COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. Canadian Constitution Foundation,* 2020 BCCA 238

Date: 20200821
Docket: CA46296

Between:

The Attorney General of British Columbia

Respondent
(Petitioner)

And

Canadian Constitution Foundation

Appellant
(Respondent)

And

Office of the Information and Privacy Commissioner for British Columbia

Respondent
(Respondent)

FILE SEALED IN PART

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated July 12, 2019 (*British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132, Vancouver Docket S1810373).

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Place and Date of Hearing:	Vancouver, British Columbia June 24, 2020
Place and Date of Judgment:	Vancouver, British Columbia August 21, 2020

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Butler

Summary:

The appellant appeals a judgment setting aside an order requiring the Attorney General to disclose the total of legal fees and disbursements the government has spent during a defined period defending a major constitutional challenge. Held: Appeal dismissed. The judge correctly decided that the amount of legal costs is presumptively privileged, and that the presumption of privilege had not been rebutted. The judge also correctly decided that the standard of review of the administrative decision requiring disclosure is correctness.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] This is an appeal of an order quashing a decision of an Office of the Information and Privacy Commissioner ("OIPC") adjudicator to compel the Ministry of the Attorney General to release the amount of legal costs it has incurred, during a defined period, defending *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, Vancouver Docket No. S090663 [*Cambie*

Surgeries]. The adjudicator determined this information was not subject to solicitor-client privilege under s. 14 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*]; the reviewing Supreme Court judge determined it was. The Canadian Constitution Foundation ("CCF") appeals, arguing the chambers judge erred in finding the record presumptively privileged, and in concluding that the presumption of privilege had not been rebutted. The appeal also raises a question of the standard of review to be applied by a court on judicial review of a decision of an OIPC adjudicator in determining whether records are protected by solicitor-client privilege.

[2] The heart of this appeal engages the scope of solicitor-client privilege in the context of a freedom of information request. It is important to stress that the issue must be assessed as of the end date of the ordered disclosure: January 18, 2017. Much water has flowed under the bridge since then, but to address this appeal we must focus on the circumstances as they existed at that time, without consideration of subsequent events. The parties do not disagree in broad terms about the following statement of the test by the judge, assuming that a presumption of privilege is applicable:

> [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: [*School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427] at paras. 58-59. As noted in [*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44] and [*Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20], the standard is very strict. The privilege must be "as close to absolute as possible": *Blood Tribe Department of Health* at para. 9.

Background

[3] CCF is a charity that raises funds to support certain constitutional challenges to government action. It is providing financial support to the plaintiffs in *Cambie Surgeries.* This litigation is a *Charter* challenge to provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286.

[4] On January 18, 2017, CCF filed a request for information pursuant to s. 5 of *FIPPA*. Section 4 of *FIPPA* creates a limited right of access to records held by a public body:

> Information rights
>
> 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.

[5] The right of access created by s. 4 does not extend to information subject to solicitor-client privilege. Solicitor-client privileged information is exempted from disclosure under s. 14 of *FIPPA*:

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

[6] Once a request has been made, s. 6(2) requires a public body to create a record in response to the request under certain conditions.

[7] Reviews by the OIPC are conducted pursuant to Part 5, Division 1 of *FIPPA*. Pursuant to s. 56, the OIPC may conduct an inquiry and decide questions of fact and law arising in the course of that inquiry. The general burden of proof on an inquiry is set out in s. 57(1) of *FIPPA*, which provides as follows:

> Burden of proof
>
> 57 (1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

[8] The request as originally made was for records during a particular period, between January 1, 2016 and January 18, 2017. The request, however, was for a detailed and comprehensive set of records which would have included details of hourly rates, disbursements, document production costs and witness fees, among many other categories of records. This request

was subsequently modified and the decision reviewed by the judge related to a very different request, which I will describe shortly.

[9] In response to CCF's request, the Attorney General created a one-page record that contained a summary of the various legal fees and disbursements incurred in relation to *Cambie Surgeries* between January 1, 2016 and January 18, 2017.

[10] The Attorney General advised CCF, on January 26, 2017, that it would be withholding the records pursuant to s. 14 of *FIPPA*.

[11] On March 6, 2017, CCF requested review of the Attorney General's decision pursuant to s. 53 of *FIPPA*.

[12] On December 4, 2017, the Information and Privacy Commissioner (the "Commissioner"), who directs reviews pursuant to *FIPPA*, notified the parties an adjudicator would be conducting a written review of the decision. Submissions and affidavits were exchanged during the process.

[13] In response to a request for clarification from the adjudicator, CCF's request expanded from legal costs of *Cambie Surgeries* incurred from January 1, 2016 to January 18, 2017 to those incurred from January 1, 2009 to January 18, 2017. This led to the Attorney General creating a new summary of the total costs incurred between these dates, although the Attorney General again took the position the record would not be released pursuant to s. 14.

[14] On August 14, 2018, the adjudicator rendered her decision (Order F18-35). Despite the appellant having initially requested specific details of *Cambie Surgeries* costs, the adjudicator only considered whether s. 14 applied to the total amount of legal costs (including fees and disbursements) incurred in defending the litigation from 2009 to January 18, 2017.

[15] The adjudicator was satisfied, at para. 13 of her reasons, that even in the context of ongoing litigation, there was no reasonable possibility the decontextualized record would reveal information about the Attorney General's legal strategy, communications with counsel, or any other

communication protected by solicitor-client privilege. She ordered the record disclosed pursuant to s. 58 of *FIPPA*.

[16] The adjudicator analysed whether the Attorney General had established how disclosure of the costs might reveal privileged communications, concluding that it had not been shown that disclosure would reveal privileged communications: at paras. 34, 39, and 44. The adjudicator reasoned:

> [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.

[17] The period captured by the decision included the entire pre-trial period and 5 months of a trial that continued for a considerable time after the period affected by the decision.

[18] At the same time, the adjudicator issued Order F18-36, which dealt with a request by another party for the production of total legal costs for the period January 1, 2016 to April 11, 2017. In that case, the adjudicator concluded that disclosure might reveal privileged communications relating to the Attorney General's state of preparation 9 months before the start of trial, and refused the request.

[19] The Attorney General applied for judicial review of Order F18-35.

The Chambers Judgment

[20] The chambers judge quashed the decision in Order F18-35.

[21] Both parties agreed the standard of review of correctness applied, as the case engaged "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" (at para. 31). That agreement reflected the law before

the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. As I will explain below, the parties no longer agree on the standard of review.

[22] In concluding the presumption of privilege applied to the record, the chambers judge agreed with the Attorney General 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" (at para. 42). She concluded that information about the interim legal costs was presumptively privileged. In reaching that conclusion, she rejected CCF's argument that the presumption of privilege applied only to information about legal costs in the criminal context, and distinguished cases said to illustrate that financial information is not presumptively privileged, by pointing out that they deal with information having a different source, such as trust ledgers (at paras. 43–50).

[23] The chambers judge went on to conclude that CCF had not rebutted the presumption of privilege. She determined CCF's submission 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" (at para. 61), which the adjudicator had accepted, was insufficient to meet its onus. CCF was required to establish there was no reasonable possibility the amount would reveal anything about privileged communications. To the contrary, in her view the "difference between an $8 million expenditure and a $20 million expenditure would be telling to the assiduous inquirer" (at para. 62), and could allow matters of privileged communication to be adduced. Critical to the judge's reasoning was the question of onus. The onus, she opined, was borne and not discharged by CCF.

On Appeal

[24] CCF repeats the arguments it made before the judge. It contends that the proposition that information about legal costs incurred in litigation, standing alone, is presumptively subject to solicitor-client privilege applies only in the criminal context. No such presumption applies in the civil context. This result, it says, is compelled by a careful reading of the Supreme Court of Canada judgment in *Maranda v. Richer*, 2003 SCC 67 [*Maranda*], the case

said to be the origin of the principle that information about the total amount of legal costs is presumptively privileged.

[25] CCF goes on to argue that, even if such information is presumptively privileged, the onus to demonstrate that releasing that information would breach solicitor-client privilege rests with the person or entity seeking to uphold the claimed privilege, not the challenger. And, in any event, regardless of the onus, the presumption was rebutted in this case. CCF contends, as the adjudicator found, that there is no reasonable possibility that an assiduous inquirer could infer, deduce or acquire any information about privileged communications from a bare total of the legal costs spent between 2009 and 2017.

[26] CCF, supported by the Commissioner, also argues that the Supreme Court of Canada decision in *Vavilov* has changed the standard of review applicable to the adjudicator's decision to reasonableness. While correctness applies to the statement of the test to be applied, reasonableness is the standard applicable to findings made by the adjudicator in the application of the test. The Attorney General contends that *Vavilov* has not changed the standard of review which remains correctness, as intimated by the Court in that case.

The standard of review

[27] Before the chambers judge, the parties had agreed that the central issue decided by the adjudicator — whether solicitor-client privilege was properly claimed as a basis for refusing to disclose information under s. 14 of *FIPPA* — was reviewable on the correctness standard. This was based on a clear line of authority: *Legal Services Society v. British Columbia (Information and Privacy Commissioner*), 2003 BCCA 278 at paras. 14–36 [*Legal Services Society (2003)*]; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.) [*Legal Services Society (1996)*]; *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at paras. 73–94 [*Central Coast*]; *Richmond (City) v. Campbell*, 2017 BCSC 331 at para. 10 [*Campbell*].

[28] The *Legal Services Society* cases pre-date *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. *Central Coast* and *Campbell* post-date *Dunsmuir*, but pre-date the Supreme Court of Canada's most recent reconsideration and clarification of the framework for determining the standard of review of administrative decisions in *Vavilov*. It follows that *Legal Services Society (2003)*, *Legal Services Society (1996)*, *Central Coast* and *Campbell* applied different principles, as were then applicable to the analysis, but reached the same result.

[29] *Vavilov* was decided after the chambers judge's decision in this case, but before the appeal.

[30] It appears to me that it was settled law, before *Vavilov*, that the standard of review of an adjudicator's decision about whether requiring disclosure of a record would potentially reveal solicitor-client communications was correctness. Whether that remains the case post-*Vavilov* requires some analysis.

[31] There is significant disagreement amongst the parties as to what effect, if any, *Vavilov* has on how this Court must approach its task of reviewing the adjudicator's decision. CCF argues that a proper application of *Vavilov* commands a reasonableness review in this case. The Attorney General disagrees, arguing that the correctness standard continues to apply. The Commissioner submits that this Court should parse the issues and review the interpretation of s. 14 of *FIPPA* on a correctness standard, but its application to this case on a reasonableness standard.

[32] I accept that *Vavilov* invites this Court to revisit the standard of review applicable in this case. The majority in the Supreme Court explained that a court determining the standard of review in a case before it "should look to these reasons first in order to determine how this general framework applies to that case". A bare application of pre-*Vavilov* jurisprudence is not sufficient. However, "past precedents will often continue to provide helpful guidance": at para. 143.

[33] *Vavilov* establishes that the presumption is that the standard of review of an administrative decision is reasonableness: at paras. 16 and 23. This

presumption is subject to a number of exceptions. Broadly speaking, there are two situations in which the presumption of reasonableness can be rebutted. First, where the legislature has indicated that it intends a different standard to apply, either by expressly prescribing the standard of review or by providing a statutory appeal mechanism. Second, "a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it": at para. 32 (emphasis added). More specifically, the rule of law requires review on a standard of correctness for constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies.

[34] The standard of review in this case turns on whether the question being reviewed is a general question of law of central importance to the legal system as a whole. As noted, the rationale for addressing this category of questions on a correctness standard is that certain general questions "require uniform and consistent answers" due to their "impact on the administration of justice as a whole": *Dunsmuir* at para. 60; *Vavilov* at para. 59.

[35] The Commissioner argues that the earlier cases supporting a correctness standard applied a multi-part contextual inquiry which is no longer part of Canadian law, taking into account the expertise of courts as decision makers in relation to the law of privilege. Expertise no longer is a factor in determining the standard of review: *Vavilov* at paras. 23–31. It follows that the old articulation of the principle that referred to questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise no longer applies.

[36] The focus, contends the Commissioner, is now on general questions of law, not fact or mixed fact and law. These latter questions involve the application of legal tests, which may be of general importance, to matters of fact or mixed fact and law, which are not. The importance of particular findings resulting from the application of a test are of importance to the parties, not the system as a whole. Accordingly, a reasonableness standard relating to the application of the test in cases involving solicitor-client privilege in the freedom

of information context is consistent with the rationale offered by the Supreme Court for reasonableness review generally.

[37] In the result, the Commissioner says the adjudicator's articulation of the test to be applied, that is the interpretation of s. 14 in this case, is reviewed on a correctness standard, but the application of that test is subject to reasonableness review. In this case, the adjudicator identified the test correctly, and the court should defer to her application of the test to her findings about the facts if it is reasonable. In other words, this Court should apply a reasonableness standard to the decision that, in this case, disclosing the litigation costs would not risk a reasonably possible disclosure of solicitor-client communications.

[38] I am not persuaded by this analysis. The core of the question under review is a general question of law of central importance to the legal system as a whole. This is sufficient to call for review on a correctness standard, notwithstanding the Supreme Court's abandonment of expertise as part of the rationale supporting correctness. The question, as I see the matter, engages the correct scope of a principle that is fundamental to the proper functioning of our legal system; a principle, the protection of which must be as near to absolute as possible. It is a question that, given its importance, calls for a uniform and consistent answer. The question is fundamentally about the scope of solicitor-client privilege. Admittedly, it arises in the factual context of a question about whether solicitor-client privilege attaches to a record disclosing the total sum spent on litigating a matter during a certain time period while the litigation is ongoing. But it remains a question about the proper scope of privilege. Moreover, the answer to that question has precedential value and a significant impact on the administration of justice as a whole and other institutions of government. It goes far beyond the immediate interests of the parties in this case. Respect for the rule of law demands this Court ensure a single, correct answer is provided. The standard of correctness, in my opinion, continues to apply.

[39] It is important to stress not just that the issue involves a general question of law, but also one of central importance. In *Vavilov*, the Court recognized that the "uniform protection of solicitor-client privilege … is necessary for the proper functioning of the justice system": at para. 59. The

communications protected by solicitor-client privilege "are essential to the effective operation of the legal system", because "the important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself": *R. v. Gruenke*, [1991] 3 S.C.R. 263; *R. v. McClure*, 2001 SCC 14. The proper approach to s. 14 of *FIPPA* reflects these interests. As Lowry J. (as he then was) put it in *Legal Services Society (1996)* at para. 26: "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."

[40] In my opinion, the Supreme Court did not intend to call into question the proposition that decisions about the scope and content of solicitor-client privilege be assessed on a correctness standard. The references to cases by the Court serve to illustrate the continuing applicability of the correctness standard, not to cast doubt on that conclusion. Notably, *Vavilov* refers to *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 [*University of Calgary*] as a case involving a general question of law of central importance to the legal system as a whole. The question in *University of Calgary* was whether a provision in Alberta's freedom of information legislation permitted solicitor-client privilege to be set aside. As CCF points out, whether a provision allows solicitor-client privilege to be set aside is a different question from the scope of solicitor-client privilege. *University of Calgary* is not, therefore, dispositive of the standard of review in this case. That said, the example chosen by the Supreme Court is striking. In the case, the Court pointed out that solicitor-client privilege "is a legal privilege concerned with the protection of a relationship that has central importance to the legal system as a whole": at para. 26 (emphasis added). This suggests that "uniform protection of solicitor-client privilege" is "necessary for the proper functioning of the justice system": see *Vavilov* at para. 59.

[41] I turn to some more specific arguments advanced on this issue. First, I disagree with CCF's characterization of the issue as engaging the exercise of discretion by the adjudicator. The issue before the adjudicator was whether the Attorney General could rely on s. 14 to withhold the record. The Attorney General is only entitled to rely on s. 14 if the record is privileged. If a

document is privileged, the Attorney General "may" refuse to disclose it. The plain text of the legislation suggests that a discretionary decision is engaged if solicitor-client privilege exists, but the discretion resides in the client. Whether the document is protected by privilege is, however, a logically prior question not subject to discretion. Solicitor-client privilege is a substantive legal right with constitutional dimensions, and a clear line of authority holds that it must be maintained as close as possible to absolute: *University of Calgary* at para. 43; *Central Coast* at para. 88.

[42] The Court did not say anything to the contrary in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 [*Criminal Lawyers' Association*]. As the Court explained in the *University of Calgary* decision, *Criminal Lawyers' Association* "addressed, as a secondary issue, whether the Assistant Commissioner properly exercised his discretion under a provision explicitly permitting him to exempt from disclosure documents subject to solicitor-client privilege": *University of Calgary* at para. 24. The "discretionary" element of the decision in *Criminal Lawyers' Association* was whether or not to exempt privileged documents. No discretion was involved in determining whether the documents were privileged. Further, the Court in *Criminal Lawyers' Association* appears to have circumscribed any discretion to disclose privileged documents, "given the near-absolute nature of solicitor-client privilege": at paras. 53–54. In the Court's view, it was "difficult to see how these records could have been disclosed" given the "categorical nature of the privilege": at para. 75.

[43] Second, I agree with the observation of Butler J. (as he then was) in *Central Coast*, where he characterized the question of "whether the Acting Commissioner erred in holding that the Board could not rely upon s. 14 of the *Act* to withhold the records" as "primarily a question of law". Justice Butler aptly observed that "questions of fact will necessarily be intertwined with the legal issue(s) in a case from time to time": at para. 86. Even where a case involves applying a standard to a unique set of facts, it may primarily engage an extricable issue of law: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36.

[44] I agree with the Attorney General that *Vavilov* does not preclude correctness review in every case that has a factual component. The scope and content of a substantive right will inevitably arise in a specific factual

context. The rule of law imperative to protect the right in the legal system as a whole invariably involves an assessment of the context in which it arises. This reality is recognized by the explicit reference in *Vavilov* to *Chagnon v. Syndicat de la function public et parapublique du Québec*, 2018 SCC 39 [*Chagnon*] to illustrate a case involving a general question of law of central importance to the legal system: *Vavilov* at para. 60. The issue in *Chagnon*, broadly stated, was the scope of parliamentary privilege. Properly defining the scope of parliamentary privilege required the Court to assess the privilege as it applied to the facts and specific circumstances of the case. The Court had no difficulty in finding a correctness standard applied.

[45] In this case, the facts are straightforward and uncontested. Whether or not solicitor-client privilege applies on those facts is essentially a legal question. This case requires the court — and required the adjudicator — to sketch the contours of the protection afforded by solicitor-client privilege. As CCF said in their main factum, “this case is about the scope of privilege.” The test for solicitor-client privilege, stated at its highest level, is not at issue. But the scope of solicitor-client privilege, at a greater degree of specificity and its protection in the fabric of the legal system, is clearly at issue.

[46] The characterization of the issue in this case as primarily a legal one is illustrated by CCF’s specific arguments on the merits of the appeal. CCF’s main argument is that the presumption of privilege over legal billings established by the Supreme Court of Canada in *Maranda* does not apply to simple disclosure of a blended total sum of expenses incurred in the government’s civil litigation. CCF asks us to interpret *Maranda*, and to distinguish it from the case at bar. Alternatively, CCF asks us accept that the judge erred in placing the onus of rebutting privilege on it. These arguments raise issues of law of broad applicability.

[47] Accordingly, I conclude the standard of review of the adjudicator’s decision is correctness. The judge correctly identified and applied the correct standard.

Maranda

[48] CCF argues that the judge erred by concluding that information that merely states the total amount of legal fees is presumptively privileged. It contends that the judge extended the conclusion reached by the Supreme Court in *Maranda* outside the limits of the principle which, it argues, applies only in the context of criminal proceedings.

[49] In *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 [*Donell*], this Court appears to have left open the question of whether or not the presumption established in *Maranda* extends beyond its immediate context. Justice Chiasson said, at para. 59: "at a minimum, *Maranda* establishes that lawyers' bills, in the criminal law context, are presumptively subject to solicitor-client privilege" (emphasis added).

[50] I am unable, however, to accept the submission that *Maranda* stands only for the proposition that a presumption of solicitor-client privilege attaches to information about the total amount of legal fees in the criminal law context. In my view, the case does not limit the scope of the principle in such a way. To the contrary, the principle is engaged in respect of information concerning the total legal fees incurred in any context.

[51] The issue of the scope of solicitor-client privilege arose in *Maranda* in the context of criminal proceedings, specifically the execution of a search warrant. There is no doubt that the Court's analysis of the issues in the case was informed by that context. The law as it was developing was animated by the need to protect solicitor-client privilege to reflect its social importance in protecting the confidentiality of communications between solicitor and client. This imperative had led to the recognition of the privilege as a rare class privilege: see para. 11.

[52] As Justice LeBel said, at para. 12:

> [12] The decisions of this Court have consistently strengthened solicitor-client privilege, which it now refuses to regard as merely an evidentiary or procedural rule, and considers rather to be a general principle of substantive law (see: *Lavallee, Rackel & Heintz*, at para. 49). The only exceptions to the principle of confidentiality established by that privilege that will be tolerated, in the criminal law context, are limited, clearly defined and strictly controlled (*R. v. McClure*), [2001] 1 S.C.R. 445, 2001 SCC 14; *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32). The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients,

> thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients. In determining the propriety of the authorization and execution of the search in Mr. Maranda's office and examining the problem of the confidentiality of the information about the fees and disbursements billed to his clients, care must be taken to follow the general approach that can be seen in this Court's decisions in this area.

[53] There is no doubt that the risks associated with a breach of solicitor-client privilege in executing a search warrant are particularly serious given the consequences for the proper operation of the criminal justice system. That does not mean, however, that the scope or content of the privilege is defined relative to that context. It simply reinforces the care that must be taken to ensure that a search does not violate the privilege, which exists independently of the search. It means then that the approach to protecting privilege must ensure the values and institutions of the criminal justice system are preserved.

[54] As I read *Maranda*, the fundamental question that had to be decided was whether information about the total amount of legal fees fell within or without the scope of common law privilege:

> [23] In this appeal, however, the Attorney General of Canada, whose arguments on this point were adopted by the Quebec Court of Appeal, submits that the application related only to neutral information, the amount of the fees and disbursements paid, and to no other details. That information, it is submitted, falls outside the scope of the solicitor-client communication that is protected by common law privilege. The Attorney General compares it to a pure fact which is not such as would inform third parties about the content of the solicitor-client communication. ...

[55] The issue was articulated in this way:

> [24] The question has never before been submitted to this Court in these terms. To answer it, I will have to assume that the Crown is seeking only the raw data, the amount of the fees and disbursements. …

[56] Justice LeBel reasoned:

> [28] The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. In the context of criminal investigations and prosecutions, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination.

[57] Justice LeBel concluded that the appropriate rule could not be based on the distinction between facts and communication. That distinction was not an accurate reflection of the nature of the relationship in issue. Hence: “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”: at para. 32. Justice LeBel concluded:

> [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.

[58] As I read the judgment, the majority is not suggesting that the scope of the privilege was defined in a way that that made it dependent on the criminal law. To the contrary, the question of the existence and scope of the privilege is logically and legally independent of any particular context. Certainly, issues concerning the protection of the privilege arise in particular contexts which may affect how the privilege is protected, but those contexts do not define the scope or content of the privilege. The analysis in *Maranda* confirms these observations.

[59] The Court rejected the proposition that the amount of fees was just a neutral fact, and endorsed the view that it can indicate something about communications between a client and solicitor. Such a question can arise in any context. Moreover, solicitor-client privilege is a fundamentally important substantive right, the protection of which has a constitutional dimension and must be as near to absolute as possible. None of these considerations are limited to the criminal context, even though that context raises special concerns which underscore the protection of privilege.

[60] In short, the Court in *Maranda* is articulating the proposition that information about amounts of legal fees is presumptively privileged because it arises out of the solicitor-client relationship and is capable of disclosing privileged information about communications between solicitor and client. The Court is defining the scope of solicitor-client privilege.

[61] Accordingly, in my view, *Maranda* stands for a general proposition that information about the total amounts of legal fees is presumptively privileged. The presumption may be displaced, but the onus of doing so rests with the party attempting to displace it. This is as it should be in my opinion. Placing the onus on the party who seeks the protection of the privilege risks forcing the disclosure of the very communications the privilege is intended to protect. It follows that the judge did not err in her conclusions on this point, and was right to say that it was important to keep the onus clearly in mind in deciding whether the presumption had been displaced.

[62] It is important to distinguish the circumstances of this case from others in which factual information in the hands of lawyers does not reveal or is not capable of revealing solicitor-client communications. Hence, for example, redacted trust ledgers have been found not to be presumptively privileged: see *Wong v. Luu*, 2015 BCCA 159 [*Luu*]; *Donell*. I do not think there is anything inconsistent with my reading of *Maranda* to be found in cases such as *Luu* or *Donell*. To the contrary, those cases are consistent with my interpretation.

[63] In *Donell*, Justice Chiasson differentiated between a statement of legal fees and a lawyers' trust ledgers. He said:

> [49] … [*Maranda*] concerned a specific type of document – a lawyer's fee account – which is intrinsically connected to the solicitor-client relationship and the communications inherent to it; to repeat LeBel J.'s formulation, "[t]he existence of the fact consisting of the bill and its payment arises out of the solicitor-client relationship and what transpires within it". As noted by LeBel J., what transpires within that relationship is communication for the purpose of enabling clients to obtain legal advice; it is that communication that is protected by solicitor-client privilege.
>
> [50] *Maranda* neither does away with the distinction between facts and communications nor holds that entries in a lawyer's trust account ledgers are presumptively privileged. It does mandate that such entries must be considered in light of any connection between them and the solicitor-client relationship and what transpires within it.

> [51] In the present case, we are not concerned with a lawyer's bill. The Receiver seeks production of trust ledgers. Generally, such documents record facts, not communications, and are not subject to solicitor-client privilege, but I would not favour a blanket endorsement of the automatic production of such records. In my view, while the analysis in *Maranda* did not dispose of the distinction between facts and communications, it requires the court to ensure that entries on a trust ledger do not contain information that is ancillary to the provision of legal advice.
>
> [Emphasis added.]

[64] The chambers judge was alive to *Donell* and, in my view, she correctly observed that, unlike the trust ledgers at issue in *Donell*, the record of interim legal costs "arise[s] out of the solicitor-client relationship and what transpires within it and reflect[s] work done at the instruction of the client": at para. 42.

[65] The appellant also argues, relying on one paragraph from *Luu*, that the record is not presumptively privileged because it merely states a total sum of costs incurred and is not a detailed bill. In *Luu*, Justice Willcock wrote:

> [38] A lawyer's bills are presumptively privileged because they are ordinarily descriptive; by recording the work done by the solicitor, they disclose the client's instructions, which the client cannot be compelled to divulge and the confidentiality of which the solicitor is obliged to protect.

[66] Here, the record does not explicitly set out "the work done by the solicitor." It states the total costs of litigation to a certain date, and is admittedly decontextualized by comparison to a comprehensive statement of account. Nonetheless, the authorities hold that the presumption of privilege applies. Indeed, *Maranda* itself was decided on the assumption that the record at issue included "only the raw data, the amount of the fees and disbursements": at para. 24. It was the "amount of the fees" that "must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege": at para. 33.

[67] As the chambers judge noted, the presumption of privilege arises from the connection between billing information and the nature of the relationship between lawyers and clients; it does not depend on the specific details included or not included in a particular bill. This is exemplified by lower court authorities explicitly applying the presumption of privilege to a gross sum of legal expenses: see *Central Coast*; *Campbell*; *Municipal Insurance Assn. of*

British Columbia v. British Columbia (Information and Privacy Commissioner) (1996), 143 D.LR. (4th) 134 (B.C.S.C.) [*Municipal Insurance Assn.*].

Did the judge err in her conclusion that CCF had not rebutted the presumption?

[68] The judge's analysis of whether the presumption of privilege had been rebutted was influenced by Justice Butler's analysis of a similar issue in *Central Coast*, drawing on consideration of these matters in other cases. She examined the criticisms of the Attorney General's evidence and said:

> [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. [Emphasis in original.]
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> [59] In this regard, CCF adopts the Adjudicator's conclusions, which are as follows:
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> 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.

[69] CCF argues that, even if it has the onus, it is evident that the mere disclosure of the total amount of legal fees incurred over many years raises no possibility that an assiduous observer could infer anything about confidential communications between the client and its solicitors. The bare number is shorn of all context and detail. Nothing could be inferred that was not already obvious to anyone who was knowledgeable about the litigation.

[70] By the time the request was made, the litigation had gone through years of pre-trial preparation including document disclosure, examinations for discovery, disclosure of expert reports and an exchange of witness lists. There had been multiple pre-trial and mid-trial applications. The defendant's strategy in defending the case, and the fact the litigation was being taken seriously and was hard fought, was obvious from the way the litigation was being conducted. The fact that the request was made in the context of ongoing litigation is, according to CCF, immaterial, at least on the facts of this case.

[71] The judge took a different view of the matter. I think she was right to do so.

[72] It is important to reiterate that we must assess whether there is a risk of disclosing solicitor-client communications in the circumstances that existed at the end date of the disclosure period. That question can be answered only by relying on the circumstances as they existed at that time (or at the latest when the adjudicator made her decision) and not by taking into account facts or circumstances as they subsequently developed. In other words, it is essential to analyse the issue in the context of the litigation as it then existed, and not as the case subsequently unfolded.

[73] Moreover, the issue before us is one of solicitor-client privilege. We are not concerned directly with issues of litigation privilege. Having said that, the issue we must consider involves solicitor-client communications in the context of litigation. Those communications may include communications about such matters as litigation strategy in all its multiple facets, the state of trial preparation, matters connected with the retention of experts and, for example, issues to do with decisions about waiving privilege and other matters.

[74] The reality of litigation is that whether the disclosure of information is capable of revealing solicitor-client communications is likely to vary or change as litigation progresses. Communications about litigation strategy are ongoing but are more likely to be confidential (which means they are about information that is not known to the other side and to the world) earlier on in the case. Solicitor-client privilege protects those communications both at the start and during a case, as well as after its conclusion. Inevitably, however, the progress of a trial will reveal much that will permit reasonable inferences to be drawn by an assiduous observer about likely solicitor-client communications of an opposing party. For example, many decisions about trial tactics become evident during trial including what kinds of admissions to make, what kinds of matters to join issue on, how to approach issues of expert evidence and so forth. These kinds of strategic calls may, indeed probably, reflect instructions which in turn depend on solicitor-client instructions. What may become obvious, or be reasonably capable of being inferred, as litigation unfolds may not be so at earlier stages of litigation or a trial. What may have been privileged early in a case may not remain so throughout the trial as

government strategy and other matters are revealed. It is for this reason that the timing of disclosure matters.

[75] In this case, it is important that the disclosure would have occurred at an early stage in the trial; a trial that could reasonably be expected to be lengthy. There had been a substantial period of pre-trial preparation. The proposed disclosure related to extensive pre-trial preparation and the first part of the trial. Much information was in the public domain. There had no doubt been many pre-trial applications. Significant numbers of expert reports had been exchanged. It would have been known how many days of discovery had taken place. At the same time, one would expect that there was much that was known to the parties that was not public, since much information would have been still subject to implied undertakings of confidentiality.

[76] CCF is not a stranger to the litigation. It has openly acknowledged its role in funding the plaintiffs. I do not suggest for a moment that CCF was privy to information it ought not to have had. But it must be treated not just as an ordinary assiduous observer, but as one that can be taken to be particularly well-informed. As such, it seems to me, that one must in part analyse the question whether the disclosure of the legal fees might reasonably disclose privileged communications recognizing that CCF is better placed than most to draw such inferences. But that is not, in any event, the end of the inquiry. If the total amount of fees is disclosed it will be in the public domain and known by the plaintiffs. One must ask whether there is a reasonable possibility that the plaintiffs, equipped with all of their knowledge of the litigation, including matters that remain confidential as between the parties, would be able to draw inferences about solicitor-client communications with the assistance of the information about the legal costs. This is so even if other assiduous observers, without that knowledge, could not draw those inferences. Even if it were reasonably possible for only the plaintiffs to draw the necessary inferences, privilege risks being breached. That is sufficient to uphold the protection of the privilege.

[77] In my opinion, the amount of public and private knowledge available about the case makes it more and not less likely that inferences about communications could possibly be drawn. I do not accept that the only available inferences are those that anyone informed of public information

could draw anyway. Certainly, publicly available information is no doubt revealing to some degree about the nature of a party's litigation strategy or the vigour with which a matter is being defended. But, I agree in principle with the Attorney General that the more information that is available enhances and does not simply replicate the inferences that could be drawn. With more information, it seems to me more likely that a knowledgeable person, armed with information about total legal costs, particularly in an ongoing matter where much of the hand is yet to be played, could draw inferences that will fill in gaps, make further connections, or illuminate what may not otherwise be clear about matters protected by the privilege.

[78] It must be remembered too that the public information available from the government is not derived only from what is known about the *Cambie Surgeries* litigation. The government discloses much other information, such as information about salaries of lawyers and others within the public service, as well as other budget information about various public activities. The possible implications of this kind of information must also be factored into the analysis.

[79] Taking all of these considerations into account, a fully informed assiduous observer could well work out more about government strategy than just that the litigation is uncompromising and hard fought and considerable resources were being devoted to the defence of the government position. Such a person would have a good idea how many counsel were involved in the case, make a reasonable estimate of the number of support staff and form a reasonable estimate of the proportion of the total legal costs paid to professional staff. Knowing the amount of document production would allow a reasonably accurate estimate of the cost of document production. Knowing the number of expert reports that had been disclosed would again allow, in rough ball-park terms, an estimate of the cost of those items. Piece by piece it seems to me reasonably possible that by comparing these estimates, and what is unaccounted for, one could begin to form judgments about such matters as whether the government was employing consulting experts in addition to testimonial experts, or had in its possession expert reports that had not been disclosed and over which it was maintaining its claim for privilege.

[80] Piecing all of the information together, more specific inferences about government strategy than just the obvious ones evident from what was already known might become available. Given that the disclosure of fees would have occurred at what was still a relatively early stage of what turned out to be a very long trial, it might reveal yet more about the government's state of preparation and future strategy in the remainder of the trial.

[81] Additionally, disclosure mid-trial of litigation costs could have a significant effect on the government's strategy in negotiating costs at the end of the day. This is not just a question of whether the government's negotiation position would be prejudiced, but, more importantly for current purposes, could indicate something about the kind of instructions the government might give or be able to give counsel in negotiating costs.

[82] In my view, none of these concerns can be dismissed as merely fanciful or entirely speculative. I agree with the judge that the difference between an $8 million and $20 million expenditure could be telling to an assiduous observer and reasonably possibly lead to the drawing of inferences about privileged communications. Furthermore, it is difficult to see how the government could do much more than raise the kinds of concerns it has in a general or categorical way without risking revealing something about the communications the privilege is intended to protect.

[83] In sum, a number factors prevent me from reaching the conclusion that CCF rebutted the presumption of privilege in this case. It seems to me that what needs to be established is that there is no reasonable possibility of revealing privileged communications by disclosing the total amount of legal costs. That is an appropriately high threshold. There is a significant amount of public information available in this case. This information, combined with knowledge of the government's interim legal costs, risks the possibility of allowing an assiduous inquirer to draw inferences about litigation strategy and communications between lawyer and client. Even more importantly, CCF is not a stranger to the litigation, and, in any event, any information it obtains will become a part of the public domain and available to the plaintiff in ongoing litigation. In this regard, Justice Butler's observations in *Central Coast* are apt:

> [132] Here, as in [*Municipal Insurance Assn.*] 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.
>
> …
>
> [134] If the access applicant is also a litigant in the proceeding in question, there is no question that any insight they might gain into these matters could be prejudicial to the public body's interests in the litigation and would therefore operate to undermine the sanctity of the solicitor-client relationship.

[84] I recognize the attraction and the force of the argument that a mere decontextualized number grounds no inferences beyond the fact that the number is the amount spent on a case. The Ontario Court of Appeal was able to reach that conclusion in respect of the amount of fees spent in connection with the Paul Bernardo case: see *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 251 D.LR. (4th) 65 (Ont. C.A.). That conclusion, however, was reached on different facts when the case was concluded. I am not able, confidently and with the necessary degree of assurance, to reach the same conclusion in the circumstances of this case.

Disposition

[85] Solicitor-client privilege is a fundamental principle of our legal system. Its protection must be as close to absolute as possible. The protection of the privilege has a constitutional dimension. It is fundamental to the rule of law. I think it appropriate therefore that CCF bears the burden of demonstrating that none of the possible inferences I have sketched above could reasonably be drawn by an assiduous observer. In my view, it has not done so. Accordingly, the presumption has not been rebutted. I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Fitch"

I agree:

“The Honourable Mr. Justice Butler”