COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Legal Services Society v. British Columbia (Information and Privacy Commissioner),*** 2003 BCCA 278

Date: 20030512

Docket: CA028263; CA028265

In the Matter of the
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

and

In the Matter of the
Decision of the Information and Privacy Commissioner of British Columbia (Order No. 322-1999), dated July 30, 1999, made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

Between:

Legal Services Society

Respondent
(Petitioner)

And

The Information and Privacy Commissioner of British Columbia and Adrienne Tanner

Appellants
(Respondents)

And

Radio and Television News Directors' Association

Respondent
(Respondent)

And

The British Columbia Branch of The Canadian Bar Association

Intervenor
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Braidwood
The Honourable Madam Justice Levine

S.E. Ross	Counsel for the Appellant Information and Privacy Commissioner
D.W. Burnett	Counsel for the Appellant Adrienne Tanner
D. MacAdams, Q.C.	Counsel for the Respondent Legal Services Society
G.P. DelBigio and T. Hunter	Counsel for the Intervenor B.C. Branch of the Canadian Bar Association
Place and Date of Hearing:	Vancouver, British Columbia April 3, 2003
Place and Date of Judgment:	Vancouver, British Columbia May 12, 2003

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Braidwood
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] As its name suggests, the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165 (the "Act") has two main purposes — to make public bodies "more accountable" by providing the public with access to their records and to protect personal privacy by preventing the disclosure of information that would unreasonably invade the privacy of individual members of the public. Thus the Commissioner appointed to administer 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, which s. 14 of the Act purports to protect in the following terms:

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

The question raised by this appeal is whether an order made by the Commissioner under the Act directing the Legal Services Society to disclose certain billing information jeopardizes the solicitor-client privilege of clients of the legal aid scheme in British Columbia. A preliminary question must also be addressed: what standard of review is applicable to the Commissioner's decision by a reviewing court?

Factual Background

[2] The chain of events leading to this appeal began on January 12, 1999 when Ms. Tanner, a reporter for a local newspaper, wrote a letter to the Legal Services Society ("LSS"). The Society is the provincial body through which "legal aid" is administered, and is a "public body" for purposes of the Act. In her letter, Ms. Tanner requested a "list of 1998's top five immigration billers [to the LSS] and the top five criminal billers by name and amount billed." Subsequently, she narrowed the time-frame of her request from 1998 as a whole to the nine-month period beginning April 1 and ending December 31 of that year.

[3] On February 19, 1999, the LSS replied to Ms. Tanner that unless one or more of the "third parties" (i.e., lawyers) requested a review of its decision within 20 days, the Society

would disclose to her the amounts billed (broken down according to fees, disbursements and GST) by the ten lawyers concerned, but that:

> LSS [has] decided it should not release the names of the billers. This decision is based on concerns relating to the scope of solicitor-client privilege and/or confidentiality as incorporated under s. 14 of the [Act] and under s. 12 of the LSS Act; and on protection of personal privacy pursuant to s. 22 of the [Act], in particular, s. 22(2)(f) and s. 22(3)(d) and (f).

[4] After one of the lawyers requested that LSS add an annotation to the information, LSS forwarded to Ms. Tanner a table showing the respective amounts billed by the ten "top billers" in the nine-month period. I attach a copy of the information provided, as an appendix to these Reasons. The table did not include the names of the lawyers.

[5] On February 24, Ms. Tanner wrote to the Commissioner to "appeal" the LSS's decision, stating in part:

> I believe I am entitled to this information for the following reasons:
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> 1. Legal aid is financed by tax dollars and therefore all expenditures should be transparent and accountable to the public.
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> 2. The release of this information would not lead to any breach of client confidentiality — I have not asked for specifics on cases.
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> 3. Almost identical information is published in an annual statement of financial information. The statement publishes a detailed account of all payments to suppliers of goods and services in excess of $10,000. Lawyers are named by name in this report, which is published at the end of every fiscal year. The reason I am not prepared to wait for the 1998 account is that it will not be published until months after the end of the fiscal year.
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> I see no reason for the information I have requested to be withheld except to satisfy the

> personal wishes of top billers to keep their identities secret. That, in my opinion, should not overrule the public's right to know how tax dollars are being spent.

[6] The Commissioner undertook a written inquiry pursuant to s. 56 of the Act. He received submissions from Ms. Tanner, the LSS and from two intervenors — the Canadian Bar Association ("CBA") and the Radio and Television News Directors' Association of Canada (British Columbia Region). In its submission, the LSS acknowledged that it publishes, in purported compliance with the ***Financial Information Act***, R.S.B.C. 1996, c. 140, an annual list of its "suppliers of goods and services" in excess of $10,000, but expressed concern that privileged information — i.e., the names of clients funded by legal aid — would be disclosed where an applicant was able to "refine the scope of such disclosure by identifying an area of practice, or narrowing the time-frame." The CBA raised a similar concern:

> . . . a person possessing the names of the top billing lawyers, knowing that legal aid matters would certainly comprise the majority, if not the entirety, of their trial work, could determine which clients had used the resources of the Legal Services Society to fund their litigation.

This result, the CBA submitted, ran counter to the decision of Lowry J. in an earlier case, ***Legal Services Society v. British Columbia (Information and Privacy Commissioner)*** (1996) 140 D.L.R. (4th) 372 (B.C.S.C.), known as the '***Gaffney***' case.

[7] For its part, the News Directors' Association did not address the issue of privilege. It argued that public scrutiny of the information is important "to ensure taxpayers get value for money from its [sic] public bodies." In its submission:

> The only way to intelligently address that public interest is to ensure access to the information about where the money is going. Whether that scrutiny satisfies taxpayers, shocks them, or engages them in healthy public debate about priorities, it achieves a vital public goal.

Submissions were also made concerning the privacy interests of lawyers and their clients in the information, in relation to s. 22 of the Act, but I need not review those submissions here.

[8] On July 30, 1999, the Commissioner issued his decision, entitled Order No. 322-1999. With respect to the arguments of the LSS and CBA concerning solicitor-client privilege and s. 14 of the Act, he stated:

> In my view, the names of the lawyers themselves are not privileged because they are not being considered for release in the context of a single client, as was the situation in the Order reviewed by Justice Lowry, referred to earlier. [See ***Gaffney***, *supra*.] Section 14 does not restrict the publication of the names of lawyers who receive funding from the Society for purposes of delivering legal services, especially since these names are disclosed under the Financial Information Act. The purpose of Section 14 is to protect the confidentiality on behalf of clients, not lawyers.
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> * * *
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> I recognize that the Legal Services Society must exercise caution in releasing the names of leading billers for services in order to ensure that identification of one or two clients of that particular lawyer is not possible. The Legal Services Society knows how many clients a lawyer billed for in a particular time period. If, for example, all of the services of a particular leading biller were for a very small number of clients, there may be a proper basis for the Society to refuse to disclose that total billing amount, because it might facilitate the identification of specific clients.
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> Unless this is the case, I find that the information in dispute is not subject to solicitor-client privilege and that disclosure would not reveal information that is subject to privilege. [at 6-7; emphasis added.]

In the result, the Commissioner concluded that the LSS was not entitled to refuse access to the records in dispute, under

either s. 14 or s. 22 of the Act. He directed the head of the Society to provide Ms. Tanner with such access.

[9] On August 27, 1999, the LSS petitioned the Supreme Court of British Columbia for an order quashing the Commissioner's order pursuant to s. 7 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, and Rules 10(1)(a) and 57 of the ***Rules of Court***. The Society alleged that the Commissioner had erred in law in the following respects:

> (1) in failing to find that the release of the names of the top five "billers" for immigration and criminal matters would breach solicitor-client privilege owed to the clients of those "billers";
> (2) in finding that contracts to supply services in immigration and criminal matters were contracts to supply services to the LSS rather than to clients of the "billers";
> (3) in finding that the information requested was no different from the information published by the LSS pursuant to the ***Financial Information Act***;
> (4) in finding that the requested information would not constitute an unreasonable invasion of the personal privacy of the "billers" and thereby misapplying s. 22(3)(f); and
> (5) in misapplying s. 22(1) and failing to consider the circumstances referred to in ss. 22(2)(e) and (f) of the Act.

[10] The petition came on for hearing before Mr. Justice Scarth on August 30, 2000. His reasons, dated February 2, 2001, are reported at (2001) 84 B.C.L.R. (3d) 344. After describing the arguments of the parties, he began his analysis by noting the ***Gaffney*** case, *supra*. On that occasion, Mr. Gaffney, a television news reporter, had requested disclosure of the amounts paid by the LSS to a particular lawyer for services rendered in two cases in which the lawyer's clients were tried for murder. The LSS refused disclosure, but the Commissioner directed that the records be disclosed, stating that access to the information requested could be given "without challenging the fundamental integrity of solicitor-client privilege." The Court quashed the Commissioner's decision on the basis that he had erred in applying s. 14. Lowry J. rejected the reporter's argument that "no information to be derived from billing records that may exist is information that is subject to solicitor-client privilege." Although he assumed, without deciding, that "any records of billings the Society may have are . . . not privileged", he regarded s. 14 as extending to "all information

in the hands of the Society, not just information on the face of a record requested." The question, he said, was whether "granting access to a record requested will disclose any information, directly or indirectly, that is the subject of solicitor-client privilege." (para. 12.) On this question, Lowry J. concluded:

> The nature and the terms of a legal aid retainer appear to me to be unquestionably a communication between lawyer, client, and the Society as agent that occurs for the purpose of obtaining legal advice where, generally, there exists an expectation of confidence. Either directly or through the Society, the client instructs the lawyer to undertake the defence on the basis that he will be paid for his services in accordance with the legal aid tariff and the lawyer, in turn, accepts the arrangement. It is a communication that occurs within the framework of the solicitor-client relationship and is accordingly privileged.
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> * * *
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> If they exist, the records of billings sought would disclose the financial arrangements for the lawyer's defence of his clients. They would reveal the nature and the terms of his retainers. They would then reveal information that is subject to solicitor-client privilege. That must be the end of the inquiry. Access to the billing records cannot be required. [paras. 16 and 18]

[11] Scarth J. in the case at bar stated that the nature and terms of a lawyer's legal aid retainer agreement with a client are privileged, "although the existence of the relationship between a solicitor and his client in itself is not", citing ***Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)*** (1996) 143 D.L.R. (4th) 134 (B.C.S.C.) at 139. (I note here that Scarth J.'s Reasons pre-date the recent decision of the Supreme Court of Canada in ***Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*** (2002) 216 D.L.R. (4th) 257, where the majority stated that "The name of the client may very well be protected by solicitor-client privilege, although this is not always the case". The Court cited ***Thorson v. Jones*** (1973) 38

D.L.R. (3d) 312 (B.C.S.C.), and R.D. Manes and M.P. Silver, ***Solicitor-Client Privilege in Canadian Law*** (1993) at 141.) Scarth J. did not understand the LSS to say that the requested information — billers' names and the respective amounts billed by them — was itself privileged; rather, the Society's position was that an "assiduous researcher" could use public records of counsel's appearances to identify clients whose lawyers were retained on a legal aid basis. Thus, the LSS contended, "Disclosure of names of the top 'billers' may disclose, even if only indirectly, privileged information about the nature and terms of the client's retainer." (para. 16.)

[12] Scarth J. then turned to consider the standard of review applicable to the Commissioner's decision. The LSS took the position that the standard of review was one of correctness, while the Commissioner distinguished the question of "whether certain information is privileged" — on which he contended the standard of review was one of correctness — from the question of "applying s. 14 . . . to the circumstances of this case", which the Commissioner characterized as a matter of mixed fact and law to which a standard of reasonableness applies. (para. 18.) Scarth J. reviewed the various factors said to characterize the "pragmatic and functional" approach to be taken by Canadian courts to judicial review of the decisions of administrative tribunals, as set out in what is now a long series of cases, but most notably ***Pezim v. British Columbia (Superintendent of Brokers)*** [1994] 2 S.C.R. 557, ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)*** [1998] 1 S.C.R. 982, ***Canada (Director of Investigation and Research) v. Southam Inc.*** [1997] 1 S.C.R. 748. (More recently, see also ***Dr. Q v. College of Physicians and Surgeons of British Columbia*** [2003] S.C.J. No. 18 (Q.L.) and ***Law Society of New Brunswick v. Ryan*** [2003] S.C.J. No. 17 (Q.L.).) On this point he concluded:

> In my opinion, the circumstances obtaining here require that the Commissioner's decision be reviewed by applying the standard of correctness. The application of s. 14 to the circumstances of this case is not one requiring a specialized expertise. With the greatest of respect the Commissioner has no greater expertise than the Court on the issue in question. The legislation does not accord the Commissioner the protection of a privative clause. Although the matter is before this Court on judicial review, rather than by way of statutory right of appeal where the jurisdiction of the Court to disagree with the reasoning of the Commissioner would

> be much broader: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commissioner*, [1989] 1 S.C.R. 1722, at pp. 1745-46, I conclude that the question before the Court is whether the Commissioner was correct in his application of s. 14 to the circumstances of the case. [para. 21]

[13] Applying a standard of correctness, Scarth J. formulated the question before him in the same way as the Court had in ***Gaffney***:

> The question to be asked must be whether granting access to a record requested will disclose *any* information, directly or indirectly, that is the subject of solicitor-client privilege. [para. 28]

On this issue, he noted the Commissioner's argument that the onus lay on the LSS to lead "evidence" that disclosure of the names of the "billers" would reveal the names of clients being funded by legal aid. Counsel for the Commissioner contended that no such evidence had been led. Mr. MacAdams on behalf of the LSS asked, however, what evidence could be adduced to "prove" that such disclosure would, or could, occur. Scarth J. agreed with his submission, observing that affidavit evidence on the point would likely amount to "little more than sworn argument". As well, he agreed with the LSS's argument that a diligent reporter could piece together already-public information with the information sought by Ms. Tanner to determine the identity of legal aid clients. As Mr. Overholt for the CBA had submitted:

> Court judgments and other information possessed by Court Registries are matters of public record, including the names of the clients and counsel on any particular matter. With the vast and rapidly expanding means of accessing this information, a diligent individual can quickly determine which counsel worked on which cases and the party for whom they worked in each of those cases. As a result, a person possessing the names of the top billing lawyers, knowing that legal aid matters would certainly comprise the majority, if not the entirety, of their trial work, could determine which clients had used the resources of the Legal Services Society to fund their litigation.

In the result, the Chambers judge ruled that the Commissioner had erred in law in applying s. 14, and quashed his decision. It was therefore unnecessary to deal with s. 22 of the Act and personal privacy considerations.

ON APPEAL

Standard of Review

[14] In this court, we were treated to very able and thorough arguments on the perennial question of "standard of review", as counsel for the Commissioner argued that the Chambers judge had erred in applying a standard of correctness rather than reasonableness. The discussion illustrated the difficulty, in the particular circumstances of this case, of segregating the question of "standard of review" from the nature, and even the content, of the substantive question before the court, and from the now considerable case law concerning solicitor-client privilege and its interrelationship with statutory provisions which may infringe it. In support of her argument that the Chambers judge had erred in applying a standard of correctness, for example, Ms. Ross relied heavily on the proposition that the essential question before the Chambers judge was whether the Commissioner had had before him an "evidentiary basis" on which to conclude that disclosure of the requested information created a risk of breach of privilege. Ms. Ross characterized this question as one of fact, or "adjudicative fact", which she defined as a matter capable of empirical proof, as contrasted with a fact of which judicial notice may be taken. She drew an analogy to the kinds of "future events" referred to in ***Athey v. Leonati*** [1996] 3 S.C.R. 458, a personal injury case dealing *inter alia* with the assessment of damages for loss of earning capacity and future care costs. There it was confirmed that such events not need be proven on a balance of probabilities, as long as they are "real and substantial" possibilities. (para. 27.) The Commissioner elaborated in his factum:

> 65. The type of "fact" involved — the <u>likelihood of a future event</u> — is not peculiar to s. 14 or solicitor client privilege. Determining the effect of disclosure of particular information is generic to the fact-finding that is the constant occupation of the Commissioner in relation to virtually all of the disclosure exceptions in the Act.
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> 66. The particular "future event" in this case — whether, on account of the makeup of any of the top billers' practices, or for any other reason,

> disclosure of their names could facilitate disclosure of the identity of any of their clients as legal aid clients — falls squarely within the Commissioner's role to find all facts relating to the applicability of a disclosure exception that is in issue in an inquiry under the Act. It is a factual question that is not based on or tied to the uncontested legal propositions that: (1) the nature and terms a lawyer's legal aid retainer agreement with an identified client is privileged information; and (2) the privilege would be infringed if disclosure of any of the names of the top billers could permit discovery of the identity of any of their clients as legal aid clients. [Emphasis added.]

[15] This argument has superficial appeal, but with respect, I am not confident that the issue can be characterized so easily. Here, there was affidavit evidence as to the information provided by the LSS. Whether the further information sought by Ms. Tanner created a risk of disclosure of the identity of the billers' clients (which the Commissioner conceded, in the passage quoted above, would infringe the privilege) seems not so much a matter of proof as one of logical reasoning from the evidence. Ms. Ross characterized this process as "speculation" on the Chambers judge's part, but it involves legal reasoning in a way that is different from the "crystal-ball gazing" undertaken by courts in assessing damages in personal injury cases. Moreover, there is no satisfactory answer to Scarth J.'s question about the kind of "proof" one could adduce to show that a diligent individual, putting together the facts requested by Ms. Tanner together with information already publicly known, could deduce that an accused on trial was on legal aid. The same would be true of any "evidence" to the contrary that might be adduced by Ms. Tanner. In either event, it would add little to the court's knowledge and would, as the Chambers judge said, effectively amount to argument.

[16] In response to the Commissioner's position, Mr. MacAdams on behalf of the LSS submitted that if the fact/law dichotomy applied, the question before the Court — which he, like Scarth J., formulated as whether granting access would disclose any information that is subject to solicitor-client privilege — was one of mixed fact and law, on an application of the analysis advanced in ***Southam***, *supra*. There, the Court considered the nature of findings made by the Competition Tribunal to the

effect that certain newspapers circulated in the Lower Mainland were in competition with each other and about what remedy would restore the competitive situation that had existed prior to the merger of two of Southam's newspapers. In applying the various contextual factors mandated by the "functional and pragmatic" approach to standard of review, the Court noted the complexity of characterizing questions of law, questions of fact, and questions of mixed law and fact. Iacobucci J. stated:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.
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> For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about

> the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases. [paras. 35-6; emphasis added.]

[17] In the present case, the question before the Commissioner cannot in my view be described as a question about "what actually took place between the parties"; nor as a question about "what the correct legal standard is". (Again I emphasize the Commissioner's concession (see above at para. 14) that solicitor-client privilege would be infringed if disclosure of the ten lawyers' names could permit the discovery of their clients' identities.) I suppose that if one were forced to "pigeon-hole" the issue, one would have to say it is one of mixed fact and law. Certainly the issue is one that has the "potential to apply widely to many cases" and is likely to have precedential value. In this regard, I note the Court's comment in ***Southam*** that "in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future." (para. 37.) I view the issue arising in this case as one that is apt to have precedential value and therefore to be of interest to courts and lawyers in the future.

[18] Counsel for the LSS also made the point, however, that even if one accepted Ms. Ross's formulation of the question before the Commissioner — whether there was an "evidentiary basis" on which he could conclude that a risk of breach of privilege existed — there was such an evidentiary basis, and indeed it was effectively recognized by the Commissioner when he stated at p. 7 of his Order:

> . . . If, for example, all of the services of a particular leading biller were for a very small number of clients, there may be a proper basis for the Society to refuse to disclose that total billing amount, because it might facilitate the identification of specific clients.
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> Unless this is the case, I find that the information in dispute is not subject to solicitor-client privilege and that disclosure would not reveal information that is subject to privilege. [Emphasis added.]

Mr. MacAdams noted that it is public knowledge, certainly in the profession, that the usual hourly rate paid to lawyers by the LSS is $80 (subject to a "holdback" of $8 per hour at present). Combining this fact with the total amounts billed for services as shown in the information that was provided by the LSS, one can readily calculate that the number of hours billed by the five criminal lawyers ranged from 938 hours to 2,063 hours. Obviously, the latter is likely to represent all or almost all of the lawyer's billed hours in the nine-month period. Thus even on the evidence adduced in this case, disclosure of the lawyers' names would be likely to facilitate the identification of specific clients funded by legal aid. This fact counters the Commissioner's assumption (see para. 8 above) that (only) the LSS "knows how many clients the lawyer billed for."

[19] Mr. MacAdams' larger point, however, was that whether the question was one of fact, mixed fact and law, or law, that consideration is only one of the four factors enumerated in the ***Southam*** and ***Pushpanathan*** line of cases as relevant to the question of the standard of review. In addition to the "nature of the problem", the existence of a privative clause in the applicable legislation, the expertise of the tribunal and the purpose of the legislation and of the provision in particular must be considered.

[20] As has been noted in other cases (see especially ***Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)*** (1998) 58 B.C.L.R. (3d) 61 (B.C.C.A.)), the British Columbia Act (unlike some of its counterparts in other jurisdictions) contains no privative clause, nor any right of appeal. Section 59(1) simply states that where the Commissioner issues an order to a public body, the order must be complied with within 30 days unless an application for judicial review is brought within that time. The absence of a privative clause tends to suggest that the Legislature did not intend to place any particular limit on one's access to the courts to review decisions of the Commissioner, and thus points more towards the correctness end of the spectrum than the "patently unreasonableness" end. However, this factor is not generally accorded a high degree of significance: see ***Moreau-Bérubé v. New Brunswick (Judicial Council)*** [2002] S.C.J. No. 9 (Q.L.), at para. 42; ***Law Society of New Brunswick***, at para. 29; and ***Aquasource***, at para. 20.

[21] The most important factor, in contrast, is the tribunal's expertise. As stated by Iacobucci J. in ***Southam***, at para. 50:

> Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review. This Court has said as much several times before, though perhaps never so clearly as in the following passage, from *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335:
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> > ... the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada* ..., it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

[22] In ***Pushpanathan***, Bastarache J. for the Court elaborated:

> Described by Iacobucci J. in *Southam*, *supra*, at para. 50, as "the most important of the factors that a court must consider in settling on a standard of review", this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded. In *Southam*, the Court considered of strong importance the special make-up and knowledge of the *Competition Act* tribunal relative to a court of law in determining questions concerning competitiveness in general, and the definition of the relevant product market in particular.
>
> Nevertheless, expertise must be understood as a relative, not an absolute concept. As Sopinka J. explained in *Bradco*, *supra*, at p. 335: "On the other side of the coin, a lack of <u>relative expertise</u> on the

> part of the tribunal vis-à-vis the particular issue before it as compared with the reviewing court is a ground for a refusal of deference" (emphasis added). Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise. [paras. 32-33; emphasis added.]

[23] In addressing the question of expertise in the case at bar, counsel for the Commissioner relied most strongly on a recent decision of the Supreme Court of Canada in ***Macdonell v. Quebec (Commission d'accès à l'information)*** (2002) 219 D.L.R. (4th) 193, which concerned a request for information relating to the expenses of members of the National Assembly of Quebec. In the course of his reasons for the majority, Gonthier J. noted that the Quebec *Commission d'accès à l'information* had no "special interest" in the decisions it was required to make and therefore was able to play its role independently. Gonthier J. went on to note that by virtue of the fact that it was always interpreting the same statute, and that it did so regularly, the Quebec Commission "develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference." (para. 8.)

[24] Similar considerations apply to the role and expertise of the Commissioner under the British Columbia legislation. The Commissioner is appointed for a six-year term and may be removed by the Legislative Assembly, only for cause or incapacity. The Commissioner's functions are diffuse: he or she may engage in research, comment on subjects related to the storage and access to information, and inform the public about the Act. He or she has several powers, listed in s. 42, including the power to conduct investigations and audits in order to ensure compliance with the Act. Under s. 56, he or she is required to conduct an inquiry into any matter under review that has not been settled or successfully mediated, and for this purpose has the powers of a commissioner under ss. 15 and 16 of the ***Inquiry Act***, R.S.B.C. 1996, c. 224. In ***Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*** [1999] B.C.J. No. 198 (Q.L.) (B.C.S.C.), L. Smith J. usefully summarized the functional aspects of the British Columbia Commissioner's role as follows:

> Under the Act the Commissioner is an officer of the Legislature (s. 37(2)) and has considerable security of tenure and independence (s. 37 & s. 38). He or she is given broad general powers to oversee the implementation of the Act and the achievement of its purposes (s. 42 & s. 44). Clearly, the legislation contemplates a Commissioner with significant relative expertise with respect to freedom of information and privacy policy and practice. It is true that the issues entrusted to the Commissioner are similar in some ways to questions that judges decide (in contrast with more specialized tasks, such as, for example, the weighing of economic interests that takes place before the Competition Bureau) but they are also unique in other ways. To the extent that the Commissioner's decision turned on the balancing of freedom of information and privacy considerations, and on an understanding of the complex issues facing public bodies, it should be afforded some degree of deference because of his relative expertise. [para. 68]

[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. And as will be developed below, the problem before him on this occasion was not one that involved the "balancing" of a polycentric set of factors and interests. Indeed, the Supreme Court of Canada has stated that "Where the interest at stake is solicitor-client privilege — a principle of fundamental justice and civil right of supreme importance in Canadian law — the usual balancing exercise . . . is not particularly helpful." (***Lavallee***, para. 36.) ***Lavallee*** also shows that solicitor-client privilege is a matter of the common law, not of statutory interpretation. Indeed, if s. 14 had not been enacted, the same issue would have arisen in this case. 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.

[26] This leads directly to the remaining factor — the purpose of the Act as a whole, and of s. 14 in particular. Counsel for the

Commissioner naturally emphasized the statement at s. 2 of the Act that one of its purposes is to "make public bodies more accountable to the public", *inter alia*, by "giving the public a right of access to records". Mr. MacAdams naturally responded by pointing out the second purpose stated in s. 2(1), to "protect personal privacy by . . . specifying limited exceptions to the rights of access" and "preventing the unauthorized . . . disclosure of personal information by public bodies."

[27] The fact is that the Act has two purposes. It provides many measures aimed at enhancing the availability, accessibility and disclosure of information about public bodies; but at the same time, it places many clear limitations on those values — most notably, the Commissioner's obligation to refuse disclosure of personal information if a third party's personal privacy would be invaded unreasonably, and the presumption that the disclosure of specified kinds of information is unreasonable. It contemplates various checks and balances to strike an appropriate balance between personal privacy and public access to information.

[28] Nevertheless, Ms. Ross contends that "Disclosure is the general rule under the Act. Non-disclosure is the exception." As well, she notes the important policy values underlying access to information legislation, as described by La Forest J. in his dissenting judgment in ***Dagg v. Canada (Minister of Finance)*** [1997] 2 S.C.R. 403. His Lordship there suggested that the "overarching purpose" of such legislation is nothing less than to facilitate democracy. He continued:

> It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
> >
> > . . .

> Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:
>
> > There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted. [paras. 61-63]

Cory J. for the majority in ***Dagg*** expressly adopted La Forest J.'s approach to the federal ***Access to Information Act***, R.S.C. 1985, c. A-1, and ***Privacy Act***, R.S.C. 1985, c. P-21, including the idea that the two statutes should be interpreted and read together. (para. 1.)

[29] What then of the purpose of s. 14 of the British Columbia legislation? Headed "Legal Advice", it states: "The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." One suspects the provision was intended to protect communications between public bodies *qua* clients and their lawyers; but again, even if s. 14 had not been enacted, the law would protect information that is

subject to solicitor-client privilege, no matter who the lawyer or client. This is best illustrated by ***Lavallee***, where the Supreme Court of Canada was asked to determine the constitutionality of s. 488.1 of the ***Criminal Code***. That section had established a set of procedures for the judicial determination of claims of solicitor-client privilege in relation to documents seized from law offices under search warrants in criminal investigations. In the course of her reasoning, Arbour J. for the majority reinforced the fact that the privilege is a substantive and constitutionally-protected rule which may be interfered with only to the extent absolutely necessary. She quoted from the judgment of Lamer J. (as he then was) in ***Descôteaux v. Mierzwinski*** [1982] 1 S.C.R. 860 at 875:

> 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.

In ***Lavallee***, Arbour J. also emphasized:

> . . . all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice. [para. 24]

[30] The Court in ***Lavallee*** then proceeded to examine whether s. 488.1 incorporated all steps necessary to prevent any deliberate or accidental access to information that is subject to solicitor-client privilege. The Court identified various deficiencies in the section, including the fact that the privilege could be lost through the absence or inaction of the lawyer and the fact the lawyer could be required to name the client whose privilege was being threatened in order to engage

the sealing procedure with respect to that client's documents. As well, the provision failed to ensure that interested clients were notified when their documents were about to be turned over to investigators; it imposed strict time limits which could not be extended without the Crown's consent; and the Attorney General could have access to the documents prior to the matter of privilege being judicially determined. In the result, s. 488.1 was struck down in its entirety and a set of ten "principles" were provided by the Court to govern the seizure of documents from lawyers' offices as a matter of "common law" until Parliament enacted appropriate measures. The key point for purposes of this appeal, however, is the Court's statement that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance", and that "stringent norms" must be adopted to ensure the privilege is protected. (para. 36.)

[31] On behalf of the LSS, Mr. MacAdams argued that this principle informs both the third and fourth factors in the ***Pushpanathan*** test, namely, the purpose of s. 14, and the "nature of the problem" in question. In his analysis, the case at bar constitutes a "classic bi-polar dispute: when one party seeks information which the other resists divulging, with the Commissioner's role being to resolve the dispute in accordance with the Act." He emphasizes that no balancing of interests is appropriate when solicitor-client privilege is at issue. (See above, at para. 25.) Further, s. 14 "in particular", although it uses permissive language, must be interpreted and was intended to protect against disclosure of information that is subject to the privilege. Thus, he submits, the standard to be applied by a court to this decision of the Commissioner must be one of correctness.

[32] Returning finally to the "nature of the question", I note the comment of Donald J.A. for this court in ***Aquasource*** to the effect that the inquiry as to the applicable standard of review in the context of the British Columbia Act is "issue-specific. That is, whether an administrative tribunal's decision will attract curial deference largely depends on the question involved. It is no longer appropriate to grant blanket deference to the tribunal . . . ." (para. 16.) In this connection, Donald J.A. disagreed with the suggestion made in ***Ontario Hydro v. Ontario (Information and Privacy Commissioner)*** [1996] O.J. No. 4636 (Q.L.) (Ont. Div. Ct.), that the interpretation and application of various exemptions under the Ontario ***Freedom of Information Act*** lie "at the heart of the Commissioner's specialized expertise and so the Commissioner's

decisions in this regard are entitled to a high degree of curial deference." (para. 1.) Instead, he agreed with the comments of Goudge J.A. in ***Walmsley v. Ontario (Attorney General)*** (1997) 34 O.R. (3d) 611 (Ont. C.A.), where on an application of the "pragmatic and functional" approach, a standard of correctness was found to be appropriate to the question of whether particular records were "under the control" of a government ministry. This involved the interpretation of a "jurisdiction-limiting" provision of the Ontario legislation, a question that was not seen as requiring specialized expertise to interpret. (Like the British Columbia Act, the Ontario legislation did not provide the commissioner with the protection of any privative clause.)

[33] Similar considerations led this court in ***Aquasource*** to conclude that a correctness standard should be applied to the Commissioner's determination of whether disclosure of the requested information would reveal "the substance of deliberations" of the Executive Council within the meaning of s. 12 of the Act. In the words of Donald J.A.:

> In summary, the nature of the question before the Commissioner was one of statutory interpretation not heavily burdened with facts. It involved Cabinet communications, a crucial area of government activity. The legislature did not intend to confer a power on the Commissioner to reshape the institutions of government in the course of administering the *Act*.
>
> For these reasons I have formed the opinion that the Commissioner was required to be correct in his interpretation of s. 12. [paras. 27-28]

[34] Mr. MacAdams contends that similarly in this case, the unique nature of solicitor-client privilege as a constitutionally-protected right and the fact that its protection must be as close as possible to absolute, militate in favour of a correctness standard. In his submission, the constitutional value attached to solicitor-client privilege means that the Commissioner should not be permitted to reach a conclusion regarding the privilege that is "reasonable, but incorrect."

[35] Having considered the four factors referred to in ***Pushpanathan*** and in particular, the nature of the issue, I agree with this submission. If, as ***Lavallee*** mandates, the 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 funded by legal aid. A decision of the Commissioner which places solicitor-client privilege at risk is not acceptable, even if "reasonable". In summary, I agree with the comments of Lowry J. in ***Gaffney*** as follows:

> Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that what would at common law be the subject of solicitor-client privilege remain privileged. There is absolutely no room for compromise. Privilege has not been watered-down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.
>
> Certainly the purpose of the Act as a whole is to afford greater public access to information and the Commissioner is required to interpret the provisions of the statute in a manner that is consistent with its objectives. However, the question of whether information is the subject of solicitor-client privilege, and whether access to a record in the hands of a government agency will serve to disclose it, requires the same answer now as it did before the legislation was enacted. The objective of s.14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly. [paras. 25-26]

[36] It is probably unnecessary to state as well that with respect to this court's review of the decision of the Chambers judge below, the standard is one of correctness: see ***Dr. Q***, *supra*, at para. 43.

Was the Commissioner Correct?

[37] Having dealt with the applicable standard of review, I come at last to the substantive question raised by this appeal: was the Commissioner correct in ordering the disclosure of the requested information, notwithstanding the objections of the LSS concerning solicitor-client privilege? In this regard, 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."

[38] In my opinion, the possibility of breach of solicitor-client privilege is a material one even in the circumstances of the particular information provided in this case. As earlier stated, the amount of fees billed by the "top billers" disclosed by the LSS supports the inference that some if not all of them spent at least half their time on LSS clients. Due to the increasing complexity of the law, criminal trials of many months' duration are now becoming fairly common in this Province. It was not argued that the situation is any different with respect to immigration hearings. An assiduous reporter who is aware of long proceedings in the public courts could easily put this information together with the billing amounts and deduce that particular clients were funded by legal aid. As suggested earlier, the Commissioner himself recognized this possibility in the concluding paragraph of his discussion of privilege, but he failed to appreciate its significance. Like the Chambers judge below, I conclude that the Commissioner was incorrect in disregarding this possibility and in ordering the disclosure of the names of the billers corresponding to the amounts billed in the information provided by the LSS.

Other Published Information

[39] Finally, I wish to note Mr. Burnett's argument that since the LSS already publishes annually the list of its major "suppliers of goods and services" in accordance with the ***Financial Information Act***, the additional information requested by Ms. Tanner — i.e., which lawyers billed for criminal or immigrations services and the amount billed by them in a nine-month period as opposed to 12 months — increases the risk of breach of privilege so minimally as to be legally insignificant. I would not want to be taken as agreeing that the LSS has correctly interpreted s. 2(2)(f)(i) of the ***Financial Information Act***, which requires it to publish the total amount paid "to each supplier of goods and services during the fiscal year" above $10,000. It is reasonable to infer this section refers to the amount paid to each supplier of goods or services to the Society during the fiscal year. Do lawyers who supply legal services to clients supply "goods or services" to the LSS (as Mr. Burnett strenuously contended), or to their clients, or

in some sense to both? I would have thought lawyers' advice and services go to their clients, and their clients alone. The ***Legal Services Society Act***, R.S.B.C. 1996, c. 256, contains various references that support this view. Certainly the privilege belongs to the clients, not to the LSS. However, counsel were not prepared to make submissions on this point and since it is not necessary to decide it in this case, I leave it for another day.

[40] Assuming, however, that the practice heretofore followed by the LSS was correct, and that an assiduous reporter might determine that particular clients represented by lawyers in the criminal and immigration fields are likely funded by legal aid, Mr. Burnett asks what is the danger of disclosing the same kind of information as is now published, but for a shorter period. There is nothing to say that shorter periods — e.g., one month — will not be the subject of future requests, making it even easier to identify legal aid clients. The real question is how and where one draws the line. Again, I read ***Lavallee*** to have supplied the answer. If privilege must be retained as a right that is as close to "absolute" as possible, the line must be drawn on the side of protection of the privilege.

[41] I would dismiss the appeal, with thanks to counsel for their helpful arguments.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Braidwood"

I AGREE:

"The Honourable Madam Justice Levine"

APPENDIX

TOP FIVE BILLERS

Bills approved for payment by Legal Services Society between April 1, 1998 and December 31, 1998[1]

Immigration Cases	Fees[2]	Disbursements[2]	Contributions[3]	GST[4]	Total
	$ 170,285	$ 89,229	$ 0	$ 18,166	$ 277,680
	113,200	74,844	0	13,163	201,206
	107,962	43,881	0	10,629	162,472
	77,655	34,762	0	7,869	120,286
	66,139	33,567	0	6,979	106,686
Criminal Cases					
	165,111	5,378	0	11,934	182,424
	This lawyer asked LSS to annotate these amounts as follows: This lawyer advised LSS that this is a two-person law firm, that both partners bill LSS for referrals and share the work equally on all referrals. The partner's bills approved for payment in this time period, according to LSS records, came to $7,820 ($7,097 in fees, $211 in disbursements, $512 in gst) for a total for the firm of $190,244.				
	75,077	70,965	0	10,223	156,266
	127,203	13,734	0	9,866	150,802
	120,451	3,713	0	8,692	132,856
	92,173	21,353	(102)	7,940	121,364

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[1] Billers may have had amounts approved for payment for other work billed, including criminal duty counsel.

Because it takes time to process bills for payment, the amounts shown as approved could be for bills received before April 1, 1998. Conversely, some bills received before December 31, 1998 could be approved for payment after December 31, 1998.

A lawyer's account may include bills for work performed by other lawyer(s) on the referrals.

[2] Lawyers have to pay their office overheads (rent, supplies, secretarial salaries, etc.) out of the fees paid.

The disbursements reimburse lawyers for out-of-pocket costs incurred on particular cases.

[3] Legal aid offices collect contributions from clients. However, on some of the older files lawyers would collect the contributions and deduct the amounts from their billings.

[4] Lawyers have to remit to Revenue Canada the GST paid by LSS, less any input tax credits. LSS recovers 100% of this GST from Revenue Canada.