

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2014-D-04 ORDER F2014-51

December 31, 2014

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Numbers F6420/F6747/F6843

Office URL: www.oipc.ab.ca

Summary: The Inquiry related to three separate requests from two separate Applicants 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 news releases and agreements (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 not to release any information in one access to information request and in the other two withheld most of the Records at Issue. The decisions to withhold were 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 some 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 all three matters, which was unsuccessful. The Applicants both filed Requests for Inquiry. By consent of the parties, the three Requests for Inquiry were consolidated into one Inquiry on the basis that the Public Body confirmed with the Commissioner that all of the Records at Issue were accounted for and included.

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.

In the Notice of Inquiry after identifying the Issues in the Inquiry, the External Adjudicator reserved the right to raise additional issues during the Inquiry. Upon receipt of the Public Body's Initial Submissions, the External Adjudicator raised a Preliminary Evidentiary Issue with respect to evidence that formed part of the Public Body's Initial Submissions. That evidence 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*. All of the parties were invited to make Initial and Rebuttal Submissions on the preliminary matter to the External Adjudicator, which they exchanged with each other. One Applicant elected not to make Submissions on the Preliminary Evidentiary Issue.

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 Issue.

The External Adjudicator made a Decision in which she found that 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 "expert" or 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, 21(1)(a), 24, 25, 25(1)(c)(i), 27, 27(1), 27(1)(a), 27(1)(b), 27(1)(c), 30, 32, 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 Mierzewski 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] In the Notice of Inquiry, I reserved the right to identify any issues during the Inquiry. As the External Adjudicator, the task before me at this time is to make a Decision with respect to the Preliminary Evidentiary Issue that I am raising after receiving the Initial Submissions from the Applicants and the Public Body.

[para 2] On August 22, 2014 all of the parties were notified of the Preliminary Evidentiary Issue. This issue arose after the Public Body's Initial Submissions in the Inquiry were received on August 6, 2014.

[para 3] In the notification letter, I requested that all the parties provide submissions on the following issue:

The Public Body has offered into Evidence as part of its Initial Submission a letter from a retired Court of Queen's Bench Justice dated July 2, 2014. The author of the letter report states "I have been retained by the Province, through its solicitor [Name of lawyer], Q.C., as a former Justice of the Alberta Court of Queen's Bench, 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 Preliminary Evidentiary Issue is whether or not the legal opinion letter [unsworn] from a retired Justice is admissible as evidence in the Inquiry.

[para 4] By correspondence dated October 8, 2014, I confirmed with all parties that the Rebuttal Submissions in the Inquiry were deferred until after the Preliminary Evidentiary Issue was concluded.

II. REFERENCES THROUGHOUT THE DECISION AND ORDER

[para 5] In its Initial Submissions in the Inquiry, the Public Body referred to the evidence as a "Letter Report." In its Response Submissions on the Preliminary Evidentiary Issue, 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 himself 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 Issue, as the "**Opinion Letter**."

[para 6] The Opinion Letter is a report prepared by a former judge. S/he will be referred to throughout as the "**author**." This Preliminary Evidentiary Issue 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 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 with respect to a Preliminary Evidentiary Issue I raised during the Inquiry, an overview of the history of the Inquiry to date is important to put the Preliminary Evidentiary Issue 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 the three 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 three 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 two separate requests with the Public Body. The first Applicant filed the first request to access information [#F6420] to the Public Body on June 12, 2012, which reads as follows:

We request copies of the following records in the custody or control of the Ministry of Justice and Solicitor General, for the time period beginning September 2005 and ending as of the date of this request:

- (a) all agreements between Alberta and Tobacco Recovery Lawyers LLP, or any member of that consortium;*
 - (b) all agreements between Alberta and any other law firms or lawyers retained to prosecute, or to assist in prosecuting, Alberta's lawsuit against tobacco manufacturers;*
 - (c) all agreements between Alberta and any other province or territory concerning Tobacco Recovery Lawyers LLP; and*
 - (d) all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers*
- (collectively, the "Agreements").*

We have made a broader but separate request for records in the custody or control of the Ministry of Justice and Solicitor General that relate [Emphasis in original] to the News Release and the Agreements.

On July 12, 2012, the Public Body made a decision with respect to the first request to access information from the first Applicant, which reads as follows:

35 pages of records were located in response to your request. Agreements were located in response to items (a) and (d). No records were located in response to items (b) and (c). Unfortunately, access to all the information that you requested is refused under sections 21, 25, and 27 of the Freedom of Information and Protection of Privacy Act.

Below is a list of the specific sections of the FOIP Act that were applied to the records responsive to your request.

Pages 1 to 14 - exempted in entirety under sections 25(1)(c)(i), 27(1)(a) and 27(1)(b).

Pages 15 to 35 - exempted in entirety under sections 21(1)(a)(i), 25(1)(c)(i), 27(1)(a) and 27(1)(b).

The first Applicant filed a second request to access information [#F6843] with the Public Body on June 12, 2012, which reads as follows:

For the time period beginning September 2005 and ending as of the date of this request, we request copies of all records (including, but not limited to, agendas, aide-memoires, analyses, authorizations, briefing books, briefing notes, costing data, diaries, drafts, emails, guidelines, instructions, letters, manuals, memos, minutes of meetings, notes, notes to file, opinions, policy statements, presentations, reports, research papers, rules, speeches, studies, travel claims and visit/travel reports) in the custody or control of the Ministry of

Justice and Solicitor General that relate [Emphasis in original] to the News Release or to any of the following records:

- (a) all agreements between Alberta and Tobacco Recovery Lawyers LLP, or any member of that consortium;*
 - (b) all agreements between Alberta and any other law firms or lawyers retained to prosecute, or to assist in prosecuting, Alberta's lawsuit against tobacco manufacturers;*
 - (c) all agreements between Alberta and any other province or territory concerning Tobacco Recovery Lawyers LLP; and*
 - (d) all agreements between Alberta and any other province or territory concerning lawsuits against tobacco manufacturers*
- (collectively, the "Agreements").*

We have made a separate request for copies of the Agreements in the custody or control of the Ministry of Justice and Solicitor General, which we accordingly exclude [Emphasis in original] from this request.

On December 17, 2012, the Public Body made a decision with respect to the second request to access information from the first Applicant, which reads as follows:

Some of the records requested contain information that is excepted from disclosure under Sections 16, 17, 21, 24, 25 and 27 of the Alberta Freedom of Information and Protection of Privacy (FOIP) 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 [#F6747] to the Public Body on December 7, 2012, which is summarized as follows:

*All records related to the contract tendering, selection process and request for proposal connected to the Government of Alberta's Tobacco Lawsuit;
Specific documents related to the contingency fee agreement by the province.
The bids submitted by law firms.*

On December 21, 2012, the Public Body made a decision with respect to the second Applicant's request to access information, which reads as follows:

Some of the records requested contain information that is excepted from disclosure under Sections 16, 17, 21, 24, 25 and 27 of the Alberta Freedom of

Information and Protection of Privacy (FOIP) 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 September 10, 2012, the first Applicant filed a Request for Review of the Public Body's decision to refuse access to all records responsive to [his or her] first request to access to information. On February 14, 2013, 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] second request to access to information.

On January 10, 2013, the second Applicant filed a Request for Review [#F6747] 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 [all] matters, however, this was not successful.

On June 25, 2013, the first Applicant filed a Request for Inquiry with respect to [his or her] first request to access information. On the same date, the first Applicant filed a Request for Inquiry with respect to [his or her] second request to access information. On June 7, 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 three Requests for Inquiry regarding the Public Body's decisions in response to the three requests to access information from the Applicants were consolidated into one inquiry provided that all of the records were included in the inquiry. 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 the three requests to access information, including all the exceptions claimed. I refer the Public Body to Appendix A of the Public Body's decision letter in #F6843 that lists the pages and sections of the FOIP Act applied, which Appendix 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 first Applicant provided his or her Initial Submission dated July 8, 2014 received on July 9, 2014. The second Applicant apologized for the unavoidable slight delay but confirmed in writing on July 10, 2014 that for the purpose of his or her Initial Submissions, s/he would be *relying on* [his or her] *previously submitted documents included in the Notice of Inquiry*. The Public Body provided its Initial Submission on August 6, 2014, in accordance with the schedule in the Notice of Inquiry.

[para 14] On August 22, 2014, I corresponded with all parties advising them I was raising a Preliminary Evidentiary Issue. The parties were advised that the dates for the Rebuttal Submissions in the Inquiry were postponed until after I received Submissions on Preliminary Evidentiary Issue from all parties and had the opportunity to consider the matter.

[para 15] All the parties were given the opportunity to submit their respective Initial and Rebuttal Submissions on the Preliminary Evidentiary Issue to the External Adjudicator and exchange these with each other.

IV. PARTIES' SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY ISSUE

[para 16] The submissions filed by the parties with respect to the Preliminary Evidentiary Issue 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 PUBLIC BODY'S INITIAL SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY ISSUE

[para 17] On September 12, 2014, the Public Body provided Initial Submissions with respect to the Preliminary Evidentiary Issue, a summary of which follows:

1. 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.
2. The Public Body further submits that relevance is also the test for admissibility of expert evidence in administrative proceedings.
3. The Public Body submits that the Opinion Letter is relevant to the issue in the Inquiry and, therefore, is admissible in evidence.

4. The Public Body submits that because the Applicants have not raised an objection to the admissibility of the Opinion Letter, it cannot address any such objection and will address it if necessary in its Rebuttal Submissions.

2. THE FIRST APPLICANT'S INITIAL SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY ISSUE

[para 18] On September 12, 2014, the first Applicant provided Initial Submissions with respect to the Preliminary Evidentiary Issue, a summary of which follows:

1. The Applicant submits that the Public Body has the burden to demonstrate admissibility and s/he, therefore, reserves the right to make further submissions in rebuttal.
2. The Applicant submits that the Opinion Letter is inadmissible because it does not meet the criteria for admissibility of expert opinion evidence. Referring to case law, the Applicant submits that the criteria for admissibility are as follows:
 - a. necessity meaning the opinion provides information that is outside the knowledge or expertise of the decision-maker
 - b. relevance including a determination that the benefits of the evidence outweigh the costs
 - c. expertise meaning that the author possesses some special knowledge and experience going beyond that of the trier of fact, and
 - d. the absence of an exclusionary rule.
3. Acknowledging that the criteria for expert opinion evidence are not binding on administrative decision-makers, the Applicant submits that they can nonetheless take guidance from them.
4. The Applicant submits that the Opinion Letter does not meet the criteria for the following reasons:
 - a. The Opinion Letter is neither necessary nor relevant. The analysis offered by the author is well within the External Adjudicator's area of knowledge and expertise. If admitted into evidence, the Opinion Letter would inappropriately usurp the role of the External Adjudicator by weighing in on the ultimate legal issue to be determined in the Inquiry. The risk is not outweighed by the benefits of the Opinion Letter given the External Adjudicator can just as easily draw the necessary conclusions.

- b. The author has no special knowledge or experience going beyond that of the External Adjudicator, who has significant experience adjudicating claims of privilege as the former Freedom of Information and Protection of Privacy Review Officer.
 - c. As a general rule, opinion evidence on matters of domestic law is inadmissible. In addition, much of the Opinion Letter could be characterized as legal argument as opposed to evidence and, as such, is inadmissible.
5. The Applicant concludes that on this basis *supra*, the Opinion Letter is inadmissible in the Inquiry.

3. THE SECOND APPLICANT'S INITIAL SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY ISSUE

[para 19] On September 17, 2014, the following was confirmed with the second Applicant by email:

1. On August 22, 2014, the second Applicant submitted his or her Rebuttal Submissions in the Inquiry by fax. The second Applicant confirmed that s/he did not intend these to be a submission on the Preliminary Evidentiary Issue.
2. Further, s/he confirmed that s/he did not intend to provide an Initial or Rebuttal Submission on the Preliminary Evidentiary Issue due on September 12, 2014 and September 26, 2014 respectively.
3. Further, the second Applicant confirmed s/he did not intend to provide any further Rebuttal Submissions in the Inquiry when the External Adjudicator resets the Rebuttal Submission Schedule in the Inquiry when the Preliminary Evidentiary Issue is concluded.

[para 20] By correspondence from the Commissioner's Office dated September 19, 2014, details of the position of the second Applicant were made known to all parties.

4. THE PUBLIC BODY'S REBUTTAL SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY ISSUE

[para 21] On September 26, 2014, the Public Body provided Rebuttal Submissions with respect to the Preliminary Evidentiary Issue, a summary of which follows:

1. 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 that affects the fairness of the proceedings may result in a decision being quashed. Thus, if there is any question as to relevance, the evidence should be admitted and the decision as to importance determined later.

2. The Public Body further submits that relevance is also the test for admissibility of expert evidence in administrative proceedings. Any frailties in the opinion or qualifications of the expert affects weight not admissibility.
3. The Public Body submits that the first Applicant does not dispute that relevance is the test for admissibility but has argued that the Opinion Letter is not relevant. The Public Body responds that this is not tenable as there can be no doubt that the Opinion Letter is relevant because it is about whether or not the Records at Issue are protected by solicitor-client privilege. The Public Body submits there is an inconsistency in the position of the first Applicant because s/he argues also that the Opinion Letter deals with the ultimate issue – it cannot deal simultaneously with the ultimate issue and be irrelevant.
4. The relevance of the Opinion Letter is, the Public Body submits, the complete answer to the Preliminary Evidentiary Issue.
5. With respect to the technical rules of evidence applicable in litigation, the Public Body submits that the first Applicant agrees these do not apply to administrative proceedings.
6. The Public Body submits that the first Applicant argues that administrative tribunals can take guidance from the technical rules of evidence and on that basis the Opinion Letter would not be admissible under the technical rules, to which the Public Body responds as follows:
 - a. The Public Body submits that the Opinion Letter is evidence about fact, not law. Suggesting there is no merit to the argument that the Opinion Letter is inadmissible because it provides evidence about the “*content of the domestic law of solicitor-client privilege*”, the Public Body submits that the Opinion Letter does not purport to provide expert evidence about what is the domestic law of solicitor-client privilege. Quoting the author, the Public Body emphasizes the question s/he had to answer was whether the Records at Issue [“Privileged Documents”] are in fact privileged. At this point, the Public Body submits that there is no issue in the Inquiry about what is the domestic law of solicitor-client privilege as the sole question is one of fact – that is, whether the Records at Issue relate to a communication for the purpose of seeking or providing legal advice. In preparing the Opinion Letter, it was necessary and appropriate for the author to state the law, the Public Body argues. Citing case law, the Public Body submits that an expert opinion which is about the proper construction of a law will be inadmissible but where it is an expert opinion about facts it should be found to be admissible. In any event, the Public Body argues there is authority for expert evidence about the content of domestic law being held to be admissible under the rules of evidence. The Public Body concludes that there is no merit to the objection that the technical rules of evidence would prevent the admissibility of the Opinion Letter on the basis that the expert evidence was

about the state of domestic law and would not be admissible in court proceedings.

- b. The Public Body submits that there is no merit to the claim that the Opinion Letter is inadmissible because it deals with the ultimate issue in the Inquiry.
7. The Public Body submits that an administrative tribunal has no discretion to exclude relevant evidence and bases that submission on the following:
- a. The former technical rule of evidence to exclude expert opinion evidence about the ultimate issue is no longer of general application even in litigation.
 - b. If the Opinion Letter were excluded on this basis it would mean the Public Body could not discharge its onus to provide proof to the issue at hand – the Applicants have no right of access – because all its other evidence attesting to whether the Records at Issue meet the requirements of solicitor-client privilege would have to be excluded. Such a ruling, it submits, would make the Inquiry process pointless.
 - c. Relying on case law it claims is directly applicable to the Opinion Letter, the Public Body cites a case where expert evidence should have been accepted by a commissioner even though it opined on the precise matter to be decided.
 - d. The Public Body submits that the first Applicant errs in submitting the Opinion Letter is not admissible because the External Adjudicator may have some knowledge and experience about solicitor-client privilege from her previous work. Apart from there being no evidence on the record about the External Adjudicator's previous work, this, it submits, is not the test of admissibility. The qualifications of the External Adjudicator to make a decision on the evidence does not determine admissibility of that evidence. The Public Body provides what it refers to as a simple example:

*Every day thousands of affidavits or records are filed in court that assert solicitor-client privilege. The fact that the court undoubtedly has expertise about solicitor-client privilege, and may ultimately have to make a ruling about whether solicitor-client privilege does apply to particular records, does not make those affidavits either unnecessary or inadmissible.
[Public Body's Rebuttal Submissions on the Preliminary Evidentiary Issue, at p. 8]*

8. The Public Body submits that it is clearly an error to exclude evidence which would have been admissible under the technical rules of evidence in litigation, which it claims the Opinion Letter meets. Even if the Opinion Letter did not meet the criteria, it submits there would have to be a compelling reason for an administrative tribunal to exclude relevant evidence. The Public Body claims that administrative tribunals do not have discretion to rule relevant evidence inadmissible.

9. The Public Body closes with a summary of the reasons why the Opinion Letter is admissible in the Inquiry:

- *The test for admissibility of evidence is relevance.*
- *The [Last name of retired judge] Report [Opinion Letter] is undoubtedly relevant to an issue in the Inquiry.*
- *The Inquiry is an administrative proceeding not governed by strict and technical rules of evidence applicable in litigation.*
- *Evidence may be admitted in administrative proceedings which might not be admissible as evidence in court proceedings, provided that 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 applicable to legislation.*
- *To the extent there is any issue about the [Last name of retired judge] Report [Opinion Letter] that issue goes to its weight and not its admissibility.*
[Public Body's Rebuttal Submissions on the Preliminary Evidentiary Issue, at p. 9]

5. THE FIRST APPLICANT'S REBUTTAL SUBMISSIONS ON THE PRELIMINARY EVIDENTIARY ISSUE

[para 22] The first Applicant elected not to file a Rebuttal Submission with respect to the Preliminary Evidentiary Issue.

V. DISCUSSION

1. INDEPENDENT OVERSIGHT AND DELEGATED POWERS

[para 23] 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 24] 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 (CA), at para. 28]
[Emphasis added]

[para 25] 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 26] 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 27] 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 28] 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 29] 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, and stated its preference that she delegate her functions to a retired judge, and confirmed the Records at Issue in the consolidated Inquiry [#F6420/#F6747/#F6843] were identical.

[para 30] On November 21, 2013 the second Applicant responded to the Commissioner's letter agreeing with her decision to recognize a potential conflict of interest regarding a named law firm. S/he also agreed that s. 75(1)(d) of the *FOIP Act* did not apply as the Commissioner's conflict of interest is not with the Public Body. The second Applicant went on to state that in any case s/he would not request nor accept a sitting judge from Alberta to adjudicate. The second Applicant recommended the case be adjudicated by a current Commissioner within Canada as they would be more up-to-date on knowledge of privacy and access to information and not a current or former judge who would lack the specialized knowledge that a Commissioner would possess. The second Applicant also agreed to the consolidation of his or her case file with those applicants who have made the same request particularly since to adjudicate them separately would be inefficient and redundant.

[para 31] On November 29, 2013 the first Applicant responded that his or her preference would be for the hearing of the Inquiry to be delegated to an individual in the private sector with expertise in access to information issues such as a former Information Commissioner or an adjudicator formerly employed by the federal information commissioner's office and not a current Commissioner. The first Applicant took no position with respect to s. 75(1)(d) of the *FOIP Act* but considered that it would be preferable and practical to have the Inquiry delegated to an individual with expertise in access to information issues rather than to a former or current judge. The first Applicant agreed to the proposal to consolidate both of his or her case files #F6420 and #F6843 on the condition s/he received assurances that the consolidation is done in a manner that ensures all of the responsive Records at Issue are accounted for and included in the Inquiry.

[para 32] On February 27, 2014 the Commissioner advised the parties that having received no objection to a delegation to a former Information and Privacy Commissioner provided the person was up-to-date, she was appointing me, the former Freedom of

Information and Protection of Privacy Review Officer for Nova Scotia (term ended within a month of the Commissioner's delegation) and the former Ombudsman for the Province of British Columbia, to be the External Adjudicator. The Commissioner confirmed that the Public Body had provided her with the assurances sought from the first Applicant that the Records at Issue in this Inquiry [the three Requests for Inquiry merged into Inquiry #F6420/#F6747/#F6843] were identical. The Commissioner also advised the parties that the deadline for completion of the Inquiry was extended to August 29, 2014.

[para 33] All parties received notification of my delegation and appointment as External Adjudicator to which there was no objection.

[para 34] 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 35] 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 F6420, F6747 and F6843.*
- *The power to require records to be produced, as set out under section 56 of the FOIP Act, for Case Files F6420, F6747 and F6843.*
- *Any other powers necessary and incidental to the power to conduct an inquiry and issue an order for Case Files F6420, F6747 and F6843 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 36] Sections 59(1) and 59(3) of the *FOIP Act* place a restrictive duty on the Commissioner, or anyone acting for her, regarding disclosure of information, which 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 37] 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 38] 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 39] 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 40] 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 41] 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 42] Section 56, specifically referred to in my delegation, emphasizes the importance of the sanctity of the Records at Issue, which 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 43] 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 44] 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 raising this Preliminary Evidentiary Issue, 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 Indices of the Records at Issue reveal 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 as other subsections have been specified.

[para 45] The second Applicant, in his or her Rebuttal Submissions in the Inquiry, represented that his or her primary concern and the reason s/he requested the Inquiry was because the Commissioner's Office had been denied the Records at Issue. The second Applicant's position in this regard may be as a result of something that became known to him or her 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 46] 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, **the 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 47] 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 48] 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 49] 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 50] 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 51] 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 52] Section 70 of the *FOIP Act* referred to therein sets out when the Commissioner can exercise her discretion not to conduct an Inquiry.

[para 53] 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 54] 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 55] 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 56] 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. I have raised a Preliminary Evidentiary Issue as to the admissibility of the Opinion Letter. In answering the Preliminary Evidentiary Issue, 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 57] 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 in the Inquiry, Tab 5: Opinion Letter, at p. 3]
[Emphasis added]*

[para 58] 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 59] 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 60] 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 in the Inquiry, Tab 5: Opinion Letter, at p. 3]

[para 61] 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 62] 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 the first Applicant in this Inquiry and letters from counsel who were denied access.

[para 63] 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 in the Inquiry, Tab 5: Opinion Letter, at p. 7]

[para 64] The author first refers to records that relate to this Inquiry [though one case file number is not part of this Inquiry]. The author goes on to refer to records in other inquiries that involve the same Public Body and one that involves another public body. In discussing the binder of records related to this Inquiry, at p. 8, the author refers to one of the Applicants in this Inquiry *by name*.

[para 65] Beginning at page 7 of the Opinion Letter, the following is the totality of how the author refers to the Records at Issue in this Inquiry:

IPC Inquiry #F6430 [sic], #F6843, #F6747

Parts 1 and 2 of Binder A – Justice documents

These two volumes consist of 1,901 pages of records contain [sic] the original and complete records from Justice.

The records pertain to retainer and contingency fee agreements with related correspondence and hard copy of electronic communications.

I am of the opinion that all of the above is privileged information under section 27(1) of FOIP.

Binder A – Justice documents (Blue)

This volume contains records from Justice which were either produced or are not in dispute.

Under Tab 5, we see a request for review by a [Name of one of the Applicants]. [The Applicant] says at page 4:

Given the nature of the requested records (which include internal agendas, analyses, authorizations, briefing notes, diaries, emails, letters, memos, presentations, travel claims and visit/travel reports), it is difficult to conceive how these two preconditions [the Solosky criteria: records must be communications between a lawyer and his or her client and entail a seeking or giving of legal advice] to solicitor-client privilege might be said to apply.

...

Further, as a matter of common sense, many aspects of the requested records (eg. travel claims) could not possibly touch on legal advice.

To state the obvious, a record can be privileged but of little substance.

*In the exercise of its discretion to withhold privileged records, **the Province has done so with much material which is not legal advice but which, in my view, entails “the seeking or giving of legal advice”**. Without the exercise of much skill in detection, even a travel claim could reveal the identity of the claimant, the lawyer who he was travelling to see, and the nature of the advice sought, if the lawyer happened to be a specialist.*

*[Public Body’s Initial Submissions in the Inquiry, Tab 5: Opinion Letter, at p. 7-8]
[Emphasis in titles in the original and other added]*

[para 66] The final paragraph in the Opinion Letter provides the author’s conclusion, which reads as follows:

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

This conclusion 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 in the Inquiry, at para. 34]

[Emphasis added]

[para 68] 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 69] I turn now to comment further on what is not in the Opinion Letter.

[para 70] 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 71] 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. Nor did the Public Body provide any credentials for the author in its Initial Submissions on the Preliminary Evidentiary Issue. In its Rebuttal Submissions on the Preliminary Evidentiary Issue, however, the Public Body merely alludes to the contested Opinion Letter as from an expert or as opinion evidence, without naming it as such directly.

[para 72] Likewise, there is no reference in the Public Body's Initial or Rebuttal Submissions on the Preliminary Evidentiary Issue 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.

3. RELEVANT FACTORS IN THE EXERCISE OF DISCRETION REGARDING 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 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 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 submitted by the Public Body and a part of a request for review from an Applicant in this Inquiry whom s/he refers to by name. 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 his or her expert or possibly another retired judge would have to be given to be on 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 Indices 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 records of another public body.
4. The conclusion the author reaches at the end of the Opinion Letter refers to the Records at Issue in this Inquiry and other records s/he discusses related to two other matters: “*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].*” The Indices of the Records at Issue clearly indicate that in this Inquiry the Public Body has claimed one or more subsections of s. 27(1) of the *FOIP Act* for every page of the Records at Issue. There are no pages where one or more subsections of s. 27(1) of the *FOIP Act* has not been claimed. The legal privilege has been claimed along with other exceptions including s. 16, 21, 24 and 25 for the Records at Issue. The only exceptions are where there has been a partial release [5 pages] and the Public Body’s Indices have not listed an exception or exceptions for the parts of those pages that have been severed.
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 about 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 Rebuttal Submissions on the Preliminary Evidentiary Issue in which it alludes to the Opinion Letter as expert and/or opinion evidence, the Public Body does not provide any evidence regarding the author’s expertise or the nature and extent of that expertise.
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 Indices of the Records at Issue clearly show 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) and not s. 27(1)(a) of the *FOIP Act*.

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 privilege exceptions to the Records at Issue. The Public Body submitted the Opinion Letter, the opinion evidence that is the subject of this Preliminary Evidentiary Issue, 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 Issue 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 Issue, 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 all the Records at Issue that have been withheld, except in the case of partial disclosure where the Public Body has not provided an exception for the portion it 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 Issue.

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 appointed under s. 75, the *FOIP Act* makes no provision for Records at Issue to be provided to a third person. 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 that 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 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 it 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 Can LII 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 of the 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 not to disclose the requested Agreements and Related Records, all of which relate to the ongoing tobacco-related health care costs recovery litigation.
[Public Body's Initial Submissions in the Inquiry, at para. 10]*

[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 to the Applicants over which it had claimed the legal privilege exceptions. 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] 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 103] 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? 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 104] How could the Applicants prepare an adequate rebuttal without the “expert” or retired judge of their choice having access to the Records at Issue? 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 105] If the Applicants seek access for their "expert" or 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" or retired judge having access to the Records at Issue that would guard against erosion of the legal privilege?

[para 106] 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 107] 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' "expert" or 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]

[Emphasis added]

[para 108] 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 109] 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 110] 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 111] 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 and applied the limited and specific exceptions.

[para 112] 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 113] 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 114] 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 115] 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 116] In its Initial Submissions on the Preliminary Evidentiary Issue, the Public Body submits that the only test in determining admissibility of evidence in all adjudicative contexts is whether the evidence is relevant to an issue at hand. In submitting this, the Public Body relies on the following:

The basic criterion for the admissibility of evidence is relevance. Relevant evidence is admissible; irrelevant evidence is inadmissible. Relevance is determined by the purpose and subject matter of the proceedings described in the notice of hearing or written allegations. Any evidence relevant to those matters is admissible.

[Public Body's Initial Submissions on the Preliminary Evidentiary Issue, at p. 1 citing Blake, Administrative Law in Canada, 4th ed., at p. 58]

[para 117] Relevance, the Public Body submits is also the test for admissibility of expert evidence in administrative proceedings, relying 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.

[Blake, at p. 60]

[para 118] The Public Body in its Rebuttal Submissions on the Preliminary Evidentiary Issue again reiterated that the test for admissibility in all adjudicative contexts is whether the evidence is relevant. Adding to what it relied on in its Initial Submissions on the Preliminary Evidentiary Issue, the Public Body cites the following:

If the failure to admit relevant evidence affects the fairness of the proceedings, the decision may be quashed. Accordingly, when in doubt as to relevance, it may be advisable to admit the evidence and decide later whether it has any importance to the matters to be decided.

...

The most important evidence is that which concerns the key facts on which the decision will turn. This is the evidence on which the tribunal should focus its attention.

[Blake, at p. 58]

[para 119] The Public Body submits that there can be no doubt the Opinion Letter is relevant to the issues in the Inquiry and is, therefore, admissible.

[para 120] At the conclusion of making its Initial Submissions on the Preliminary Evidentiary Issue, the Public Body took the position that as the Applicants had not raised an objection to the admissibility of the Opinion Letter, it would only address further if necessary. As a point of procedure, I make the following *obiter* observation. As the External Adjudicator, I exercised my discretion to raise the Preliminary

Evidentiary Issue. In the Notice of Inquiry, I notified the parties that I reserved the right to raise new issues. The issue relates directly to evidence submitted by the Public Body as part of its Initial Submissions in the Inquiry. In this instance, the first Applicant elected to respond with detailed submissions to which the Public Body responded with substantial Rebuttal Submissions and thus the procedural issue is moot. But as a point of procedure for future inquiries, it is important for the Public Body to note that it was not within its right to simply deflect responsibility for a response to the Applicants. As I raised the Preliminary Evidentiary Issue and it related solely to the admissibility of evidence it submitted in the Inquiry, the Public Body had the onus to respond fully in the first instance.

[para 121] In response to the Preliminary Evidentiary Issue, the first Applicant submits that the Opinion Letter is inadmissible because it fails to meet the criteria for admissibility, stating the criteria as follows:

As a general rule, expert opinion evidence is inadmissible unless it meets the following four criteria (the “Mohan criteria” specified in R. v. Mohan, [1994] 2 S.C.R. 9):

- i. necessity, in that it provides information outside the knowledge or expertise of the decision maker;*
 - ii. relevance, including a determination that the benefits of the evidence outweigh its costs;*
 - iii. expertise, in that the expert possesses special knowledge and experience going beyond that of the trier of fact; and*
 - iv. the absence of an exclusionary rule.*
- [First Applicant’s Initial Submissions on the Preliminary Evidentiary Issue, at p. 1-2]*

[para 122] The first Applicant acknowledges that the *Mohan* criteria are not binding on administrative decision-makers but submits that tribunals may take guidance from them. What follows is a summary of the reasons given by the first Applicant why the Opinion Letter does not meet the *Mohan* criteria:

1. The Opinion Letter is neither necessary nor relevant because the analysis regarding the application of legal privilege is well within the External Adjudicator’s knowledge and expertise. To permit the Opinion Letter would inappropriately usurp the role of the External Adjudicator by weighing in on the ultimate legal issue in the Inquiry. S/he submits the risk of the Opinion Letter usurping the role of the External Adjudicator is not outweighed by the benefits of the report.
2. The author of the Opinion Letter has no special knowledge or experience going beyond that of the External Adjudicator who has significant experience adjudicating claims of privilege as a former Freedom of Information and Protection of Privacy Review Officer.

3. A general rule is that opinion evidence on matters regarding domestic law are inadmissible. In addition, the Opinion Letter could be characterized as *legal argument as opposed to evidence and is inadmissible as such.*

[para 123] The Public Body provided a response to the first Applicant's Initial Submissions on the Preliminary Evidentiary Issue. While it re-asserts that the relevance of the Opinion Letter is the complete answer to the Preliminary Evidentiary Issue, the Public Body goes on to submit that the Opinion Letter is completely consistent with the technical rules. It begins by stating that the first Applicant *agrees that the technical rules of evidence applicable in litigation do not apply to administrative proceedings* relying on a Court of Appeal of Alberta case, which it quotes, a portion of which states:

This general rule applies even in the absence of specific legislative direction to that effect. While many statutes stipulate that a particular tribunal is not constrained by the rules of evidence applicable to courts of civil and criminal jurisdiction, "these various provisions do not however alter the common law; rather they reflect the common law position: in general, the normal rules of evidence do not apply to administrative tribunals and agencies"
[*Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276, at para. 64]

[para 124] The Public Body then cites a statute which it acknowledges does not apply to the Commissioner but which it submits reiterates the common law. As the statute cited does not apply to the Commissioner or her delegates, I find no need to consider the Public Body's reliance on the statute.

[para 125] With respect, the Public Body misstates the first Applicant's position regarding the applicability of the technical rules of evidence. What the first Applicant in fact states is that the technical rules are not binding on administrative decision-makers which is quite different than agreeing they do not apply.

[para 126] I fully 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)*, at para. 63]
[*Emphasis added*]

[para 127] As the 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 Issue. I turn now to that analysis.

[para 128] 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 129] 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 first Applicant submits:

*Although the Mohan criteria are not binding on administrative decision-makers, **administrative tribunals may nonetheless take guidance from them:***

[citations omitted]

[First Applicant’s Initial Submissions on the Preliminary Evidentiary Issue, at p. 2]

[Emphasis added]

[para 130] The technical rules for the admissibility of expert evidence have been laid out by the Supreme Court of Canada in *Mohan*. The first Applicant provided a complete submission *supra* on the criteria laid out in *Mohan*. For the purpose of my analysis it is useful to repeat the criteria for the admissibility of “expert” evidence *infra*. 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 Issue, 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 131] 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 132] Applying the *Mohan* criteria to the case at hand, I begin with the first criterion: relevance.

[para 133] 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 134] The Public Body submits the first Applicant does not dispute that relevance is a test for admissibility. Again with respect, the Public Body misstates the position of the first Applicant. What s/he submitted was that relevance is one of the criteria for admissibility not *the* test.

[para 135] 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 is 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 136] 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, the stakes associated with admitting the Opinion Letter are simply too high. 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 137] 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 138] As the first Applicant submits:

...the [Last name of retired judge] Report [Opinion Letter] (if admitted) would inappropriately usurp the role of the External Adjudicator by weighing in on the ultimate legal issue to be determined in this inquiry.

[First Applicant's Initial Submissions on the Preliminary Evidentiary Issue, at p. 2]

[para 139] The 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 the principle.

[Mohan, at p. 14-15]

[para 140] 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 141] Were the Applicants forced into a position of having to retain their own “expert” or 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]

[Emphasis added]

[para 142] 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 143] The Public Body submits the following as to what the issue is in the Inquiry:

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. In providing an opinion about that question of fact, it is entirely necessary and appropriate that the author of the [Last name of retired judge] Report [Opinion Letter] state the law.

[Public Body's Rebuttal Submissions on the Preliminary Evidentiary Issue, at p. 5]

[para 144] The first Applicant submits, as a general rule, opinion evidence on matters of domestic law is inadmissible. In other words, the first Applicant is proposing that the Opinion Letter is an opinion about the law. Courts have held that making a determination regarding legal privilege is a matter 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 145] 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 146] 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.

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 147] 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 148] 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 Issue 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 149] 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 150] On p. 5 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 151] 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:

Accordingly, Alberta Justice submits that all of the Agreements and all of the Related Records are protected by legal privilege.

This conclusion is confirmed by the report of the [Name of retired judge], a retired Justice of the Court of Queen's Bench, 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 in the Inquiry, at paras. 33-34]

[para 152] The Public Body provides the following summary with respect to legal privilege being the principal issue:

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 Rebuttal Submissions on the Preliminary Evidentiary Issue, at p. 5]

[para 153] The question put by the Public Body in its retainer with the author of the Opinion Letter was:

For greater certainty, my opinion is sought on the question of whether "the Privileged Documents" are in fact privileged. [Public Body's Initial Submissions in the Inquiry, Tab 5: Opinion Letter, at p. 3]

[para 154] The importance of determining what the ultimate issue is and whether or not the Opinion Letter seeks to answer it, is particularly important. The Public Body states:

If any part of section 27 applies to any record, it is not necessary to consider whether any of the other exceptions also applies to that record.
[Public Body's Initial Submissions in the Inquiry, at para. 55]
[Emphasis added]

[para 155] 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 156] 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. 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 157] In addressing the rule to exclude expert evidence with respect to the ultimate issue, the Supreme Court of Canada stated:

*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 158] The concern in this case is 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. By proffering up the Opinion Letter, the Public Body may 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 159] 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 160] 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 161] 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 162] 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 163] 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 164] 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 165] 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 Rebuttal Submissions on the Preliminary Evidentiary Issue, 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 166] 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.

[British Columbia Lottery Corporation v. Skelton, 2013 BCSC 12, at paras. 63, 64 and 67]

[Emphasis added]

[para 167] 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 168] While it submits *Skelton* is authority for the proposition that it is an error to exclude evidence that would be admissible under the technical rules of evidence, the Public Body has neglected to refer to the necessity criterion that the evidence be from a qualified expert.

[para 169] 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.

[para 170] With respect to the criterion of expertise, the first Applicant states:

Second, [Name of retired judge] [author] has no special knowledge or experience going beyond that of the External Adjudicator. Indeed, the External Adjudicator has significant experience adjudicating claims of privilege in the freedom of information context, including as Nova Scotia's Freedom of Information and Protection of Privacy Review Officer.

[First Applicant's Initial Submissions on the Preliminary Evidentiary Issue, at p. 2]

[para 171] In responding, the Public Body submits:

Finally, and with respect, [name of Applicant] errs in submitting that the [Last name of retired judge] Report [Opinion Letter] is not admissible because you as External Adjudicator may have some knowledge and experience about solicitor-client privilege from your previous work. Apart from the fact that there is no evidence on the record about the extent of your previous work, that is not the test for admissibility. The fact that an adjudicator has the qualifications to make a decision based on the evidence does not determine the admissibility of that evidence.

[Public Body's Rebuttal Submissions on the Preliminary Evidentiary Issue, at p. 8]

[para 172] With respect, the Public Body appears to have partly missed the point. On the one hand, the Public Body is correct that an External Adjudicator's competencies to decide a matter does not determine the admissibility of evidence. On this point, I agree with the Public Body. But on the other hand, the point the first Applicant was making is that it is necessary to qualify the author of the Opinion Letter as an expert in order to provide an opinion. The Public Body has failed to provide credentials for the author as to his or her expertise. Any evidence about whether the External Adjudicator *may have some knowledge and experience* or whether there is evidence *on the record about the extent of [my] previous work* is wholly irrelevant to the issue of whether or not the Public

Body has provided evidence that would qualify the author as an “expert” to provide an opinion.

[para 173] 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. And with respect, the Public Body did not make reference to the retired judge in the context of establishing him or her as an expert. In the result, the Public Body has not established the author as an expert or the Opinion Letter as expert evidence. Without establishing the author as an expert, the author’s opinion is unnecessary. As the *Skelton* Court stated: *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 174] 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 in 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 175] 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 176] The Public Body submits in its Rebuttal on the Preliminary Evidentiary Issue:

*Similarly, even if the [Last name of retired judge] Report [Opinion Letter] did not meet the Mohan criteria, there would have to be a **compelling reason** for an*

administrative tribunal to exclude relevant evidence. Administrative tribunals do not have discretion to rule that relevant evidence is inadmissible.
[Public Body's Rebuttal Submissions on the Preliminary Evidentiary Issue, at p. 9]
[Emphasis added]

VI. DECISION F2014-D-04

[para 177] I have the discretion to rule on the admissibility of evidence in the Inquiry. 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 find 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 in 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 “expert” or 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 “expert” or 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’ “expert” or 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 178] 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 F2014-51

[para 179] 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 180] 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 #F6420/#F6747/#F6843 and shall not include any information or records that are part of any other inquiries.

[para 181] 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 #F6420, #F6747 and #F6843. 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 Indices of the Records at Issue.

[para 182] 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 183] 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 184] **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 185] I take the opportunity presented by Decision F2014-D-04 and Order F2014-51 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 186] In its Initial Submissions the Public Body states as follows:

*Alberta Justice respectfully submits that, if there is any doubt about whether section 16 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 applies to the information relating to them.
[Public Body's Initial Submissions in the Inquiry, at para. 69]*

[para 187] 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, which will be discussed *infra*.

[para 188] First it is important to note that the Public Body has not provided any Initial Submissions on the s. 17 exception. Prior to my delegation, the Public Body confirmed with the Commissioner when the three inquiries were merged into one inquiry that the Records at Issue were identical, as a condition of the merger. In its decision in response to the first Applicant's initial access to information request, the Public Body did not rely on s. 17 of the *FOIP Act*. However, the Public Body did rely on s. 17 of the *FOIP Act* in its decision in response to the second access to information request from the first Applicant and in its decision in response to the first and only access to information request from the second Applicant. It is also important to note that there is no reference to s. 17 of the *FOIP Act* in the Indices of the Records at Issue. While no Initial Submissions from the Public Body have been received with respect to s. 17 of the *FOIP Act*, the Notice of Inquiry identifies an issue with respect to the s. 17 exception

based on two of the access to information decisions of the Public Body, which the Applicants take issue with in the Inquiry. The Public Body did not provide any comment on the Notice of Inquiry and its reference to s. 17. After an examination of the Records at Issue pursuant to my Order, this issue with respect to reliance or withdrawal of reliance on the s. 17 exception can be resolved. Having relied on the s. 17 exception in two of its decisions, which put it as an issue in the Notice of Inquiry, I consider this to be sufficient for me to give notification as required to any affected party whose personal privacy would be unreasonably invaded by the disclosure of any part of the Records at Issue. The onus is on the Public Body to make it clear during an Inquiry if it has elected to withdraw its reliance on any particular exception for redaction in whole or in part.

[para 189] 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 190] To date, no third parties have been given notice by the Public Body either prior to or during the Inquiry.

[para 191] Section 67 of the *FOIP Act* imposes a duty on the Commissioner to give notice to other affected persons, which reads as follows:

(a) *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 192] In the Notice of Inquiry, at p. 7, 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 193] 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 194] Notification to the affected parties is only *practicable* after the Records at Issue have been reviewed. Some of the potentially affected parties are evident from the Public Body's Initial Submissions in the Inquiry 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 195] 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 196] 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] does the question of whether s. 16 [disclosure harmful to business interests of a third party] or, if this exception is still an issue, s. 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 197] Once the Public Body has complied with the Order with respect to producing the Records at Issue for examination and I have had the opportunity to examine the Records at Issue, thereafter, as soon as is practicable, 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 198] By letter dated June 6, 2014, I extended the completion date of the Inquiry to January 30, 2015. During the Inquiry, specifically on August 22, 2014, I raised the Preliminary Evidentiary Issue. The Inquiry submissions were placed on hold by agreement until the Preliminary Evidentiary Issue was decided. The Decision with respect to that issue 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 199] 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-04, ORDER F2014-51 and extension of Inquiry completion date duly signed:

S. Dulcie McCallum, LL.B
External Adjudicator