ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2014-D-03
ORDER F2014-50

December 31, 2014

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Numbers F6525/F6761

Office URL: www.oipc.ab.ca

Summary: Two Applicants made separate requests for access to information from Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (*FOIP Act*). Their access requests were for any and all requests for proposals, agreements, contingency contracts (and all related information) between the Alberta government and lawyers retained with respect to lawsuits or prosecutions against tobacco manufacturers for the recovery of health care costs.

The Public Body decided to release or partially release a number of pages but withheld most of the Records at Issue from the Applicants based on the harm to business interests, the harm to personal privacy, the harm to intergovernmental relations, the reveal advice from officials, the harm to economic interests of the Public Body, and the legal privilege exceptions to disclosure. The Public Body also claimed that some of the information was non-responsive. The Applicants both filed Requests for Review of the Public Body's decisions. A portfolio officer was assigned to investigate and attempt to settle both matters, which was unsuccessful. The Applicants both filed Requests for Inquiry. By consent of the parties, the two Requests for Inquiry were consolidated into one Inquiry on the basis that the Public Body confirmed with the Commissioner that the Records at Issue were identical.

The Commissioner advised the head of the Public Body that her office could not conduct the Inquiry as a result of a conflict of interest that arose because the Applicants had requested, in part, records that relate to a law firm that routinely acts for the

Commissioner. Having asked the parties for input with respect to who should be the External Adjudicator, the Commissioner, given she received no objection to this choice, appointed a former provincial Freedom of Information and Protection of Privacy Review Officer.

The External Adjudicator received her delegation from the Commissioner, took an oath of confidentiality under the *FOIP Act* and commenced the Inquiry. The Applicants filed their Initial Submissions in the Inquiry followed by the Public Body's Initial Submissions.

Thereafter, upon receipt of the Public Body's Initial Submissions, one Applicant filed an objection to evidence that formed part of the Public Body's Initial Submissions. The other Applicant supported the objection to the evidence and elected to rely on the other Applicant's Submissions in that regard.

The evidence to which the Applicants objected was in the form of an unsworn letter from a retired judge [Opinion Letter] in which s/he provided a legal opinion as to whether the Records at Issue were in fact privileged, as claimed by the Public Body under s. 27(1) of the *FOIP Act*.

The External Adjudicator agreed with the parties that the outstanding Rebuttal Submissions in the Inquiry should be placed on hold pending her making a Decision with respect to the Preliminary Evidentiary Objection.

The External Adjudicator made a Decision in which she found that the Applicants had met their burden in the Preliminary Evidentiary Objection that the Opinion Letter was not admissible. She found the Opinion Letter did not meet the admissibility criteria for expert opinion evidence. She found that while the Opinion Letter was otherwise logically relevant, its probative value was overborne by its prejudicial effect, that it was unnecessary in order for her as the statutory designated trier of fact and law to adjudicate the matter, that the Opinion Letter opined on the ultimate issue which would constitute a delegation of her delegated authority contrary to the *FOIP Act* and her delegation, and that the author of the Opinion Letter had not been qualified as an expert to give an opinion.

Even though the technical rules regarding admissibility had not been met, the External Adjudicator went on to consider whether she should exercise her discretion to admit or refuse to admit the evidence, given the relaxed rules of evidence in administrative proceedings. She refused to admit the Opinion Letter because there were compelling reasons to exclude the evidence. The Public Body provided the Records at Issue to the author of the Opinion Letter in order for him or her to prepare his or her opinion. The Public Body failed to provide any evidence of any conditions in its retainer with the author as to the confidentiality and sanctity of the Records at Issue, over which it had claimed legal privilege. The External Adjudicator found it unnecessary to determine whether, if by doing so, the Public Body had waived (or it amounted to limited waiver of) its legal privilege. She held legal privilege was too important a foundational principle in our legal system and that, therefore, she must decide the matter in a manner that itself

does not condone or constitute piercing the privilege over the information for which the Public Body has claimed legal privilege. In particular, the External Adjudicator found that it would be impossible to ensure a fair process for all of the parties; for the Applicants who would want their own retired judge to have access to the Records at Issue in order to prepare his or her opinion and for the Public Body because the procedural adjustments required in order to accommodate the Applicants in the process could place the legal privilege it has claimed over the Records at Issue in further jeopardy of being waived.

The External Adjudicator also issued an Order for the Public Body to produce the Records at Issue for her examination at the Commissioner's Office or, alternatively, due to the fact that the Public Body had claimed legal privilege over the Records at Issue and given the circumstances of this case, if the Public Body so elected, she was willing to examine the Records at Issue at the Public Body's site, if the Public Body made that request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, Parts 4 and 5, Division 2, ss. 2, 7, 7(1), 16, 17, 21, 24, 25, 27, 27(1), 27(1)(a), 27(1)(b), 27(1)(c), 30, 51(7), 56, 56(1), 56(2), 56(3), 56(4), 56(5), 58, 59, 59(1), 59(3), 59(5), 61, 61(1), 67, 69, 69(1), 69(2), 69(3), 69(4), 69(5), 69(6), 70, 72(3)(a), 72(6), 74, 74(3), 75, 75(1)(d), 78, 92(1)(d), 92(1)(f); *Public Inquiries Act*, R.S.A. 2000, c. P-39, ss. 4, 5, 9.

Authorities Cited: AB: Orders 99-019, H2004-003, M2004-001, F2006-021, F2013-02

Cases Cited: *Ontario (Minister of Health and Long-Term Care) v Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 OR (3d) 321; *McBreairty v College of North Atlantic,* 2010 NLTD 28; *Newfoundland and Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General),* 2011 NLCA 69; *School District No. 49 (Central Coast) v British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427; *Andrews v Law Society of British Columbia,* [1989] 1 S.C.R. 143; *Canada (Privacy Commissioner) v Blood Tribe Department of Health, [2008]* 2 SCR 574; *R. v McClure,* [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v Canada (Attorney General),* [2002] 3 S.C.R. 209, 2002 SCC 61; *Pritchard v Ontario (Human Rights Commission),* [2004] 1 SCR 809; *Solosky v The Queen,* [1980] 1 SCR 821; *Descôteaux et al. v Mierzwinski et al.*, [1982] 1 SCR 860; *Goodis v Ontario (Ministry of Correctional Services),* [2006] 2 SCR 32; *Western Canadian Place Ltd. v Con-Force Products Ltd.,* 1997 CanLII 14770 (ABQB); *Imperial Oil Limited v Alberta (Information and Privacy Commissioner),* 2014 ABCA 231; *Alberta (Provincial Treasurer) v Pocklington Foods Inc.,*1993 ABCA 69; *Alberta (Information and Privacy Commissioner) v Alberta Federation of Labour,* 2005 ABQB 927; *Interprovincial Pipe Line Inc. v MNR,* [1996] 1 FC 367; *Lavallee v Alberta (Securities Commission),* 2010 ABCA 48; *MacDonald v. Martin* *1990 CanLII 32 (CSC)*, [1990] 3 S.C.R. 1235, 1262-63; *SDL v Governors of the University of Alberta,* 2012 ABQB 244; *Alberta (Workers' Compensation Board) v Appeals Commission,* 2005 ABCA 276; *British Columbia Lottery Corporation v. Skelton,* 2013 BCSC 12; *R. v Mohan,* [1994] 2 SCR 9; *R v Abbey,*

[1982] 2 SCR 24; *Dalla Lana v University of Alberta,* 2013 ABCA 327; *TransAlta Corp v Alberta (Market Surveillance Administrator),* 2014 ABCA 196; *Walsh v BDO Dunwoody LLP,* 2013 BCSC 1463; *Merck Frosst Canada Ltd. v Canada (Health),* [2012] 1 SCR 23; *Alberta (Employment and Immigration) v Alberta Federation of Labour,* 2009 ABQB 344.

Others Cited: Solicitor-Client Privilege Adjudication Protocol, Office of the Information and Privacy Commissioner of Alberta (www.oipc.ab.ca); Blake, *Administrative Law in Canada,* 4th ed.

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I. INTRODUCTION

[para 1] On August 14, 2014, one Applicant in Inquiry #F6525/#F6761 filed a formal objection to evidence that had been submitted by Alberta Justice and Solicitor General [the Public Body] in its Initial Submissions, which submissions had been provided on August 6, 2014. On August 29, 2014, the second Applicant agreed with the objection and chose to rely on the submissions of his or her co-Applicant.

[para 2] The Applicant's objection reads as follows:

> *We write to formally object to the use of an unsworn legal opinion of the* [Name of retired judge] *(the "**Legal Opinion**") by Alberta Justice and Solicitor General ("**Alberta Justice**") in its Initial Submission in this Inquiry.*
>
> *The inclusion of and reliance on an unsworn legal opinion of a retired judge is highly irregular in an inquiry under the Freedom of Information and Protection of Privacy Act ("**FOIP**"). In our submission, the Legal Opinion impermissibly usurps the role of the External Adjudicator.*
>
> *We respectfully ask that you exercise your discretion as External Adjudicator to order the Legal Opinion inadmissible in the Inquiry, on the ground that it is contrary to fundamental rules of expert opinion evidence. A decision on admissibility of the Legal Opinion should be made before the parties make further submissions regarding Alberta Justice's refusal to disclose the Records at Issue; accordingly, we further respectfully request an extension of the deadlines to respond to the Initial Submission.*
> *[Emphasis in original]*

[para 3] As the External Adjudicator, the task before me at this time is to make a decision in response to the Applicant's preliminary objection ["Preliminary Evidentiary Objection"]. By all-party agreement, the deadlines for the outstanding submissions in the Inquiry have been suspended until the Decision has been made with respect to the Preliminary Evidentiary Objection.

II. REFERENCES THROUGHOUT THE DECISION AND ORDER

[para 4] In his or her Preliminary Evidentiary Objection, the Applicant refers to the evidence provided by the Public Body, included at Tab 4 of its Initial Submissions, as the "Legal Opinion." In its Initial Submissions in the Inquiry, the Public Body referred to it as a "Letter Report." In its Response Submissions to the Preliminary Evidentiary Objection, the Public Body referred to it as the "[Last name of retired judge] Report." The author of the evidence at issue, a former judge, states in the report that s/he is not giving legal advice but was asked by the Public Body to provide an "opinion." S/he refers to his or her evidence as a report in the text. The author does not refer to him or herself as an expert or refer to his or her report as expert evidence. The evidence is in letter format. Throughout this Decision for the purpose of clarity and consistency, I will refer to the evidence, which is the subject of the Preliminary Evidentiary Objection, as the "**Opinion Letter**."

[para 5] The Opinion Letter is a report prepared by a former judge. S/he will be referred to throughout as the "**author**." The Preliminary Evidentiary Objection presents a unique situation. In order to be patently clear throughout the Decision, the author will be referred to as a "**third person**" or outside person and not as a Third Party as the

latter has defined meaning under the *FOIP Act*. "Third person" or outside person will be used in reference to the author as denoting a person who has no identifiable statutory role under the *FOIP Act*. This will distinguish the author as a third person from a Third Party (who may get Notice from the Public Body) or an Affected Party (who may get Notice from the Commissioner or her delegate).

[para 6] Given that the co-Applicant supports the Preliminary Evidentiary Objection and has chosen to rely on the other Applicant's submissions, I will refer to them collectively as the "**Applicants**" throughout unless the context requires otherwise.

[para 7] Throughout this Decision and Order I will refer to myself as the "**External Adjudicator"** or delegate of the Commissioner to limit the use of the first person.

III. BACKGROUND

[para 8] While this Decision is in response to an objection raised during the Inquiry, an overview of the history of the Inquiry to date is important to put the Preliminary Evidentiary Objection into context. I provide the following relevant background.

[para 9] On May 16, 2014, my initial correspondence to the parties was to confirm three matters:

1. *The parties had received a copy of my delegation from the Commissioner as an External Adjudicator*

2. *The parties had already agreed that both of the case files would be consolidated into one Inquiry, and*

3. *The parties were advised I had taken an oath under s. 51(7) of the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 [FOIP Act] prior to commencing the Inquiry on May 13, 2014.*

[para 10] By separate correspondence on the same date, I sought the consent of the both Applicants to have their identities disclosed to each other, to share copies of their respective Requests for Inquiry [and their Requests for Review that were attached], and to share their contact information with each other. Both Applicants provided their consent in writing.

[para 11] On June 6, 2014 I sent the formal Notice of Inquiry to the Public Body and the Applicants. The Notice of Inquiry reads as follows:

> *This Inquiry arises from two separate requests to access information filed by two separate Applicants with Alberta Justice and Solicitor General [the "Public Body"] pursuant to s. 7 of the Freedom of Information and Protection of Privacy Act [the "FOIP Act"].*

The first Applicant filed a request to access information [#F6525] with the Public Body on June 12, 2012, which reads as follows:

We request all records available from the [Public Body], with respect to the following matters:

1. *Any requests for proposals for external legal services from the [Public Body] or any other "public body," as defined in s. 1(p) of the FOIP, relating to the recovery of health care costs pertaining to tobacco use, including, without limitation, the recovery of health care costs under the Crown's Right of Recovery Act, SA 2009, C-35 (the "CRRA"), and including, without limitation, any deliberations, discussions, evaluations, or other information related to any such requests for proposals, and the preparation of any such proposals.*

2. *Any agreements entered into for external legal services relating to the recovery of health care costs pertaining to tobacco use, including recovery under the CRRA, or pursuant to any requests for proposals for external legal services described in point 1, supra.*

3. *Any policies, standing orders, terms and conditions, or other documents regarding procurement applicable to requests for proposals for external legal services, described in point 1, supra, or agreements described in point 2, supra.*

4. *Without limiting the request set out in point 2, supra, any agreements entered into between:*

    (a) the Government of Alberta, or any "public body," as defined in s. 1(p) of the FOIP; and

    (b) any law firms, including without limitation:

        (i) Jensen Shawa Solomon Duguid Hawkes LLP ("JSS Barristers");

        (ii) Cuming & Billespie Lawyers; and

        (iii) Tobacco Recovery Lawyers LLP,

    relating to the recovery of health care costs pertaining to tobacco use, including recovery under the CRRA, or pursuant to any requests for proposals for external legal services described in point 1, supra.

On August 31, 2012, the Public Body made a decision with respect to that request to access information from the first Applicant, which reads as follows:

> *564 pages of records were located in response to your request. Some of the records requested contain information that is exempted from disclosure under sections 16, 17, 21, 24, 25 and 27 of the Freedom of Information and Protection of Privacy Act or contain information non-responsive to your request. We have severed the exempted and non-responsive information so that we could disclose to you the remaining information in the records.*

The second Applicant filed a request to access information [#F6761] with the Public Body on July 30, 2012, which reads in its entirety as follows:

> *This request for all records as defined by Section 1(q) of the Act related to the awarding of the contingency contract between Alberta Justice and Tobacco Recovery Lawyers. The request would include, but not [be] limited to, the contingency contract itself. [Time period of the records: Sept. 1, 2010 – July 1, 2011]*

The request to access information was amended on September 11, 2012, based on an email from the second Applicant to the Public Body, which stated "please amend my request to include" the following:

> *any records as defined by Section 1(q) to the process of awarding the tobacco litigation legal work, including but not limited to the approval of the firm - Tobacco Recovery Lawyers - by the minister. Specifically, I am seeking any records related to how Tobacco Recovery Lawyers were chosen over their competitors.*

On September 21, 2012, the Public Body made a decision with respect to that request to access information from the second Applicant, which reads as follows:

> *564 pages of records were located in response to your request. Some of the records requested contain information that is exempted from disclosure under sections 16, 17, 21, 24, 25 and 27 of the Freedom of Information and Protection of Privacy Act or contain information non-responsive to your request. We have severed the exempted and non-responsive information so that we could disclose to you the remaining information in the records.*

On October 23, 2012, the first Applicant filed a Request for Review of the Public Body's decision to withhold information from the records it provided in response to [his or her] *request to access information.*

On January 10, 2013, the second Applicant filed a Request for Review of the Public Body's decision to withhold information from the records it provided in response to [his or her] *request to access information.*

The Commissioner subsequently authorized a portfolio officer to investigate and attempt to settle both matters, however, this was not successful.

On June 25, 2013, the first Applicant filed a Request for Inquiry with respect to [his or her] *request to access information.*

On May 27, 2013, the second Applicant filed a Request for Inquiry with respect to [his or her] *request to access information.*

By consent of the parties, the two Requests for Inquiry regarding the Public Body's decisions in response to the two requests to access information from the Applicants were consolidated into one inquiry provided that the records were identical. Legal counsel for the Public Body assured the Commissioner that this was so by letter dated November 21, 2013. The Commissioner confirmed the basis of the agreement to consolidate by letter dated February 27, 2014 to all of the parties.

I. ISSUES IN THE INQUIRY

Based on my reading of all of the Requests for Inquiry with the requisite attachments, I have identified the following issues relevant to the consolidated inquiry:

1. *Whether the Public Body properly relied on and applied s. 16 of the FOIP Act [reasonable expectation disclosure harmful to business interests of a third party] to the information in the records.*

2. *Whether the Public Body properly relied on and applied s. 17 of the FOIP Act [disclosure of personal information unreasonable invasion of privacy] to the information in the records.*

3. *Whether the Public Body properly relied on and applied s. 21 of the FOIP Act [reasonable expectation disclosure harmful to intergovernmental relations] to the information in the records.*

4. *Whether the Public Body properly relied on and applied s. 24 of the FOIP Act [reasonable expectation disclosure could reveal advice from officials] to the information in the records.*

5. *Whether the Public Body properly relied on and applied s. 25 of the FOIP Act [reasonable expectation disclosure harmful to economic and other interests of a public body] to the information in the records.*

6. *Whether the Public Body properly relied on and applied s. 27 of the FOIP Act [privileged information] to the information in the records.*

7. *Whether the Public Body properly removed some information in the records on the basis the information was non-responsive to the request to access information.*

8. *Whether public interest under s. 32 of the FOIP Act is an issue in the inquiry.*

This list may not be exhaustive. I encourage all parties to identify any additional issues in their initial submissions. In addition, I reserve the right to identify further issues as the inquiry proceeds.

II. RECORDS

No copies of the Record have been received and none are being requested at this stage.

The Public Body's decision letters indicate that wherever it has withheld all or part of the Record, it has claimed all or some of the exceptions listed above. The Public Body is asked to confirm in its initial submission that the decision letters have been interpreted correctly.

For the purpose of this inquiry, I request that the Public Body provide an Index of Records that identifies the exceptions claimed, in accordance with Adjudication Practice Note 1. Consistent with the all-party agreement to consolidate, the Index is to detail the complete Record that is responsive to both requests to access information, including all the exceptions claimed. I refer the Public Body to the detailed lists provided with its decision in #F6525 and its decision in #F6761, which could be used as the foundation for the Index.

The Index is to be provided to both Applicants and to the Commissioner's Office when the Public Body provides its initial submission.
[Emphasis in original]

[para 12] The remainder of the Notice of Inquiry discussed procedural matters including the schedule for the parties' Submissions.

[para 13] In accordance with the schedule outlined in the Notice of Inquiry, the Applicants provided their respective Initial Submissions on July 7, 2014 and July 9, 2014, and the Public Body provided its Initial Submissions on August 6, 2014.

[para 14] On August 14, 2014 the Preliminary Evidentiary Objection was submitted to to the External Adjudicator with a copy to all parties. The parties were notified that they had three business days to respond to the objection, in accordance with the Inquiry Procedures.

[para 15] On August 15, 2014, I corresponded with all parties requesting that they notify me and each other of their intentions with respect to the Preliminary Evidentiary Objection and gave them additional time to do so due to the Public Body's counsel being unavailable. On August 29, 2014, I received a letter from the other Applicant indicating that s/he was in agreement with the objection, that s/he intended to rely on his or her co-Applicant's legal arguments and that s/he joined him or her in asking that the Opinion Letter be ruled inadmissible. A copy of the co-Applicant's letter was shared with the other parties.

[para 16] On September 12, 2014, the Public Body filed its Response Submissions opposing the Preliminary Evidentiary Objection raised by the Applicants. On September 26, 2014, the Applicants filed their Reply Submissions.

[para 17] I agreed with the parties that the schedule for the remaining Rebuttal Submissions from the parties in the Inquiry would be put on hold pending a decision on the Preliminary Evidentiary Objection being communicated to the parties.

IV. PARTIES' SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY OBJECTION

[para 18] The submissions filed by the parties with respect to the Preliminary Evidentiary Objection follow. The case law cited by the parties in support of their respective submissions will be discussed throughout the Decision and, in particular, under DISCUSSION [Part V] *infra*.

1. THE APPLICANTS' INITIAL OBJECTION SUBMISSIONS

[para 19] The following is a summary of the Applicants' Initial Submissions with respect to the Preliminary Evidentiary Objection:

1. The Applicants submit that inclusion of and reliance on an unsworn legal opinion of a retired judge is highly irregular in an Inquiry because the Opinion Letter impermissibly usurps the role of the External Adjudicator. The Applicants request that the External Adjudicator exercise her discretion to order the Opinion Letter inadmissible because it is contrary to the fundamental rules of expert opinion.

2. The Applicants review the content of the Opinion Letter noting the author is a former judge who states s/he has been retained by the Public Body to state an opinion on the question of whether the Records at Issue are in fact privileged as the Public Body claims.

3. The Applicants next provide details regarding the history of the appointment of the External Adjudicator and the choices being considered by the Commissioner including a current or former Information and Privacy Commissioner within Canada, a retired judge (Albertan or otherwise) or an individual suggested by the parties. The Applicants submit that the Opinion Letter usurps the role of the External

Adjudicator and, in addition, circumvents the Commissioner's choice of External Adjudicator.

4. Acknowledging that the rules of evidence are generally more relaxed in administrative proceedings, the Applicants submit that Courts will uphold an administrative tribunal's refusal to admit information adduced by the parties where the tribunal finds it inherently flawed or where the expert opinion evidence goes to the ultimate issue in the proceeding.

5. The Applicants submit that expert opinion evidence on questions of domestic law that are well within the experience and knowledge of the trier of fact should be rejected as unnecessary or superfluous. They state, as a question of law, expert evidence will not be permitted if it failed to meet the "*necessity*" requirement for the admission of expert evidence. Necessity, they submit, means that the evidence is likely to be outside the experience or knowledge of the trier of fact. Another inherent concern in applying the necessity and relevance criteria, the Applicants submit, is that the expert evidence not be permitted to usurp the functions of the trier of fact as to an ultimate decision.

6. The Applicants submit that the Commissioner's delegated External Adjudicator has the requisite competence with respect to the application of established exceptions and is capable of determining, interpreting and applying domestic law of access to information to the Records at Issue without the necessity of the assistance of a third person "expert." The legal opinion of a retired judge is unnecessary, the Applicants submit, and should not be admitted.

7. The Opinion Letter indicates the former judge is giving an opinion on "whether 'the Privileged Documents' are in fact privileged." Given the authority under the *FOIP Act* for the Commissioner to decide all questions of fact and law in the course of an Inquiry, the Applicants submit that the Opinion Letter goes directly to an ultimate issue in the Inquiry, as laid out in the Notice of Inquiry: *"whether the Public Body properly relied on and applied s. 27 of the FOIP Act [privileged information] to the information in the records*."

8. The Applicants submit the Commissioner has the power and authority to require any record to be produced and to examine the information in the record. The Applicants further submit that the External Adjudicator should exercise her statutory discretion pursuant to s. 56 of the *FOIP Act* to compel the production of the Records at Issue to make a determination as to whether the Public Body properly exercised its discretion to withhold the Records at Issue and that the Public Body must produce to the Commissioner within 10 days the Records at Issue requested under s. 56(2) of the *FOIP Act.*

9. The Applicants request that the deadline to respond to the Initial Submissions in the Inquiry be extended until the issue of the admissibility of the Opinion Letter is decided. If the Opinion Letter is admitted, the Applicants submit that in setting a

new schedule consideration be given to allowing the Applicants sufficient time to retain the services of their own retired Supreme Court Justice so they may offer their own expert legal opinion.

2. THE PUBLIC BODY'S RESPONSE SUBMISSIONS

[para 20] The following is a summary of the Public Body's Response Submissions with respect to the Preliminary Evidentiary Objection:

1. The Public Body states the Applicants' request is for a preliminary ruling that the Opinion Letter is inadmissible on the ground that it is contrary to the fundamental rules of expert opinion evidence.

2. The Public Body submits that the test for admissibility of evidence in all adjudicative contexts is whether the evidence is relevant to an issue at hand: relevant evidence is admissible and irrelevant evidence is inadmissible. Failure to admit relevant evidence affects the fairness of the proceedings and a decision to do so may be quashed. Thus, if there is any question as to relevance, the evidence should be admitted and the decision as to importance determined later. The Public Body submits the Opinion Letter is undoubtedly relevant and, therefore, is admissible. This, it submits, is a full answer to the Preliminary Evidentiary Objection.

3. The Public Body submits that the Applicants' submissions are based on technical rules of evidence that do not apply to administrative proceedings and further submits that tribunals are not required to receive evidence under oath or obliged to adhere to the rules of evidence applicable to Courts. The test for the admissibility of expert evidence in administrative proceedings is relevance and that any frailties in the opinion [factual or qualifications of the expert] will, the Public Body submits, affect the weight of the evidence not its admissibility.

4. Regardless, the Public Body submits, the Opinion Letter would be admissible under the rules of evidence and to refuse to admit it would be a fundamental error on the part of the administrative adjudicator. With respect to why the Opinion Letter would be admissible, the Public Body submits that:

    a. the Opinion Letter does not propose to provide expert evidence about what is the domestic law of solicitor-client privilege, there is no question about the domestic law of solicitor-client privilege, and the sole issue in the Inquiry is a question of fact – whether the Records at Issue relate to a communication for the purpose of seeking or providing legal advice. This question, the Public Body submits, is wholly a question of fact one for which it is entirely appropriate for the author of the Opinion Letter to state the law. Even if there is a question of mixed fact and law, where the expert evidence is essentially about facts, it is admissible under the rules of evidence. In any event, the Public Body submits, Courts have admitted expert evidence about the content of domestic law under the rules of evidence and likewise the Opinion Letter is admissible.

b. the former technical rule of evidence excluding expert opinion evidence about the ultimate issue is no longer of general application. The Public Body claims that to exclude on this basis would mean that any evidence it submits including the affidavits from FOIP administrators, filed with its Initial Submissions, would be ruled inadmissible making it impossible for the Public Body to ever discharge its burden of proof, proof it submits must involve evidence about the nature of the Records at Issue and whether or not they meet the test for solicitor-client privilege. Regardless, the Public Body submits, even where the expert evidence opines on the precise matter to be decided by the Commissioner, that evidence should be accepted.

c. there is no requirement that evidence be sworn. The Public Body submits that in the absence of some statutory or other procedural requirement, sworn evidence is not required in an administrative proceeding and an administrative tribunal lacks the inherent power to require evidence under oath or by affirmation. The Public Body submits there is no requirement in the *FOIP Act* or in the Commissioner's procedures requiring sworn evidence. The Public Body claims there is no cross-examination in this type of Inquiry. If there was a requirement for all evidence to be sworn it would be simple to comply but such a requirement would have to apply to all the evidence including that submitted by the Applicants.

5. The Public Body submits that there is discretion *to admit* evidence otherwise inadmissible under the strict rules of evidence in administrative proceedings if the evidence is relevant. But, the Public Body submits, there is no untrammelled discretion in administrative proceedings *to exclude* relevant evidence. The Public Body submits the Opinion Letter meets the strict criteria for admissibility and submits it is an error to rule it inadmissible. The Public Body submits that there must be *a compelling reason* for an administrative tribunal to exclude relevant evidence even if it would be ruled inadmissible by a Court. Despite some administrative tribunals having authority to control their own processes and refuse evidence that is inherently flawed, the Public Body submits that this does not vest administrative tribunals with full power and unlimited discretion to rule relevant evidence inadmissible.

6. The Public Body identifies three matters it claims are extraneous to the Preliminary Evidentiary Objection:

a. There is no issue that the Commissioner decided to appoint the External Adjudicator she chose instead of a retired Judge. The identity of the External Adjudicator has nothing to do with the admissibility of the Opinion Letter. The Commissioner's decision to appoint as she did does "*not prevent a retired judge who has experience in applying the law of solicitor-client privilege from providing factual evidence in this Inquiry about the nature of the records in question*."

There is no issue that the External Adjudicator is the person who must make decisions on the basis of the evidence which is presented.

b. The Applicants' request to issue an Order to produce the Records at Issue has nothing to do with the objection. The Public Body indicates an intention to respond to this issue in its Rebuttal Submissions in the Inquiry.

c. The Public Body notes that the Applicants have relied on a decision from the Court of Queen's Bench of Alberta that is presently under appeal, the Order from which has been stayed.

7. The Public Body closes with a summary of the reasons why the Opinion Letter is admissible in the Inquiry and why the Preliminary Evidentiary Objection must be dismissed:

- *The test for admissibility of evidence is relevance.*
- *The Inquiry is an administrative proceeding not governed by strict and technical rules of evidence applicable in Courts.*
- *Evidence may be admitted in the Inquiry which might not be admissible as evidence in Court, providing the evidence is relevant to the issue in the administrative proceeding.*
- *An administrative decision-maker cannot exclude evidence which would be admissible under the technical rules of evidence.*
- *To the extent there is any issue about the* [Last name of retired judge] *Report* [Opinion Letter] *the issue is one of weight and not admissibility.*

[Public Body's Response Submissions, at p. 12]

3. THE APPLICANTS' REPLY SUBMISSIONS

[para 21] The following is a summary of the Applicants' Reply Submissions with respect to the Preliminary Evidentiary Objection:

1. The Applicants draw attention to the fact that the Public Body has not cited any decision in its Response Submissions to an administrative or judicial decision in which an expert opinion of an active or retired judge interpreting Canadian law has been admitted as evidence submitting that the reason for that is that a party cannot "cloak" an opinion on the ultimate issue to be decided under the auspices that it is evidence.

2. The Applicants submit that the Opinion Letter is doubly improper given that the Records at Issue have yet to be produced to the External Adjudicator and they

suggest that the Public Body seeks to have the External Adjudicator defer to it and the “ready-made inference” in the opinion.

3. The Applicants submit that administrative tribunals have the discretion to exclude expert evidence. The authorities relied on by the Public Body confirm that administrative tribunals are not required to apply strict rules of evidence, but the Applicants argue that does not prohibit administrative tribunals from acting as gatekeepers to exclude evidence that for reasons of law or policy should be ruled inadmissible nor does it oblige them to ignore the strict rules of evidence.

4. The Applicants argue that the Public Body misstates the law in suggesting relevance alone is the test for admissibility. The Applicants submit it is trite law that in judicial proceedings, evidence is not admissible unless it is relevant and not subject to exclusion under any other rule of law or policy. The examples provided are the four criteria Courts require for expert evidence: relevance, necessity, absence of an exclusionary rule and qualified expert. These criteria, submit the Applicants, have been used by administrative tribunals to exclude unnecessary expert evidence. The Applicants submit the Opinion Letter is unnecessary to assist the trier of fact in reaching a conclusion on the privilege claims of the Records at Issue. The Applicants argue that the reason the Public Body has made no submission with respect to the criteria of necessity is because the Opinion Letter is unnecessary for the External Adjudicator to understand the matters at issue. The criterion of necessity has been applied strictly at times to exclude expert evidence in respect to an ultimate issue.

5. The Applicants respond to the Public Body’s claim that to rule the Opinion Letter inadmissible would render all the evidence regarding the nature of the Records at Issue inadmissible. They submit that there is no interplay between the ultimate issue and the two affidavits of Public Body employees offered into evidence because they are not offered as expert evidence, do not provide a legal opinion or cite any case law.

6. The Applicants state that solicitor-client privilege is a legal concept the scope of which is a question of law. Applying that law to specific documents is a question of mixed fact and law. The Opinion Letter includes legal interpretation followed by an application of the law to the Records at Issue, which, the Applicants submit, render it inadmissible because it is unnecessary as it relates to the interpretation and application of domestic law.

7. The Applicants query why the Public Body failed to provide any explanation as to why the former judge, author of the Opinion Letter, is better suited than the independent External Adjudicator to review the claim of privilege, which the Legislature has granted to the Commissioner [or her delegate]. The Public Body should not, the Applicants submit, be permitted to frustrate the legislation by retaining a third person to review the Records at Issue while at the same time withholding the Records at Issue from review by the External Adjudicator. A failure

to exclude the Opinion Letter or to issue an Order to produce the Records at Issue under the *FOIP Act* would result in a process that is inconsistent with the appointment of an independent External Adjudicator tasked with reviewing the Public Body's decisions to withhold the Records at Issue.

V. DISCUSSION

1. INDEPENDENT OVERSIGHT AND DELEGATED POWERS

[para 22] Section 2 of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (*FOIP Act)* sets out the purposes of the statute, which states, in part, as follows:

> *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*
> *…*
> *(e)* ***to provide for independent reviews of decisions made by public bodies under this Act*** *and the resolution of complaints under this Act.*
> *[Emphasis added]*

[para 23] The Information and Privacy Commissioner [Commissioner] is the designated decision-maker appointed by statute, pursuant to Part 4 of the *FOIP Act*, to carry out the duties and functions set out in the statute. That is, the Commissioner is the legal designate to fulfill the statutory purpose of conducting independent reviews of access to information decisions made by public bodies.

> *One of the principles the Act is expressly founded on is* ***that disclosure decisions should be reviewed independently of government.*** *It creates the office of the Commissioner to deliver* ***on that principle and gives to the Commissioner broad and unique powers of inquiry to review those decisions. It constitutes the Commissioner as a specialized decision maker. In my view, this implies that the legislature sees the Commissioner as the appropriate reviewer of disclosure decisions by government. The very structuring of the office and the specialized tools given to it to discharge one of the Act's explicit objectives suggest that the courts should exercise deference in relation to the Commissioner's decisions.*** *[Ontario (Minister of Health and Long-Term Care) v Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 OR (3d) 321, at para. 28*]*
> *[Emphasis added]*

[para 24] On November 6, 2013 the Commissioner advised the head of the Public Body [Minister of Justice and Solicitor General] that Requests for Inquiry had been received, which she determined her Office could not hear because of a conflict of interest. The Commissioner indicated that the conflict of interest arose because the Applicants requested, in part, records that relate to a law firm that routinely acts for the

Commissioner's Office. The Commissioner proposed some options to the parties for their consideration as to whom she could delegate her powers to hear the Inquiry, specifically:

- *a current or former Information and Privacy Commissioner within Canada*
- *a retired judge (Albertan or otherwise)*
- *any other suggestions made by the parties*

[para 25] The Commissioner noted that while she did not believe s. 75(1)(d) of the *FOIP Act* applied in these circumstances because her conflict of interest was not with a public body, she invited the parties to make their views known, which she would consider.

[para 26] Section 75(1)(d) provides as follows:

> *The Lieutenant Governor in Council* ***may designate a judge of the Court of Queen's Bench of Alberta to act as an adjudicator***
>
> *…*
>
> *(d) to review, if requested under section 78, a decision, act or failure to act of a head of a public body and the Commissioner had been a member, employee or head of that public body or, in the Commissioner's opinion,* ***the Commissioner has a conflict with respect to that public body,***
>
> *[Emphasis added]*

[para 27] Section 78, referred to in s. 75(1)(d) of the *FOIP Act*, outlines the process for when the Commissioner has a *conflict of interest with respect to a public body*. This Inquiry does not involve a conflict of interest between the Commissioner and the Public Body. Throughout this Decision, the use of the word Adjudicator in relation to the External Adjudicator does not refer to an adjudicator appointed under s. 78 of the *FOIP Act.*

[para 28] The Public Body responded on November 21, 2013 and advised that it agreed s. 75(1)(d) of the *FOIP Act* did not apply, that the Commissioner was correct that s. 61(1) of the *FOIP Act* did permit her to delegate her functions, stated its preference that she delegate her functions to a retired judge, and confirmed the Records at Issue in the consolidated Inquiry [#F6525/#F6761] were identical.

[para 29] On November 14, 2013 one Applicant responded that s/he preferred a current commissioner but strongly opposed a sitting judge, former judge or a private practice lawyer to hear the Inquiry.

[para 30] On November 29, 2013 the other Applicant responded that the Commissioner should pursue either a retired judge or another person proposed by the parties and suggested two names.

[para 31] On February 27, 2014 the Commissioner advised the parties that having received no objection to a delegation to a former Information and Privacy Commissioner, she was appointing me, the former Freedom of Information and Protection of Privacy Review Officer for Nova Scotia and the former Ombudsman for the Province of British Columbia, to be the External Adjudicator. The Commissioner also advised the parties that the deadline for completion of the Inquiry was extended and that the Public Body had confirmed with her that the Records at Issue in this Inquiry [the two Requests for Inquiry were merged into Inquiry #F6525/#F6761] were identical.

[para 32] All parties received notification of my delegation and appointment as External Adjudicator to which there was no objection. In its Response Submissions on the Preliminary Evidentiary Objection, the Public Body confirmed my role when it stated:

> *There is no issue that Jill Clayton, the Alberta Information and Privacy Commissioner, decided to appoint you as the External Adjudicator in this matter, rather than a retired judge.*
> *…*
> *There is no issue that it is you as the External Adjudicator who must make decisions on the basis of the evidence which is presented to you.*
> *[Public Body's Response Submissions, at p. 11]*

[para 33] Section 61 of the *FOIP Act* sets out a delegation by the Commissioner as follows:

> *(1) The Commissioner may delegate to any person any duty, power or function of the Commissioner under this Act* ***except the power to delegate.***
>
> *(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the Commissioner considers appropriate.*
> *[Emphasis added]*

[para 34] The Commissioner provided a delegation to me under s. 61(1) of the *FOIP Act* on February 27, 2014, a copy of which was provided to all parties, which reads as follows:

> ***Delegation of the powers of the Information and Privacy Commissioner of Alberta, as set out under section 61 of the Freedom of Information and Protection of Privacy Act (the FOIP Act)***
>
> *I, Jill Clayton, Information and Privacy Commissioner of Alberta, delegate to Dulcie McCallum, the following powers under the FOIP Act:*
>
> - *The power to conduct an inquiry and to issue an order, as set out under Part 5 of the FOIP Act for Case Files F6525 and F6761.*

- *The power to require records to be produced, as set out under section 56 of the FOIP Act, for Case Files F6525 and F6761.*
- *Any other powers necessary and incidental to the power to conduct an inquiry and issue an order for Case Files F6525 and F6761 and, for greater certainty, including, but not limited to, the power to extend the time limit for completing the inquiry.*

This delegation does not include the power to delegate.
[Emphasis of heading in original and other added]

[para 35] Sections 59(1) and 59(3) of the *FOIP Act* which place a restrictive duty on the Commissioner, or anyone acting for her, regarding disclosure of information, read as follows:

> *(1) The Commissioner and* ***anyone acting for*** *or under the direction of* ***the Commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act,*** *except as provided in subsections (2) to (5).*
> ...
> *(3) In conducting … an inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner* ***must take every reasonable precaution to avoid disclosing and must not disclose***
>
> *(a)* ***any information the head of a public body would be required or authorized to refuse to disclose*** *if it were contained in a record requested under section 7(1),*
>
> *[Emphasis added]*

[para 36] In addition, s. 51(7) of the *FOIP Act* provides that:

> ***Every person employed or engaged*** *by the Office of the Information and Protection of Privacy Commissioner must, before beginning to perform duties under this Act,* ***take an oath****, to be administered by the Commissioner,* ***not to disclose any information received by that person under this Act*** *except as provided in this Act.*
> *[Emphasis added]*

[para 37] On May 13, 2014, after receiving my delegation and prior to issuing the Notice of Inquiry, I took an Oath pursuant to s. 51(7) of the *FOIP Act*, which Oath reads as follows:

> *I, Dulcie McCallum, do solemnly swear that I will execute according to law and to the best of my ability the duties I have agreed to perform and* ***that I will not disclose or make known any information received by me under the***

> ***Freedom of Information and Protection of Privacy Act,*** *except as provided in that Act.*
> *[Emphasis added]*

[para 38] The information supplied during an inquiry is protected under s. 58 of the *FOIP Act,* which reads as follows:

> *Anything said, any information supplied* ***or any record produced by a person during an*** *investigation or* ***inquiry by the Commissioner is privileged*** *in the same manner as if the investigation or inquiry were a proceeding in a court.*
> *[Emphasis added]*

[para 39] The equivalent provision in other jurisdictions has been interpreted to mean that any privileged documents submitted in accordance with the oversight legislation that were used only for that purpose remain privileged. *[McBreairty v College of North Atlantic,* 2010 NLTD 28, at para. 107*; Newfoundland and Labrador (Information and Privacy Commissioner) v Newfoundland and Labrador (Attorney General*), 2011 NLCA 69, at paras. 78-79*; School District No. 49 (Central Coast) v British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427, at para. 50*]*

[para 40] The equivalent section to s. 58 of the *FOIP Act* was considered by the Newfoundland and Labrador Court of Appeal that stated:

> *Further protection is also given by section 55* ***which preserves the privilege over documents in the hands of the Commissioner****, to the same extent as if the documents had been tendered in court…*
> *[Newfoundland and Labrador (Information and Privacy Commissioner),* at para. 77*]*
> *[Emphasis added]*

[para 41] Section 56, which is specifically referred to in my delegation, emphasizes the importance of the sanctity of the Records at Issue that is further reflected in the Commissioner's duty to return the Records at Issue to the Public Body at the conclusion of the Inquiry, pursuant to s. 56(5) of the *FOIP Act*, which reads:

> *After completing a review or investigating a complaint, the Commissioner* ***must return any record*** *or any copy of any record produced.*
> *[Emphasis added]*

[para 42] On June 6, 2014, I issued the Notice of the Inquiry, *supra,* in which I stated:

> *No copies of the Record have been received and none are being requested at this stage.*

[para 43] Since the Notice of Inquiry, I have not made any demand or request to the Public Body to produce the Records at Issue. At no time has the Public Body refused to produce the Records at Issue to the External Adjudicator during the Inquiry. Prior to this

Preliminary Evidentiary Objection being filed, my plan for the Inquiry as the External Adjudicator was first to request a detailed Index of the Records at Issue and second to receive and consider the Initial Submissions from the parties. This would enable me to have an informed understanding of the parties' submissions and an overview of the Records at Issue in advance of my examination of them, *if and as necessary*. With its Initial Submissions in the Inquiry, the Public Body provided two affidavits from FOIP administrators, elected not to provide the Opinion Letter in affidavit form and has not produced an Affidavit under the Solicitor-Client Privilege Adjudication Protocol of the Office of the Information and Privacy Commissioner. The Index of the Records at Issue reveals that the Public Body's reliance on s. 27(1) of the *FOIP Act* goes beyond reliance on solicitor-client under the legal privilege exceptions.

[para 44] The Applicants represented in their Initial Submissions and those filed with respect to the Preliminary Evidentiary Objection that the Public Body had refused to produce the Records at Issue. In his or her Initial Submissions, the Applicant, who elected to rely on the submissions of the Applicant who raised the Preliminary Evidentiary Objection, emphasized his or her concerns that the Commissioner, as an Officer of the Legislature, should be able to review the Records at Issue in order to hold the Public Body to account. The Applicants' position in this regard may be as a result of something that became known to them during the investigation or mediation stage at the Commissioner's Office prior to the matter being set down for the Inquiry. Anything that transpired prior to the Commissioner deciding to hold an Inquiry does not form part of this Inquiry.

[para 45] Section 56 of the *FOIP Act* confers powers on the Commissioner [or her delegate under s. 61] in order to conduct an investigation or an Inquiry. The section reads:

> *(1) In conducting … an inquiry under section 69 … 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).***
>
> *(4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, t****he head of that public body may require the Commissioner to examine the original at its site.***

(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.
[Emphasis added]

[para 46] Section 56 of the *FOIP Act* imposes a *statutory duty on the Public Body* to produce the Records at Issue to the Commissioner and imposes a timeline for doing so. The Records at Issue are made available to the Commissioner or her delegate under the strict legislative protections for one purpose and one purpose only: to ensure the Public Body has relied on and applied the chosen exceptions in a manner that complies with the governing statute and to make an Order and/or Decision accordingly.

[para 47] Pursuant to s. 72(3)(a) of the *FOIP Act,* the Commissioner or her delegate can enforce the performance of a duty. It reads as follows:

*(3) If the inquiry relates to any other matter, the Commissioner may, **by order**, do one or more of the following:*

*(a) **require that a duty imposed by this Act** or the regulations **be performed**;*
[Emphasis added]

[para 48] Further, the Commissioner or her delegate can enforce an Order pursuant to s. 72(6) of the *FOIP Act*, which reads as follows:

A copy of an order made by the Commissioner under this section may be filed with a clerk of the Court of Queen's Bench and, after filing, the order is enforceable as a judgment or order of that Court.

[para 49] The legislation further strengthens the power to enforce an Order of the Commissioner by rendering it an offence to fail to comply with an Order. Section 92(1)(d) and (f) of the *FOIP* Act provides as follows:

A person must not wilfully
…
(d) obstruct the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,
…
*(f) **fail to comply with an order** made by the Commissioner under section 72 …*
[Emphasis added]

[para 50] Section 69 of the *FOIP Act*, referred to in s. 56(1), sets out a duty and the powers of the Commissioner or her delegate with respect to an Inquiry, and reads as follows:

> *(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner* ***must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.***
> *[Emphasis added]*

[para 51] Section 70 of the *FOIP Act* referred to therein sets out when the Commissioner can exercise her discretion not to conduct an Inquiry.

[para 52] Section 69 goes on to set out some of the conditions, powers and duties in relation to holding an Inquiry that can be summarized as follows:

1. Inquiries may be conducted in private or, in other words, *in camera* [s. 69(2)]

2. Parties must be given the opportunity to make representations [s. 69(3)]

3. No party is entitled to be present or to have access to or comment on representations made by another person [s. 69(3)]

4. The Commissioner or her delegate decides if the representations are to be made orally or in writing [s. 69(4)]

5. Any party is entitled to be represented at an inquiry by counsel or an agent [s. 69(5)]

6. The Commissioner may extend the date of completion but in doing so must give notice and provide an anticipated date [s. 69(6)].

[para 53] In addition, powers under the *Public Inquiries Act* are referentially incorporated pursuant to s. 56(1) of the *FOIP Act*. Two relevant powers are found in the *Public Inquiries Act, R.S.A. 2000, c. P-39*, which read as follows:

> *4 The commissioner or commissioners have* ***the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things*** *that the commissioner or commissioners consider to be required for the full investigation of matters into which the commissioner or commissioners are appointed to inquire.*
>
> *5 The commissioner or commissioners have* ***the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents and things as is vested in a court of record in civil cases, and the same privileges and immunities as a judge of the Court of Queen's Bench.***
> *[Emphasis added]*

[para 54] These sections under the *Public Inquiries Act* provide powers to the Commissioner or her delegate in addition to those under the *FOIP Act.* These include the power to compel a witness to attend, to give *viva voce* evidence and to produce documents. Some information may be protected under s. 9 of the *Public Inquiries Act* but only if it falls within the exceptions listed and is certified by the Minister as falling within an exception.

2. ANALYSIS OF THE OPINION LETTER

[para 55] The Public Body has chosen to submit evidence that accompanied its Initial Submissions in the Inquiry in the form of an Opinion Letter from the author. The Applicants have raised the Preliminary Evidentiary Objection as to the admissibility of the Opinion Letter. In answering the Preliminary Evidentiary Objection, it is important to examine the Opinion Letter. I turn now to an analysis of what is and is not in the Opinion Letter.

[para 56] After a brief summary of his or her understanding of the mechanism under access to information legislation, the author identifies that this case involves a discretionary refusal of access under s. 27(1) of the *FOIP Act* when s/he states:

> *The privilege claimed by the Province is* ***not specific as to type, but rather a general one.***
> *[Public Body's Initial Submissions, Tab 4: Opinion Letter, at p. 3]*
> *[Emphasis added]*

[para 57] The author does not provide any further explanation in the Opinion Letter as to what s/he means by the Province's claim of general privilege.

[para 58] The author states the Commissioner, after receipt of a request for a review under Part 5, must conduct an Inquiry and cites s. 69 of the *FOIP Act.* S/he makes no reference to s. 70 of the *FOIP Act* that outlines when the Commissioner may refuse to conduct an Inquiry.

[para 59] The author identifies his or her retainer as:

> *…not to give legal advice, but rather to state an opinion as to the nature of documents which the Province says are privileged.*
>
> *For greater certainty, my opinion is sought on the question of whether "the Privileged Documents" are in fact privileged.*
> *[Public Body's Initial Submissions, Tab 4: Opinion Letter, at p. 3]*

[para 60] The author continues on the same page to list what s/he has been shown in preparing the Opinion Letter:

In preparing this report I have been shown the following:

- *the Freedom of Information and Protection of Privacy Act, RSA 2000, c. F-25;*
- *Solicitor-client Privilege Adjudication Protocol of the Office of the Information and Privacy Commissioner;*
- *the "Privileged Documents".*

[para 61] Throughout the Opinion Letter, however, the author refers to other information s/he appears to have considered, not included in his or her list on p. 3. These references include an affidavit of one FOIP Advisor for the Public Body, a quote from an applicant who is not a party to this Inquiry and letters from counsel who were denied access.

[para 62] After reviewing some case law, all of which refer to decisions about *solicitor-client privilege*, the author states the following:

> *Under the contract of retainer, I am "to review the Privileged Documents to confirm that they are privileged", by which I understand that I am to examine each document which, by its nature, engages section 27(1). The retainer contract does not require confirmation that documents withheld for other reasons have been properly withheld, nor that those released are not privileged.*
>
> *I have examined both "Justice" and* [Name of another public body] *documents and related materials contained in seven loose-leaf volumes. Where necessary to refer to them, I will do so by reference to the tags they bear.*
> *[Public Body's Initial Submissions, Tab 4: Opinion Letter, at p. 7]*

[para 63] The author first refers to records that do not relate to this Inquiry but which s/he states involve the same Public Body. S/he also refers to records that relate to another public body.

[para 64] At page 9 of the Opinion Letter, the following is the totality of how the author refers to the Records at Issue in this Inquiry:

> ***IPC INQUIRY #F6525 AND #F6761***
>
> *Binder B – Justice documents (Red)*
>
> *Tab 2* ***contains the original and complete records consisting of 564 pages.***
>
> *Tab 1 lists the exemptions applied.* ***In all but two records,*** *the reason for the exemption was s. 27(1). I agree.*
>
> *Tabs 3 and 4 contain letters from counsel who were denied access, and the release package.*
> *[Emphasis in titles in the original and other added]*

[para 65] Despite the reference, "*in all but two records"* quoted above*,* the final paragraph in the Opinion Letter provides the author's conclusion:

> *One may fairly characterize the extensive material described above as entailing the giving or seeking of legal advice concerning pending litigation by the Government of Alberta to recover tobacco-related health care costs.* ***As such it is, in its entirety, privileged under section 27(1) of the Freedom of Information and Privacy Act of Alberta*** [sic]***.***
> *[Emphasis added]*

[para 66] The conclusion reached by the author in the Opinion Letter is consistent with how the Public Body refers to the Opinion Letter upon introducing it into evidence where it states:

> ***This is confirmed by the report*** *of the Hon.* [Name of retired judge]*, a retired Justice of the Court of Queen's Bench* [the author]*,* ***who has reviewed all of the records in question and determined that they were all subject to solicitor-client privilege.***
> *[Public Body's Initial Submissions, at para. 28]*
> *[Emphasis added]*

[para 67] The author's conclusion is that the extensive material in its entirety is privileged under s. 27(1) of the *FOIP Act*. In introducing the Opinion Letter, the Public Body, on the other hand, refers to the records in question as all being subject to solicitor-client privilege. The difference in the two statements is important to note as solicitor-client privilege is but one component of s. 27(1)(a) of the *FOIP Act*. There are many other protected privilege exceptions in the whole of s. 27(1), including other legal privileges and privileged information prepared by or for the Minister of Justice and Solicitor General, that go beyond solicitor-client.

[para 68] I turn now to comment further on what is not in the Opinion Letter.

[para 69] In detailing his or her retainer quoted *supra*, the author makes no mention of any terms, conditions or protections included in his or her retainer with respect to confidentiality of the Records at Issue. The Opinion Letter gives no indication whether the author has or does not have an appreciation for the conditions imposed by the *FOIP Act* to protect the integrity of the Records at Issue. There is no evidence the author has taken an oath of confidentiality or given a promise not to disclose the contents of the Records at Issue. The Opinion Letter is not in affidavit form.

[para 70] When the Public Body proffered the Opinion Letter in its Initial Submissions, the Public Body did not refer to the author as an expert. The author of the Opinion Letter does not refer to him or herself as an expert. No credentials for the author are provided in the Opinion Letter or in the Public Body's Initial Submissions that introduced the Opinion Letter as an appendix.

[para 71] Likewise, there is no reference in the Public Body's Initial Submissions which introduced the Opinion Letter nor in its Response Submissions on the Preliminary Evidentiary Objection as to any term, condition or protection it imposed on the author of the Opinion Letter with respect to the confidentiality of the Records at Issue.

[para 72] Nor did the Public Body provide any credentials for the author in its Response Submissions on the Preliminary Evidentiary Objection. In its Response Submissions, however, the Public Body refers to the contested report, for the first time, as expert opinion evidence. The only reference to the author's background is under "Extraneous matters" at p. 11 of the Public Body's Response Submissions where it refers to the author as "*a retired judge who has experience in applying the law of solicitor-client privilege.*"

3. RELEVANT FACTORS IN THE EXERCISE OF DISCRETION REGARDING THE ADMISSIBILITY OF THE OPINION LETTER

[para 73] It is important to note that the purpose of providing details of the Opinion Letter *supra* and an analysis of its contents that follows *infra* is not to show any disrespect to the author. Rather the purpose is to make clear the factors I have considered in exercising my discretion as an External Adjudicator in making this Decision.

1. There is an apparent lack of attention given to the sanctity of the Records at Issue. There is no reference by the author in the Opinion Letter as to any terms or conditions imposed by the Public Body as part of his or her retainer with respect to an oath of confidentiality or any specific provision with respect to the confidentiality of the purportedly privileged Records at Issue. The author has no role under the *FOIP Act* so the legislative safeguards, which for example bind me as a delegated External Adjudicator, do not apply. There is no evidence the Public Body put in place any restrictions or protections with respect to non-disclosure of the information in the Records at Issue in its retainer with the author. Under access to information legislation, the protection of *any* record from unauthorized disclosure is always of utmost importance but particularly so, as here, for Records at Issue over which the Public Body has claimed legal privilege.

2. There is a lack of clarity with respect to what the author was given to consider in preparing the Opinion Letter. The author does not provide complete information as to what s/he considered in the course of preparing the Opinion Letter. While s/he lists the three items s/he has been shown in preparing his or her report, throughout the Opinion Letter the author makes reference to other information such as an affidavit of a FOIP Advisor filed by the Public Body and a request for review from another person whom s/he names but who is not a party to this Inquiry. The information on which an "expert" opinion is based is important to know. Were the Applicants to be given the opportunity to provide their own "expert" opinion by way of rebuttal, what their retired judge would have to be given to be on a par with the

author in preparing an opinion would be difficult to determine due to the lack of clarity in the Opinion Letter.

3. There is a lack of coherency with respect to exactly what Records at Issue the author has reviewed in order to prepare his or her Opinion Letter in this Inquiry. The author reports that s/he was given the *original* Records at Issue in order to prepare his or her Opinion Letter. S/he makes no specific reference to the Index of the Records at Issue in this Inquiry prepared by the Public Body but chooses to refer to them by "*the tags they bear*." Throughout the Opinion Letter, the author also refers to records that are not part of this Inquiry that include a record involving another public body.

4. There is a lack of consistency in the Opinion Letter with respect to the conclusions reached by the author. The conclusion the author reaches at the end of his or her report refers to the Records at Issue as a whole: "*As such it is, in its entirety, privileged under section 27(1) of the Freedom of Information and Privacy Act of Alberta"* [sic]. The conclusion reached by the author at the end of the Opinion Letter appears inconsistent with a prior statement s/he makes in the Opinion Letter. At page 9 of the Opinion Letter, the author reviews the contents of the Records at Issue and states: "*In all but two records, the reason given for the exemption was section 27(1). I agree."* The Index of the Records at Issue clearly indicates that for the bulk of the Records at Issue the Public Body has claimed more than one exception alongside the subsections of s. 27(1) of the *FOIP Act.* But there are at least 23 pages for which s. 27(1) of the *FOIP Act* has *not* been claimed by the Public Body where it has relied on other exceptions. The author does not address this fact in the Opinion Letter other than to state s/he has only been asked for a legal opinion with respect to "the Privileged Documents." The author indicates there are 564 pages for the Records at Issue, the same number of pages referred to by the Public Body in its access decisions. When the author reaches a conclusion that the Records at Issue are in their *entirety* privileged under s. 27(1), s/he makes no reference to the two records s/he found that did not fall under s. 27(1) or the fact that the Public Body has not claimed s. 27(1) of the *FOIP Act* for a portion of the Record. What the author concludes, however, is consistent with how the Public Body characterizes the determination of the author in its Initial Submissions when it states: *"…who has reviewed all of the records in question and determined they were all subject to solicitor-client privilege."*

5. There is a lack of clarity as to what exactly the Opinion Letter intends to provide – a legal opinion but not legal advice, an expert opinion on the law, an opinion of fact, an expert opinion on solicitor-client privilege or privilege more generally or an opinion of fact and law from a non-expert. The author indicates that s/he was only asked for an opinion with respect to s. 27(1) of the *FOIP Act* and not for one in regards to any other exceptions claimed or about privilege with respect to Records at Issue that have been disclosed but his or her conclusion is with respect to the information in its entirety. The author states the nature of his or her retainer as: *"not to give legal advice, but rather to state an opinion as to the nature of documents which the*

Province says are privileged. For greater certainty, my opinion is sought on the question of whether "the Privileged Documents" are in fact privileged." The author states it is not legal advice but is an opinion as to the nature of the documents. Though s/he canvasses the law on solicitor-client privilege, which is only one aspect of the legal privilege exceptions under s. 27(1) of the *FOIP Act*, the author says the question before him or her is whether "the Privileged Documents" are, in fact, privileged.

6. It is not clear whether the author is being offered as an expert and, if yes, as an expert in what. Neither the Public Body in its Initial Submissions in the Inquiry nor the author in the Opinion Letter provide any information about the author's credentials to establish him or her as an expert. In its Response Submissions on the Preliminary Evidentiary Objection in which it refers to the Opinion Letter as expert opinion evidence, the Public Body does not provide any evidence regarding the author's expertise or the nature and extent of that expertise. The only reference the Public Body makes to the author's background at all is in its Response Submissions under "Extraneous matters" where it states: "*That decision* [to appoint me as External Adjudicator] *does not prevent a retired judge who has experience in applying the law of solicitor-client privilege from providing factual evidence in this Inquiry about the nature of the records in question."*

7. There is a lack of coherency in the Opinion Letter with respect to the subject of the report: legal privilege. The author states the privilege claimed by the Province is not specific as to type, but rather a general one. The case law canvassed by the author in the Opinion Letter, however, are cases discussing solicitor-client privilege, one exception that is provided for in s. 27(1)(a) of the *FOIP Act*. The Index of the Records at Issue clearly shows the Public Body has also relied on s. 27(1)(b) and s. 27(1)(c), to which the author makes no reference. The author concludes the Records at Issue are in their entirety privileged under s. 27(1). The Public Body, however, has not claimed s. 27(1) of the *FOIP Act* over a portion of the Records at Issue. As will be discussed *infra*, the Courts have indicated that in order to ascertain if documents are subject to privilege they require a line-by-line, document by document, examination. In addition, in the context of access to information, the trier of fact must pay attention to how each of the specific exceptions under s. 27(1) of the *FOIP Act* have been claimed and how they each apply to each line of the Record.

8. The author of the Opinion Letter found that the Records at Issue in their entirety contained privileged information. This has the potential to be an important error or misunderstanding because in fact the Public Body has not claimed s. 27(1) of the *FOIP Act* over the whole of the Records at Issue. While the author has not been asked to comment on the other exceptions relied on by the Public Body, s/he still claims privilege applies to the Records at Issue in their entirety.

4. LEGAL ANALYSIS REGARDING THE ADMISSIBILITY OF THE OPINION LETTER

a. Legal Privilege

[para 74] The principal issue in the Inquiry is whether the Public Body has properly relied on and applied the legal privilege exceptions to the Records at Issue. The Public Body submitted the Opinion Letter, the opinion evidence contested by the Applicants in the Preliminary Evidentiary Objection, as evidence in support of their claim that s. 27(1) of the *FOIP Act* applies to the Records at Issue. I refer to legal privilege as the principal issue because where the exception of legal privilege applies to the Records at Issue, it may be unnecessary to consider the applications of the other exceptions where they have been claimed in conjunction with s. 27(1) of the *FOIP Act.*

[para 75] In making a determination as to the admissibility of the Opinion Letter, I consider it relevant, therefore, to discuss legal privilege. I do so ***without*** making any decision about the applicability of s. 27(1) of the *FOIP Act* to the Records at Issue. The reason is obvious: the examination of the Records at Issue is yet to take place and the final Rebuttal Submissions from all parties in the Inquiry are outstanding and, therefore, any such determination would be premature and totally inappropriate. That is a decision I will make at the conclusion of the Inquiry.

[para 76] The Opinion Letter purports to provide a legal opinion about whether legal privilege applies to the Records at Issue. A discussion about how legal privilege relates to the Preliminary Evidentiary Objection is required, therefore, because it is relevant to the exercise of my discretion as to whether or not the Opinion Letter is admissible.

[para 77] Legal privilege is of fundamental importance in our justice system. The foundational principles on which it is based were summarized by the Supreme Court of Canada when the Court stated:

> ***Solicitor-client privilege is fundamental to the proper functioning of our legal system.***
> ***...***
> ***[S]olicitor-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…It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.* ***The privilege belongs to the client not the lawyer.*** *In Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that* ***the Court will not permit a solicitor to disclose a client's confidence.***
> *[Canada (Privacy Commissioner) v Blood Tribe Department of Health,* [2008] 2 SCR 574, at para. 9 citing *R. v McClure,* [2001] 1 S.C.R. 445, 2001 SCC 14, at

para. 35, quoted with approval in *Lavallee, Rackel & Heintz v Canada (Attorney General),* [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36*]*
[Emphasis added]

[para 78] The Supreme Court of Canada emphasized that clear language is required to interfere with legal privilege when it said:

> *To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents…This case falls squarely within that principle.*
> *[Blood Tribe,* at para. 11 citing *Lavallee, Rackel & Heintz v Canada (Attorney General),* [2002] 3 SCR 209, at para. 18 and *Pritchard v Ontario (Human Rights Commission),* [2004] 1 SCR 809, at para. 33*]*

[para 79] The test for making any determination with respect to the applicability of legal privilege is set out by the Supreme Court of Canada:

> *…**privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege** —(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.*
> *[Solosky v The Queen,* [1980] 1 SCR 821, at p. 837*]*
> *[Emphasis added]*

[para 80] This kind of detailed examination of each of the documents over which privilege has been claimed is an essential part of the review to make a determination as to whether legal privilege applies.

> *One form of misuse would be for the DOJ to claim a "blanket" privilege for files which, while they contain some privileged documents, also contain others for which privilege clearly does not attach.*
> *[Newfoundland and Labrador (Information and Privacy Commissioner),* at para. 80*]*

[para 81] For the purpose of this Preliminary Evidentiary Objection, it is important to review how the substantive rule of solicitor-client privilege has been formulated. The Supreme Court of Canada provides instruction:

1. *The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.*

2. ***Unless the law provides otherwise****, when and to what the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential,* ***the resulting conflict should be resolved in favour of protecting the confidentiality.***

3. ***When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.***

4. *Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3* ***must be interpreted restrictively.***

[Descôteaux et al. v Mierzwinski et al., [1982] 1 SCR 860, p. 875*]*
[Emphasis added]

[para 82] The Supreme Court of Canada has indicated that the same stringent requirements may be applicable in access to information cases.

> *I am mindful that openness of the court's process is a recognized principle. However, as with all general principles, there are exceptions. Records that are subject to a claim of solicitor-client privilege in an access to information case are such an exception. Absent* ***absolute necessity*** *in order to achieve the end sought by the enabling legislation, such records may not be disclosed.*
> *[Goodis v Ontario (Ministry of Correctional Services),* [2006] 2 SCR 32, at para. 25*]*
> *[Emphasis added]*

[para 83] The Public Body seeks to defend its decisions not to disclose the Records at Issue to the Applicants based *primarily* on its reliance on the legal privilege exceptions in s. 27(1) of the *FOIP Act*, which it has applied to the majority of the Records at Issue that have been withheld. To do so, the Public Body has chosen to solicit an opinion from an outside person, the author, and may have, inadvertently, gone beyond what will interfere the least with the privilege in accordance with the *Descôteaux* formula or because to do so was absolutely necessary as required by the *Goodis* decision.

[para 84] The *FOIP Act* provides the framework for the Commissioner or her delegate that permits incursion on legal privilege solely for the purpose of giving effect to the purposes of the statute. *[Central Coast,* at para. 50*; Newfoundland and Labrador (Information and Privacy Commissioner),* at para. 84*]* How the Public Body has chosen to proceed in this Inquiry is not the procedure set down by statute for the independent review and examination of the Records at Issue and is, in fact, a major deviation. This gives rise to the issue of waiver, to which I now turn.

[para 85] For the sake of clarity, the discussion of waiver in this Decision relates solely to a matter arising during the Preliminary Evidentiary Objection.

b. Waiver of Privilege

[para 86] Access to Information Commissioners handle privileged records all the time but there are legislative protections to safeguard the sanctity of the privileged communications and, in doing so, Commissioners lean towards a test of only doing so as and when absolutely necessary *[Newfoundland and Labrador (Information and Privacy Commissioner),* at paras. 78-83*].*

[para 87] Outside of those delegated by the Commissioner under the statute or, in the case of a conflict of interest with a public body, a judge of the Court of Queen's Bench appointed as an adjudicator under s. 75, the *FOIP Act* makes no provision for Records at Issue to be provided to a third person with limited exceptions. For example, the Commissioner may disclose to the Minister of Justice and Solicitor General if there is evidence of an offence, which has no application in this case as it is the Public Body. *[Refer to s. 59(5)]*

[para 88] I agree with the Public Body that there is no requirement that the Opinion Letter be in affidavit form. In this case, failure to provide the Opinion Letter in affidavit form is not the definitive issue. It may, however, be evidence of the laxness on the part of the Public Body in regards to the handling of the Records at Issue, which will be discussed more fully *infra*. In other words, it is the unconditional disclosure of the Records at Issue thereby potentially piercing the privilege that is of concern and not the fact the Opinion Letter is not in the form of an affidavit.

[para 89] As the "client" in relation to any Records at Issue that may be protected by solicitor-client privilege, the Public Body is the "owner" of the privilege and the only one who can waive it.

> *As to the effect of the filing of the experts' reports and legal opinions in the other proceedings and the reference to them in affidavits and transcripts in those other proceedings,* ***waiver must be done by or on behalf of the party that owns the privilege****.*
> *[Western Canadian Place Ltd. v Con-Force Products Ltd.,* 1997 CanLII 14770 (ABQB), at para. 26*]*
> *[Emphasis added]*

[para 90] It appears that the Public Body has not taken any precautions with respect to the disclosure of the Records at Issue to the author. While evidence in administrative tribunals does not need to be in affidavit form or sworn under oath or affirmed, given the fact that the Records at Issue may be protected by legal privilege, caution may have dictated that the author provide his or her evidence in affidavit form and state therein the instructions s/he received from the Public Body with respect to protecting the Records at Issue against disclosure and the obligation to respect their confidentiality. The Public

Body chose not to put the Opinion Letter in affidavit form, which it was not required to do, despite having proffered other evidence with its Initial Submissions regarding legal privilege that are in affidavit form. Had the Public Body put protections in place *vis a vis* the Records at Issue, it may have been prudent to have the conditions the author agreed to, if there had been any, attested to in an affidavit to demonstrate an intention to protect the Records at Issue from disclosure, particularly information over which the Public Body has claimed legal privilege.

[para 91] There is no evidence that any safeguards were put in place by the Public Body in its retainer with the author of the Opinion Letter who was given access to the original Records at Issue.

> *Once a document is disclosed, it is exposed for all purposes, and nothing can be done to make it secret again.*
> *[Imperial Oil Limited v Alberta (Information and Privacy Commissioner),* 2014 ABCA 231, at para. 37; citing *Alberta (Provincial Treasurer) v Pocklington Foods Inc.,*1993 ABCA 69, at paras. 21-31*; Alberta (Information and Privacy Commissioner) v Alberta Federation of Labour,* 2005 ABQB 927, at para. 34*]*

[para 92] In the *Interprovincial Pipe Line* case, the Court discussed waiver for a limited purpose. In that case, unlike here, there was a statutory obligation to provide privileged information to outside auditors for the purpose of a legislated purpose where there was no intention to waive the privilege. Courts have cautioned how to approach such situations.

> *If the* ***doctrine of limited waiver*** *is to be relied on in future in similar circumstances, it would appear to me to be* ***the prudent course of action to set forth in writing the client's intent regarding limited waiver in any disclosure*** *to its auditors* ***of solicitor-client privileged information and in the formal arrangement*** *between the client and its auditors.*
> *[Interprovincial Pipe Line Inc. v MNR,* [1996] 1 FC 367, at p. 12*]*
> *[Emphasis added]*

[para 93] While there is no indication the Public Body intended to waive its privilege, there is also not a scintilla of evidence that the Public Body gave any attention to making adequate provision for protection of the Records at Issue in its retainer with the author. And, unlike in the *Interprovincial Pipe Line* case, here there was neither a legal obligation nor the legal authority to provide the privileged information to an outside person. In the Opinion Letter the author makes no reference to the importance of the confidentiality of the Records at Issue generally or to any protections s/he was asked to observe regarding the purported privilege of the Records at Issue in the Inquiry specifically.

> *A close review of the many authorities cited regarding waiver reveals that intention and fairness are at its foundation.*
> *…*

> *There are cases where disclosure of privileged material was inadvertent, but in those cases, waiver was required because fairness demanded it. Indeed, it is likely that fairness has become the dominant test for waiver rather than intention.*
> *…*
> ***Unfairness arises generally where one party puts into issue a matter arising from a privileged communication. It is unfair to permit a party to do that while at the same time withholding the privileged communication.***
> *[Western Canadian Place Ltd.,* at paras. 34, 35 and 37*]*
> *[Emphasis added]*

[para 94] The Public Body correctly asserts it needs to offer evidence in order to meet its statutory burden to defend its decision to withhold the Records at Issue. It is trite law to state that parties are entitled to proffer evidence they consider relevant to advance their case in an Inquiry. This includes evidence to establish the Records at Issue are privileged.

> *Imperial Oil replies that it could not refer to the Remediation Agreement in an affidavit without waiving privilege, but that is not accurate. A party can provide evidence supporting the existence of a privilege without waiving the privilege, or else no assertion of privilege could ever be successful.*
> *[Imperial Oil,* at para. 47*]*

[para 95] There are ample means by which the Public Body can meet its burden under access to information legislation without running the risk of waiving the privilege by disclosing the Records at Issue to an outside person, not a party to the proceeding, under a retainer silent on protections.

[para 96] Alberta Justice and Solicitor General is the Public Body in this Inquiry. It has claimed legal privilege over the Records at Issue not on behalf of another public body or person but on its own behalf. The documents that form the Records at Issue are described by the Public Body as follows:

> *The issue in this inquiry is the decision by Alberta Justice to withhold agreements (and related documents) relating to the Government of Alberta and its external lawyers with respect to the provision of external legal services in connection with the ongoing tobacco-related health care costs recovery litigation.*
> *[Public Body's Initial Submissions, at para. 3]*

[para 97] At the outset, prior to the Inquiry, the Public Body made discretionary decisions not to waive its legal privilege under s. 27(1) of the *FOIP Act* in response to the access requests from the Applicants and, thereafter, refused to provide the Records at Issue over which it had claimed the legal privilege exceptions to the Applicants. The reliance by the Public Body on s. 27(1) of the *FOIP Act* may have entitled the Public Body, in its initial decisions, to deny the Applicants access. This exception, however, will not entitle the Public Body to withhold the Records at Issue from the Commissioner or her delegate. Whether the Public Body has withheld the Records at Issue from the

Applicants in this case in accordance with the statute remains to be decided at the conclusion of the Inquiry.

[para 98] The Public Body seeks to defend its non-disclosure decisions by submitting the Opinion Letter from an author who has been given *unconditional and full access to the original Records at Issue.* By doing so the Public Body has clearly deviated from who has been designated to examine the Records at Issue in order to make a determination as to the applicability of the exceptions. In order to do so in a manner intended by the Legislature, this review and determination must be done by the designated trier of fact and law and in accordance with the legislation.

[para 99] Is there the potential that the release of the Records at Issue to a third person without legislative authority or requirement to do so and absent any protections to safeguard the Records at Issue embodied into the retainer of the author of the Opinion Letter could constitute waiver of the privilege over the Records at Issue? This is problematic and potentially detrimental. I do not, however, need to decide if there has been waiver or limited waiver at this stage. How the potential for waiver relates to the fairness imperative for all parties becomes the next consideration, to which I now turn.

c. Fairness for all Parties

[para 100] Equally problematic to the potential for waiver is the fact that the Public Body would be aware that to submit the Opinion Letter places the Applicants in an untenable position in the Inquiry. In the Inquiry, once the Public Body has met its burden of proof, the Applicants are entitled to have an equal opportunity to provide their Rebuttals. *[Refer to Western Canadian Place Ltd.,* at para. 37*]*

[para 101] The Court of Appeal of Alberta has made it clear that an administrative tribunal *may* refuse to consider evidence proffered by the parties.

> *By the same token,* ***a panel has the discretion to refuse evidence; for example, evidence that it considered to be inherently flawed.*** *The provisions of the statute must be read so as to give effect to the legislative* ***intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and given the Commission control over its own process.***
> *[Lavallee v Alberta (Securities Commission),* 2010 ABCA 48, at para. 17; Leave to Appeal to SCC refused*]*
> *[Emphasis added]*

[para 102] The Applicants submit the following in the eventuality the Opinion Letter is ruled admissible:

> *Should the* [Opinion Letter] *be admitted, the deadline to respond to Alberta Justice's Initial Submission should be extended to allow us to determine what, if*

> *any evidence we will file in response, including retaining the services of our own retired Supreme Court Justice, so that we may offer our own legal opinion. [Applicants' Initial Objection Submissions, at p. 7]*

[para 103] While there can be little doubt that such a request for a time extension would be granted in fairness to the Applicants, the problems that emerge are, in my opinion, more complicated than that.

[para 104] Section 56(1) of the *FOIP Act* grants the Commissioner and her delegates all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act.* Section 4 of the *Public Inquiries Act* states as follows:

> *The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.*

[para 105] Were I to exercise my discretion to employ my powers under the *Public Inquiries Act* could the author of the Opinion Letter be compelled to give evidence under oath or by affirmation and be required to attend with documentation including the Records at Issue if so ordered? The Public Body is incorrect when it asserted in its Response Submissions that "*[t]here is no cross-examination in this type of Inquiry*." While not usual during inquiries, the powers under the *Public Inquiries Act* referentially incorporated into the *FOIP Act* make it a possibility open to me. *[Refer to* Order 99-019, at para. 27; Order F2006-021, at para. 10; Order H2004-003, at paras. 19-41; Order M2004-001, at para. 55; Order F2013-02, at para. 24*]* Would fairness dictate that the Applicants be permitted to cross-examine the author about the information upon which his or her opinion is based? Would procedural fairness require this step if the Applicants are unable to solicit a comparable rebuttal opinion from a retired judge because they lack a means by which to access the Records at Issue for him or her to examine?

[para 106] How could the Applicants prepare an adequate rebuttal without the "expert" or retired judge of their choice having access to the Records at Issue? Can we anticipate the Applicants making another preliminary motion for an Order that the judge of their choice be permitted to examine the Records at Issue in order to prepare an opinion on which they could base their Rebuttals? Faced with a similar situation, the Supreme Court of Canada has identified the problems that arise:

> *I see another grave objection to an undertaking by counsel not to pass the privileged information on to his client. The Supreme Court of Canada considered a similar point on a motion to forbid a lawyer to act for one litigant. The lawyer's partner once acted for the opposing litigant. The Supreme Court firmly rejected any undertaking by the partner with the secrets not to tell the lawyer.* ***Such an undertaking was unreliable, would give the public a very bad impression,***

> ***and would not remove the conflict of interest.*** *See MacDonald v. Martin 1990 CanLII 32 (CSC), [1990] 3 S.C.R. 1235, 1262-63. The present situation is worse than that. Here the lawyer who seeks to learn the Crown's secret is not a mere partner of the lawyer for the plaintiff. He is himself the lawyer for the plaintiff. He would take on an impossible conflict of interest, for he cannot compartmentalize his mind.*
> *[Pocklington Foods,* at para. 29*]*
> *[Emphasis added]*

[para 107] If the Applicants seek access for their retired judge to be able to examine the Records at Issue, what are the logistics of protecting the potentially privileged information when it is the very information to which the Applicants are seeking access? What safeguards would be required with respect to the Applicants' "expert" retired judge having access to the Records at Issue that would guard against erosion of the legal privilege?

[para 108] Understandably given the importance of legal privilege, Courts have been reluctant to permit a person to view privileged information on an undertaking not to disclose the contents to their clients.

> *In my respectful view, such use of the documents drives a Mack truck through the middle of the privilege. Often the shreds of the privilege would be scarcely worth having.*
>
> *Therefore, inspection by the opposing lawyer would destroy the object of the exercise. It is like pulling up the beets by the roots to see if they are growing well. It helps answer the question but simultaneously makes it academic.*
> *[Pocklington Foods,* at paras. 26-27*]*

[para 109] Were the Applicants to try to gain parity in the exchange of opinion evidence by seeking access to the Records at Issue, what conditions could possibly be put in place to protect the legal privilege the Public Body claims over the Records at Issue while the Applicants' retired judge examines them?

> *Is the objection to revealing a privileged document merely an appeal to theory or tradition or precedent? Is there any real harm done by showing the document to the opposing lawyer, upon undertakings not to reveal the contents to his client?* ***In my respectful view, there is substantial harm. Indeed in substance that is the virtual death of any privilege, whatever kind it may be.***
> *[Pocklington Foods,* at para. 19*]*

[para 110] It is important that I follow precedent and, in particular, *Descôteaux* and *Goodis* and render a decision that will itself least interfere with the potentially privileged information. It is unnecessary for me to make a finding at this stage as to whether or not the privilege has been waived. It is conceivable that up to this point, what has transpired is an example of limited waiver for a specific purpose though notably here

there was no legal authority or obligation. Apart from what the Public Body has done, it is imperative that as the External Adjudicator, I do nothing that would condone or constitute "piercing" the privilege.

[para 111] Even if the Public Body were to successfully argue that what has transpired to date with respect to sharing the Records at Issue with the author amounts to limited waiver, if the Opinion Letter continues to be evidence in the Inquiry, the potential for future problems remain. I find that in order for the Applicants to be given a fair hearing it would be difficult to do so without the potential of further risk to the legal privilege claimed over the Records at Issue. Equally important is that it would be unfair to the Public Body because, were extraordinary procedural adjustments required to achieve fairness for the Applicants in the Inquiry process, these procedural accommodations could compromise the legal privilege it claims over the Records at Issue.

[para 112] There was no necessity for the Public Body to choose to do this in order for the goals under the *FOIP Act* to be met. The statute sets out the means by which the Legislative Assembly intended independent review of public body decisions to be conducted with all the legal safeguards required to protect highly confidential records such as Cabinet confidences or legal privileged communications. For decades the safeguards entrenched in access to information legislation have provided the appropriate and adequate protections for the information contained in records held by public bodies to which the public seeks access.

[para 113] There was also no necessity, certainly no "absolute necessity", to take the step of handing over the Records at Issue to the author outside the parameters provided for under the access to information legislative regime. All the powers and protections are contained in the *FOIP Act* for the legally designated independent oversight authority to review the Records at Issue to determine if the Public Body has properly relied on and applied the limited and specific exceptions.

[para 114] There are ample means by which the Public Body can make its case of privilege.

> *Privilege relates to the legal status of a document, and it depends on the circumstances under which the document was created.*
> *[Imperial Oil,* at para. 58*]*

[para 115] For example, the Public Body could request an *in camera* hearing with the External Adjudicator pursuant to s. 69(2) of the *FOIP Act* to review the Records at Issue and therein provide further explanation on a line-by-line, document by document, basis as to how it applied all of the various exceptions in the subsections of s. 27(1) of the *FOIP Act* and the circumstances under which each part of the record was created. This protects the Records at Issue because s. 69(3) of the *FOIP Act* makes it clear that the Applicants would have no right to attend such a hearing. *[See* Order 99-019, at para. 18*]* As the External Adjudicator during an *in camera* hearing, I am obliged to comply

with the confidentiality requirements provided for under my s. 51 Oath and pursuant to s. 59 of the *FOIP Act*. No such safeguards were in place with respect to the author.

[para 116] As will be discussed, *infra,* there was no necessity for the Public Body to elect to take the extraordinary step of soliciting an outside opinion about purportedly privileged information and in doing so to take the unnecessary risk of sharing the original Records at Issue in unshielded form potentially waiving the very privilege it seeks to claim as both the Public Body and the client. Without the proffered evidence, it still remains open to the Public Body to argue that the Records at Issue are subject to legal privilege *[SDL v Governors of the University of Alberta,* 2012 ABQB 244, at para. 78*].*

[para 117] On balance, I find all of the parties would be denied procedural fairness if the Opinion Letter was held to be admissible. What has transpired with respect to the unconditional release of the Records at Issue to the author also leads me to the inevitable conclusion that an Order for the production and examination of the Records at Issue is absolutely necessary in order for the Inquiry to proceed with all parties on an equal footing and as the legislation intended.

> *Having found that section 52 of ATIPPA authorizes the Commissioner to compel the production of responsive records subject to solicitor-client privilege, the Court must go on to determine whether the routine production of such records is absolutely necessary. The purpose of the legislation, described above, is to provide for an independent review officer which can undertake a timely and affordable first level review of all information request denials. This access to justice rationale mandates that* ***the Commissioner's routine exercise of his authority to review solicitor-client privileged materials is absolutely necessary. The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production.*** *[Newfoundland and Labrador (Information and Privacy Commissioner),* at para. 78*] [Emphasis added]*

d. Admissibility of the Opinion Letter

[para 118] The Public Body submits that the only test in determining admissibility of evidence is relevance and that the External Adjudicator's response to the Preliminary Evidentiary Objection should be to wait to determine the importance and decide the weight to be given the Opinion Letter later during the Inquiry. In my opinion, the stakes associated with admitting the Opinion Letter are simply too high.

[para 119] The Public Body claims the test for admissibility of evidence in administrative proceedings is whether the evidence is relevant to an issue at hand. The Public Body's Response submits that failure to admit relevant evidence may impact on the fairness in the proceedings and that if there is any doubt the advisable route is to

admit the evidence and decide importance later. In submitting this, the Public Body relies on the following:

> *Relevant expert evidence is admissible. Any frailties in the facts or hypotheses upon which an opinion is based, or in the qualifications of the expert, affect the weight of the evidence but not its admissibility.*
> *[Public Body's Response Submissions,* at p. 3 citing Blake, *Administrative Law in Canada,* 4th ed., at p. 60*]*

[para 120] I understand that the Courts have held that administrative tribunals are not bound by the technical rules of evidence.

> *As a general rule, strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed….While rules relating to the admissibility of evidence (such as the Mohan test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever,* ***required*** *to apply those strict rules.*
> *[Alberta (Workers' Compensation Board) v Appeals Commission,* 2005 ABCA 276, at para. 63*]*
> *[Emphasis added]*

[para 121] As an External Adjudicator I am neither bound by the technical rules of evidence nor am I obliged to ignore them. It is within my discretion to consider the law and facts as they relate to the Preliminary Evidentiary Objection. I turn now to that analysis.

[para 122] The Court of Appeal of Alberta has held that an interpretation that means all relevant evidence should be admitted could lead to an absurd result and would remove the discretion of an administrative decision-maker.

> *Section 29(e) provides the Commission "shall receive that evidence that is relevant to the matter being heard". The chambers judge interpreted this to mean that all relevant evidence must be admitted by the Commission, regardless of any other concerns raised by the evidence, including its unreliability or prejudicial nature.*
> *…*
> *To read s. 29(e)* [of the Securities Act] *as removing all discretion from the Commission in the conduct of its hearings and* ***mandating the admission of all relevant evidence would, in my view, render the section irrational or meaningless and could lead to absurd consequences.*** *It would, for example, compel the Commission to admit communications covered by solicitor-client privilege if they were relevant to the matter in question, as they invariably would be. Such a result would be contrary to the special position occupied by solicitor-client privilege, which has been described as a "principle of fundamental justice, and a civil right of supreme importance that forms a cornerstone of our judicial system".*
> *[Lavallee,* at paras. 6 and 9*]*

[Emphasis added]

[para 123] While administrative tribunals have more flexibility with respect to applying the rules of evidence, in other words, they are not bound by them, they are certainly free to consider them and apply them accordingly. The Applicants submit:

> *…an administrative tribunal is not required in all circumstances to apply the strict rules of evidence used by courts of law.* ***This does not prohibit administrative tribunals from acting as gatekeepers to exclude otherwise relevant evidence that for reason of law or policy should be ruled inadmissible.***
> *[Applicants' Reply Submissions, at p. 2]*
> *[Emphasis added]*

[para 124] While the Public Body submits that the Opinion Letter *"is undoubtedly relevant to the issues in this Inquiry, and therefore is admissible. This is a complete answer to the Preliminary Evidentiary Objection" [Public Body's Response Submissions, at p. 2],* it goes on to state that the Opinion Letter would be admissible under the rules of evidence.

> *Even if the rules of evidence in litigation were applicable to this Inquiry, the* [Opinion Letter] *is entirely consistent with those technical rules, and it would be a fundamental error for an administrative adjudicator to exclude evidence which would be admissible under the rules of evidence:*
>
> - *British Columbia Lottery Corporation v. Skelton, 2013 BCSC 12, at paras. 52 - 70, where the court set aside a decision by the British Columbia Information and Privacy Commissioner which excluded an expert report which was admissible under the rules of evidence applicable in court proceedings.*
>
> *[Public Body's Response Submissions, at p. 4-5]*

[para 125] The technical rules for the admissibility of expert evidence have been laid out by the Supreme Court of Canada in *R. v Mohan,* [1994] 2 SCR 9. I will begin this part of the analysis with respect to the admissibility of the Opinion Letter, the evidence that is the subject of the Preliminary Evidentiary Objection, by measuring the Opinion Letter against the test provided for in *Mohan*. The analysis will answer the following questions:

i. What are the *Mohan* criteria for the admissibility of expert evidence?
ii. Does the Opinion Letter meet the *Mohan* criteria?
iii. Whether or not the Opinion Letter meets the *Mohan* criteria, how should I exercise my discretion to admit or refuse to admit the expert evidence?

i. What are the *Mohan* criteria for the admissibility of expert evidence?

[para 126] I will begin with the first question: what are the *Mohan* criteria? In *Mohan,* the Supreme Court of Canada laid out four criteria upon which the admission of expert evidence is dependent. These are:

> *Expert Opinion Evidence*
>
> *Admission of expert evidence depends on the application of the following criteria:*
> *(a) relevance;*
> *(b) necessity in assisting the trier of fact;*
> *(c) the absence of any exclusionary rule;*
> *(d) a properly qualified expert.*
> *[Mohan,* at p. 11*]*

ii. Does the Opinion Letter meet the *Mohan* criteria?

(a) Relevance

[para 127] Applying the *Mohan* criteria to the case at hand, I begin with the first criterion: relevance.

[para 128] The Public Body submits that there is no doubt that a legal opinion about whether the Records at Issue are in fact privileged is relevant. The Public Body further submits that relevance is the only test for an administrative tribunal, in other words, if it is relevant then it is admissible.

[para 129] Because of the importance the Public Body places on relevance as the sole criteria, it is important to examine what the *Mohan* Court said about the relevance criterion:

> *Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as a question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." … Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process.* ***Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect,*** *if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact … is out of proportion to its reliability.*

[Mohan, at p. 11*]*
[Emphasis added]

[para 130] I understand that one way to approach any frailties or flaws in the Opinion Letter, which have been discussed *supra*, is to consider these when deciding what weight to assign the evidence during the Inquiry. In this case, however, I find that while the Opinion Letter may be logically relevant, I consider its probative value is overborne by its prejudicial effect.

(b) Necessity in assisting the trier of fact

[para 131] The second *Mohan* criterion is necessity. The Supreme Court of Canada turned to an earlier decision that said the following with respect to necessity:

> *With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion.* ***An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate.*** *"An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.* ***If on the proven facts a judge or jury can form their own conclusions without help then the opinion of the expert is unnecessary.***
> *[R v Abbey,* [1982] 2 SCR 24, at p. 42 cited in *Mohan,* at p. 13*]*
> *[Emphasis added]*

[para 132] The Applicants stress that necessity is a required factor to consider along with relevance and points out the Public Body has failed to address the issue of necessity in its Response Submissions. In their Reply Submissions, the Applicants state:

> *In the present case, the* [Opinion Letter] *is unnecessary to assist the trier of fact in reaching a conclusion on the privilege claims of the Records at Issue.*
>
> *Remarkably, Alberta Justice has made no submissions regarding the necessity of the* [Opinion Letter]. *This is because there is no basis to argue the* [Opinion Letter] *is necessary for the adjudicator to "appreciate the matters in issue due to their technical nature."*
> *[Applicants' Reply Submissions, at p. 3-4]*

[para 133] The Applicants are correct. While the Public Body claims the Opinion Letter would be admissible under the rules of evidence, it does not address whether or how the Opinion Letter meets the *Mohan* criterion of necessity.

[para 134] Further the Applicants submit that Courts have applied the criterion of necessity strictly to exclude expert evidence where the evidence amounts to rendering the ultimate decision.

> *The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.*
> *[Mohan,* at p. 14-15*]*

[para 135] In its analysis of the necessity criterion, the Supreme Court of Canada stressed the following with respect to expert evidence:

> *What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury."*
> *…*
> *As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process.*
> *…*
> ***If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.***
> *…*
> *There is also concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming* ***nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.***
> *[Mohan,* at p. 13-14*]*
> *[Emphasis added]*

[para 136] Were the Applicants forced into a position of having to retain their own retired judge would the Inquiry become a "contest of experts" with the External Adjudicator becoming nothing more than a "referee"? Where it is clearly a question that is within the purview of the administrative tribunal to decide, Courts have held expert evidence to be inadmissible.

> *The Board concluded that it would not admit the evidence of Dr Collins. It said that the evidence was relevant and probative only in relation to the credibility of the complainant "which is the ultimate issue in this appeal" and pointed out that in the will-say statement, Dr Collins said "in my professional opinion the case has the hallmarks of a false complaint".*
> *This is the very issue the UAB is required to decide.*
> *…*
> *While the strict rules of evidence that apply in a court of law do not govern the admissibility of evidence in these proceedings,* ***evidence on the ultimate question of credibility remains a determination to be made by the panel****.*
> *[Dalla Lana v University of Alberta,* 2013 ABCA 327, at para. 37; Leave to Appeal to SCC refused*]*

[para 137] Turning to the question: does the Opinion Letter meet the *Mohan* criterion of necessity? This requires an examination of what is the ultimate question in the Inquiry.

[para 138] The Applicants submit that the scope of the legal concept of privilege is a question of law and the application of that law to particular Records at Issue is a question of mixed fact and law.

> *Conversely, the determination of whether the personal documents are privileged, should the entitlement to such a claim exist, is a matter of mixed fact and law for which the standard is palpable and overriding error. Finally, the question of whether the chambers judge erred in finding that certain individual records did not fall within solicitor-client (legal advice) privilege is also a matter of mixed fact and law calling for deference.*
> *[TransAlta Corp v Alberta (Market Surveillance Administrator),* 2014 ABCA 196, at para. 21*]*

[para 139] The Public Body claims that this Inquiry involves solely a question of fact and that the domestic law regarding privilege is settled or as it submits "*there is no question about the domestic law of solicitor-client privilege."* Because it is only a question of fact, the Public Body argues it is necessary and appropriate that the author of the Opinion Letter state the law.

[para 140] In the Inquiry, there appears to be consensus that the ultimate issue is determining whether the Records at Issue can be withheld because they are privileged pursuant to s. 27(1) of the *FOIP Act.* This is in line with what the Court of Appeal of Alberta referred to as mixed fact and law: the application of a legal standard to a set of facts.

> *…the Supreme Court noted that questions of law are about the correct legal test,* ***whereas questions of mixed fact and law are about whether the facts satisfy the legal test.***
> *…*
> *In that case the Court noted that questions of mixed fact and law involve the application of a legal standard to a set of facts;*
> *[Alberta (Workers' Compensation Board),* at paras. 21 and 22*]*
> *[Emphasis added]*

[para 141] As I outlined in the Analysis of the Opinion Letter *supra,* the author canvasses the law on solicitor-client privilege and then goes on to apply the law to the Records at Issue in order to reach his or her conclusion regarding legal privilege. Opinion evidence that provides an interpretation of domestic law has been held inadmissible. The Applicants submit that the Opinion Letter is not solely about a question of fact and should be held to be inadmissible as it amounts to an expert opinion on the application of domestic law.

> *I conclude that Mr. Ryer's opinion is not "necessary" in the circumstances of this case. It does not assist the court in arriving at a decision. I say this both in terms of determining the applicable law and applying that law to the facts which might be found at trial. It is not outside the competence of judges of this Court to determine the applicable domestic law and apply it.*
> *…*
> *These are, in my view, valid concerns that would have to be properly addressed by the court if Mr. Ryer's opinion was to be considered for admission. It is not, however, necessary for me to decide the bias or independence issue at this point, as it is my conclusion that Mr. Ryer's opinion does not meet the "necessity" requirement, per Mohan, in any event. Needless to say, these arguments, if decided in BDO's favour, would only have served to reinforce my conclusion that the opinion is not admissible, as it relates to the interpretation and application of domestic law.*
> *[Walsh v BDO Dunwoody LLP,* 2013 BCSC 1463, at paras. 87 and 106*]*

[para 142] The Courts have treated each case as unique. In other words, there is no blanket exclusionary rule. Evidence has been rejected where it is found to be unnecessary or superfluous.

> *In my view, there is no blanket exclusionary rule against such evidence As Doherty, J.A. notes in Abbey, each case is unique; different trial judges may exercise their discretion differently: para. 79. Nevertheless, I consider that the issues that arise in relation to this type of evidence will inevitably dictate that the circumstances where such evidence is appropriate will be rare. That conclusion is consistent with the statement in Mohan at p. 25, concerning the strict application of the principles in relation to evidence such as this.*
> *[Walsh,* at para. 89*]*

[para 143] The primary exception relied upon by the Public Body as outlined in its Initial Submissions in the Inquiry is its reliance on s. 27(1) of the *FOIP Act*. One of the issues in the Preliminary Evidentiary Objection is whether submitting the Opinion Letter attesting to whether the Records at Issue are in fact privileged usurps the role of the External Adjudicator by deciding the ultimate question.

[para 144] The authority of the Commissioner or her delegate in an Inquiry, set out in s. 69(1) of the *FOIP Act,* is she:

> *…must conduct an inquiry and* ***may decide all questions of fact and law arising in the course of the inquiry.***
> *[Emphasis added]*

[para 145] On p. 4 of the Notice of Inquiry, I stated one of the issues in the Inquiry as follows:

Whether the Public Body properly relied on and applied s. 27 of the FOIP Act [privileged information] to the information in the records.

[para 146] It is apparent that the principal issue in the Inquiry is the application of the legal privilege exceptions. The largesse of the Public Body's Initial Submissions in the Inquiry are devoted to legal privilege and s. 27(1) of the *FOIP Act.* In those Submissions, the Public Body states:

> *If section 27 applies to any record, it is not necessary to consider any of the other exceptions.*
> *[Public Body's Initial Submissions, at para. 46]*

[para 147] The Public Body provides the following summary:

> *In summary, Alberta Justice submits that the information in the requested records is exempted from disclosure by one of more parts of section 27(1).*
> *[Public Body's Initial Submissions, at para. 65]*

[para 148] The question put by the Public Body in its retainer with the author of the Opinion Letter was:

> *…on the question of whether "the Privileged Documents" are in fact privileged.*
> *[Public Body's Initial Submissions, Tab 4: Opinion Letter, at p. 3]*

[para 149] The Public Body states:

> *The issue in this Inquiry is solely a question of fact—namely, whether the records in question relate to a communication for the purpose of seeking or providing legal advice.*
> *[Public Body's Response Submissions, at p. 4]*

[para 150] This is particularly important in a case involving a claim of legal privilege. If a public body can establish the Records at Issue are privileged, for example, by proffering evidence like the Opinion Letter that concludes the Records at Issue are ***in fact privileged***, it could, hypothetically, attempt to argue that was a complete answer with respect to the question of whether the Records at Issue were protected from disclosure.

> *If Imperial Oil could establish that the Remediation Agreement was privileged, that would be a complete answer to the application of the City of Calgary for disclosure.*
> *[Imperial Oil,* at para. 57 citing *Merck Frosst Canada Ltd. v Canada (Health),* [2012] 1 SCR 23, at para. 98*]*

[para 151] As the Applicants submit:

> *… a party may not cloak an opinion on the ultimate issue to be determined under the auspices of evidence …*
>
> *Instead, it asks the adjudicator to defer to the* [Opinion Letter] *and the "ready-made inference contained in his opinion.*
> *[Applicants' Reply Submissions, at p. 1]*

[para 152] This would, in effect, render the role designated to the statutory decision-maker superfluous. It is notable that the Public Body chose to proffer evidence of a retired judge and by doing so appears to be attempting to do indirectly what it is not legally entitled to do under the *FOIP Act*, that is have the author of the Opinion Letter, a retired judge, answer the ultimate question that is before the External Adjudicator. Division 2 of the *FOIP Act* prescribes when a judge may be designated as an adjudicator. As discussed *supra* s. 75 of the *FOIP Act* has no application in this case to which the Public Body agreed. The Public Body, however, when asked by the Commissioner as to who should be appointed to conduct the Inquiry, it indicated its sole preference for the External Adjudicator to be a former judge.

[para 153] The Public Body argues that the *"the former technical rule of evidence excluding expert opinion is no longer of general application" [Public Body Response Submissions, at p. 14].* With respect to that submission, here is what the Supreme Court of Canada stated in full:

> *These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application,* ***the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue.***
> *[Mohan,* at p. 14-15*]*
> *[Emphasis added]*

[para 154] The concern in this case is what appears to be the Applicants' apprehension that the Public Body will claim there is factual evidence in the form of the Opinion Letter that attests as a question of fact that the Records at Issue are in their entirety privileged and that will be a full answer in the Inquiry. The apprehension on the Applicants' part appears to be that by proffering up the Opinion Letter the Public Body will try to refuse production of the Records at Issue to the External Adjudicator inviting me to rely on the "ready-made inference" [*Abbey* cited in *Mohan*, at p. 13] in the Opinion Letter. I find that the Opinion Letter is an attempt to provide evidence that in essence answers questions of law and fact that are at the core of the my decision-making role as the delegate of the Commissioner.

[para 155] In addition to it being unnecessary as it attempts to opine on the ultimate issue before me, I find, on examination and analysis of the Opinion Letter *supra,* it is

unnecessary because it may be flawed. For convenience, the following cite is reproduced:

> *By the same token, a panel has the discretion to refuse evidence; for example,* ***evidence that it considers to be inherently flawed.*** *The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process.*
> *[Lavallee,* at para. 17*]*
> *[Emphasis added]*

[para 156] The question of whether or not the Records at Issue may be withheld as subject to privilege under any or all of the subsections of s. 27(1) of the *FOIP Act* upon which the Public Body has relied is the ultimate determination for me to make under my delegation from the Commissioner. This is my duty under the *FOIP Act* and in order to fulfil that duty it is now incumbent on me to examine the Records at Issue and receive and duly consider the final Rebuttal Submissions from all of the parties. As such, I find the Opinion Letter unnecessary to fulfill my obligations as the External Adjudicator.

[para 157] Further, s. 61 of the *FOIP Act* and the terms of my delegation are clear. I do not have the authority to delegate any of my duties, powers or functions under the *FOIP Act* or the terms of my delegation. In particular, I am under a specific duty not to delegate my delegation. I interpret that to include that I must not delegate a decision with respect to the ultimate issue. The Public Body proffered the Opinion Letter to opine on the ultimate Issue, which I am to decide in the Inquiry. Were I to allow evidence that in effect replaces or seeks to replace my obligations and decision-making powers under the *FOIP Act* under which I am required to make a determination on all questions of fact and law, I find this would amount to a delegation of my delegated duties and powers in the Inquiry, which would be contrary to s. 61(1) of the *FOIP Act* and the terms of my delegation.

(c) The Absence of any Exclusionary Rule

[para 158] The third *Mohan* criterion is the absence of any exclusionary rule. As discussed *supra,* the Court in *Mohan* said:

> *While frequently considered as an aspect of legal relevance,* ***the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule…Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same.*** *The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.*
> *[Mohan,* at p. 11*]*
> *[Emphasis added]*

[para 159] The prejudicial effect of the evidence, discussed *supra,* with respect to potential waiver and fairness to both parties weighs in favour of finding the Opinion Letter inadmissible.

(d) A Properly Qualified Expert

[para 160] The fourth and final *Mohan* criterion is a properly qualified expert. The Supreme Court of Canada stated:

> ***Finally the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.***
>
> *In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and* ***whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.***
> *[Mohan,* at p. 14*]*
> *[Emphasis added]*

[para 161] The Applicants refer to the Opinion Letter as expert opinion evidence. The Public Body did not provide any information to establish the expertise of the author to provide the Opinion Letter. I note in its Initial Submissions in the Inquiry, the Public Body did not refer to the Opinion Letter as an expert report. In its Response Submissions on the Preliminary Evidentiary Objection, the Public Body does not refer directly to the Opinion Letter as expert evidence and fails to provide any evidence to establish the author as a properly qualified expert.

[para 162] The Public Body relied on a British Columbia case where its Commissioner was found to have erred in failing to exercise her discretion to admit expert evidence that opined on the monetary value of lottery information held by government that, if disclosed, would advantage competitors. The market research report, referred to as the *Lauzon Report,* was from an expert specializing in the lottery and gaming industry. The BC Supreme Court stated:

> *The Lauzon Report contains opinions. Opinions are only admissible as expert evidence. If the opinion meets the Mohan criteria, it is not open to the Commissioner to determine that she will admit the evidence "but not as expert evidence".* ***Opinion evidence is only admissible as expert evidence. It cannot be admitted in any other way.***
>
> ***What the Commissioner had to decide was whether or not the Lauzon Report met the Mohan criteria. If it did, it was then admissible as expert evidence. If it did not, given the relaxed rules of evidence in administrative proceedings, she could at her discretion admit it in any event.***

> *…*
> *The Lauzon Report met the Mohan criteria for admissibility. It was prepared by a qualified expert, it was relevant, it was necessary and was not subject to any exclusionary rule. I find the Commissioner erred in failing to consider the Lauzon Report as expert evidence.*
> *[Skelton,* at paras. 63, 64 and 67*]*
> *[Emphasis added]*

[para 163] The present case is distinguishable from the decision in *Skelton.* There the report met the *Mohan* criteria: the report was provided by a qualified expert, the evidence from the expert was about the monetary value of lottery information, which was beyond the expertise of the trier of fact, and fair process dictated that the expert report be weighed and considered by the Commissioner. In this case, all of the *Mohan* criteria have not been met including the author has not been qualified as an expert.

[para 164] While the Public Body referred to the author as a retired judge, it did not do so in the context of establishing his or her expertise. The Public Body has failed to provide any evidence that would qualify the author of the Opinion Letter as an expert. With no disrespect to the author of the Opinion Letter, without evidence as to his or her credentials, I am not prepared to make any finding as to his or her qualifications to give an expert opinion in the circumstances of this Inquiry based solely on the fact s/he is a retired judge. In the result, the Public Body has not established the author as an expert or the Opinion Letter as expert evidence. As the Court in the *Skelton* case relied on by the Public Body, *"opinion evidence is only admissible as expert evidence. It cannot be admitted in any other way." [Skelton,* at para. 63*]*

iii. Whether or not the Opinion Letter meets the *Mohan* criteria, how should I exercise my discretion to admit or refuse to admit the expert evidence?

[para 165] In line with case law, I treat the *Mohan* criteria, referred to as the technical rules for expert evidence in a Court, as conjunctive and, therefore, all criteria must be met. Having outlined the *Mohan* criteria, in answer to the questions posed, I find the Opinion Letter measured against the *Mohan* criteria as follows:

1. While logically the Opinion Letter *may* be relevant, any probative value is overborne by its prejudicial effect.

2. The Opinion Letter is unnecessary for my adjudication of all questions of law and fact outlined in the Notice of Inquiry pursuant to my delegated authority under the *FOIP Act*.

3. The Opinion Letter does not constitute evidence from an expert and, therefore, it would be extraordinary in an Inquiry to admit it simply as an opinion from the author who has not been qualified as an expert.

[para 166] I find, therefore, the Opinion Letter does not meet the *Mohan* criteria for the admissibility of expert evidence but as discussed *supra* that is not the end of the matter. The final question is, even if the Opinion Letter does not meet the *Mohan* criteria, should I exercise my discretion to admit or refuse to admit the Opinion Letter given the relaxed rules of evidence that *may* be applied in administrative proceedings?

[para 167] The Applicants submit that administrative tribunals have the discretion to exclude evidence:

> *Administrative tribunals have discretion to exclude relevant expert evidence. The authorities Alberta Justice relies on merely confirm an administrative tribunal is not required in all circumstances to apply the strict rules of evidence used by courts of law. This does not prohibit administrative tribunals from acting as gatekeepers to exclude otherwise relevant evidence that* ***for reason of law or policy should be ruled inadmissible.***
> *[Applicants' Reply Submissions, at p. 2]*
> *[Emphasis in original and added]*

[para 168] The Public Body submits in its response to the Preliminary Evidentiary Objection:

> *[T]here is no untrammelled discretion in administrative proceedings to exclude relevant evidence.*
> *…*
> *Similarly,* ***there must be a compelling reason*** *for an administrative tribunal to exclude relevant evidence even if it would not be admissible in a court of law.*
> *[Public Body's Response Submissions, at p. 9-10]*
> *[Emphasis added]*

VI. DECISION F2014-D-03

[para 169] I am exercising my discretion to find the Opinion Letter inadmissible in the Inquiry. I base the exercise of my discretion on the following grounds (which have been discussed in detail *supra)*, all of which I consider to be compelling reasons to find the Opinion Letter inadmissible:

1. By disclosing the Records at Issue to an outside person in order to solicit an opinion without any legislative protections or terms and conditions in the retainer of that person, the Public Body may have waived privilege. Given the unquestionable stature of legal privilege, I am not prepared to place the potentially legally privileged Records at Issue at further risk. Even if what has transpired to date amounts to limited waiver, I find the potential for future difficulties were the Opinion Letter to remain in evidence, with respect to achieving fairness for the Applicants, very problematic, unnecessary and thus to be avoided. The admission of the Opinion Letter poses too high a risk of the potential for waiver of the legal privilege claimed over the Records at Issue. I make no finding with respect to whether or not

releasing the Records at Issue to the author of the Opinion Letter constitutes waiver or limited waiver. I find, however, that in order to preserve the integrity of the Records at Issue over which legal privilege has been claimed, the Opinion Letter should not be admitted into evidence in the Inquiry.

2. I find the Opinion Letter attempts to answer the ultimate question in the Inquiry with respect to whether or not the Records at Issue are protected by legal privilege, which is a question of law and/or fact that is the ultimate issue to be decided by the External Adjudicator. I find the Public Body's reliance on evidence of a retired judge to be an attempt to do indirectly what it is not legally entitled to do under the *FOIP Act*. Division 2 of the *FOIP Act* prescribes when a judge may be designated as an adjudicator. I agree that s. 75 of the *FOIP Act* has no application in this case. The Public Body when asked by the Commissioner, indicated its sole preference for the External Adjudicator to be a former judge. Were the Opinion Letter allowed to be admitted into evidence that purported to answer the ultimate issue before me, it would usurp my role and would amount to a delegation of my delegated authority as the External Adjudicator contrary to s. 61 of the *FOIP Act* and the terms of my delegation.

3. I find the Opinion Letter does not meet the *Mohan* criteria as set down by the Supreme Court of Canada. Specifically:

    a. While logically the Opinion Letter *may* be relevant, any probative value is overborne by its prejudicial effect.

    b. The Opinion Letter is unnecessary for my adjudication of all questions of law and fact outlined in the Notice of Inquiry pursuant to my delegated authority under the *FOIP Act*.

    c. The Opinion Letter does not constitute evidence from an expert and, therefore, it would be extraordinary in an Inquiry to admit it simply as an opinion from the author who has not been qualified as an expert.

4. I find that in order to meet the test of procedural fairness for all parties, the Opinion Letter must be held to be inadmissible. It would be impossible for the Applicants to rebut the evidence in the Opinion Letter because they have no means by which to have their "expert" or retired judge gain access to the Records at Issue in order to prepare his or her opinion. If the Applicants were to attempt to gain access to the Records at Issue for their retired judge, the potential for further erosion of the privilege is inevitable. Fairness in the Inquiry will require that the Applicants are able to rebut the evidence of the Public Body with respect to its reliance on s. 27(1) of the *FOIP Act.* In order for the retired judge of their choice to be able to provide an opinion, the Applicants may seek access for that person to the Records at Issue. By allowing access to the Applicants' retired judge would make any decision in the Inquiry academic. The path the Inquiry would take under such a scenario is fraught with problems particularly in relation to the integrity of the Records at Issue and the

significant deviation from the inquiry process established under the *FOIP Act.* As stated *supra,* equally important is that it would be unfair to the Public Body because, were extraordinary procedural adjustments required to achieve fairness for the Applicants in the Inquiry process, these procedural accommodations could compromise the legal privilege the Public Body seeks to protect in its claim of legal privilege over the Records at Issue.

[para 170] The paramount concerns at this point in the Inquiry are first, to protect the integrity of the Records at Issue over which legal privilege has been claimed and second, to ensure fairness for all the parties. This means all parties: the Public Body to enable it to meet its burden of proving the exceptions on which it relies apply without placing the legal privilege it claims in jeopardy and, equally, the Applicants who are entitled to proffer evidence by way of rebuttal. To admit the Opinion Letter as evidence sets up a procedural quagmire in which either the privilege claimed by the Public Body could be compromised or the process for the Applicants destined to be unfair. This result would defeat the legislated purpose to provide for independent oversight under the *FOIP Act* to review decisions of public bodies. If public bodies were able to make access decisions, defend those decisions based on opinions from former judges and argue that is sufficient to dispose of the Inquiry, this would significantly erode the duties, powers and obligations of the Commissioner or her delegate disabling her from fulfilling her statutory mandate. Thus, to admit the Opinion Letter as evidence places the integrity of the oversight inquiry process given to the Commissioner, or her delegate, by the Legislative Assembly in peril and the governing legislation into disrepute. These, in conjunction with those factors discussed *supra*, are the compelling reasons on which I base the exercise of my discretion to decide the Opinion Letter is inadmissible.

VII. ORDER F2014-50

[para 171] By the powers granted in Part 5 and sections 56, 61, and 72 of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 [*FOIP Act*] and the *Public Inquiries Act*, R.S.A. 2000, c. P-39 vested in me by my delegation from the Commissioner, **I ORDER the Public Body to comply with its duty under the *FOIP Act,* pursuant to s. 56(3) and 72(3)(a) of the *FOIP Act*, to produce and to make available for examination the original or a copy of the Records at Issue to the External Adjudicator, pursuant to s. 56(2) of the *FOIP Act*.**

[para 172] The Records at Issue to be produced are limited to the Records at Issue for the Public Body in this Inquiry. Specifically, the Records at Issue that are the subject of this Order shall consist solely of the Records at Issue for Inquiry #F6525/#F6761 and shall not include any information or records that are part of any other inquiries.

[para 173] The Records at Issue to be provided should be a complete copy or the original of the Records at Issue, as agreed to by the Public Body at the time it agreed to the consolidation of Case Files #F6525 and #F6761. Pursuant to this Order, the Public Body is to provide an unredacted copy or the original Records at Issue and a copy of

the Records at Issue showing the redacted parts with the specific exceptions relied upon, as particularized in the Public Body's Index of the Records at Issue.

[para 174] The Public Body is under a duty to produce the Records at Issue as described herein to the Office of the Information and Privacy Commissioner for examination, pursuant to s. 56(3) of the *FOIP Act*. Alternatively, given the sensitive nature of the Records at Issue over which legal privilege has been claimed and the circumstances of this case the Public Body may consider it practicable to elect to rely on s. 56(4) of the *FOIP Act*. The External Adjudicator is willing to comply with any request forthcoming from the Public Body to examine the original or a copy of the Records at Issue, as described *supra*, at the Public Body's site, at a date mutually convenient to the Public Body and the External Adjudicator.

[para 175] The following is with respect to the time in which the Public Body has to comply with this Order. Section 56 of the *FOIP Act* imposes a duty on the Public Body to produce the Records at Issue for examination within 10 days. Section 72(3)(a) requires the Public Body to comply with an Order to perform a duty imposed by the *FOIP Act.* Section 74 of the *FOIP Act* prohibits the Public Body from taking any steps to comply with an Order of the Commissioner or her delegate until the period for bringing an application for judicial review has expired. Section 74(3) requires that an application for judicial review be made not later than 45 days after the person making the application is given a copy of the Order. Compliance with the timeline imposed by s. 56 of the *FOIP Act* would effectively preclude the Public Body or the Applicants from seeking relief by way of judicial review, to which they are entitled if they so choose, pursuant to s. 74 of the *FOIP Act.*

[para 176] **Therefore, I FURTHER ORDER** the Public Body to comply with this Order no later than 50 days from the day that the Public Body is given a copy of this Order by providing the original or a copy of the Records at Issue, as described *supra,* to the Office of the Information and Privacy Commissioner of Alberta or, alternatively, by notifying me in writing no later than 50 days from the day that the Public Body is given a copy of this Order that it is requesting that the original or a copy of the Records at Issue be viewed by the External Adjudicator at its site, at a mutually convenient time and date.

VIII. SUPPLEMENTARY MATTERS

1. NOTICE TO AFFECTED PARTIES

[para 177] I take the opportunity presented by Decision F2014-D-03 and Order F2014-50 to respond to the reference to affected parties in the Public Body's Initial Submissions. This is a matter that will arise as the Inquiry continues and the parties are entitled to understand how the Inquiry will proceed *vis a vis* affected parties.

[para 178] In its Initial Submissions the Public Body, states as follows:

> *Alberta Justice respectfully submits that, if there is any doubt about whether section 16 [or section 17] applies, all of the outside lawyers involved in this matter should be given notice of this Inquiry and be given the opportunity to make submissions about whether section 16 [or section 17] applies to the information relating to them.*
> *[Public Body's Initial Submissions, at paras. 59 and 62]*

[para 179] With respect that is only partially correct. The timing of when affected parties are identified, notified and thus drawn into an Inquiry is extremely important. Involving affected parties prematurely and perhaps unnecessarily is to be avoided.

[para 180] Section 30 of the *FOIP Act* provides for when a public body is to give notice to a third party, which reads as follows:

> *(1)* ***When the head of a public body is considering giving access to a record*** *that may contain information*
>
> *(a) that affects the interests of a third party under section 16, or*
>
> *(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> ***the head must, where practicable and as soon as practicable, give written notice to the third party*** *in accordance with subsection (4).*
> *[Emphasis added]*

[para 181] To date, no third parties have been given notice by the Public Body either prior to or during the Inquiry.

[para 182] Section 67 of the *FOIP Act* imposes a duty on the Commissioner to give notice to other affected persons, which reads as follows:

> *(1) On receiving a request for a review, the Commissioner must* ***as soon as practicable***
>
> *(a) give a copy of the request*
> *…*
> *(ii)* ***to any other person*** *who in the opinion of the Commissioner is affected by the request,*
> *[Emphasis added]*

[para 183] In the Notice of Inquiry at p. 6, I advised the parties as follows, with respect to affected parties:

> *Please note that I may identify affected parties during an inquiry and that none have been identified to date. I reserve the right to identify affected parties as the inquiry proceeds. Should affected parties be identified, the parties will be notified and an updated schedule will be provided.*

[para 184] For the portion of the Records at Issue where s. 27(1) of the *FOIP Act* is found not to apply, there may be affected parties identified in the Records at Issue who are entitled to notification under the *FOIP Act* where the Public Body has relied on another exception. Now this matter is at Inquiry, these affected parties can only be identified once the Records at Issue have been examined. To do so in advance of viewing the Records at Issue would be difficult, if not impossible and, in any event, premature.

[para 185] Notification to the affected parties is only *practicable* after the Records at Issue have been reviewed. Some of the potentially affected parties may be evident from the Applicants' access to information requests and the Public Body's Initial Submissions that included a copy of the Statement of Claim in the tobacco litigation.

> *The affected third party would therefore only be notified where the public body or the Commissioner had determined that all ss. 18-28 government operation non-disclosure considerations were invalid.*
> *[Alberta (Employment and Immigration) v Alberta Federation of Labour,* 2009 ABQB 344, at para. 53*]*

[para 186] The Public Body submits all affected parties should be given notice. With respect, that is correct but not totally accurate. The timing and necessity of doing so is critical. In order to identify ***all*** the affected parties, it is essential for me to view the Records at Issue. At that time, a determination will be made whether the Public Body has properly relied on and applied s. 27(1) of the *FOIP Act*.

[para 187] The determination of the applicability of the remaining exceptions claimed by the Public Body will be dependent on the outcome of this initial determination with respect to the applicability of legal privilege. Only after I determine that part or all of the Records at Issue could be disclosed [where s. 27(1) does not apply or has not been claimed by the Public Body] does the question of whether s. 16 [disclosure harmful to business interests of a third party] or 17 [disclosure unreasonable invasion of privacy] arise. If these exceptions have not been properly relied on and applied by the Public Body and that portion of the Records at Issue may be subject to disclosure, only then will Notice to the affected parties by the Commissioner or her delegate be required under the statute.

[para 188] Once the Public Body has complied with the Order with respect to producing the Records at Issue for examination, I will have the opportunity to examine the Records at Issue and determine whether some or all of the Records at Issue may be subject to an Order for the release of records. This determination can only be made after the examination of the Records at Issue reveals that the s. 24 exception does not

apply. Where s. 16 and/or s. 17 has also been claimed by the Public Body for these same Records at Issue, notification to affected parties will be required. In that case, as soon as is practicable, notice will be given to the affected parties and the following steps will be taken:

1. The External Adjudicator will prepare an Amended Notice of Inquiry.

2. Affected parties who have been identified from the contents of the Records at Issue will be given the Amended Notice of the Inquiry pursuant to s. 67 of the *FOIP Act*;

3. Affected parties who have been given the Amended Notice will be given the opportunity to make Submissions in the Inquiry pursuant to s. 69(3) of the *FOIP Act;*

4. A new schedule for the Submissions from the Applicants, the Public Body and the affected parties will be set, copies of which will be provided to all parties.

2. EXTENSION OF INQUIRY COMPLETION DATE

[para 189] By letter dated June 6, 2014, I extended the completion date of the Inquiry to January 30, 2015. During the Inquiry, specifically on August 14, 2014, an Applicant filed a motion in the form of a Preliminary Evidentiary Objection. The Inquiry submissions were placed on hold by agreement until the Preliminary Evidentiary Objection motion was decided. The Decision with respect to that motion has now been made *supra*. In order to allow sufficient time for the examination of the Records at Issue pursuant to this Order *supra*, the possible notification of affected parties, the outstanding Submissions from the parties including possible affected parties, and the time necessary to review those Submissions and make a Decision, an extension for the completion of the Inquiry is required.

[para 190] As permitted by s. 69(6) of the *FOIP Act* and the powers granted to me by my delegation, I am extending the time for completing the inquiry. The anticipated date for completion of the inquiry is now November 30, 2015.

DECISION F2014-D-03, ORDER F2014-50 and extension of Inquiry completion date duly signed:

_____

S. Dulcie McCallum, LL.B
External Adjudicator