Order F23-41

# MINISTRY OF INDIGENOUS RELATIONS AND RECONCILIATION

Allison J. Shamas
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**Summary:** An applicant made a request to the Ministry of Indigenous Relations and Reconciliation (the Ministry), under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for all records and communications relating to himself and his company in the Ministry's possession. The Ministry withheld some information under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege), 16(1)(a)(iii) and 16(1)(c) (harm to intergovernmental relations or negotiations), 17 (harm to financial interests of a public body), 19 (harm to individual or public safety) and 22(1) (harmful to personal privacy) of FIPPA. The parties resolved the disputes over ss. 17 and 19 during the inquiry. The adjudicator confirmed the Ministry's decision to withhold the information under ss. 16(1)(a)(iii) and 22(1) in full, and its decision to withhold information under s. 14 in part. As a result of the overlap in the Ministry's application of the provisions, the adjudicator was not required to determine the Ministry's application of ss. 13(1) or 16(1)(c).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ss. 14, 16(1)(a)(iii),16(1)(c) and 22(1), 22(2), 22(3), 22(4), and 44(1).

## INTRODUCTION

[1] The applicant submitted a request to the Ministry of Indigenous Relations and Reconciliation (Ministry) for access to records about himself and his company. The Ministry disclosed the responsive records but withheld some information under ss. 13(1) (policy advice and recommendations), 14 (solicitor-client privilege), 16(1)(a)(iii) and (16(1)(c) (harm to intergovernmental relations or negotiations), 17 (harm to financial interests of a public body), 19 (harm to individual or public safety) and 22 (harmful to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to refuse access. Following the applicant's request, the Ministry reconsidered its decision and released additional information to the applicant. Mediation did not resolve the issues in dispute, and they proceeded to inquiry. Following the issuance of the notice of

inquiry, the Ministry further reconsidered its decision and provided additional information to the applicant. Finally, during the inquiry the Ministry identified three additional records that it had not previously included in the responsive records, but withheld those records under s. 14.

## PRELIMINARY ISSUES

[3] Several preliminary matters arose during the inquiry which are addressed below.

### *Late-Raised Issue*

[4] In his response submission, the applicant raised an issue that was not in the notice of inquiry. He alleged the Ministry breached its obligations under s. 6(1) (duty to assist) by improperly failing to produce certain records which he claimed were in the Ministry's possession but were not provided to him. This assertion runs through his submission and subsequent correspondence.

[5] The Ministry objected to the applicant's attempt to raise a new issue that was outside the scope of the inquiry and argued that he should be precluded from doing so at this late stage in the proceedings.

[6] The notice of inquiry that the OIPC sent to the parties specified the issues to be decided and expressly stated "parties may not add new exceptions or issues into the inquiry without the OIPC's prior consent." In addition, the OIPC has repeatedly ruled that parties may only raise new issues at the inquiry stage if they request and receive permission to do so.[1] In this case the applicant did not explain why he did not raise s. 6(1) earlier, why he did not seek the OIPC's permission to add it to the inquiry, or why s. 6(1) should be added at this late point.

[7] Furthermore, the OIPC has procedures in place for addressing complaints that a public body has breached its obligations under s. 6(1). The complainant must first give the public body an opportunity to respond and resolve the complaint. If there is no resolution, then the complainant may ask that the matter be investigated (and potentially resolved) by the OIPC. Only then may the applicant request that it proceed to adjudication. The OIPC's procedures are in place to ensure the efficient, cost effective and fair administration of FIPPA. When a party raises an issue for the first time at an inquiry, all parties are deprived of the benefits available under the OIPC's investigation and early resolution procedures. In this case, there is no evidence that the parties first attempted to resolve this mater between themselves.

[1] See for example Order F20-38, 2020 BCIPC 44 at paras 4-7, Order F11-28, 2011 BCIPC 34 at para. 11, and Order F21-24, 2021 BCIPC 29 (CanLII) at para. 4 and 5.

[8] In the circumstances, I am not persuaded that there is a justifiable reason to add s. 6(1) as an issue to the inquiry, and I decline to do so. I will not address the applicant's s. 6 submissions and as a result, his arguments about records that were not provided to him further.

### *Sections 17 and 19 No Longer at Issue*

[9] During the inquiry, the Ministry reconsidered its application of ss. 17 and 19 and disclosed the information previously withheld under these provisions to the applicant. The applicant received this information.[2] Therefore, I find there is no longer any live dispute between the parties concerning the information previously withheld under these sections. Accordingly, I conclude ss. 17 and 19 are no longer at issue in this inquiry.

### *Number of Records at Issue*

[10] The parties disagreed over the number of pages of responsive records the Ministry provided to the applicant in response to his request. The Ministry asserted that the records consisted of 433 pages of responsive records. The applicant asserted that the Ministry's statement was incorrect and that "there [wa]s in fact 597 (440-page PDF) of responsive records at issue in this inquiry" and directed my attention to the copy of the responsive records attached to his submissions.

[11] In determining this inquiry, I considered the information in both the records provided by the Ministry and those provided by the applicant. From these records I have a clear understanding of the context and of the information that remains in dispute. A determination of the precise number of pages the Ministry produced to the applicant over the multiple phases and reconsiderations described above is not necessary to my determination.

### *Submissions Outside the Scope of FIPPA*

[12] The applicant's submissions include assertions about the rights of an Indigenous nation that the applicant represented in negotiations with the Province (Nation A). Those submission also include allegations that the Ministry engaged in misconduct toward him in his role as negotiator on behalf of Nation A.

[13] The Ministry argues that the submissions about Nation A's rights are outside of the scope of the inquiry and that the allegations of misconduct by Ministry officials should be disregarded because they are unfounded and inflammatory.

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[2] The applicant's submissions vary on the question of whether s. 17 remains in dispute. However, he has not identified any information that remains withheld under this provision, and my review of the records confirms that none of the information in dispute is withheld under s. 17.

[14] My role is to determine the issues concerning the application of FIPPA. I do not have jurisdiction to make determinations about rights that are outside the scope of FIPPA or about the propriety of the Ministry's conduct during negotiations with the applicant. However, many of the applicant's submissions provide useful background and context about the FIPPA issues. I will refer to those submissions where it is necessary in adjudicating the issues that are properly before me. I have considered the applicant's submissions accordingly.

### *Additional Submissions*

[15] During the inquiry, the OIPC wrote to the Ministry to request a complete copy of the records and to clarify the accuracy of a date in the Ministry's records table.[3] In response, the Ministry provided an amended table of records (Records Table 2) and additional submissions.[4] I gave the applicant an opportunity to respond, and the Ministry an opportunity of reply.[5] Both parties provided additional evidence and/or argument on the merits of the inquiry.[6]

[16] In addition, based on my preliminary review of the Ministry's evidence and argument, I determined that it had not provided a sufficient evidentiary foundation for me to assess its assertion of privilege under s. 14. Due to the importance of solicitor-client privilege, I determined that in the circumstances of this case, it was appropriate to permit the Ministry to submit additional evidence in support of its s. 14 assertion.[7]

[17] The Ministry filed additional submissions, two additional affidavits from Lawyers 1 and 2, and a third version of the records table (Records Table 3).[8] The applicant filed a response to that material,[9] and the Ministry filed a reply.[10] In preparing the instant decision, I considered all of the evidence and argument filed by both parties, subject to my comments regarding s. 6 and the scope of FIPPA, above.

## ISSUES AND BURDEN OF PROOF

[18] The issues to be decided in this inquiry are as follows:

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[3] The Registrar's email to the Ministry is dated February 14, 2023.
[4] The Ministry's response is dated February 15, 2023.
[5] My letter is dated February 16, 2023.
[6] The applicant's correspondence is dated February 23, 2023 and the Ministry's correspondence is dated March 2, 2023.
[7] My letter to the parties is dated March 16, 2023.
[8] The Ministry's submission is dated March 28, 2023. The third version of the records table are appendices to the two affidavits.
[9] The applicant's response is dated April 18, 2023.
[10] The Ministry's reply is dated April 26, 2023.

1. Is the Ministry authorized to refuse to disclose the information at issue under ss. 14, 13(1), 16(1)(a)(iii) and 16(1)(c)?

2. Is the Ministry required to refuse to disclose the information at issue under s. 22(1)?

Section 57(1) of FIPPA places the burden on the Ministry to prove that the applicant has no right of access to the information in dispute under ss. 13(1), 14, 16(1)(a)(iii) and 16(1)(c).

[19] While the Ministry has the initial burden to establish that the information in dispute is personal information, s. 57(2) of FIPPA places the burden on the applicant to prove that disclosure of any personal information in the records would not be an unreasonable invasion of a third party's personal privacy under s. 22(1).[11]

## BACKGROUND

[20] The applicant operates a company through which he seeks to provide Indigenous groups with "business and consulting solutions [related] to natural resource development."[12] In 2016, the applicant began representing Nation A in its negotiations with the BC government. Those negotiations included, but were not limited to, consultation regarding the Coastal GasLink Pipeline Project (Pipeline Project).

[21] The Pipeline Project is a project in BC that crosses territories over which several Indigenous nations including Nation A have established or asserted rights and/or title (Affected Nations). As part of the environmental assessment (EA) process for the Pipeline Project, the BC government consulted with the Affected Nations. The consultation process was complex and involved five BC government ministries and agencies that are relevant to this inquiry:

- The Ministry, which is responsible for pursuing reconciliation with Indigenous nations and peoples on behalf of the BC Government.
- The Environmental Assessment Office (Assessment Office), which is part of the Ministry of Environment and Climate Change Strategy. The Assessment Office administers the environmental assessment process under the *Environmental Assessment Act* (*EAA*)[13] and enforces compliance with environmental assessment certificates. The Assessment Office fulfills two purposes under the *EAA*: promoting sustainability and supporting reconciliation with Indigenous peoples.[14] For a major project to

[11] Order F21-64, 2021 BCIPC 75 (CanLII), at para. 9.
[12] Applicant's response, para. 4.
[13] RSBC 2018 c 51 [*EAA*].
[14] RSBC 2018 c 51, s. 2(2).

proceed in BC, an environmental assessment must be completed by the Assessment Office.
- The Oil and Gas Commission (Commission), which is an agent of the government of BC responsible for regulating all oil and gas activities in BC.[15]
- The Ministry of Energy, Mines and Petroleum Resources (Ministry of Energy).
- The Ministry of Transportation and Infrastructure (Ministry of Transportation).

[22] During the EA process, the Ministry led negotiations with Affected Nations on behalf of the Province. As part of this process, the Ministry sought to enter into pipeline revenue sharing agreements or pipeline benefits agreements (PBA) in exchange for the pipeline being located on each Affected Nation's territory. Nation A was involved in these negotiations.

[23] For its part, the Assessment Office consulted with 29 Affected Nations including Nation A. Furthermore, the Assessment Office led a coordinated response to address the Pipeline Project's potential adverse effects which were identified by Affected Nations. In this process, it also sought input from government agencies, including the Ministry, the Ministry of Energy, and the Commission.

[24] During negotiations regarding the Pipeline Project, the applicant became dissatisfied with the Ministry's conduct toward him. In response, he filed an access request with the Ministry broadly seeking all records relating to himself and his company in the Ministry's possession for the period from January 1, 2018 – November 18, 2019. It is the Ministry's response to this request that is at issue in these proceedings.

## RECORDS AND INFORMATION AT ISSUE

[25] The responsive records relate to the Ministry's negotiations and consultation with Nation A and in some cases other Indigenous nations. While the responsive records relate to a number of different matters, most of the withheld information relates to the Pipeline Project.

[26] The Ministry provided the records containing the information withheld under ss. 13(1), 16(1)(a)(iii), 16(1)(c) and 22(1) for my review, but not the information withheld under s. 14.

[15] *Oil and Gas Activities Act* [SBC 2008] c. 36, s. 3.

## SECTION 14 - SOLICITOR CLIENT PRIVILEGE

[27] Section 14 provides that the head of a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.[16] The Ministry claims legal advice privilege applies to the information withheld under s. 14.

[28] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.[17] For information to be protected by legal advice privilege it must be:

- a communication between solicitor and client (or their agent);
- that entails the seeking or providing of legal advice; and
- that is intended by the solicitor and client to be confidential.[18]

Not every communication between client and solicitor is protected by solicitor-client privilege. However, if the conditions set out above are satisfied, then legal advice privilege applies.[19]

[29] Legal advice privilege extends to more than the individual records that actually communicate or proffer legal advice. It includes communications that are "part of the continuum of information exchanged" between the client and the lawyer in order to obtain or provide the legal advice.[20] This "continuum of communications" involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as "history and background from a client" or communications to clarify or refine the issues or facts.[21] It also covers communications at the other end of the continuum, after the client receives the legal advice, such as internal client communications about the legal advice and its implications.[22]

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[16] Order F22-64, 2022 BCIPC 72 (CanLII) at para. 15.
[17] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College of Physicians*] at para. 26.
[18] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), p. 837, *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22 [*Solosky*].
[19] *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22, *Solosky* at p. 13; *R. v. McClure*, 2001 SCC 14 at para. 36; *Festing v. Canada (Attorney General),* 2001 BCCA 612 at para. 92.
[20] *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 83. See also *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 40-46 [*Camp Developments*].
[21] *Camp Developments*, *supra* note 20 at para. 40.
[22] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 at paras. 22-24.

[30] In short, legal advice privilege applies to information that, if disclosed, would reveal or allow an accurate inference to be made about privileged communications between a lawyer and their client.[23]

***Overview of the Evidence and Records in Dispute***

[31] The Ministry withheld 33 records in their entirety under s. 14. The withheld records are email chains and attachments to those email chains. All of the records withheld under s. 14 relate to the Pipeline Project.

[32] The Ministry did not provide the information withheld under s. 14 for my review. Instead, over the course of three rounds of submissions it provided five affidavits (four from two lawyers (Lawyer 1 and Lawyer 2) at the Province's Legal Services Branch (LSB)) and one from the Assistant Deputy Minister, Negotiations and Regional Operations Division for the Ministry (the ADM). It also provided three tables of records (Records Tables 1, 2, and 3) which summarize the responsive records.

[33] I am satisfied that I have sufficient evidence to decide if s. 14 applies. The lawyers' sworn affidavit evidence establishes that they are practicing lawyers and officers of the court with a professional duty to ensure that privilege is properly claimed. Their evidence was detailed and addressed each individual record. Both state that they reviewed the records at issue, and that they were involved in the communications about which they provided evidence. Their evidence is confirmed by the evidence of the ADM and the records tables. Finally, the records the Ministry did disclose and the materials provided by the applicant provide additional context.

***Ministry's Evidence and Argument***

[34] The Ministry's position is that the email chains are subject to solicitor-client privilege because they reveal confidential communications among employees of the Ministry, the Ministry of Energy, the Commission, the Assessment Office, and LSB lawyers about consultation issues in respect of the Pipeline Project within the framework of a solicitor-client relationships between Lawyer 1 and Lawyer 2 and their respective clients.

[35] Both lawyers state that disclosing the withheld information would reveal legal advice.

[36] The Ministry takes the position that Lawyer 1's client is the Ministry.[24] In both of her affidavits Lawyer 1 states that at the time of the communications the

[23] See for example Order F22-34, 2022 BCIPC 38 (CanLII), at para. 41, Order F22-53, 2022 BCIPC 60 (CanLII), at para. 13, and Order F23-07, 2023 BCIPC 8 (CanLII), at para. 25.
[24] Ministry initial submissions at para. 84.

Ministry was her client, and that between August and October 2019 she provided legal advice to the Ministry on various matters regarding the implementation of the PBA with Nation A.[25]

[37] She explains that due to the ongoing nature of her relationship with the Ministry, she was regularly copied with email chains in order to keep her informed and so she could formulate legal advice about matters related to the implementation of the PBA with Nation A.

[38] Lawyer 1 provided detailed evidence about the nature of the communications in which she was personally involved. According to Lawyer 1:

- The Ministry withheld four email chains in which a Ministry representative forwarded Lawyer 1 an email chain together with a request for legal advice, and Lawyer 1 provided legal advice to Ministry representatives.[26] The email messages that precede the request for advice are between the applicant, and representatives of the Ministry, the Assessment Office, and the Ministry of Energy. However, the request for and provision of legal advice are, with the exception of one email chain in which another LSB lawyer is copied, exclusively between Lawyer 1 and Ministry representatives.

- The Ministry also withheld one email in which a Ministry representative forwarded Lawyer 1 an email chain together with a request for legal advice.[27] Again, while the email messages that precede the request for advice are between the applicant and various representatives of the government entities involved in the Pipeline Project, the request for legal advice is exclusively between Lawyer 1 and the Ministry.

- The Ministry withheld 11 email chains that Lawyer 1 says were sent to her (and in some cases her colleague at LSB) so she could formulate legal advice and to keep her informed about developments in the matters on which she was advising.[28] The chains involve communications amongst representatives of the Ministry, the Assessment Office, the Commission, and Nation A. Eight of the chains were sent to Lawyer 1 by a Ministry representative – these messages are exclusively between Lawyer 1 and

[25] Affidavit no. 1 of Lawyer 1 at paras. 6 and 7. See also affidavit no. 2 of Lawyer 1 at paras. 7 and 8.
[26] See description of the records at pages 130-134, 158-164, 177-180, and 181-186 of phase 2 of 2 of the records described in Records Table 3. See also affidavit no. 2 of Lawyer 1 at para. 11(a).
[27] See description of the records at pages 3-6 of phase 2 of 2 of the records described in Records Table 3. See also affidavit no. 2 of Lawyer 1 at para. 11(c)
[28] See description of the records at pages 19-22, 82-86, 87-90, 91-95, 108-111, 120-124, 127-128, 135-136, 206-208, 219-224, 227-231, 232-235 of phase 2 of 2 of the records described in Records Table 3. See also affidavit no. 2 of Lawyer 1 at para. 11(b) and affidavit no. 2 of Lawyer 2 at para. 14.

Ministry representatives.[29] In the other three chains a representative of the Commission copied Lawyer 1 and other government entities involved in the Pipeline Project with the chain.[30]

- The Ministry also withheld four attachments to the email chains which were sent to her so she could formulate legal advice. She describes the attachments as an arbitration decision, a letter from a Ministry representative to Nation A that accompanied the arbitration decision, meeting summary notes, and a PBA. According to Lawyer 1, the attachments relate to the substance of the legal advice she provided to the Ministry related to negotiation and implementation of agreements with Nation A and their contents informed her legal advice.[31] With respect to the PBA, Lawyer 1 also explains that she provided the Ministry a legal opinion regarding the agreement.

- Finally, the Ministry withheld one email chain between representatives of the Ministry, the Commission and the Assessment Office that includes a reference to legal advice that the Ministry sought from Lawyer 1.[32]

[39] Lawyer 1 explains that given the high degree of government coordination required for the Pipeline Project as a whole the Ministry, the Ministry of Environment, the Assessment Office and the Commission informed each other about issues that arose during their engagement with Indigenous nations.[33]

[40] Addressing the involvement of the applicant and representatives of Nation A in some of the email chains that were forwarded to her, Lawyer 1 explains that while many of the email chains began with communications between the applicant or representatives of Nation A and various government entities involved

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[29] See description of the records at pages 82-86, 87-90, 91-95, 120-124, 127-128, 135-136, 206-208, 219-224 and 227-231 of phase 2 of 2 of the records described in Records Table 3.
[30] See description of the records at pages 19-22, 108-111 and 232-235 of phase 2 of 2 of the records described in Records Table 3.
[31] See affidavit no. 2 of Lawyer 1 at para. 12.
[32] See description of the records at pages 112-113 of phase 2 of 2 of the records described in Records Table 3 and affidavit no. 2 of Lawyer 1 at para. 11(d). While the heading in Lawyer 1's affidavit and Records Table 3 suggests that the Ministry requested the advice under discussion, the body of the of Lawyer 1's affidavit suggests that the Assessment Office requested it. In addition, the Ministry's evidence does not specify which LSB lawyer provided the advice. As the Ministry's right to withhold this information ultimately turns on the question of waiver, nothing turns on the question of whether the Lawyer 1 or 2 gave the advice, or whether they gave it to the Ministry or the Assessment. For the purposes of my analysis below, I will assume that the Ministry sought the advice. In addition, as Lawyer 1 provided evidence about this chain, and paras. 11 – 19 of her first affidavit strongly suggest that the records about which she provided evidence related to her own legal advice, for the purpose of my analysis I will assume the chain relates to Lawyer 1's legal advice.
[33] Affidavit no. 2 of Lawyer 1 at para. 9.

in the Pipeline Project, the applicant and Nation A were not included in internal discussions about legal advice or communications with her.[34]

[41] Finally, with respect to confidentiality Lawyer 1 deposes that her communications with the Ministry were on a confidential basis, and that she considered the matters she was advising on to be sensitive and confidential and treated them accordingly. She also states that to the best of her knowledge the Ministry treated the s. 14 information in a confidential manner. The ADM confirms Lawyer 1's evidence stating that he believes that the communications at issue were understood to be confidential and that to the best of his knowledge, the Ministry treated the s. 14 Information in a confidential manner.

[42] While in her first affidavit Lawyer 2 states that her client was the Assessment Office and the Commission, in her second affidavit Lawyer 2 states that her client was the Assessment Office, the Commission, the Ministry, and the Ministry of Energy. Addressing the relationship between all four entities for the purpose of the communications at issue, Lawyer 2 explains that the Assessment Office, and the Commission had distinct, but related responsibilities and authorities regarding application processes associated with the Pipeline Project and were in regular communication with each other as well as employees of the Ministry and the Ministry of Energy in order to coordinate consultation with Affected Nations in respect of the extension request. Lawyer 2 states that she advised these entities on various matters regarding consultation issues related to the extension request for the Pipeline Project EA certificate.

[43] Lawyer 2 explains that during the time period covered by the withheld communications she provided legal advice to her clients on various matters regarding the extension request for the Pipeline Project environmental assessment and that her clients often copied her with information which was relevant for the purpose of formulating her legal advice.

[44] Lawyer 2 states that she was involved in a single email chain which included a number of attachments that a representative at the Assessment Office sent to her. She describes the email chain as an ongoing conversation between her clients and a third-party contractor about the Pipeline Project,[35] and explains that she was copied throughout these discussions in order to keep her informed and so she could formulate legal advice.[36]

[45] With respect to the attachments, Lawyer 2 explains that two of the attachments were incoming letters from Affected Nations which provided the necessary context for the third attachment, a draft response to the letters prepared by the Ministry. Lawyer 2 explains that she provided legal advice to her

[34] Affidavit no. 2 of Lawyer 1 at paras. 14 – 17.
[35] Affidavit no. 2 of Lawyer 2 at paras. 9, 13, 14, 15.
[36] Affidavit no. 2 of Lawyer 2 at para. 14.

clients regarding the draft response, that in order to do so she reviewed all three documents, and that their contents informed the advice she provided her clients.[37]

[46] Lawyer 2's evidence about confidentiality mirrors that of Lawyer 1.

[47] Citing the BC Court of Appeal's decision in *British Columbia (Attorney General) v. Lee*, the Ministry argues that solicitor-client privilege captures more than just communications which give or receive legal advice, and that all communications made within the framework of solicitor-client privilege are protected.

[48] The Ministry also asserts that privileged communications should not be severed unless severance can be accomplished without any risk that privileged legal advice will be revealed or capable of ascertainment.

[49] With respect to confidentiality, it argues that the fact that employees circulated legal advice or emails that were part of the continuum of communications between themselves and LSB lawyers did not impact the confidentiality of the communications.

[50] Finally, addressing waiver, the Ministry submits that just as discussions between clients/employees about legal advice received from counsel fall within the continuum of legal advice, so too do discussions between government representatives about legal advice received from their respective counsel when the matter being discussed is of common interest.

***Applicant's Arguments***

[51] The applicant challenges the Ministry's assertion of privilege over communications shared between such a broad group of individuals and entities.

[52] He argues that communications shared between a broad range of individuals and across four entities cannot be construed as being subject to solicitor-client privilege. In this regard, he specifically notes that some communications included open communications with persons outside of the solicitor client relationship and should not be "blanketed by solicitor client privilege."[38] He states it is difficult to understand in what capacity information was being exchanged between parties, and by whom and whether that information was exchanged in a continuum of confidentiality. He submits that it "seems very unlikely" that the conversations between so many people were consistently treated as confidential, arguing that confidentiality "seems highly improbable" considering the number of individuals involved.

[37] Affidavit no. 2 of Lawyer 2 at para. 10.
[38] Applicant's submission dated February 23, 2023 at para. 54.

[53] The applicant also argues that solicitor-client privilege does not protect communications between a third party and a lawyer, except where the third party is acting as an agent of the client for the purpose of the advice. He also argues that lawyers who were not personally involved in the communications at issue swore affidavits in support of solicitor-client privilege.

[54] In addition, the applicant alleges that one of the LSB lawyers held a different, non-lawyer role in respect of the EA. He does not, however, present evidence to substantiate or explain the relevance of this claim. Whatever other role an LSB lawyer may have, I am satisfied that for the purpose of the communications at issue, Lawyers 1 and 2 were acting in their capacities as solicitors. As this argument is not borne out in the facts, I will not address it further.

### *Findings and Analysis*

*Who is the Client?*

[55] Lawyer 1's evidence is not contradicted and I have no difficulty accepting her first-hand, sworn evidence that for the purposes of the communications at issue her client was the Ministry. However, as the identity of Lawyer 1's client is fundamental to some of the determinations below, it bears further comment.

[56] Lawyer 1 also states that the Province of BC as represented by the various ministries of government is her client. However, for the reasons set out below, I do not find this evidence relevant to the issue of the identity of Lawyer 1's client <u>for the purpose of the communications at issue</u>.

[57] First, I understand this statement to relate to Lawyer 1's general responsibilities as an LSB lawyer, not to the identity of her client for the purpose of the communications at issue in this inquiry. In making this finding, I rely on the distinction Lawyer 1 makes in her evidence about the Ministry versus the Province. She states:

> 7. Between August and October 2019, I provided legal advice to the Ministry on various matters regarding the implementation of the [Pipeline Project PBAs with Nation A].
>
> 8. At the time relevant to the inquiry, the Ministry or MIRR was my client. My client is also His Majesty the King in the right of the Province of British Columbia as represented by the various ministries of government.

[58] In my view, the only reasonable interpretation of Lawyer 1's words is that she represented the Ministry in its negotiations with Nation A regarding the implementation of a PBA (the substance of the communications at issue in this

inquiry), but that in general, as an LSB lawyer, she represents all BC government ministries. Moreover, to interpret her evidence about the government of BC otherwise would be at odds with her clear statement that at the relevant time her client was the Ministry.

[59] However, in case I am mistaken about Lawyer 1's evidence, even if Lawyer 1 did intend to state that the BC government as a whole was her client for the purpose of the communications at issue, I would not accept this evidence. The Ministry provided no facts that would substantiate this assertion, and given the sensitivity and limited nature of the legal issues concerning the negotiation of a PBA with Nation A in respect of the Pipeline Project, it is difficult to conceive of how or why the BC government as a whole could have an interest in Lawyer 1's advice on this issue.

[60] Moreover, the BC Supreme Court recently made clear that a global assertion of privilege across government as a whole cannot support a claim of solicitor-client privilege over individual documents.[39] I understand this to mean that a government entity, just like any private client, must provide evidence about the identity of the client for the purpose of each individual communication over which it asserts privilege. It is not enough for a government lawyer, as Lawyer 1 did in this case, to simply assert that they work on behalf of the BC government.

[61] All this to say, I find that the Ministry not the BC Government as a whole was Lawyer 1's client for the purpose of the communications at issue.

[62] As for Lawyer 2's client, the OIPC has in past orders accepted that multiple government entities are the client where, as in the instant case, the public body provides evidence to establish that a lawyer advised a group of government ministries or entities who were working on a specific matter.[40] Furthermore, the BC Supreme Court has affirmed that evidence from a lawyer stating that they gave legal advice in confidence about a matter to a group of government ministries or entities who were working on that matter can be sufficient to establish that multiple government ministries are a single client for the purpose of an assertion of solicitor-client privilege.[41]

[63] While I have concerns about Lawyer 2's failure to explain the reason for the change in her evidence about the identity of her clients from her first to second affidavit, her evidence is that she advised all government entities who participated in consultations with respect to the extension request for the Pipeline Project EA Certificate. It is clear from the records, the Records Tables, and the

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[39] *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner)* 2021 BCSC 266 (CanLII) [*Ministry of Finance*] at paras. 133 – 134.
[40] See for example Order F22-11, 2022 BCIPC 11 (CanLII) at paras. 36 – 38, Order F20-18, 2020 BCIPC 20 (CanLII), at paras. 35 – 43, and Order F23-19, 2023 BCIPC 22.
[41] *Minister of Finance, supra* note 39 at paras. 133 – 135.

Ministry's other evidence and submissions that all four entities were involved in addressing this issue on behalf of the BC government. Considering all the evidence together, I am satisfied that for the purposes of the communications at issue, the Ministry, the Ministry of Energy, the Assessment Office, and the Commission were Lawyer 2's client.

*Nature of the Communications and Confidentiality*

[64] Before delving into my analysis, I will briefly describe my approach to the communications at issue. The records before me are email chains. For the purpose of determining whether legal advice privilege applies, I have analysed each individual email message and attachment in each chain. For ease of analysis, in the discussion below I break down the email chains into their component parts. However, in doing so, I have kept in mind the cautionary statement from the BC Supreme Court that "disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant … to infer the contents of legal advice."[42]

[65] Based on the lawyers' evidence, the records tables, and the context, I find that the information in dispute falls into five categories: requests for and provision of legal advice, email chains sent or forwarded by a client to a lawyer, email chains forwarded by a third party to a lawyer, attachments to email chains, and discussions of legal advice amongst the government entities involved in the Pipeline Project. I will address each in turn.

Requests for and Provision of Legal Advice

[66] The Ministry asserts solicitor-client privilege over four email exchanges in which a Ministry representative requested and Lawyer 1 provided legal advice, and one email communication in which a Ministry representative requested legal advice from Lawyer 1. With the exception of the involvement of another LSB lawyer, the only persons involved in these communications were Lawyer 1 and Ministry representatives.

[67] There is no question that email communications between lawyer and client in which a client requests and/or a lawyer provides legal advice satisfy the first and second steps of the test for legal advice privilege.

[68] Turning to the involvement of the other LSB lawyer, courts have long recognized that lawyers, their staff and other firm members working together on a file may share privileged information amongst themselves without vitiating confidentiality.[43] Justice Slatter of the Alberta Court of Queen's Bench explained: "a lawyer is allowed to disclose privileged communications to members of his or

[42] *Camp Development, supra* note 20 at para. 46.
[43] *Shuttleworth v. Eberts et. al.*, 2011 ONSC 6106 at paras. 67 and 70-71 [*Shuttleworth*].

her staff, other associates in the office, expert witnesses, and lawyers with specialized knowledge that might be retained to assist in serving the client."[44] Justice Quigley of the Ontario Superior Court of Justice phrased it more broadly, stating: "[t]he cornerstone of privilege, including solicitor-client privilege, is that expectation of confidentiality, but it is vis-à-vis third parties, not inter se between the parties to the privileged relationship itself."[45] The OIPC has recognized that these principles apply equally to the government context.[46] Relying on these principles, I find that the involvement of Lawyer 1's colleague has no bearing on the confidentiality of the communications described above.

[69] The communications are between the Ministry and LSB lawyers. Both the context and Lawyer 1's evidence make clear that the subject matter of Lawyer 1's legal advice was sensitive. Finally, both Lawyer 1 and the ADM clearly state that these communications were intended to be confidential. For all these reasons, I am satisfied that that the confidentiality requirement is satisfied.

[70] I find that the communications described above satisfy the test for legal advice privilege.

Email Chains Sent from a Client to a Lawyer

[71] The Ministry also asserts solicitor-client privilege over 14 whole or part email chains that a client sent or forwarded to the lawyer. Specifically, the Ministry withheld:

- The parts of the five email chains discussed above that the Ministry sent to Lawyer 1 along with its request for legal advice. These chains involve communications amongst the applicant and Ministry representatives.
- Eight complete email chains between representatives of the Ministry, the Assessment Office, the Commission, and Nation A that a Ministry representative forwarded to Lawyer 1.
- One complete email chain involving Lawyer 2's clients and a third-party contractor involved with the Pipeline Project that a representative of the Assessment Office forwarded to Lawyer 2.

[72] The courts are clear that information does not become privileged simply by sending a copy of it to a lawyer.[47] Instead, the evidence must establish that the information was provided to the lawyer in a context where it is directly related

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[44] *Weary v. Ramos*, 2005 ABQB 750 at para. 9.
[45] *Shuttleworth*, *supra* note 36 at para. 67.
[46] See Order F20-10, 2020 BCIPC 1 (CanLII) at para. 36.
[47] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.* 2006 BCSC 1180 at para. 61, *Humberplex Developments Inc. v. TransCanada Pipelines Ltd*., 2011 ONSC 4815 at para. 49, *Imperial Tobacco Canada Limited v. The Queen*, 2013 TCC 144 at para. 57.

to the seeking, formulating or giving of legal advice, [48] or that it was provided to the lawyer in order to obtain legal advice.[49] I am satisfied that the email chains described above satisfy this standard.

[73] Lawyers 1 and 2 depose that that their respective clients sent the email chains to them so they could formulate legal advice. The context supports the lawyers' evidence. In this regard I note that the lawyers and the ADM state that the emails related directly to the topics on which the lawyers provided advice to their respective clients. The client representatives sent the chains to Lawyers 1 and 2 during the time when the lawyers were providing ongoing legal advice to their respective clients. Finally, the individuals and entities involved in the email chains (the applicant and representatives of Nation A in the case of Lawyer 1, and a third-party contractor in the case of Lawyer 2) are those that I would expect to have information related to, and that would inform each lawyers' legal advice.

[74] Turning to confidentiality, the emails in which clients sent the chains to their lawyers were exclusively between lawyer and client – no third parties were involved. As above, this fact, together with the sensitive nature of the matters at issue and the affiants' evidence that the communications were intended to be confidential, satisfies me that the communications were intended to be confidential.

[75] I now turn to the applicant's arguments that communications shared between such a broad range of individuals and entities are not confidential and cannot be subject to solicitor-client privilege. While it is certainly true that the involvement of third parties in communications can undermine a claim of solicitor-client privilege, in the circumstances described above I find that it does not.

[76] The confidentiality requirement in the test for solicitor-client privilege applies to communications between lawyer and client. In this case, the third parties who were involved in the email chains were excluded from the communication where the client representative sent the email chains to their lawyer. Instead, the third parties' communications were simply sent to Lawyers 1 and 2 as information so the lawyers could formulate legal advice. There is no requirement that the information a client sends to a lawyer so the lawyer can formulate legal advice be confidential. Accordingly, I find that the fact that the involvement of third-party individuals in the email chains does not undermine the confidentiality of the communications between lawyer and client.

[77] Finally, in assessing the Ministry's evidence concerning these emails, I considered the applicant's argument that lawyers who were not personally

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[48] *Murchison v. Export Development Canada*, 2009 FC 77 at para. 44, *Canada (Public Prosecution Service) v. JGC*, 2014 BCSC 557 at paras. 16-19, *Belgravia Investments Ltd. v Canada*, 2002 FCT 649 at para. 46 Order F15-52, 2015 BCIPC 55 at para. 14.
[49] *Descôteaux et al v. Mierzwinski,* 1982 CanLII 22 (SCC) at pages 892-893.

involved in the communications swore affidavits in support of solicitor-client privilege. While the lawyers were not involved in the earlier exchanges in the email chains, I am not persuaded that this fact impacts their ability to provide evidence about those chains. In the circumstances, what is relevant to the Ministry's assertion of solicitor-client privilege is the purpose for which the clients sent the email chains to the lawyers. The lawyers, as recipients of the email chains, were able to, and in fact provided first-hand evidence about the purpose for which the chains were sent – so the lawyers could formulate legal advice. I have no concerns about the fact that the lawyers were not involved in the earlier portions of these chains.

[78] I find that the communications described above satisfy the test for legal advice privilege.

Email Chains forwarded by a Third-Party to a Lawyer

[79] The Ministry also asserts solicitor-client privilege over three email chains that a representative of the Commission (who is not Lawyer 1's client) forwarded to Lawyer 1.

[80] Lawyer 1 asserts that these email chains were sent to her so she could formulate legal advice. She also states that given the high degree of government coordination required for the Pipeline Project as a whole the Ministry, the Ministry of Environment, the Assessment Office, and the Commission informed each other about issues that arose during their engagement with Indigenous nations. For the purpose of assessing the application of s. 14 to these email chains, I accept the Ministry's evidence. However, it bears repeating the Commission was not Lawyer 1's client. Accordingly, the communications in this category were between Lawyer 1 and a third-party.

[81] Solicitor-client privilege protects communications between lawyer and client. As the applicant notes, legal advice privilege only extends to communications involving third parties in limited circumstances.[50] Legal advice privilege applies to third party communications if the communication meets the criteria for legal advice privilege and the third party either:

> (a) serves as a channel of communication between client and solicitor; or
> (b) performs a function integral to the solicitor client relationship.[51]

[82] The courts have made clear that information provided to a lawyer by a third party is not protected simply because it relates to legal advice. In *General Accident Assurance Company v. Chrusz* [*Chrusz*], the leading case on

[50] *College of Physicians, supra* note at para. 32.
[51] *Greater Vancouver Water District v. Bilfinger Berger AG,* 2015 BCSC 532 [*Bilfinger Berger*] at para. 27 (b) and (c).

communications between lawyers and third parties, Justice Doherty of the Ontario Court of Appeal rejected the notion that legal advice privilege should extend "to all information relevant to a legal problem which is conveyed at a client's request by a third party to a lawyer."[52] In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* [*College of Physicians*], the BC Court of Appeal adopted Justice Doherty's reasons and found that communications with experts whose opinions were "relevant, and even essential, to the legal problem confronting the College" did not perform a function that was integral to the relationship between the solicitor and client.[53] Finally, in *Greater Vancouver Water District v. Bilfinger Berger AG* [*Bilfinger Berger*], after a fulsome review of the BC court decisions regarding communications between lawyers and third parties with respect to solicitor-client privilege,[54] the British Columbia Supreme Court stated: "Communications with a third party are not protected by solicitor-client privilege merely because they assist the solicitor in formulating legal advice to the client."[55]

[83] In the instant case, Lawyer 1's evidence is that the Commission sent the email chains to Lawyer 1 to keep her informed and so she could formulate her legal advice. While Lawyer 1 makes clear that the Ministry worked closely with the Commission on consultation issues regarding the Pipeline Project, the Ministry does not explain why or in what capacity a Commission representative sent information to the Ministry's lawyer. The Ministry does not argue that the Commission served as a channel of communications between the Ministry and Lawyer 1, or that it performed a function integral to the relationship. It simply treats the communications between the Commission and Lawyer 1 in the same manner as the communications between the Ministry and Lawyer 1, stating that they were sent to Lawyer 1 to keep her informed and so she could formulate legal advice.

[84] Based on the information before me, I cannot conclude that the Commission acted as a channel of communication between, or performed a function that was essential to the operation of the solicitor-client relationship. The Ministry's submissions and evidence indicate only that the Commission provided information that Lawyer 1 used to formulate her legal advice. Following *Bilfinger Berger, Chrusz,* and *College of Physicians*, it is not enough that the communications assisted Lawyer 1 in formulating legal advice, even if the information provided by the third parties was essential to formulating the legal advice.

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[52] 1999 CanLII 7320 (ON CA), [*Chrusz*] Doherty JA dissenting in part. While Justice Doherty's comments were in the dissent, they have been repeatedly cited since.
[53] *College of Physicians, supra* note  at para. 51.
[54] *Bilfinger Berger, supra* note 51. See paras. 25 – 40 for the court's complete discussion of third parties and legal advice privilege.
[55] *Bilfinger Berger, supra* note 51 at para. 27 (a).

[85] Accordingly, I find that the three email chains that a representative of the Commission sent to Lawyer 1 do not satisfy the test for legal advice privilege.[56]

The Attachments

[86] The Ministry also withheld seven attachments to the email chains discussed above.

[87] An attachment may be privileged on its own, independent of being attached to another privileged record, or it 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.[57]

[88] In this case the attachments are not, themselves, privileged communications between lawyer and client. The Ministry's evidence reveals that when the attachments were originally created they were not confidential communications between solicitor and client for the purpose of seeking, formulating or providing legal advice. Nonetheless, in the present context, each attachment is appended to a record that I found is privileged. The critical question is whether the attachments are an integral part of the privileged communication to which they are appended such that they would reveal the legal advice at issue.

[89] Based on Lawyer 1's evidence and the information in Records Table 3, I am satisfied that the attachments would reveal the nature of the legal advice sought and provided in the emails to which they are attached. The Ministry provided each of the attachments to Lawyer 1 in the context of providing Lawyer 1 with information on which to formulate her advice about the negotiation of a PBA with Nation A. From the descriptions of the attachments,[58] I can see that the attachments relate directly to the advice that Lawyer 1 provided to the Ministry on this issue. In the circumstances, I accept Lawyer 1's evidence that all four attachments informed her legal advice.

[90] However, I note that three of the attachments that were sent to Lawyer 1 (the arbitration decision, the letter that accompanied the arbitration decision, and the meeting summary notes) are attached both to privileged,[59] and unprivileged[60] email chains. They are identified as duplicates in Records Table 3. In my view, revealing these attachments in the context of the unprivileged email chains will reveal information that I found is privileged.

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[56] The Ministry may not withhold the email chains found at pages 19-22, 108-111 and 232-235 of phase 2 of 2 of the records. However, for the reasons discussed below, the Ministry may withhold the attachments to those chains.
[57] Order F18-19, 2018 BCIPC 22 (CanLII) at para. 36 – 44.
[58] See Affidavit no. 2 of Lawyer 1 and Records Table 3.
[59] See Records Table 3, description of pages 91-95 of phase 2 of 2 of the records.
[60] See Records Table 3, description of pages 19-23 of phase 2 of 2 of the records.

[91] Lawyer 2 deposes that two of the attachments to the email chain in which she was involved provided the necessary background for her legal advice about the third – a draft letter the Ministry had prepared. Lawyer 2's evidence makes clear the connection between her legal advice and the attachments. Furthermore, the Ministry's description of the records corroborates Lawyer 2's evidence. I accept Lawyer 2's evidence that the three attached records informed her legal advice.

[92] Given the clear connection between the attachments and the legal advice at issue, in my view revealing the attachments would allow accurate inferences to be made about the privileged communications in the email messages to which they were attached. Knowing what documents were exchanged, and when, would allow accurate inferences about the confidential privileged communications in the emails. I find that all of the attachments are protected by privilege because they are an essential part of, and if disclosed, would reveal, the privileged communications to which they are appended. Furthermore, for the reasons set out above, I find that it is appropriate to permit the Ministry to withhold all duplicate copies of the attachments, including those attached to unprivileged communications. [61]

Discussion of Legal Advice amongst Government Entities involved in the Pipeline Project

[93] The Ministry withheld one email chain between representatives of the Ministry, the Commission, and the Assessment Office that includes a reference to legal advice sought by the Ministry from Lawyer 1.

[94] I accept that the legal advice itself was a communication between solicitor and client that entailed the seeking or providing of legal advice and that was intended by the solicitor and client to be confidential.

[95] As discussed above, legal advice privilege applies not only to communications between lawyer and client, but also internal client communications about the legal advice and its implications. However, legal advice privilege does not necessarily apply to discussions of legal advice with third parties as the disclosure of the legal advice may amount to waiver.

[96] Before addressing the issue of waiver, I will briefly address the applicant's argument that lawyers who were not personally involved in the communications at issue swore affidavits as it applies to this record. Again, while Lawyer 1 was not involved in the communication at issue, I am not persuaded that this fact

[61] The attachments to unprivileged communications which may be withheld are found at pages 19-23 of phase 2 of 2 of the records. See description in Records Table 3, pages 19-23 of phase 2 of 2 of the records.

impacts her ability to provide evidence about those chains. In the circumstances, what is relevant to the Ministry's assertion of solicitor-client privilege is whether the communications satisfy the test for legal advice privilege. Lawyer 1, as the solicitor who provided the advice being discussed in the communications, is well positioned to provide this evidence. I have no concerns about the fact that Lawyer 1 was not personally involved in this chain.

[97] I will now turn to the issue of waiver as it applies to this email chain and all communications the Ministry withheld under s. 14.

*Waiver*

[98] Generally, the disclosure of privileged information to individuals outside of the solicitor-client relationship may amount to a waiver of privilege.[62] However, common interest privilege is an exception to the general rules of waiver, and it allows parties with interests in common to share privileged information or communications without waiving their privilege.[63]

[99] In *Iggillis Holdings Inc. v. Canada (National Revenue),* Justice Wyman Webb of the Federal Court of Appeal affirmed a broad protection for common interest privilege stating:

> [S]olicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties.[64]

[100] As set out above, I find that the Ministry discussed legal advice it received from Lawyer 1 with representatives of the Assessment Office and the Commission – that is, with third parties. Lawyer 1's evidence is that given the high degree of government coordination required for the Pipeline Project as a whole the Ministry, the Ministry of Environment, the Assessment Office and the Commission informed each other about issues that arose during their engagement with Indigenous nations.[65] The Ministry also acknowledges that Lawyer 1's advice was shared with the Ministry of Transportation, but explains that it was shared "due to each ministry's involvement in the … Pipeline

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[62] *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.* 1983 CanLII 407 (BC SC) at para. 6. See also *Graham v. Canada (Minister of Justice),* 2021 BCCA 118 at paras. 47-48.
[63] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 (CanLII) at para. 14; Order F17-23, 2017 BCIPC 24 (CanLII) at para. 56.
[64] 2018 FCA 51 (CanLII) at para. 41, leave to appeal to the Supreme Court of Canada denied, 2018 CanLII 99657 (SCC).
[65] Affidavit no. 2 of Lawyer 1 at para. 9.

Project."[66] In respect of all withheld information, Lawyer 1 and Lawyer 2 are both clear that "there has been no intentional or unintentional waiver of privilege with respect to the s. 14 information."[67]

[101] I accept Lawyer 1 and 2's evidence that there was no waiver of privilege in this case. As both the Ministry, the Assessment Office, the Commission, and the Ministry of Transportation were involved in the Pipeline Project on behalf of the Province, I have no difficulty accepting the Ministry's argument that where legal advice was shared between them it was subject to common interest privilege.

[102] Thus, I find that the email chain in which representatives of the Ministry, the Assessment Office, and the Commission discussed legal advice is subject to legal advice privilege. While the Ministry has not specifically identified which communications were shared with the Ministry of Transportation, I find that any such sharing did not amount to waiver.

### *Conclusion – Section 14*

[103] Having carefully considered each of the applicant's concerns, I find that the Ministry is permitted to withhold most of the information it withheld under s. 14. However, it may not withhold the three email chains that the Assessment Office sent to Lawyer 1 because they are third-party communications, that do not satisfy the requirements established by the courts for protection of such communications.[68]

## *Section 16 - Harm to Intergovernmental Relations or Negotiations*

[104] Section 16 allows a public body to withhold information where disclosure could reasonably be expected to harm intergovernmental relations or negotiations.

[105] There was overlap in the Ministry's application of ss. 16 and 14. There is no need to consider the Ministry's application of s. 16 to the information that I have already determined it is authorised to withhold under s. 14, and I will not do so.

[106] The overlap includes the three records that I found the Ministry was not authorized to withhold under s. 14. As noted above, the Ministry did not provide the information it withheld under s. 14 for my review. Without a copy of the information at issue, I am not able to assess the applicability of s. 16.

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[66] Ministry's initial submissions dated September 15, 2022 at para. 84.
[67] Affidavit no. 1 of Lawyer 1 at para. 23 and Affidavit no. 2 of Lawyer 2 at para. 21.
[68] The Ministry may not withhold the email chains found at pages 19-22, 108-111 and 232-235 of phase 2 of 2 of the records. However, for the reasons discussed above, the Ministry may withhold the attachments to those chains.

Section 44(1) of FIPPA gives me, as the commissioner's delegate, the power to order production of records. In the circumstances, I find that it is necessary to do so in order to determine whether the Ministry is authorized to withhold under s. 16 the three records that it is not authorized to withhold under s. 14. However, in the interest of resolving as many issues as possible, I will consider the Ministry's application of s. 16 to those records the Ministry did not withhold under s. 14.

***Recent Amendments to Section 16***

[107] The Ministry argued that both ss. 16(1)(a)(iii) and (c) applied to the withheld information. The BC Legislature recently amended ss. 16(1)(a)(iii) and (c) of FIPPA and the related definitions in Schedule 1 of FIPPA. These amendments took effect on November 25, 2021.

[108] Prior to the amendment, and at the time the Ministry responded to the applicant's request for information, those sections read:

> 16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
> ...
> (iii) an aboriginal government;
> ...
> (c) harm the conduct of negotiations relating to aboriginal self government or treaties.

[109] In addition, Schedule 1 of FIPPA defined "aboriginal government" as "an aboriginal organization exercising governmental functions."

[110] The amendments replace the term "aboriginal government" with "Indigenous governing entity" in s. 16(1)(a)(iii), and the word "aboriginal" with "Indigenous" in s. 16(1)(c). In addition, the amendments remove the definition of "aboriginal government" from Schedule 1 and replace it with the following: "'Indigenous governing entity' means an Indigenous entity that exercises governmental functions, and includes but is not limited to an Indigenous governing body as defined in the Declaration on the Rights of Indigenous Peoples Act."

[111] In determining whether the Ministry is authorized to refuse to disclose the information in dispute under s. 16, I have considered the language that was in effect at the time the Ministry made its decision about what information to withhold. In doing so, I rely on the well-established principle that where a legislative amendment affects substantive rights it is presumed to take effect

going forward only unless there is evidence that the Legislature intended the amendment to apply to actions that took place before it came into effect.[69] In the case of s. 16, there is no evidence of such an intention. However, nothing substantive in this case hangs on the amendments, and my analysis applies equally to the amended provisions.

[112] I will first decide whether s. 16(1)(a)(iii) applies, and if necessary, go on to consider s. 16(1)(c).

### *Harm to Intergovernmental Relations – Section 16(1)(a)(iii)*

[113] Section 16(1)(a)(iii) has two parts and the Ministry has the onus to prove both. The first question is whether the information at issue relates to an "aboriginal government." The second is whether disclosure of the information could reasonably be expected to harm the conduct of relations between the BC government and "aboriginal governments."

#### Part 1: "Aboriginal government"

[114] As mentioned above, prior to the amendments, Schedule 1 of FIPPA defined "aboriginal government" as "an aboriginal organization exercising governmental functions."

[115] It is well-established that while the term "aboriginal government" includes a "band" under the federal *Indian Act* the definition is not limited to bands or groups that have concluded self-government agreements or treaties.[70] Recently, the OIPC also accepted that where Indigenous nations are "clearly exercising a representative function" they are "aboriginal governments" for the purpose of s. 16(1)(a)(iii).[71]

#### *Parties' Submissions*

[116] The Ministry's submissions relate to the language of the current version of s. 16. It submits that the various groups referred to in the records are "Indigenous governing entities" for the purpose of s. 16(1)(a)(iii).

[117] The Ministry explains that, in keeping with the Province's commitment to reconciliation through negotiation with Indigenous groups and the principle of self-determination, the Province has recognized a number of different Indigenous nations as exercising governmental functions. The Ministry states that where an

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[69] *R. v. Dineley*, 2012 SCC 58, at paras. 10 - 12. In addition, this approach was recently adopted in *Order F23-06,* 2023 BCIPC 7, at paras. 56-60 in which an OIPC Adjudicator considered the same issue.
[70] Order F20-48, 2020 BCIPC 57, para. 190 citing Order 01-13, 2001 CanLII 21567 at para. 14, citing Order 14-1994, [1994] BCIPCD No. 17.
[71] Order F22-34, 2022 BCIPC 38 (CanLII), Order F23-06, 2023 BCIPC 7 (CanLII).

Indigenous group has recognized an entity as having the authority to represent them and negotiate on their behalf, the Province has followed suit and recognized that entity as an "Indigenous governing entity" for the purposes of FIPPA.

[118] In support of its position that the Indigenous nations referenced in the withheld information are "Indigenous governing entities," the Ministry relies on the ADM's evidence that all of the Indigenous nations referenced in the withheld information negotiated with the Province regarding the Pipeline Project, and that in order to be involved in the negotiations, each nation had asserted or established rights to territory crossed by the Pipeline Project.[72]

[119] The applicant did not make submissions on the issue of "aboriginal government." However, it is clear from his submissions that he accepts, at least in the case of Nation A, that the nation has the right to exercise a representative function on behalf of Indigenous rights holders.

*Findings and Analysis*

[120] I am satisfied that the withheld information relates to "aboriginal governments" within the meaning of s. 16(1)(a)(iii).

[121] The withheld information relates to specific Indigenous groups. It is clear from the records themselves that the Indigenous groups negotiated with the BC government for benefits in exchange for the pipeline crossing their territory. I accept the ADM's evidence that all Indigenous groups with which the BC government negotiated in respect of the Pipeline Project had asserted or established territorial rights that were affected.

[122] The definition of "aboriginal government" under FIPPA requires only that a group be "an aboriginal organization exercising governmental functions." In my view, the fact that the groups at issue asserted or established territorial rights on behalf of rights holders and then negotiated with the BC government on the basis of those rights satisfies the definition of "exercising a governmental function" within the meaning of s. 16(1)(a)(iii). Moreover, these groups are "clearly exercising a representative function" and, thus, I find they meet the definition of "aboriginal government" under s. 16(1)(a)(iii).

Step 2: Evidence of "Harm"

[123] Section 16(1)(a)(iii) applies if disclosure could reasonably be expected to harm the conduct of relations between the Province and an aboriginal government.

[124] According to the Supreme Court of Canada, the language "could reasonably be expected to harm" means "a reasonable expectation of probable harm."[73] In this case, the Ministry must provide evidence "well beyond"[74] or "considerably above"[75] a mere possibility of harm in order to meet the standard under s. 16. The s. 16 analysis is contextual and the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[76]

[125] The parties disagreed about the appropriate approach to harm in this case. The Ministry takes the position that in assessing whether or not disclosure could reasonably be expected to result in harm under FIPPA, a public body is entitled to assume disclosure under FIPPA is effectively disclosure to the world at large. In support of this position, the Ministry cites the following passage from Order 01-52:

> . . . With the exception of access by individuals to their own personal information, Part 2 of the Act is an instrument for public access to information and is not an instrument for selective or restricted disclosure. The idea of an applicant being bound to make only restricted use of personal information disclosed through an access request under the Act is inconsistent with the objective of public access articulated in s. 2(1) of the Act.[77]

[126] The applicant submits that he has "ample records" in his possession which he "could have sought the Court of public opinion on" but chose not to.

[127] I accept that the applicant has had access to many of the relevant records through his role as a representative of Nation A. However, I do not agree that the applicant's access or role should somehow lead to a different analysis. In Order F22-31, the OIPC wrote:

> I accept the Ministry's point that, under FIPPA, disclosure of information to an applicant in response to an access request is, in effect, disclosure to the world. This is a well-established principle. It is based on the fact that there

[73] *Ontario (Community Safety and Correctional Services) v. Ontario (Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Ltd. v. Canada (Health),* 2012 SCC 3.
[74] *Ibid,* at para. 54.
[75] *Ibid,* at para. 54.
[76] *Ibid,* at para. 54.
[77] 2001 CanLII 21606, para. 73.

> are no restrictions in FIPPA prohibiting an applicant from disclosing the information publicly. Even if an applicant does not in fact disclose the information publicly, they could do so, so the FIPPA analysis assumes that disclosure is to the world and not just to the applicant.[78]

[128] The applicant did not provide a sufficient basis to depart from this principle. Accordingly, when considering the harms under the relevant exemptions, I will do so on the basis that the records could be disclosed to the world.

*Ministry's Position*

[129] The Ministry explains that the records it withheld under s. 16 relate to the Province's relationships with various Indigenous nations who are potentially affected by the CGL Project and include government-to-government consultation regarding potential project effects and potential mitigation measures, capacity funding, timelines and the EA process.

[130] The Ministry provided extensive submissions about the potential for harm in light of the importance of the relationship between the Crown and Indigenous peoples. The Ministry explains that "these sometimes fragile relationships are the result of a history of mistrust, but are essential for the Province to fulfil its obligations to Indigenous peoples." It asserts that to build trusting relationships, Indigenous nations must have confidence in their communications with the Province and must not see any indicia of bad faith. Further, the Ministry says it needs to be able to develop and assess its negotiating position without concerns that it will later be subject to public scrutiny or that the information could be released and compromise its relationship with an Indigenous group because there is a misinterpretation or misunderstanding.

[131] Regarding the information in dispute, the Ministry submits that much of the withheld information would reveal the subject matter of and specific positions taken in negotiations. It argues that disclosure of this information could reasonably be expected to harm the government's relationship with the Indigenous nation with whom it was negotiating by breaching the trust and confidence necessary to engage in meaningful and successful negotiations. It also argues that disclosing this information could harm its relationship with other Indigenous nations because the negotiation subject matter or positions could be incorrectly interpreted without sufficient context to facilitate a full understanding.

[132] The Ministry also argues that the release of communications between government entities and Nation A could harm BC's relationship with Nation A by breaching the trust and confidence necessary to engage in meaningful and successful negotiations. In this regard, it specifically notes that communications

[78] 2022 BCIPC 34, para. 80.

that would disclose the internal dynamics within Nation A are particularly sensitive and that the release of this information could be harmful to the Province's relationship with the nation.

*Applicant's Position*

[133] The applicant relies on affidavit evidence from a current representative of Nation A in which the representative states that she does not wish her communications with the Ministry to result in the applicant's personal information being withheld.

*Analysis and Findings*

[134] The information the Ministry withheld under s. 16 directly relates to the consultations and negotiations between the Province and "aboriginal governments." I will address each category of information below.

Information relating to bargaining proposals and strategy

[135] Most of the withheld information relates to bargaining proposals and strategy. It includes specific bargaining proposals from Indigenous groups as well as internal government communications about negotiation strategy, the details of agreements with specific Indigenous groups, recommendations about negotiation strategy, and internal power dynamics within Nation A in relation to bargaining. This information is found in email correspondence amongst Ministry representatives and between Ministry representatives of Nation A.[79]

[136] The OIPC has repeatedly held that disclosure of information that would reveal the give and take between parties during negotiations would breach the trust and confidence necessary to engage in meaningful and successful negotiations and could reasonably be expected to cause harm under s. 16(1)(a)(iii).[80] I make the same finding in this case. I accept the Ministry's evidence that the relationship between the Province and Indigenous groups is fragile and meaningful negotiation requires some degree of trust and confidence. In my view, were the Ministry to disclose either the specific bargaining proposals made by Indigenous groups or its own negotiation strategy these disclosures would "create a "reasonable expectation of probable harm" to these fragile relationships.

[79] The information that relates to bargaining proposals and strategies is found at pages 9-11, 15-16, 17, 18, 20-21, 28-29, 30-31, 32-34, 36-39, 63-64, 66-70, 81, 133, 151-152, 160-164, 177-198, of phase 1 of 2 of the records and pages 78-81, 114-115, 116-117, 137-140, 151-152, 153-155, 165-166 and 225 of phase 2 of 2 of the records.
[80] See Orders F20-48, 2020 BCIPC 57 (CanLII), F22-34, 2022 BCIPC 38 (CanLII), F23-06, 2023 BCIPC 7 (CanLII).

[137] I find that the information relating to bargaining proposals and strategy is properly withheld under s. 16(1)(a)(iii).

Family history shared with Ministry employee

[138] The withheld information includes information about an Indigenous person's family history which the person shared with a Ministry employee.[81] The information is recorded in handwritten notes from a journal belonging to a Ministry official. According to the ADM, the notes include details from the representative's phone calls and in-person meetings regarding consultation issues. The withheld information includes a note stating that the person does not want to share the information publicly because they do not want publicity. It is clear from the context, that the information was shared during a meeting or telephone call in which the Ministry and an Indigenous group were engaged in negotiations.

[139] I find that disclosure of this information would violate the individual's confidence. Moreover, assuming that disclosure is "to the world at large," that breach of confidence could risk the very publicity that the individual told the government employee they wished to avoid. For the Ministry to violate the confidence of a member of an Indigenous group by sharing personal information that was disclosed in confidence during a meeting that involved negotiations could very well erode the trust required for meaningful negotiating.

[140] While a family history is not the kind of information typically protected under s.16(1)(a)(iii), given the context in which the information was shared, I find that disclosing the information creates a "reasonable expectation of probable harm" to the relationship between the BC government and the Indigenous nation at issue. Accordingly, I am satisfied that s.16(1)(a)(iii) applies.

Information relating to human remains

[141] The withheld information also includes a reference to human remains found in or near an Indigenous group's territory.[82] Again, this information is found in the Ministry representatives' handwritten notes. The notes reflect a conversation between government employees and representatives of the Indigenous group. From the context and the Ministry's evidence I understand that the notes were recorded during a meeting at which Ministry employees and members of the Indigenous group discussed issues related to the group's rights and entitlements. However, neither the Ministry's submissions nor the records provide any context about the nature of the remains or the relevance of the information to the negotiation. The information is simply a brief note about the remains.

[81] The information is found on pages 184 – 186 of phase 1 of 2 of the records.
[82] The information is found on page 179 of phase 1 of 2 of the records.

[142] The question I must decide is whether disclosing this information creates a "reasonable expectation of probable harm" to the relationship between the BC government and the Indigenous group.

[143] In determining this issue, I take judicial notice that the discovery of human remains, is, in many contexts, an issue of utmost sensitivity to Indigenous groups. The threshold for judicial notice was set out by the Supreme Court of Canada in *R v. Find.* [83] It requires that the facts must be either so notorious or generally accepted as not to be the subject of debate among reasonable persons or must be capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. In my view, even a cursory look at the media coverage of issues involving Indigenous populations and human remains over the past few years leaves no room for reasonable debate that these issues are, in many cases, highly sensitive to the affected Indigenous group.

[144] The withheld information references the area where the remains were found and would allow a knowledgeable reader to connect the remains to an Indigenous nation or nations. It was discussed during a meeting between an Indigenous group and the Ministry. While the Ministry does not address the information about human remains specifically, its submissions underscore the fragile nature of the relationship between Indigenous nations and the Province.

[145] It is well-established that the amount and quality of evidence needed to establish harm depends, in part on the seriousness of the potential consequences.[84] Considering the seriousness of the potential consequences, I find that disclosing the information creates a "reasonable expectation of probable harm" to the relationship between the BC government and the Indigenous group within the meaning of s. 16(1)(a)(iii).

*Conclusion – Section 16*

[146] In determining the question of harm, I have carefully considered the wishes of the current representative of Nation A that her communications with the Ministry not undermine the applicant's request for his own personal information. However, none of the information that the Ministry withheld under s. 16 is about the applicant or is his personal information.

[147] In conclusion, I find that disclosing the information the Ministry withheld under s. 16(1)(a)(iii) could reasonably be expected to harm the conduct by the

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[83] *R v. Find*, 2001 SCC 32 (CanLII), at para. 48.
[84] See for example the Supreme Court of Canada's rulings in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) at para. 54, *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94, and *F.H. v. McDougall*, 2008 SCC 53 at para. 40.

government of British Columbia relations with an aboriginal government. As a result of this finding, it is not necessary for me to consider whether these records also qualify for exemption under s. 16(1)(c).

### *Section 22 – Unreasonable Invasion of Third-Party Personal Privacy*

[148] Section 22 provides that a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[149] The Ministry's applications of s. 22 overlapped with its application of s. 16. I will limit my consideration of the Ministry's application of s. 22 to those records that I have not already found the Ministry was authorized to withhold under s. 16.[85]

#### *Section 22(1) – Personal Information*

[150] As s. 22(1) only applies to personal information, the first step in the s. 22 analysis is to determine whether the information in dispute is personal information.

[151] Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information."[86] Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.[87] Finally, contact information is defined in FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[88]

[152] All of the information the Ministry withheld under s. 22 is found in the handwritten notes from a journal belonging to a Ministry official.[89]

[153] The Ministry argues that the information at issue is personal information. The applicant did not make submissions relating to s. 22.

[154] For the following reasons, I find that all of the information at issue is "personal information" within the meaning of s. 22(1) of FIPPA.

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[85] The information I am considering under s. 22 is on pages 177, 181, 191, 195-196 of phase 1 of 2 of the records.
[86] Schedule 1 of FIPPA.
[87] Schedule 1 of FIPPA says that a third party is "any person, group of persons or organization other than: (a) the person who made the request, or (b) a public body."
[88] Schedule 1 of FIPPA.
[89] The information withheld under s. 22 is found in the record at pages 177 – 198.

[155] The Ministry withheld full names from the records. A name is the most direct means of identifying an individual.[90] These names are not contact information given the context in which they appear, so they are personal information within the meaning of s. 22(1).

[156] The Ministry also withheld the title, first name and opinion of an individual. Again, it is clear from the context that the name and title are not contact information and I find that this information is about an identifiable person. Accordingly, I find that the information is personal information.

[157] The Ministry also withheld information about the geographical location of an individual's home. The individual is described by title and first name, and when read in the context of the portions of the records that were disclosed, the person's identity is clear. It is also clear from the context that the location information is about the individual's home not their place of business, and therefore the information is not contact information. Therefore, I find that the name and title and geographical location of the individual's home are personal information.

[158] The Ministry has satisfied the burden of establishing that the withheld information is personal information about identifiable individuals who are not party to the inquiry. The burden now shifts to the applicant to establish that disclosure of the information would not be an unreasonable invasion of the third parties' privacy.

### *Section 22(4) – Disclosure Not an Unreasonable Invasion of Privacy*

[159] The next step is to consider whether any of the factors in s. 22(4) apply to the withheld information. Section 22(4) sets out circumstances when disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[160] The Ministry submits that none of the factors in s. 22(4) apply. The applicant did not make submissions about s. 22(4). Based on my review of the withheld information and the s. 22(4) factors, I find that s. 22(4) does not apply.

### *Section 22(3) – Presumptions that Disclosure is an Unreasonable Invasion of Privacy*

[161] The third step is to determine whether any of the presumptions against disclosure in s. 22(3) apply. Section 22(3) sets out the circumstances in which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy.

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[90] See for example Order F21-47, 2021 BCIPC 55 (CanLII) at para. 13.

[162] The Ministry's submissions under s. 22(3) relate to information that I have already found the Ministry was authorized to withhold under s. 16. These submissions are no longer relevant to the information that remains in dispute under s. 22. Having considered the relevant factors, I find that s. 22(3) does not apply.

***Step 4 – Subsection 22(2) – Other Factors***

[163] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances. Section 22(2) contains a non-exhaustive list of factors that may be relevant to determining this issue.

[164] The Ministry argues that ss. 22(2)(a) and (f) weigh in favour of withholding the information in dispute.

Section 22(2)(a) – Scrutiny of a Public Body

[165] Section 22(2)(a) provides that the head of a public body must consider whether the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny.

[166] What lies behind s. 22(2)(a) is the concept that, where disclosure of records would foster accountability of a public body, this may support a finding that the release of third-party personal information would not constitute an unreasonable invasion of personal privacy.[91]

[167] The Ministry submits that disclosing the withheld information would not subject the Ministry to public scrutiny, but would at most subject the third parties to scrutiny.

[168] In this case, the withheld information is very limited. It is individuals' names and titles, a reference to the location of one individual's home, and another individual's opinion. It reveals nothing about the Ministry's activities, and its redaction does not impact the ability to scrutinize the Ministry's activities. I find that disclosing the personal information is not desirable for the purpose of subjecting the Ministry to public scrutiny.

Section 22(2)(f) – Supplied in Confidence

[169] Section 22(2)(f) provides that the public body must consider whether the personal information has been supplied in confidence.

[91] See for example Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.

[170] Relying on the ADM's evidence that all of the withheld information was collected during meetings between Indigenous nations and the Ministry, the Ministry argues that disclosure of third-party personal information collected within the context of these private meetings could have a negative effect on the Province's relationship with Indigenous nations.

[171] It is clear from the records that all of the withheld information was collected during meetings between the Ministry and Indigenous nations in which the parties engaged in negotiations. I accept that this context creates an expectation that personal information discussed during the meetings is supplied to the Ministry in confidence. I find that s. 22(2)(f) weighs in favour of withholding the information relating to the geographical location of the home address and the wishes of an individual as well as the associated identifying information.

[172] In determining this matter, I also considered the following factors.

Section 22(2)(d) – Claims of Aboriginal People

[173] The version of s. 22(2)(d) that was in effect at the relevant time provided that the head of a public body must consider whether the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people.[92] As much of the withheld information relates to the claims of Indigenous groups (or aboriginal people), in assessing the Ministry's decision to withhold the personal information, I considered s. 22(2)(d).

[174] In Order 01-37, then Commissioner Loukidelis stated that the reference to "people" in s. 22(2)(d) was intended in a collective sense, *i.e*., to any people in the sense of a First Nation, Indian band under the *Indian Act* or other distinct aboriginal people, rather than individual aboriginal person.[93] I accept this interpretation.

[175] However, for reasons similar to those set out in respect of s. 22(2)(a), I find that s. 22(2)(d) does not weigh in favour of disclosing the information withheld under s. 22(1). The information is simply too limited in nature. It does not relate to the claims, disputes or grievances of aboriginal people, and I can see no way that its disclosure could assist in researching or validating the claims, disputes or grievances of aboriginal people.

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[92] Amendments to s. 22(2)(d) came into effect on November 25, 2021. The current language substitutes the words "aboriginal people" for "Indigenous peoples". For the reasons set out in respect of s. 16, I find that the applicable language is the language that was in effect at the time the Ministry made its decision. However, as with s. 16, my analysis applies equally to the amended language.

[93] [2001] B.C.I.P.C.D. No. 38 at para. 38.

Not the Applicant's Personal Information

[176] It is clear from the nature of the applicant's request and his submissions that his interest in this inquiry is in information that relates to himself and his business. In light of the applicant's concerns, I wish to be clear that none of the personal information withheld under s. 22(1) relates to the applicant or his business.

[177] Past OIPC orders make clear that disclosure to an applicant of their own personal information would, only in very rare circumstances, be an unreasonable invasion of a third party's personal privacy.[94] This factor does not weigh in favour of disclosure.

***Conclusion – Section 22***

[178] The information in dispute is personal information within the meaning of s. 22(1). There are no circumstances present where disclosure would not be an unreasonable invasion of a third party's privacy under s. 22(4), and equally there are no circumstances present where disclosure is presumed to be an unreasonable invasion of a third party's privacy under s. 22(3).

[179] Turning to s. 22(2), in my view, there are no factors in s. 22(2) or otherwise that weigh in favour of disclosing the information. In this regard I note that due to its highly limited nature, its disclosure would not assist in subjecting the Ministry's activities to scrutiny and its disclosure will not assist in researching or validating the claims, disputes or grievances of aboriginal people. Furthermore, it is not the applicant's personal information. Conversely, I am satisfied that it was supplied in confidence and this factor weighs in favour of withholding the s. 22 information.

[180] Ultimately, the onus is on the applicant to establish that disclosing personal information would not be an unreasonable invasion of a third party's privacy. As there are no factors that persuade me the information should be disclosed and in light of the s. 22(2) factors, I find that the Ministry is required to withhold all of the information I have considered under s. 22(1).[95]

**CONCLUSION**

[181] For the reasons given above, under s. 58:

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[94] See for example Order F10-10, 2010 BCIPC 17 at para. 37 and Order F22-10, 2022 BCIPC 10 (CanLII) at para. 150.

[95] The information the Ministry is authorized to withhold is found on pages 177, 181, 191, 195-196 of phase 1 of 2 of the records.

1. I confirm the Ministry's decision to refuse to disclose the information it withheld under s. 22(1) of FIPPA.
2. Subject to the order in paragraph 180, below, I confirm the Ministry's decision to refuse to disclose the information it withheld under ss.16(1)(a)(iii) and 16(1)(c) of FIPPA.
3. I confirm, in part, the Ministry's decision to refuse to disclose the information it withheld under s. 14 of FIPPA. However, the Ministry is not authorized under s. 14 to withhold pages 19-22, 108-111 and 232-235 of phase 2 of 2 of the records (excepting the attachments).

[182] Pursuant to s. 44(1) and (3) of FIPPA, I order the Ministry to produce a copy of pages 19-22, 108-111 and 232-235 of phase 2 of 2 of the records (excluding the attachments) to the registrar of inquiries by **June 9, 2023** so that I may determine whether the Ministry is authorized to withhold this information under s. 16.

May 26, 2023

**ORIGINAL SIGNED BY**

Allison J. Shamas, Adjudicator

OIPC File No.: F20-82551