S-1810373
No.
Vancouver Registry

In the Supreme Court of British Columbia

In the Matter of the decision of the Office of the Information and Privacy Commissioner for British Columbia, Order F18-35, dated August 14, 2018 and
in the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

The Attorney General of British Columbia

Petitioner

And:

Office of the Information and Privacy Commissioner for British Columbia
and the Canadian Constitution Foundation

Respondents

PETITION TO THE COURT

ON NOTICE TO:

Office of the Information and Privacy Commissioner for British Columbia
4th Floor, 947 Fort Street
Victoria, BC V8V 3K3

Canadian Constitution Foundation
Suite 200, 514 11 Avenue SW
Calgary, AB T2R 0C8
Attention: Howard Anglin, Executive Director

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

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

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

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

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

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

Time for response to petition

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

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

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

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

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

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioners is: Ministry of Attorney General Legal Services Branch 1301-865 Hornby Street Vancouver, BC V6Z 2G3 Fax number for service of the petitioner: 604-660-6797 Email address for service of the petitioner: mark.witten@gov.bc.ca
(3)	The name and office address of the petitioner's lawyer is: Jacqueline Hughes and Mark Witten Ministry of Attorney General Legal Services Branch 1301-865 Hornby Street Vancouver, BC V6Z 2G3

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. An order setting aside Order F18-35 of the Office of the Information and Privacy Commissioner for British Columbia, dated August 14, 2018, requiring the Ministry of Attorney General to provide the Canadian Constitution Foundation with information withheld under section 14 of the *Freedom of Information and Protection of Privacy Act*.

Part 2: FACTUAL BASIS

1. On January 18, 2017, the Canadian Constitution Foundation (the "CCF") submitted a request for information pursuant to s. 5 of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"). The CCF requested from the Ministry of Attorney General (the "Ministry") all records generated between January 1, 2016 and January 18, 2017 describing or recording litigation costs to the Government of British Columbia in *Cambie Surgeries Corp. et al v. Medical Services Commission of British Columbia et al (File No. S090663)* since 2009 ("Cambie Litigation").

2. The Cambie Litigation is a *Charter* challenge to provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 brought by Cambie Surgeries Corporation and several other individual and corporate plaintiffs. The litigation concerns prohibitions against extra-billing for medically necessary health care services. The Attorney General of British Columbia is the named defendant and the Attorney General of Canada is a party pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

3. The CCF is a non-profit organization that is providing financial and legal support to the plaintiffs in the Cambie Litigation.

4. The Cambie Litigation is ongoing. At the time the Request was submitted, the litigation had occupied over 80 days of hearing time in the British Columbia Supreme Court.

5. In response to the Request, the Ministry created a one-page record that contained a summary of legal fees and disbursements related to the Cambie Litigation between January 1, 2017 and January 18, 2018. On January 26, 2017, the Ministry advised the CCF that the requested records would be withheld in their entirety pursuant to s. 14 of *FIPPA*. Section 14 provides that public bodies may refuse to disclose information that is subject to solicitor client privilege.

6. On March 6, 2017, the CCF requested that the Office of the Information and Privacy Commissioner ("IPC") review the Ministry's decision to deny access to the records.

7. On December 4, 2017, the IPC issued a Notice of Written Inquiry. The notice stated that the IPC inquiry would consider whether s. 14 of *FIPPA* authorized the Ministry to refuse to disclose the information in question.

8. On January 11, 2018, the Ministry provided the IPC with written submissions for the inquiry and a supporting affidavit sworn by a supervising solicitor. The CCF filed written submissions on February 5, 2018 and the Ministry filed a reply submission on February 20,

2018. The Ministry argued that the relevant British Columbian case law clearly established that interim legal costs are subject to solicitor client privilege and outlined a number of privileged inferences that could be extracted from the billing information.

9. On April 27, 2018, the IPC adjudicator assigned to conduct the inquiry (the "Adjudicator") wrote to the parties seeking clarification regarding whether the Request concerned litigation costs between January 1, 2016 and January 18, 2018 or between 2009 and January 18, 2018. In response, the CCF advised that although it was seeking information regarding litigation costs since 2009, it was only requesting records generated since January 1, 2016.

10. On June 7, 2018, counsel for the Ministry wrote to the Adjudicator to advise that the Ministry had created a new 1-page record in response to the CCF's Request, which included a summary of legal fees and disbursements related to the Cambie Litigation between January 1, 2009 and January 18, 2017 (the "Record"). The Ministry also provided the Adjudicator with a supplementary affidavit in support of its position that s. 14 of *FIPPA* applied to the Record.

11. On August 14, 2018, the Adjudicator rendered her decision ("Order F18-35" or the "Decision"). Although the Request sought details of the litigation costs, including "any hourly rate (real or notional) recorded by the Government with respect to the Crown lawyers' costs of litigation, and any and all other information assigning any costs to the Government connected in any way to the litigation of this case", the Adjudicator understood the CCF to have clarified that it was seeking only the <u>total</u> litigation costs since 2009. Accordingly, the Adjudicator only decided whether s. 14 applied to the interim total cost of the Cambie Litigation between 2009 and January 18, 2017 ("Interim Total Cost").

12. In the Decision, the Adjudicator concluded that the Interim Total Cost was not subject to solicitor-client privilege, and that s. 14 of *FIPPA* did not apply. The Adjudicator attempted to distinguish the leading decisions and considered the privileged inferences described by the Ministry to be "self-evident". The Adjudicator therefore ordered the Ministry to provide the CCF with access to the Interim Total Cost contained within the Record by September 26, 2018.

13. Also on August 14, 2018, the same Adjudicator rendered a separate decision concerning a similar request for litigation costs in the Cambie Litigation over a shorter time period ("Order F18-36"). In Order F18-36, the Adjudicator reached the opposite conclusion, confirming the Ministry's decision to withhold records concerning Cambie Litigation costs between January 1, 2016 and April 11, 2017 under s. 14 of *FIPPA* on this basis that solicitor client privilege applied.

Part 3: LEGAL BASIS

<u>Introduction and Basic Principles</u>

14. This petition is brought pursuant to the *Judicial Review Procedure Act,* R.S.B.C., c. 241 and the *Supreme Court Civil Rules.*

Grounds of review

15. The Decision must be set aside because the Adjudicator incorrectly concluded that the Interim Total Cost was not subject to solicitor client privilege, and that the Ministry could not withhold the information under s. 14 of *FIPPA*.

Section 14 of FIPPA

16. Section 4 of *FIPPA* creates a right of access to records held by public bodies. The right of access does not extend to information excepted from disclosure under ss. 12 – 22.1 of *FIPPA*.

17. Section 14 of *FIPPA* states that "the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege". If information can reasonably be severed from a record that is excepted from disclosure, an applicant has the right of access to the remainder of the record: *FIPPA*, s. 4.

18. The objective of s. 14 is to "preserve a fundamental right that has always been essential to the administration of justice".

> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, para. 24

19. Section 14 imports all of the principles of solicitor client privilege at common law.

> *Legal Services Society v. B.C. (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.) at paras. 25-26

20. Although "litigation privilege" is a distinct type of privilege, the Courts have interpreted the term "solicitor client privilege" in s. 14 of *FIPPA* as encompassing litigation privilege. The inclusion of litigation privilege is an "extension" of the protection provided by s. 14.

> *College of Physicians, supra,* para. 26.
>
> *Richmond (City) v. Campbell,* 2017 BCSC 331, para. 62

Standard of Review

21. The standard of review for an IPC decision regarding solicitor client privilege is correctness. Any variance with the common law principles of solicitor-client privilege are subject to correction by the Court pursuant to its review jurisdiction under the *JRPA*.

> *Richmond (City) v. Campbell,* 2017 BCSC 331, para. 75
>
> *British Columbia v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. 2534 ("*District of North Vancouver*"), para. 18.

Legal billing information is presumptively protected by solicitor client privilege

22. Solicitor client privilege protects the confidentiality of communications between solicitor and client. The privilege applies to all communications regardless of whether they concern administrative, financial, or legal matters.

Maranda v. Richer, 2003 SCC 67 para. 22

23. Solicitor client privilege is fundamental to the proper functioning of our legal system. The privilege must be "as close to absolute as possible to ensure public confidence and retain relevance." It will only yield in certain clearly defined circumstances, and "does not involve a balancing of interests on a case-by-case basis."

Blood Tribe Dept. of Health v. Canada (Privacy Commissioner), 2008 SCC 44, para. 9

24. There is a rebuttable presumption that solicitor client privilege applies to information about lawyer's fees and disbursements, including the gross amount of legal costs. This presumption flows from the connection between billing information and the nature of the relationship between lawyers and clients. Billing information reflects work done on behalf of the client which involves communications that are privileged.

Maranda, supra, paras. 32-33

Luu (Re), 2015 BCCA 159, para. 16

25. The presumption may be rebutted if there is no reasonable possibility that an assiduous inquirer, aware of background information, could use the information requested to deduce or otherwise acquire privileged information.

Central Coast, supra, para. 112

Luu (Re), supra, para. 16

The Adjudicator incorrectly concluded that s. 14 of *FIPPA* did not apply to the Interim Total Cost

26. The Adjudicator cited the correct legal framework but incorrectly applied the rebuttable presumption test. The Adjudicator's legal analysis contains several identifiable errors. As a result, the Adjudicator incorrectly concluded that the presumption that the Interim Total Costs were subject to solicitor client privilege was rebutted.

The Adjudicator erroneously concluded that the leading authorities were distinguishable

27. Two previous decisions of this Court (and multiple decisions of the IPC) have held that the presumption of solicitor client is not rebutted in respect of the total amount of legal costs in ongoing litigation. Both British Columbia Supreme Court decisions were, like the present case, judicial reviews of decisions of the IPC.

British Columbia v. British Columbia (Information and Privacy Commissioner), [1996] B.C.J. No. 2534 (*"District of North Vancouver"*)

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

28. *District of North Vancouver* and *Central Coast* are binding upon this Court on the principles established in *Re Hansard Spruce Mills,* [1954] 4 D.L.R. 590, paras. 3-5.

29. The Adjudicator concluded that *District of North Vancouver* and *Central Coast* could be "distinguished based on appellate authorities on the issue" (para. 22), citing two British Columbia Court of Appeal decisions: *Luu (Re),* 2015 BCCA 159 and *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135.

30. Both *Donell* and *Luu* concerned whether solicitor client privilege attached to lawyers' trust account ledgers. These decisions are not applicable to the present case and are not a proper basis to "distinguish" binding decisions that are directly on point, involving the same administrative decision maker and section of *FIPPA*. Unlike billing information, trust ledgers are not presumptively privileged and are more tangentially related to solicitor client communications.

31. The remainder of the appellate decisions relied upon by the Adjudicator originated from other provinces and are, therefore, not binding on this court and/or distinguishable on their facts. They do not provide any principled basis for the Adjudicator to "distinguish" *Central Coast* or *District of North Vancouver*. Notably, one of the appellate decisions cited was *Kruger Inc. v. Kruco Inc.,* 1998 CanLII 962 (QC CA), a dated Quebec Court of Appeal decision that the Adjudicator relied upon based upon the description in *Maranda,* despite being unable to locate an English translation.

The Adjudicator erroneously disregarded the possibility that privileged information could be deduced

32. In *Richmond (City) v. Campbell,* 2017 BCSC 331, a *FIPPA* s. 14 judicial review concerning legal fees for two concluded employment actions, Gray J. held that "how much a government entity is willing to spend to defend itself" and "how expensive it found such claims" was privileged information. Grey J. held that this information was connected to solicitor-client instructions regarding how vigorously to defend a claim and the cost of doing so.

Richmond City, para. 87, 91

33. In the present case, lead counsel for the Province in the Cambie Litigation swore an affidavit explaining that a number of privileged inferences that may be drawn from the Interim Total Cost, including:

a. The Province's state of preparation;

b. The amount of resources the Province is willing to spend on the litigation;

c. The Province's litigation strategy;

d. The importance of the case to the Province;

e. Whether the Province believes that the case involves "hotly contested issues" on which the law is unclear or the elaboration of new principles of law;

f. Whether the Province has front loaded or back loaded the cost of litigation, which would reveal the Province's belief about the strength of its position and if the case would resolve early;

g. The amount of time spent by lawyers and "non-lawyer resources" preparing for the litigation and conducting document discovery; and

h. Which phases of the litigation are associated with significant costs, and conversely, which phases of the litigation are less expensive.

Affidavit of Heather Lewis, Exhibit "P", pages 76-80

34. In her Reasons, the Adjudicator disregarded the risk that privileged information could be abstracted from the Interim Total Cost. Her decision was based upon flawed reasoning. The Adjudicator believed that inferences regarding, *inter alia,* preparation, importance, acceptable costs, and strategy were "self-evident" because the Cambie Litigation was a unique, "land mark constitutional case" with a significant "public record" (paras. 40, 46, 52). Accordingly, she held that the presumption of privilege was rebutted.

35. The Adjudicator erred in assuming that the "public record" in the Cambie Litigation revealed all deducible inferences concerning the Ministry's strategy, willingness to spend, or the importance of the case to the Ministry. The Adjudicator's suggestion that Interim Total Costs would only reveal that the Province was "vigorously" defending an important case is a simplistic and unwarranted assumption that was made without reviewing the information in question (*Richmond City,* para. 91).

36. The Ministry submits that the Adjudicator over-emphasized her interpretation of the media articles and public decisions that she reviewed. Her focus upon these "extraneous considerations" caused her to lose sight of what an assiduous inquirer such as the CCF may deduce from the Interim Total Costs: *District of North Vancouver,* para. 45.

37. It is not unusual for government to be engaged in protracted, high-profile litigation, including constitutional challenges (*see, for example, J.P. v. British Columbia,* 2015 BCSC 1216 rev'd 2017 BCCA 308, *Conseil Scolaire francophone v. British Columbia,* 2016 BCSC 1764). By emphasizing the protracted and public nature of the Cambie Litigation, the Adjudicator indirectly created an exception to the presumption of privilege for protracted, high-profile constitutional challenges. This creates a double-standard that undermines solicitor-client privilege for government clients in the absence of any principled basis for doing so.

38. As the Supreme Court held in *Maranda,* solicitor client privilege is broad and decision makers must "exercise great caution" before trying to circumscribe of create exceptions to that privilege. The Adjudicator's implied exception for billing information in protracted, high profile constitutional challenges is not a principled exception to solicitor client privilege.

Maranda, supra, para. 22
See, also, Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860

The Adjudicator's Decision failed to account for future requests

39. At the Inquiry, the Ministry submitted that the potential for revealing privileged information was heightened because a separate *FIPPA* applicant sought Cambie Litigation costs for a different period of time. The Ministry submitted that putting the two figures together would allow costs and litigation strategy to be deduced for separate phases of the litigation.

40. In Order F18-36, the Adjudicator *accepted* the Ministry's submission that billing information over a shorter fifteen month period (January 2016 to April 2017) "could be linked to particular steps in the litigation" and may reveal privileged inferences and strategic communications (para. 17). However, because the Adjudicator ordered only one of the two requests for Cambie Litigation billing information, she believed there was no risk that a separate costs figure could be used in conjunction with the Interim Total Costs to deduce privileged information (para. 47). This finding ignored the likelihood of future requests.

41. The Adjudicator's finding that s. 14 does not apply to the Interim Total Costs sets a troubling precedent. Order F18-35 makes it likely that future applicants will also be able to obtain interim costs information for other lengthy periods of the Cambie Litigation. At minimum, the present decision makes further disclosure of billing information a "reasonable possibility": *Central Coast,* para. 112. If this occurs, the Interim Total Costs at issue can be subtracted from the total costs at a later point, permitting deduction of costs for a shorter time period.

42. In Order F18-36, the Adjudicator *already found* that costs information for shorter time periods is solicitor client privileged. Accordingly, the Ministry submits that the Adjudicator's conclusion that there is no risk that privileged information will be revealed in the present case is irreconcilable with her decision in Order F18-36.

43. There is no principled basis upon which to find that multiple years of interim legal costs are not privileged but 15 months of legal costs are. In considering "where and how to draw the line" in a case concerning s. 14 of *FIPPA*, our Court of Appeal has held that "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": *Legal Services Society, supra,* para. 40.

44. In making this assessment, it is necessary to consider the likelihood of "future requests" for information under *FIPPA*: *LSS,* para. 40. The Adjudicator erred in failing to draw the line on the side of protecting privilege.

The Interim Total Costs are subject to litigation privilege

45. In addition to being subject to solicitor client privilege, s. 14 of *FIPPA* also applies to the Interim Total Costs because they are subject to litigation privilege. Litigation privilege attaches to documents and information gathered or created by a solicitor for the dominant purpose of litigation: *Blank v. Canada,* 2006 SCC 39, paras. 59-60. The Interim Total Costs information and the Record containing it would not exist but for the Cambie Litigation.

46. Unlike solicitor-client privilege, which protects a relationship, litigation privilege protects the integrity of the litigation process itself by creating a "zone of privacy" for the duration of the

litigation. Litigation privilege serves "the efficacy of the adversarial process" by allowing parties "to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure".

Blank, supra, at para. 27

47. The CCF is funding the plaintiffs. In fundraising materials, the CCF has implied that the Ministry has utilized obstructionist litigation tactics that have "caused [the plaintiffs] to run out of funds." Disclosure of the Ministry's litigation costs mid-process may induce media scrutiny or influence public opinion as to how the Province ought or ought not to be conducting its case.

48. Releasing the Interim Total Cost to the CCF will facilitate the "adversarial interference" that litigation privilege is intended to prevent. The CCF's request impedes on the "zone of privacy" that exists to enable the Province to make decisions about its positions, litigation plan, and strategy free from undue influence. In short, forcing the government to disclose billing information mid-trial trenches upon the integrity of the adversarial process.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Heather Lewis, made September 25, 2018.

2. Such other material as the Petitioner may advise and the Honourable Court permit.

The petitioner estimates that the hearing of the petition will take **one day**.

Date: September 25, 2018

Signature of Jacqueline Hughes and Mark Witten
Counsel for the Petitioner

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this petition

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....

Signature of [ ] Judge [ ] Master