-S105020

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 49 (CENTRAL COAST)

PETITIONER

AND:

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER and CHARLES BRYFOGLE

RESPONDENTS

Petition to the Court

Name and address of each Petitioner:

The Board of Education of School District No. 19 (Central Coast)
PO Bag 130
Hagensborg, BC V0T 1H0

Name and address of each Petition Respondent:

Office of the Information and Privacy Commissioner
3rd Floor, 756 Fort Street
Victoria, BC V8W 1H2

Charles Bryfogle
PO Box 273
Hagensborg, BC V0T 1H0

On notice to:

Attorney General of British Columbia
Legal Services Branch
6th Floor, 1001 Douglas Street
Victoria, BC V8V 1X4

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

a. file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

b. serve on the petitioner(s)

   i. 2 copies of the filed response to petition, and

   ii. 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

a. if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you;

b. if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you;

c. if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or;

d. if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is:	The Law Courts 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The address for service of the Petitioner is: Fax number for service (if any) of the Petitioner:	c/o Harris & Company LLP (604) 684-6632

(3)	The name and office address of the Petitioner's lawyer is:	Harris & Company LLP Barristers and Solicitors 14th floor Bentall 5 550 Burrard Vancouver, BC V6C 2B5 Attention: Keith E.W. Mitchell

Claim of Petitioner

Part 1: Order(s) Sought

1. An order quashing those portions of Order No. F10-19 of the Acting Information and Privacy Commissioner dated June 7, 2010, that allow the Respondent Charles Bryfogle partial access to the disputed records;

2. An order declaring that the Respondent Bryfogle is not entitled to access any portion of the disputed records;

3. In the alternative, an order referring the question of the Respondent Bryfogle's access to the disputed records back to the Acting Information and Privacy Commissioner, with directions that prohibit any disclosure of the disputed records;

4. As against the Respondent Bryfogle, costs; and

5. Such further and other relief as this Honourable Court considers just.

Part 2: Factual Basis

1. Since 2003, the Respondent Bryfogle has been a plaintiff in a number of civil proceedings in which the Petitioner has been a defendant. Bryfogle was declared a vexatious litigant by order of Mr. Justice Meiklem on April 2, 2007, which decision was upheld by the Court of Appeal on June 5, 2009.

2. In certain of those proceedings, Bryfogle made certain allegations against the Petitioner, its trustees and its Superintendent, alleging, among other things, that the Defendants had been derelict in their duty to manage public funds by allowing the Superintendent of Schools to

expend public money on legal fees to defend legal proceedings commenced by Bryfogle against the Superintendent.

3. On or about February 20, 2004, Bryfogle requested the Petitioner disclose records relating to litigation proceedings and public expenditure of funds.

4. The Petitioner identified various records as responsive to the request, including those described below which are in issue on this application for judicial review.

5. On February 9, 2006, the Petitioner withheld a number of records from disclosure on the basis that they were protected by solicitor client privilege and could be properly withheld under section 14 of the Freedom of Information and Protection of Privacy Act.

6. The records remaining in issue at this time are:

   a. Two pages of a computer printout labelled "G/L Account summary" which shows budget numbers and a lump sum of expenditures of an account described as "OPER-BUS ADMIN-LEGAL-NON" ("Document 1").

   b. Two computer printouts labelled "Vendor Inquiry", one dated 2003 and one dated 2004. Each has the name of the law firm who rendered invoices handwritten on the top (Document 2).

7. On February 27, 2006, Bryfogle requested a review of the Petitioner's decision to withhold the records in question and other records.

8. The parties engaged in a mediation process with the assistance of a Portfolio Officer from the Office of the Information and Privacy Commissioner. As a result of the mediation process, further records were disclosed, but no records over which solicitor client privilege was claimed were disclosed.

9. On January 26, 2007, Mr. Bryfogle wrote to the Petitioner requesting the same type of records as those withheld from his original request, for the years 2005-2007. Specifically, Bryfogle requested:

a. Contracts for legal services for litigation or grievances;

b. Authorizations of expenditures of public funds for litigation or grievances; and

c. Documents showing disclosure of these contracts and expenditures of public funds.

10. On January 29, 2008, the Petitioner responded to Bryfogle by letter that the records were being withheld under section 14 of FOIPPA.

11. The Petitioner has never waived privilege over the records in issue.

12. On March 27, 2007, the Petitioner brought an application before the Office of the Information and Privacy Commissioner, asking the Commissioner to exercise his discretion under section 56(1) of the FOIPPA to decline to proceed with an inquiry under part 5 of the FOIPPA in relation to Bryfogle's access to information requests.

13. On April 19, 2007, Bryfogle responded to the application.

14. On April 26, 2007, the Petitioner responded to Bryfogle's submission.

15. On September 7, 2007, an Adjudicator delegated the task of addressing the application denied the Petitioner's request and referred the matter to an Inquiry.

16. On March 19, 2008, the Portfolio Officer issued the Portfolio Officer's Fact Report.

17. The Inquiry proceeded on the basis of written submissions, between March 19, 2008 and April 25, 2008.

18. Before the Commissioner, various provisions of the FOIPPA were in issue. On this petition, the only provision relevant is section 14 (legal professional privilege).

19. The Petitioner provided copies of the documents over which privilege was claimed to the Acting Information and Privacy Commissioner *in camera.* The Petitioner and Bryfogle each made written submissions on the Inquiry and each replied to the submissions of the other.

20. The Acting Information and Privacy Commissioner issued his Order on June 7, 2010.

21. The Acting Information and Privacy Commissioner decided:

a. The Supreme Court of Canada decision in *Maranda v. Richer* 2003 SCC 67 confirms that the amount of legal fees of a client is, as a general rule, information that is protected by solicitor client privilege;

b. Context may be an important factor in assessing the privilege which attaches to information about legal fees;

c. The presumption that privilege applies to information about legal fees is rebuttable;

d. The presumption is rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privileged;

e. The question must be approached from the perspective whether an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged communications;

f. The applicant is not obliged to make submissions to rebut the presumption. The Commissioner can consider the nature of the information and the circumstances and context to determine if the presumption is rebutted;

g. By contrast, the Acting Information and Privacy Commissioner held that the School District must provide a factual foundation to allow for a determination that the presumption of privilege attaches to the document at all;

h. The Acting Information and Privacy Commissioner could not determine that Document 1 revealed anything about attorney's fees at all or that the disclosure of the document "would disclose anything about attorney's fees at all" or reveal privileged communications or "interfere with the ability of the government to communicate with counsel in confidence" and the School District was not authorized to withhold the record based on section 14 of the FOIPPA; and

i. The Petitioner was not authorized to withhold the total amount spent on legal fees during a particular period and disclosure of such information would not reveal or allow anyone to deduce privileged communications.

22. In respect of the remaining documents, the Acting Information and Privacy Commissioner concluded the Petitioner was entitled to rely upon section 14 and withhold the records.

Part 3: Legal Basis

23. This petition is brought pursuant to sections 2, 3, 7 and 10 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and Rules 16-1, 14-1 and 20-4 of the Supreme Court Civil Rules.

24. The basis upon which the Petitioner seeks the relief set out above is that the Acting Information and Privacy Commissioner erred in law, or alternatively, exceeded his jurisdiction, in holding that the Petitioner could not rely upon section 14 of the *Freedom of Information and Protection of Privacy Act* to withhold access to certain records from the Respondent Bryfogle.

25. More particularly, the Acting Information and Privacy Commissioner erred in failing to follow the previous decisions of the Commissioner or Delegate, and of the British Columbia courts, including decisions which post-date *Maranda*, such as the decision of the previous Information and Privacy Commissioner in Order O5-07 which established that it was beyond doubt in British Columbia that the total amount of legal fees paid is protected by privilege and can be withheld under section 14, and in adopting a new approach to the determination of whether a record relating to legal fees is privileged.

26. Further, the Acting Information and Privacy Commissioner erred in holding that the Applicant need not lead evidence or provide argument to rebut the privilege, but that instead the Commissioner could independently determine whether the privilege was rebutted, taking into account the context.

27. The Acting Information and Privacy Commissioner further erred by concluding that a document identified by the Petitioner as responsive to the request could not be withheld under section 14 of the FOIPPA on the basis that the Acting Commissioner could not conclude that the document had anything to do with legal fees, despite having been identified as responsive to the request by the Petitioner.

28. Further, the Acting Information and Privacy Commissioner erred in concluding that the records themselves do not reveal information that is protected by privilege. The Petitioner says that the records do reveal privileged information.

Part 4: Material to be relied on

29. The affidavit of Scott McCann #1, made July 8, 2010;

The Petitioner estimates that the hearing of the Petition will take one day.

Dated: 8 July 2010

Signature of Keith E.W. Mitchell
Lawyer for the Petitioner

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this Petition

☐ with the following variations and additional terms:

_____

_____

_____

Date: _____ _____

Signature of ☐ Judge ☐ Master

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 49 (CENTRAL COAST)

PETITIONER

AND:

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER AND CHARLES BRYFOGLE

RESPONDENT

Petition to the Court

666049.989 KEWM/emv

HARRIS & COMPANY LLP

14th floor • 550 Burrard Street
Vancouver BC • V6C 2B5
Tel 604 684 6633

Attention: Keith E.W. Mitchell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427

Date: 20120323
Docket: S105020
Registry: Vancouver

Between:

The Board of Education of School District No. 49 (Central Coast)

Petitioner

And

Office of the Information and Privacy Commissioner and Charles Bryfogle

Respondents

On judicial review from: Order No. F10-19 of the Acting Information and Privacy Commissioner of British Columbia dated June 7, 2010

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Petitioner:	Keith E.W. Mitchell
Counsel for the Respondent, Office of the Information and Privacy Commissioner:	Catherine Boies Parker
The Respondent, Charles Bryfogle:	Appearing In Person
Written Submissions of the Petitioner:	November 30, 2011
Written Submissions and Reply of the Respondent, Office of the Information and Privacy Commissioner:	November 17 and December 9, 2011
Place and Date of Hearing:	Vancouver, B.C. June 29 and 30, 2011
Place and Date of Judgment:	Vancouver, B.C. March 23, 2012

[1] The petitioner, the Board of Education of School District No. 49 (Central Coast) (the "Board"), applies for judicial review of Order F10-19 (the "Order") issued by the Acting Information and Privacy Commissioner (the "Acting Commissioner"). In the Order, the Acting Commissioner decided that the Board of Education could not rely on s. 14 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "*Act*") to withhold certain records relating to the expenditure of legal fees on the basis of solicitor-client privilege.

[2] For the reasons that follow, I allow the Board's application for judicial review and order that the decision of the Acting Commissioner be quashed.

BACKGROUND

[3] Two requests were made by the Respondent, Charles Bryfogle, for access to information regarding the expenditure of public funds on legal fees by the Board. The first request was made in 2004 and the second request was made in 2007. The access requests arose in the context of ongoing legal proceedings between Mr. Bryfogle and the Board. In those proceedings, Mr. Bryfogle was declared to be a vexatious litigant: *Bryfogle v. School District No. 49*, 2007 BCSC 457, (aff'd) 2009 BCCA 256. Mr. Bryfogle alleged that the Board breached a duty, was negligent, or acted improperly in relation to the expenditure of legal fees to defend claims brought by Mr. Bryfogle.

[4] In response to the requests, the Board produced some records, but withheld others on the basis of exceptions in the *Act*: s. 12(3)(b) (local body confidences), and s. 14 (solicitor-client privilege). The Board initially relied on the exceptions in s. 17 and s. 22(1) in relation to some of the records, but subsequently abandoned that position.

[5] Mr. Bryfogle sought a review of the Board's decision to withhold certain documents. The Board requested, pursuant to s. 56 of the *Act*, that an inquiry not be held with respect to the documents withheld from disclosure under s. 14, on the basis that it was plain and obvious those documents were subject to solicitor-client privilege. In Decision F07-07, the adjudicator determined that the matter should proceed to an inquiry.

[6] At the inquiry, the Board provided unredacted copies of the documents to the Acting Commissioner *in camera*. The Board did not provide sworn evidence and offered very little description in its submissions regarding the nature of the withheld records.

[7] The Acting Commissioner, Paul Fraser Q.C., issued the Order on June 7, 2010. The categories of documents that were the subject of the inquiry are described at para. 5:

1. Minutes of school board meetings.
2. Two pages of a computer printout labelled "G/L Account summary" which shows

> budget numbers and a lump sum of expenditures of an account described as "OPER-BUS ADMIN-LEG—NON". One page has the heading "2003" and the other is headed "2004".
>
> 3. Invoices for legal services provided to the School District, divided into two batches, one relating to the period between July 2002 and March 2003, and one relating to the period between March 2003 and December 2003.
>
> 4. Two computer printouts labelled "Vendor Inquiry", one dated 2003 and one dated 2004. Each has the name of the law firm who rendered the invoices handwritten on the top. They appear to be summaries of the invoices noted above in item 3. Each summary is stapled to the batch of invoices to which it relates.

[8] The Acting Commissioner upheld the Board's decision to withhold the documents described in category 1 on the basis of the exception relating to local body confidences. The other categories of documents were withheld on the basis of s. 14. The Order contains a comprehensive review of the case law regarding solicitor-client privilege, including *Maranda v. Richer*, 2003 SCC 67, and relevant decisions of the Commissioner. The test the Acting Commissioner applied is found at para. 40:

> [40] ... I am prepared to accept, for the purposes of this case, that there is a rebuttable presumption that privilege does apply to information about lawyer's fees and disbursements. I also agree that the presumption will be rebutted "if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege." I also agree with Adjudicator Higgins that the following questions will be of assistance in this regard:
>
> > (1) Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege?
> >
> > (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[9] With regard to the documents withheld on the basis of s. 14, the Acting Commissioner made the following orders at para. 55:

- I confirm that the School District is authorized to withhold the information it withheld under s. 14 in the second category of records, namely the lawyers' bills of account.
- Subject to Para. 4 below, I confirm that the School District is authorized to withhold the information in the two pages of records called "Vendor Inquiry".
- I require the School District to disclose the total amount of payment and the name of the law firm as they appear on the documents titled "Vendor Inquiry".
- I require the School District to disclose the two pages titled "G/L Account Summary".

[10] With respect to the documents titled "G/L Account Summary" (the "G/L Account Summary Documents"), the Acting Commissioner stated as follows at para. 46:

> [46] The School District did not provide any evidence regarding what the numbers in

> this printout represent or their connection to any information that might be privileged under s. 14. Even if the onus is on the applicant to displace a presumption of privilege, the School District must still provide a factual foundation to allow for a determination that presumption of privilege attaches to the documents in issue. In this case, in the absence of any evidence or submissions on point from the School District, I am unable to conclude that these documents disclose anything about attorney's fees at all. I certainly cannot see how the disclosure of the documents would reveal privileged communications or interfere with the ability of the government to communicate with counsel in confidence and receive legal advice. In these circumstances, I find that the School District is not entitled to rely on s. 14 with respect to these records.

[11] With respect to the documents titled "Vendor Inquiry" (the "Vendor Inquiry Documents"), the Acting Commissioner noted that the records consist of "what appears to be a summary of the amounts paid on various dates with respect to various legal matters" (para. 49). He stated at para. 51 that "because the information request was not targeted at legal expenses relating to any particular matter, I must consider the impact of any disclosure on all matters in which the school board may have been advised". He concluded as follows at para. 52:

> [52] The documents at issue contain dates on which individual invoices were paid, the amounts of those individual payments and a description of the matters to which the services rendered relate. The documents also contain a global total for the amount spent during the period covered by the vendor inquiry. I am satisfied that the total amount expended can be released without revealing or allowing anyone to deduce any communications protected by the privilege. Rather, any speculation about how this might affect privileged information is, in the words of our Court of Appeal, only a "fanciful or theoretical possibility." Release of this figure will not provide any information about what was spent, much less what was done by counsel, on specific matters. I cannot see any realistic possibility that it would in way disclose privileged details of the School District's relationship with its counsel or "prejudice its right to communicate with counsel in confidence."

[12] In this petition, the Board seeks review of the decision to order disclosure of the records relating to the Vendor Inquiry Documents and G/L Account Summary Documents.

ISSUES

[13] I have considered the following issues:

1. Does the Commissioner have the jurisdiction to adjudicate claims of solicitor-client privilege where a public body has refused disclosure pursuant to s. 14 of the *Act*?

2. What standard of review should be applied to the decision of the Acting Commissioner?

3. Did the Acting Commissioner err in holding that the Board could not rely upon s. 14 of the *Act* to withhold the records? In other words, did the Acting Commissioner err by concluding that the records did not reveal information that is protected by solicitor-

client privilege?

[14] Under the third issue, the following specific sub-questions arise:

(a) Did the Acting Commissioner err by not following previous decisions and adopting a new approach to the determination of whether a record relating to legal fees is privileged under s. 14?

(b) Could the Acting Commissioner determine the privilege by taking the nature and context of the information into account, in the absence of submissions by Mr. Bryfogle to rebut the presumption of privilege?

(c) Where the Board has identified documents as being responsive to the request, could the Acting Commissioner order that the documents not be withheld on the basis that he could not conclude the documents had anything to do with legal fees?

(d) Did the Acting Commissioner err in concluding that the records themselves do not reveal information that is protected by privilege?

(e) In any event, did the Acting Commissioner err by premising his analysis on the presumption that he has jurisdiction to compel production of solicitor-client privileged records and independently review them prior to adjudicating the claim of privilege?

[15] I will address these issues in turn.

Issue 1: Does the Commissioner have the jurisdiction to adjudicate claims of solicitor-client privilege where a public body has refused disclosure pursuant to s. 14 of the *Act*?

Position of the Board

[16] The Board says the language of the *Act* should be considered in light of the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44. It argues that *Blood Tribe* makes it clear that the determination of the existence of solicitor-client privilege is a function that is reserved to courts except where legislation clearly grants another body the jurisdiction to adjudicate such claims. Here, it says that s. 44(3) is not sufficiently clear and precise so as to abrogate solicitor-client privilege, and therefore it cannot grant to the Commissioner the jurisdiction to adjudicate whether the Board is justified in relying on that privilege.

[17] In addition, the Board says that the Commissioner is not a neutral adjudicator. The Commissioner is an advocate for information and privacy rights, and the broad powers and duties set out in s. 42 go beyond the powers of a neutral adjudicator. Section 47(4) of the *Act*

authorizes the Commissioner to turn over records to the Attorney General if they relate to the commission of an offence. In such circumstances, the Board says, the Commissioner could actually become an adversary to the public body, rather than a neutral adjudicator.

[18] The Board also argues that the legislature could not have intended a lay adjudicator to rule on a legal right as fundamental as solicitor-client privilege without clearly stating so in the legislation. While the Order was made by Paul Fraser Q.C., a highly qualified, legally trained adjudicator, there is nothing in the *Act* that requires the Acting Commissioner to have legal training.

[19] Finally, the Board says that the adjudication of s. 14 solicitor-client privilege claims in the past cannot be the basis for jurisdiction to do so; the Commissioner cannot assume a jurisdiction that has not been granted by statute.

Position of the OIPC

[20] The OIPC says that the Board's reliance on *Blood Tribe* is misplaced. *Blood Tribe* considered the statutory scheme of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), which is quite different from the statutory framework of the *Act*. Pursuant to *PIPEDA*, the federal Privacy Commissioner has no adjudicative powers, whereas under s. 56(1) of the *Act*, the OIPC is specifically tasked with adjudicating access rights. Those adjudicative powers are in addition to the power granted to require production of documents.

[21] The OIPC submits that the recent decision in *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General*), 2011 NLCA 69 (the "*Newfoundland Appeal*"), properly distinguishes *Blood Tribe*. The Newfoundland legislation contains provisions relating to production of documents which are similar to the relevant provisions in the *Act*. The court found that the document production provisions were sufficiently clear to abrogate solicitor-client privilege.

[22] In any event, the OIPC says that this case is not concerned with the power to order production of documents because the Board produced the documents in question without the need for any order by the Commissioner. This case concerns the jurisdiction of the Commissioner to adjudicate privilege claims. That power does not derive from the Commissioner's power to order production of documents over which privilege is claimed, but rather, flows from the statutory framework of the *Act*. The OIPC argues that s. 56(1) confers a power to adjudicate; any person denied access to a document can request an inquiry into the matter under that section and the Commissioner is empowered to determine all matters of fact or law arising on the inquiry. The Commissioner is given the power to conduct an inquiry into

any refusal to produce documents based on one of the exceptions to disclosure, including the application of s. 14. This power is consistent with the purposes of the *Act*, which include ensuring a right of access to documents and providing for an independent review of decisions of public bodies.

[23] In reply to the Board's argument that the Commissioner is in an adversarial position, the OIPC says that the court in the *Newfoundland Appeal* took the proper approach to the provision in the Newfoundland legislation which is similar to s. 47(4) of the *Act*: The section is inapplicable to solicitor-client privileged documents. If that conclusion is reached, the Commissioner could never be adverse in interest to a party on an inquiry.

The Legislation

[24] The purposes of the *Act*, as set out in s. 2(1) are:

> ... to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> ...
>
> (c) specifying limited exceptions to the rights of access,
>
> ...
>
> (e) providing for an independent review of decisions made under this Act.

[25] Section 4 creates a right of access to records held by public bodies; however the right of access does not extend to information excepted from disclosure under Division 2 of Part 2. If that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record. Division 2 of Part 2 (which includes ss. 12 and 14) sets out exceptions to the requirement to provide access. Some are mandatory exceptions and some are discretionary exceptions. Section 14 is discretionary and provides:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[26] The powers and duties of the Commissioner are listed in s. 42. Section 42(1) provides that the Commissioner's responsibilities include conducting reviews, monitoring how the *Act* is administered to ensure that its purposes are achieved, conducting investigations to ensure compliance with the *Act*, making orders respecting records and information, informing the public about the *Act*, receiving comments from the public about the *Act*, commenting on various matters relating to access to information or protection of privacy, and authorizing the collection of personal information from sources other than the individual the information is about. Pursuant to s. 42(2), the Commissioner may also investigate and attempt to resolve various complaints.

[27] Section 47(4) provides that the Commissioner may disclose information if it relates to an offence:

> The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.

[28] Section 44 sets out the Commissioner's powers in conducting investigations, audits or inquiries:

> (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
>
> ...
>
> (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.
>
> (2) The commissioner may apply to the Supreme Court for an order
>
> (a) directing a person to comply with an order made under subsection (1), or
>
> ...
>
> (2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.
>
> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

[29] Section 56(1) provides for the conduct of inquiries by the Commissioner:

> If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

Analysis

[30] This issue was the focus of the detailed oral and written submissions on this judicial review, including the supplementary submissions delivered after the decision in the *Newfoundland Appeal*, even though the issue was not considered by the Acting Commissioner in the Order. As previously noted, the Board voluntarily produced for consideration by the Commissioner, those documents over which it claims privilege. The arguments advanced at the inquiry addressed the issue of whether the Board could refuse access to the information and documents in question on the basis of solicitor-client privilege. The issue as to whether the Commissioner has jurisdiction to adjudicate claims of solicitor-client privilege and order the production of documents over which solicitor-client privilege is claimed was not argued or considered. It has been raised for the first time in this petition. I understand that this is a case of first instance in the province.

[31] The OIPC does not take the position on this application that it is too late for the Board to raise this issue. However, in light of the recent decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, I should indicate why I have proceeded to consider an issue that was not raised before the Acting Commissioner.

[32] In *Alberta Teachers' Association*, the Teachers' Association raised on judicial review, for the first time, an argument that the Commissioner lost jurisdiction because of his failure to extend the time for completion of an inquiry in accordance with the Alberta *Personal Information Protection Act,* S.A. 2003, c. P-6.5. The decision to extend the time was implied, as the Commissioner was never called upon to rule on that issue, let alone provide reasons for that decision. The Supreme Court of Canada allowed the Commissioner's appeal. It decided that a court owes deference to a tribunal's decision, even where the decision is implicit. It determined that the standard of review was reasonableness and that it could determine whether a reasonable basis existed for the implied decision based on other decisions of the Commissioner and adjudicators appointed under the legislation.

[33] Justice Rothstein, in the majority reasons, noted that deference will usually be given where a tribunal is interpreting its own statute unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply. Those categories include constitutional questions, questions of law that are of central importance to the legal system as a whole, and, perhaps, questions of "jurisdiction or *vires"*. Justices Binnie and Cromwell, in separate concurring reasons, criticized the use of the terms "jurisdictional or *vires*" in the majority decision to describe issues which can, post-*Dunsmuir v. New Brunswick*, 2008 SCC 9*,* still be reviewed on a standard of correctness.

[34] In the present case, the Acting Commissioner's decision to consider whether the Board could refuse to produce the documents in question on the basis of solicitor-client privilege necessarily involves an implied decision: that the Commissioner has the jurisdiction to adjudicate questions of solicitor-client privilege. This is an implied decision regarding the interpretation of the Commissioner's home statute. In other words, it is a decision to which some deference might be expected. Nevertheless, both parties submit, and I agree, that the applicable standard of review for this issue is correctness.

[35] Given the position of the parties regarding the applicable standard of review, and the fact that this issue was not argued, I need not decide if this is one of the exceptional issues that goes to "jurisdiction or *vires*", as Rothstein J. would have it, or whether it is an issue that upon a full consideration of the legislative intent, must be determined correctly, as Cromwell J. would have it. It is, in my view, one or the other. Solicitor-client privilege is a fundamental substantive

right: *Blood Tribe* at para. 10. Whether the jurisdiction to determine that privilege has been granted to the Commissioner, or left to the courts, is a critical issue that the legislature must have intended be decided correctly. It is an issue that raises squarely the jurisdiction of the Commissioner. Accordingly, I will consider the issue on a standard of correctness and need not defer to the implied decision of the Acting Commissioner.

Solicitor-Client Privilege

[36] The Board's argument is founded on the importance of solicitor-client privilege. In *Blood Tribe*, Binnie J. prefaced his analysis with this succinct observation at para. 9:

> [9] Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice.

[37] While solicitor-client privilege started out as a rule of evidence, it is now unquestionably a rule of substance: *Blood Tribe* at para. 10. The substantive rule is set out in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications 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 extent 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.

[38] In *R. v. McClure*, 2001 SCC 14, the Court noted at para. 35:

> [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance.

[39] These principles must guide the approach to the interpretation of the *Act.* There is no question that the adjudication of a claim of solicitor-client privilege by the Commissioner amounts to an incursion of the privilege. The incursion is even greater if the Commissioner can also compel disclosure of records over which claims of solicitor-client privilege are made.

[40] In *Blood Tribe*, the Court determined that the provisions of *PIPEDA* did not grant the Privacy Commissioner the authority to compel production of documents for the purpose of

determining whether a claim of solicitor-client privilege was justified. At para. 2, the Court summarized its decision:

> [2] ... The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved for the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*.

[41] At para. 11, the Court noted that in order to give effect to the fundamental policy regarding solicitor-client privilege, legislative language that might permit incursions on the privilege must be interpreted restrictively:

> [11] To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents: *Lavallee*, at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle.

[42] The Board argues that the document production provisions of the *Act* are similarly open-textured such that the decision in this case should be the same as in *Blood Tribe*. I disagree. The provisions of the *Act* are quite different from the provisions in *PIPEDA*, both with regard to document production and adjudication. With regard to document production, the analysis in the *Newfoundland Appeal* is applicable to the issues raised by the language in the *Act*. The provisions of the Newfoundland statute bear a greater similarity to the provisions of the *Act* than do the provisions of *PIPEDA*. As I explain below, I would adopt similar reasoning in my interpretation of the document production provisions of the *Act*.

[43] However, the more fundamental difference between the provisions of *PIPEDA* and the *Act* is that the latter grants adjudicative powers to the Commissioner, while the former does not give the Privacy Commissioner any such powers. As noted at para. 22 of *Blood Tribe*:

> [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 court's 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.

[44] I will divide my analysis of the provisions of the *Act* by examining the adjudicative powers granted to the Commissioner and follow that with my consideration of the document production provisions of the *Act*.

Adjudicative Powers

[45] The modern approach to statutory interpretation is set out in *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: [citations omitted.]

[46] Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides as follows:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[47] Applying the modern approach to interpretation and taking into account the provisions of s. 8 of the *Interpretation Act* requires me to give a contextual, purposive interpretation that best ensures the attainment of the objects of the legislation. Of course, in this case the objects are directly expressed in s. 2(1) of the *Act* and include providing the public the right of access to public records, creating limited exceptions to that right and providing for an independent review of decisions made under the *Act.*

[48] As the Board has argued, there is a possibility of a conflict between the principle that the *Act* be given a broad, purposive interpretation, and the principle referred to in *Blood Tribe* that legislative language be interpreted restrictively so as to prevent incursions on solicitor client-privilege that might occur if legislative language is interpreted broadly. I agree, however, with the statement expressed by the court in the *Newfoundland Appeal* at paras. 29-32: a strict or restrictive interpretation will only be resorted to where there are multiple interpretations following a contextual, purposive analysis. If a purposive analysis yields an interpretation that authorizes encroachment of solicitor-client confidentiality, then the substantive rule requires a second step to the analysis. At the second step of the analysis, the court must be satisfied that the specific exercise of the authority is "absolutely necessary to achieve the ends sought by the enabling legislation": *Descôteaux* at 875.

[49] Summarizing the proper approach, the first step is to consider whether a purposive, remedial construction of the express provisions of the *Act* gives rise to more than one possible interpretation. If the *Act* is capable of two interpretations, one involving the abrogation of solicitor-client privilege and the other not, the court must favour the interpretation that respects

the privilege. If, however, there is only one possible interpretation, and that interpretation allows an incursion on solicitor-client privilege, then the court must be satisfied that the incursion is necessary to achieve the objects of the legislation. A restrictive interpretation is only necessary where the provisions of an *Act* are ambiguous and the court is required by the substantive rule to prevent an incursion into solicitor-client privilege.

[50] Applying those principles to the relevant sections of the *Act*, I conclude there is only one possible interpretation. The legislature intended to give the Commissioner the power to adjudicate questions of solicitor-client privilege to facilitate resolution of these issues without the cost and formality of court proceedings. The legislative scheme necessarily creates an incursion on solicitor-client privilege. I also conclude that the incursion is limited to the extent necessary to give effect to the objects of the legislation.

[51] Pursuant to s. 56 of the *Act*, the Commissioner is tasked with adjudicating access rights under the *Act*. Any person who is denied access to a document can request an inquiry into the matter under s. 56. The Commissioner is specifically empowered to determine "all questions of fact or law arising in the course of the inquiry." Pursuant to s. 57, the public body (here, the Board) has the onus of proof that the applicant has no right of access to the record. Pursuant to s. 58, the Commissioner is required to "dispose of the issues by making an order under this section." A public body is required to comply with the order within the period set out in the order "unless an application for judicial review of the order is brought before that period ends": s. 59 (1.1).

[52] Other provisions relevant to the adjudicative power include the provisions of s. 44 set out above. The Commissioner may require a person (including a person who is in control of documents for a public body) to attend and produce records. Further, if a record that is subject to solicitor-client privilege is disclosed, pursuant to s. 44(2.1), "the solicitor client privilege of the record is not affected by the disclosure."

[53] When these provisions are examined in the context of the *Act* and having regard to the objects of the *Act,* I have little hesitation in concluding that the legislature intended that the Commissioner be given the power to determine whether a refusal to disclose documents based on s. 14 of the *Act* should be upheld based on the questions of fact and law relating to that refusal. There is no limitation in the statute on the nature of the "questions of fact and law" that the Commissioner can determine; it is specifically "all" such questions.

[54] The Board relies on the language in s. 44(3) to argue that the production power only overrides rules of evidence and not rules of substance. I disagree with that submission. There is no arguable limitation on the power of the Commissioner to determine <u>all</u> questions of fact and law arising in an inquiry. There is no doubt that a refusal to disclose information or records

under s. 14 is caught by the inquiry process mandated by s. 56. Accordingly, the only possible conclusion, reading the words in the *Act* in context and in their grammatical and ordinary sense, is that a claim of solicitor-client privilege by a public body is to be determined at an inquiry conducted by the Commissioner, who will decide all questions of fact and law necessary to resolve that question.

[55] The scheme and objects of the *Act* strengthen the conclusion that the legislature intended the Commissioner to adjudicate questions of solicitor-client privilege raised by a public body claiming an exemption from disclosure under s. 14 of the *Act*. The objects include giving the public a right of access to records held by public bodies and providing for an independent review of access decisions made under the *Act*. The objects are furthered by a legislative scheme that puts in place an independent review officer who can, as an alternative to the courts, undertake a timely and affordable first level review of public body denials of information requests. This is the same conclusion arrived at in the *Newfoundland Appeal* at para. 65. However, the conclusion is fortified here where the legislation includes both a power to demand production of documents as well as a power to adjudicate.

[56] The incursion on solicitor-client privilege is kept to a minimum by the provisions of s. 44 (2.1) and s. 59 of the *Act*. Section 44(2.1) preserves solicitor-client privilege over any document that is ordered disclosed by the Commissioner or is voluntarily disclosed to the Commissioner. Pursuant to s. 59, if the Commissioner makes an order requiring the public body to disclose a record or information, the public body has 30 days to appeal the order, the operation of which is stayed until further court order. In this way, the extent of the incursion into the privilege is limited and the right to have the question of solicitor-client privilege reviewed by the court is preserved.

[57] The position of the Board seems to rest on the assertion that, as a result of the decision in *Blood Tribe*, administrative tribunals that have been granted adjudicative powers cannot use those powers to make determinations regarding solicitor-client privilege. The Board's assertion cannot be maintained. The powers of an administrative tribunal must, of course, be determined by properly examining the legislative intent behind its enabling statute through the modern approach to statutory interpretation. As the OIPC argued, there are a number of decisions of courts and tribunals since the decision in *Blood Tribe* which have considered legislation containing a grant of adjudicative powers to administrative tribunals. The tribunals concerned have continued to adjudicate questions of solicitor-client privilege. While those decisions are not directly applicable to the issue raised here, they provide support for the proposition that there is nothing preventing a legislature from giving an administrative tribunal the power to adjudicate these questions.

[58] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Court considered a review of a decision by a commissioner acting under Ontario's *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31. Section 19 of the Ontario legislation, like s. 14 of the *Act*, allows the head of a public body to refuse to disclose documents on the basis of solicitor-client privilege. While the jurisdiction of the Commissioner was not in issue in that case, the Court affirmed at para. 68 the Commissioner's power to adjudicate claims of solicitor-client privilege:

> [68] The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

[59] As counsel for the OIPC noted, subsequent to *Blood Tribe*, the Ontario Information and Privacy Commissioner has continued to adjudicate issues of privilege under both the Ontario legislation and the *Municipal Freedom of Association and Protection of Privacy Act,* R.S.O. 1990, c. M.56. The Office of the Information and Privacy Commissioner for Prince Edward Island has also adjudicated solicitor-client privilege issues after *Blood Tribe*: *Re: City of Waterloo*, (30 November 2010), Interim Order MO-2573-I, OIPC, [2010] O.I.P.C. No. 165 (Q.L.); *Corporation of the City of Waterloo v. Cropley and Higgins*, 2010 ONSC 6522; *Re: York University*, (22 December 2010), Final Order PO-2939-F, OIPC, [2010] O.I.P.C. No. 186 (Q.L.); and *Re: Department of Transportation and Public Works*, (18 December 2008), Order No. 08-005, PEIPC, 2008 CanLII 67686 (PEI.P.C.).

[60] The Board advances two additional arguments that touch on the adjudication issue. First, it says there is nothing in the *Act* which requires that adjudication under s. 56 of a refusal to produce documents because of solicitor-client privilege pursuant to s. 14 be conducted by a lawyer or someone with legal training. It argues that the legislature cannot have intended a lay adjudicator to conduct an inquiry into a refusal to disclose documents on the basis of solicitor-client privilege. The Board says I should conclude from the failure to specify that a commissioner must be legally trained that the legislature did not intend questions of solicitor-client privilege to be considered by the Commissioner.

[61] In my view, no such conclusion can be drawn from the language in the *Act*. The Commissioner under s. 56 is authorized to "decide all questions of fact and law" relating to a refusal under s. 14. Obviously the legislature intended that the Commissioner would have the education and skills to decide the questions arising and that the Commissioner or acting commissioners appointed under the *Act* would be appropriately qualified. It is not necessary for the *Act* to specifically state that, and the failure to specify that a legally trained adjudicator should handle questions of solicitor-client privilege is not indicative of an intent that would be

contrary to the clear legislative scheme.

[62] While it is not an answer to the Board's argument, I note that the Acting Commissioner in this case was legally trained and highly qualified. Further, the OIPC has in place Policies and Procedures which set out a separate solicitor-client privilege case review process for information withheld under s. 14. Under s. 8.5, Investigation and Inquiry, of the Policies and Procedures, a legally trained Adjudicator is delegated authority to require production of records under s. 44, conduct inquiries under s. 56 or make orders under s. 58 of the *Act*.

[63] The second argument advanced by the Board is that the Commissioner has the potential to become an adversary to the public body who has refused production of records and information. The Board says this can occur because the Commissioner may, pursuant to s. 47 (4), disclose to the Attorney General information concerning the commission of an offence if the Commissioner considers there is evidence of an offence.

[64] The Board's reliance on s. 47(4) is misplaced. The solicitor-client privilege of any document disclosed to the Commissioner is specifically preserved by s. 44(2.1). Accordingly, the privilege would continue to attach and, so long as it did, that would constrain the Commissioner's authority to disclose any such document under s. 47(4).

[65] In the *Newfoundland Appeal*, the court came to the same conclusion about s. 56(4), a similar provision in the Newfoundland legislation which reads as follows:

> The commissioner may disclose to the Attorney General information relating to the commission of an offence under this or another Act of the province or Canada, where the commissioner has reason to believe an offence has been committed.

[66] At para. 77, Harrington J.A. stated as follows:

> [77] ... Further protection is also given by section 55 which preserves the privilege over documents in the hands of the Commissioner, to the same extent as if the documents had been tendered in court and subsection 54(2) which states that the Commissioner "shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the Commissioner in performing duties or exercising powers under this Act". While in some cases the Commissioner may be able to disclose documents tendered to him, pursuant to section 56, that section should be read as being inapplicable to solicitor-client privileged documents. That section does not specifically address this privilege and does not explicitly authorize its abrogation, unlike section 52.

[67] Section 47(2.1) is similar to the provision in the Newfoundland legislation which prevents the Commissioner from giving evidence in court:

> The commissioner and anyone acting for or under the direction of the commissioner must not give or be compelled to give evidence in court or in any other proceedings in respect of any records or information obtained in performing their duties or exercising their powers and functions under this Act.

[68] In summary, I conclude that the *Act* preserves solicitor-client privilege and that s. 47(4) does not put the Commissioner in an adversarial position with the head of a public body over records and information protected by solicitor-client privilege.

Document Production Provisions

[69] As I have already indicated, my conclusion regarding the jurisdiction of the Commissioner to adjudicate issues of solicitor-client privilege is based on my construction of the *Act*, and the language which specifically grants to the Commissioner the ability to conduct an inquiry to resolve s. 14 solicitor-client privilege issues. As the Board voluntarily produced the records in question, I need not decide whether the *Act* gives the Commissioner the power to compel the head of a public body to produce to the Commissioner documents which it refuses to produce because of a claim of solicitor-client privilege. However, it is apparent from my conclusion on the adjudication issue that the disclosure provisions in the *Act* are relevant to the adjudication issue.

[70] While I need not decide the question, I will comment on the Board's argument based on the language in s. 44(3) of the *Act*. The Board argues that the phrase "any enactment or any privilege of the law of evidence" is not broad enough to include solicitor-client privilege. The Board says that solicitor-client privilege is a rule of substance and not a rule of evidence. In advancing this argument it relies on the trial decision in *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 31. Of course, that decision was overturned in the *Newfoundland Appeal*.

[71] I prefer and adopt the reasoning of the court in the *Newfoundland Appeal*. The Newfoundland legislation contains the same wording as in the *Act*. The court noted that the language is very different from the language in the *PIPEDA* which was considered in *Blood Tribe.* The court referred to two decisions of the Federal Court of Appeal where that court considered the federal *Access to Information Act*, R.S.C. 1985, c. A-1, and found that the phrase "any privilege under the law of evidence" included solicitor-client privilege. The court noted that the language in the federal Act was similar to the Newfoundland legislation and stated at para. 72:

> [72] The Federal Court of Appeal, by way of *obiter dicta* appears to be consistent on this point: Section 46 and subsection 36(2) of the federal *Access to Information Act* empower the court and the Commissioner, respectively, to compel the production of responsive records subject to a claim of solicitor-client privilege to verify the validity of the claim. As the language used in those provisions is similar to that found in subsection 52 (3) of ATIPPA, this reasoning provides further support for the inclusion of solicitor-client privilege within the ambit of the words "privilege under the law of evidence".

[72] Of course, any decision as to the scope of the disclosure powers of the Commissioner

must be based on an interpretation of the words in the *Act* read in their entire context and in their ordinary sense harmoniously with the scheme and objects of the *Act*. I will leave consideration of that issue for a case that raises it directly. However, there appears to me to be considerable merit to the conclusion the court arrived at in the *Newfoundland Appeal* at para. 78:

> [78] ... The purpose of the legislation, described above, is to provide for an independent review officer which can undertake a timely and affordable first level review of all information request denials. This access to justice rationale mandates that the Commissioner's routine exercise of his authority to review solicitor-client privileged materials is absolutely necessary. The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production.

Issue 2: What Standard of Review should be applied to the Decision of the Acting Commissioner?

Parties' Positions

[73] The Board argues that the decision of the Acting Commissioner, both as to the test to be applied and the application of that test to the records in issue, must be reviewed on a correctness standard. It says the sanctity of solicitor-client privilege would be violated if a court were to allow privilege to be interfered with based on a determination that a commissioner, who is not statutorily required to have legal training, followed a "reasonable" analytical process, but was wrong in determining that privilege did not exist. In the alternative, the Board says that the decision of the Acting Commissioner is unreasonable.

[74] The OIPC argues that the ultimate determination as to whether the records may be withheld pursuant to s. 14 is reviewable on a standard of correctness. However, it takes issue with the Board's characterization of errors made by the Acting Commissioner in his approach to the question of privilege. The Board has highlighted three of the sub-issues set out at para. 14 above, which relate to the process or reasoning followed by the Acting Commissioner in arriving at the decision. The OIPC argues that these sub-issues should not be subject to a standard of correctness as argued by the Board; it is sufficient if the Acting Commissioner's approach was reasonable. The three sub-issues are:

> (a) Did the Acting Commissioner err by not following previous decisions and adopting a new approach to the determination of whether a record relating to legal fees is privileged under s. 14?
>
> (b) Could the Acting Commissioner determine the privilege by taking the nature and context of the information into account, in the absence of submissions by Mr. Bryfogle to rebut the presumption of privilege?

(c) Where the Board has identified documents as being responsive to the request, could the Acting Commissioner order that the documents not be withheld on the basis that he could not conclude the documents had anything to do with legal fees?

[75] The OIPC says these issues have to do with the Acting Commissioner's decision about what to take into consideration in making the determination of whether documents are privileged, and are reviewable on a standard of reasonableness.

Law

[76] The appropriate analysis to determine the standard of review is set out in *Dunsmuir*. There are two possible standards of review: (a) the "correctness" standard, which is used where the court should not defer to the decision-maker's decision; and (b) the "reasonableness" standard, which is used in all other situations where the court should defer to the decision-maker's decision. The analysis in *Dunsmuir* involves two steps: first, the court considers whether the previous jurisprudence has satisfactorily determined the appropriate standard of review. If that is not the case, the court reviews the factors identified in *Dunsmuir* as being relevant to determination of the appropriate standard. If it is necessary to proceed to the second step, the analysis is set out in *Dunsmuir* at para. 64:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[77] In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112, Joyce J. recently considered the application of *Dunsmuir* to the provisions of the *Act*. At paras. 46-47, he listed the circumstances where a more deferential standard may be appropriate:

> [46] The Court identified circumstances where the reasonableness standard will usually apply as including:
>
> - where there is a privative or preclusive clause, which indicates a legislative intent to give deference to the decision maker (para. 52.)
> - where the question is one of fact, discretion or policy (para. 53.)
> - where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (para. 54.)
> - where an tribunal has developed particular expertise in the application of a general common law or civil rule in relation to a specific statutory context (para. 54.)
>
> [47] At para. 55 the Court summarized:

> 55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[78] With respect to when the correctness standard should be applied, Joyce J. stated at para. 48:

> [48] ... Existing jurisprudence may identify questions that generally fall to be determined according to the correctness standard, for example:
>
> - constitutional questions regarding the division of powers between Parliament and the provinces (para. 58.)
> - true questions of jurisdiction or *vires* in the narrow sense of whether or not the tribunal had the authority to make the inquiry (para. 59.)
> - where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

[79] The Board cites several cases where courts have found that a standard of correctness should be applied to aspects of the interpretation of sections of the *Act*:

- In *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 58 B.C.L.R. (3d) 61 (C.A.), the court applied a correctness standard of review to construing cabinet deliberations in the exception to disclosure under s. 12.

- In *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726, the court applied a correctness standard to the interpretation of s. 13. Although the Court of Appeal overturned the decision, it did not explicitly address the standard of review: 2002 BCCA 665.

- In *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 [*Legal Services Society*], at paras. 14-36, the Court of Appeal addressed the standard of review to be applied in relation to solicitor-client privilege, and held that correctness applied.

- In *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131, the court concluded that pure questions of law that limit or define the scope of the *Act* and are not regarded as essential to the core expertise of the Commissioner, attract a correctness standard and that decisions in which the Commissioner's core expertise is invoked must be reviewed on a reasonableness standard.

[80] The OIPC relies on the comments of Garson J. (as she then was) at para. 72 of *British Columbia Teachers' Federation* for the proposition that the three sub-issues should be reviewed on a standard of reasonableness as they relate to the Commissioner's discretionary powers regarding his own process:

> [72] Decisions on matters within the Commissioner's core expertise-for example, fact-intensive questions and the interpretation and application of disclosure exceptions, the burden of proof in s. 57, and the Commissioner's discretionary powers concerning his own process (notice and receipt of *in camera* evidence) have been reviewed on the reasonableness standard.

[81] All of these cases were decided prior to the decision in *Dunsmuir*. Justice Joyce noted at para. 61 of *British Columbia (Attorney General)* that:

> [61] ... I agree with the submission that the standard of review analysis in *Aquasource* on questions of interpretation has been superceded by the Supreme Court's clarification of the law of judicial review, which establishes that deference is the norm for questions of law involving a decision maker's interpretation of its home statute and that correctness applies only to true jurisdictional questions.

[82] In spite of the recent changes to the law, these earlier cases remain instructive so long as they do not conflict with the developments in the jurisprudence.

Analysis

Step One: Does existing jurisprudence determine the standard of review?

[83] Previous cases have applied a standard of correctness to the Commissioner's decisions on the application of s. 14. However, those cases which have considered the standard to be applied to decisions involving solicitor-client privilege under the *Act* all predate *Dunsmuir*. Therefore, as the Court held in *British Columbia (Attorney General)* at para. 61, I cannot accept those decisions as determinative and must engage in a standard of review analysis under step two of the *Dunsmuir* approach.

Step Two: Analysis of the relevant factors

(1) The presence or absence of a privative clause

[84] There is no privative clause in the *Act*. However, the absence of a privative clause is

neutral in the analysis: *British Columbia (Attorney General)* at para. 62.

(2) The purpose of the tribunal as determined by interpretation of enabling legislation

[85] In *British Columbia (Attorney General)*, Joyce J. held that the *Act* "creates a discrete and specialized administrative regime to deal with rights of access to information in records held by public bodies, the limited exceptions to those rights, and the Commissioner's independent oversight of the administration of the Act" (at para. 63). He concluded that this factor supports deference (at para. 65). I agree that the purpose of the legislative scheme generally supports deference to the decisions of the Commissioner.

(3) The nature of the question at issue

[86] The question is whether the Acting Commissioner erred in holding that the Board could not rely upon s. 14 of the *Act* to withhold the records. This is primarily a question of law. Some questions of fact will necessarily be intertwined with the legal issue(s) in a case from time to time. Nevertheless, the issue in this case is primarily a question of law, which weighs against according deference to the Acting Commissioner's decision.

[87] More importantly, solicitor-client privilege is a substantive legal right, the importance of which goes far beyond s. 14 of the *Act*. In *Legal Services Society*, at para. 35, the court found that the constitutional value attached to solicitor-client privilege was such that the Commissioner should not be permitted to reach a conclusion regarding the privilege that is "reasonable, but incorrect":

> [35] ... If, as *Lavallee* mandates, [solicitor-client privilege] is to be maintained as close as possible to "absolute", a standard of correctness must be applied to the Commissioner's determination of whether the disclosure of particular information carries the potential to breach the privilege of clients...

[88] The nature of the question weighs heavily towards attracting a correctness standard. Solicitor-client privilege is a substantive legal right with constitutional value. It is a legal right which is to be maintained as close as possible to absolute. In order to do that, a correctness standard must be applied to any question as to whether solicitor-client privilege has been properly claimed.

[89] The Board also identified the three sub-issues noted above at para. 14 a) to c) within this overarching ground for review. The errors alleged in those sub-issues go to the question of whether the Acting Commissioner applied the correct law and took the relevant information into account in arriving at his decision. I agree that these sub-issues must be considered alongside the overarching question and do not attract a different standard of review. The answer to the errors alleged in relation to each sub-issue will help determine the answer to the overall

question. If the overall question must be reviewed on a standard of correctness, then it would be nonsensical to impose a standard of review of reasonableness on the sub-issues. The ultimate determination as to whether the Acting Commissioner was correct is the important question. It is not helpful, or perhaps even possible, to put some of the steps along the way to that decision into watertight compartments and decide whether the step was taken reasonably or not.

(4) The expertise of the decision-maker

[90] The expertise of the Commissioner must be evaluated contextually. I must take into account the court's expertise relative to that of the Commissioner and the nature of the specific issue before the Commissioner relative to his or her expertise.

[91] The court, in *British Columbia (Attorney General)* at para. 65 cites *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), leave to appeal to SCC refused [2005] S.C.C.A. No. 95, where at paras. 28 and 31 the court discusses the expertise of the Commissioner. However, the discussion in both of those cases was with regard to the issue of cabinet privilege. While that discussion is relevant in a general way, it is not specific to the particular issue in question in this case. The issue here is the expertise of the court compared to that of the Commissioner when it comes to assessing whether the Board could not rely upon solicitor-client privilege (s. 14) to withhold records. There is no question that the court has a particular expertise in this area. The OIPC, in its submissions, admits that "the Court is as well placed as the Commissioner to determine whether the disclosure of the withheld information will reveal privileged information".

[92] In *Legal Services Society*, Newbury, J.A. stated at para. 1:

> [1] ... the Commissioner appointed to administer the [the *Act*] has functions that involve the balancing and reconciliation of complex and sensitive interests. Some interests, however, have attached to them sufficient constitutional or legal value that they do not admit of compromise or "balancing". This is the case with solicitor-client privilege...

Justice Newbury's statement at para. 25 regarding the Commissioner's expertise with respect to solicitor-client privilege, is applicable here:

> [25] There is nothing to suggest, however, that the Commissioner has particular expertise with respect to solicitor-client privilege or its protection — matters with which courts are very familiar. Nor does the Act provide the Commissioner with any "special procedure" for dealing with issues of solicitor-client privilege. The Commissioner simply receives evidence and submissions from the parties and assesses it to reach his conclusion. His method of proceeding may be described as similar to the judicial process. ...The Commissioner's expertise in interpreting the Act is therefore less important in this context than a court's expertise in matters relating to privilege.

[93] The factor does not favour deference to the Commissioner.

Standard of Review

[94] The analysis required under *Dunsmuir* has changed the approach to this question. However, an analysis of the four factors to be considered does not result in a different conclusion. The analysis from the pre-*Dunsmuir* cases in relation to the question of solicitor-client privilege claimed under s. 14 is still persuasive. Given the importance of solicitor-client privilege to the operation of our legal system, and the body of jurisprudence which emphasizes the importance of that privilege, it would be inconceivable to conclude that the consideration as to whether s. 14 could be relied upon by a public body should be reviewed on a standard of reasonableness. It must be reviewable on a standard of correctness.

Issue 3: Did the Acting Commissioner err in holding that the Board could not rely upon s. 14 of the *Act* to withhold the records?

[95] The sub-issues set out at para. 14 a) to c) above outline three discrete errors alleged by the Board. The issues raised by these errors are, for the most part, intertwined. However, I will consider the issues separately and then consider the ultimate question.

a) Did the Acting Commissioner err by not following previous decisions and adopting a new approach to the determination of whether a record relating to legal fees is privileged under s. 14?

[96] The Board says the Acting Commissioner erred when he failed to follow previous decisions of the Commissioner, and of the British Columbia courts, including decisions which post-date *Maranda.* The Board emphasizes that in *Regional District of Comox-Strathcona*, (26 September 2005), Decision 05-07, BCIPC, [2005] B.C.I.P.C.D. No. 43 (Q.L.), the Commissioner determined it was beyond doubt in British Columbia that the total amount of legal fees paid is protected by privilege and can be withheld under s. 14. The Board argues that when the Acting Commissioner undertook the analysis set out in the Order, he ignored the existing jurisprudence and took a new approach to the determination of whether a record that sets out the amount paid for legal fees is privileged.

[97] The Board argues that *Maranda* does not overrule or limit any of the British Columbia cases, and in fact, is consistent with them, holding that the gross amount of legal fees paid is protected by privilege. The British Columbia cases cited by the Board are: *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (S.C.); *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (S.C.); and *Legal Services Society*.

[98] The OIPC says there is no reason why it would constitute an error for the Acting

Commissioner to adopt a new approach to determining privilege so long as that approach is based on, and consistent with, the evolution of the case law. Further, the principle of *stare decisis* does not apply to administrative tribunals and so the Acting Commissioner was not obliged to follow previous decisions of the Commissioner.

Analysis

[99] In my view, the sub-issue as phrased misdirects the inquiry. The important question is whether the Acting Commissioner applied the correct legal test.

[100] In *Maranda*, the Supreme Court of Canada clarified the proper approach to determining questions of solicitor-client privilege with respect to billing information contained in lawyers' statements of account or other documents. There is a presumption of privilege in relation to documents containing such information; however, that presumption can be rebutted by the party seeking the release of the documents (paras. 33-34).

[101] Although the cases cited by the Board predate *Maranda*, they nonetheless take a similar approach. The previous cases do not refer to a "rebuttable presumption", but do hold that an adjudicator must consider whether the records in question could provide privileged information to an informed member of the public if released. The cases do not say that there should be a blanket refusal to release all records subject to any claim of solicitor-client privilege; rather, they suggest the court must start from the position that records containing lawyers' billing information are *prima facie* privileged. The Acting Commissioner articulates this at para. 41 of the Order: "[n]one of these cases then requires a blanket protection for all information related to a lawyer's billing activities under the rubric of solicitor-client privilege".

[102] The pre-*Maranda* cases in British Columbia culminated with *Legal Services Society*, where the court stated at para. 37:

> [37] ... I accept that more than a merely fanciful or theoretical possibility of breach of the privilege would have to exist before withholding the information could be justified. On the other hand, the importance of retaining the privilege in its full vigour suggests that Scarth J. was correct in placing the focus not on the casual reader but on the "assiduous, vigorous seeker of information relating to clients."

[103] The decision in *Legal Services Society* thus recognizes the tension between the starting proposition that billing information is *prima facie* privileged and the reluctance to create a rule that prevents release of information based on a fanciful or theoretical chance of breaching privilege. By placing the focus of the privilege analysis on the "assiduous, vigorous seeker of information" rather than the casual reader, the court established an approach that protects the privilege but still permits release of information where the claim of solicitor-client privilege is fanciful or merely theoretical. The Board's argument fails to recognize the obvious: *Legal*

Services Society and the other decisions acknowledge that there are occasions when claims of privilege will not stand up to scrutiny and, therefore, there has to be some way for the adjudicator of the privilege issue to assess the validity of the assertion of privilege.

[104] In the Order at paras. 40-41, the Acting Commissioner accepted the rebuttable presumption of privilege in relation to information about lawyers' billings and found that the presumption of privilege would be rebutted "if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege". Citing *Re: Ministry of the Attorney General,* (17 July, 2006), Order PO-2484, OIPC, [2006] O.I.P.C. No. 111 (Q.L.), a decision by an adjudicator under the Ontario legislation, the Acting Commissioner agreed that the way to approach the issue was to ask:

> (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and
>
> (2) could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[105] The approach taken by the Acting Commissioner is consistent with the decision in *Maranda*, and with previous decisions of the courts in British Columbia. He properly acknowledges the starting position: there is a rebuttable presumption of privilege. In addition, he accurately describes the high bar that must be met before information will be released.

[106] In summary, I conclude that the Acting Commissioner did not create an approach that was different from, or inconsistent with, the evolving jurisprudence. The prior decisions do not create an absolute privilege that could not be rebutted. His articulation of the legal test, taking into account *Maranda* and the previous decisions of the British Columbia courts was correct.

b) Could the Acting Commissioner determine the privilege by taking the nature and context of the information into account, in the absence of submissions by Mr. Bryfogle to rebut the presumption of privilege?

[107] The Board argues that because Mr. Bryfogle (as the access applicant) did not put forth evidence or argument to rebut the presumption of privilege in this case, it was an error for the Acting Commissioner to proceed to consider the nature and context of the information in the documents in adjudicating the claim of privilege. In essence, the Board's submission is that if the documents and their contents are presumptively privileged, and the law provides that the privilege can be rebutted by the party seeking access to them, then the onus switches to that party to put forth either evidence or argument to rebut the presumption. A failure to do so, the Board submits, must necessarily mean that the presumption of privilege stands, and the documents and their contents are protected from disclosure.

[108] The OIPC argues that the starting point for the analysis is s. 57 of the *Act*, which puts the onus on the public body to satisfy the Commissioner that the exception applies. The presumption of privilege cannot be considered without reference to s. 57. Where, as here, the public body provides only minimal information in its submissions, the OIPC argues that the Commissioner must be permitted to examine the nature and context of the records in order to determine whether the privilege is properly claimed.

[109] In support of this assertion, the OIPC notes that in most cases, the public body will have the most information about the content of the records and will therefore be in the best position to speak to the privileged information that is at risk of being disclosed if they are made available. In the instant case, the OIPC argues, the paucity of information in the Board's submissions would have made it difficult for Mr. Bryfogle to put forth evidence or argument to rebut the presumption; how could he be expected to make submissions about the nature of documents if he had no knowledge of those documents to begin with?

Analysis

[110] Here again, the relevant principles are set out in *Maranda*. Justice LeBel spoke to the issue of privilege as it relates to lawyers' fees and bills of account at paras. 33-34, in the context of discussing the requirements for authorization of a search of a lawyer's office in a criminal investigation:

> [33] ...the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. ... Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. ...
>
> [34] Accordingly, when the Crown believes that disclosure of the information would not violate the confidentiality of the relationship, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. The judge will have to satisfy himself or herself of this, by a careful examination of the application, subject to any review of his or her decision.

[111] A search by public authorities in a criminal context for documents in a lawyer's office has some similarities to a request by an access applicant for information relating to litigation expenditures. However, it is not by any means analogous. While the Crown may be required to "make the allegation adequately" in an application for a search warrant, it would be inappropriate to place a similar burden on an access applicant. An access applicant has neither the resources nor the powers available to the Crown and police.

[112] Further, the principle set forth in *Maranda* can be upheld and applied without placing, in every case, an evidentiary burden, or a requirement to make submissions, on an access

applicant. So long as the test is properly applied – privilege is presumed; and there is no possibility that an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged information – then it may be possible to reach a conclusion that the documents are not privileged.

[113] If the Commissioner could not take the nature and context of the information into account in determining if a claim of privilege should be upheld, the Commissioner would be deprived of material evidence. The nature and context of records and information will almost always have evidentiary value when considering claims of privilege. This is particularly so where the access applicant has a limited ability to put forward other evidence regarding the records or information. There is nothing in the *Act*, or the relevant jurisprudence, which precludes the Commissioner from considering this important evidence for the purpose of determining whether privilege has been properly claimed.

[114] Accordingly, I conclude that the Acting Commissioner did not err when he found, at para. 44:

> [44] I agree that the lack of submissions directly on point by the applicant cannot be determinative of the proper application of FIPPA. It is still incumbent upon me to consider the nature of the information and the circumstances and context of the case to determine whether the presumption is rebutted.

[115] In my view, this position is consistent with the Supreme Court of Canada's statement in *Maranda* that the privilege will be rebutted where it is alleged without a proper basis (at para. 34), or, in the words of Newbury J.A. in *Legal Services Society*, where it is possible to conclude that the release of the information creates a "merely fanciful or theoretical possibility of breach of the privilege" (at para. 37). Furthermore, irrespective of any submissions by the access applicant on the point, the high standard of the "assiduous inquirer" provides sufficient protection against possible interference with the privilege.

c) Where the Board has identified documents as being responsive to the request, could the Acting Commissioner order that the documents not be withheld on the basis that he could not conclude the documents had anything to do with legal fees?

[116] The Board says that when it advised the Acting Commissioner that the documents it produced were responsive to the request for information about legal fees, a presumption of privilege arose. In the Board's submission, it was an error for the Acting Commissioner to conclude that the documents had nothing to do with legal fees in the absence of evidence or argument that rebuts the presumption of privilege.

[117] The OIPC argues that although *Maranda* establishes that information about the amount of legal fees paid by a client to a lawyer attracts a presumption of privilege, a public body

cannot render information presumptively privileged simply by identifying it as responsive to an access request. At the very least, the OIPC says, the public body must identify the nature of the information it says is entitled to the presumption.

[118] The OIPC submits that in this case the request for information was not limited to legal fees or disbursements, but rather extended to any expenditures relating to litigation or grievances, or a "litigation fund". The Board was provided with the Notice of Written Inquiry, which noted that in an inquiry, it is up to the public body to prove that the applicant has no right of access to the record; the Board chose not to provide any submissions or evidence about the records it sought to withhold.

Analysis

[119] The part of the Order that is at issue here is found at paras. 45-46, where the Acting Commissioner stated as follows:

> [45] ... As noted at the outset, the School District withheld three types of records under s. 14. ...
>
> [46] The School District did not provide any evidence regarding what the numbers in this printout represent or their connection to any information that might be privileged under s. 14. Even if the onus is on the applicant to displace a presumption of privilege, the School District must still provide a factual foundation to allow for a determination that presumption of privilege attaches to the documents in issue. In this case, in the absence of any evidence or submissions on point from the School District, I am unable to conclude that these documents disclose anything about attorney's fees at all.

[120] The Acting Commissioner's analysis in this part of the Order is misdirected. Given the nature of the access request and the indication from the Board that the documents were responsive to that request, the Acting Commissioner should have addressed these considerations in determining the claim of privilege. Indeed, this would seem to be fundamental to a full consideration of the nature and context of the records.

[121] In my view, the analysis must be guided by the onus on the Board and the presumption of privilege. Here, the Board has the burden of establishing that Mr. Bryfogle has no right of access to the documents pursuant to s. 57. On the other hand, if the documents do, in fact, relate to legal fees paid to counsel by the Board, privilege is presumed. The Board maintains that all it needed to do to satisfy its burden under s. 57 was indicate that the requested documents contained information pertaining to litigation expenditures. Having done so, the Board argues that the burden shifted to Mr. Bryfogle to rebut the presumption of privilege by way of evidence or argument.

[122] While the presumption will not create an evidentiary burden in every case, it may do so where either the context of the information or a review of the records satisfies the adjudicator

that the document does contain billing information relating to litigation expenditures. Where that is the case, the presumption of privilege will prevail unless it is rebutted by evidence or argument that is sufficient to satisfy the adjudicator that there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege and that an assiduous inquirer, aware of background information, could not use the information requested to deduce or otherwise acquire privileged communications.

[123] This is the approach taken by the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65 (Ont. C.A.):

> [12] The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 (B.C.C.A.) at 43-44. If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege.

[124] That case concerned a decision of the Ontario Information and Privacy Commissioner that required the Attorney General to disclose the total amount of legal fees it had paid to two lawyers who had acted for intervenors in a criminal proceeding. The circumstances were therefore similar to the circumstances here. The court stated as follows at para. 11:

> [11] While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

[125] In my view, the context of the matter before me is very similar to the context of the case before the Ontario Court of Appeal. Mr. Bryfogle was seeking information about legal expenses incurred in litigation being conducted by the Board. Here, as in the Ontario case, the Acting Commissioner also reviewed the records. In doing so, he saw that the records included a statement as to the amount of fees paid to a law firm within a calendar year. He also knew that the records were responsive to the request for information. Nothing in the review of the records or in the context could rebut the presumption that results from the Board's identification of the records as being responsive to the request for information pertaining to legal fees or

disbursements, expenditures relating to litigation or grievances, or a “litigation fund”.

[126] While the Acting Commissioner appears to have recognized that the amount of fees paid to a lawyer is presumptively protected by the privilege, he does not properly consider the effect of the Board’s assertion that the records and information it provided were responsive to Mr. Bryfogle’s access request. Had that been given due weight, it would not have been possible for the Acting Commissioner to reach the conclusion that the documents do not “disclose anything about attorney’s fees at all”. The Acting Commissioner erred in arriving at that conclusion. He erred in holding that “the School District must still provide a factual foundation to allow for a determination that presumption of privilege attaches to the documents in issue”. He should have started from the presumption that privilege did apply, and examined the documents and information to determine if it might be possible for an assiduous inquirer to use the information provided to draw possible inferences. The presumption should have applied to these documents because the Board indicated they were responsive to the request and withheld pursuant to s. 14. Once raised, the presumption should have remained in place until the Acting Commissioner was satisfied it was rebutted. In short, he failed to give adequate weight to the assertion by the Board that the information was responsive to the request.

d) Did the Acting Commissioner err in concluding that the records themselves do not reveal information that is protected by privilege?

[127] The Board argues that the information in the records attracts the protection of solicitor-client privilege because an assiduous inquirer could potentially obtain information about the terms of the retainer and other confidential communications connected to the lawyer/client relationship. Considering the nature of Mr. Bryfogle’s allegations in the underlying litigation – namely, that the Board had improperly expended public funds in its defence – the Board argues it is apparent that this is precisely the kind of information he is looking for. Furthermore, the Board submits, the fact of the aggregate amount of the legal fees billed would permit the intelligent deduction of other privileged information, such as the Board’s strategies in respect of litigation.

[128] The Board further submits that the Acting Commissioner erred in concluding that the Vendor Inquiry Documents could be severed, with the information regarding the total amount of payment and the name of the law firm being disclosed and the other parts withheld. In so finding, the Board argues, the Acting Commissioner failed to heed the Court’s admonition in *Maranda* regarding the inherent difficulty in separating privileged information from neutral information in records showing legal expenditures (at para. 33). The Board further submits that the Acting Commissioner erred in applying the approach to severance that is applicable under other provisions of the *Act*. They refer to *British Columbia (Minister of Environment, Land & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64

(S.C.), which was later modified by *College of Physicians and Surgeons*, for the proposition that in cases such as this, where privileged information is intertwined with other non-privileged information, severing the information is not an appropriate option.

Analysis

[129] The classic formulation of the kinds of communications which attract the protection of solicitor-client privilege was summarized by Holmes J. in *Municipal Insurance Assn. of British Columbia* at para. 24. In summary, communications are privileged where legal advice is sought from a lawyer by a client, the communications relate to that purpose, and were made in confidence.

[130] The issue in that case was whether the Commissioner had erred in finding that the City of North Vancouver could not withhold information regarding the total amount of legal expenditures it had incurred to that date in the defence of a lawsuit. The document at issue was a one-page interim invoice for legal costs.

[131] Justice Holmes concluded that in the circumstances of the case at the time of the access request, the document should have been protected from disclosure on a proper interpretation of s. 14. In my view, his comments at paras. 47-48 are apt in the instant case:

> [47] I find North Vancouver's being required to disclose the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important detail in relation to its retainer and to prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instructions to be formulated and given.
>
> [48] Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.

[132] Here, as in the case before Holmes J., the access requests were made in the circumstances of ongoing litigation and sought information regarding the total amount of funds that the public body had spent in relation to litigation. The fact that the request related to litigation expenses generally does not change the situation. An assiduous inquirer would know what other litigation the Board was involved in and could likely infer how much of any global litigation expense amount related to the case under consideration. As Holmes J. recognized, the possibility that such information could reveal privileged communications between a public body and its lawyer may require the public right of access to information to be tempered in these circumstances. I find that this is the case here.

[133] Justice Holmes described a number of examples of the types of conclusions that could reasonably be discerned from the fact of the total of interim fees to date in a lawsuit (at para. 49). In his view, these could include:

- the state of a party's preparation for trial;
- whether the expense of expert opinion evidence had been incurred;
- whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
- where co-defendants are involved whether it appears one might be relying upon the other to carry the defence burden;
- whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;
- whether legal accounts were being paid on an interim basis and whether payments were relatively current;
- what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.

[134] If the access applicant is also a litigant in the proceeding in question, there is no question that any insight they might gain into these matters could be prejudicial to the public body's interests in the litigation and would therefore operate to undermine the sanctity of the solicitor-client relationship.

[135] Having reviewed the documents in question, I find that the Vendor Inquiry Documents are subject to solicitor-client privilege and should therefore be protected from disclosure under s. 14. In my view, the information in these records – specifically, the name of the law firm and the total amount of fees paid – could enable an assiduous inquirer, aware of background information, to deduce or otherwise acquire privileged information.

[136] I agree with the Board that the Acting Commissioner erred when he ordered the disclosure of records which he had been advised related to legal fees because he was unable to determine that they in fact related to legal fees. He was bound to approach his consideration of the privilege question from the starting position that the information identified by the Board was directly responsive to an access request which expressly sought information relating to legal fees.

[137] Since I have found that he erred in ordering the release of this information, I need not comment on whether the Acting Commissioner improperly severed the Vendor Inquiry Documents. These records, in their entirety, are protected by solicitor-client privilege and should not be disclosed.

[138] With respect to the G/L Account Summary Documents, it is less apparent that these records contain information that, if disclosed, would risk revealing privileged information. The law firm's name does not appear on the document. Rather, there is reference to budget and expenditure amounts for a specific account in the G/L Account Summary. However, I conclude that the Acting Commissioner also erred in applying the test in relation to these documents.

Once again, he was required to start his consideration from the basis that these documents and the information contained in them are responsive to the request for information about expenditures on legal fees by the Board. The fact that this may not have been apparent on the face of the documents is, in my view, an insufficient ground for the Acting Commissioner to have reached the opposite conclusion. In other words, it must be concluded, absent information or argument to allow for rebuttal, that the information provided must relate to legal fees paid to counsel.

[139] Although the information in the G/L Account Summary Documents is limited, it may nonetheless allow for the deduction of privileged information. Indeed, it is entirely possible that an assiduous inquirer could use the account identifier and the expenditure totals stated in the records to draw inferences about Board expenditures in respect of the particular legal matter in question. As I have said, an assiduous inquirer would know whether the Board is involved in other litigation and on this basis could foreseeably infer whether and possibly to what extent, amounts stated in the records relate to the underlying litigation in this case. On the authorities, it is clear that information of this kind raises a presumption of privilege. As Mr. Bryfogle did not provide any evidence or argument in this case, the presumption of privilege has not been rebutted. As a result, I conclude that the G/L Account Summary Documents should not be disclosed.

e) In any event, did the Acting Commissioner err by premising his analysis on the presumption that he has jurisdiction to compel production of solicitor-client privileged records and independently review them prior to adjudicating the claim of privilege?

[140] I have already indicated that this question is not necessary to the decision in this case, as the Board voluntarily disclosed all of the documents in question to the Acting Commissioner. I have however set out my views on this issue above with the caveat that those views are clearly obiter.

CONCLUSION

[141] In summary, I find that the Commissioner has the jurisdiction to adjudicate questions of solicitor-client privilege for the purpose of determining whether records sought to be disclosed are exempted from disclosure under s. 14 of the *Act*.

[142] I have reviewed the decision of the Acting Commissioner on a standard of correctness. The Acting Commissioner set out the correct legal test to be applied when considering issues of solicitor-client privilege. However, I have concluded that the Acting Commissioner's ultimate conclusion that the records in question would not disclose privileged information was incorrect. He erred in ordering the Board to disclose the information in the Vendor Inquiry Documents

regarding the total amount of the payment and the name of the law firm, as well as in ordering disclosure of the G/L Account Summary Documents. His decision ordering that the redacted documents be produced is thus quashed.

[143] If the parties wish to make submissions regarding costs, those submissions should be made in writing on a schedule arranged through Trial Scheduling.

"Butler J."