IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 1132

Date: 20190712
Docket: S1810373
Registry: Vancouver

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 Canada Constitution Foundation

Respondents

Before: The Honourable Madam Justice Ross

Reasons for Judgment

In Chambers

Counsel for the Petitioner:	J.D. Hughes M.A. Witten
Counsel for the Respondent Office of the Information and Privacy Commissioner for British Columbia:	T. Hunter A.R. Hudson
Counsel for the Respondent Canadian Constitution Foundation:	J.B. Maryniuk
Place and Date of Hearing:	Vancouver, B.C. March 28 and 29, 2019
Place and Date of Judgment:	Vancouver, B.C. July 12, 2019

Table of Contents

Introduction

[1] This is an application for judicial review by the Ministry of the Attorney General of British Columbia (the "Ministry") in relation to Order F18-35 (the "Decision"). The Decision was issued by a delegate (the "Adjudicator") of the Office of the Information and Privacy Commissioner (the "Commissioner") in relation to a request for information concerning legal costs under s. 56 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "*Act*").

[2] The Ministry had withheld production of the requested documents on the basis of solicitor-client privilege. The Adjudicator held that the record at issue was subject to a rebuttable presumption of solicitor-client privilege but that the presumption was rebutted and ordered the document at issue produced.

[3] The two main issues in this application are:

a) Whether the record at issue is subject to a rebuttable presumption of solicitor-client privilege.

b) If so, has the presumption been rebutted.

[4] For the reasons that follow I have concluded that the record is one which is subject to a rebuttable presumption of solicitor-client privilege and that the Canadian Constitution Foundation has not discharged its burden to rebut the presumption. The Ministry also raised, for the first time on this application, the issue of litigation privilege. However given my conclusion with respect to solicitor-client privilege I will not deal with the issue either on the merits or on the propriety of raising the issue for the first time on judicial review.

Background

[5] The Canadian Constitution Foundation ("CCF") is a non-profit charitable foundation that raises funds through donations and uses those funds to support litigants who are pursuing "meritorious constitutional challenges to government

action". The CCF on occasion provides legal representation to constitutional litigants.

[6] The case at the centre of the request for information is *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, which I will generally refer to as the "Cambie Litigation". 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 other individual and corporate plaintiffs.

[7] The nature of the constitutional challenge at issue in the Cambie Litigation was described by Justice Winteringham, in reasons indexed at 2018 BCSC 2026, at para. 4:

> In the *Cambie* action, the plaintiffs allege that ss. 14, 17, 18 and 45 of the *Medicare Protection Act* violate ss. 7 and 15 of the *Charter*. Briefly, the sections in issue provide:
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> > a) Section 14 - permits physicians who are enrolled in the Medical Services Plan to opt out and bill patients directly for the provision of services, rather than submitting claims to the MSP;
> >
> > b) Section 17 - prohibits the charging of beneficiaries (BC residents enrolled in the MSP) for, or in relation to, the provision of benefits (medically necessary services covered by MSP or provided in a public hospital) by physicians who are enrolled in the MSP (other than "opted out" physicians);
> >
> > c) Section 18 - prohibits the charging of beneficiaries more than the amount payable by the MSP for the provision of benefits if those benefits are provided in a publicly funded facility by a physician who is not enrolled in the MSP, or by an "opted-out" physician, wherever delivered; and
> >
> > d) Section 45 - deems void any contract of insurance providing coverage for services that are benefits.

[8] 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.

[9] The trial of the Cambie Litigation commenced in September 2016 and is ongoing. At the time the request was submitted, the litigation had occupied over 80

days of hearing time in addition to numerous interlocutory applications. The plaintiffs had yet to close their case.

[10] The CCF is providing support to the plaintiffs in the Cambie Litigation.

[11] On January 18, 2017, the CCF submitted a request for information pursuant to s. 5 of the *Act* seeking that the Ministry provide "any and all records recording, describing or mentioning the cost of litigation to the Provincial Government" of the Cambie Litigation. The request stated that the information sought in the records would relate to costs incurred since 2009 but the request was limited to records generated since January 1, 2016.

[12] In response to the request, the Ministry created a one page document that contained a summary of legal fees and disbursements related to the Cambie Litigation between January 1, 2016, and January 18, 2017.

[13] On January 26, 2017, the Ministry advised the CCF that the requested records would be withheld in their entirety pursuant to s. 14 of the *Act*.

[14] On March 6, 2017, the CCF requested the Commissioner review the Ministry's decision to deny access to the records.

[15] On December 4, 2017, the Commissioner issued a Notice of Written Inquiry. The notice stated the inquiry would consider whether s. 14 of the *Act* authorized the Ministry to refuse to disclose the information in question.

[16] The parties exchanged written submissions and affidavits in January and February 2018.

[17] On April 27, 2018, the Adjudicator wrote to the parties seeking clarification about whether the request concerned litigation costs between January 1, 2016 and January 18, 2017 or between 2009 and January 18, 2017. 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.

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

[19] The Adjudicator rendered the Decision on August 14, 2018. In the Decision the Adjudicator notes that during the course of submissions CCF clarified the scope of what it was seeking noting at para. 7:

> CCF has clarified that it seeks only the total costs since 2009, and not the particulars of that cost. Therefore, I will only make a determination regarding the Ministry's decision to withhold the total cost under s. 14.

[20] The Adjudicator rejected the Ministry's claim. The Decision states:

> ***Summary***
>
> [51] The purpose of solicitor client privilege is to ensure that clients are not reluctant to obtain legal advice and to foster the proper taking and giving of legal advice. Disclosing the gross cost to the Province of legal services for Cambie litigation will not violate the Province's right to communicate in confidence with legal advisors, or have a chilling effect on that right. That is because I am satisfied that there is no reasonable possibility that the litigation cost would reveal anything about the communications between the Ministry counsel and the Province or the Province's legal strategy.
>
> [52] I have considered the Ministry's arguments about what types of inferences could be drawn from the litigation cost in this case and how disclosure might prejudice the Province. In my view, given the nature of the litigation, i.e., a landmark constitutional case, the stage of the proceedings, the variety of a costs represented in the sum total, in combination with information available on the public record, any conclusions which might be drawn from the litigation cost would already be evident to anyone knowledgeable about the litigation.
>
> [53] The parties to the litigation have undoubtedly incurred substantial legal fees. Disclosure of the exact figure would only confirm what is already in public record - that the Province is "vigorously" defending this important constitutional case. As a result, I find that the presumption that the litigation cost is privileged has been rebutted and the Ministry cannot rely on s. 14 to withhold the figure.

> ***Conclusion***
>
> [54] For the reasons stated above, pursuant to s. 58 of FIPPA I require the Ministry to give the applicant access to the total cost of litigation contained in the record by September 26, 2018. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

[21] The Decision was determined by the Adjudicator together with a second request for production of information relating to the legal costs of defending the Cambie Litigation over the period January 1, 2016 to April 11, 2017. With respect to this request, in Order F18-36 the Adjudicator confirmed the Ministry's decision to withhold the records on the basis that solicitor-client privilege applied to those costs. The Adjudicator noted that the request covers a relatively recent and short time frame and may reveal the Province's strategy for identifiable steps in the litigation.

Role of the commissioner in this application

[22] The Commissioner made submissions both orally and in writing concerning the following issues:

(a) the procedural history of this case;

(b) whether the Ministry is entitled to raise litigation privilege for the first time on judicial review;

(c) the applicable standard of review;

(d) the extent to which previous decisions of this Court are binding on this Court;

(e) the *in camera* material, without directly defending the Decision on its merits; and

(f) the appropriate remedy if this Court determines that the Decision was incorrect.

[23] There was no formal objection taken to the participation of the Commissioner by either the Ministry or the CCF. The parties sought guidance from the Court in the reasons with respect to the appropriate scope of the Commissioner's participation in the circumstances of this case.

[24] The issue of the role of the tribunal in a proceeding for judicial review has been discussed in numerous authorities on this issue, such as *Northwestern Utilities Ltd. et al. v. Edmonton*, [1979] 1 S.C.R. 684, *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, *Timberwolf Log Trading Ltd. v. Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70, and *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476.

[25] In my view submissions with respect to the nature of the legislative scheme, the record of the proceeding, whether the petitioner should be permitted to raise a new issue in the judicial review, the standard of review, and the appropriate remedy fall within the scope described in the authorities. In the particular circumstances of this case, given the *in camera* evidence to which CCF did not have access, it was appropriate in my view for the Commissioner to make submissions about the *in camera* material without defending the Decision on its merits.

[26] However, it fell outside the appropriate role for the tribunal to make submissions about the extent to which this Court is bound by previous decisions of this Court. That is a matter within the expertise and jurisdiction of this Court, not the tribunal. In addition, it was appropriate for the Commission to make submissions concerning the standard of review associated with findings of fact, factual inferences and findings of mixed fact and law. However, in my view, the characterization of different aspects of the Decision as fact, factual inference and mixed fact and law was a matter that strayed beyond the appropriate role for the tribunal.

[27] In any event, I agree with the submission of the Ministry that the Adjudicator's conclusions regarding whether privileged inferences can be deduced from the Interim Legal Costs are not "facts" owed deference on judicial review. These findings are inextricably intertwined with the Adjudicator's privilege analysis and are subject

to a correctness review: see, e.g., the Commissioner's written submissions at paras. 63(c), (i), (l), (o) and (p). In this regard, the Adjudicator's speculation about what the defendant "believes" about the Cambie Litigation, its "views" on the strength of the case, whether an inference would be "obvious", and suppositions about actions of counsel are not findings of fact.

Legislative Framework

[28] Section 4 of the *Act* 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 to 22.1 of the *Act*.

[29] Section 14 provides:

> 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[30] The purpose of s. 14 is to preserve a fundamental right that has always been essential to the administration of justice. This was discussed by Lowry J. in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 at paras. 25-26 (B.C.S.C.), as follows:

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

See also: College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner), 2002 BCCA 665 at para. 24.

Standard of Review

[31] The parties agree that the standard of review for a Commission's decision regarding solicitor-client privilege is correctness. This is a question of law which is of central importance to the legal system as a whole and which falls outside of the Adjudicator's specialized expertise: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 20. Accordingly, the correctness standard applies: *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 55; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 at para. 30. This Court has previously held that the Commissioner's determination of whether s. 14 applied to the records at issue was reviewable on the correctness standard: *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 at para. 94 [*Central Coast*], *Richmond (City) v. Campbell,* 2017 BCSC 331 at para. 10.

[32] A correctness review requires the court to undertake its own analysis of the question. If the court arrives at the same result as the Adjudicator, but by different reasoning, the Decision ought to be upheld. The correct approach was described in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 50:

> As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[33] The Commissioner submitted that the appropriate standard of review for findings of fact and factual inferences is reasonableness, citing *Dunsmuir* at para. 53, *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 19-25, and *Langtry Industries Ltd. v. British Columbia (Human Rights Tribunal),* 2009 BCSC 1091 at paras. 61-63. A finding of mixed fact and law, which involves applying a legal

standard to a set of facts, is reviewable in this case on the basis of correctness: *Housen*.

Is the Record subject to a rebuttable presumption of solicitor-client privilege?

[34] The Ministry submits that legal billing information is presumptively protected by solicitor-client privilege, citing *Maranda v. Richer*, 2003 SCC 67 at para. 22 for the proposition that the privilege applies to all communications regardless of whether they concern administrative, financial, or legal matters.

[35] Counsel submits that it is well established that a rebuttable presumption of solicitor-client privilege applies to information about lawyers' fees and disbursements, including the total 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. In *Maranda*, LeBel J. stated at paras. 32-33:

> 32 ...The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.
>
> 33 …the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. 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.

See also: *Central Coast* at paras. 112, 115, 122.

[36] In *Luu Bankruptcy (Re)*, 2013 BCSC 1374, Sewell J. concluded at para. 43 that:

> With respect to the information sought in para. 6(e), I have concluded that the weight of recent legal authority supports the conclusion that information about lawyer's legal accounts and the fees relating to them are presumptively privileged. The amount of legal fees at a minimum is indicative of the level of activity carried out on behalf of the client. In my view *Maranda* has now settled the law that the amount of legal fees charged and paid is presumptively privileged.

[37] In *Central Coast* at para. 122 the court explained that the presumption of privilege over legal costs may be rebutted:

> While the presumption will not create an evidentiary burden in every case, it may do so where either the context of the information or a review of the records satisfies the adjudicator that the document does contain billing information relating to litigation expenditures. Where that is the case, the presumption of privilege will prevail unless it is rebutted by evidence or argument that is sufficient to satisfy the adjudicator that there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege and that an assiduous inquirer, aware of background information, could not use the information requested to deduce or otherwise acquire privileged communications.
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> [Emphasis added.]

[38] Counsel submits further that solicitor-client privilege is fundamental to the proper functioning of our legal system, citing the following passage from *R. v. McClure*, 2001 SCC 14 at para. 35:

> …solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case- by-case basis.

See also: Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 at para. 9 [Blood Tribe Department of Health].

[39] CCF submits that the presumption of privilege does not apply to the Record because it is not a lawyer's bill but a document recording the factual costs of the Cambie Litigation to the BC Government. CCF submits that because there is no other information associated with this sum, the record represents a fact, not a communication, and is thus not presumed to be privileged.

[40] In support of the proposition that the Record at issue represents a fact to which no presumption of privilege applies, CCF cites the decision of the Court of Appeal in *Donnell v. GJB Enterprises Inc*., 2012 BCCA 135. In that case the court concluded that in a civil context, ledgers merely recording payments in and out of a lawyer's trust account were not presumptively privileged. Justice Chiasson, for the majority, summarized the law as follows at para. 59:

> In summary, in my view:
>
> 1. at a minimum, *Maranda* establishes that lawyers' bills, in the criminal law context, are presumptively subject to solicitor-client privilege;
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> 2. this presumption flows from the connection between lawyers' bills and the nature of the relationship between lawyers and clients; the account reflects work done on behalf of the client which involves communications that are privileged;
>
> 3. the presumption may be rebutted if it is established that there is no reasonable possibility that disclosure will directly or indirectly reveal any communications protected by privilege;
>
> 4. *Maranda* did not do away with the distinction between communications, which are privileged, and facts, which are not;
>
> 5. other financial records of lawyers are not presumptively subject to solicitor-client privilege insofar as they merely represent records of actions or facts, but they should not be produced automatically solely for that reason;
>
> 6. *Maranda* mandates that it is necessary to consider such records in order to determine whether they arise out of the solicitor-client relationship and what transpires within it, that is, communications to obtain legal advice;
>
> 7. if it is concluded that the records do arise out of that relationship and what transpires within it, they are presumed to be privileged, but the privilege can be rebutted and the document produced if it is established that production will not permit the deduction or acquisition of communications protected by solicitor-client privilege.

[41] CCF notes that the approach taken in *Donnell* was followed in *Wong v. Luu*, 2015 BCCA 159, where the court affirmed the decision of the chambers judge that the disclosure of a redacted trust ledger would not violate the client's right to communicate in confidence with his legal advisor.

[42] The Record at issue in the case at bar is a document that records the interim legal costs of the Cambie Litigation. In my view this is a document to which the presumption of privilege applies. I agree with the submission of the Ministry that the interim legal costs arise out of the solicitor-client relationship and what transpires

within it and reflect work done at the instruction of the client. The case by case approach discussed in *Donnell* applies to other types of documents and financial information such as trust ledgers.

[43] With respect to the decision of the Court of Appeal in *Donnell*, I note first that *Donnell* concerned trust ledgers, not legal costs. *Donnell* therefore does not stand for the proposition that legal costs are not presumptively privileged. Further, I agree with the Ministry's submission that Justice Chiasson did not confine *Maranda* to the criminal context. Rather, he stated that, in the criminal context, at a minimum a lawyer's bill was presumptively subject to solicitor-client privilege. Thus CCF's submission that *Maranda* is confined to the criminal context is not correct.

[44] There is a well settled line of authority in this province both prior and subsequent to *Donnell* holding that legal costs in civil proceedings are presumptively privileged:

a) In *Central Coast* at paras.104-05 and 115 Butler J., as he then was, concluded that "information about lawyers' billings" was presumptively privileged. In that case the Vendor Inquiry Documents that disclosed the name of the law firm and total amount of fees paid, together with the G/L Account summary documents were held to be subject to solicitor-client privilege: paras. 134-39.

b) In *Luu Bankruptcy (Re)* at para. 43 per Sewell J., as quoted above at para. 39.

c) In *Richmond (City) v. British Columbia (Office of the Information and Privacy Commissioner)*, 2017 BCSC 331 at para. 78, where Gray J. applied *Maranda* in the civil context by quoting with approval the adjudicator's statement that "there is a rebuttable presumption that lawyer's billing information in statements of accounts or other documents are subject to solicitor client privilege".

[45] There appears to be a suggestion in the submissions of CCF — and more particularly in the Decision — that appellate authority subsequent to *Central Coast* and *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*], has rejected the proposition that legal fees unaccompanied by other detail could reveal solicitor-client communications. In my view, for the reasons discussed in the previous paragraphs, this is not the case.

[46] In addition, the Adjudicator referred to *Kruger Inc. c. Kruco Inc.*, [1988] R.J.Q. 2323, 20 Q.A.C. 106 (Q.C.C.A.), as standing for the proposition that billings without further detail are not protected by solicitor-client privilege in Quebec law. The Adjudicator explained that *Kruger Inc.* was described in *Maranda*, and that she had been unable to locate an English translation. However, in *Maranda* LeBel J. did not endorse *Kruger Inc.* and noted that the decision was governed by the law of evidence and civil procedure of Quebec: paras. 27-29.

[47] The Adjudicator also cited *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65 (Ont. C.A.) [*Ontario (AIPC)*]. In that case, the Ontario Court of Appeal upheld a decision of the Assistant Information and Privacy Commissioner requiring the Attorney General to reveal legal fees paid to lawyers who had acted for interveners in a legal proceeding, and for Paul Bernardo on his conviction appeal.

[48] *Ontario (AIPC)* does not stand for the broad proposition that there is “no reasonable possibility” that privileged inferences can be deduced from a party's bare legal fees, as the Decision stated at para. 31. Rather, the court accepted that in some circumstances an assiduous inquirer may use the amount of fees paid to deduce privileged information but found no realistic possibility “in this case”: para. 13.

[49] It is also significant to note that in *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, a decision subsequent to *Donnell,* the Court cast doubt on the usefulness of the fact/communication distinction, rejected the contention that information found in accounting records constitute facts rather than communications and is therefore always excluded from the protection of solicitor-client privilege, and once again spoke of the strength of the presumption at paras. 36-41:

> [36] In answering the second question from *Edwards* in respect of an unreasonable seizure that is contrary to s. 8, the courts must balance the interests at stake, namely an individual's privacy interest on the one hand and the state's interest in carrying out a search or seizure on the other. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Court stated in this regard "that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" (pp. 159-60).
>
> [37] Here again, however, where the interest at stake is the professional secrecy of legal advisers, which is a principle of fundamental justice and a legal principle of supreme importance, the usual balancing exercise under s. 8 will not be particularly helpful (*Lavallee*, at para. 36). As the Court observed in *Goodis*, "[w]hile a fact-specific balancing may have been appropriate in *Fuda* [*v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.)], it cannot, having regard to this Court's categorical jurisprudence, apply where the records involve communications between solicitor and client" (para. 18).
>
> [38] In *Lavallee*, the Court stated that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance" (para. 36). In *Smith*, the Court noted that "[t]he disclosure of the privileged communication should generally be limited as much as possible" (para. 86). This means that any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable (*Lavallee*, at para. 36). Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case (*Goodis*, at para. 20). In short, "[t]he appropriate test for any document claimed to be subject to solicitor-client privilege is 'absolute necessity'" (*Goodis*, at para. 24). Stringent standards must therefore be adopted to protect it. A procedure will withstand *Charter* scrutiny only if its impact on the professional secrecy of legal advisers is minimal, as minimal impairment "has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege" (*Lavallee*, at para. 37).
>
> [39] Thus, where professional secrecy is in issue, what matters is not the context in which a privileged document or privileged information could be disclosed to the state, but rather the fact that the document or information in question is privileged. It is important that a client consulting a legal adviser

> feel confident that there is little danger that information or documents shared by the client will be disclosed in the future regardless of whether the consultation takes place in the context of an administrative, penal or criminal investigation: "The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients" (*Foster Wheeler*, at para. 34).
>
> [40] From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected (*Maranda*, at paras. 30-33; *Foster Wheeler*, at para. 38). The line between facts and communications may be difficult to draw (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 941). For example, there are circumstances in which non-payment of a lawyer's fees may be protected by professional secrecy (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30). The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication" (*Maranda*, at para. 48). This is why there must be a rebuttable presumption to the effect that "all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42).
>
> [41] It follows that we must reject the argument of the AGC and the CRA that some information, particularly information found in accounting records, constitutes facts rather than communications and is therefore always excluded from the protection of solicitor-client privilege as defined in s. 232(1) of the *ITA* .

[50] In the result, I conclude that the Record is subject to a rebuttable presumption of solicitor-client privilege.

Has the presumption been rebutted?

[51] The parties are in agreement that the presumption may be rebutted if it is established that there is no reasonable possibility that disclosure would directly or indirectly reveal privileged communications. The test for whether privileged communications could be revealed must be considered from the perspective of whether an assiduous inquirer could deduce, infer, or otherwise acquire privileged communications: *Central Coast* at paras. 58-59. As noted in *Blood Tribe Department of Health* and *Chambre des notaires du Québec,* the standard is very strict. The privilege must be "as close to absolute as possible": *Blood Tribe Department of Health* at para. 9.

[52] The Ministry submits that *Central Coast* and *Municipal Insurance* have both held that the presumption of solicitor-client privilege was not rebutted in respect of the total amount of legal costs in the context of ongoing litigation, and establish that the presumption of privilege is generally not rebutted in respect of legal costs in ongoing litigation. Counsel submits that these decisions are binding on this Court on the principles established in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.). An assiduous inquirer can be expected to deduce from interim legal costs privileged inferences relating to instructions to counsel and litigation strategy.

[53] CCF submits that, in essence, the Ministry's position is that *Municipal Insurance* and *Central Coast* stand for the proposition that in ongoing proceedings the presumption of privilege attaching to records containing legal fees is not rebutted.

[54] In my view, *Central Coast* makes it clear that no absolute privilege that could not be rebutted is created, even in relation to matters of ongoing litigation. However, the fact that litigation is ongoing is an important factor to be considered in determining whether the presumption has been rebutted in a particular case. As Butler J. (as he then was) noted at paras. 105-06, 129-32:

> [105] The approach taken by the Acting Commissioner is consistent with the decision in *Maranda*, and with previous decisions of the courts in British Columbia. He properly acknowledges the starting position: there is a rebuttable presumption of privilege. In addition, he accurately describes the high bar that must be met before information will be released.
>
> [106] In summary, I conclude that the Acting Commissioner did not create an approach that was different from, or inconsistent with, the evolving jurisprudence. The prior decisions do not create an absolute privilege that could not be rebutted. His articulation of the legal test, taking into account *Maranda* and the previous decisions of the British Columbia courts was correct.
>
> …
>
> [129] The classic formulation of the kinds of communications which attract the protection of solicitor-client privilege was summarized by Holmes J. in *Municipal Insurance Assn. of British Columbia* at para. 24. In summary, communications are privileged where legal advice is sought from a lawyer by a client, the communications relate to that purpose, and were made in confidence.

> [130] The issue in that case was whether the Commissioner had erred in finding that the City of North Vancouver could not withhold information regarding the total amount of legal expenditures it had incurred to that date in the defence of a lawsuit. The document at issue was a one-page interim invoice for legal costs.
>
> [131] Justice Holmes concluded that in the circumstances of the case at the time of the access request, the document should have been protected from disclosure on a proper interpretation of s. 14. In my view, his comments at paras. 47-48 are apt in the instant case:
>
> > [47] I find North Vancouver's being required to disclose the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important detail in relation to its retainer and to prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instructions to be formulated and given.
> >
> > [48] Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.
>
> [132] Here, as in the case before Holmes J., the access requests were made in the circumstances of ongoing litigation and sought information regarding the total amount of funds that the public body had spent in relation to litigation. The fact that the request related to litigation expenses generally does not change the situation. An assiduous inquirer would know what other litigation the Board was involved in and could likely infer how much of any global litigation expense amount related to the case under consideration. As Holmes J. recognized, the possibility that such information could reveal privileged communications between a public body and its lawyer may require the public right of access to information to be tempered in these circumstances. I find that this is the case here.

[55] The burden is on CCF to rebut the presumption of privilege by way of evidence or argument: *Central Coast* at para. 121. CCF must show that "there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by privilege": *Central Coast* at para. 123, citing *Ontario (AIPC)* at para. 12.

[56] In its submissions CCF was very critical of the evidence submitted by the Ministry, which included a list of privileged inferences that may be drawn from the disclosure of the Cambie Litigation legal costs. CCF submits that:

> An examination of the affidavit of Mr. Penner and Ms. Greathead leads to the conclusions that they:
>
> (a) offer inferences for a wide range of information not sought by the CCF;
>
> (b) consist mainly of legal argument disguised as evidence; and
>
> (c) do not contain any reasonable basis to withhold the Cambie Legal Costs.

[57] CCF concludes that the affidavits offer no basis to conclude there is a reasonable possibility that the Cambie Litigation legal costs would reveal anything about privileged communications. Counsel submits that the Ministry's claims of privilege "boil down to speculation".

[58] In my view it is important to keep the *onus* in the forefront. Given the presumption of privilege, there is no onus on the Ministry to establish that there is a reasonable possibility that the Cambie Litigation legal costs would reveal anything about privileged communications. Nor is there an onus on the Ministry to establish some particular inference that could or would be drawn from the disclosure. Rather, the onus is on CCF to establish through evidence or argument that there is no such reasonable possibility.

[59] In this regard, CCF adopts the Adjudicator's conclusions, which are as follows:

a) It is "self-evident" from the nature of the litigation that the case will involve hotly contested issues, novel issues or unclear areas of the law (para. 40);

b) The Cambie Litigation is a landmark constitutional case, it is not plausible that the litigation is unimportant to the Province or that the Province does not believe the case involves unique issues (para. 40);

c) It is evident from the public record that the case is hard fought and important to both sides (para. 41);

d) Because the parties are in the thick of trial, the state of the Province's preparation is evident (para. 42); and

e) Because of the state of the litigation, the length of time covered by the Record and the fact that the amount in the Record is undifferentiated, no particular insight could be gained from disclosure (paras. 42-44).

[60] At para. 52 the Adjudicator concluded that given the nature of the litigation, the stage of the proceedings, and the undifferentiated nature of the amount, in combination with what is available on the public record, any conclusions which might be drawn would be evident to anyone knowledgeable about the litigation — namely that the Province is vigorously defending and has incurred substantial legal fees.

[61] The Adjudicator's reasoning, adopted by CCF on this review, is in brief that it is clear from the facts available in the public record that the amount of legal expenditure is high. Knowing how high could only confirm this, and no more. This echoes CCF's submission to the Adjudicator, cited at para. 35 of the Decision, that "knowing whether the total cost to date are '$8 million or $12 million or $20 million' may prove embarrassing for the Province, but will not reveal privileged communications".

[62] In my view this line of reasoning is not sufficient to discharge the onus of proof to rebut the presumption of privilege, particularly in circumstances of ongoing litigation. I agree that the Cambie Litigation is an important constitutional case, that it is hard fought on both sides and that the amount of legal cost is undoubtedly substantial. However, in my view, an assiduous inquirer, aware of the background available to the public (which would include how many court days had been occupied both at trial and in chambers applications, the nature of those applications, the issues disclosed in the pleadings, and the stage of the litigation for the period covered by the request), would, by learning the legal cost of the litigation, be able to draw inferences about matters of instruction to counsel, strategies being employed or contemplated, the likely involvement of experts, and the Province's state of preparation. To use the CCF submission quoted by the Adjudicator, the difference

between an $8 million expenditure and a $20 million expenditure would be telling to the assiduous inquirer and would in my view permit that inquirer to deduce matters of privileged communication.

[63] The Adjudicator identified the correct test to be applied when considering issues of solicitor-client privilege over information about legal fees. However, I have concluded that the Adjudicator did not apply the test correctly. As a consequence, the Decision of the Adjudicator requiring the production of the Record is quashed.

"Ross J."