file, there has never been any suggestion that solicitor-client privilege did not initially attach to the redacted portions of this document. As reflected in the questions posed in your 28 February 2020 letter, the point of your further investigation is whether privilege was waived when a copy of the document was posted on the Department of Justice's internal intranet site.*
>
> *The Department of Justice's view is that, as a matter of law, the posting of the document on the intranet site cannot possibly have waived the privilege in this factual context.*
>
> *In your letter, you assert that the Justice intranet site was, theoretically, accessible to anyone who held a Government of Yukon YNET account, which included many people who were not Government of Yukon employees. However, even assuming that access by someone not covered by the "client" half of the solicitor-client category was therefore*

[56] An estimated 6000 YNET accounts are linked to unique users in addition to service and system accounts.
[57] See the Microsoft reference for how this process works https://support.office.com/en-us/article/customize-permissions-for-a-sharepoint-list-or-library-02d770f3-59eb-4910-a608-5f84cc297782

possible during the time the document was available on the site, that mere possibility is irrelevant to the existence of the privilege.

At a minimum, waiver by disclosure requires an actual disclosure. The theoretical possibility of a disclosure does not constitute a disclosure for the purposes of waiving privilege-and there has never been any suggestion from your Office that any one of the non-client parties who might, theoretically, have had access to the document ever actually did get access.

Moreover, even if there had been an actual disclosure, inadvertent disclosure (which this very clearly would have been} does not waive the privilege. The waiver of solicitor-client privilege by disclosure requires both a disclosure and an intention to waive the privilege by that disclosure. The statutory declarations already filed in this matter are explicit that there was never any intention on the part of the client to waive privilege. Indeed. the sworn declarations explicitly say precisely the opposite.

In summary, then:

1. *Your Office has never suggested that solicitor-client privilege did not initially cover the redacted material (and there is explicit sworn evidence to support the assertion of privilege).*

2. *There is explicit sworn evidence establishing that there was never any intention to waive that privilege.*

3. *There is no evidence that there ever was an actual disclosure.*[58]

[67] A recent decision, *Nova Scotia (Attorney General) v. Cameron* (*NSAG v. Cameron*),[59] issued by the Nova Scotia Court of Appeal (NSCA), sets out the current law in Canada on waiver of solicitor-client privilege. In that case, a former lawyer who was employed with the Government of Nova Scotia Department of Justice, alleged that his former employer damaged his reputation and professional integrity by making public statements about his acting without instruction on a particular file. The lawyer sought to disclose privileged communication between himself and the Nova Scotia Government (NS Gov) to defend his actions, which request was refused. The lawyer's position was that the privileged communications associated with the case was impliedly waived by the NS Gov.

[58] Letter from I.H. Fraser, Counsel, Litigation Group, dated September 11, 2020.
[59] 2019 NSCA 38 (CanLII), leave to appeal to the Supreme Court of Canada refused.

[68] Farrar, J.A., writing for the majority, began by setting out the leading case in Canada on waiver of privilege.

> *The leading decision on waiver in this country is that of McLachlin J. (as she then was) in S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd., 1983 CanLII 407 (BC SC), [1983] B.C.J. No. 1499 (S.C.). Professor Adam M. Dodek summarizes the decision in his text, Solicitor-Client Privilege (Markham: LexisNexis Canada Inc., 2014), as follows:*
>
> > ***§7.107*** *… McLachlin J. laid out the test for both explicit and implied waiver. Waiver occurs where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. Waiver may also occur in the absence of intention to waive, "where fairness and consistency so require". This second set of principles applies to implied waiver. As the terms indicate, "fairness and consistency" are open-ended concepts and there are various scenarios where implied waiver may arise …*[60]
> >
> > [Emphasis in original]

[69] Justice Farrar went on to address and ultimately dismiss the arguments of NS Gov that the waiver of solicitor-client privilege is restricted to just three circumstances, that implied waiver can only arise where there is ongoing litigation, and that there is no societal values test for implied waiver. Below I have included information from the decision that is relevant to the matter before me.

[70] On the restriction argument he stated:

> *There is no suggestion in S. & K. Processors that implied waiver is somehow "restricted" to the three types of cases described by the Province in its factum, or that "fairness and consistency" is limited to the type of cases described by it. As Professor Dodek notes, the language of fairness and consistency is open-ended to encompass the various scenarios where implied waiver may arise.*[61]

[71] On the requirement for ongoing litigation for implied waiver he stated:

> *The application judge canvassed the law of implied waiver and found that the Province's Statements impliedly waived privilege (¶38-54). In doing so, he rejected the Province's argument that implied waiver cannot arise without existing litigation (¶54). The application judge supported his decision by*

[60] *Ibid.*, at para 30.
[61] *Ibid.* at para 32.

> *referencing two freedom of information cases: Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General), 2007 NLTD 172 and Peach v. Nova Scotia (Transportation and Infrastructure Renewal), 2010 NSSC 91, which did not involve ongoing litigation and which concluded that solicitor-client privilege had been waived (¶53).*[62]

[72] He dismissed the NS Gov's position that ongoing litigation is a requirement for implied waiver and stated the following, referring to Professor Dodek's explanation about waiver in "*Solicitor-Client Privilege*":

> ***§7.1*** *… Waiver involves situations where a lawyer or client has taken some subsequent action which calls into question the continuing intention to keep their communications confidential or is inconsistent with that intention. Waiver is the flip side of the "made in confidence" requirement for the privilege to attach in the first place. As discussed in Chapters 2 and 5, confidentiality is the sine qua non of privilege [citing Blank v. Canada (Minister of Justice), 2006 SCC 39 (CanLII), 2006 S.C.J. No. 39, at para. 32]. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege.*[63]

[73] He then added:

> *Simply put, waiver involves ending the confidentiality that would otherwise cloak solicitor-client privilege. Ending that confidentiality can happen expressly or impliedly. In the following passages, Professor Dodek explains express waiver, implied waiver, and the difficulty inherent in distinguishing the two:*
>
> > ***§7.5*** *Courts use the terms "expressly", "voluntarily" and "explicitly" interchangeably to refer to the situation where the client openly decides to waive the privilege over part or all of their confidential communications with their solicitor…*
> >
> > ***§7.6*** *For there to be express waiver, it must be shown that the privilege-holder: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it. This test was set out by McLachlin J (as she then was) in … S. & K. Processors … and remains the leading authority on the issue of both express and implied waiver…*
> >
> > *[…]*

---

[62] *Ibid.,* at para. 47.
[63] *Ibid.*, at para. 49.

> ***§7.104*** *… "implied waiver" refers to the situation where a party does not explicitly waive the privilege but takes some action that is inconsistent with maintaining the privilege….*
>
> *[…]*
>
> ***§7.105*** *The line between explicit and implied waiver is frequently blurry. What the courts refer to as "waiver by conduct" is sometimes considered explicit waiver and at other times as "implied waiver". The label attached to the waiver is far less important than the analysis and the consequences: the loss of privilege and the revelation of confidential lawyer-client communications.*
>
> ***§7.106*** *… Thus, the common characteristic of all types of waiver is some voluntary action on behalf of the privilege holder that is inconsistent with continuing to protect the privilege.*
>
> ***§7.107*** *In S. & K. Processors… McLachlin J. laid out the test for both explicit and implied waiver… Waiver may also occur in the absence of intention to waive, "where fairness and consistency so require." This second set of principles applies to implied waiver….*[64]

Waiver involves conduct inconsistent with confidentiality. Such conduct can be express, or it can be implied. The focus of the analysis is on the conduct of the person who holds the privilege and whether they waive it by doing something which is inconsistent with continuing to protect it. [65]

[Emphasis in original]

[74] On the argument about societal values and implied waiver, Justice Farrar agreed with the finding of the trial judge that solicitor-client privilege is not absolute and will yield to other societal values, noting that the trial Judge's words were taken from Cory, J., in *Smith v. Jones*, who stated *inter alia* that:[66]

> *Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal*

[64] *Ibid.*, at para. 50.
[65] *Ibid.*, at para. 51.
[66] 1999 CanLII 674 (SCC).

> *system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.*[67]
>
> [Emphasis in original]

[75] In response to the NS Gov's argument that there must be some manifestation of voluntary intention to waive the privilege to some extent where fairness has been held to require implied waiver,[68] Justice Farrar stated that:

> *Considerations of "fairness and consistency" are central to the doctrine of implied waiver in all of its manifestations, not just where some aspect of privilege has already been waived. They apply in the case of an unintended implied waiver based on partial disclosure by the privilege holder and they apply equally in the case of an unintended implied waiver based on the privilege holder impugning the advice or conduct of his or her lawyer.*
>
> *This is clear from a reading of the entire paragraph of McLachlin J.'s decision in S. & K. Processors, and not just that portion cited by the Province. The whole of ¶10 is as follows:*
>
> > *[10] Notwithstanding the fact that the Evidence Act, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their disclosure? As pointed out in Wigmore on Evidence (McNaughton Rev., 1961), vol. 8, pp. 635-36, relied on by Meredith J. in Hunter v. Rogers supra, double elements are predicated in every waiver--implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. In Hunter v. Rogers, supra, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In Harich v. Stamp (1979), 1979 CanLII 1904 (ON CA), 27 O.R. (2d) 395, it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.*

[67] *Ibid.,* at para. 54.
[68] *Ibid.* at para 58.

[Emphasis in original]

The passage from Wigmore on Evidence, McNaughton Rev., 1961, relied on by Meredith J. in Rogers v. Hunter (1981), 34 B.C.L.R. (S.C.) (which McLachlin J. referenced) provides as follows:

> *7…*
>
> *What constitutes a waiver by implication?*
>
> *Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, ie., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.*
>
> [Emphasis added]

The words from Wigmore on Evidence, underlined above, confirm that a privileged person's intention does not control the operation of implied waiver. Rather, it is considerations of fairness, referencing the "objective consideration" of the privileged person's conduct, which govern.

I do not accept, as the Province suggests, that fairness considerations arise only where some aspect of privilege has already been voluntarily waived. Justice McLachlin did not state any such limitation. Indeed, that argument would make a privileged person's intention, rather than their conduct, the controlling consideration and would effectively eliminate the doctrine of implied waiver. [69]

[76] I will first address the submissions by the Department. The Department asserts that the Record was "theoretically" accessible. According to the evidence, the Record was stored on Yukonnect and accessible by anyone with a YNet account, including the Department, employees in other YG departments, and third parties. There is nothing theoretical about this fact. The Department indicates that the fact that the Record was accessible on Yukonnect does not amount to disclosure. On the facts before me, I disagree that there is a distinction on

[69] *Ibid.,* at paras. 58 to 62.

whether access in this case amounts to a disclosure. The meaning of "disclosure" in the Oxford online dictionary is "[t]he action of making new or secret information known".[70] In my view, the act of storing the Record on Yukonnect which is accessible by thousands of persons amounts to the action of making the information in the Record known to those persons. The situation is akin to publishing a record on a website. Doing so makes the information known to those who choose to access it.

[77] Whether the act of storing the Record on Yukonnect amounts to waiver of the privilege is a different matter.

[78] The Department acknowledged that the Record was stored on Yukonnect. It submitted that there is no evidence that the Record was accessed by YNet account holders beyond the Department. It provided no evidence to support this assertion.

[79] The cases on solicitor-client privilege referenced herein make it clear that solicitor-client privilege is foundational to the proper functioning of our legal system in Canada and must be nearly absolute. Once established, privilege is broad and all-encompassing, and it should only be set aside in the most unusual circumstances.

[80] As indicated in *NSAG v. Cameron*, the foundation of express waiver is knowledge and intention. Express waiver will have occurred where the possessor of the privilege knows about the existence of the privilege and voluntarily evinces an intention to waive the privilege. Waiver can also be implied from conduct.

[81] It is clear from the evidence that the Department did not expressly waive its privilege to the information in the Record that is subject to solicitor-client privilege. However, it may have impliedly waived the privilege.

Did the Department impliedly waive its privilege over the information in the Record that is subject to solicitor-client privilege?

[82] As indicted, the evidence provided is that the Department stored the Record on Yukonnect. I infer from the evidence that this storage was intentional. The Department provided no evidence to support its assertion that the Record was not accessed by any third party. The employees in other YG departments are third parties to the solicitor-client relationship, as are those parties external to YG as it relates to the privileged communication in the Record that is between Ms. Overington and the Department. There is nothing on the Record to suggest that it is confidential or that its contents are subject to solicitor-client privilege.

[70] Oxford dictionary online at https://www.lexico.com/definition/disclosure.

[83] The cases in *NSAG v. Cameron* establish that it is the conduct of the possessor of the privilege and fairness and consistency that must be assessed when determining whether the possessor of the privilege has impliedly waived its privilege.

[84] Because the Department stored the Record in a location that was widely accessible by third parties, the Department has taken an action which calls into question its intent to keep the privileged information in the Record confidential, as its actions are inconsistent with that intention.

[85] This is not a case where the Department partially disclosed the privileged information in the Record. Here, the entirety of the privileged information was made accessible on Yukonnect which, as stated, was accessible by thousands of persons within and external to YG. The Department cannot rely on its position that it had no intent to disclose the information in the Record to third parties where the evidence provided indicates the contrary.

[86] Fairness and consistency must be considered as part of implied waiver. In my view, because of its conduct, the Department made the Record widely accessible to third parties and, in doing so, has touched the point of disclosure of the privileged information. Fairness and consistency require, therefore, that the privilege cease whether it intended that result or not.

[87] However, there is an exception to the implied waiver of privilege that I will consider before making my finding on whether the privilege in the information in the Record has been waived by the Department.

[88] The common interest exception to waiver of privilege was articulated in a recent decision by adjudicator Faughnan in Ontario (Finance)(Re) as follows.[71]

> *The common interest exception to waiver of privilege*
>
> *In Order PO-3154, I reviewed the case law pertaining to a determination of whether the common interest exception to waiver of privilege exists in the context of a commercial transaction. I reviewed Pritchard v. Ontario (Human Rights Commission), where Major J., for the Supreme Court of Canada stated:*
>
> > *The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R. described it in Buttes Gas & Oil Co. v. Hammer (No. 3), [1980] 3 All E.R. 475 (C.A.) at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the*

[71] 2019 CanLII 82865 (ON IPC), at paras. 118 to 122.

> *parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations…*

I wrote at paragraph 27:

> *Although the doctrine of common interest privilege is characterized in a number of ways in the jurisprudence cited by the parties, in the absence of a fiduciary or like duty, including trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue in the appeal before me, my view is that the argument is better framed as to whether there is a common interest that is sufficient to withstand waiver of any solicitor-client privilege that might have existed in the information…*

I also referred to Order MO-1678, in which Adjudicator Donald Hale reviewed the authorities as they existed then and wrote:

> *In the present appeal, it is clear that although the Municipality and the plaintiffs are all concerned about the noise created by the Dragway, they do not have the "selfsame" interest. For example, the plaintiffs would share in any award of damages, while it appears that the Municipality would not. However in my view, the fact that the interests are not identical is not a bar to the existence of a common interest in the context of the Canadian authorities. …*
>
> *Other Canadian authorities also indicate a broader basis for common interest, which may exist outside the context of litigation privilege and encompass situations involving solicitor-client communication privilege. For example, in Canadian Pacific Ltd. v. CNADA (Competition Act, Director of Investigation and Research), [1995] O.J. No. 4148 (Gen. Div.), Farley J. found that common interest privilege could apply to communication by a bank's outside counsel with a third party in the context of a commercial transaction. He formulated the following test for common interest (at para. 27):*
>
> > *It would also seem to be that a useful test might be whether for there to be a common interest, would it be reasonably possible for the same counsel to represent both…*
>
> *And in Pitney Bowes of Canada Ltd. v. Canada, [2003] F.C.J. No. 311 (T.D.), the court dealt with a situation in which various companies were*

parties to a complex leasing transaction involving both the purchase and subsequent leasing of railway cars. One law firm represented all the parties at one time or another, "where multiple parties need legal advice in areas where their interests were not adverse." The Court applied common interest privilege and stated (at para. 18):

> *As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost – through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure. I read the foregoing cases as authority for the proposition that in certain commercial transactions the parties share legal opinions in an effort to put them on an equal footing during negotiations as, in that sense, the opinions are for the benefits of multiple parties, even though they may have been prepared for a single client. The parties would expect that the opinions would remain confidential as against outsiders. In such circumstances, the courts will uphold the privilege.*

I went on to articulate the following test at paragraph 179 of PO-3154:

> *… the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:*
>
> *a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under Branch 1 of section 19(a) of the Act, and*
>
> *b) the parties who share that information must have a "common interest", but not necessarily [an] identical interest.*

I also referenced Pitney Bowes, cited above, and wrote at paragraph 180 that the determination of the existence of a common interest is highly fact-dependent.

[Citations omitted]

[89] An example cited by Adjudicator Faughnan where the common interest exception applied to privileged communications being disclosed to third parties is summarized below.

a. A solicitor and client privilege relationship existed between the Government of Ontario's Assistant Deputy Attorney General and the Ministry's Assistant Deputy Minister in regard to a memorandum.

b. The memorandum was shared with the Ontario Chiefs of Police.

c. The interest of the Crown Attorneys, the Ministry and the Chiefs of Police are not identical as they each play different roles in the administration of criminal justice.

d. They share a common interest in having a uniform understanding of the state of law on the particular point in issue and a uniform approach to its administration as evidenced by the content of the memo.

e. The words "privileged and confidential" appear on the memo, thus indicating it is to remain confidential against others.

f. The common interest negates the waiver of the privilege that would otherwise have occurred by its disclosure to persons outside the solicitor-client relationship.

g. The context in which the document was provided to the Chiefs of Police demonstrated there existed a common interest in the confidential communications:

    i. they share a common interest in matters relating to law enforcement and administration of justice generally; and

    ii. the memo describes a confidential opinion that was shared with the Chiefs because of their common interest with Attorney General and the Ministry in law enforcement matters.

h. Disclosure to the Chiefs did not constitute a waiver of privilege that existed in the document.[72]

[90] I already found that the Record contains information that is subject to solicitor-client privilege. The Record was stored on Yukonnect, making it accessible to all employees in YG departments across YG and third parties external to YG. I inferred that this storage was intentional. The solicitor-client relationship of the Record is between Ms. Overington and the Department. It is not between Ms. Overington and all those with a YNet account with access to Yukonnect.

[72] *Ibid.*, at paras. 123 to 125.

[91] Based on the test of common interest and the case examples set out above, I accept that there are certain employees in other YG departments, such as senior officials and ATIPP coordinators, that would have a common interest in the privileged information in the Record. The advice is about how the ATIPP Act applies to records containing solicitor-client privilege information. While the advice is for the LSB Lawyers in the Department, given that they are involved in decision-making associated with whether to claim the subsection 18 exceptions, the decision about whether to claim the exception or not is up to the public body, not the LSB Lawyers. As such, certain individuals in other YG departments that are involved in making decisions about access to information under the ATIPP Act would share a common interest with the Department in understanding the basis on which LSB Lawyers make decisions about the section 18 exception.

[92] However, I do not accept that there is a common interest with all YG employees in departments across YG and those external to YG who had access to the privileged information in the Record via their access to Yukonnect.

[93] Based on the foregoing, I find that the Department impliedly waived its privilege to the information in the Record that was subject to solicitor-client privilege.

[94] As a result of my finding, I do not need to consider Issue Two.

IX FINDINGS

[95] On Issue One, I find the Department has not met its burden of proving that subsection 18 (a) applies to the information that was separated or obliterated from the Record and is not, therefore, authorized to refuse access to this information.

[96] I did not consider Issue Two for the reasons above noted.

X RECOMMENDATIONS

[97] On Issue One, I recommend that the Department provide the Applicant with access to the information the Applicant is entitled to. For the sake of clarity, the Applicant is entitled to access the Record in full, without any separations or obliterations.

Public Body's Decision after Review

[98] Subsection 58 (1) of the ATIPP Act[73] requires the Department to decide, within 30 days of receiving this Inquiry Report, whether to follow my recommendations. The Department must give written notice of its decision to me and the parties who received a copy of this report, noted on the distribution list below.

[99] If the Department does not give notice of its decision within 30 days of receiving this report, then it is deemed to have refused to follow my recommendations.

[100] If the Department does not follow my recommendations, then it must inform the Applicant, in writing, of their right to appeal that decision to the Yukon Supreme Court.

Diane McLeod-McKay, B.A., J.D.
Information and Privacy Commissioner

Distribution List:

- Department
- Applicant

Postscript

[101] The Department raised an issue about the practice of my Office to redact from submissions received from the parties, information about determinations or other decisions made by my investigators during the settlement phase of a review under section 48 of the ATIPP Act. After receiving the submissions of the Department and reviewing them, the Registrar informed the Department that they redacted from their submissions "reference to discussions which occurred between you and the investigator during the informal case resolution process". The Registrar explained that "[i]n order to ensure an unbiased inquiry, the [IPC] is not privy to settlement discussions from the informal case resolution process. As such, these references were redacted prior to providing the applicant and the [IPC] a copy".

[73] The ATIPP Act, R.S.Y. 2002, c.1 applies in respect of this Review, see subsection 130 (3) of the *Access to Information and Protection of Privacy Act*, SY 2018, c.15.

[102] The Department objected to the redaction of its submissions, highlighting that section 51 authorizes the IPC to try to settle or may authorize a mediator to investigate and try to settle a matter under review, and that subsection 52 (1) authorizes the IPC to conduct an inquiry if a matter under section 51 is not settled. Both authorities are discretionary, meaning that the IPC may decide to conduct either or both.

[103] The Department indicated that the Registrar made an error by suggesting the lawyer who wrote the submissions conversed with the investigator during the settlement phase of the review. The Department is correct that this information was inaccurate, and that the conversation was between the investigator and the Department's ATIPP coordinator as the Department pointed out. It was this information that was redacted from the Department's submissions.

[104] I agree with the Department that the provisions referenced indicate that the IPC or one of her investigators may try to settle a matter under review, and if settlement fails, then the IPC may conduct an inquiry. In my view, a perception of bias could arise if during the inquiry phase of a review, the IPC were privy to discussions during the mediation phase.

[105] To avoid the perception of bias that could arise in these circumstances, my Office has a process that separates the mediation process from the inquiry process. To my knowledge, this process of separation has been in place since the Office of the Information and Privacy Commissioner began its operations in the 1990s. In my view, the adopted process is an essential component of ensuring that the mediation and inquiry phases are conducted in a procedurally fair manner.

[106] The separation of the mediation phase of a review from the inquiry phase is common in offices of information and privacy commissioners across Canada.

[107] In an effort to avoid information from the settlement phase of a review being included in a party's submissions for an inquiry, we provide the parties with instruction on how to make submissions. Moreover, we inform them that no information about the settlement process should be included in the inquiry submission.[74] This instruction is provided through an FAQ for written inquiries that we provide to parties when a Notice of Inquiry is issued.

[74] *Access to Information and Protection of Privacy Act* (ATIPP Act), Frequently Asked Questions for Written Inquiries, at p. 4, located on the IPC's website at: https://www.yukonombudsman.ca/uploads/media/5b5623e7c52d1/FAQs%20for%20Written%20Inquiries.pdf?v1