IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner),* 2023 BCSC 1179

Date: 20230711
Docket: S2210192
Registry: Vancouver

Between:

Minister of Children and Family Development

Petitioner

And:

Information and Privacy Commissioner for British Columbia and IndigiNews

Respondent

Before: The Honourable Justice Iyer

On judicial review from: A decision of the Office of Information and Privacy Commissioner dated December 9, 2022 in (OIPC File No.: F21-84994 and F21-85040)

Reasons for Judgment
In Chambers

Counsel for the Petitioner:	J. Ruttle M. Bennett
Counsel for the Respondent:	K.R. Phipps
Counsel for the Respondent IndigiNews:	D.F. Sutherland, K.C. N. Rayani
Place and Dates of Hearing:	Vancouver, B.C. June 12-13, 2023
Place and Date of Judgment:	Vancouver, B.C. July 11, 2023

OVERVIEW

[1] In this judicial review proceeding, the Minister of Children and Family Development ("MCFD") seeks to quash a decision made by a delegate of the Information and Privacy Commissioner's Director of Adjudication ("Adjudicator") compelling the MCFD to produce certain records that are subject to solicitor-client privilege.

[2] The dispute arose out of an access to information request made to the MCFD under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*] by IndigiNews, a digital media outlet serving Indigenous communities, for records between June 2019 and September 2020 relating to "birth alerts".

[3] The term "birth alerts" refers to a discontinued MCFD practice that flagged pregnant women that the MCFD considered would pose a risk to their children. It enabled the MCFD to apprehend those children as soon as they were born. This practice disproportionately affected Indigenous and marginalized women.

[4] The MCFD declined to disclose some of the requested records ("Records") on the basis that the information they contained was protected by solicitor-client privilege. IndigiNews argued that, despite being privileged, the public interest override in s. 25 of *FIPPA* required disclosure. On June 27, 2022, the matter went to inquiry before the Adjudicator.

[5] In Order F22-64, dated December 9, 2022, ("Decision"), the Adjudicator decided that she did not have sufficient evidence to decide whether s. 25 required disclosure of the Records. She therefore made an order under s. 44 requiring the MCFD to disclose the Records to her.

[6] The MCFD applied for judicial review of the Decision.

LEGISLATION

[7] This application requires me to interpret specific sections of *FIPPA* relating to solicitor-client privilege. In order to do that, it is necessary to consider the purposes and framework of *FIPPA* as well as the specific sections in issue.

[8] Section 2(1) of *FIPPA* states its two purposes, which are to make public bodies more accountable by giving the public greater access to information, and to protect personal privacy. It creates an administrative body, the Office of the Information and Privacy Commissioner ("OIPC"), headed by a person appointed by the Legislature ("Commissioner") to monitor the administration of *FIPPA* (s. 37).

[9] Section 4 creates a basic right of access to information: anyone who requests a record in the custody or control of a public body has a right of access to it, subject to the exceptions listed in the Act.

[10] Part 2 of *FIPPA* creates the procedures for making and responding to access requests. It also establishes mandatory and discretionary exceptions to disclosure. These include s. 14, which states:

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

[11] Independent of requests for access and exceptions, s. 25 of the Act creates an overriding positive obligation on public bodies to disclose information that is clearly in the public interest:

> **Information must be disclosed if in the public interest**
>
> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

[12] Part 3 of *FIPPA* provides for personal privacy.

[13] Part 4 creates the OIPC to monitor the administration of *FIPPA*. In particular, s. 44 empowers the Commissioner to compel disclosure of information when conducting an investigation, audit or inquiry:

Powers of commissioner in conducting investigations, audits or inquiries

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

(2) The commissioner may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

[14] Part 5 creates the process for reviews and complaints. An applicant who makes a request for records from a public body can ask the Commissioner to review

the public body's decision about that request. If the matter is not resolved in that process, s. 56 authorizes the Commissioner (or an adjudicator) to conduct an inquiry, and to decide all questions of fact or law arising from it. When conducting an inquiry, the adjudicator may receive evidence and information *in camera*.

[15] Part 5.1 of FIPPA creates offences and Part 6 contains general provisions.

ISSUES

[16] There is no dispute that solicitor-client privilege is fundamental and nearly absolute. That said, there is also no question that the Legislature can choose to enact a law that abrogates solicitor-client privilege.

[17] The parties agree that the standard of review in this case is correctness. While I will consider the Adjudicator's reasons carefully, they are not owed deference.

[18] Against this background, I must decide whether, in enacting ss. 25 and 44 of *FIPPA*, the Legislature used sufficiently clear language to abrogate solicitor-client privilege. That is a matter of statutory interpretation. Specifically, I must answer two questions:

a) Does s. 25 compel disclosure of information protected by solicitor-client privilege?

b) If so, does s. 44 permit the Adjudicator to require the MCFD to produce the Records?

DISCUSSION

Principles of Statutory Interpretation

[19] The Supreme Court of Canada has repeatedly affirmed the "modern principle" as the correct approach to statutory interpretation. It requires the court to read the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the

intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; most recently, see *R. v. Breault*, 2023 SCC 9, at para. 25.

[20] In *Alberta v. University of Calgary*, 2016 SCC 53 [*Calgary*], the Supreme Court of Canada applied the modern principle to determine whether Alberta's freedom of information and protection of privacy statute, the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 [*FOIPP*] required disclosure of documents protected by solicitor-client privilege to Alberta's privacy Commissioner. The parties before me referred extensively to the majority judgment of Justice Côté and the concurring judgment of Justice Cromwell.

[21] Both judgments refer to *FIPPA* because s. 44(3) of *FIPPA* contains the phrase "any privilege of the law of evidence," which phrase is also used in s. 56(3) of *FOIPP*. The justices agree that parallel legislation may be an interpretative aid in construing a particular statutory provision (*Calgary* at para. 60), but reach different conclusions about what the use of the phase in s. 44(3) of *FIPPA* means for the interpretation of s. 56(3) of *FOIPP*.

[22] In this way, *Calgary* provides an important caution for courts engaged in statutory interpretation: while considering parallel legislation may be useful in some cases, the court must remain mindful of the particular statute before them. The use of a phrase in one statute will not necessarily have the same meaning as in a different statute, even if the statutes have the same general purposes and subject matter.

[23] As I have said, there is no dispute that solicitor-client privilege is fundamental. It is a cornerstone of our justice system: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 26. The Legislature may abrogate the privilege, but must do so using clear, explicit and unequivocal legislative language: *Calgary* at para. 2.

Does s. 25 compel disclosure of information protected by solicitor-client privilege?

[24] Subsection 25(1) imposes an overriding obligation on public bodies to disclose information:

> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[25] Subsection 25(2) underscores the importance of this obligation by stating that s. 25(1) applies "despite any other provision of this Act." As I have noted, s. 14 of the Act permits public bodies to refuse to disclose information that is subject to solicitor-client privilege. In *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 31, the Court of Appeal held that the purpose of s. 14 is to protect what is covered by solicitor-client privilege at common law.

[26] Is the language of s. 25(2) sufficiently clear, explicit and unequivocal to abrogate the solicitor-client privilege in s. 14?

[27] The MCFD says it is not. Essentially, it takes the position that anything short of express use of the words "solicitor-client privilege" in the statute requires the court to infer abrogation of the privilege, which is impermissible.

[28] I do not read the cases on which the MCFD relies*, Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*] and *Calgary*, as restricting legislative drafting to that extent.

[29] In *Blood Tribe*, the Supreme Court of Canada considered whether s. 12 of the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*] authorized the federal privacy Commissioner to compel disclosure of records protected by solicitor-client privilege. As it read at the time, that section conferred general powers on the Commissioner when investigating complaints:

> **Powers of Commissioner**
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> **12** (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may
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> (a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;
>
> (b) administer oaths;
>
> (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;
>
> [Emphasis added.]

[30] Justice Binnie held that this language was too "open-textured" to authorize the Commissioner to compel production of solicitor-client privileged documents because solicitor-client privilege cannot be abrogated by inference: *Blood Tribe* at para. 11.

[31] Not only is the language of s. 12 of *PIPEDA* markedly different from that of s. 25 of *FIPPA*, they are about different things. Section 12 is about the federal Commissioner's powers when investigating complaints. Section 25 is about imposing on public bodies a positive obligation to disclose information that is clearly in the public interest.

[32] Section 25(2) of *FIPPA* is not "open-textured" in the sense that s. 12 of *PIPEDA* is, nor does it require an inferred abrogation of privilege in the way that s. 12 does. To read s. 12 as authorizing the federal privacy commissioner to compel production of privileged documents, the reader must infer that a general document production power includes privileged documents, and specifically includes documents subject to solicitor-client privilege, the most fundamental of privileges.

[33] By contrast, s. 25(2) says that the disclosure obligation in s. 25(1) applies "despite any other provision of this Act." The inference is minimal. Short of using the actual words "despite solicitor-client privilege", the subsection could not be clearer.

[34] As the Supreme Court of Canada held in *Lizotte v. Aviva Insurance Company of Canada,* 2016 SCC 52 at para. 61, the legislature does not have to use the words "solicitor-client privilege":

> An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege.

[35] In *Calgary*, the Supreme Court of Canada had to decide whether s. 56(3) of *FOIPP* required a public body to produce documents subject to solicitor-client privilege. Section 56 confers powers on the Commissioner when conducting investigations or inquiries:

> **Powers of Commissioner in conducting investigations or inquiries**
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> **56** (1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.
>
> (2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.
>
> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).
>
> …
>
> [Emphasis added.]

[36] Section 56 of *FOIPP* is more akin to s. 12 of *PIPEDA* than it is to s. 25 of *FIPPA*. The purposes of these *FOIPP* statutory provisions, as well as the different words, limit their interpretive utility in this case. The meaning of "privilege of the law of evidence" in *Calgary* does not assist me in deciding whether or not s. 25(2) abrogates solicitor-client privilege.

[37] A purposive and contextual reading of s. 25(2) demonstrates that it does compel disclosure of solicitor-client privileged information.

[38] Section 25 is exceptional. It differs from the rest of *FIPPA* because it imposes a direct and overriding obligation on public bodies to disclose a narrowly-defined

category of information even in the absence of any request for it. I agree with the Adjudicator that its wording means that the threshold for s. 25 disclosure is high:

> **31** Given what s. 25(2) states, if s. 25(1) applies, it overrides every other provision in FIPPA, including the exceptions to disclosure and the privacy protections in FIPPA. Therefore, the threshold for proactive disclosure under s. 25(1) is very high. The s. 25(1) duty to disclose exists only in the "clearest and most serious of situations" and the disclosure must be "not just arguably in the public interest, but clearly (i.e., unmistakably) in the public interest."
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> [Citations omitted.]

[39] Reading the words of s. 25(2) in a manner consistent with the modern principle of statutory interpretation, “in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”, they mean exactly what they say: where s. 25 requires disclosure, all disclosure exceptions, including the solicitor-client privilege in s. 14, must give way.

[40] By contrast, interpreting s. 25(2) as the MCFD proposes requires the reader to construe it as saying “despite any other provision of this Act except s. 14”. That reading does not accord with the ordinary meaning of the words. The MCFD has not argued that reading the subsection in this way is consistent with a contextual reading of the Act, its scheme or its object.

[41] While the MCFD is correct that an exception to solicitor-client privilege must be clear, explicit and unequivocal, the words of s. 25(2) satisfy that requirement. They are not “open-textured”, imprecise or indirect. The Legislature intended to override all exceptions and used language that directly conveys its intent.

[42] Before leaving this issue, I will briefly address the MCFD’s submission that the Adjudicator’s interpretation of s. 25 “creates a sliding scale where significant public interest in a matter means that disclosure will likely be required.” I do not read anything in the Decision as creating a sliding scale or as predicting whether or when disclosure of privileged information will be required. The Adjudicator simply sets out the factors to consider in determining whether the high threshold for disclosure is

met and summarizes the positions of the parties on that issue. The Decision in no way foreshadows the outcome of her s. 25 analysis in this case or more generally.

[43] I conclude that s. 25(2) compels the MCFD to disclose information subject to solicitor-client privilege.

Does s. 44 require the MCFD to produce the Records to the Adjudicator?

[44] In the Decision, the Adjudicator described the test under s. 25 as follows:

> **32** What constitutes "clearly in the public interest" under s. 25(1)(b) is contextual and determined on a case-by-case basis. The issue is whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest.
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> **33** The first question to answer when deciding if s. 25(1)(b) applies is whether the information concerns a matter that engages the public interest. For instance, is the matter the subject of widespread debate in the media, the Legislature, or by officers of the Legislature or oversight bodies? Does the matter relate to a systemic problem rather than to an isolated situation?
>
> **34** If the matter is one that engages the public interest, the next question is whether the nature of the information itself meets the high threshold for disclosure. The list of factors that should be considered include whether disclosure would:
>
> - contribute to educating the public about the matter;
> - contribute in a substantive way to the body of information that is already available;
> - facilitate the expression of public opinion or allow the public to make informed political decisions; or
> - contribute in a meaningful way to holding a public body accountable for its actions or decisions.
>
> **35** In any given set of circumstances there may be competing public interests, weighing for and against disclosure, and the threshold will vary according to those interests. FIPPA exceptions themselves are indicators of classes of information that, in the appropriate circumstances, may weigh against disclosure of the information.
>
> [Citations omitted.]

[45] Based on the information disclosed by the MCFD, including a lawyer's affidavit describing the general nature of the Records, the Adjudicator was able to

answer the first question, finding that disclosure was plainly and obviously in the public interest.

[46] The Adjudicator accepted that, in some situations, it may be possible to decide whether disclosure of solicitor-client privileged information is required under s. 25 without seeing the information in dispute. However, she explained that the information she had in this case was not sufficiently detailed to enable her to decide whether the high threshold for disclosure of the Records was met. She afforded the MCFD another opportunity to disclose the information, noting the possibility of providing it and submissions about it *in camera*. The MCFD declined to make further disclosure.

[47] In light of that, the Adjudicator found that it was "absolutely necessary" to make an order under s. 44(1)(b), compelling production to her of the Records so that she could decide whether s. 25 requires disclosure of the information they contain: Decision at para. 60.

[48] The MCFD agues that s. 44 does not compel disclosure of solicitor-client privileged information because the words of s. 44(2.1) are not clear, explicit and unequivocal. It is convenient to reproduce the relevant parts of s. 44 again here:

> **44** (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:
>
> …
>
> (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.
>
> (2) The commissioner may apply to the Supreme Court for an order
>
> …
>
> (b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).
>
> (2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

[49] The words of subsection 2.1 are clear, express and unequivocal. Not only do they create a safeguard in the event that privileged records are inadvertently disclosed, as the MCFD submits, they also abrogate solicitor client privilege. That is because the subsection directly addresses the situation where the Commissioner has made an order under s. 44(1) requiring the production of records subject to solicitor-client privilege, by expressly stating that compliance with the Commissioner's order does not waive the privilege.

[50] I agree with the Adjudicator's conclusion on this issue and with her reliance on the reasons of Cromwell J. in *Calgary* on this point. He noted that *FIPPA* was amended in 2003 to add s. 44(2.1):

> **117** The premise of the amendment – and this is the important point – is that records subject to solicitor-client privilege fall within the Commissioner's powers under s. 44(1) and (3) to order production notwithstanding "any privilege of the law of evidence". Otherwise, the amendment dealing with waiver of solicitor-client privilege would be meaningless in relation to records ordered produced by the Commissioner under s. 44(1). The amendment (s. 44(2.1)) refers specifically to solicitor-client privileged records that a person "discloses ... at the request of the commissioner, or under subsection (1)". The legislature must have assumed that s. 44(1) permits the Commissioner to require production of solicitor-client privileged records. Otherwise, there could be no record subject to solicitor-client privilege disclosed to the Commissioner under s. 44(1) to which the amendment could refer.
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> [Emphasis in original.]

[51] While Cromwell J.'s comments on *FIPPA* were *obiter* as it was not the statute before the Court, they are persuasive. I do not read his interpretation of this provision of *FIPPA* as inconsistent with Côté J.'s comments on *FIPPA*. Rather, their disagreement was about the meaning of "any privilege of the law of evidence" in subsection 44(3) of *FIPPA* as it informs the meaning of the same phrase in s. 56(3) of *FOIPP*.

[52] In fact, Côté J.'s discussion of *FIPPA* suggests that she might well agree that s. 44(2.1) of *FIPPA* abrogates solicitor-client privilege. She emphasizes the "significant differences between the operational frameworks" of *FOIPP* and *FIPPA*: *Calgary* at para. 60. At para. 64, she points to the fact that, unlike FOIPP, s. 44(2) of

FIPPA, “vests much of the production power in a court … in a manner consistent with legislative respect for fundamental values…”

[53] Reading s. 44 as a whole in light of the modern principle of statutory interpretation, I conclude that the Commissioner has the power to make an order under s. 44(1) compelling the production of solicitor-client privileged records. If the public body does not comply with that order, s. 44(2) empowers the Commissioner to apply to this Court to enforce it.

CONCLUSION

[54] For these reasons, the petition is dismissed. The matter is remitted to the Adjudicator to continue her inquiry under s. 25.

“Iyer J.”