Order F19-45

MINISTRY OF FINANCE
AND
MINISTRY OF ATTORNEY GENERAL

Ian C. Davis
Adjudicator

December 16, 2019

CanLII Cite: 2019 BCIPC 51
Quicklaw Cite: [2019] B.C.I.P.C.D. No. 51

Summary: The applicants made joint requests to the Ministries for records relating to indemnity agreements between them and the Province, including records relating to the Province's decisions to issue the applicants T4A tax slips. The Ministries withheld some of the records on the basis that they were outside the scope of the Act under s. 3(1)(c), and withheld the other records on the basis of solicitor-client privilege under s. 14. The adjudicator found that some of the records were outside the scope of the Act under s. 3(1)(c) and confirmed the Ministries' decisions under s. 14.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(c), and 14.

INTRODUCTION

[1] This inquiry concerns the joint requests of two applicants to the Ministry of Finance and Ministry of Attorney General (Ministries) for records relating to "special indemnity" agreements between the applicants and the Province (Indemnity Agreements). Specifically, the applicants requested records relating to the Province's decisions to amend the Indemnity Agreements, release the applicants from repayment obligations under those agreements, and subsequently issue the applicants T4A tax slips (T4As).

[2] The Ministries disclosed some records responsive to the applicants' requests. The Ministries withheld the remaining records, some in part but most in their entirety, on the basis of solicitor-client privilege under s. 14 of the *Freedom of Information and Protection of Privacy Act* (FIPPA or the Act). In addition, the Ministries refused to disclose some of the records on the grounds that they are outside the scope of the Act pursuant to s. 3(1)(c) of FIPPA.

[3] The applicants requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministries' decisions. Mediation did not resolve the issues, and the applicants requested that the matter proceed to a written inquiry.

PRELIMINARY MATTER

[4] I note that the applicants' submissions address a complaint they made under s. 6 of FIPPA.[1] The OIPC investigator's fact report states that this complaint was settled and is not an issue in this inquiry. Further, the notice of inquiry did not list the complaint as an issue to be decided, and the applicants were not granted prior approval to add that issue into the inquiry. Accordingly, I decline to consider or make any determination about the complaint.

ISSUES

[5] The issues to be decided in this inquiry are:

1. Are any of the records in dispute outside the scope of the Act pursuant to s. 3(1)(c) of FIPPA?

2. Are the Ministries authorized to withhold the information in dispute on the basis of solicitor-client privilege under s. 14 of FIPPA?

[6] I deal with these issues in the order set out above. Based on s. 57(1) of FIPPA, the Ministries have the burden of proof under s. 14. The Ministries also have the burden under s. 3(1)(c).[2] The burden is on the applicants to establish any exception to solicitor-client privilege.[3]

BACKGROUND

[7] The applicants are former ministerial assistants. In late 2010, they pled guilty to, and were convicted of, criminal charges of breach of trust in relation to the sale of provincial assets. The matter was high profile and resulted in two previous OIPC orders, Orders F14-02 and F14-03.[4]

Special Indemnities and T4As

[8] The Province funded the applicants' legal costs to defend against the criminal charges (Legal Costs). It did so pursuant to "special indemnity" agreements dated July 22, 2005 (Indemnity Agreements). The Indemnity

[1] Applicants' written submissions at paras. 11, 17, 19(a), 33(b), 36-37, and 45-46.
[2] See e.g. Order F16-28, 2016 BCIPC 30 (CanLII) at para. 8.
[3] *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 46.
[4] Order F14-02, 2014 BCIPC 2 (CanLII); Order F14-03, 2014 BCIPC 3 (CanLII).

Agreements were granted under s. 72(1) of the *Financial Administration Act*.[5] Through the Indemnity Agreements, the government agreed to pay the Legal Costs "for circumstances not covered by PSA's [the Public Service Agency's] terms and conditions of employment."[6] The rationale for providing such an indemnity is "to protect an individual from personal liability for legal expenses arising from conduct in good faith in the performance of his or her employment."[7]

[9] The Indemnity Agreements included provisions requiring the applicants to repay the Legal Costs if they were convicted. However, in exchange for guilty pleas, the Province decided to amend the Indemnity Agreements and enter into further agreements with the applicants. Those agreements, dated October 12, 2010, released the applicants of their obligations to repay the Legal Costs as required under the Indemnity Agreements (Release Agreements).

[10] Subsequently, in May 2012, the Province issued each applicant a T4A (Statement of Pension, Retirement, Annuity, and Other Income).[8] The T4As were issued in respect of the 2010 taxation year in which, according to the Province, the applicants enjoyed the taxable employment benefits of payment of the Legal Costs in the amount of roughly $3,000,000 each.[9] As a result, the applicants were reassessed by the Canada Revenue Agency (CRA).[10] The applicants objected, and the CRA confirmed the reassessments.[11] The applicants then filed Notices of Appeal of the reassessments in the Tax Court of Canada.[12]

Records and Information in Dispute

[11] The records and information in dispute are as follows:

- **Audit Records** – The Ministry of Attorney General (MAG) submits that 16 pages of the disputed records were created by or for an officer of the Legislature, namely the Auditor General. MAG says that s. 3(1)(c) applies and these pages are outside the scope of FIPPA. MAG also submits that all of the information in seven of these 16 pages are protected by solicitor-client privilege under s. 14.

- **MAG Information** – In addition to the Audit Records, there are 782 pages of records responsive to the request to MAG. MAG has withheld all of the information in those pages under s. 14.

---

[5] R.S.B.C. 1996, c. 138.
[6] Office of the Auditor General of British Columbia, *An Audit of Special Indemnities* (Victoria: Office of the Auditor General of British Columbia, 2013) at p. 14 [*Special Indemnities*].
[7] *Ibid* at p. 23.
[8] Affidavit of MC at para. 3.II.a.
[9] *Ibid* at paras. 3.II.a-b.
[10] *Ibid* at para. 3.II.c.
[11] *Ibid* at para. 3.V.
[12] *Ibid* at para. 3.VI.

- **FIN Information** – There are 19 pages of records responsive to the request to the Ministry of Finance (FIN). Three pages have been partly severed under s. 14 and the balance have been withheld in their entirety under s. 14.

[12] The Ministries have not provided for my review any of the documents withheld under s. 14, except for the unsevered parts of the FIN Information mentioned above.

The Ministries' Evidence

[13] The Ministries' evidence in this inquiry consists of the affidavit of RRL. RRL has been employed as a lawyer in the Revenue and Taxation Group of the Legal Services Branch (LSB) of MAG since September 2016. RRL deposes that he reviewed all of the records in dispute in this inquiry.[13]

[14] RRL also states that he reviewed two tables summarizing the nature of the information in the records.[14] The tables are attached as exhibits to RRL's affidavit. One table relates to the FIN Information and the other table relates to the Audit Records and the MAG Information. The tables include page numbers identifying the records and corresponding descriptions, in summary form, of the nature of those records.

SECTION 3(1)(C) AND THE AUDIT RECORDS

[15] MAG submits that the Audit Records are beyond the scope of the Act pursuant to s. 3(1)(c) of FIPPA. The applicants made no submissions on this issue.

[16] Section 3(1)(c) of FIPPA states:

> (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act[.][15]

[13] Affidavit of RRL at para. 6.
[14] *Ibid*.
[15] Section 3(1)(3) of *FIPPA* sets out a list of sections of *FIPPA* which apply to officers of the Legislature "as if the officers and their offices were public bodies". However, none of the sections listed apply to this inquiry.

[17] The purpose of s. 3(1)(c) is "to facilitate, and prevent interference with, the exercise of an officer of the Legislature's functions under an enactment."[16] Previous OIPC orders have stated that the following criteria must be met for s. 3(1)(c) to apply:

1. An "officer of the Legislature" is involved.
2. The record must either:
    a. have been created *by* or *for* the officer of the Legislature; or
    b. be in the *custody* or *control* of the officer of the Legislature.
3. The record must relate to the exercise of the officer's functions under an Act.[17]

[18] Based on RRL's evidence, I find that the Audit Records are emails dated mid-May 2012 between the then Assistant Auditor General and an LSB lawyer, JP. JP, now retired, worked in the Revenue and Taxation Group of LSB from the mid-1980s to September 2015.[18] JP was the main lawyer responsible for providing taxation-related advice to the Province regarding the Indemnity Agreements.[19] Although some of the emails include individuals other than the Assistant Auditor General and JP, all of them involve those two. One of the Audit Records is not an email, but rather an undated draft response from JP to the Assistant Auditor General.

[19] The first two criteria of the s. 3(1)(c) test are clearly met. The term "officer of the Legislature" is defined in Schedule 1 of FIPPA as including "the Auditor General".[20] The Audit Records are communications (or drafts thereof) between the then Assistant Auditor General, acting on behalf of the Auditor General, and a government lawyer. Some of the emails are from the Assistant Auditor General to JP, and were therefore "created by" the Assistant Auditor General. Other emails were from JP to the Assistant Auditor General, and were therefore "created for" the Assistant Auditor General.

[20] The third criterion is also met. The *Auditor General Act* provides that the Auditor General's functions include to "audit an individual" or "undertake an examination" in relation to "an indemnity given by the government".[21] In the Audit Records, the Assistant Auditor General and JP discuss the Indemnity and Release Agreements. I accept MAG's evidence that the Audit Records were

---

[16] Order F16-07, 2016 BCIPC 9 (CanLII) at para. 9 citing Order 01-43, 2001 CanLII 21597 (BC IPC) at para. 25.
[17] Order F16-28, 2016 BCIPC 30 (CanLII) at para. 16 citing Order 01-43, *ibid.* at para. 14; Order F14-12, 2014 BCIPC 15 (CanLII) at para. 8.
[18] Affidavit of RRL at para. 5.
[19] *Ibid* at para. 7.
[20] See also *Auditor General Act*, S.B.C. 2003, c. 2, s. 2(1).
[21] *Ibid* at ss. 11(6)(a), 13(1)(b).

created in relation to the Auditor General's audit of special indemnities, leading to a report in December 2013.[22] That audit was a direct exercise of the Auditor General's functions under the *Auditor General Act*.

[21] For these reasons, I conclude that the Audit Records are outside the scope of the Act pursuant to s. 3(1)(c) of FIPPA. Given this conclusion, I will not consider MAG's alternative argument that s. 14 also applies to some of the Audit Records.

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[22] Section 14 of FIPPA states that the "head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." Section 14 encompasses both legal advice privilege and litigation privilege.[23] The Ministries argue legal advice privilege applies to the FIN Information and the MAG Information.

[23] The test for legal advice privilege is well-established in previous OIPC orders:

> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.[24]

[24] The authorities are replete with commentary about the fundamental importance of solicitor-client privilege to the justice system. Suffice it to say that solicitor-client privilege is "a fundamental civil and legal right",[25] which "must be as close to absolute as possible".[26] Disclosure of information subject to solicitor-client privilege "is to be ordered only when it is absolutely necessary to achieve the ends of justice".[27]

---

[22] Affidavit of RRL at paras. 12-13.
[23] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[24] Order 00-06, 2000 CanLII 6550 (BC IPC) at p. 8 (cited to CanLII) citing *R. v. B.*, [1995] B.C.J. No. 41, 1995 CanLII 2007 (S.C). See also *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 18.
[25] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 839, 105 D.L.R. (3d) 745 (S.C.C.).
[26] *R. v. McClure*, 2001 SCC 14 at para. 35.
[27] *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 14 [*Camp*].

The MAG Information

[25] Based on RRL's evidence, I find that the MAG Information falls into the following categories:

- **Category A** – emails or email chains dated 2011-2012 between LSB lawyers and representatives of various government ministries or agencies.[28]

- **Category B** – legal research, legal opinions, covering letters, memos to file, handwritten notes, information briefing notes, decision briefing notes, confidential issues notes, confidential estimates notes, reporting templates, or drafts thereof, all drafted or commented on by a LSB lawyer.[29] The records are either undated or dated 2011-2012 or January 2015.

- **Category C** – emails or email chains dated 2010-2012 between LSB lawyers (or their assistants).[30]

- **Category D** – attachments to other records. The attachments are a draft memorandum sent from RB to JP, legal opinions prepared by LSB lawyers, meeting materials, briefing notes, confidential issues notes, estimates notes, or drafts thereof.[31]

Category A Records

[26] RRL deposes that:

- JP worked with other LSB lawyers, who RRL names, on the matter of the Indemnity Agreements;[32]

- JP's clients in relation to the Indemnity Agreements were the Assistant Deputy Attorney General, Deputy Attorney General, Attorney General, Ministry of Finance, the Public Service Agency, Ministry of Citizens' Services, and Government Communications and Public Engagement;[33]

---

[28] Pages 360-366, 391-558, 588-596, 598-601, 607-608, 612-616, 619-628, 665-703, 704-706, 713, 722-748, and 751-756.
[29] Pages 1-2, 5-142, 170, 173-213, 286-325, 367-370, 382-387, 389-390, 559-571, 582-587, 597, 602, 605-606, 609-611, 642-649, 652-655, 709-712, 719-721, 757-759, 764-765, and 771-798.
[30] Pages 3-4, 143-169, 171-172, 214-285, 326-359, 371-381, 388, 572-581, 603-604, 617-618, 629-630, 631-641, 650-651, 656-664, 707-708, 714-718, and 749-750.
[31] Parts of pages 143-169, 174-185, 214-242, 244-318, 326-359, 391-558, 573-581, 588-594, 612-616, 619-625, 636-641, 656-661, 665-703, 705-706, 714-718, 722-726, 727-748.
[32] Affidavit of RRL at para. 8.
[33] *Ibid* at para. 9.

- based on RRL's understanding of this matter and his experience in the same Revenue and Taxation Group as JP and JP's colleagues, the MAG Information consists of "confidential communications that were not intended to be disclosed outside of the solicitor-client relationship";[34] and

- the MAG Information relates "to the seeking, formulating, and provision of legal advice on the issue of the indemnity agreements."[35]

[27] First, I am satisfied by the Ministry's evidence that most of the Category A records are direct written communications between solicitors and their clients, specifically JP, and JP's LSB colleagues, and their various clients as identified in the evidence of RRL.

[28] However, there are some communications in the Category A records that are not directly between lawyers and their clients. There is one email between executive support staff for the Assistant Deputy Attorney General (ADAG) and an LSB paralegal with ten briefing notes attached (pages 391-558). There are other emails between the Deputy Attorney General and ADAG executive support staff with meeting materials attached (pages 665-698, and 699-703).

[29] I find that the communications in these pages were made within a solicitor-client relationship even though they do not directly involve a lawyer. The Supreme Court of Canada has stated that the solicitor-client relationship extends to those who assist a lawyer professionally.[36] Clients may also communicate with their lawyers through agents or representatives, such as support staff. Thus, I find the solicitor-client relationship extends to the paralegal and executive support staff involved in these emails, given the roles that these professionals play in facilitating solicitor-client communications.

[30] Second, I accept RRL's evidence that the Category A records were not intended to be disclosed outside of the solicitor-client relationship. RRL is currently a lawyer in the group formerly occupied by JP and the other lawyers who provided legal advice on the Indemnity Agreements. In that regard, RRL has personal knowledge and experience of expectations of confidentiality in the context of providing taxation-related advice to government clients. I note also that the communications in the Category A records do not involve third parties.[37] Further, the matter of the Release Agreements was high profile. I find it

---

[34] *Ibid* at para. 10.
[35] *Ibid* at para. 11.
[36] *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873; see also Order F19-33, 2019 BCIPC 36 (CanLII) at para. 23.
[37] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis, 2014) at para. 14.49.

reasonable to conclude, given that context, that the communications were intended to be kept in confidence.

[31] Third, I am satisfied that the Category A records are communications directly related to the seeking, formulating, or giving of legal advice. I accept RRL's sworn evidence in this regard.[38] The context is crucial. On October 20, 2010, the Minister of Finance signed the Release Agreements.[39] The T4As were issued to the applicants in May 2012. The Category A records are emails dated within this time period: 2011-2012. The latest emails are dated May 11, 2012. The parties to the emails are tax lawyers and their government clients. Given this timeline and the parties to the communications, the evidence is sufficient to establish that the Category A records are solicitor-client communications directly related to the seeking and providing of legal advice about taxation issues arising from the Indemnity and Release Agreements.

[32] In the result, I conclude the Category A records are subject to solicitor-client privilege.

Category B and C Records

[33] The Category B and C records are not direct communications between solicitor and client. Rather, they are a collection of notes, memos and other documents within lawyers' files, drafted or commented on by a lawyer, and emails between lawyers, in some cases sharing Category B-type documents. They were created by JP and his LSB lawyer colleagues including RB, a lawyer who drafted several notes for the Attorney General and Deputy Attorney General. The Ministry submits these records fall within the "continuum of communications"[40] covered by solicitor-client privilege.[41]

[34] The Category B and C records are what are sometimes referred to as a lawyer's "working papers". Such papers are subject to solicitor-client privilege if they were intended to be confidential and are directly related to the seeking, formulating, or giving of legal advice.[42]

[35] I find the Category B and C documents were intended to be confidential. Some of them appear not to have been shared at all. For those that were, they were shared only with government clients or other LSB lawyers, not third parties.

---

[38] Affidavit of RRL at para. 11.
[39] *Special Indemnities*, *supra* note 6 at p. 45.
[40] *Lee*, *supra* note 24 at para. 33.
[41] Ministry's written submissions dated March 12, 2019 at para. 24.
[42] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27; cited in Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at para. 5.79.

[36] I am also satisfied that the Category B and C records are directly related to the formulating and providing of legal advice. I accept RRL's evidence that some of the information in the records is "legal opinion" or "legal research". For the other records, I am persuaded given the context that they relate to the provision of legal advice. The Deputy Attorney General advised the Minister of Finance on whether to amend the Indemnity Agreements and enter into the Release Agreements.[43] These are complex legal matters. I find it reasonable to conclude the Deputy Attorney General and the Minister sought legal advice from the LSB on these issues, and that legal working papers were created as a result. I find the sharing of those papers between lawyers facilitated the formulation and provision of that advice.

[37] In summary, the Category B and C records are privileged. They reflect the "research, thinking and strategy of the lawyer in advising the client" and are therefore related to solicitor-client communications.[44] To disclose them would reveal privileged information either directly or through inference.

Category D Records

[38] The records in this category are all attached to records that I have determined above are protected by legal advice privilege. If a document is attached to a privileged communication, the attachment is not necessarily privileged. The attachment will only be privileged if it satisfies the test for privilege. For instance, an attachment may be privileged on its own, independent of being attached to another privileged record. Alternatively, an attachment may be privileged if it is an integral part of the privileged communication to which it is attached and it would reveal that communication either directly or by inference.[45]

[39] The attachments are a draft memorandum sent from RB to JP, legal opinions prepared by LSB lawyers, meeting materials, briefing notes, confidential issues notes, estimates notes, or drafts thereof. MAG's evidence satisfies me that these attachments are either themselves privileged for the same reasoning as the Category B and C records are, or that they are integral to, and would reveal, the privileged communications to which they are attached. One could infer from the attachments the legal advice being contemplated or provided by JP and his colleagues to their various government clients.

The FIN Information

[40] The Ministry of Finance's evidence about the FIN Information is in RRL's affidavit and in the relevant table attached to his affidavit. RRL says in a very general way that the information withheld under s. 14 is between LSB lawyers

[43] See *Special Indemnities*, *supra* note 6 at pp. 44-45.
[44] Order 01-10, 2001 CanLII 21564 (BC IPC) at para. 68.
[45] See Order F18-19, 2018 BCIPC 22 (CanLII) at paras. 36-40 (and the cases cited therein).

and their clients and that it relates to the seeking, formulating and provision of legal advice on the issue of the Indemnity Agreements.[46] The table says that the FIN Information consists of an "[e]mail string (with attachments) between [five employees] of the Public Service Agency dated 26 May 2011, with legal advice provided by legal counsel with Legal Services Branch, Ministry of Attorney General severed."[47]

[41] Based on RRL's evidence and the parts of the three pages of emails available to me, I find that the FIN Information consists of email exchanges between clients of LSB, specifically the Public Service Agency and the Ministry of Finance, about legal advice provided by LSB.

[42] Even though a lawyer is not directly involved in the communications, the FIN Information is privileged. To disclose the communications between the clients about the legal advice would disclose the legal advice itself.[48] Further, I find it reasonable to conclude given the context of the communications that the attachments are either the legal advice provided by the lawyer or documents related to the advice that would reveal the advice.

The "Future Crimes and Fraud" Exception to Privilege

[43] The applicants submit that the "future crimes and fraud exception" to privilege applies to some of the records because they "conceal a civil or criminal wrong which would abrogate the privilege".[49]

[44] Although solicitor-client privilege is "nearly sacrosanct",[50] "not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication".[51] In particular, "privilege does not attach to communications in relation to intended unlawful conduct."[52] This is known as the "future crimes and fraud exception", although it captures conduct broader than crime and fraud.

[45] A party seeking to invoke the exception must establish a *prima facie* case that the exception applies.[53] If a *prima facie* case is made out, the decision-maker would then review the documents to determine whether the exception does in fact apply. To establish the exception:

---

[46] Affidavit of RRL at para. 11.
[47] *Ibid* at Exhibit "A".
[48] See *Lee*, *supra* note 24 at para. 50.
[49] Applicants' written submissions dated April 2, 2019 at para. 52.
[50] *Dudley v. British Columbia*, 2016 BCCA 328 at para. 77.
[51] *Maranda v. Richer*, 2003 SCC 67 at para. 30.
[52] *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143, 93 A.C.W.S. (3d) 231 at para. 16 (B.C.S.C); cited with approval in *Camp*, *supra* note 27 at para. 23.
[53] *Camp*, *ibid* at para. 24.

a) "the challenged communications must pertain to proposed future conduct", not past improper conduct of the client which the lawyer seeks to address;

b) "the client must be seeking to advance conduct which it knows or should know is unlawful"; and

c) "the wrongful conduct being contemplated must be clearly wrong."[54]

[46] The applicants allege the Province committed a number of intentional unlawful acts which abrogate privilege over some of the MAG Information. I understand these allegations stem primarily from a letter one of the applicants received from his criminal defence counsel. In the letter, counsel states that he spoke with RB, a LSB lawyer, on several occasions following the applicants' guilty pleas. Counsel states that RB unequivocally advised him that "it was not the government's intention to make the indemnity taxable" and that he had written a legal opinion to that effect.[55]

[47] The applicants point to the letter as evidence that the Province entered into the Release Agreements "knowing, as a result of legal advice" from RB that the releases were invalid.[56] The applicants say this was "a fraud and a civil wrong".[57] They argue that by issuing the T4As the Province intended in bad faith to commit an indirect attempt at collecting tax in breach of the Release Agreements.[58] The applicants argue the Province's delay in issuing the T4As to the applicants and failure to send copies of the T4As to the applicants were contrary to law and possibly "the result of intentional wrongdoing."[59]

[48] In response, the Ministries submit I should not rely on the letter from defence counsel for the truth of its contents because it is "triple hearsay" and "bears no markers of reliability".[60] They submit the applicants' allegations of intentional unlawful conduct are "bare", "speculative and inflammatory", and in any event fail to establish the "future crimes exception".[61]

[49] I need not address the Ministries' hearsay submissions here. The applicants' argument fails even if it is true that RB provided a written legal opinion to the Province that the Indemnity and Release Agreements were not intended to create taxable benefits.

---

[54] *Ibid* at para. 28.
[55] Affidavit of MC at Exhibit "N".
[56] Applicants' written submissions dated April 2, 2019 at para. 46.
[57] *Ibid*.
[58] *Ibid* at paras. 20 and 50.
[59] *Ibid* at para. 39.
[60] Ministries' written reply submissions dated April 16, 2019 at para. 8.
[61] *Ibid* at paras. 25-28.

[50] The futures crime and fraud exception is not engaged where a lawyer and client contemplate, in a bona fide attempt to deal with a legal problem, conduct "whose legality is not plain or apparent."[62] In my view, those are the circumstances here. The evidence before me suggests that the tax implications of the Indemnity and Release Agreements have never been entirely clear. Documents disclosed to the applicants reveal that the Province was at one point communicating, through its lawyers, with a rulings officer at CRA about tax issues arising from the Indemnity and Release Agreements.[63] A legal opinion from the Department of Justice was contemplated. The matter is now before the Tax Court of Canada. Given this context, the issuance of the T4As could not have been "clearly wrong" and the Province did not know that its proposed conduct was unlawful in the way required to establish a *prima facie* case that this exception to privilege applies.

[51] At any rate, even if issuing the T4As was unlawful, the evidence does not satisfy me that the MAG Information includes communications in which the Province and its lawyers contemplated intentional unlawful conduct.

[52] For these reasons, the applicants' evidence and argument do not establish that the futures crime and fraud exception to privilege applies to the information in dispute.

Waiver of Privilege

[53] Finally, the applicants argue the Province waived privilege over the information in dispute, or some of it, by partially disclosing privileged communications. The law recognizes that if a party waives privilege over part of a communication, fairness and consistency may require disclosure of the entire communication.[64]

[54] The Ministry has already disclosed to the applicants emails between JP, an employee of the Income Taxation Branch of the Ministry of Finance, and a CRA Rulings Officer.[65] In those emails, it appears the Province sought the CRA's opinion on the tax implications of the Release Agreements. The applicants say that by disclosing those emails the Province waived privilege over the entirety of the communications with the CRA.[66]

[55] Based on my review of the Ministries' tables, the Ministries have not refused to disclose its communications with the CRA or claimed that any such

---

[62] *Camp*, *supra* note 27 at para. 28.
[63] Affidavit of MC at Exhibit "R".
[64] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 at para. 6, 45 B.C.L.R. 218 (S.C.); *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 30.
[65] *Supra* note 63.
[66] Applicants' written submissions dated April 2, 2019 at paras. 28-29.

communications are protected by solicitor-client privilege. The table descriptions contain no references to the CRA. There can be no waiver of privilege over a communication if no privilege has been claimed for that communication.

[56] Further, the applicants argue the Province waived privilege over RB's "opinion letter or memo" that said the Release Agreements were not intended to create taxable benefits.[67] This is the advice referred to in the letter from one of the applicants' former criminal defence counsel. In response, the Ministries reiterate that the applicants' evidence is triple hearsay and should be given no weight. The Ministries further submit no unfairness or inconsistency arises to compel full disclosure because the Province is not relying on RB's legal opinion to justify its conduct in a proceeding.[68]

[57] I find that the letter from defence counsel is not sufficiently reliable evidence to establish waiver of privilege. Defence counsel's letter is his recollection of what RB told him at some unspecified earlier dates. The letter was sent to one of the applicants, forwarded to the applicants' current counsel, and then attached as an exhibit to the affidavit of MC, a legal assistant at the applicants' current counsel's office. Thus, MC's evidence involves multiple layers of hearsay. It is not reliable evidence about what RB actually said to defence counsel.

[58] In any event, in Order F15-09, the adjudicator found that "merely disclosing the existence and gist" of legal advice, as RB allegedly did, is insufficient to establish waiver over all of the privileged communications related to that advice.[69] I make a similar finding here.

[59] Solicitor-client privilege will only yield in "clearly defined circumstances".[70] The applicants have not established such circumstances here.

---

[67] *Ibid* at para. 29.
[68] Ministries' written reply submissions dated April 16, 2019 at para. 31.
[69] Order F15-09, 2015 BCIPC 9 (CanLII) at para. 20.
[70] *McClure*, *supra* note 26.

CONCLUSION

[60] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. the Audit Records (as defined in para. 11 above) are outside the scope of FIPPA pursuant to s. 3(1)(c) of the Act; and

2. I confirm the Ministries' decisions that they are authorized under s. 14 of FIPPA to refuse the applicants access to the MAG Information and the FIN Information (as defined in para. 11 above).

December 16, 2019

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.s: F17-72625
F18-74185