IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Langley (Township) v British Columbia (Information and Privacy Commissioner),* 2026 BCSC 2170

Date: 20261110
Docket: S237729
Registry: Vancouver

In the matter of the decision of the Office of the Information and Privacy Commissioner, Order F23-88 dated October 18, 2023 and in the matter of the *Judicial Review Procedure Act*, RSBC 1996, c 241

Between:

The Corporation of the Township of Langley

Petitioner

And:

The Information and Privacy Commissioner of British Columbia and Langley Rod and Gun Club

Respondents

Before: The Honourable Mr. Justice G. R. J. Gaul

Reasons for Judgment

Counsel for the Petitioner:	N. Lapper R. Walton, Articled Student
Counsel for the Respondent Langley Rod and Gun Club:	N. Baker
Counsel for the Respondent Information and Privacy Commissioner of British Columbia:	K. Phipps R. McMillan, Articled Student
Place and Date of Hearing:	Vancouver, B.C. May 30-21, 2024
Place and Date of Judgment:	Vancouver, B.C. November 10, 2026

Introduction

[1] This matter involves the judicial review of a decision of the Office of Information and Privacy Commissioner of British Columbia (the "OIPC") relating to a public body's refusal to disclose information to an applicant on the ground that the information is protected by litigation privilege.

[2] Before proceeding further, I wish to acknowledge that regrettably it has taken longer than anticipated to deliver this judgment. In reaching my decision, I have carefully reviewed my hearing notes, the record, and the parties' written submissions, and where necessary I have listened to portions of the audio recording of the proceedings.

Background facts

[3] In 1946, the Langley Rod and Gun Club (the "LRGC") began operating a recreational firearms club on property it owns that is situate in the Township of Langley, British Columbia (the "Township").

[4] Between 2016 and 2018, the Township received complaints from concerned residents relating to the LRGC's operations, and in particular the noise that was emanating from the LRGC's property. The Township investigated the complaints and in 2019 it adopted the Community Standards Bylaw 2019 No. 5448 (the "2019 Noise Bylaw").

[5] In the summer of 2020, the Township conducted inspections of the LRGC's property to ensure it was complying with the 2019 Noise Bylaw. The LRGC retained legal counsel to assist with the developing situation. The Township followed suit and referred the issues involving the LRGC to external legal counsel.

[6] In November 2020, the LRGC filed a request with the Township, pursuant to the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 [*FIPPA*] for access to the Township's records that contained information about the

noise complaints it had received relating to the LRGC's property and neighbouring areas (the "*FOI* Request").

[7] In response to the *FOI* Request, the Township disclosed some of the requested information, but it withheld 58 pages of information or disclosed redacted versions of them, pursuant to s 13(1), 14, 15(1) and 22(2) of *FIPPA* (the "Records"). Among the Records the Township withheld were 26 pages of information it asserted were protected by litigation privilege, as they related to communications between its legal counsel and an expert acoustic consultancy firm that they had retained (the "Privileged Records").

[8] The LRGC disputed the Township's claim over the Privileged Records and consequently requested that the Commissioner review the Township's decision relating to those documents.

[9] In November 2022, the OIPC appointed an adjudicator to review the Township's decision to withhold the Privileged Records from the LRGC (the "Adjudicator").

[10] In December 2022, the Township issued the LRGC three offence notices for allegedly breaching the 2019 Noise Bylaw (the "2022 Bylaw Offence Notices"). The LRGC disputed each of these notices.

[11] Between 23 January and 12 September 2023, the parties delivered to the Adjudicator their respective submissions and evidence. In accordance with OIPC order made in December 2022, some of the submissions and evidence of the Township was provided *in-camera* and only to the Adjudicator.

[12] On 27 July 2023, the Adjudicator requested that the Township provide them with additional clarifying information. On 14 August 2023, the Township complied with that request and amongst the materials it provided to the Adjudicator was a "Table of Records" that described each of the Privileged Records and identified the

FIPPA exception that the Township contended justified its refusal to disclose the documents.

[13] On 18 October 2023, following the receipt of written submissions from the parties, the Adjudicator released their decision wherein they concluded s 14 of *FIPPA* permitted the Township to refuse to disclose certain of the Documents, but not the Privileged Records (the "Decision").

[14] The Township seeks only to have the portions of the Decision and resulting order ("OIPC Order F23-88") that relate to the Privileged Records judicially reviewed and quashed.

The Decision

[15] The Adjudicator reviewed the legal principles that govern a claim of litigation privilege and at paras 72 to 75 of the Decision observed:

> [72] Litigation privilege is intended to ensure the efficacy of the adversarial process by creating a protected area in which parties to pending or anticipated litigation are free to investigate, develop and prepare their contending positions in private, without adversarial interference into their thoughts or work product and without fear of premature disclosure.
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> [73] To succeed in a claim of litigation privilege the party invoking it must establish that:
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> 1) litigation was ongoing or was reasonably contemplated at the time the document was created; and
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> 2) the dominant purpose of creating the document was to prepare for that litigation.
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> [74] The threshold for determining whether litigation is "reasonably contemplated" is a low one and it does not require certainty. The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?
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> [75] There is no absolute rule for determining whether litigation was the "dominant purpose" for the document's production. A finding of dominant purpose is a factual determination that must be made based on all of the circumstances and the context in which the document was produced.

[16] The Adjudicator's articulation of the legal principles is well founded in case law: *Blank v Canada (Minister of Justice)*, 2006 SCC 39 [*Blank*]; *Gichuru v British*

Columbia (Information and Privacy Commissioner), 2014 BCCA 259 [*Gichuru*]; and *Raj v Khosravi*, 2015 BCCA 49 [*Raj*].

[17] The Adjudicator found that the Township failed to show the Privileged Records were created at a time when it reasonably contemplated that litigation would result from its dispute with the LRGC. The Adjudicator explained that conclusion as follows:

> [78] […] [T]he Township asserts that it immediately referred the matter to the law firm. However, lawyers may provide advice about bylaw enforcement that has nothing to do with litigation and the Township has not provided me with evidence that, for example, it only involves the law firm when litigation is contemplated or that, in this instance, it involved the law firm because it contemplated litigation.
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> [79] … at no point does the Township assert that it believed, at the time the records were created, that the issues were unlikely to be resolved without litigation. It appears that since 2015, the parties have been engaged, through legal counsel, in discussions about the applicant's operations. The records at issue were created in 2020. The Township issue bylaw offence notice to the [LRGC] in December 2022 related to breaches from August 2022. At the time of its submissions in this inquiry, three years after the records were created, the Township states that it is still pursuing voluntary compliance with the applicant. The manager says the Township will need to pursue other enforcement options should voluntary compliance fail. However, the Township does not provide context into how it determines whether voluntary compliance, or any other bylaw enforcement mechanism, has or is likely to fail and has not explained whether any of the criteria in this determination were met at the time the records were created.
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> [80] I acknowledge that the threshold for determining whether litigation is "reasonably contemplated" is low. However, it still requires the public body to establish litigation was reasonably contemplated. Here, the Township has explained only that the law firm advised them about a variety of enforcement options available to address the bylaw dispute, but not the Township's views on the anticipated need for litigation. The Township has not established that it reasonably contemplated litigation in 2020 when the records were created.

[18] The Adjudicator found that the Township had failed to show that the Privileged Records were made when litigation was reasonably contemplated. Consequently, they concluded that they need not decide whether the dominant purpose of the Privileged Records was to prepare for litigation. Notwithstanding that determination, the Adjudicator did add that the Township had failed to meet the second branch of the test as well. In the Decision, the Adjudicator explained:

> [82] […] I also find that the Township has not established that the documents in question were produced for the dominant purpose of litigation. At no point does the Township say in its *in camera* or open submissions that the records were created for the purpose, dominant or otherwise, of preparing for litigation. Rather, the Township states that the acoustic consulting firm's draft report was prepared for the purpose of bylaw enforcement, and the bylaw consultant's advice was about strategies to address the applicant's breach of the 2019 bylaw.
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> [83] Bylaw enforcement is not synonymous with litigation and not every instance of bylaw investigation or enforcement invariably leads to litigation. Litigation privilege may apply to a document created for more than one purpose, but only if the dominant purpose is litigation. […] The Township has not explained whether or when the purpose of its investigation into the applicant shifted to litigation.

[19] Having found none of the Privileged Records protected by litigation privilege, the Adjudicator concluded Township could not rely on s 14 of *FIPPA* to refuse their disclosure to the LRGC. This determination became a part of OIPC Order F23-88.

Statutory provision

[20] Section 14 of *FIPPA*, the statutory provision of interest in this case, provides:

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

[21] Although this section of *FIPPA* referred to "solicitor client privilege" the parties do not dispute that in the circumstances of the present case, the term encompasses both legal advice privilege as well as litigation privilege: *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

Standard of review

[22] The parties agree that the "correctness" standard generally applies to reviews of decisions relating to the adjudication of a privilege claim made under s 14 of *FIPPA*. The LRGC adds, however, that the Adjudicator's factual findings and their assessment of evidence are entitled to deference.

[23] In *British Columbia (Attorney General) v Canadian Constitution Foundation*, 2020 BCCA 238 [*CCF*], the court dismissed an appeal from a judicial review that

quashed an OIPC adjudicator's decision that certain records were not privileged and exempt from disclosure under s 14 of *FIPPA*. Mr. Justice Harris, writing for a unanimous court, explained:

> [38] […]The core of the question under review is a general question of law of central importance to the legal system as a whole. This is sufficient to call for review on a correctness standard, notwithstanding the Supreme Court's abandonment of expertise as part of the rationale supporting correctness. The question, as I see the matter, engages the correct scope of a principle that is fundamental to the proper functioning of our legal system; a principle, the protection of which must be as near to absolute as possible. It is a question that, given its importance, calls for a uniform and consistent answer. The question is fundamentally about the scope of solicitor-client privilege. Admittedly, it arises in the factual context of a question about whether solicitor-client privilege attaches to a record disclosing the total sum spent on litigating a matter during a certain time period while the litigation is ongoing. But it remains a question about the proper scope of privilege. Moreover, the answer to that question has precedential value and a significant impact on the administration of justice as a whole and other institutions of government. It goes far beyond the immediate interests of the parties in this case. Respect for the rule of law demands this Court ensure a single, correct answer is provided. The standard of correctness, in my opinion, continues to apply.

[24] In *The District of Sechelt v Information and Privacy Commissioner of British Columbia*, 2021 BCSC 2143 [*Sechelt*], I adjudicated a judicial review from an OIPC decision that rejected a public body's claim of legal advice privilege or litigation privilege over certain materials. As in the present case, counsel for the OIPC appeared and provided submissions respecting the statutory framework and record before the court. In doing so, counsel for the OIPC understandably took no position of the merits of the Decision and instead focussed their submissions on assisting the Court to understand the statutory context and the record that was before the Adjudicator. One of the issues that I was required to address in *Sechelt* was the applicable standard of review, and at paras 45 to 47 of my reasons I explained:

> [45] Sechelt submits that the correctness standard requires this Court to place itself in the Adjudicator's position and reach a decision without any deference to the analysis or conclusions she reached. This means reviewing each of the Remaining Records to determine whether the privilege claimed applies to any or all of them.
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> [46] The IPC does not dispute that a question of law of central importance to the legal system will attract the higher correctness standard. However, the

> IPC submits that situations can arise, as in this case, where it is not necessary or appropriate to apply that standard to the entire review before the Court (see: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 50).
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> [47] The IPC submits that as an administrative tribunal it is entitled to deference on matters where one of its adjudicators assesses the evidence before them and decides questions of fact, even where they do so in the course of deciding a larger issue that is subject to a correctness standard. Therefore, to the extent that the issues before the Court on the present judicial review involve purely factual determinations, such as the circumstances surrounding the creation of the communication or record in question, when it was created, who created or authorized it, and what use was or could be made of it, the standard of reasonableness applies and the adjudicator's findings are entitled to deference.

[25] I was not convinced by these submissions of the OIPC and found the principles of law articulated by Mr. Justice Harris in *CCF* were apposite to the *Sechelt* case. In the results I concluded that on a judicial review of an adjudicator's decision regarding a s 14 *FIPPA* claim of privilege, the applicable standard of review is correctness.

[26] I refer to my decision in *Sechelt* because counsel for the OIPC submits the decision, and presumably *CCF*, "appears" to have been overturned by *Societé des casinos du Québec v Association des cadres de la Societé des casinos du Québec*, 2024 SCC 13 [*Societé*]. In *Societé* the justices of the Supreme Court of Canada are unanimously of the opinion that the standard of correctness applies to findings of law and mixed fact and law made by an administrative tribunal in the context of analyzing a constitutional question. A court reviewing an administrative tribunal's decision ought to show deference, however, to the findings of "pure fact that can be isolated from the constitutional analysis" because "the rule of law does not require that there be a determinate and final answer to questions of pure fact, as they will vary from case to case": *Societé*, para 97. The issues raised by the Township do not concern that type of finding of fact. Nothing in *Société* alters the jurisprudence governing judicial review of privilege determinations under s 14 of *FIPPA*. The issues raised by the Township concern the proper scope and application of litigation privilege, attracting review on a correctness standard.

[27] In my view the central question on this judicial review is whether the Adjudicator correctly determined the scope of the Township's claim of litigation privilege.

Position of the Township

[28] The Township argues the Adjudicator failed to consider relevant evidence and submissions that the Township had provided and erred in their assessment of both branches of the litigation privilege test by adopting a higher standard than that required at law.

Position of the LRGC

[29] The LRGC submits that the Adjudicator reasonably and correctly applied the appropriate test to determine whether the Privileged Records were protected by litigation privilege.

[30] The LRGC argues that when read as a whole, the Decision shows that in reaching their conclusion that that litigation privilege did not apply to the Privileged Records, the Adjudicator had considered all of the Townships' submissions and evidence, including the *in-camera* materials that the LRGC had not seen.

Discussion

Litigation Privilege

[31] There is no dispute that the terms "solicitor client privilege" contained in s 14 of *FIPPA* incorporates both legal advice privilege and litigation privilege: *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26.

[32] In *Blank*, Justice Fish explained the scope of litigation privilege as follows:

> [27] Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the

solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[28] R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
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> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
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> ("Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65)

[33] In *Lizotte v Aviva Insurance Company of Canada* [*Lizotte*], 2016 SCC 52, Justice Gascon explained:

> [20] Litigation privilege is a common law rule of English origin: *Lyell v. Kennedy (No. 2)* (1883), 9 App. Cas. 81 (H.L.). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege, which at the time was considered to be a rule of evidence that was

necessary to ensure the proper conduct of trials: A. Cardinal, "*Quelques aspects modernes du secret professionnel de l'avocat*" (1984), 44 *R. du B*. 237, at pp. 266-67. In an oft-cited case, Jackett P. of the former Exchequer Court of Canada explained the purpose of litigation privilege, once known as the lawyer's brief rule, as follows:

> Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system. [Emphasis removed.]

(*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34)

…

[22] However, since *Blank* was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:

- The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);
- Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);
- Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
- Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "*Claiming Privilege in the Discovery Process*", in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65);
- Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

…

[24] While it is true that in *Blank*, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that

> they have some characteristics in common. For instance, it noted that the two privileges "serve a common cause: The secure and effective administration of justice according to law" (para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).

[34] Adopting the submissions of the LRGC, I find the principles that can be distilled from *Blank* and *Lizotte* are:

a) Litigation privilege extends to any records and communications produced for the dominant purpose of litigation.

b) Litigation privilege does not depend on the existence of a solicitor-client relationship, and it operates even in the case of litigants who are not represented by counsel.

c) Litigation privilege does not depend upon confidentiality; one of the key purposes of the privilege is to permit litigants to obtain information from third parties who have no need or expectation of confidentiality.

d) Unlike solicitor-client privilege, litigation privilege is temporary and terminates once the litigation has ended. However, litigation will not be seen as having ended between two parties as long as they “remain locked in what is essentially the same legal combat” across closely related proceedings.

[35] The test and considerations that apply to a claim of privilege were helpfully articulated and explained by Madam Justice Garson in *Gichuru*:

> [32] Madam Justice Gray then proceeded at para. 94 [in *Keefer Laundry Ltd. v. Pellerin Milner Corp et al.*, 2006 BCSC 1180], and following, to usefully describe the type of information necessary to sustain a claim of privilege. (*Keefer Laundry* concerns discovery of documents in a civil suit but the principles discussed by Gray J. are equally applicable to s. 14, the issue under consideration here.) I would adopt her comments as follows:

> [96] Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:
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> 1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
> 2. that the dominant purpose of creating the document was to prepare for that litigation.

(*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* (2005), 40 B.C.L.R. (4th) 245, 2005 BCCA 4 at paras. 43-44.)

> [97] The first requirement will not usually be difficult to meet. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it. (*Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254])
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> [98] To establish "dominant purpose", the party asserting the privilege will have to present evidence of the circumstances surrounding the creation of the communication or document in question, including evidence with respect to when it was created, who created it, who authorized it, and what use was or could be made of it. Care must be taken to limit the extent of the information that is revealed in the process of establishing "dominant purpose" to avoid accidental or implied waiver of the privilege that is being claimed.
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> [99] The focus of the enquiry is on the time and purpose for which the document was created. Whether or not a document is actually used in ensuing litigation is a matter of strategy and does not affect the document's privileged status. A document created for the dominant purpose of litigation remains privileged throughout that litigation even if it is never used in evidence.

[36] There is no dispute that the Adjudicator identified the correct test to be used in determining whether the Privileged Records were protected from disclosure under s 14 of the *FIPPA*. The Township's complaint is with how the Adjudicator interpreted the test and applied it to the evidentiary record.

Did the Adjudicator err on the first branch of the litigation privilege test?

[37] The Township argues that the Adjudicator failed to consider relevant evidence when they concluded the Privileged Records were not prepared in anticipation of litigation. In response to that argument, the LRGC says the Adjudicator was not required to identify every piece of evidence that had been provided by either party.

With respect, the LRGC is correct, but that does not address the error the Township argues the Adjudicator committed.

[38] The Township says that in reaching their conclusion at para 79 of the Decision with respect to the Township's failure to "provide context into how it determined whether voluntary compliance, or any other bylaw enforcement mechanism, has or is likely to fail and has not explained whether any of the criteria in this determination were met at the time the records were created", the Adjudicator fails to acknowledge the evidence on this point that is contained in the affidavit of Ruby Sanghera, the manager of the Township's Bylaw Department. Specifically, the Township says the Adjudicator fails to acknowledge para 9 of Ms. Sanghera's affidavit where Ms. Sanghera attests to the Township continuing to give "serious consideration" to its enforcement options. Ms. Sanghera further attests in her affidavit:

> 21. To date, the Township has sought to resolve the matter through voluntary compliance by the LRGC, but no such resolution has been reached. The Township continues to consider all its enforcement options.
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> 22. In light of the ongoing discussions with the LRGC, and reasonable prospect the Township will need to [*in camera*] should such voluntary compliance fail, the disclosure of the above information, and in particular the legal advice from NRF, would create a significant risk of harm to the Township's position and its potential legal claims against LRGC [*in camera*]. In particular, it would make public the Township's legal strategy in this particular case (as well as provide insight into its legal strategy for bylaw enforcement more generally) and could expose considerations regarding [*in camera*].
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> 23. […] Disclosure of the records could reveal to the public the Township's litigation strategy for bylaw enforcement matters.

[39] As a further example of the Adjudicator's failure to consider relevant evidence, the Township points to para 80 of the Decision and the conclusion that the Township's evidence only explained "...that the law firm advised about a variety of enforcement options available to address the bylaw dispute, but not the Township's views on the anticipated need for litigation". The Township argues that in her

affidavit sworn 5 January 2023, Ruby Sanghera, the manager of the Township's Bylaw Department, addressed this issue as follows:

> 7. The Township also started an investigation into the matter to consider whether to take bylaw enforcement actions. The issue has not been resolved but discussions surrounding the LRGC's voluntary compliance with the Township's bylaws are ongoing to date and the Township has reserved all of its rights to take enforcement steps against the LRGC [*in camera*].

[40] The Township argues this evidence supported the written submissions it also had provided to the Adjudicator on the question of anticipated litigation and squarely answered the deficiency the Adjudicator found in the Township's position. Consequently, the Township maintains the Adjudicator's conclusion fails to consider Ms. Sanghera's evidence on this issue.

[41] I should note at this point that I have been able to review the unredacted version of Ms. Sanghera's affidavit as well as all of the other materials that were provided to the Adjudicator for the *in-camera* portion of their work. In my opinion, this evidence further supports and substantiates the Township's position on this judicial review.

[42] The Township is correct when it argues that contrary to the Adjudicator's conclusions, there was evidence before them that directly addressed the Township's views regarding the anticipated need for litigation and supporting that the issues were unlikely to be resolved without litigation.

[43] I also agree with the Township that the Adjudicator's conclusions at para 79 and 80 of the Decision reflect the application of a more demanding standard than the law requires.

[44] In my view the law does not require a party in the Township's position to tender evidence on when and how it would determine that voluntary compliance could be met. Under the first branch of the litigation privilege test, the relevant question is whether litigation was reasonably contemplated. The Adjudicator properly identified that this first branch of the test for privilege is to be assessed

objectively, through the eyes of a reasonable person; however, I find they failed to correctly apply that standard in this case.

[45] The term “reasonably contemplated” is more than mere speculation but less than certainty or the existence of actual litigation: *Raj*, paras 10-11

[46] In this case, the evidence shows that through their respective legal counsel, the Township and the LRGC had been discussing the level of noise from the LRGC’s operations since about 2015, and that the Privileged Records were created in 2020. It is undisputed that those Privileged Records were created through legal counsel in the context of receiving advice about bylaw enforcement measures. Ms. Sanghera explained this in her evidence.

[47] The difficulty with the Decision is not that the Adjudicator assigned insufficient weight to the evidence. Rather, the difficulty is that the Adjudicator concluded the Township had failed to provide evidence on a point that had in fact been directly addressed by Ms. Sanghera in her affidavit.

[48] Furthermore, I find the Adjudicator’s reliance on the timing of the 2022 Bylaw Offence Notices was misplaced in that the issuance of these notices did not necessarily mean that litigation was not reasonably contemplated two years earlier in 2020. In my view the Township is correct when it argues litigation can be reasonably contemplated from the outset of a dispute and that in the present case the Adjudicator’s reliance on the timing of events referenced at para 79 of the Decision reflects an analytical error by treating voluntary compliance efforts and contemplated litigation as mutually exclusive concepts. Those two concepts are not mutually exclusive and are in fact to be expected in the enforcement of municipal bylaws.

[49] Viewed objectively, a reasonable person possessing the information available to the Township in 2020 would conclude that litigation was a realistic and probable outcome of the dispute, notwithstanding the Township's continued efforts to achieve voluntary compliance. Moreover, the fact that the Township continued to pursue

voluntary compliance with the LRGC after the records in question were created does not mean that in 2020, litigation was not reasonably contemplated, nor does it mean that such contemplation had ceased. In my view, the nature and scope of the Privileged Records (i.e. communications between the Township's legal counsel and its subject matter expert), supports the conclusion that litigation was in reasonable contemplation at the time they were created.

Did the Adjudicator err on the second branch of the litigation privilege test?

[50] The Adjudicator concluded that the Township had failed to succeed on the first branch of the test. Consequently, it was not necessary for them to proceed to consider whether the Township had met the test's second branch. As noted in the Decision, "for the sake of completeness" the Adjudicator nevertheless did so.

[51] The LRGC says that the Adjudicator's finding with respect to the second part of the privilege test was reasonable and entitled to deference. As I have earlier explained in these reasons, I do not accept that to be the proper test on this judicial review. The test is whether the Adjudicator correctly interpreted and applied the law and in my opinion they did not.

[52] As the Township correctly noted in their submissions, the Adjudicator's reliance on the fact that bylaw enforcement is not synonymous with litigation is misplaced. There is no requirement for litigation to ultimately materialize, nor a requirement for a document over which litigation privilege is claimed to be used in litigation. The Adjudicator's analysis risk treating litigation privilege as unavailable where a record also serves a bylaw enforcement purpose. That approach is inconsistent with the dominant purpose analysis described in *Blank* and *Raj*.

[53] The initial submissions of the Township to the Adjudicator highlighted how the Township had sought and obtained legal advice from its counsel relating to its bylaw enforcement involving the LRGC. Moreover, the submissions explained that the provision of legal advice relating to litigation options is "consistent with the nature of

bylaw enforcement more generally, where [*in camera*] is always an enforcement option for municipal bylaws".

[54] In addressing the second branch of the privilege test, Mr. Justice Tysoe in *Raj* explained:

> [17] A claim of privilege will succeed when a party can establish that a document produced for dual or multiple purposes, one of them being litigation, was produced for the dominant purpose of litigation. There is no absolute rule for determining whether litigation was the dominant purpose for the document's production (*Hamalainen* at para. 25). A finding of dominant purpose involves an individualized inquiry as to whether, and if so when, the focus of the investigation/inquiry shifted to litigation. This is a factual determination to be made based on all of the circumstances and the context in which the document was produced. As Wood J.A. explained in *Hamalainen*:
>
> > [24] Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case. [Emphasis in original.]
>
> [18] Thus, the focus of an inquiry may shift to litigation at any point along the continuum between the preliminary information-gathering stage and the final litigation stage. It may occur while other investigations are being conducted and other documents are being produced with respect to related matters that are not for the dominant purpose of litigation. There is no legal requirement that every potential or conceivable purpose for the creation of a document must be negatived before it can be found that the document was produced for the dominant purpose of litigation. The effect of such a requirement would be the adoption of the "sole purpose test", which was expressly rejected in *Blank*.

[55] In the instant case, the evidence and submissions the Township made to the Adjudicator show that the "continuum" referenced in the jurisprudence moved to litigation when the Township sought and obtained legal advice from its counsel, and the expert retained by counsel, relating to its approach to bylaw enforcement. In other words, the evidence demonstrates that the acoustic consultant was retained

through counsel to assess issues that were directly connected to anticipated enforcement proceedings. The consultant's work was therefore not merely part of a general fact-finding exercise but formed part of the Township's preparation for possible litigation arising from the ongoing dispute.

[56] By treating the bylaw-enforcement purpose as incompatible with a claim of litigation privilege, the Adjudicator effectively required the Township to establish litigation as the exclusive purpose for the creation of the records. That approach is inconsistent with *Blank* and *Raj*, both of which recognize that litigation privilege may attach to documents created for multiple purposes, provided litigation is the dominant one.

Conclusion

[57] The Adjudicator erred in their assessment of the scope of the Township's privilege claim, and this occurred principally because they incorrectly interpreted and applied the law relating to the litigation privilege test.

[58] Having reviewed the complete record, including the *in-camera* materials that was before both the Adjudicator and this Court, there is no factual issue requiring reconsideration. Applying the correct legal test to the undisputed evidentiary record leads to the conclusion that the Privileged Records were created when litigation was reasonably contemplated and for the dominant purpose of preparing for that litigation and consequently, they are protected by litigation privilege.

[59] The relevant evidentiary record is complete, the materials facts are known, and the issue before the Court is the proper application of the governing legal principles. In these circumstances, it is neither necessary nor useful to remit the matter to the OIPC for reconsideration.

Order

[60] I am granting the relief sought in the Township's petition.

[61] The portion of OIPC Order F23-88 that requires the Township to provide copies of the Privileged Records to the LRGC is set aside and there is a declaration that the Township is entitled to withhold production of those documents, as they are protected by litigation privilege and thus exempt from disclosure by virtue of s 14 of *FIPPA*.

"G. R. J. Gaul, J."