IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richmond (City) v. Campbell,* 2017 BCSC 331

Date: 20170228
Docket: S156741
Registry: Vancouver

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

AND OIPC Order F15-31

Between:

City of Richmond

Petitioner

And

William Campbell, Office of the Information & Privacy Commissioner

Respondents

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Petitioner:	F.V. Marzari
Counsel for the Respondent, William Campbell:	No Appearance
Counsel for Respondent, Office of the Information & Privacy Commissioner:	N.M. Byres, Q.C. M.A. Mitchell
Place and Date of Hearing:	Vancouver, B.C. July 8, 2016
Place and Date of Judgment:	Vancouver, B.C. February 28, 2017

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INTRODUCTION

[1] The City of Richmond ("City") has petitioned for an order quashing the order ("Order") of the respondent Office of the Information and Privacy Commissioner of British Columbia ("OIPC") requiring the City to create and disclose to the respondent Campbell ("Campbell") a record of the total aggregate legal fees and settlement amounts regarding claims by two other individuals against the City ("Information"). The Adjudicator's reasons for the Order ("Decision") are set out in Order F15-31.

[2] At the time Campbell requested documents relating to the Information, he was a union employee of the City. The City dismissed him, and he grieved the dismissal. Counsel advised that the claim between the City and Campbell has been resolved, and that Campbell has no further legal interest in obtaining the Information. Campbell tried to withdraw his request, but that does not affect the Order. Campbell did not file a response to the petition or appear at the hearing of the petition.

[3] This petition raises issues regarding the scope of ss. 14 and 17 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"), and regarding the common law of settlement privilege. It also raises issues about whether it was reasonable for OIPC to conclude that release of the Information could not reasonably be expected to harm the City, and about the process leading to the Order.

[4] The Petition proceeded to a one-day hearing on the basis of affidavits. The evidence filed included Affidavit #2 of Cindy Hamilton made on October 19, 2015, which is the subject of a sealing order. This affidavit attached copies of confidential records which were included in the record before the OIPC, but were not provided to Campbell.

[5] OIPC made submissions addressing the merits of the judicial review. The OIPC commissioner is entitled to be a party to the City's application pursuant to s. 15(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, which is as follows:

> **15** (1) For an application for judicial review in relation to the exercise… of a statutory power, the person who is authorized to exercise the power
>
> (a) must be served with notice of the application and a copy of the petition, and
>
> (b) may be a party to the application, at the person's option.
>
> …

[6] Courts have discretion in determining the scope of a tribunal's standing on appeal of its own decision, as discussed in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44. Tribunals are permitted to defend the merits of their own decisions where there is no one else to argue their side, to ensure that the court has the benefit of competing arguments, as discussed in *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 at para. 46.

[7] The City did not object to OIPC making submissions regarding the merits of the Order, except to the extent that OIPC made an argument about the dates of the Information, which was not discussed in the Decision.

LAW AND STANDARD OF REVIEW

[8] The relevant parts of sections 4, 14, 17(1), and 58 of *FIPPA* are as follows:

> **4** (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.
>
> …
>
> **14** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.
>
> …
>
> **17** (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …

> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.
>
> …
>
> **58** (1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.
>
> (2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must, by order, do one of the following:
>
> (a) require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access;
>
> (b) either confirm the decision of the head or require the head to reconsider it, if the commissioner determines that the head is authorized to refuse access;
>
> (c) require the head to refuse access to all or part of the record, if the commissioner determines that the head is required to refuse access.
>
> …
>
> (4) The commissioner may specify any terms or conditions in an order made under this section.
>
> …

[9] The City argued first, that the Decision incorrectly interpreted s. 14 of *FIPPA* as not encompassing settlement privilege; second, that the City can claim settlement privilege over the Information even if s. 14 does not encompass settlement privilege; third, that the Decision unreasonably interpreted s. 17 of *FIPPA*; and fourth, that OIPC breached procedural fairness by failing to give notice to the City that it would reframe the issues, and exceeded its jurisdiction by ordering the creation of a new record.

[10] The parties agree that the standard of review with respect to OIPC's decisions regarding the scope of s. 14 of *FIPPA*, and the application of the law of solicitor client privilege to the Information, is correctness. This is consistent with the

decision in *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 [*Central Coast*] at paras. 94, 125, 138 and 142.

[11] The parties agree that the standard of review with respect to OIPC's interpretation and application of s. 17 of *FIPPA* is reasonableness. This is consistent with *Imperial Oil Ltd. v. Calgary (City)*, 2014 ABCA 231 [*Imperial Oil*] at para. 33, leave to appeal to SCC refused, 36098 (February 19, 2015).

[12] The parties agree that the standard of review regarding procedural fairness is fairness. The standard of fairness is comparable to the correctness standard, as discussed in *Robertson v. British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331 at para. 66.

FACTS

[13] In 1999 and 2008 respectively, the City settled claims made against it by two former union employees, Dave Crozier ("Crozier") and Mario Ferreira ("Ferreira"). I refer to Crozier and Ferreira together as the "Previous Grievers". The Previous Grievers both alleged that they had been harassed in their employment. The settlements were negotiated through correspondence. The City incurred legal costs in achieving those settlements.

[14] The Respondent Campbell is a former employee of the City. He was represented by the Canadian Union of Public Employees, Local 718 ("Union"). The City was required to deal with the Union regarding any issues relating to Campbell's employment.

[15] At some point in the summer of 2013, the City advised Campbell that he must return to work in the position of a night-shift Building Service Worker ("BSW"). Campbell declined to do so.

[16] In July 2013, Campbell advised the City that he would not accept the BSW position, in part because it involved night shifts.

[17] On July 8, 2013, Campbell requested that the City provide copies of all financial information in regards to the legal action and resulting settlement between the City and Ferreira, including settlement costs paid to Ferreira and all legal costs paid by the City or by others on behalf of or for the City. He made a similar request regarding the legal action and resulting settlement between the City and Crozier (collectively, the "Request").

[18] On August 1, 2013, the City advised Campbell that it was terminating his employment because of his refusal to work as a night-time BSW.

[19] Also on August 1, 2013, the Union filed a grievance on behalf of Campbell regarding his dismissal. The Grievance Form alleges that the City failed to accommodate Campbell, and alleges a violation of the Collective Agreement and of the *Canadian Human Rights Act*, R.S.B.C. 1996, c. 210.

[20] The City identified the following documents ("Identified Documents") as responsive to the Request:

a) regarding Crozier, letters, a cheque, a release, and legal invoices, documents which are dated in the years 1994 to 1999; and

b) regarding Ferreira, a memorandum of settlement, agreement, cheque, and legal invoices, documents which are dated in the years 2003 to 2008.

[21] On August 26, 2013, the City advised Campbell that it required an extension of time to provide its response to the Request.

[22] On September 17, 2013, the City advised Campbell that it was withholding the Identified Documents on the basis of s. 14 (solicitor client privilege), s. 17 (financial harm), and s. 22(1) (personal information of third party). The City is no longer relying on s. 22(1).

[23] By letter dated September 25, 2013, Campbell requested that OIPC review the City's decision to withhold the Identified Documents.

[24] Campbell wrote a letter to the City's Mayor and Council dated October 1, 2013. In this letter, he alleged that he had been harassed and bullied in his employment with the City. He referred to rumours about the amounts paid by the City to two other former City employees who had alleged harassment and bullying, and suggested that he would involve the media if necessary. Campbell requested payment of $1 million, writing that it would "save the [City] the costs of legal expenses which have been shown to far exceed the settlement costs".

[25] On March 24, 2014, Campbell asked that OIPC consider whether the City was authorized to withhold the Identified Information under ss. 14 and 17 of *FIPPA*.

[26] On October 1, 2014 OIPC sent Campbell and the City a Notice of Written Inquiry.

[27] On October 9, 2014, OIPC issued a revised notice of written inquiry. It included the following:

> 1. Issues - in the inquiry the adjudicator will consider whether the [City]:
>
> > …
> >
> > iii) is required to withhold the total settlement amounts for each request under s. 22 of [*FIPPA*]; or
> >
> > iv) is authorized to withhold the total settlement amounts under s. 17 of [FIPPA]; and
> >
> > v) is authorized to withhold the total aggregate legal fees for each request under s. 14 of [*FIPPA*].
>
> [Underlining added.]

[28] Jim Tait, Director of Human Resources with the City, swore an affidavit dated November 19, 2014 in the OIPC proceedings. It includes the following:

> 9. … Providing information to [Campbell] about the settlement and legal costs in regards to disputes with two former employees of the City can be reasonably expected to cause financial harm to the City. Given that the information relates to claims against the City by two former employees, [Campbell] will be able to use this information to his advantage in the upcoming mediation and any other negotiations to the City's detriment. This not only discloses the amounts of the settlements, it would also give [Campbell] information about the legal costs incurred by the City prior to entering into settlements with the two former employees. This would give [Campbell] an unfair advantage in any negotiations with the City.

> [Underlining added.]

[29] Campbell's initial submission in the OIPC proceedings included the following:

> #2 … I requested information through the [*FIPPA*] and the [City] has denied my requests. These requests were for two previous incidents of employees … In these cases the [City] has rumoured to have spent over a million dollars on legal fees and several hundreds of thousands on settlement costs to the employees …
>
> #11 I am currently trying to reach a settlement … and these two previous cases which are the subject of my freedom of information requests show that the [City] has been through this previously and how they handled the situation. These [precedents] showing the [City's] actions should also be available to the public …
>
> [Underlining added.]

[30] Campbell's Final Submission in the OIPC proceedings is dated December 9, 2014, and includes the following:

> #6 I am currently trying to reach a Fair and Honest Settlement for being harassed and bullied at my workplace and the two cases which are the subject of my freedom of information requests show that the [City] has been through this previously. These previous settlements which were mutually agreed upon by both parties indicate that the settlements were Fair and Honest which I am trying to achieve.
>
> #7 My requests are for the Aggregate Amount Totals for Settlement Costs and for Legal Costs. …I am looking for one single total sum for Settlement Costs and one single total sum for Legal Costs. … I am looking for two single total sum figures.
>
> #9 The settements [*sic*] were mutually agreed by both parties which makes the settlements Fair and Honest. I am seeking a Fair and Honest settlement similar to the two previous settlements. If the City wants to negotiate a Fair and Honest settlement, then that settlement will be similar in value to the previous settlements and therefore releasing the previous settlements will in no way harm the [City].
>
> …
>
> #12 My requests are for a single figure of the Aggregate Total Amount of the two Settlements and a single figure of the Aggregate Total Amount of the Legal Costs of the two Settlements. …
>
> [Underlining added.]

[31] Campbell's 1st Affidavit in the OIPC proceedings is dated December 11, 2014, and includes the following:

> 7. I have agreed to Unbinding Mediation with Vince Ready only after I have received the Aggregate Sums for the two previous cases I have requested.
>
> 8. When I have the Aggregate Sums then I will know what a Fair and Honest Settlement should be as both previous settlements were mutually agreed upon.
>
> 9. The Aggregate Sums do not cause any harm or give any unfair advantage in negotiations with the City as both previous settlements were mutually agreed to and therefore were Fair and Honest.
>
> [Underlining added.]

[32] The Order is OIPC's Order F15-31 dated July 6, 2015. It required the City to create and disclose to Campbell, by August 18, 2015, a record of the total aggregate legal fees and the total aggregate settlement amounts regarding the claims against the City by Ferreira and Crozier.

[33] The Decision includes the following:

> **a. Regarding the Amount of Legal Fees:**
>
> [25] What the above cases consistently demonstrate is that the question of whether the presumption that the legal fee amount is subject to solicitor client privilege has been rebutted turns on the circumstances of the particular case. I am satisfied in the circumstances of this case that the presumption is rebutted.
>
> [26] There is no reasonable possibility that disclosure of the legal fee amount will directly or indirectly reveal any communication protected by privilege. The legal fee amount comprises an aggregate amount of the legal fees for two legal disputes involving named individuals. No other information is being disclosed. I am satisfied that in the context of this case, that information is "neutral information" that does not directly or indirectly reveal any communication protected by privilege.
>
> [27] I find that disclosure of the information at issue would not enable an assiduous inquirer to deduce or otherwise acquire privileged communications. The information at issue in this case is neutral information that is insufficiently detailed to disclose privileged communications, even when combined with background information that is known by - or could be acquired by - an assiduous inquirer.
>
> [28] In summary, I find the presumption that disclosure of the legal fee amount is subject to solicitor client privilege has been rebutted. I reach this conclusion because there is no reasonable possibility that disclosure of the legal fee amount will directly or indirectly reveal any communication protected by the privilege, or that an assiduous inquirer, aware of background information (such as the two specific disputes the legal fee amount relates to), could use the information requested to deduce or otherwise acquire privileged communications.

…

b. Regarding Settlement Privilege

[30] The City argues the settlement amount can be withheld under s. 14 because s. 14 of [*FIPPA*] provides a disclosure exemption for information that is protected by settlement privilege. The same argument was recently considered in detail in Order F-15-20. Senior Adjudicator Barker agreed with the approach taken in previous Orders that the words used in s. 14 of [*FIPPA*] do not encompass a disclosure exemption for information that is protected by settlement privilege. I adopt and apply the reasoning in Order F15-20. The settlement amounts cannot be withheld on the basis of settlement privilege under s. 14.

…

c. Regarding Potential Harm to City

[33] Section 17 lists specific examples of the types of harm that s. 17 covers. However, the list is not exhaustive and disclosing information that does not fit into these enumerated examples may still constitute harm under s. 17(1). The City identifies s. 17(1)(d) (information the disclosure of which could reasonably be expected to result in undue financial loss or gain to a third party), s. 17(1)(e) (information about negotiations carried on by or for the City) and s. 17(1)(f) (information the disclosure of which could reasonably be expected to harm the City's negotiating position) as particularly relevant to this inquiry.

[34] The standard of proof for s. 17 is whether disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as requiring a reasonable expectation of probable harm from disclosure of the information. It can be described as a middle ground between what is probably and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach this standard. The determination of whether the standard of proof has been met is contextual, and the quantity and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences." As the City acknowledges in its submissions, the evidence of harm must establish the reasonable likelihood of the harm occurring in relation to the specific information and the specific context of the disclosure.

[35] The City says that the applicant seeks to use the information in issue to his advantage in negotiations regarding a settlement of his own employment dispute with the City. It says that this can reasonably be expected to cause financial harm to the City and give the applicant an unfair advantage in any negotiations with the City.

[36] In support of its position, the City cites the Alberta Court of Appeal decision [*Imperial Oil*], where the Court dealt with a request under Alberta's equivalent to [*FIPPA*] for a settlement agreement. In that case, the Court concluded that disclosure of the settlement agreement between *Imperial Oil* and Alberta Environment would give a significant tactical advantage to the City of Calgary in its own negotiations with *Imperial Oil*. The Court found that

it could be a severe disincentive to negotiations generally if a party has the advantage of knowing what other parties have agreed before beginning to negotiate. It went on to find that disclosing the agreement could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of *Imperial Oil"*, the party to the agreement. The Court also observed that disclosure might also discourage third parties [to an agreement] from providing information to the public body when it is in the public interest that similar information be supplied.

[37] The applicant concedes he intends to use the legal fee amount and settlement amounts as the basis for, and leverage in, negotiating with the City because he believes his dispute and the two previous settlements are similar. However, the applicant's statement about how he intends to use the information does not, in my view, establish that he will be able to use the information for his stated purposes and, therefore, that the harm required to satisfy s. 17 will flow from disclosure.

[38] Further, the applicant submits there is no harm to the City in making the disclosure because the settlements it reached with the named former employees were by mutual agreement, and were fair and honest settlements. He says that if the City is seeking a fair and honest settlement with him, then disclosing previous fair and honest settlements will not cause the City harm. The applicant cites Order F10-44 in support of his position.

[39] In my view, the scope of the information in issue and the nexus between the information requested and the applicant's dispute distinguishes *Imperial Oil* from this case. In *Imperial Oil*, the applicant sought the entire settlement agreement. The applicant in this case seeks only a part of the agreement, namely the settlement amount. A settlement amount typically comprises only one component of a settlement agreement. The limited scope of the information in issue diminishes the likelihood that disclosure of it will cause harm.

[40] The limited scope of the applicant's request also significantly reduces the concern expressed by the court in *Imperial Oil* that "disclosure might discourage third parties (to an agreement) from providing information to the public body when it is in the public interest that similar information be supplied." The information at issue here does not disclose information supplied by third parties.

[41] Many factors influence a party's behaviour in a given negotiation. Without further information that establishes the factual nexus between the applicant's negotiations and the negotiations that led to the settlement agreements, I am not satisfied that a previous negotiation is predictive of behaviour in a future negotiation so that it would result in harm under s. 17. This principle has been recognized frequently in the context of s. 21, where orders have typically found that there is not a reasonable expectation of harm to public bodies or third parties from disclosure of a previous negotiation or bid.

[42] In *Imperial Oil*, there was a nexus between the applicant's claim and the settlement agreement sought. The applicant's claim arose from the very same set of events. The Court in *Imperial Oil* found that disclosure in that case offered a "significant tactical advantage" to the applicant. This is

> because there was a known, close connection between the existing settlement and a potential settlement involving the applicant.
>
> [43] Here, the parties agree that the disputes share the common characteristics of being employment disputes between the City and an employee involving claim of harassment. However, unlike *Imperial Oil*, the disputes arise from separate factual backgrounds. It is not the City's submission, nor is there evidence before me, that there are factual similarities in the circumstances of the applicant's dispute and the disputes already settled beyond the fact that they all include a claim of harassment. There is no evidence that the applicant's situation is similar to the other disputes whose information is in issue, such that it would influence the outcome of his settlement negotiations. The lack of evidence of any significant similarity between the applicant's dispute and the settled disputes differentiates this case from *Imperial Oil*.
>
> [44] Moreover, the applicant's request is for aggregate amounts for two separate disputes, rather than one entire settlement agreement as in *Imperial Oil*. In my view, that the amount is an aggregate further diminishes the value of the information as a precedent for the applicant to use in negotiations with the City. This is because even if the applicant knew about the merits or factual background of one or both settled disputes, he cannot link that information to the settlement amount because it is an aggregate amount from two disputes.
>
> [45] The City says there is a clear and direct connection between disclosure of the information in issue and potential harm to the City in this specific case. I am not satisfied that disclosing the information in issue will afford the applicant a significantly stronger negotiating position that he has without it. The information sought and the applicant's case include claims of harassment in employment. However, by itself this does not establish a link between the withheld information and the applicant's dispute that is sufficient to show that disclosure of the information could reasonably be expected to harm the financial or economic interests of the City in the ways the City suggests. Ultimately I am not satisfied that the City has established that disclosure of the information the applicant seeks could reasonably be expected to cause it harm under s. 17.
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> [Underling added.]

[34] About four months later, in his letter dated November 25, 2015 to the City, Campbell wrote that he thereby withdrew all previous requests for records from the City and, in particular, his request that is the subject of the Order. Counsel advised that Campbell's claim against the City was resolved, but there was no procedure for withdrawing a request for information following an order of OIPC.

[35] By without notice sealing Order dated November 26, 2015, Madam Justice Bruce ordered that access to the Affidavit #2 of Cindy Hamilton, sworn October 19,

2015, was sealed until further order of the Court, with access restricted to counsel for the City and OIPC, and to those parties themselves.

[36] The City filed the petition in these proceedings on August 18, 2015. Pursuant to s. 59(2) of *FIPPA*, the filing of the petition caused the Order to be stayed for a period of 120 days. Sections 59(2) and (3) are as follows:

> (2) Subject to subsection (3), if an application for judicial review is brought before the end of the period referred to in … an order given under section 54.1, the order of the commissioner is stayed for 120 days, beginning on the date the application is brought, unless a court makes an order shortening or extending the stay.
>
> (3) If a date for hearing the application for judicial review is set before the expiration of the stay of the commissioner's order referred to in subsection (2), the stay of the commissioner's order is extended until the judicial review is completed or the court makes an order shortening the stay.

[37] The City and OIPC agreed to a series of consent orders extending the stay of proceedings, the last of which extended it until August 1, 2016. Because the petition was heard before that date, the stay of proceedings continues until the release of this decision, pursuant to s. 59(3) of *FIPPA*.

ANALYSIS

[38] With respect to the part of the Order requiring it to release the total amount of its settlements with the two Previous Grievers ("Settlements Information"), the City's position is that the Adjudicator incorrectly applied the law regarding settlement privilege. The City relies on s. 14 of *FIPPA*, or alternatively, the common law settlement privilege.

[39] With respect to the part of the Order requiring it to release the total amount of its aggregate legal fees relating to the claims by the two Previous Grievers ("Fees Information"), the City's position is that the Adjudicator incorrectly applied the test for solicitor client privilege under s. 14 of *FIPPA*, or alternatively, unreasonably applied s. 17 of *FIPPA*.

[40] With respect to the Order in its entirety, the City relies on the alternative arguments that OIPC breached the requirements of procedural fairness and natural

justice, by reframing the issues from release of existing documents to release of information aggregated for the two Previous Grievers without notice to the parties, and by ordering the creation of a new record.

i) Settlements Information

[41] The parties apparently agree, correctly, that the Settlements Information falls within the common law settlement privilege. This leaves the question of whether s. 14 of *FIPPA* permits the City to avoid revealing documents and information falling within the common law settlement privilege, or alternatively, whether the common law of privilege applies and permits the City to avoid revealing documentation and information falling within that privilege.

[42] It is useful to begin by summarizing the law relating to the common law of privilege.

[43] Settlement privilege is a “blanket” or “class” privilege recognized at common law. The leading case concerning settlement privilege is *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*]. In that case, the plaintiff settled with some defendants and the remaining defendants wanted to know the amount of the settlement. The Court concluded that settlement privilege expressly applies to the amount of concluded settlements (para. 18) and that the reasons for protecting settlement communications from disclosure “are not usually spent when a deal is made.”

[44] The judgment of the Court in *Sable* was delivered by Abella J., and includes the following at paras. 1-3 and 12-18:

> **1** The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.
>
> **2** The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

3 Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

…

12 Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).

13 Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications -- Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

> [P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

14 *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

15 Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation

would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

> In such circumstances it would, I think, place a serious fetter on negotiations ... if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

16 *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the *Act*, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

> ... the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, *and whether or not a settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

17 As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement *negotiations* and what was ultimately negotiated:

> Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself... . *The distinction ... is arbitrary*. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it*. [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

> ... the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable. [Emphasis added; para. 14. 341.]

18 Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185, at para. 40, citing *Hudson Bay Mining and Smelting Co. v. Wright* (1997), 120 Man. R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

[Underlining added.]

[45] The first question is whether settlement privilege falls within the words of s. 14, which permits the head of a public body to refuse to disclose information that is subject to solicitor client privilege.

[46] Section 14 refers to “solicitor client privilege”, but does not define that term.

[47] The use of the term “solicitor client privilege” in *FIPPA* has been held by our Court of Appeal to include not only legal advice privilege, but also litigation privilege. See *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*], leave to appeal to SCC refused, 29626 (June 12, 2003), and *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 [*Legal Services Society*].

[48] In *College of Physicians* at para. 24, Madam Justice Levine wrote on behalf of the Court of Appeal that “Section 14 of [*FIPPA*] imports all of the principles of solicitor client privilege at common law”. In that case, the Court found that litigation

privilege was protected by the term “solicitor client privilege” in s. 14, despite being a distinct type of privilege.

[49] Paragraph 24 of *College of Physicians* is as follows:

> [24] Section 14 of the *Act* imports all of the principles of solicitor client privilege at common law: see *Legal Services Society v. B.C. (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 at paras. 25-6 (B.C.S.C.), where Lowry J. said:
>
> > Certainly the purpose of the [*Freedom of Information and Protection of Privacy] 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.
>
> [Underlining added.]

[50] The passage written by Mr. Justice Lowry suggests that s. 14 is not a codification of all applicable privileges, but instead, a specific preservation of a right.

[51] In *Legal Services Society* at para. 40, Madam Justice Newbury wrote on behalf of the Court of Appeal that “[i]f 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 privilege.” Paragraph 40 of *Legal Services Society* is as follows:

> [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.

[52] Two cases in which the court in other jurisdictions concluded that documents subject to settlement privilege were privileged from disclosure are of some interest. However, they are from Ontario and Alberta respectively, and the analysis in each is affected by the wording of the applicable statute.

[53] The Ontario Court of Appeal concluded that a head could refuse to disclose documents subject to settlement privilege in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 [*Magnotta OCA*]. At the relevant time, s. 19 of Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, included the following:

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[54] The appeal was from the 2009 decision of the Divisional Court, reported at 97 O.R. (3d) 665 [*Magnotta Div. Ct.*]. That Court concluded the records were exempt from disclosure both pursuant to the common law settlement privilege, and also pursuant to s. 19 of the legislation. In *Magnotta Div. Ct.*, the Divisional Court referred to settlement privilege as requiring a case-by-case analysis. However, the later decision in *Sable* clarified in para. 12 that settlement privilege is a class privilege.

[55] Paragraphs 62, 65, 73, and 86 of *Magnotta Div. Ct.* in relevant part are as follows:

> [62] What may have been true in 1980 is not necessarily true in 2009. Almost 30 years have passed. From *Rush* to *Kelvin*, above, the common law has expanded settlement privilege from a rule of evidence to an overriding public interest in favour of settlement.
>
> …
>
> [65] What follows from the IPC's view of the law regarding settlement negotiations? First, the details of negotiations and settlement of any dispute between a government institution and a third party will be available to the world at large, following a request. Apparently, a Requester need but ask anonymously and the IPC will undertake the heavy lifting, as in this case. There is a delicious irony in this matter whereby the IPC, in the name of transparency, labours for an anonymous Requester. Second, and perhaps more important, no third party would willingly entertain settlement discussions with a government institution, particularly where admissions are made and

concessions offered that would enure to the detriment of the third party, if publicly disclosed. As this court said in *Rudd*, above, at para. 38:

> Parties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others.

…

[73] I conclude that the public policy interest in encouraging settlement as embodied in the common-law concept of settlement privilege trumps the public policy interest in transparency of government action, in the circumstances of this case. I turn, then, to analyze this conclusion within the context of the indicators of legislative meaning proposed by Professor Sullivan.

…

[86] The proposed interpretation of Branch 2 is acceptable because it arrives at an outcome that is reasonable and just. The IPC's narrow interpretation of Branch 2 would result in an unreasonable and unjust outcome, since it would deprive government institutions of the privilege attached to settlement discussions otherwise available to all other litigants. Moreover, the IPC's interpretation would discourage third parties from engaging in meaningful settlement negotiations with government institutions. In *Children's Lawyer*, above, at para. 94, this court said:

> We should not adopt an interpretation of legislation that places a public servant in such a position of conflict of interest if there is a reasonable alternative. It would be absurd to suppose that the Legislature intended such a result. The respondent put it succinctly in para. 63 of its factum.
>
> > To read Branch 2 so as to exclude the child from access would lead to absurd consequences. The presumption that legislation is not intended to produce absurd consequences is a fundamental rule of interpretation. Moreover, "[a]bsurdity is not limited to logical contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense, and other public standards . . . " The primary 'absurd' results of reading Branch 2 in such a manner would be to put the Children's Lawyer in violation of its fundamental duties to the client/ requester.
> >
> > R. Sullivan, Driedger on the Construction of Statutes (Markham: Butterworths, 1994), at 85-86.
> >
> > [Underlining added.]

[56] The Ontario Court of Appeal concluded that the records were exempt from disclosure under s. 19 and chose not to consider whether the common law privilege also applied.

[57] Paragraphs 29 and 38 of *Magnotta OCA* are as follows:

> **29** Again, Carnwath J. concluded that the public policy interest in encouraging settlement, as embodied in the common law concept of settlement privilege, trumps the public policy interest in the transparency of government action. This interpretation he viewed as plausible and efficacious because it complies with s. 1(a), which provides for "necessary exemptions" that are "specific and limited". The exemption is necessary to maintain the confidentially of negotiated settlements. It is specific and limited by the circumstances of this case. Further, he opined, the interpretation is acceptable because it leads to a conclusion that is both reasonable and just. No one would willingly entertain settlement discussions with a government institution if it knew its confidential discussions would be made public. This is particularly so as during the settlement process the parties may make admissions and offer concessions that would otherwise be to their detriment.
>
> …
>
> **38** Further, based on recent judgments of the Supreme Court of Canada, I understand that fundamental common law privileges, such as settlement privilege, ought not to be taken as having been abrogated absent clear and explicit statutory language: see *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, at para. 11 and *Lavallee, Rackel & Heintz v. Canada (Attorney-General)*, [2002] 3 S.C.R. 209, at para. 18. While both of these cases relate to solicitor-client privilege, many of the same considerations apply to settlement privilege. Section 19 does not contain express language that would abrogate settlement privilege. Accordingly, in my view, it ought not to be so interpreted.
>
> [Underlining added.]

[58] The relevant parts of s. 27 of Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, are as follows:

> **27(1)** The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,
>
> …
>
> **(2)** The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.
>
> …

[59] The Alberta Court of Appeal concluded that the protection of documents subject to "any type of legal privilege" extended to documents subject to settlement privilege. Paragraph 64 of *Imperial Oil* is as follows:

> [64] Section 27(2) of the *FOIPP Act* is in mandatory terms, and does not give the Commissioner any authority to override the settlement privilege by consideration of broader aspects of public policy, such as any perceived "public policy of openness". There is in addition no common law jurisdiction in the Commissioner to ignore or override legal privileges: ***Canada (Privacy Commissioner) v Blood Tribe Department of Health*** at paras. 11, 30; ***Ontario (Public Safety and Security) v Criminal Lawyers' Association***, 2010 SCC 23 (CanLII) at paras. 39-40, 53, [2010] 1 SCR 815; ***Ontario (Liquor Control Board) v Magnotta Winery Corp.*** at para. 38. Since the Remediation Agreement is privileged in law, that ends the debate.
>
> [Underlining added.]

[60] Unlike the Alberta legislation considered in *Imperial Oil*, *FIPPA* does not permit the head of a public body to refuse to disclose information subject to "any type of legal privilege".

[61] Unlike s. 19 of the Ontario legislation considered in *Magnotta Div. Court* and *Magnotta OCA*, *FIPPA* does not permit the head to refuse to disclose a record "for use in litigation".

[62] Legal advice privilege attaches to confidential communications between lawyers and their clients. Litigation privilege extends beyond lawyers and clients, because it can include communications with, for example, experts, for the purposes of preparing for litigation. So while litigation privilege is related to litigation, it is not necessarily related to communications between solicitors and clients. In that sense, its inclusion within "solicitor client privilege" in s. 14 can be seen to be an extension.

[63] Essentially, the City argued that there should be a similar extension for settlement privilege. Settlement privilege deals with documents exchanged between adverse parties, such as in settlement negotiations and the settlement documentation itself. Lawyers are often, but not always, involved in settlement negotiations. Like litigation privilege, settlement privilege can be related to legal disputes, and is not related to communications between solicitors and clients.

[64] There has been some confusion historically between legal advice privilege and litigation privilege. In *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006

BCSC 1180, a case decided before *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 [*Blank*], I wrote as follows at para. 59:

> The applicable legal test is different for each of the three distinct kinds of lawyer-client privilege: Legal Advice Privilege, Litigation Privilege, and Lawyer's Brief Privilege. Some of the confusion in this area of law arises from confusion between the different kinds of lawyer-client privileges.

[65] In *Blank*, the head of an agency was required to produce documents which had been subject to litigation privilege, because the litigation had resolved and the privilege had therefore ended. Justice Fish, for the majority, wrote as follows at paras. 3 and 4:

> [3] This case has proceeded throughout on the basis that "solicitor-client privilege" was intended, in s. 23 of the *Access Act*, to include the litigation privilege which is not elsewhere mentioned in the *Act*. Both parties and the judges below have all assumed that it does.
>
> [4] As a matter of statutory interpretation, I would proceed on the same basis. The Act was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the Act. … In interpreting and applying the Act, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

[66] Justice Bastarache, writing for himself and Charron J., wrote at para. 71 that reading litigation privilege into s. 23 of the *Act* was the better approach because "litigation privilege has always been considered a branch of solicitor-client privilege."

[67] I am not aware of any authorities in which the term "solicitor-client privilege" was held to include settlement privilege or was used to describe settlement privilege. While both privileges serve the goal of the effective administration of justice, they are very different. Legal advice privilege serves that goal through protecting the confidentiality of communications between a lawyer and client, while settlement privilege serves that goal by encouraging free discussion between adverse parties towards reaching a settlement and the terms of any settlement.

[68] In my view, the term "solicitor client privilege" in s. 14 does not include settlement privilege.

[69] This leaves the question of whether the common law settlement privilege applies to protect an agency from producing documents which it would otherwise be required to produce under *FIPPA.*

[70] Section 4 of *FIPPA* gives an individual a right of access to a record in the custody of a public body, but that does not extend to information excepted from disclosure under Division 2 of that Part of *FIPPA*. That Division includes sections 12 through 22.1.

[71] As discussed in para. 38 of *Magnotta OCA*, settlement privilege is a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit statutory language. There is an overriding public interest in settlement. It would be unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by government, of the settlement privilege available to all other litigants. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions.

[72] *FIPPA* does not contain express language that would abrogate settlement privilege and, accordingly, it should not be interpreted to have done so.

[73] I therefore conclude that OIPC was incorrect in ordering the City to provide information concerning the amount of its settlements with the two Previous Grievers, whether that information was in aggregated form or not, because that information was protected by the common law settlement privilege.

ii) Fees Information

[74] The City argued that the Fees Information was subject to solicitor client privilege within s. 14 of the *FIPPA*, and in particular, the aspect of solicitor client privilege termed “legal advice privilege”. The City argued that the amount it paid for legal services in connection with the claims of the Previous Grievers effectively disclosed the City’s instructions to its counsel, including the tenor of the City’s

instructions, and the amounts that the City was prepared to pay in legal fees to defend its position in those two cases.

[75] The standard of review of a decision of OIPC regarding solicitor client privilege is correctness. This was discussed by Mr. Justice Butler in *Central Coast* at para. 94, as follows:

> [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.

[76] The Supreme Court of Canada clarified how to determine questions of solicitor client privilege with respect to lawyers' billing information in *Maranda v. Richer*, 2003 SCC 67 [*Maranda*]. In that case, the question arose in the context of authorization to search a lawyer's office in a criminal investigation. Justice LeBel wrote as follows in paras. 33 and 34:

> 33 In law, when authorization is sought for a search of a lawyer's office, 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. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class 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. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure, supra*, at paras. 4-5.
>
> 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. In addition, certain information will be

> available from other sources, such as the client's bank where it retains the cheques or documents showing payment of the bills of account. As a general rule, however, a lawyer cannot be compelled to provide that information, in an investigation or in evidence against his or her client. In this case, the Crown neither alleged nor proved that disclosure of the amount of Mr. Maranda's billings would not violate the privilege that protected his professional relationship with Mr. Charron. That information therefore had to remain confidential, as the trial judge held.
>
> [Underlining added.]

[77] The need to take into account the nature and context of the information was discussed in *Central Coast* at paras. 111 to 113, as follows:

> [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.
>
> [Underlining added.]

[78] The Adjudicator correctly discussed the inquiry at para. 13 of the Decision, as follows:

> In 2003, the Supreme Court of Canada confirmed in [*Maranda*] that there is a rebuttable presumption that lawyers' billing information in statements of accounts or other documents are subject to solicitor client privilege. This presumption recognizes the importance of solicitor client privilege, as well as

> the inherent difficulties in determining the extent to which the information contained in lawyers' bills of account disclose communications protected by privilege as opposed to "neutral information". Therefore, there is a presumption that the legal fee amount in this case is subject to solicitor client privilege. The issue then becomes whether the presumption has been rebutted.
>
> [Underlining added.]

[79] The Adjudicator correctly discussed the test from *Central Coast* at para. 14 of the Decision, as follows:

> [14] [*Central Coast*] states that "the presumption of privilege will prevail unless it is rebutted by evidence or argument that is sufficient to satisfy the adjudicator" that the answer is "no" to the two following questions:
>
> (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?

[80] In *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C.S.C.) [*Municipal Insurance*], Mr. Justice Holmes discussed disclosure of legal fees at paras. 47 to 49, as follows:

> **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.
>
> **49** Some examples, certainly not intended as exhaustive, which might be reasonably discerned from knowledge only of the type of information contained in the document record in issue here, being basically the total of interim legal fees to date in a lawsuit, could include:
>
> - the state of preparation of a party 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.
>
> [Underlining added.]

[81] In *Central Coast*, Mr. Justice Butler held that the total amount of the School Board's legal fees in ongoing litigation between it and the information applicant, Mr. Bryfogle, was subject to solicitor client privilege. In the instant case, the Adjudicator distinguished *Central Coast* on the basis that Campbell's request was for information from concluded disputes rather than ongoing litigation.

[82] However, that is an unimportant distinction. Here, the amount of the legal fees incurred by the City to resolve two employment harassment claims against it, even if aggregated, could reveal both how much the City was prepared to pay to defend itself before choosing to compromise, and how expensive the City found defending such claims. This is exactly what Mr. Campbell suggested he wanted to know. He referred, in his initial submission to OIPC, to a rumour that the City had spent "over a million dollars on legal fees and several hundreds of thousands on settlement costs".

[83] It is notorious that the cost of litigation is an important factor for considering settlement.

[84] The cost of defending employment harassment claims is a particularly significant element in resolving such claims. It is well-known among employment litigators and judges that the cost of defending employment harassment claims can be very significant, because the claim will often involve numerous employees and the claim will often require the employer to provide a significant amount of

documentation. This is in contrast to the employee, who likely has few documents and will be the sole witness for himself or herself.

[85] If, as Mr. Campbell suggested, the aggregated legal fees for the two employment harassment claims were over a million dollars, an assiduous observer could reasonably discern that the City found the prior claims very expensive, and might be willing to pay a larger amount in settlement of a later claim before incurring such significant fees. The assiduous observer could conclude that the City instructed its counsel to take significant and expensive steps before settling the claims.

[86] This information would be particularly valuable together with information about the amount of the settlements, because the later claimant could suggest in negotiation that the costs of the later claim would be significant, and that a settlement should therefore be greater to avoid such costs.

[87] Even without the knowledge of the Settlements Information, knowledge of what the City spent on legal fees aggregated for two harassment claimants could assist a later claimant against the City, like Campbell, to know how much the City was willing to spend to defend itself against such claims in the past, and how expensive it found such claims.

[88] In short, knowledge of the amount spent on the two prior claims would reveal privileged information about the City's instructions to its legal counsel about how much it was willing to pay in its defence.

[89] For ease of reference, I repeat paras. 26 to 28 of the Decision:

> [26] There is no reasonable possibility that disclosure of the legal fee amount will directly or indirectly reveal any communication protected by privilege. The legal fee amount comprises an aggregate amount of the legal fees for two legal disputes involving named individuals. No other information is being disclosed. I am satisfied that in the context of this case, that information is "neutral information" that does not directly or indirectly reveal any communication protected by privilege.
>
> [27] I find that disclosure of the information at issue would not enable an assiduous inquirer to deduce or otherwise acquire privileged communications. The information at issue in this case is neutral information that is insufficiently detailed to disclose privileged communications, even

> when combined with background information that is known by - or could be acquired by - an assiduous inquirer.
>
> [28] In summary, I find the presumption that disclosure of the legal fees amount is subject to solicitor client privilege has been rebutted. I reach this conclusion because there is no reasonable possibility that disclosure of the legal fee amount will directly or indirectly reveal any communication protected by the privilege, or that an assiduous inquirer, aware of background information (such as the two specific disputes the legal fee amount related to), could use the information requested to deduce or otherwise acquire privileged communications.

[90] The Adjudicator considered that, because the Information was aggregated for two claims, it would not reveal privileged information.

[91] The Adjudicator erred in failing to consider the context of the claims of the Previous Grievers and the special nature of employment harassment claims. While one could imagine that, for example, aggregating the fees for two personal injury claims might not reveal much, because each claim might involve different liability and quantum issues, aggregating the fees for two employment harassment claims could reveal the City's instructions to its lawyers about how vigorously to defend those claims, and about the cost of doing so.

[92] The cost of employment harassment litigation is an important aspect of settlement negotiations, and information about how much an employer spent to defend one claim or two claims could assist a later employment harassment claimant in negotiations.

[93] The Fees Information could enable an assiduous inquirer, aware of background information, to deduce or otherwise acquire privileged information. As a result, it is subject to solicitor client privilege.

iii) Interpretation of s. 17

[94] As a result of my conclusions regarding settlement privilege over the Settlements Information and solicitor client privilege over the Fees Information, it is unnecessary for me to consider the question of whether the Decision was unreasonable with respect to the interpretation of s. 17.

iv) Procedural Fairness and s. 58(2)

[95] As a result of my conclusions regarding settlement privilege over the Settlements Information and solicitor client privilege over the Fees Information, it is unnecessary for me to consider the question of whether OIPC exceeded its jurisdiction under s. 58(2), and breached the requirements of procedural fairness and natural justice, by reframing the issues without notice to the parties and by ordering the creation of a new record.

SUMMARY

[96] In summary, I have reviewed the Decision on a standard of correctness regarding both settlement privilege and solicitor client privilege. The Adjudicator correctly found that settlement privilege is not encompassed within "solicitor client" privilege in s. 14 of *FIPPA*. However, the common law settlement privilege over the amount of a negotiated settlement applies and, as a result, the Settlements Information is protected from disclosure.

[97] The Adjudicator set out the correct legal test to be applied when considering issues of solicitor client privilege over information about legal fees. However, the Adjudicator incorrectly applied that test, by failing to take into account the context of employment harassment claims.

[98] As a result, the Order that the City provide aggregated totals of the Settlements Information and the Fees Information is quashed.

[99] The City sought an order that OIPC pay costs, at least to the extent that its submissions exceeded the analysis in the Decision by referring to the dates of the Settlements Information and the Fees Information.

[100] Generally, an administrative tribunal will neither be entitled to recover costs nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part. This is discussed in *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2009 BCCA 203 at para. 79.

[101] I do not consider that OIPC has misconducted itself. As a result, there will not be any order as to the costs of this judicial review proceeding.

"Madam Justice V. Gray"