IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Minister of Justice) v. British Columbia (Information and Privacy Commissioner,* 2019 BCSC 1787

Date: 20191018
Docket: 16-1459
Registry: Victoria

In the Matter of the decision of the Office of the Information and Privacy Commissioner, Order F-16-08 dated February 26, 2016 and in the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Minister of Justice

Petitioner

And:

Information and Privacy Commissioner of British Columbia and John English

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Petitioner:	D. G. Cowie
Counsel for the Respondent:	T. Hunter
Appearing in Person:	J. English
Place and Date of Hearing:	Victoria, B.C. September 23, 2019
Place and Date of Judgment:	Victoria, B.C. October 18, 2019

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A. INTRODUCTION

[1] The petitioner, the British Columbia Minister of Justice, applies to set aside part of a decision of the Information and Privacy Commissioner ("IPC"), dated February 26, 2016. If successful, the petitioner seeks a referral back to the IPC for another decision.

[2] The co-respondents, the IPC and Mr. John English, oppose the petition.

[3] The primary issue here is the application of s. 14 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FOIPPA*") and whether solicitor-client privilege permits the petitioner to refuse to disclose to the respondent Mr. English an email sent by one lawyer to two other lawyers, either by itself or as part of an email string.

B. BACKGROUND

[4] The background to this petition is that the Province of British Columbia ("British Columbia") and the Government of Canada ("Canada") were (and/or are) in negotiations with a First Nation for "land and cash."

[5] In January 2009, lawyers for British Columbia and Canada were involved in discussions about an offer of land and cash to the First Nation.

[6] On January 21, 2009, a lawyer for Canada wrote an email to two lawyers for British Columbia (the "Email"). Two named people were copied on the Email, but their positions and employers are unknown. The same day the Email was forwarded by one of the British Columbia lawyer recipients to the person who was drafting documents and negotiating on behalf of British Columbia with the First Nation. For the purpose of this petition the printed versions of these communications have been sealed.

[7] The IPC ruled that the Email was not protected by solicitor-client privilege and s. 14 of the *FOIPPA* and, therefore, British Columbia was ordered to disclose it. That decision is the subject of the current petition.

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[8] There were other email exchanges between the lawyer for British Columbia and other government officials made on January 21, 2009 that discussed the Email. These email exchanges covered a number of issues and made comments, for example, about legal issues in the offer to the First Nation being discussed in the context of the information contained in the Email. In its decision of February 26, 2016, the IPC ruled that British Columbia could refuse to disclose these latter communications on the basis of solicitor-client privilege and s. 14 of the *FOIPPA*.

[9] The respondent Mr. English owns property and operates businesses in the area of the First Nation involved in the negotiations. Mr. English, in his response to the petition, says that he and his family have been the subject of a "criminal conspiracy" carried out by British Columbia and Canada. This conspiracy has included, among other things, acts of violence including attempted murders, unlawful trespass and willful destruction of property.

[10] According to Mr. English, the objective of the conspiracy is to acquire the lands owned by Mr. English, his family and his businesses. He says there is "reasonable suspicion" that Ministers of the Government of British Columbia and/or senior civil servants have been involved. Mr. English seeks documents from British Columbia for the purpose of proving this conspiracy.

[11] In August 2013, Mr. English filed his application through the IPC for disclosure of information from British Columbia. Mediation was apparently unsuccessful. Ultimately, the disclosure requested by Mr. English was refused by British Columbia, relying on s. 14 of the *FOIPPA.* Mr. English then asked for a review under s. 52 of the *FOIPPA* (which resulted in the February 26, 2016 decision of the IPC at issue here).

[12] Part of the record for the s. 52 review application was an affidavit from K.B., a lawyer with the petitioner. The affidavit was sworn July 20, 2015 and the relevant parts of it are:

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> …
>
> 7. The following pages in the Records came from my file and I believe that all of the information in those pages (the "Section 14 Information) is subject to solicitor client privilege:
>
> …
>
> • Pages 166 to 181, being an email from myself to [name of negotiator], of the Ministry, dated January 22,2009, wherein I forwarded advice and comments on a proposed land and cash offer to [name of First Nation];
>
> …
>
> • Pages 323 to 324, an email from a lawyer with the Department of Justice, [name of lawyer], dated January 21, 2009 to myself and another lawyer within LSB. This email confirmed Canada's views on some legal issues associated with a joint land and cash offer that the Province and Canada were to make to [name of First Nation]. That communication was received from [name of lawyer] in confidence and on the basis of common interest privilege.
>
> 8. I believe that the Section 14 Information relates directly to the seeking, formulating or giving of legal advice to our client, the Province, as represented by the Ministry.
>
> 9. All of the Section 14 Information was communicated in confidence.

[13] On February 26, 2016 an adjudicator delegated by the IPC (under s. 49 of the *FOIPPA*) made a decision on Mr. English's s. 52 review application for disclosure. Mr. English was successful in obtaining disclosure of some documents and not successful in obtaining disclosure of other documents.

[14] One document is at issue in this petition. This is the Email discussed above. In its February 2016 decision, the IPC ordered British Columbia to disclose it. However, as noted, the IPC ruled that British Columbia could refuse to disclose the other email exchanges made on January 21, 2009 discussing the Email.

[15] The relevant excerpt of the IPC decision dealing with the Email reads:

> *Email from federal Department of Justice*
>
> [34] There is one email, however, that is unlike the others in that it is not a communication between a lawyer and a client that is directly related to the seeking, formulating, or giving of legal advice. It is an email from a lawyer with the federal Department of Justice ("DOJ") to two Ministry lawyers and copied to two individuals whose identities have not been provided in the Ministry's submissions and evidence. With respect to this email, one of the

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> Ministry lawyers deposed that the email was sent to him and another Legal Services Branch lawyer, and it "confirmed Canada's views on some legal issues associated with a joint land and cash offer that the Province and Canada were to make" and it "was received from [the DOJ lawyer] in confidence and on the basis of common interest privilege." Other than the Ministry lawyer's assertion that this email is subject to common interest privilege, the Ministry made no other submissions or argument in relation to common interest privilege.
>
> [35] Common interest privilege is an exception to circumstances that might otherwise amount to a waiver of privilege. It protects against waiver when a privileged communication is disclosed to someone who otherwise would have no right to it (but with whom the party has a common interest). Absent any supporting argument or evidence from the Ministry, I am not satisfied that this principle applies in this case. That is because the email does not meet the criteria for legal advice privilege in the first place. It is not a communication between a solicitor and client, and, based on my review of the email, it does not contain a communication that is directly related to the seeking, formulating, or giving of legal advice.
>
> [Footnotes omitted]

[16] Another document, a cabinet document, was ordered disclosed in the February 2016 IPC decision (at paras. 36 and 37) and the amended petition sought a review of that decision. However, at the hearing of this petition, the petitioner withdrew its challenge to paras. 36 and 37 of the IPC decision. The reason given for withdrawing the challenge was that the document had been extensively redacted.

[17] The result is that only paras. 34 and 35 of the IPC decision and the corresponding Email are at issue here.

C. ANALYSIS

[18] As a preliminary matter, counsel for the IPC appeared and made submissions on behalf of her client.

[19] Previous judgments have expressed concerns about tribunals appearing in court because of a concern about active and even aggressive partiality (*Northwestern Utilities Ltd. v. Edmonton (City),* [1979] 1 S.C.R. 684 at 709). However, there is now a "more relaxed attitude in allowing tribunals to participate in judicial review proceedings" (*Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para. 46 citing David Mullan, "Administrative Law and Energy

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Regulation" in Gordon Kaiser and Bob Heggie, eds., *Energy Law and Policy* (Toronto: Carswell, 2011) 35 at 51). A recent judgment from the Court of Appeal has summarized the standing of a tribunal as a matter of discretion for the reviewing court, one that balances tribunal impartiality with facilitating fully informed adjudication on review (*18320 Holdings Inc. V. Thibeau,* 2014 BCCA 494, at para. 51).

[20] The representation of the IPC in this case struck the right balance between these two principles and without addressing the issue of correctness. Further, it was of assistance to the court to have the submissions of the IPC, particularly as the co-respondent Mr. English was self-represented and could not, for obvious reasons, be given a copy of the sealed documents at issue.

[21] I will address the standard of review and then the Email at issue.

(a) Standard of Review

[22] With respect to the standard of review for the interpretation and application of s. 14 of the *FOIPPA*, the petitioner and IPC agree that the applicable standard of review is correctness. I am also of the view that the applicable standard of review is correctness. Section 14 is as follows:

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

[23] I note that a previous judgment of this court has pointed out the importance of solicitor-client privilege to the operation of our legal system in the context of s. 14 of the *FOIPPA*. It was considered "inconceivable" that the standard of review would be reasonableness; it must be correctness (*School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 at para. 94).

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[24] I am proceeding on the basis that the standard of review in this petition is correctness. I do not understand there to be any issues in dispute that would require the application of the standard of reasonableness.

(b) Review of the January 21, 2009 Email

[25] As discussed above, the Email at issue here appears twice in the record. It first appeared by itself as an email sent from a lawyer for Canada to two lawyers for British Columbia. Two additional named people were copied on the Email, but their positions and employers are unknown. The second occasion was when the Email was forwarded by one of the British Columbia lawyer recipients of the Email to a person who was the negotiator for the Province.

[26] The IPC decided that the Email was not subject to solicitor-client privilege, and I am reviewing that decision on the basis of correctness. If that privilege does apply, then the petitioner may refuse to disclose the Email in dispute under s. 14 of the *FOIPPA*. I add that the IPC appears to have considered the Email as a stand-alone document and not part of the subsequent email string.

[27] The court in *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, leave to appeal ref'd [2017] S.C.C.A. No. 328 [*Lee*], sets out a useful discussion of solicitor-client privilege:

> **Legal Advice and the Solicitor-Client Privilege**
>
> [30] Over the past thirty years, protection of the solicitor-client privilege in Canada has evolved from a rule of evidence to "a fundamental and substantive rule of law": *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 17. The solicitor-client privilege "must remain as close to absolute as possible": *Lavallee* at para. 36 [*Lavallee, Rackel & Heintz v. Canada (Attorney General),* 2002 SCC 61].
>
> [31] The purpose of section 14 of FOIPPA is to ensure that what would at common law be the subject of solicitor-client privilege remains protected: *LSS 2003* at para. 35 [*Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278]; see also *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at para. 53 in reference to analogous Ontario freedom of information legislation.

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> [32] The most important question when the status of communications from a lawyer is questioned is whether those communications took place within the context of a solicitor-client relationship. Once privilege has been established, it applies "to all communications made within the framework of the solicitor-client relationship": *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 893; *Maranda v. Richer*, 2003 SCC 67, [2003] S.C.R. 193 at para. 22. This principle is central to the disposition of this appeal.
>
> [33] A common way of expressing the breadth of the privilege once the context of the solicitor-client relationship has been established is that the privilege attaches to the continuum of communications in which the solicitor provides advice: *British Columbia Teachers' Federation v. British Columbia,* 2010 BCSC 961 at paras. 28-30; *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp*] at paras. 42-44; *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 at para. 26.
>
> [34] The Supreme Court of Canada has applied this principle to advice given by a government lawyer to an administrative tribunal in *Pritchard v. Ontario*, 2004 SCC 31 [*Pritchard*]:
>
> > 21 Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

[28] The petitioner emphasizes the broad scope of solicitor-client privilege set out in *Lee* as reflected in the use of terms such as "all communications" and "broad range of communications".

[29] As also discussed in *Lee,* there are some limits on the scope of solicitor-client privilege and, in some cases, severance may be appropriate:

> [36] The principle that privilege attaches to all communications made within the framework of the solicitor-client relationship does not mean that severance of particular communications within that continuum can never be appropriate. Advice given by lawyers on matters outside the solicitor-client relationship is not protected and may be severed.
>
> [37] For example, in *Campbell* [*R. v. Campbell,* [1999] 1 S.C.R. 565], Mr. Justice Binnie elaborated on his observation that "not everything done by a government (or other) lawyer attracts solicitor-client privilege", in these terms at para. 50:
>
> > Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental

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> know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.
>
> [38] This Court has also permitted severance in the context of access to information requests in circumstances where the disclosed information was a third party document, disclosure of which could not reveal any of the legal advice given to the client: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 68.
>
> [39] The rationale for caution in severing portions of otherwise privileged documents has been aptly expressed in these terms at para. 46 of *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority,* 2011 BCSC 88:
>
> > Disclosing one part of a string of communications gives rise to the real risk that privilege might be eroded by enabling the applicant for the communication to infer the contents of legal advice.
>
> [40] Thus severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment.

[30] In the circumstances of this petition, there can be little doubt that the forwarding of the Email by the lawyer for British Columbia to the negotiator for British Columbia was in the context of a solicitor-client relationship. That is, it is clear that the negotiator was the "client" for the purposes of the relationship. The contents of the Email discussed legal issues, the negotiations and the presence of risks related to those issues. Subsequent emails discussed the significance of those risks and these emails were found by the IPC to be subject to solicitor-client privilege.

[31] I accept that the Email itself did not originate in this solicitor-client relationship within British Columbia as the Email was sent from a lawyer from Canada. It is not clear that the Email originated in a solicitor-client relationship within Canada, although the Email states it is written from "a legal perspective". However, again, I have found the forwarding of the Email occurred in the context of a solicitor-client relationship between the lawyer for British Columbia and British Columbia itself (i.e. the negotiator).

[32] I also note that the affidavit of July 20, 2015 from K.B., that was part of the record before the IPC, included the assertion that the Email was subject to solicitor-client privilege. However, that assertion was not binding on the IPC and the adjudicator was entitled to disagree with it, which she seems to have done. Similarly,

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the assertions in the affidavit are not binding on me. Solicitor-client privilege is to be decided by reviewing the communication at issue, and its circumstances, and not by how the party asserting the privilege characterizes the communication at issue. The affidavit also relied on "common interest privilege" (and the IPC decision discussed this issue), but it is agreed that common interest privilege is not applicable here.

[33] Taken on its own, the Email does have something of a different character than the other emails since it was not a document internal to British Columbia. However, it was sent to lawyers for British Columbia and the legal issues arising from it became the subject of a discussion internally within British Columbia. Indeed, the Email is the reason for that discussion. And, as above, the IPC decided that British Columbia can refuse to disclose its internal exchanges discussing the Email, but not the Email itself.

[34] In my view it is appropriate and necessary to consider all the emails as a whole. Relying on the above authorities, I conclude that the communications, including the Email, took place within the context of a solicitor-client relationship. That finding means that solicitor-client privilege applies to all communications made within the framework of the relationship. In my view the Email in dispute sits comfortably within the solicitor-client relationship and is therefore covered by solicitor-client privilege.

[35] I note that not all communications from a lawyer are privileged. Advice given by a lawyer outside of the solicitor-client relationship is not protected and may be severed (*Lee* at para. 36). For instance, the court in *Lee* indicated at para. 37 that the offering of policy advice occurs outside of the solicitor-client relationship. The Email is not related to policy advice. It is clear on the record that the Email was part of a discussion of the legal issues related to the development of an offer to the First Nation. While the document originated from a third-party, Canada, in my view, the Email cannot be severed from the context and continuum of communications around it, including the fact that the IPC found all communications discussing the Email were subject to solicitor-client privilege.

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D. SUMMARY

[36] The IPC decision of February 26, 2016 concluded that communications solely within British Columbia related to the Email are protected by solicitor-client privilege and British Columbia can refuse to disclose them under s. 14 of the *FOIPPA*.

[37] The IPC ordered British Columbia to disclose the Email because it was not a communication subject to solicitor-client privilege. I am deciding the correctness of that decision.

[38] It is clear that the Email was the reason for the subsequent email communications that the IPC found to be privileged. The legal risks of the Email's contents were discussed in subsequent emails. On this basis the Email in dispute was part of communications within the solicitor-client relationship. Further, the Email was not policy advice, nor is there a basis for severing it from the other email communications. Severing the Email would create the inconsistent result of the subsequent emails, which discussed the subject matter of the Email, being covered by solicitor-client privilege, while the contents of the original Email are not.

[39] The petition is allowed. The petitioner is entitled, under s. 14 of the *FOIPPA*, to refuse to disclose the January 21, 2009 email.

[40] In its petition, the petitioner, if successful, seeks referral back to the IPC for a different decision. In my view the above conclusion deals fully with the issue in dispute: pursuant to s. 14 of the *FOIPPA,* the petitioner is entitled to refuse to disclose the Email. There is no reason to refer it back to the IPC.

[41] No party will have costs against another party.

"J. J. Steeves, J."
The Honourable Mr. Justice Steeves

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SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
VICTORIA
REGISTRY
APR 12 2016

No. 16 1459
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the decision of the Office of the Information and Privacy Commissioner, Order F16-08 dated February 26, 2016
and in the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

BETWEEN:

MINISTRY OF JUSTICE

PETITIONER

AND:

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
and JOHN ENGLISH

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
4th Floor - 947 Fort Street
Victoria, B.C. V8V 3K3

JOHN ENGLISH
Box 570
TOFINO BC V0R 2Z0

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served the petition anywhere in Canada, within 21 days after that services,

(b) if you were served the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 850 Burdett Avenue Victoria, BC V8W IB4
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: Ministry of Justice Legal Services Branch 6th Floor - 1001 Douglas Street Victoria, B.C. V8V 9J7 Fax number address for service (if any) of the petitioner(s): 250-356-9154 E-mail address for service (if any) of the petitioner(s): John.Tuck@gov.bc.ca
(3)	The name and office address of the petitioner's(s') lawyer is: John M. Tuck Ministry of Justice Legal Services Branch 6th Floor - 1001 Douglas Street Victoria, B.C. V8V 9J7

CLAIM OF THE PETITIONER(S)

Part 1: ORDER(S) SOUGHT

1. An order in the nature of certiorari setting aside those portions of Order F16-08 of the Information and Privacy Commissioner, dated February 26, 2016, requiring the Ministry of Justice (the "Ministry") to provide the applicant with the information the Ministry withheld under section 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"); and

2. An order that a referral of the question back to the Information and Privacy Commissioner will be for a new hearing, and that parties are entitled to file further evidence or submissions, or both, as the parties consider necessary.

3. Such other order as this Court considers just.

Part 2: FACTUAL BASIS

1. OIPC File No. F13-55936 (the "Inquiry") related to a request for records by the co-respondent, John English ("Mr. English"), for a records concerning meetings which took place between Pacific Rim Resort, the Tla-o-qui-aht First Nation, and/or provincial ministries (with or without Pacific Rim Resort present) concerning the purchase and/or lease of [specified/described] Pacific Rim Resort/Cox Bay/Tofino properties including all correspondence with Tla-o-qui-aht First Nations (the "Records).

2. On October 28, 2013, the Ministry responded to Mr. English's request but severed information from the Records under ss. 12, 14 and 16 of FIPPA.

3. On November 1, 2013, Mr. English asked the Information and Privacy Commissioner (IPC) to review the Ministry's decision to withhold information from the Records. Mediation did not resolve the issue and Mr. English requested the matter proceed to an inquiry. The Notice of Written Inquiry was issued by the IPC along with the Investigator's Fact Report on June 12, 2015.

4. The Ministry provided Initial Submissions on July 30, 2015. Mr. English replied to those submissions on August 3, 2015. The Ministry did not file reply submissions.

5. An adjudicator appointed by the IPC (the "Adjudicator") rendered her decision on February 26, 2016 regarding the request for records. Some of those records involved communications between staff at the Ministry of Aboriginal Affairs and Reconciliation (MARR) and a lawyer at the Ministry's Legal Services Branch (LSB). The Ministry withheld those records under s. 14 of the FIPPA. That section provides that the head of a public body may withhold information subject to solicitor client privilege.

6. The Adjudicator found many of the records at issue were properly subject to s. 14 of the FIPPA. However, the Adjudicator found that solicitor client privilege did not apply to:

    - An email attached to other emails exchanged between an employee of the Ministry of Aboriginal Relations and Reconciliation (MARR) and legal counsel for the Ministry (the "Email"):
    - Information in a Cabinet document that had been forwarded by an employee of MARR to legal counsel for the Ministry (the "Cabinet Document").

7. The Ministry's Initial Submissions contained an affidavit sworn by a LSB solicitor stating that:

    - The Cabinet Document was forwarded to him in his capacity as the Ministry's legal advisor and that it was provided to me on a confidential basis so that he could ensure that the draft ITA that he was drafting for the client was consistent with their approved mandate;
    - The information withheld under s. 14, including the Cabinet Submission and the Email, related directly to the seeking, formulating or giving of legal advice to the Province; and
    - Such information was communicated in confidence.

8. The Email appears in the Records in the following locations:

    - pages 168 and 169 ("Version One"); and
    - pages 323 and 324 ("Version Two").

9. The above mentioned affidavit sworn by a LSB lawyer also stated, with respect to Version Two of the Email, that:

    - It was sent by a lawyer with the Department of Justice to two lawyers within LSB;
    - It confirmed Canada's views on some legal issues associated with a joint land and cash offer that the Province of British Columbia and the Government of Canada were to make to the First Nations in question;
    - It was received in confidence and on the basis of common interest privilege.

10. The part of the Adjudicator's decision dealing with the Cabinet Document is found in the following paragraphs:

> [36] The Ministry is withholding the entire contents of the cabinet submission under s. 12(1) and s. 14. I must therefore consider whether s. 14 applies to the small amount of information in the cabinet cabinet to which I have determined s. 12(1) does not apply. This includes the title and some headings of the cabinet submission, and information such as the Minister responsible, the key contact person, the Ministry's document number, the date and the first sentence on the second page of the cabinet submission.
>
> [37] The Ministry did not provide any sworn evidence that the cabinet submission is protected by solicitor client privilege. The cabinet submission is a recommendation from the Ministry to Cabinet. There is no evidence before me that the information, in the cabinet submission that I found could not be withheld under s. 12(1), is a confidential communication between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice. Absent further evidence from the Ministry in this case, I am not satisfied that the information in the cabinet submission, to which I have determined s. 12(1) does not apply, is a communication between a client and a legal advisor, or that this information relates to communications that are protected by solicitor client privilege. I am satisfied that disclosing this information in the cabinet submission would not directly reveal or allow one to accurately infer anything about legal advice or privileged communications. I therefore find that s. 14 does not apply to the information in the cabinet submission to which I have determined s. 12(1) does not apply, and that the Ministry must disclose this information.

11. The part of the Adjudicator's decision dealing with the Email is found in the following paragraphs:

> [34] There is one email, however, that is unlike the others in that it is not a communication between a lawyer and a client that is directly related to the seeking, formulating, or giving of legal advice. 24 It is an email from a lawyer with the federal Department of Justice ("DOJ") to two Ministry lawyers and copied to two individuals whose identities have not been provided in the Ministry's submissions and evidence. With respect to this email, one of the Ministry lawyers deposed that the email was sent to him and another Legal Services Branch lawyer, and it "confirmed Canada's views on some legal issues associated with a joint land and cash offer that the Province and Canada were to make" and it "was received from [the DOJ lawyer] in confidence and on the basis of common interest privilege." Other than the Ministry lawyer's assertion that this email is subject to common interest privilege, the Ministry made no other submissions or argument in relation to common interest privilege.

> [35] Common interest privilege is an exception to circumstances that might otherwise amount to a waiver of privilege.26 It protects against waiver when a privileged communication is disclosed to someone who otherwise would have no right to it (but with whom the party has a common interest). Absent any supporting argument or evidence from the Ministry, I am not satisfied that this principle applies in this case. That is because the email does not meet the criteria for legal advice privilege in the first place. It is not a communication between a solicitor and client, and, based on my review of the email, it does not contain a communication that is directly related to the seeking, formulating, or giving of legal advice.

12. The Adjudicator concluded that for the reasons given above, under s.58 of *FIPPA*, that the Ministry was required to or may refuse to disclose the information it has withheld under s.14 except for the information highlighted in yellow in the records accompanying the Ministry's copy of her order (the "Decision"), including the Cabinet Document and Version One and Version Two of the Email.

13. The Adjudicator noted in the Decision, in a footnote, that the Email was found in two places in the records, namely, at pages 168, 169, 323 and 324. As such, if only Version Two of the Email is disclosed to Mr. English, Mr. English would be able to accurately infer the substance of Version One of the Email, being the copy of the Email that was forwarded in confidence by the LSB lawyer to his client.

The petitioner seeks review of the Adjudicator's decision that the Email, both Version One and Version Two, is not subject to s. 14 of FIPPA and therefore must be released to Mr. English. The petitioner also seeks review of the Adjudicator's decision that the Cabinet Document is not subject, in its entirety, to s. 14 of FIPPA.

Part 3: LEGAL BASIS

1. This Petition is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C., c. 241 and the Supreme Court Civil Rules.

2. The basis upon which this application for judicial review is brought is that:

- The delegate of the Information and Privacy Commissioner, in concluding that most of the information the Cabinet Document was protected by solicitor client privilege but that some information in that document was not so protected, committed an error of law, mixed fact and law and failed to take into account relevant facts, resulting in a decision that is not supported by law.

- The delegate of the Information and Privacy Commissioner, in concluding that the Ministry is not entitled to refuse to disclose both versions of the Email under s. 14 of FIPPA, committed errors of law, mixed fact and law and failed to take into account relevant facts, resulting in a decision that is not supported by law.

3. The Adjudicator erred in not recognizing that the context of Version One of the Email was important in determining whether it was subject to solicitor client privilege. Specifically, the Adjudicator erred in failing to recognize that that record was part of a confidential communication between a lawyer and his client.

4. The Adjudicator erred in failing to recognize that by referring in the Decision to the Email being found in two places in the records, namely, at pages 168, 169, 323 and 324, any release of Version Two of the Email would necessarily reveal the substance of the Email, as found in Version Two, which the Petitioner says is subject to solicitor client privilege.

5. The Commissioner's delegate recognized that common interest privilege arises in response to a plea of waiver of that privilege. However, the Adjudicator erred in finding that there was no supporting evidence from the Ministry on that issue. For instance, the Adjudicator failed to recognize that the record itself provided such evidence. Also, the LSB lawyer deposed that the Email was from a lawyer with the Department of Justice that confirmed Canada's views on some legal issues associated with a joint land and cash offer that the Province and Canada were to make to Tla-o-qui-aht First Nations. The LSB lawyer also deposed that that communication was received in confidence and on the basis of common interest privilege. The lawyer also deposed that the information withheld under s. 14, including the Email, related directly to the seeking, formulating or giving of legal advice to the Province.

6. In summary, The Adjudicator erred in:

- Finding that the Cabinet Document was not protected in it's entirely by solicitor client privilege.
- Finding that Version One of the Email (at pages 168 and 169) was not subject to section 14 of FIPPA.
- Failing to recognize the material difference between Version One and Version Two of the Email, namely, that Version One was attached to and formed part of a confidential communication between a lawyer at LSB and his client;
- Finding that Version Two of the Email (at pages 323 and 324) was not subject to section 14 of FIPPA.

Standard of Review

7. The first question for a court on judicial review is to determine the amount of deference that the court must pay to the statutory decision maker. Courts on judicial review of decisions of the Commissioner typically pay considerable deference to the decision of the Commissioner. In such cases, the standard of review of a decision of the Commissioner is "reasonableness". In this case, however, given the nature of the

question, there is authority to support the argument that the standard of review should be correctness.

8. The B.C. Supreme Court dealt with the standard of review in relation to s. 14 in *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 and noted:

> 32 In *Alberta Teachers' Association*, the Teachers' Association raised on judicial review, for the first time, an argument that the Commissioner lost jurisdiction because of his failure to extend the time for completion of an inquiry in accordance with the Alberta *Personal Information Protection Act,* S.A. 2003, c. P-6.5. The decision to extend the time was implied, as the Commissioner was never called upon to rule on that issue, let alone provide reasons for that decision. The Supreme Court of Canada allowed the Commissioner's appeal. It decided that a court owes deference to a tribunal's decision, even where the decision is implicit. It determined that the standard of review was reasonableness and that it could determine whether a reasonable basis existed for the implied decision based on other decisions of the Commissioner and adjudicators appointed under the legislation.
>
> 33 Justice Rothstein, in the majority reasons, noted that deference will usually be given where a tribunal is interpreting its own statute unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply. Those categories include constitutional questions, questions of law that are of central importance to the legal system as a whole, and, perhaps, questions of "jurisdiction or *vires*". Justices Binnie and Cromwell, in separate concurring reasons, criticized the use of the terms "jurisdictional or *vires*" in the majority decision to describe issues which can, post-*Dunsmuir v. New Brunswick*, 2008 SCC 9, still be reviewed on a standard of correctness.
>
> 34 In the present case, the Acting Commissioner's decision to consider whether the Board could refuse to produce the documents in question on the basis of solicitor-client privilege necessarily involves an implied decision: that the Commissioner has the jurisdiction to adjudicate questions of solicitor-client privilege. This is an implied decision regarding the interpretation of the Commissioner's home statute. In other words, it is a decision to which some deference might be expected. Nevertheless, both parties submit, and I agree, that the applicable standard of review for this issue is correctness.
>
> 35 Given the position of the parties regarding the applicable standard of review, and the fact that this issue was not argued, I need not decide if this is one of the exceptional issues that goes to "jurisdiction or *vires*", as Rothstein J. would have it, or whether it is an issue that upon a full consideration of the legislative intent, must be determined correctly, as Cromwell J. would have it. It is, in my view, one or the other. Solicitor-client privilege is a fundamental substantive right: *Blood Tribe* at para. 10. Whether the jurisdiction to

> determine that privilege has been granted to the Commissioner, or left to the courts, is a critical issue that the legislature must have intended be decided correctly. It is an issue that raises squarely the jurisdiction of the Commissioner. Accordingly, I will consider the issue on a standard of correctness and need not defer to the implied decision of the Acting Commissioner.

9. In *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner),* [2012] B.C.J. No. 584, the court said at paragraph 94:

> **94** The analysis required under *Dunsmuir* has changed the approach to this question. However, an analysis of the four factors to be considered does not result in a different conclusion. The analysis from the pre-*Dunsmuir* cases in relation to the question of solicitor-client privilege claimed under s. 14 is still persuasive. Given the importance of solicitor-client privilege to the operation of our legal system, and the body of jurisprudence which emphasizes the importance of that privilege, it would be inconceivable to conclude that the consideration as to whether s. 14 could be relied upon by a public body should be reviewed on a standard of reasonableness. It must be reviewable on a standard of correctness.

10. Solicitor-client privilege is a question of law that is of central importance to the legal system as a whole.

11. The central importance the courts have paid to the role of solicitor-client privilege in the proper functioning of our legal system. The Supreme Court of Canada, in the case of *Blood Tribe Dept. of Health v. Canada (Privacy Commissioner)* (2008), SCC 44, 2008 CarswellNat 2245 (SCC), emphasized that solicitor-client privilege is central to the proper functioning of the legal system and must be as absolute as possible to ensure public confidence in the system. The court said as follows at paragraph 9 of that decision:

> Solicitor client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

> (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36)
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence. (emphasis added)

12 Recently, the Supreme Court of Canada in *Attorney General of Canada v. Federation of Law Societies of Canada* 2015 SCC 7, related solicitor-client privilege to a new principle of fundamental justice. The Court found that the maintenance of solicitor-client privilege is integral to the public confidence in the administration of justice. Accordingly per *Dunsmuir,* the appropriate standard of review in this case is correctness.

13. In *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* (2003) BCCA 278, at paragraph 35, the court held that the standard of correctness in reviewing administrative orders relating to solicitor client privilege was correctness.

Analysis of the Grounds on a Correctness Standard

14. The grounds for review as stated earlier have both legal and factual components. As a matter of law, the issue is whether the three findings set out in paragraph 14 of the Decision are based on a correct interpretation of s. 14 of *FIPPA*, taking into account relevant case law. Then, as a matter of fact, did the Adjudicator err in finding that some of the Emails were for information purposes only and/ or of an administrative nature and therefore not related to the seeking or giving of legal advice?

Section 14 of the FIPPA reads as follows:

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

15. The courts have accepted that s. 14 of the Act incorporates the common law of solicitor-client privilege and does not in any way modify it.

> *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995), CanLII 634 (BCSC* (Order #29-1994), December 12, 1995

16. The Cabinet Submission and the Email formed part of ongoing communications between Ministry legal counsel and MARR regarding ongoing legal issues concerning a

treaty first nation land cash offer and, therefore, are protected by solicitor-client privilege and s. 14 of the Act.

17. The Supreme Court of Canada, in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, also dealt with whether communications between legal counsel and client on administrative matters falls within solicitor-client privilege. The Court held that all communications given to obtain legal advice, including administrative matters, are covered by solicitor-client privilege. The Court held as follows:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and *whether they deal with matters of an administrative nature such as financial means* or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently *even before the formal retainer is established.* (Emphasis added)

18. The B.C. Supreme Court has also recognized that solicitor-client privilege attaches to a "continuum" of communications and that it is not necessary that the communications specifically request or give advice. In *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority,* 2011 BCSC 88, P.G. Voith J, held as follows:

> **42** The recognition that privilege attaches broadly to the "continuum of communications and meetings" that underlie legal advice is widely accepted. In Blood Tribe, at para. 26, the Alberta Court of Appeal, relying on *Balabel v. Air India*, [1988] 2 All E.R. 246 at 254, confirmed the claim of privilege over a range of minutes of meetings, e-mails and correspondence between the Department of Justice and the Department of Indian and Northern Affairs. The court considered that all such documents were made in confidence and were part of the necessary exchange of information between solicitor and client for the purpose of providing legal advice.
>
> **43** Similarly, in Currie the court held that solicitor-client privilege attached to the factual and financial information provided to legal counsel for the purpose of obtaining legal advice. Ferrier J., at para. 46, said:
>
> > It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communications in which the solicitor tenders advice. The privilege applies when a lawyer negotiates a commercial

> transaction (such as a share of structuring agreement), draws up contracts or communicates with the client in the course of the transaction.

19. *Camp Development* supports the Petitioner's position that emails which form part of on-going communications between lawyer and client, even when the lawyer is simply copied on the email, are subject to solicitor-client privilege. Previous orders of the Commissioner have recognized this. For instance, the Adjudicator held in Order 10-20 as follows:

> **14** In some instances, Lisa McBain is copied on emails between her clients. I am cognizant of Commissioner Loukidelis's caution in Order 00-06[11] that such a communication -- even a confidential one -- addressed by a client to someone and that is copied to the client's lawyer does not, without more, mean the client's copy of the communication is privileged. In this case, however, the nature of the records satisfies me that the severed information at issue was clearly part of an ongoing communication between lawyer and client where the lawyer was copied so that she was in a position to formulate and give legal advice. I would add that disclosure of these copied emails, in this case, would also reveal legal advice. For these reasons, these communications are privileged.

In this case, the Email was attached to other emails exchanged between an employee of the Ministry of Aboriginal Relations and Reconciliation (MARR) and legal counsel for the Ministry. The Petitioner says that the Email formed part of the ongoing communication between lawyer and client.

20. In *Blank v. Canada (Minister of Justice)* 2007 FCA 87 the court dealt with the provision in the federal Access to Information Act dealing with solicitor client privilege. Evans JR. held:

> **13** Second, it is well established that section 25 applies to records falling within section 23: see, for example, *Blank v. Canada (Minister of Justice),* [2004] F.C.J. No. 1455, 2004 FCA 287, [2005] 1 F.C.R. 403 at para. 66 ("*Blank* 2004"). However, section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

21. In *The Minister of Environment, Lands are Parks v. The Information and Privacy Commissioner*, 16 BCLR (3d) 64, Thackray J, held as follows:

> The provision in s. 4(2) that severable information gives a right of access in no way modifies or abrogates the principle of solicitor-client privilege. As was submitted by counsel for ICBC, the purposes of the *Act* as set forth in s. 2 and the severance provisions of s.4(2) fall "far short of the clear and unambiguous mandate [required] for interference with solicitor-client privilege."
>
> Severance is not a common law concept in solicitor-client privilege. In *Descoteaux*, supra, at page 892 Lamer J. said:
>
> > In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

The Commissioner's delegate concluded that most of the information the Cabinet Document was protected by solicitor client privilege. However, the delegate concluded that some information in that document was not so protected.

22. In *Maximum Ventures Inc. v. de Graaf*, [2007] B.C.J. No. 1784, Cullen J. held that:

> **49** Common interest privilege constitutes an exception to the general rule that disclosure of a privileged document to a third party normally constitutes a waiver of privilege. The rationale underlying it was expressed by Lord Denning in *Buttes Gas and Oil Company Ltd. v. Hammer* at pages 483 to 484 as follows:
>
> > Although this litigation is between Buttes and Occidental, we must remember that standing alongside them in the selfsame interest are the rulers of Sharjah and UAQ respectively. McNeill J thought that this gave rise to special considerations, and I agree with him. There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All

await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

50 *Buttes* has been applied in Canada in a number of decisions, including *Almecon Industries Ltd.* v. *Anchortek Ltd.* (1998), 85 C.P.R. (3d) 30 (F.C. (T.D.)); *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), *per* Carthy J.A.; *Fraser Milner Casgrain LLP* v. *Canada (M.N.R.)*, [2002] B.C.J. No. 2146, 2002 BCSC 1344; Home Depot of Canada Inc. v. Ladner Downs, [2003] B.C.J. No. 2905, 2003 BCSC 1928. See also J. Sopinka *et al., The Law of Evidence in Canada*, 2d ed. (Vancouver: Butterworths, 1999) at 760-61.

51 Common interest privilege was not confined to circumstances where litigation exists or is contemplated. In *The Law of Evidence in Canada* (Sopinka et al. Second edition supplement Toronto Butterworths 2004) at page 133, the author states as follows:

> There may well be common interest privilege available in circumstances where no litigation is in existence of even contemplated. In commercial transactions, legal opinions are often disclosed and shared among various parties to the transaction who all have a common interest in the successful completion of the transaction. In certain commercial transactions this sharing of opinions is for the purpose of putting the parties on a equal footing during negotiations, and in that sense the opinions are for the benefit of multiple parties even though the opinions may have been prepared for a single client. The parties in those circumstances would expect that the opinions would remain confidential as against outsiders and that mere disclosure in that context would not necessarily result in a privileged status of the legal opinions being lost.

23. However, the Adjudicator erred in finding that there was no supporting evidence from the Ministry on the common interest privilege issue. For instance, the Adjudicator failed to recognize that the record itself provided such evidence. Also, the LSB lawyer deposed that the Email was from a lawyer with the Department of Justice that confirmed Canada's views on some legal issues associated with a joint land and cash offer that the Province and Canada were to make to Tla-o-qui-aht First Nations. The LSB lawyer also deposed that that communication was received in confidence and on the basis of common interest privilege. The lawyer also deposed that the information withheld under s. 14, including the Email, related directly to the seeking, formulating or giving of legal advice to the Province

24. In light of the case law, the Adjudicator's Decision is incorrect. The Adjudicator, in finding that solicitor client privilege applied to most of the information in the Cabinet Document, erred in finding that some of the information in that records was not subject to solicitor client privilege.

25. The Email formed part of confidential communications between counsel and client. It is simply incorrect to find that such communications are not subject to solicitor-client privilege. Nor is that finding supported by the evidence at the Inquiry, which provided that the Email related to the seeking, formulating or giving of legal advice to the Province.

Conclusion

26. The Adjudicator was incorrect in finding that the Cabinet Document was not protected in it's entirely by solicitor client privilege.

27. The Adjudicator was also incorrect in finding that Version One of the Email, being an attachment to a confidential communication between a lawyer and his client, was not subject to solicitor- client privilege. The Adjudicator was also incorrect in finding that:

- There was no evidence that Version Two of the Email was subject to common interest privilege; and

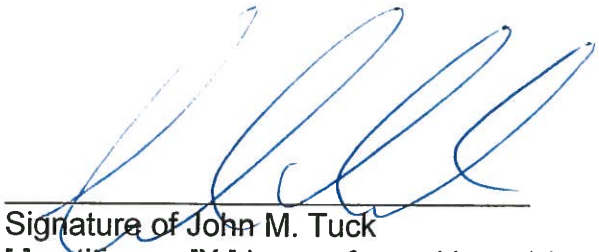
- Version Two of the Email was not subject to solicitor client privilege.

Part 4: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Marilyn Ackerman, sworn April 12, 2016.

The petitioner estimates that the hearing of the petition will take one day.

Date: April 12, 2016



Signature of John M. Tuck
[ ] petitioner [X] lawyer for petitioner(s)

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this petition

[ ] with the following variations and additional terms:

.....

.....

.....

Date: .....[*dd/mmm/yyyy*].....

Signature of [ ] Judge [ ] Master