ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION P2011-D-003

June 30, 2011

DAVIDSON AND WILLIAMS LLP

Case File Numbers P1472 and P1473

Office URL: www.oipc.ab.ca

Summary: Two Applicants made an access request to a law firm, under the *Personal Information Protection Act* ("PIPA" or "the Act") for their personal information, that had been contained in a client file created by the law firm in the course of representing a client who was opposed in interest to one of the Applicants during legal proceedings.

The law firm withheld all responsive records, relying upon section 24(2)(a) (information protected by solicitor/client or litigation privilege) and 24(2)(c) (information collected for an investigation or legal proceeding) of the Act. Subsequently, it took the position that all the information in the client file was subject to solicitor-client privilege.

The law firm and Law Society made preliminary arguments that the Commissioner should not conduct an inquiry in this matter, on the basis of section 4(5) of the Act (Act not to be applied so as to affect any legal privilege, or to limit information available by law to a party to a legal proceeding), as well as its idea that the applications were in themselves an abuse of process. They also relied on the decision of the Supreme Court of Canada in the *Blood Tribe* case. As well, they took the position that the Commissioner does not have the power to order the production to him for the purposes of determining the solicitor-client privilege claim, of records for which this claim had been made.

The Commissioner found that he had the jurisdiction and the obligation to review the law firm's responses to the Applicants, including its responses relative to records over which

it was claiming solicitor-client privilege. There was no other means by which this determination could be made.

However, he commented that while law firms are obliged to respond to access requests under PIPA, the only information available to requestors under this Act is their personal information, and that typically much of the information in the client file of an opposing party would not be personal information in the sense of being "about" the requestors even though the file related to legal matters in which they were involved. It is important for law firms to understand that they need to respond to applicants, and to decide which exceptions in the Act are applicable, only with respect to information that is actually responsive or possibly responsive to the request in the sense of being "about" requestors. Furthermore, most or all such information would in many cases be subject to exceptions in the Act, including solicitor-client privilege, litigation privilege, and information collected for a legal proceeding (though for the latter of these, law firms would still have to properly exercise their discretion in deciding whether to withhold such information).

The Commissioner also concluded that the wording of sections 38(1), (2), and (3) of the Act, which give him power to require production of records for his own review "notwithstanding any privilege of the law of evidence", permit him to require production of solicitor-client privileged records. However, he recognized that this must be done, in accordance with the substantive rule of confidentiality of solicitor-client communications that had been laid down by the Supreme Court of Canada, only in circumstances in which this is absolutely essential for him to perform his statutory duty, and only to the extent absolutely necessary. He found that the Solicitor-Client Adjudication Protocol of his office met the requirements of the substantive rule in this regard.

Accordingly, he ordered the law firm to respond in accordance with the Protocol for any records over which it was claiming solicitor-client privilege, and to provide for his review any records responsive or potentially responsive to the requests for which it was not claiming solicitor-client privilege – the latter to include records for which it was claiming litigation privilege but not solicitor-client privilege.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 4(1)(k), 4(3), 4(5), 24(1), 24(1.2), 24(2)(a), 24(2)(c), 38, 38(1), 38(2), 38(3), 38(5), 38.1, 41(3), 41(3.1), 41(3.2), 50, 50(1), 50(4)(b), 52, 52(6), 54, 54.1, 54.1(2); **CANADA:** *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ss. 12, 15.

Orders Cited: AB: 96-015**,** 96-017, 97-009, 2001-025, P2006-002, P2006-004, P2006-005, P2007-002, F2007-014, F2007-029, F2009-015.

Court Cases Cited: *Canada (M.N.R.) v. Coopers and Lybrand Ltd.* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *Canada v. Solosky*, [1980] 1 S.C.R. 821 (S.C.C.); *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Ct. J.)**;** *Canada (Information Commissioner) v. Canada (Minister of Environment),* [2000] F.C.J. No. 480 (C.A.); *Pritchard v. Ontario Human Rights Commission* [2004] S.C.J. No. 16 (S.C.C.); *Canada (Attorney General) v. Canada (Information Commissioner),* [2005] F.C.J. No. 926 (C.A.); *Blank v. Canada (Minister of*

Justice), [2006] S.C.J. No. 39 (S.C.C.); *Canada (Privacy Commissioner*) *v. Blood Tribe Department of Health*, [2008] S.C.J. No. 45; *Law Society of Saskatchewan v. Merchant* [2008] S.J. No. 623 (C.A.); *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, [2010] N.J. No. 52 (T.D.); *R. v. Ahmad*, [2011] S.C.J. No. 6.

Authorities Cited: R. Cross, *Cross on Evidence***,** 5th ed., 1979; EA. Driedger, *Construction of Statutes*, 2nd ed. (Butterworths: Toronto, 1983; Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*, *Carswell*, Chapter 24.

I. BACKGROUND

[para 1] On October 31, 2009, the Applicants made two separate requests to the organization, a law firm, each for their own personal information, under the *Personal Information Protection Act* ("PIPA" or "the Act"). The law firm had represented another individual in legal proceedings, in 2004 to 2008, relative to one of the Applicants; the law firm's client and the Applicant were opposed in interest in those proceedings. The Applicants had been married to one another, and the second Applicant was consequently affected by the proceedings. The law firm refused to provide any information to the Applicants, relying on the exceptions to disclosure in section 24(2)(a) (information protected by solicitor/client or litigation privilege) and 24(2)(c) (information collected for an investigation or legal proceeding) of the Act.

[para 2] The Applicants asked this office to review the law firm's decisions. Mediation was authorized, but was not successful, and the matter proceeded to inquiry.

[para 3] On July 30, 2010, this office asked the law firm to produce any records in its possession that were responsive to the requests and that were not protected by solicitor-client privilege, and to follow the office's Solicitor-Client Privilege Adjudication Protocol (the Protocol) with respect to any responsive records over which it was claiming solicitor-client privilege.

[para 4] On September 24, 2010, the law firm responded advising that all the documents sought by the Applicants were contained in a client file protected by solicitor-client privilege, and that the law firm was electing to refuse to provide these records. The law firm did not otherwise follow the steps set out in the Protocol.

[para 5] The Law Society of Alberta was invited to become an intervenor, and accepted this invitation.

[para 6] The Applicants provided initial and rebuttal submissions. The law firm and the Law Society provided initial submissions only.

II. INFORMATION AT ISSUE

[para 7] The information at issue is any personal information of the Applicants in the possession of the law firm.

III. ISSUES

[para 8] The issues stated in the Notices of inquiry were as follow:

1. Was the information in the withheld records, or any of it, responsive to the Applicant's request for the Applicant's personal information having regard to the definition of personal information in section 1(k) of the Act?

2. If yes, is the information or any of it excluded from the Act by the application of section 4(3)(k) of the Act (information in a court file)?

3. Is the Applicant's personal information in the Organization's custody or control?

4. If the Organization refused to provide access to the Applicant's personal information in its custody or control that is not excluded by section 4(3)(k), did it do so in accordance with section 24(2) (discretionary grounds for refusal)? In particular,

    a. Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the requested personal information or parts thereof?

    If "solicitor-client privilege" is asserted over any one or more of the records at issue please refer to the "Solicitor-Client Privilege Adjudication Protocol" available on our office's web site www.oipc.ab.ca .

    b. Did the Organization properly apply section 24(2)(c) of the Act (information collected for an investigation or legal proceeding) to the requested personal information or parts thereof?

IV. DISCUSSION OF ISSUES

[para 9] The law firm did not address most of the issues set out in the Notice of Inquiry. Instead, it made what it termed a preliminary argument that I should not conduct this inquiry, based on what it regards to be the correct interpretation of section 4(5) of PIPA, together with the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44.

[para 10] I do not accept this argument, for the reasons given below.

OUTLINE OF DISCUSSION

A. Jurisdiction to determine claims of solicitor-client privilege

1. The arguments under section 4(5) of the Act

[para 11] The law firm's and Law Society's first arguments relate to section 4(5) of the Act, which provides as follows:

> ***(5)*** *This Act is not to be applied so as to*
>
> *(a) affect any legal privilege,*
>
> *(b) limit the information available by law to a party to a legal proceeding, or*
>
> *(c) limit or affect the collection, use or disclosure of information that is the subject of trust conditions or undertakings to which a lawyer is subject.*

[para 12] The law firm argues that the presence of this provision indicates that "the *Act* is clearly intended to provide a zone of protection to the solicitor-client relationship and to prevent the very kind of applications that are before the Commissioner in these Inquiries".

[para 13] I agree that the Act protects against the requirement for disclosure of information subject to solicitor-client privilege, as well as to "any legal privilege", from access by a requestor. Section 24(2)(a) provides that an organization may refuse to provide such information on a request, and if on reviewing such a decision of an organization I agree that the information is so subject, I am to confirm the decision.

[para 14] However, the very fact that section 24(2)(a) is included as an exception to the duty generally imposed on organizations by the Act to provide access indicates that reviewing such decisions is an aspect of my function. Had the Act excluded information subject to solicitor-client privilege from the scope of the Act (as it does other categories of information under section 4(3)), the law firm might successfully argue that the Act "intended to prevent the very kind of applications" being made here. The Act did not do this; rather it placed the question of access to privileged information within the scope of the matters I am to address in a request for review of decisions of an organization. There is no other means under the Act, nor under the common law, by which I could refer the question of whether information is subject to privilege to the courts. I have no power to state a case to the court, and such a power exists only if granted by statute.[1] Furthermore, the Court is limited by section 54.1 (previously section 54) to reviewing my decisions on judicial review. Therefore, if I do not decide the question, I will have failed to perform a duty the Act requires me to perform.

[para 15] As noted, the law firm and Law Society rely on section 4(5) in support of their argument that I should not entertain this request for review. Section 4(5) says the Act is not to be applied so as to affect any legal privilege, nor limit the information available by law to a party to a legal proceeding.

[para 16] Section 4(5) certainly supports the position – also made clear by section 24(2)(a) - that organizations may withhold information subject to legal privilege. As well, it might be taken as an additional directive to me that I am not to order disclosure of privileged records.

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[1] See Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals* , Carswell, at Chapter 24 "Stated Case", para 1: "The right to [state a case] is found, if at all, in the enabling statute of the agency. If there is no provision, there is no right to state a case."

[para 17] As well, section 4(5) guides me as to how I am to interpret any of the other provisions in this Act so that in applying them, I do not affect a legal privilege. Thus, for example, if in addressing the application of section 24(2)(a), I were to decide to review an organization's exercise of discretion, and direct it to exercise discretion by taking into account factors which might require it to disclose information that was privileged, I might be applying the Act so as to affect a legal privilege. (As already decided in earlier orders of this office, the exercise of an organization's discretion under section 24(2)(a) is a matter that is not, on this account, reviewable. See Orders P2006-002; P2007-002.)

[para 18] However, the law firm and Law Society have not explained how they think any of the subsections of section 4(5) can be interpreted so as to "prevent requests" that are for disclosure of information in the file of the law firm's client (some of which may be subject to legal privilege).

[para 19] Possibly, the point is that if, in the course of making a determination as to whether a claim of privilege is justified, I require information over which the privilege is claimed to be produced to me, I am "affecting" the privilege insofar as the confidentiality in the information is breached when I review it for the purpose of making my decision – or that this might be said at least with respect to those records or information actually subject to privilege. This argument is in accord with statements of the Supreme Court of Canada in the *Blood Tribe* case (at para 21), where the Court said that compelled disclosure (in that case to the Federal Commissioner), even if not disclosed further, would constitute an infringement of confidentiality.

[para 20] However, section 38.1 of the Act states the following:

> *38.1 If a legal privilege, including solicitor-client privilege, applies to information disclosed to the Commissioner on the Commissioner's request under section 37.1 or section 38, the legal privilege is not affected by the disclosure.*

This provision has the effect, even if otherwise requiring records would involve "affecting" the privilege, that disclosing the records to me in response to my exercise of my powers to require them under section 38 does not "affect the privilege". Presumably, this provision was enacted precisely to clarify that section 4(5) is not to be taken as diminishing my power to require records under section 38 – in other words, to resolve any conflict between section 4(5) and section 38(3), in favour of giving full effect to 38(3). [2]

[para 21] Moreover, and of great significance in this case, it is by no means clear that all of the personal information of an access requestor that exists in the "client file" of a person whom a law firm has represented in some legal action or claim, in opposition to the requestor, is subject to legal privilege.

[2] Possibly as well, it is meant to clarify that providing privileged information to me is not to be taken as a waiver of the privilege as against others.

[para 22] It seems certain that some or much of it will be subject to solicitor-client privilege. Very likely much or all of the rest of it will at some time have been the subject of litigation privilege.

[para 23] At the same time, however, solicitor-client privilege covers only a very specific type of information, which was described by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. According to this decision, the evidence must establish, for each record, that:

> (a) There is a communication between a lawyer and the lawyer's client; and
> (b) The communication entails the giving or seeking of legal advice; and
> (c) The communication was intended to be confidential.

[para 24] In Order 96-017, the former Commissioner defined "legal advice" to include "a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications". In *Canada (Privacy Commissioner*) *v. Blood Tribe Department of Health*, 2008 SCC 44, the Supreme Court added that solicitor-client privilege is likely to cover any communications between a lawyer and a client where the lawyer is acting as a lawyer (see para 10).

[para 25] It seems unlikely that all the personal information of a requestor that exists in a client file would meet all the components of this test. To take an obvious example, it would not cover any correspondence from the access requestor or their counsel, sent during the course of litigation, to the law firm, among other reasons because this would not be a communication between a lawyer and a client, would not involve the seeking or giving of legal advice, and would not be provided in confidence.

[para 26] As for litigation privilege, this category covers information gathered by the law firm for the purposes of litigation, and is on this account likely to cover much or all of the information in a client file, including the personal information of the access requestor.[3] However, litigation privilege ceases when litigation concludes.[4]

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[3] As stated in Order 96-015 litigation privilege applies to papers and materials created or obtained by the client for a lawyer's use in existing or contemplated litigation, or created by a third party on behalf of the client for a lawyer's use in existing or contemplated litigation.

[4] This position was affirmed in *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39 (S.C.C.), in which the Supreme Court held (according to the summary) that:

> The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well. [para. 27] [paras. 33-39]

[para 27] On this account, any information in the client file that is not subject to solicitor-client privilege or is no longer, at this stage, subject to "legal privilege" (even though it may have been so subject at an earlier time) cannot be withheld under section 24(2)(a) or by reference to section 4(5). I have noted that the law firm provides evidence of a more current statement of claim by the second Applicant relating to an allegation of false misrepresentations during the initial proceedings, but it does not explain precisely how this might relate to any information that was collected for the purpose of litigation that has been concluded, or whether it meets the test for related litigation as set out in footnote 4.

[para 28] There is another factor that is equally key, to the outcome of this decision, as that mentioned in para 21. The law firm notes in its submission (under the "section 4(5)" heading) that the breadth of the requests made by the Applicants means that I should not interpret the Act in a way that results in the disclosure of any information from the client's file.

[para 29] I do not quite agree that the breadth of the request means that I should not order disclosure of any of the information. However, the law firm's point about the breadth of the request provides an opportunity for me to address the fact that under PIPA, an access request can only be for a person's own personal information, and in this and similar cases, what is properly regarded as the requestor's personal information does not by any means extend to what are likely to be the greatest parts of the file. I addressed a similar point in an earlier order, P2006-004. In that case, an individual had requested his own personal information from the Law Society. Much of the information in the Law Society's files consisted of its dealings with complaints the applicant had made against Law Society members. I said:

> 11 My jurisdiction over information requests under the Personal Information Protection Act is limited to access requests for personal information. Sections 24 and 46(1) of the Act combine to confer my jurisdiction. They provide:
>
> > 24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:
> >
> > (a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization; … .
> >
> > 46(1) An individual who makes a request to an organization respecting personal information about that individual may ask the Commissioner to review any decision, act or failure to act of the organization. [emphasis added]
>
> 12 The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore

> connected to them in some way - is not necessarily "about" that person. In this case, only a part of the information that the A/C asked for was information "about" him. Had he relied on PIPA to obtain information, he would not have received much of the information that was made available to him under the Legal Profession Act and the Rules created thereunder, or pursuant to the requirements of fairness.
>
> **...**
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> 18 I do not need to decide for the purpose of this inquiry precisely which parts of the information in the documents collected or created for the purpose of the complaint proceedings were "personal information" of the A/C, as that term is to be understood in PIPA. It is sufficient to say that there is a great deal of information in the documents that is not the A/C's personal information even though it was generated in consequence of his complaints. The latter includes information about the persons about whom he complained and their dealings with the A/C, information about other third parties and their dealings with the A/C, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process. As well, the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information.

[para 30] In my view, there is likely to be a close parallel between the type of information that is in the "client file" held by the law firm, and the type of information described in the paragraphs just quoted. The fact the file contains information related to one of the Applicants because he was the opposing party in the legal matters does not of itself make the information "about him". What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information, in contrast to information other than this type of information, that was generated or gathered by the law firm or its client for the purpose of pursuing the litigation. The point is that much or most of the latter may well not be the first Applicant's personal information even though it relates to a legal matter that involved him. An obvious example would be legal opinions given to the law firm's client as to how to deal with the litigation with the Applicant or associated legal matters. The way in which the law firm was advising its client and dealing with the legal matters may have affected the Applicants, but it was not "about" them in the sense meant by the definition of personal information in the Act. (This information would also be privileged, but the point here is that much or most of it would likely not be the Applicant's personal information within the definition of the term contained in the Act.)

[para 31] The same observation applies to information in the file relating to the other Applicant. Only information that is "about" her in this same sense can become the subject of an access request under PIPA.

[para 32] These observations are made to point out that if, which seems likely, there is information in the "client file" of the law firm's client that is not covered by solicitor-client privilege, or that is no longer covered by litigation privilege, it seems equally likely that much of it need not be disclosed to the Applicants in this access

request because it is not their personal information. (I say this despite the fact that the Law Society seems to concede the converse in its third bullet in para 19 of its submission.)

[para 33] It also follows, as I will discuss further below, that some of the information to which the Applicants are entitled under the Act may not be the sort of information to which they desire access, as it is known to them already, or if not, would not be of particular interest to them.

[para 34] I turn finally to the law firm's and Law Society's final point under the "section 4(5)" heading – that the law firm is collecting publicly available data, and that the collection does not make the data personal information. I am not sure in what sense the information being referred to here is "publicly available". If the reference is to information in court files, that information is excluded from the Act in any event under section 4(1)(k), and I have no jurisdiction over it. The organization also describes the information at issue in this paragraph as "data upon which the law firm relies to provide advice". Again, I am unsure precisely what data is being described in this way, but if it is information relative to which advice was given, the exception to disclosure on the basis of solicitor-client privilege (as well as the prohibition in section 4(5)) would cover this information.

2. Abuse of process

[para 35] I accept that as a statutory decision maker I have jurisdiction to take steps to ensure that the process afforded by PIPA is not abused.

[para 36] The law firm argues that it would be an abuse of process if the Applicants were using the right of access under PIPA to gain "a litigation advantage" in related lawsuits. It points to litigation recently commenced by the second Applicant in the companion file (on April 30, 2010) against the person who was (and it appears may still be) the law firm's client in the present matter.

[para 37] Earlier orders of this office have said that the fact that a person's motive for an access request is related to litigation, and that access is or may be available through the litigation process, does not detract from the an applicant's right to take advantage of the access rights in the FOIP Act. In Order F2009-015, the Adjudicator said:

> 66 The Affected Parties' combined rebuttal submission argues, under the heading of 17, that privacy rights are not (as the Applicant has suggested) diminished by commencing litigation, and that in any event it is the insurer and not the homeowners that is driving the litigation in this case. This submission also points out that the "rights of 'discovery' are granted and refined by the courts and legislation, in particular the *Alberta Rules of Court",* and points out in detail the ways in which the applicant can obtain information relevant to the litigation by way of the rules relating to expert evidence as

well as through examinations for discovery and affidavit of records processes (with the exception of privileged documents).

67 Former orders of this office have addressed this type of argument. For example, in Order 97-009, the former Commissioner said, at paras 97 and 98:

> The Act provides in section 3(a) that "This Act is in addition to and does not replace existing procedures for access to information or records." I was not referred to any authority, either in the Rules of Court or elsewhere, that would restrict an applicant to obtaining information only in the discovery process under the Rules of Court when the applicant has commenced that process in the court.
>
> In my view, the Freedom of Information and Protection of Privacy Act, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that same information. Furthermore, the Rules of Court do not affect my jurisdiction to apply the Act where there is an issue of whether information in the custody or control of a public body is subject to a privilege to which the Rules of Court may also apply.

The same point was made more recently by the current Commissioner in order F2007-029, at paras 55 to 57.

[para 38] In my view, this conclusion applies equally to access requests under PIPA. Furthermore, it is not clear to me that the litigation proceeding would involve taking an unfair advantage of information provided in response to the present access request.

[para 39] I have, in addition, considered the idea that it is an abuse of process for a person who is opposed in interest to an organization in legal proceedings to make an access request to the organization. I can see that there is something wrong with the idea that one party to proceedings should be able to require the other party to give it information, beyond that which must be given for the sake of fairness in the course of the proceedings. It is doubtless in part for this reason that PIPA contains an exception to the duty to provide access to information under section 24(2)(c), for information "collected for an investigation or a legal proceeding". However, that is an exception to the duty to give access, not an exclusion from the Act. Thus, the organization who receives such a request must still respond to it, and in withholding information under section 24(2)(c), it must exercise its discretion taking into account the purposes of the Act and the particular provision on which it is relying. Furthermore, under PIPA, requestors are, again, entitled only to their own personal information, with the result that it may not be so much an "abuse of process" that the request is made, as a waste of time and effort for both sides. To the extent this is so, it is to be hoped that once requestors and respondents are aware of the limited extent of their rights and obligations in this context, it may become unnecessary, over time, to deal with access requests that do not serve any useful purpose for requestors.

3. The argument of the Law Society regarding solicitor-client privilege

[para 40] The law firm relies on the submission of the Intervenor, the Law Society of Alberta, with respect to its position that I do not have power to compel the production of records over which a claim of solicitor-client privilege has been made in order to determine whether this claim is in my view appropriate, and as well that I do not have jurisdiction to make such a determination.

[para 41] The Law Society's argument with respect to whether I have power to adjudicate claims of solicitor-client privilege, and to compel documents over which privilege is claimed in order to make such decisions, is as follows:

> It is interesting to consider the construction of the *Act* around matters involving lawyers and their clients. Consider the following:
>
> - A lawyer retained by a client owes a fiduciary obligation to his client and is obliged to maintain professional competence
> - A key competence in files involving an opposing party is gathering information or conducting an investigation in order to provide informed and reliable legal advice to the client
> - Where a legal difference or dispute has arisen between the parties, invariably the information gathered by the lawyer is directly or indirectly information about the opposing party
> - The client is entitled to assert a claim of solicitor client privilege regarding matters arising from the relationship with the lawyer
> - Other forms of privilege arise during the course of some legal proceedings
> - Section 4(5) specifically limits the scope of the *Act* to exclude any impact on legal proceedings, trust conditions and undertakings
>
> In all of the circumstances it appears it was the intention of the legislature to craft this *Act* in a fashion that issues of solicitor client privilege are excluded from the jurisdiction of the Commissioner.
>
> The limits placed by section 4(5) coupled with the absence of any language giving authority to the Commissioner to determine privilege makes it clear the Commissioner lacks the jurisdiction to determine these matters.

[para 42] I do not disagree with the points in the bulleted list above (with the exception of that in the third bullet that describes the information referred to therein as "about" the opposing party). However, I do dispute that they suggest an intention of the legislature to exclude from my jurisdiction the decision as to whether solicitor-client privilege applies to records to which access is sought. As well, I disagree that there is no language in the Act giving me authority to determine privilege.

[para 43] Rather, as already discussed above, by including the fact that information is protected by "any legal privilege" as a ground on which an organization may refuse to provide access to personal information (in section 24(2)(a))[5], and by giving me authority to review decisions of organizations as to whether to provide access to information, and in conducting an inquiry to decide all questions of fact and law (section 50(1)), the legislature has expressly given me the power to determine whether information is or is not protected by "any legal privilege". The Act provides that the determination is to be made, but provides no other mechanism by which it is to be made. The scheme of the Act is clearly that I am to make it.

[para 44] In saying this I acknowledge that in the *Blood Tribe* case (which is discussed at greater length below), the Supreme Court of Canada said that determining whether solicitor-client privilege is properly claimed is a role that is reserved for the courts. However, in my view, that was not a general statement pertaining to *any* legislation dealing with solicitor-client privilege claims; rather it was meant to convey the factual situation in the case before it – in other words, the Court was referring to the fact that the federal Privacy Commissioner had only an investigative role relative to this issue, and that under the statutory scheme there being considered, only the Federal Court had the power to determine it finally.

B. The Commissioner's power to require the production of potentially solicitor-client privileged records

[para 45] I turn next to the question of whether I have power to require potentially solicitor-client privileged records for my review. Before beginning this discussion, I note that I have at this point not required production of any records over which solicitor-client privilege has been claimed, and may not need to do so if the law firm provides affidavit evidence that satisfies me that personal information of the requestor over which it is claiming solicitor-client privilege is so privileged in fact. However, as the law firm and the Law Society have made representations on the question of whether I have this power, and also because the answer informs the determination of whether I have jurisdiction to hear this case, as well as for the sake of efficiency should this question become important in the further course of this hearing, I will make a decision about it now.

1. Solicitor-client privilege as a rule of evidence

[para 46] The power under section 38 to require records to be produced in the course of conducting an investigation or inquiry applies "notwithstanding any privilege of the law of evidence". Section 38 states in part:

> *38(1) In conducting an investigation under section 36 or an inquiry under section 50, the Commissioner has all the powers, privileges and immunities of a*

[5] It cannot be contended that solicitor-client privilege is not a component of legal privilege in this list, because if that were so, there would be no basis in the Act for withholding such information on a request.

> *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 this Act.*
>
> *(3) Notwithstanding any other enactment or any privilege of the law of evidence, an organization must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).* [emphasis added]

[para 47] As I will explain further below, solicitor-client privilege is a privilege of the law of evidence. Therefore, the effect of the opening words of section 38(3) is, on its face, that I may require the production of solicitor-client privileged records.

2. *The substantive rule relating to the confidentiality of solicitor-client communications*

[para 48] However, as I will also explain more fully below, the confidentiality of solicitor-client communications also has a broader dimension which is manifested in the law in other ways. The suggestion has been made in some court decisions that the fact that the privilege has "evolved into a substantive rule" may have the effect that language such as "notwithstanding any privilege of the law of evidence" cannot be taken to permit records subject to solicitor-client privilege to be required for review. Indeed, I will discuss a case below (with which I disagree) that has reached this very conclusion.[6]

[para 49] To respond to this contention, it is necessary to first examine the privilege as a rule of evidence, as well as the nature and scope of the substantive rule relating to the confidentiality of solicitor-client communications, and to consider the relationship between the two.

[para 50] In the *Solosky* case, the Supreme Court explained that privilege, as a rule of evidence, is "a shield to prevent privileged materials from being tendered in evidence in a court room" and arises whenever there is an "evidentiary connection" such as when a search warrant is executed to seize documents believed to "afford evidence" (at 757-758).

[para 51] In *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.), the Supreme Court of Canada similarly explained this evidentiary rule by quoting from *Cross on Evidence*:

> " … confidential communications passing between a client and his legal adviser need not be given in evidence by the client and, without the client's consent, may not be given in evidence by the legal adviser in a judicial proceeding" (at 605).

[6] *Newfoundland Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner),* [2010] N.J. No. 52 (T.D.) is discussed below at paras 81 *et. seq.*.

[para 52] Solicitor-client privilege, as a rule of evidence, means that, absent statutory authority and constitutional considerations, privileged documents cannot be compelled or admitted for evidentiary purposes in legal proceedings.

[para 53] In the *Descôteaux* case, the Supreme Court of Canada also set out the four-part *substantive rule* relating to breach of the confidentiality of solicitor-client communications. In this part of the decision, Lamer, J. was commenting on the reasoning of Dixon, J. in the *Solosky* case. In Justice Lamer's view, Justice Dixon had applied the substantive rule without formulating it. Justice Lamer proceeded to formulate the rule. He stated:

> It is quite apparent that the Court in that case applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court.[7] The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.
>
> It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:
>
> > 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 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.

[para 54] Based on the foregoing, the substantive rule arises in any context in which the exercise of legal rights would interfere with the confidentiality of solicitor-client communications, or in which a law gives someone the authority to do something which could interfere with that confidentiality.[8] The rule provides that confidentiality will

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[7] The issue in *Solosky* was whether privilege, as a rule of substance, prevented corrections officers from routinely opening mail between inmates and their lawyers. Privilege as a rule of evidence was not engaged because the conduct was not aimed at obtaining or affording evidence in a proceeding, but at protecting the security of other inmates and employees (*Descôteaux*, at 603-605).

[8] The broader rule of substance applies to records described by Justice Dixon in the *Solosky* case as containing the elements that give rise to the application of solicitor-client privilege – that is, there is a communication between a lawyer and a client, which entails the giving or seeking of legal advice, and was intended to be confidential.

prevail relative to such records if there is no law providing otherwise. If a law allows such interference in either of the situations described in the second and third elements of the rule, it is to be interpreted restrictively. As well, where the law gives authority to someone to so interfere, it is to be done only to the extent absolutely necessary.

[para 55] The substantive rule was described in a similar fashion in the judgment of the the Federal Court of Appeal in the *Blood Tribe* case ([2006] F.C.J. No. 1544) (which was affirmed by the Supreme Court of Canada), as follows:

> In 1982, the Supreme Court of Canada in *Descôteaux et al. v. Mierzwinski …,* established a substantive rule for solicitor-client privilege, which provides some guidance on the proper interpretation of a statutory power to compel the production of records. First, solicitor-client privilege will protect a record regardless of the legal setting where the competing right arises; there need not be a pending legal proceeding. Second, where a law or statute creates a right purporting to permit access to a privileged communication, the right of privilege should be given precedence. Third, a law which expressly authorizes interference with the privilege is to be circumscribed by a procedure that avoids unnecessary violation of the privilege and ensures any violation is minimized. Finally, any such statutory power must be interpreted restrictively (at page 875). [emphasis added]

[para 56] In the present circumstances, solicitor-client privilege *in its form as a rule of evidence* – which would preclude requiring potentially privileged information as evidence in this proceeding – is countered by the phrase "notwithstanding any privilege of the law of evidence" in section 38(3) of the Act. By the inclusion of this phrase, information that is subject to privilege, which according to the way this phrase is normally understood in legal discourse, includes solicitor-client privilege[9], may nonetheless be required by the Commissioner under section 38 without offending the privilege *as a rule of evidence*. In other words, PIPA abrogates this evidentiary privilege.

3. The operation of the substantive rule in the present circumstances

[para 57] However, that does not end the matter, because the substantive rule described above applies to this situation: where the law has conferred the authority on someone to do something – require solicitor-client privileged documents – that might interfere with the confidentiality of solicitor-client communications. The question I must answer is how the substantive rule applies in relation to section 38.

[para 58] Before discussing this question I note that its fourth element has been formulated by the Supreme Court of Canada somewhat differently in different cases.

[para 59] In its original formulation by Justice Lamer in the *Descôteaux* case, the fourth element includes the following aspect: "… enabling legislation referred to in

[9] I will discuss below why in my view this phrase necessarily encompasses solicitor-client privilege as a rule of evidence.

paragraph 3 [which is where the law gives someone the authority to do something which, in the circumstances of the case, might interfere with confidentiality] must be interpreted restrictively".[10]

[para 60] This formulation presupposes that the "enabling legislation" does confer the authority to interfere with the confidentiality of solicitor-client communications. Thus it is the *authority to interfere* that, according to the fourth element, is to be interpreted restrictively.[11]

[para 61] However, in the *Blood Tribe* decision, which is discussed extensively below, Binnie, J. put the rule somewhat differently. He 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.

[para 62] In contrast to what Justice Lamer said, this formulation indicates that particular legislative authority which could be interpreted as embracing the authority to

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[10] The directive in the fourth element of the rule, to interpret restrictively, also applies to "acts providing otherwise" under the second element – that is, acts that derogate from the protection for confidentiality in situations in which the exercise of a right might require interference with confidentiality. However, in the present circumstance, I believe we are dealing with the situation described in the third element rather than in the second (though potentially the two circumstances could overlap).

[11] This point was recognized by the Saskatchewan Court of Appeal in *Law Society of Saskatchewan v. Merchant* [2008] S.J. No. 623 at para 43, where it said:

> 42 The principle of protecting communications between a client and his or her lawyer has long been established as a fundamental feature of the legal system and as being critical for the proper administration of justice. Nonetheless, at least at this point in the evolution of the law, solicitor-client privilege does not have a status which renders it immune to legislative limitation. Subject to the possibility of *Charter of Rights and Freedoms* or other constitutional considerations not argued or relied on by the respondents, Parliament or a provincial legislature, by choosing appropriate statutory language, can restrict solicitor-client privilege or authorize its breach. Thus, for example, in *Solosky v. The Queen, supra*, the Supreme Court recognized that the Penitentiary Service Regulations and a Commissioner's Directive empowered the head of a prison to inspect and read correspondence, including privileged correspondence, in order to ensure the safety and security of the institution.
>
> 43 The "absolutely necessary" concept introduced in *Solosky v. The Queen*, and formalized in *Descôteaux v. Mierzwinski*, presupposes that solicitor-client privilege is subject to statutory limitation. In other words, it does not purport to deny legislative authority to interfere with privilege but, rather, prescribes how the authority to limit privilege must be exercised. This is readily apparent from the language used by Lamer J. in *Descôteaux v. Mierzwinski* itself which, for ease of reference, is repeated below:
>
> > 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.

However, the Court did not explain what it thought was meant by the directive of the Supreme Court of Canada set out in the fourth element of the substantive rule – that the enabling legislation in question must be interpreted restrictively.

interfere with confidentiality (if broadly construed) is not to be broadly construed. In other words, if a narrow interpretation results in the position that there will be no ability to interfere with the confidentiality of solicitor-client communications, that is the proper interpretation and the proper result.[12]

a. Restrictive interpretation of the legislation

[para 63] One implication of applying the substantive rule is that the legislation which, in the words of the third element, "in the circumstances of the case, might interfere with confidentiality" – in this case section 38 – is, according to the fourth element, to be interpreted restrictively.

[para 64] As already noted, in the abstract, the idea of a "restrictive interpretation" can be applied to two different questions. First, a restrictive interpretation can be applied to determine whether a given power is to be understood as encompassing the power to interfere with solicitor-client confidentiality. Second, a *given power* to interfere with solicitor-client confidentiality (this assumes such a power to exist) can be interpreted restrictively.

[para 65] As to the first question, arguably a restrictive interpretation of the power under section 38 could involve interpreting "notwithstanding any privilege of the law of evidence" as excluding solicitor-client privilege, in its form as a rule of evidence, from the ambit of the phrase - with the consequence that I would be empowered to require records subject to other privileges of the law of evidence, but not this one.

[para 66] However, before a phrase can be interpreted restrictively, its language must be capable of being interpreted in a restrictive manner. In the present circumstances, I do not believe the phrase "any privilege of the law of evidence" is susceptible of an interpretation such that one of the privileges of the law of evidence is excluded. To say that it was would be the same as saying that the term 'primary colours' can be "restrictively interpreted" as excluding yellow or blue. In other words, I do not believe that a restrictive interpretation can be done so as to deprive language of its ordinary meaning, or to deprive categories of their well-understood content, at least not without some associated legislative language that clearly mandates this. While the Supreme Court of Canada has said that "[o]pen-textured language governing production of documents will be read not to include solicitor-client documents"[13], the language in the phrase at issue – "notwithstanding any privilege of the law of evidence" is not "open-textured" in the sense that it is capable of bearing an interpretation that excludes solicitor-client privilege as a rule of evidence. Rather it indicates, clearly, precisely and unequivocally,

[12] As well, in *Pritchard v. Ontario Human Rights Commission* [2004] S.C.J. No. 16, Major, J. expressed the rule as "[l]egislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively". While this formulation does not in itself make it entirely clear which of the two earlier formulations of the rule was being adopted, the result of the case was that the legislation was held to not have conferred the power to abrogate the privilege.

[13] This statement is found in para 11 of the *Blood Tribe* decision.

that records can be required despite *any* privilege of the law of evidence which, as a matter of the established use of the phrase in legal language, includes solicitor-client privilege.

[para 67] I note that in *Pritchard v. Ontario Human Rights Commission* [2004] S.C.J. No. 16, the Supreme Court of Canada held that the phrase "the record of the proceedings" in the context of section 10 of the *Judicial Review Procedure Act* of Ontario did not, in compliance with the demand for a restrictive interpretation, include privileged communications from a lawyer to the body whose decision was being reviewed.[14] However, in that case, nothing was suggested which would have (had it not been for the substantive rule) clearly led to the contrary conclusion that "record of the proceedings" did include legal opinions given to the adjudicative body. In fact, the Court noted that "the relevant statutory provision" did not "stipulate that the 'record' includes legal opinions". In contrast, in the present circumstances, there is ample authority for the position that solicitor-client privilege is a privilege of the law of evidence.

[para 68] As well, in *Law Society of Saskatchewan v. Merchant* [2008] S.J. No. 623 (C.A.), the Court held that language less clearly evincing the intention to abrogate privilege than that in section 38(3) was effective to do so. After quoting from the *Pritchard* case just cited, the Court said:

> The wording of s. 63(1) of *The Legal Profession Act, 1990*, considered in its statutory context, clearly reveals a legislative intention that the Law Society be empowered to demand access to material subject to solicitor-client privilege. The phrase "... any of a member's records or other property ...", when used in reference to the professional activities of a lawyer, must necessarily include privileged material.[15]

[para 69] I turn to the idea that the phrase "any privilege of the law of evidence" in section 38 should be "restrictively interpreted" so as to exclude solicitor-client privilege on account of the long line of authorities to the effect that solicitor-client privilege has evolved to a fundamental rule of substance. As described above, the four-part rule set out by Justice Lamer is a 'rule of substance'. However, this rule of substance is not that confidentiality of solicitor-client privilege is necessarily to be maintained; rather, the rule is that confidentiality is to prevail if there is no law otherwise, *but if there is a law*

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[14] Section 10 provided:

> 10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

I will deal below with the particular statutory authorization that was the subject of the *Blood Tribe* decision.

[15] Section 63(1) provided:

> 63(1) Every member and every person who keeps any of a member's records or other property shall comply with a demand of a person designated by the benchers to produce <u>any of the member's records or other property</u> that the person designated by the benchers reasonably believes are required for the purposes of an investigation pursuant to this Act. [Emphasis added by the Court]

otherwise, the rule governs how that law is to be exercised, and interpreted. In other words, there is no necessary conflict between permitting abrogation of the privilege (as section 38 does) and the rule of substance. The phrase "notwithstanding any privilege of the law of evidence" does not purport to, nor could it, interfere with this substantive rule – it interferes only with the privilege *in its form as a rule of evidence*, (and only to the extent that it permits me to review the records). There is nothing in the language of section 38 to prevent the substantive rule from operating – in the overarching way that it is meant to and ought to do – by limiting the way in which the statutory power to interfere with the privilege that is set out in section 38 is exercised (in accordance with the third element of the rule stated by Lamer, J. in *Descôteaux*). As well, there is nothing to prevent section 38 from being given any restrictive interpretation that it is capable of bearing. Thus, it does not follow, from the existence of the substantive rule, that section 38 must be interpreted as incapable of authorizing the production of solicitor-client privileged records.

[para 70] Furthermore, as I will discuss further below, "restrictively interpreting" the phrase such that I would be unable to require production of solicitor-client privileged records for my review would preclude performance by me of a duty that the Legislature has obliged me to perform.

[para 71] Finally – though this point is not essential to my conclusion – section 38.1 of PIPA makes perfectly clear the intention of the Legislature that section 38(3) encompasses solicitor-client privilege. Section 38.1, states:

> *38.1 If a legal privilege, including solicitor-client privilege, applies to information disclosed to the Commissioner on the Commissioner's request under section 37.1 or 38, the legal privilege is not affected by the disclosure.*

This is an added indicator that "privilege of the law of evidence" was intended by the legislature to include solicitor-client privilege (and exclude the operation of that privilege for the purposes of section 38(1) and (2)). Otherwise, section 38.1 would have no scope for operation. While this point involves deriving an abrogation of the privilege by inference, (which, as already noted, courts have warned against in some circumstances) it is an inescapable inference. I will return to the idea of inferring the power to require solicitor-client privileged information (from the necessity of having it in order to perform my mandatory duties) at para 92 below.

[para 72] The second type of "restrictive interpretation" that has been discussed by the courts in relation to the fourth element of the substantive rule involves interpreting a statutory power that *does interfere* with solicitor-client confidentiality *in a restrictive manner*. The wording of the rule suggests that this idea is distinct from the one (expressed in the third element) that such a power is to be exercised only when, and only to the extent, that is absolutely necessary, since the two ideas are expressed in different parts of the rule (the former in the fourth and the latter in the third). However, the two

ideas have been taken as interchangeable.[16] As I can think of no other way in which section 38 can be restrictively interpreted, possibly treating the exercise of the power in accordance with the third element – which, as I will discuss next, is in my view accomplished by this office's Solicitor-Client Privilege Adjudication Protocol - satisfies the requirement for restrictive interpretation of section 38.

b. Exercise of the authority to require production only as absolutely necessary

[para 73] The second implication or consequence of applying the substantive rule is that I am, in accordance with the third element of the substantive rule as stated by Lamer, J. in *Descôteaux*, obliged to exercise the power such that I would require or compel potentially privileged information only when deciding to do so was absolutely necessary to perform my statutory function, and would require the information only to the extent it was absolutely necessary. This aspect of the rule presents no obstacle to my process. The Solicitor-Client Privilege Adjudication Protocol developed by my office ensures that all other available means of obtaining the evidence necessary for making the determination I am to make are exhausted before records will be required. As well, since there is no mechanism in the statute or common law for a court to make the determination, I must make it to perform my statutory function. Thus, the requirements under the third element of the rule are met.

[para 74] I acknowledge that the Protocol creates a mechanism whereby production of records will be unnecessary in many cases, since the respondents will often be willing and able to provide information by way of affidavit that satisfies the adjudicator that privilege is properly claimed. However, there may be cases in which a respondent is unwilling to do this or lacks the resources to do it. Arguably, in such situations, I may make a decision without compelling records, on the basis that the organization has failed to discharge its onus under section 51 of the Act to show that the record was properly withheld. However, if I were to do this, it would potentially put me in the position of ordering the disclosure of records that are privileged in fact, and organizations may not have the desire or resources to judicially review such a decision – with the unacceptable consequence that privileged records would be disclosed. Thus, in my view, the power to require the records for review is absolutely necessary, in the last resort, to the proper performance of my function

4. Cases dealing with language similar to the opening words in section 38(3)

[para 75] I find some support for the conclusions reached above as (as to how the privilege and the substantive rule apply given the opening words of section 38(3)) in a decision of the Federal Court of Appeal, in which the Court commented on language in federal legislation very similar to the language at issue in section 38(3).

[16] This was the case in *Canada (Attorney General) v. Canada (Information Commissioner),* [2005] F.C.J. No. 926 (C.A.), which I discuss further below.

[para 76] In *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] F.C.J. No. 926 (C.A.), the Court considered section 36(2) of the *Access to Information Act*, R.S.C. 1985, c. A-1, which provides:

> *36(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any compliant under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.*

The parties in that case had agreed that section 36(2) allowed the Federal Information Commissioner to order the production of documents over which privilege was claimed when those documents were the subject of an access request and the organization refused access based on privilege. The Federal Court did not take issue with the parties' agreement to this effect. However, the Court appeared to agree with the argument of the appellant (the Attorney General) that while the Commissioner has the ability to compel the disclosure of records that had been requested under the Act despite any claim of privilege, "beyond, this, subsection 36(2) must be interpreted restrictively and … solicitor-client privilege should only be interfered with to the extent absolutely necessary in order to achieve the ends sought by the Act".

[para 77] The record in question was not one which had been the subject of the access request, but rather was a legal advice memorandum prepared to provide legal advice relating to the access to information requests. The Commissioner regarded this memorandum as relevant to his investigation. The Court held that in the circumstances, this record was not one that it was absolutely necessary for the Commissioner to examine in order to complete his investigation of the complaint. The Court said:

> In my analysis, the Commissioner's use of the powers granted to him under paragraph 36(1)(a) and subsection 36(2) of the Act to obtain the confidential legal advice memorandum interferes with solicitor-client privilege in a manner that is unnecessary for the achievement of the enabling legislation. Applying the foregoing Supreme Court of Canada jurisprudence, subsection 36(2) must be interpreted restrictively in order to allow access to privileged information only where absolutely necessary to the statutory power being exercised. (See *Lavallee*, at paragraph 18; *Maranda v. Richer*, [2003] 3 S.C.R. 193, at paragraph 16; and *Pritchard*, at paragraph 33.)

[para 78] The Court's application of the substantive rule in this case seems to involve a blending of the third and fourth elements of the rule as stated by Lamer, J. in *Descôteaux*, in that the Court describes as a "restrictive interpretation" (which is referred to in the fourth element) the kind of limiting of the exercise of the power that is described in the third element.

[para 79] It is also not clear whether the Court meant that had the record in question been one of the records subject to the access request, the Court would have agreed with the parties that it would necessarily have been one which the Commissioner would have the power to examine, or whether in the Court's view, even if it had been such a record,

the Commissioner would have to consider before requiring it whether he absolutely needed to examine it in order to make his determination.[17]

[para 80] Either way, the case stands for the idea that the substantive rule relating to the confidentiality of solicitor-client communications is intended to operate, in part, as an overlay over a statutory provision (in that case, section 36(2)) that allows the compulsion of solicitor-client privileged records. Given that there might be other means by which the determination can be made besides actually examining solicitor-client privileged records for which access has been requested – for example, by following a procedure such as that set out in this office's Solicitor-Client Privilege Adjudication Protocol – in my view the substantive rule can and ought to be applied also in relation to records that are the subject of access requests.[18]

[para 81] I turn to *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, [2010] N.J. No. 52 (T.D.), which held that language very similar to "notwithstanding any privilege of the law of evidence" did not have the effect of permitting the Commissioner in Newfoundland and Labrador to require records that are potentially subject to solicitor-client privilege as part of his power to require the production of records relevant to an investigation. With respect, I do not agree with part of the reasoning in this decision.

[para 82] I begin by noting that this case was based in part on the fact that, like PIPEDA, the Newfoundland legislation provides for an informal dispute resolution process, failing which the Commissioner can make recommendations, but not binding orders (ss. 46, 49). Unlike the Alberta Commissioner, the Newfoundland Commissioner is not an adjudicator and does not have order making powers. Thus, the ability of the Newfoundland Commissioner to verify privilege claims is questionable according to a key aspect of the *Blood Tribe* analysis in which the Supreme Court held that the power to require production of solicitor-client records depends on the function of finally resolving claims of the privilege.

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[17] The Court said, at para 14: "The appellants accept that the Commissioner, when confronted with a refusal to disclose a record requested under the Act based on a section 23 exemption, must be able to review the record and verify that the exemption is properly claimed, and that subsection 36(2) provides the Commissioner with the authority to do so." However, while the Court did not take issue with this position, neither did it clearly adopt it.

[18] An earlier Federal Court of Appeal decision dealing with section 36(2) of the federal *Access to Information Act* does not provide much assistance. In *Canada (Information Commissioner) v. Canada (Minister of Environment)*, [2000] F.C.J. No. 480 (C.A.) (leave to appeal dismissed: [2000] S.C.C.A. No. 275), the Federal Court of Appeal considered both section 36(2), and a similar provision (which also included the "notwithstanding any privilege" phrase, in the same legislation (section 46). The latter provision gave an examination power to the Court for the purpose of any proceedings before the Court arising from applications for access. The Court said of *the Court's* power to examine under section 46 that with respect to examination of material over which solicitor-client privilege is claimed, "the obstacle of privilege is eliminated by the clear wording" (para. 14). However, the Court did not pronounce directly on the parallel provision (section 36(2)) that gives a similar power to the Information Commissioner to examine records to which the act applies.

[para 83] Nevertheless, the part of the case dealing with the interpretation of the words "notwithstanding … a privilege under the law of evidence" is more closely on point. The Newfoundland and Labrador Supreme Court held that the phrase should be interpreted restrictively so as to remove solicitor-client privilege from its ambit, with the result that the Commissioner was held not to have the power to compel records subject to solicitor-client privilege. While the Court's conclusion in this case is not binding on me, its reasoning has some persuasive effect. However, it is this part of the Court's reasoning with which I disagree.

[para 84] In reaching its conclusion, the Court canvassed the historical development of solicitor-client privilege, as well as the cases in which it was developed into a broader substantive rule. However, the Court seemed to overlook the part of the substantive rule that operates, *in situations in which the evidentiary rule had been abrogated so as to permit interference*, by requiring the power to so interfere to be exercised in a narrow manner. Rather, it seemed to regard the broader rule as operating only so as to require that the legislation be interpreted as precluding interference with the privilege altogether.

[para 85] As noted earlier, while the original formulation of the substantive rule did not seem to contemplate doing this, later formulations did suggest that it could be done. The question remains whether it is appropriate to do so when the legislation contains the phrase, as it did in that case, "notwithstanding any privilege of the law of evidence".

[para 86] The Newfoundland Court based its view that the phrase should be interpreted so as not to permit encroachment of the privilege in part on its idea that solicitor-client privilege as a rule of evidence is *an aspect of* the substantive rule. It said, at para 38:

> Solicitor-client privilege is a rule of substance; a broad concept of which one aspect is its application as a rule of evidence. The rule of evidence is not mutually exclusive from the rule of substance; rather, solicitor-client privilege as a rule of evidence is inclusive within its existence as a rule of substance.[19]

[para 87] Based on its idea that the substantive rule encompassed the narrower rule of evidence, the Court concluded that the language used by the legislature – "notwithstanding … a privilege of the law of evidence" – could not be understood as ousting "the privilege as a substantive legal right". The Court seemed to regard this as something the legislation would have to accomplish before it could be taken to empower the Commissioner to require the production of solicitor-client privileged records. The Court said, at para 72:

> Even if the language of section 52(3) could be so broadly construed as to allow "incursions on solicitor-client privilege" (*Blood Tribe)*, section 52(3) must be interpreted restrictively (see *Blood Tribe* and *Descôteaux).* A restrictive interpretation leads to the finding that section 52(3) lacks the specificity required to abrogate the privilege. It does

[19] This conclusion seems to overlook that the Supreme Court expressed the rule of evidence and the substantive rule as both evolving, at different times, from the underlying right to confidentiality in solicitor-client communications, which contradicts the idea that the rule of evidence is a sub-component of the rule of substance.

> not "clearly or unequivocally express an intention to abrogate solicitor-client privilege" (see *R. v. Pritchard*, at paragraph 35). The words used in section 52(3) only capture an aspect of solicitor-client privilege. Referring solely to one aspect of the privilege (i.e. its application as a rule of evidence) does not permit an interpretation extending the language to capture the fullness of the privilege as a substantive legal right. If the legislature had specifically referenced solicitor-client privilege, and had not restricted the language of s. 52(3) to privileges which are merely "under the law of evidence", the Commissioner's interpretation may well have been accepted.

[para 88] It is true that statutory language that authorizes encroachment on solicitor-client privilege as a rule of evidence cannot be taken as authorizing encroachment on the rule of substance. However, as I have already discussed above, it does not follow that the phrase is ineffective to do that which it is limited in its intention to do - ousting the privilege *as a rule of evidence*. Rather, its very effectiveness in doing this is what triggers the operation of the aspect of the rule of substance which directs how the power to encroach is to be exercised. In other words, a very significant aspect of the substantive rule is meant to be applied where the narrower rule of evidence is – as in this case – abrogated by statute. Thus, in my view, it does not follow from the fact that only the privilege *as a rule of evidence* was abrogated by the phrase, that the phrase must be regarded as excluding solicitor-client privilege as a rule of evidence.

[para 89] I note further that the Newfoundland Court said that to adopt the interpretation put forward by the Commissioner in that case "would mean ignoring the law established by the Supreme Court of Canada as it relates to restrictively interpreting statutory language that may, if broadly construed, encroach upon solicitor-client privilege (*Blood Tribe* and *Descôteaux*)".

[para 90] The full extension of this point of view would be that any language that might encroach upon solicitor-client privilege is to be interpreted so as not to have this effect. Clearly, that is not the case, since a significant aspect of the substantive rule directs how such encroaching powers are to be exercised. Thus, the "restrictive interpretation" is not necessarily to be done. In my view, it is to be done only in relation to language that is capable of a narrow interpretation without violating its clear meaning. As I have already explained above, the phrase "any privilege of the law of evidence" is not in my view "open-textured" or "general" such that it is susceptible of an interpretation narrower than one that includes all established privileges of the law of evidence. Solicitor-client privilege is a key privilege of the law of evidence. While there might be some other way of "restrictively interpreting" the phrase, depriving it of the content that it naturally bears would not properly be described as "restrictively interpreting" it.

[para 91] For the foregoing reasons, I decline to apply this aspect of the decision in this case.

5. The production power as integral to the scheme of the Act

[para 92] Even if PIPA did not explicitly grant the power to order production of information for which privilege is claimed for evidentiary purposes, in my view, the statute as a whole reflects the Legislature's intent that the Commissioner verify that an organization has properly claimed privilege, and that in some circumstances verification will require a production order.

[para 93] As the Supreme Court of Canada has said on numerous occasions, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (quoting EA. Driedger, *Construction of Statutes*, 2nd ed. (Butterworths: Toronto, 1983) at 87, recently quoted in *R. v. Ahmad*, [2011] S.C.J. No. 6 at para. 28).

[para 94] A contextual analysis of PIPA indicates that the Legislature intended that the Commissioner be able to verify a privilege claim, as doing so is necessary to fulfill his statutory mandate. The purpose of PIPA is to protect personal information by holding organizations accountable in their collection, use and disclosure of personal information The right of an individual to find out what information organizations have about them and what they are doing with that information is key to enabling individuals to take steps to ensure the privacy rights that are established by the Act are not being violated. As well, it provides an opportunity for the individual to have erroneous information corrected. To this end, the Legislature has created the Commissioner's office, given him the power to adjudicate complaints and access requests, and entrusted him to verify that an organization has properly claimed a statutory exception to disclosure, including the statutory exception based on privilege. The Legislature has made clear that the Court's role under the Act is restricted to judicially reviewing the Commissioner's decisions and orders.

[para 95] Verification of an organization's claim that a record is not subject to disclosure is necessary given that organizations may, inadvertently or even intentionally, mischaracterize the nature of a record. For example, in the following cases, adjudicators in this office have found that a claim that records were privileged was unfounded: Orders 2001-025, P2006-005, F2007-014.

[para 96] Thus, by establishing the Commissioner as an independent and impartial adjudicator to verify whether an organization has properly claimed a statutory exception to disclosure, the Legislature has fulfilled the key purpose of the Act. An organization's refusal to disclose information to an applicant based on the exception in section 24(2)(a) of PIPA is exactly the kind of decision the Legislature has entrusted the Commissioner to review. Fulfilling his statutory mandate requires the Commissioner to be able to verify that all statutory exceptions, including those based on privilege, are properly claimed. There is no other means by which such determinations can be made.

6. The impact of the Blood Tribe case

[para 97] The Law Society's submission also includes the observation that the Solicitor-Client Privilege Adjudication Protocol of this office "argues that the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner*) *v. Blood Tribe Department of Health*, 2008 SCC 44 ("Blood Tribe") does not apply in Alberta as the statutory framework of [PIPA] differs from is Federal equivalent". Following this observation, the Law Society states that it "continues to dispute the jurisdiction of the Commissioner to adjudicate these matters".

[para 98] In the *Blood Tribe* decision, the Supreme Court of Canada held that the federal Privacy Commissioner does not have the power to review claims of solicitor-client privilege with respect to disputed documents or to compel the production of documents over which privilege is claimed for the purpose of reviewing them.

[para 99] The Protocol summarizes how this office has interpreted the effect of that decision, as follows:

> Although this Protocol has been prepared in response to the Supreme Court's *Blood Tribe* decision, the Commissioner notes that the statutory regime and procedural context in which he operates differs from that of the Privacy Commissioner of Canada in several fundamental respects. The Commissioner is an adjudicator of disputed claims over legal rights and has order-making power similar to that of a court. Further, an order of the Commissioner is final and becomes enforceable as an order of the Court of Queen's Bench upon being filed with the Court. Unlike the Privacy Commissioner of Canada, the Commissioner is empowered to compel production "[d]espite any other enactment or any privilege of the law of evidence…". Finally, the Commissioner does not routinely compel production of information over which solicitor-client privilege is claimed; rather, he does so only on a case-by-case basis, when the party claiming the privilege fails to present adequate evidence of it and/or when opposing, persuasive evidence or argument has been presented to him that, in either circumstance, necessitates production in order for him to fairly decide the issue. Importantly, the Commissioner only compels production to the extent absolutely necessary in exceptional cases.

[para 100] The Law Society's observation seems to suggest that it disagrees with this interpretation of *Blood Tribe*, but it does not explain why it disagrees. Despite this however, I will set out in more detail the reasons for my interpretation of the effect of the *Blood Tribe* case on my jurisdiction to decide whether solicitor-client privilege applies to records, and on my ability to compel records over which privilege is claimed.

[para 101] In my view, the *Blood Tribe* case is distinguishable, for the following reasons.

[para 102] In *Blood Tribe*, the Supreme Court did not make a blanket prohibition against all Information and Privacy Commissioners' reviewing potentially privileged documents to verify whether a claim of privilege is properly asserted. Rather, the Court limited its decision to the Federal Commissioner operating under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"). In

doing so, the Court based its conclusions on features of PIPEDA which are distinguishable from those in PIPA. As is explored in more detail below, consideration of these factors, as well as the specific wording of PIPA, leads to the conclusion that the *Blood Tribe* decision is inapplicable.

[para 103] As the Court noted in *Blood Tribe*, under PIPEDA, the Federal Privacy Commissioner can become adverse in interest to the party claiming the privilege. That is, under section 15 of PIPEDA, the Federal Commissioner is not the final adjudicator of requests for access to information, but may appear before the Court on behalf of any complainant who has applied for a hearing under that Act. Thus, in *Blood Tribe* the Supreme Court expressed its concern that privileged documents inspected by the Federal Commissioner could ultimately be used against the party claiming the privilege. In contrast, under PIPA, the Commissioner is the final decision maker for access requests; there is no parallel process to that in PIPEDA, and therefore no possibility for the Commissioner to become adverse in interest to the party claiming privilege.

[para 104] The Supreme Court also noted its concern that the Privacy Commissioner under PIPEDA could share compelled privileged information with prosecutorial authorities if the information relates to commission of an offence, without court order or the consent of the party from whom the information was compelled. That is explicitly not the case under PIPA. Although the Commissioner has the same ability to share information relating to commission of an offence, section 41(3.2) of PIPA specifically excludes from the relevant provision information subject to solicitor-client privilege. Further, in my view, this provision is added for certainty only, since the same conclusion could be reached by reference to the fact that the provision permitting the Commissioner to share information with prosecutorial authorities (section 41(3.1)) does not contain a clause that specifically ousts the privilege as a rule of evidence. Since such a clause is found in section 38, the "expressio unius" maxim dictates that section 41(3.1) was not meant to operate regardless of the privilege.

[para 105] Another significant point of distinction relates to the whether there is any alternative mechanism by which a claim of privilege can be adjudicated. In *Blood Tribe*, the Supreme Court pointed to the ability of the Commissioner to refer a question of solicitor-client privilege to the Federal Court under section 18.3(1) of the *Federal Courts Act*, as well as to section 15 of PIPEDA, which the Court regarded as another mechanism under which the Commissioner could bring an application to have such an issue resolved. There is no such provision in PIPA, nor any of which I am aware in any other Alberta legislation. As well, I have no power to state a case. The result is that if I do not make the types of decisions in question here, there is no mechanism by which they can be made, I will fail in my duty, and applicants and respondents will have no means for resolving their rights respecting personal information potentially subject to the privilege.

[para 106] I turn to the key consideration in the *Blood Tribe* case that under PIPEDA, the Federal Commissioner can make only recommendations, not binding orders, and thus is not an adjudicator. The Court said that the power to review documents over which

privilege is claimed primarily derives from the power to adjudicate disputed claims over legal rights. It stated:

> … a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.

[para 107] In contrast to the Federal Commissioner, the Alberta Commissioner is a quasi-judicial adjudicator. In *Canada (M.N.R.) v. Coopers and Lybrand Ltd.* (1978), 92 D.L.R. (3d) 1 (S.C.C.) the Supreme Court of Canada set out a non-exhaustive list of factors for determining whether a tribunal is quasi-judicial:

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
> (at pp. 6-8)

[para 108] Applying the *Coopers* factors, PIPA provides for an inquiry where both the applicant and the organization, as opposing parties, are given an opportunity to make representations to the Commissioner, either independently or through a lawyer or agent (section 50). It is through this process that the Commissioner determines whether an organization has properly denied a right of access. Thus, the rights of individuals and organizations are directly affected by the Commissioner's decisions. During the course of an inquiry, the Commissioner has powers similar to those of a court in that he can require the production of a record and determine all questions of fact and law (sections 38 and 50). The Commissioner applies the rules set out in the legislation and precedents to the individual cases that come before him. At the conclusion of the inquiry, the Commissioner is bound to make an order determining the parties' rights under the Act and does not become an advocate for either party (section 52). Finally, the Commissioner's orders may be filed and enforced as orders or judgments of the Court of Queen's Bench and are subject to judicial review (sections 52(6), 54.1).

[para 109] Not only is my function adjudicative, but my office is established for the very purpose of determining whether personal information is properly dealt with and exceptions to the right of access to this information are properly claimed. The question of whether disputed records are excepted from the duty to provide access because they are, for example, privileged, is not preliminary or tangential to the use of the record for some

other purpose; it is precisely that issue (among others) that my office was established to determine.

[para 110] I acknowledge that in the *Blood Tribe* decision, the Court used language suggesting that in order for a statutory authorization to require records to be properly interpreted as including the power to require production of potentially solicitor-client privileged records, the power must "specifically indicate that the production must include records for which solicitor-client privilege is claimed". This might be taken to mean that the authorizing statute would have to explicitly mention "solicitor-client privilege". However, a close examination of the Court's assessment of the statutory authorization at issue in the case reveals that the absence of a specific reference to "solicitor-client privilege" was not the reason that particular language did not meet the Court's test. What was missing from the conferral of authority was not these particular words, but rather the ability to require production of solicitor-client privileged records in the absence of the function – of finally determining solicitor-client privilege claims – with which the power to compel such records was necessarily associated. The Court decided that the words employed in the authorizing provision did not confer the power to order production in the absence of the authority to make such decisions.

[para 111] The authorizing provision at issue in *Blood Tribe* was section 12 of PIPEDA, which gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record". The Supreme Court did not regard this language as sufficiently broad to permit the Commissioner to require solicitor-client privileged documents for the purpose of determining whether the privilege was properly claimed. It said this was a "general production provision" which lacked the specific indication that that production ordered by the Commissioner must include records for which solicitor-client privilege is claimed.

[para 112] Superior courts of record adjudicate privilege claims, and thus have the authority to compel privileged records, including solicitor-client privileged ones. Still, the Supreme Court said that the words giving the power to compel records "in the same manner and to the same extent as a superior court of record" did not give the Privacy Commissioner the power to compel potentially solicitor-client privileged records.

[para 113] As already stated, it was key to the Court's decision that the Federal Privacy Commissioner did not have the power to finally determine whether the privilege claim was proper, but that she was merely an investigator with powers to recommend. The Court said (at para 22) that

> "… the court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights".

On the basis of this reasoning, the Federal Privacy Commissioner, in performing her investigative function, is not enabled by section 12 to compel production of solicitor-client privileged records "in the same manner and to the same extent as" a court of record can, because she does not perform the function that forms the basis of the court's power to require records.

[para 114] To put this another way, the general words of section 12 give the Federal Commissioner the power to compel records that a court of record has, to the extent that she performs functions parallel to those of a court of record. The general words are given specific content by the nature of the function being performed. Unless they adjudicate, tribunals cannot derive a power, from such general language, that is possessed by the courts not by reference to statute, but by virtue of their adjudication function. Conversely, both courts and tribunals have powers to require production of records which are essential to the performance of their duties, and are thereby derived therefrom as a matter of necessity.

[para 115] Similarly, while the Supreme Court reiterated in *Blood Tribe* its statement from earlier cases that an abrogation of the privilege cannot be achieved through inference, I believe that this is meant to apply to inferences where other contrary inferences are also possible in the circumstances. Where, as in this case, the inference is inescapable because without it I am unable to exercise statutory powers that I am obliged to exercise, I believe I am permitted to draw it. The same point applies, in my view, to the Court's statement that express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. I believe that express words that make it essential for me to pierce the privilege, in the sense that doing so is absolutely necessary for performing my statutory duties, meet the Court's test.

[para 116] Further, in contrast to the legislation at issue in *Blood Tribe*, my power to require the production of records specifically refers to records over which privilege is claimed (which, as I have explained above, in my view necessarily includes solicitor-client privileged records).

[para 117] Finally, the Court was critical of the Federal Commissioner's argument that she was entitled to routine access to documents over which privilege is claimed. The Court commented that routine access, regardless of the circumstances, does not respect the Court's prior comments that adjudicators should only view allegedly privileged documents when doing so is absolutely necessary in the circumstances (para. 31), which is in accordance with the third element of the substantive rule of confidentiality of solicitor-client confidentiality.

[para 118] In contrast to the Federal Commissioner's approach (under which the Commissioner had apparently failed to consider an affidavit asserting privilege that had been tendered by the respondent organization), the Alberta Commissioner does not seek routine production of records over which solicitor-client privilege is claimed. Rather, the production powers over information over which privilege is claimed is exercised only when the organization refuses to tender evidence sufficient for the Commissioner to

adjudicate the complaint, and/or when opposing persuasive evidence or argument has been tendered to him, and thus, unless a production order issues, he cannot fulfill his statutory mandate (See Solicitor-Client Privilege Adjudication Protocol.)

[para 119] The goal of this Protocol is to respect the Commissioner's statutory responsibility to ensure an organization has properly denied a request for records, while at the same time ensuring that an order for production of such records is only made in exceptional circumstances when the organization has failed to provide sufficient information to substantiate the claim. When records over which privilege is claimed are reviewed, they are reviewed only for the purpose of determining whether they are indeed privileged and therefore properly excluded from a disclosure order.

[para 120] To summarize the comparison with *Blood Tribe*, the Commissioner cannot become adverse in interest to a party appearing before him and cannot advocate on behalf of a party; he also cannot share solicitor-client privileged information with prosecutorial authorities; the Commissioner is a quasi-judicial adjudicator with the power to make decide all issues of fact and law in a matter before him and to make binding orders; the Commissioner's production powers refer to privilege specifically; the Commissioner does not seek routine access to allegedly privileged records; and PIPA does not allow the Commissioner to refer a matter to the Courts for determination. The question of whether an organization has properly applied a statutory exception to refuse disclosure to an applicant must be proven by the organization and is precisely the question the Legislature has entrusted the Alberta Commissioner to decide. For all these reasons, I find that the conclusion in the *Blood Tribe* case does not apply in the present circumstances.

7. PIPA's confidentiality provisions

[para 121] It is not expressly a part of the substantive rule of confidentiality of solicitor-client communications that a statutory authorization to interfere with the privilege will be accompanied by provisions for ensuring the confidentiality will be breached no further. However, the existence of provisions having this effect support an interpretation of the legislation such that it permits my review of records.

[para 122] The following provisions ensure that any privileged records that are supplied for my review are not further disclosed or used:

- Section 41(3) of PIPA provides that the Commissioner, and anyone acting under his direction, cannot disclose information relative to which an organization would be required, or permitted, to refuse access under the Act (s. 41(3)).

- PIPA requires any record, or copy of a record, to be returned to the organization when the Commissioner has completed his investigation or inquiry (section 38(5)). That is, the Commissioner cannot provide any records directly to an applicant even if he thinks the organization has improperly claimed an exception; he can only direct the organization to do so.

- If the Commissioner finds that records were not properly withheld as privileged, but an organization continues to assert that they properly withheld records on the basis of privilege, the organization can apply for judicial review of the Commissioner's order. An application for judicial review of the Commissioner's production or disclosure order acts as an automatic stay of that order (section 54.1(2)) Thus, if the organization is of the view that the information provided in support of claim of privilege was sufficient, or objects to an order requiring disclosure of records to an applicant, it can ask the Court to review the Commissioner's decision. Pending the Court's decision, it will not be required to comply with the Commissioner's production or disclosure order.

- Most significantly, section 38.1 provides that if a legal privilege, including solicitor-client privilege, applies to information disclosed to the Commissioner on his request under section 38, the legal privilege is not affected by the disclosure (which possibly means that the privilege is not to be taken as waived – although this is so in any case to the extent that the provision of the records is involuntary). As well, section 41(3.2) provides that the Commissioner may not disclose information that is subject to solicitor-client privilege to prosecutorial authorities under section 41(3.1).

[para 123] The latter of these provisions demonstrate that the Legislature has turned its mind to the potential for the disclosure by the Commissioner of records over which privilege has been claimed, ensuring that such records are not improperly disclosed.

C. Conclusion

[para 124] I conclude that I have jurisdiction to decide whether the records over which solicitor-client privilege has been claimed in this case (assuming them to be responsive to the Applicants' request for their personal information) may be withheld under section 24(2)(a) of the Act. As well, I find that for this purpose, should it become essential for me to do so because I cannot otherwise make a determination, I may require the production, for my review, of records over which a claim of solicitor-client privilege is being made.

D. The steps available to the law firm

[para 125] I am not satisfied that the records over which the law firm is claiming solicitor-client privilege meet the test for this privilege simply by virtue of the law firm's blanket assertion that this is so. In view of this, the law firm's options with respect to records which consist or may consist of the Applicants' personal information, over which it is claiming solicitor-client privilege, are the following.

[para 126] First, the law firm may swear an affidavit with sufficient detail to substantiate that the records are subject to solicitor-client privilege, which is to be shared

with the Applicants. In the alternative, the law firm can apply to have evidence regarding the privilege given *in camera*, pursuant to section 50(4)(b). As noted in the Inquiry Information document provided to the parties in this case, such a request is often granted where the submissions supporting an organization's reliance on an exception would reveal the contents of the records at issue. Finally, the law firm can provide the records over which it is claiming solicitor-client privilege, in confidence, for my review.

[para 127] An illustration of the kind of information that will be satisfactory to establish a solicitor-client privilege claim is found in *Ansell Canada Inc. v. Ions World Corp.*, [1998] O.J. No. 5034 (Ct. J.). In that case, the Court quoted prior cases asserting that a party cannot avoid production by giving an "unadorned assertion that the documents are subject to solicitor and client privilege". It said that the degree of detail required "should include the function, role and status of the receiver and sender of the documents in question and their relationship to the party to the action, the grounds for the claim of privilege, and a description of each document consistent with the law which renders it privileged" (paras. 10, 19). See also the "Record Form" portion of the Protocol, and accompanying instructions.

[para 128] For records over which it is not claiming solicitor-client privilege, including those for which is claiming litigation privilege or the exception under section 24(2)(c) (information collected for an investigation or legal proceeding), I will direct that these records be provided to me for my review.

Concluding comments

[para 129] I note that the result of the foregoing analysis and conclusions is that law firms may, depending on what is reasonable in the circumstances and on the proper application of exceptions, be obliged to provide requestors with access to information about the requestor which they have in their possession, but which the requestor does not really want because he or she already knows it, or it is information which is not of particular interest to them. It seems to me that often, requestors will far more likely be interested in, and therefore really be seeking access to, only information that will in fact not be made available to them because it is the subject of solicitor-client privilege. As well, if the action or related litigation is still ongoing, such information may be covered by litigation privilege, or it may fall within the exception that it was collected for an investigation or legal proceeding (though in the latter of these situations, the law firm must still properly exercise its discretion in deciding to withhold such information). In other words, in many circumstances requestors will not really want the information to which they are actually entitled because they are entitled only to what is *their own personal information* (that is not properly withheld under an exception) – not to information about the strategies of the opposing side in litigation or information they used to develop this strategy, simply because the litigation concerned the applicant.

[para 130] Thus I concede that the conclusions in this decision may, in some circumstances, require law firms to engage in providing responses that are not productive from anyone's standpoint. At the same time, however, it is to be hoped that it will become generally known that only limited information can actually be made available to

applicants in the present type of request, which may dissuade applicants from needlessly making such requests. As well, organizations are able to charge fees for access to personal information and related information, which may also have the effect of deterring applications that serve no useful purpose for applicants.

[para 131] I note as well that on the basis of the ability of organizations to take into account what is reasonable in responding to access requests under section 24 of the Act, it is open to an organization to argue, in appropriate circumstances, that it is not reasonable to provide access to an applicant's personal information, or parts of this information. This may apply for information that consists of meaningless or insignificant snippets, particularly if it reveals nothing of substance to an applicant. It may also apply where providing information would require an organization to review a large volume of information only to provide an applicant with minor items of information of which he is already well aware, especially where there is an indication that the access request for such information is not being made for a *bona fide* purpose. (However, this may not apply where the applicant's purpose is to determine how the information was used or to whom it was disclosed, or to have errors corrected, even though the applicant already knows it.)

[para 132] Before concluding, I will also comment on the fact that it seems possible that all the information in the hands of the law firm in this case that relates to the Applicants was collected for the purpose of an investigation or legal proceeding within the terms of the exception to disclosure in section 24(2)(c) of the Act. That this may be true does not, however, obviate the duty of the law firm to consider whether providing the Applicants with their own personal information will meet the goals of PIPA and of section 24(2)(c). (Possibly it is sound to routinely withhold such information on the basis that such applicants are opposed in interest to the law firm's clients, but possibly the right of access should take precedence where the personal information of an applicant that is at issue is entirely neutral information relative to the legal matter, hence its release would not meet the goals of the exception provision. The views of the parties on this question, should it arise, would be helpful.) I note finally that to the extent an organization relies on this exception to access rather than on solicitor-client privilege, it is obliged to provide such information to me for my review.

[para 133] Finally, I note that in their original access request and in their submissions, the Applicants asked not only for their own personal information, but also for information as to how this information was used by the law firm and to whom it was disclosed. There is a duty on organizations to provide such information under section 24(1) of PIPA (as it existed prior to its amendment in 2009 (effective May 1, 2010)) and under section 24(1.2) in the current version. This aspect of the access request does not appear to have been specifically answered in the law firm's responses to the Applicants, nor was it raised as an issue in the original Notices of Inquiry, except to the extent that it might be taken as encompassed by the question of whether section 24 was properly applied. On this account, I would ask the law firm, at the same time as it complies with this Order, and the Law Society if it wishes to do so, to comment on how these obligations under section 24 apply in circumstances such as the present (including whether the former or current

versions of the provisions apply), and whether they were met in this case. I will give the Applicants an opportunity to respond to these submissions.

V. ORDER

[para 134] I make this Order under section 52 of the Act.

[para 135] The law firm presently has three options with respect to records over which it is claiming solicitor-client privilege: it may provide an affidavit that is to be shared with the Applicants explaining why it is claiming the privilege; it may apply to have such an affidavit submitted *in camera*; or it may provide the records to me for my review, following which they will be returned to the law firm in accordance with section 38(5).

[para 136] I direct the law firm to provide to me for my review any records in its possession that are responsive in accordance with my comments above, or potentially responsive (since this is also a question that I may decide), to the Applicants' requests, but over which it is not claiming solicitor-client privilege. This includes records that are or once were subject to litigation privilege.

[para 137] I ask the law firm to comply with these directions by August 22, 2011.

[para 138] As this inquiry has not yet been completed, I am extending the time for completion until December 30, 2011, to provide time for the steps that need to be taken to complete it.

Frank Work, Q.C.
Information and Privacy Commissioner