COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner),* 2024 BCCA 190

Date: 20240515
Docket: CA49271

Between:

Minister of Children and Family Development

Appellant
(Petitioner)

And

Information and Privacy Commissioner for British Columbia and IndigiNews

Respondents
(Respondents)

And

Law Society of British Columbia

Intervener

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Voith
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated July 11, 2023 (*British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner)*, 2023 BCSC 1179, Vancouver Docket S2210192).

Counsel for the Appellant:	M. Bennett D. Balca
Counsel for the Respondent, Information and Privacy Commissioner for British Columbia:	K.R. Phipps
Counsel for the Respondent, IndigiNews:	D.F. Sutherland, K.C. N. Rayani
Counsel for the Intervener:	M.D. Lucas, K.C.

Place and Date of Hearing:	Vancouver, British Columbia March 19, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 15, 2024

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Mr. Justice Voith
The Honourable Madam Justice Horsman

Summary:

This is an appeal from a judicial review of an order made by an OIPC adjudicator. The respondent IndigiNews made an access to information request to the appellant Ministry of Children and Family Development seeking certain records relating to "birth alerts". The Ministry provided responsive records, but withheld certain information in them. The information which remains in dispute is subject to solicitor-client privilege. The adjudicator ordered the disputed information be provided to her so she could determine whether its disclosure was required by s. 25 of the Freedom of Information and Protection of Privacy Act (FIPPA). The chambers judge dismissed the Ministry's petition for judicial review, concluding that s. 25 compels the Ministry to disclose information subject to solicitor-client privilege, and that the adjudicator had the power under s. 44 of FIPPA to compel the production of the disputed information so she could consider whether disclosure was required under s. 25. On appeal, at issue is whether s. 25 overrides solicitor-client privilege.

Held: Appeal allowed. Section 25 of FIPPA does not unambiguously override solicitor-client privilege. It follows that the adjudicator has no power to order production of the disputed information, which is privileged, in the circumstances of this case. The portion of the Commissioner's order addressing ss. 25 and 44 of FIPPA is quashed.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

I. Introduction

[1] For decades prior to September 16, 2019, the Ministry of Children and Family Development (Ministry) and its predecessors issued "birth alerts" when the Ministry was concerned a mother might put a newborn delivered at a hospital at risk. The hospital was notified on the expectant mother's admission and a social worker would attend to determine whether the baby should be taken into government care.

[2] On October 6, 2020, a digital news platform, IndigiNews, made an access to information request to the Ministry for all records, including briefing notes and reports, of birth alerts from June 1, 2019, to September 1, 2020.

[3] The Ministry responded to IndigiNews' request by providing records in two phases: the first on December 9, 2020, the second on January 15, 2021. The disclosure consisted cumulatively of "68 partially and completely severed pages of responsive records". In doing so, the Ministry inadvertently disclosed some information subject to solicitor-client privilege. Disclosure of some of the information

sought by IndigiNews was refused by the Ministry under ss. 13(1), 14 and 22(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FIPPA*].

[4] Those provisions read, in part, as follows:

> Policy advice or recommendations
>
> 13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> …
>
> Legal advice
>
> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.
>
> …
>
> Disclosure harmful to personal privacy
>
> 22 (1) The head of 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.

[5] IndigiNews asked the Office of the Information and Privacy Commissioner (the Commissioner) to review the Ministry's refusal to disclose some of the requested information. It also asserted the Ministry was required to disclose the withheld information pursuant to s. 25(1)(b) of *FIPPA* because disclosure was clearly in the public interest.

[6] The matter proceeded to mediation, which resolved IndigiNews' challenge to the application of s. 22(1), but not issues relating to the Ministry's other grounds for refusal, nor the s. 25 issue. As a result, the matter proceeded to an inquiry conducted by the Commissioner's Director of Adjudication (the Adjudicator).

[7] During the course of the inquiry, the "disputed information" was identified as being at pp. 33–34 and 47 of the first phase of disclosure and p. 2 of the second phase of disclosure. Based on an affidavit from the Ministry's legal counsel, IndigiNews withdrew its inquiry into whether the Ministry had made out a case for solicitor-client privilege with respect to that information. The question that remained

was whether disclosure of the disputed information could be compelled, notwithstanding the fact it was privileged.

[8] On this question, IndigiNews maintained its position that s. 25 of *FIPPA* required the Ministry to disclose the disputed information. Subsections 25(1) and (2) provide:

> Information must be disclosed if in the public interest
>
> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> [Emphasis added.]

[9] On December 9, 2022, the Adjudicator, for reasons indexed at 2022 BCIPC 72, ordered the Minister to provide the disputed information to her so that she could decide whether s. 25(1) of *FIPPA* applied so as to require its disclosure.

[10] Despite the fact IndigiNews did not take issue with the assertion that the disputed information was privileged, the Adjudicator reviewed the evidence before her with a view to ensuring that it substantiated a claim of privilege over the disputed information. The Ministry relied on affidavit evidence from a solicitor describing why the claim for privilege was established. Based on this evidence, the Adjudicator was satisfied the disputed information was a record of communication between solicitor and client about the seeking and providing of legal advice and was intended to be confidential. Accordingly, the Ministry had established the s. 14 exception applied to the disputed information.

[11] She then turned to IndigiNews' submission that, notwithstanding the applicability of s. 14, the Ministry was required to disclose the disputed information under s. 25.

[12] She referred to s. 25 as the "the public interest override" and held, at para. 31, that if s. 25 applies "it overrides every other provision in *FIPPA*, including the exceptions to disclosure". Turning specifically to s. 25(1)(b), the "clearly in the public interest" branch of the provision relied on by IndigiNews, she expressed the view that the question whether disclosure is required necessitates the Commissioner to engage in the following analysis:

> [33] The first question to answer when deciding if s. 25(1)(b) applies is whether the information concerns a matter that engages the public interest. For instance, is the matter the subject of widespread debate in the media, the Legislature or by officers of the Legislature or oversight bodies? Does the matter relate to a systemic problem rather than to an isolated situation?
>
> [34] If the matter is one that engages the public interest, the next question is whether the nature of the information itself meets the high threshold for disclosure. The list of factors that should be considered include whether disclosure would:
>
> - contribute to educating the public about the matter;
> - contribute in a substantive way to the body of information that is already available;
> - facilitate the expression of public opinion or allow the public to make informed political decisions or
> - contribute in a meaningful way to holding a public body accountable for its actions and decisions.

[13] The Adjudicator held the information sought concerned a matter of public interest and that, while the record was sufficient to establish that the disputed information was privileged, it was insufficient to permit her to determine whether disclosing the information was clearly in the public interest pursuant to s. 25(1)(b).

[14] In considering s. 25, the Adjudicator also addressed the Ministry's submission that, because s. 25(1)(b) lacks the clear and unequivocal language necessary to abrogate solicitor-client privilege, once solicitor-client privilege over the disputed information had been established, the Commissioner lacked authority to order that information be disclosed under s. 25(1)(b).

[15] After considering *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 [*University of Calgary*]; *Canada (Privacy*

Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 [*Blood Tribe*]; and *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31; as well as provisions of Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, and Newfoundland and Labrador's *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, which had been referred to her by the Ministry, she rejected this submission:

> [55] I am not persuaded by the Ministry's submission that s. 25 fails to provide the kind of clear, explicit and unequivocal indication that the Supreme Court of Canada says is required to abrogate privilege … I read s. 25(2) as an unambiguous statement of legislative intent, namely that when disclosure meets the threshold for disclosure that is in the public interest under 25(1), it overrides any provision in *FIPPA* that provides an exception to access, including s. 14. The language used in Ontario and Newfoundland and Labrador's public override provisions merely illustrate that if the BC Legislature had similarly meant for s. 25 not to apply to s. 14, it would have said so.

[16] She further held that s. 44(1) of *FIPPA* gave her authority to order production of privileged documents in order to determine whether disclosure of those documents should be ordered pursuant to s. 25. That provision reads, in part, as follows:

Powers of commissioner in conducting investigations, audits or inquiries

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

…

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

(2) The commissioner may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) <u>If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure</u>.

> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).
>
> [Emphasis added.]

[17] She concluded the production power in s. 44(1)(b) extended even to records covered by solicitor-client privilege:

> [59] The wording of ss. 44 (2.1) and (3) demonstrates that the Legislature intended the commissioner to have the power to order production and review records protected by solicitor and client privilege in order to fulfil the commissioner's statutory functions. ...

[18] In so concluding, she adopted the view expressed by Cromwell J. in *University of Calgary* that s. 44(2.1) would be meaningless unless the Legislature intended the Commissioner to be able to order the production of privileged material.

[19] Applying her interpretation of *FIPPA* to the matter before her, she concluded that:

> [60] … it is absolutely necessary to order the Ministry to produce the Disputed information for my review pursuant to s. 44(1)(b) so that I can fulfil my duty under the Act and make an independent and informed decision about whether s. 25(1)(b) applies.

[20] By petition filed December 22, 2022, the Ministry sought, among other relief, an order in the nature of *certiorari* under s. 2(2)(a) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], quashing the order of the Commissioner.

[21] For reasons indexed at 2023 BCSC 1179, the chambers judge held that s. 25(2) compels the Ministry to disclose information subject to solicitor-client privilege. She reasoned:

> [37] A purposive and contextual reading of s. 25(2) demonstrates that it does compel disclosure of solicitor-client privileged information.
>
> [38] Section 25 is exceptional. It differs from the rest of *FIPPA* because it imposes a direct and overriding obligation on public bodies to disclose a narrowly-defined category of information even in the absence of any request for it. …
>
> [39] Reading the words of s. 25(2) in a manner consistent with the modern principle of statutory interpretation, "in their entire context, in their

> grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", they mean exactly what they say: where s. 25 requires disclosure, all disclosure exceptions, including the solicitor-client privilege in s. 14, must give way.
>
> [Emphasis in original.]

[22] Further, she held that the Adjudicator had the power to make an order under s. 44(1) compelling the production of solicitor-client privileged records. She reasoned:

> [49] The words of subsection 2.1 are clear, express and unequivocal. Not only do they create a safeguard in the event that privileged records are inadvertently disclosed, as the [Ministry] submits, they also abrogate solicitor client privilege. That is because the subsection directly addresses the situation where the Commissioner has made an order under s. 44(1) requiring the production of records subject to solicitor-client privilege, by expressly stating that compliance with the Commissioner's order does not waive the privilege.

[23] On the s. 44 issue, the chambers judge considered the discussion of *FIPPA* in the judgment of Côté J., writing for the majority in *University of Calgary*, and the judgment of Cromwell J., dissenting on this point (of which more will be said below), writing:

> [50] I agree with the Adjudicator's conclusion on this issue and with her reliance on the reasons of Cromwell J. in *Calgary* on this point. He noted that *FIPPA* was amended in 2003 to add s. 44(2.1) …
>
> [51] While Cromwell J.'s comments on *FIPPA* were *obiter* as it was not the statute before the Court, they are persuasive. I do not read his interpretation of this provision of *FIPPA* as inconsistent with Côté J.'s comments on *FIPPA*. Rather, their disagreement was about the meaning of "any privilege of the law of evidence" in subsection 44(3) of *FIPPA* as it informs the meaning of the same phrase in s. 56(3) of *FOIPP*.
>
> [52] In fact, Côté J.'s discussion of *FIPPA* suggests that she might well agree that s. 44(2.1) of *FIPPA* abrogates solicitor-client privilege. She emphasizes the "significant differences between the operational frameworks" of *FOIPP* and *FIPPA*: *Calgary* at para. 60. At para. 64, she points to the fact that, unlike FOIPP, s. 44(2) of *FIPPA*, "vests much of the production power in a court … in a manner consistent with legislative respect for fundamental values…"

[24] The chambers judge remitted the matter to the Adjudicator to continue the inquiry; that is, to review the disputed information and determine whether it had to be disclosed under s. 25.

[25] For the reasons set out below, I am of the opinion the Adjudicator erred in concluding that s. 25 of *FIPPA* unambiguously "overrides" solicitor-client privilege in that it compels public bodies to disclose information subject to solicitor-client privilege, and that her decision ought to have been set aside on judicial review. Once it was established that the disputed information was a record of communication between solicitor and client about the seeking and providing of legal advice which was intended to be confidential, there remained no appropriate investigation or audit under s. 42 nor any appropriate inquiry under s. 56 for the Adjudicator to conduct and, therefore, there was no basis for the Adjudicator to make a s. 44 production order in respect of the disputed information.

II. Issues and Standard of Review

[26] There is no doubt that the question whether the provisions of *FIPPA* override solicitor-client privilege is a question of central importance to the legal system as a whole and that the applicable standard of review is correctness: see *University of Calgary* at paras. 19–20.

[27] It also appears clear that if s. 25 of *FIPPA* does not effectively override claims to solicitor-client privilege, then the Adjudicator has no power to order production of the disputed information, which is privileged, in the circumstances of this case. The Commissioner accepts as correct the Ministry's position to that effect.

[28] The respondent IndigiNews contests the position taken by the Ministry and the Commissioner with respect to the scope of s. 44. It argues the power to order the production of documents, even those protected by solicitor-client privilege, is necessary to ensure the Adjudicator can effectively carry out her duties and conduct thorough investigations, and says the Commissioner is empowered to balance claims to privilege against the public interest in transparency and accountability.

[29] However, in my view, the Commissioner is correct to acknowledge that an Adjudicator can only order the production of a record under s. 44 for the purpose of conducting an inquiry under s. 56 or an investigation or audit under s. 42. There is no freestanding power to investigate whether documents that are said to be privileged should be disclosed in the public interest except, arguably, for the purpose of determining whether an assertion of privilege by a public body for the purpose of reliance on the s. 14 disclosure exception is well-founded. That is not in issue in the case at bar, as the Commissioner was satisfied that s. 14 applied to the disputed information without needing to review it.

[30] The Ministry takes the position, in the alternative, that even if s. 25 overrides solicitor client privilege, s. 44 does not empower the Commissioner to order the production of solicitor-client records. While this appears to me to be a difficult argument to maintain, I need not finally decide the point. For the reasons that follow, I conclude that s. 25 does not override solicitor-client privilege. As such, it is unnecessary to address the Ministry's alternative argument as to the scope of the Commissioner's powers under s. 44 in the event that s. 25 was found to override privilege.

III. Submissions

A. The Ministry

[31] The appellant Ministry contends the chambers judge erred in concluding that the language of s. 25 of *FIPPA* is capable of overriding privilege. It contends it was an error to find that the reference in s. 25(2) to "any other provision of this Act" was sufficient to meet the high threshold required by the Supreme Court of Canada for doing so. While s. 14 expressly exempts information that is subject to solicitor-client privilege from disclosure, s. 25(2) refers to that provision only indirectly. It says s. 25(2) might be effective to override solicitor-client privilege if it could be said that the privilege was created by a "provision of the Act", but that is not the case, and s. 25 does not support the "infringement of a foundational legal principle that exists independently of any legislative reference".

[32] The Ministry notes that there are statutory provisions that expressly and unambiguously limit or abridge privilege, for example s. 88(1.1) of the *Legal Profession Act*, S.B.C. 1998, c. 9, and s. 34(2) of the *Privacy Act*, R.S.C. 1985, c. P-21. By contrast, it contends, the language of s. 25 of *FIPPA* does not do so.

[33] In short, the Ministry says the words in *FIPPA* which are said by IndigiNews to override solicitor-client privilege are "open-textured" and must be interpreted restrictively.

[34] The Ministry notes that, because it provides that the head of a public body *may* refuse to disclose privileged information, s. 14 requires the head of a public body to be satisfied that the public interest in protecting solicitor-client privilege outweighs the objective of making information accessible before asserting privilege as the basis for a refusal to disclose information. The Commissioner can order the head of a public body to reconsider the exercise of that discretion but the discretion rests with the Ministry, not with the Commissioner. *FIPPA* thus demonstrates an intention to leave the weighing of the public interest in the hands of the public body and this is a task for which the Commissioner is ill-suited.

B. IndigiNews

[35] The respondent IndigiNews argues that the Supreme Court of Canada's decision in *Blood Tribe* provides an illustration of what is meant by "abrogation by inference" and "open textured language". The statute there considered, the *Personal Information Protection and Electronic Documents Act*, S.C. 2000. c. 5 [*PIPEDA*], confers on the federal Privacy Commissioner statutory authority to investigate complaints "in the same manner and to the same extent as a superior court of record" and to receive and accept evidence "whether or not it is or would be admissible in a court of law". The federal Privacy Commissioner argued that language should be read as permitting her to have access to documents that would otherwise be protected by solicitor-client privilege. The Court disagreed, concluding

these general production powers could not be read as authorizing the compulsion of privileged documents. It explained:

> [11] … legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents: *Lavallee*, at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle.

[36] IndigiNews contends that, because s. 25(2) of *FIPPA* provides that the disclosure obligation in s. 25(1) applies "despite any other provision of this Act", only a "minimal" inference must be drawn. It says, "Short of using the actual words 'despite solicitor-client privilege', the subsection could not be clearer".

[37] In part, IndigiNews relies upon the view that *FIPPA* is a complete code with respect to access to information and protection of privacy for public bodies. It notes that, in a slightly different context, in *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468, this Court held:

> [53] … [T]he *Freedom of Information and Protection of Privacy Act* provides a comprehensive complaint and remedy scheme for violations of s. 30 (or violations of a public body's duty to make reasonable security arrangements to protect personal information). Where a statute comprehensively regulates the matter at issue by, for example, establishing an institution or office administering and enforcing a regulatory program, it is proper to infer that the legislature did not intend parallel common law remedies to exist: at Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 350.
>
> [Emphasis added.]

[38] It claims the Ministry's interpretation of *FIPPA* is inconsistent with the intention of the Legislature to create a complete code governing access to information and protection of privacy for public bodies.

[39] It submits that interpreting s. 25(2) as the Ministry proposes requires the reader to construe it as saying "despite any other provision of this Act *except s. 14*" (my emphasis), and says that such a reading does not accord with the ordinary meaning of the words employed and is not supported by a contextual reading of the Act, its scheme or its object.

[40] In response to the Ministry's reference to other statutes that more clearly abrogate solicitor-client privilege, as a means of illustrating the type of language the Legislature could have used in *FIPPA* to do so, IndigiNews notes that the majority of the Court in *University of Calgary* cautioned that parallel legislation may be helpful, but that "words and phrases cannot be extricated from their specific statutory context and cross-applied automatically to other legislation": see para. 60.

[41] IndigiNews asserts that the other statutes referred to by the Ministry are not of interpretive assistance. It says s. 9 of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* is the most relevant statutory provision. That provision specifically describes the discretionary disclosure exceptions under that Act which may be outweighed by public interest considerations, one of which is the legal advice exception. IndigiNews argues that, in British Columbia, the Legislature chose to make the public interest override applicable to *all exceptions* to disclosure and to *all of the duties to withhold* information in *FIPPA.* It says this supports the conclusion that s. 25 was intended to override all exceptions and reflects the predominance of public interests over the exceptions.

[42] IndigiNews further says the key provision in the Alberta legislation at issue in *University of Calgary*, the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, was s. 56(3) which reads: "Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record … required …". That language presented a problem because solicitor-client privilege is far more than a rule of evidence. In contrast, s. 25 in our legislation provides that the Ministry must disclose information where doing so is clearly in the public interest "despite any other provision of this Act". This establishes an obligation to make disclosure despite s. 14, which refers specifically to the right to refuse to disclose "information that is subject to solicitor client privilege". This is a more specific reference to solicitor-client privilege than the reference to "any privilege of the law of evidence" referred to in *University of Calgary*. It is, in the words of IndigiNews' counsel, a reference to "the whole and not a part of solicitor-client privilege".

IV. Analysis

[43] As should be apparent from my description of the parties' submissions, both the Ministry and IndigiNews have attempted to apply, and for some purposes distinguish, the judgment of the Supreme Court of Canada in *University of Calgary*, a closely analogous case.

[44] The issue in *University of Calgary* was whether the Information and Privacy Commissioner of Alberta had erred in ordering the production of records over which solicitor-client privilege was claimed in order to verify that the privilege was properly asserted. There is no such issue in this case.

[45] The specific question before the Court in *University of Calgary* was succinctly described by Côté J. as follows:

> [1] … At the heart of this appeal is whether s. 56(3) of *FOIPP*, which requires a public body to produce required records to the Commissioner "[d]espite . . . any privilege of the law of evidence", allows the Commissioner and her delegates to review documents over which solicitor-client privilege is claimed.

[46] The conclusion was just as succinctly recounted:

> [2] I conclude that s. 56(3) does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal. In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. ...

[47] The Alberta legislation before the Court did not override solicitor-client privilege by simply overriding *privileges of the law of evidence*. As Côté J. elaborated:

> [44] Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such

> as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege of the law of evidence".
>
> [45] In this regard, it is noteworthy that s. 56(3) of *FOIPP* was first enacted in its present form in 1994, in the *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, s. 54(3). At that time, the elevation of solicitor-client privilege from a privilege of the law of evidence into a substantive privilege had been well established in the jurisprudence for over a decade.

[48] This conclusion was reinforced by careful consideration of the scheme of the Act in question. Like *FIPPA*, that statute expressly excepts information protected by solicitor-client privilege from disclosure, and it gives public bodies discretion to protect or disclose such information in the public interest. Unlike *FIPPA*, however, the Alberta legislation does not preserve the privilege in cases where the information comes into the hands of the Commissioner. The significance of that difference is a matter for us to consider. On this point, Côté J. noted:

> [58] … [G]iven its fundamental importance, one would expect that if the legislature had intended to set aside solicitor-client privilege, it would have legislated certain safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. In addition, there is no provision in *FOIPP* addressing whether disclosure of solicitor-client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person. The absence from *FOIPP* of any guidance on when and to what extent solicitor-client privilege may be set aside suggests that the legislature did not intend to pierce the privilege.

[49] In her judgment, Côté J. considered *FIPPA* for the purpose of comparing it to the Alberta legislation the Court had been called on to interpret. She made the following points:

a) Section 44 of *FIPPA* does not give the Commissioner broad powers to compel the production of records. Under s. 44(2) much of that power resides in a court of inherent jurisdiction—the traditional arbiter of solicitor-client privilege: at para. 61;

b) It is difficult to conceive a reading of s. 44(3) of *FIPPA* that would ascribe to the Commissioner the type of power the Alberta Commissioner purported to have "without rendering s. 44(2) … nugatory": at para. 61; and

c) The fact that s. 44(2) of *FIPPA* vests much of the production power in a court in a manner consistent with legislative respect for fundamental values militated against the Alberta Commissioner being able to override privilege. Reading the Alberta statute in a manner that permitted the Alberta Commissioner to compel production of a privileged document would be inconsistent with the presumption of legislative respect for fundamental values: at para. 64.

[50] In his partly dissenting judgment, Cromwell J. disagreed with the majority that the Alberta Commissioner lacked the authority to compel production for review of records over which solicitor-client privilege is asserted. He concluded that the Alberta Commissioner's statutory authority to order a public body to produce for review any record required by the Commissioner "[d]espite . . . any privilege of the law of evidence" was an explicit legislative grant of power which should be respected, not evaded. He held: "[T]he words of the enactment, read in context, evince a clear intention to permit the Commissioner, subject to judicial review, to order production for inspection of records over which solicitor-client privilege is claimed": at para. 73.

[51] Like Côté J., Cromwell J. began by restating the approach mandated by *Blood Tribe*:

> [76] In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, this Court held that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively": para. 11. Solicitor-client privilege cannot be "abrogated by inference" and "[o]pen-textured language governing production of documents will be read *not* to include solicitor-client documents": para. 11 (emphasis in original); see also *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at paras. 23-25.

[52] In his comparative analysis of *FIPPA*, Cromwell J. noted:

a) Section 44(1)(b) authorizes the Commissioner to "make an order requiring a person to … produce for the commissioner a record in the custody or under the control of the person": at para. 115;

b) Section 44(2)(a) permits the Commissioner to apply to the Supreme Court of British Columbia for an order "directing a person to comply with an order made under subsection (1)": at para. 115;

c) The 2003 amendment of *FIPPA* to provide, at s. 44(2.1), that, where a record subject to solicitor-client privilege is produced to the Commissioner at the Commissioner's request or "under subsection (1)", the solicitor-client privilege of the record is not affected by the disclosure, would be meaningless if the Commissioner cannot order the production of privileged documents under s. 44(1). Otherwise, there could be no record subject to solicitor-client privilege disclosed to the Commissioner under s. 44(1) to which the amendment could refer: at paras. 116–117;

d) The Legislature, in requiring records to be produced to the Commissioner notwithstanding "any privilege of the law of evidence" in s. 44(3), assumed that phrase to refer to records subject to solicitor-client privilege: at para. 118; and

e) The expression "any privilege of the law of evidence" in the British Columbia legislation clearly *includes* solicitor-client privilege: at para. 119.

[53] The statutory provision said to override solicitor-client privilege in this case, s. 25(2) of *FIPPA*, says simply that the statutory obligation contained in s. 25(1), which requires the head of a public body to disclose information, the disclosure of which is clearly in the public interest, "applies despite any other provision of this Act". In my view, that provision is no more unambiguous than that considered in *University of Calgary*. It is not a direct reference to the substantive rule recognized in s. 14 of *FIPPA*. It is not a more specific reference to solicitor-client privilege than the

reference to “any privilege of the law of evidence”. Nor, in my view, can it be read as IndigiNews contends: as a reference to “the whole and not a part of solicitor-client privilege”. In interpreting s. 25, an inference is still necessary in order to extend the ambit of the provision so as to abrogate solicitor-client privilege. The principle of interpretation described in *Blood Tribe* and applied in *University of Calgary* is applicable here: “legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference”.

[54] It bears noting that the Alberta statute considered in *University of Calgary* provided that the Commissioner could demand production of any document required “[d]espite *any other enactment* or *any privilege of the law of evidence*”. While the Court’s attention was focused upon the question whether solicitor-client privilege could properly be described as a “privilege of the law of evidence” (as we have seen, it does not), the judgment must also be read as a rejection of the proposition that the words “despite any other enactment” are sufficient to override the protection of privilege in s. 27(1)(a) of the Alberta statute, which exempts from disclosure “information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege”.

[55] While *FIPPA* has been held to establish a comprehensive complaint and remedy scheme, it does not establish a complete code for addressing and resolving claims to solicitor-client privilege. Section 14 is not the source of the substantive common law principle of solicitor-client privilege; rather it ensures that the common law “remains protected”: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 291 at para. 31.If read broadly, as IndigiNews proposes, so as to require disclosure of privileged documents to the Commissioner (and in the case of s. 25, to “the public, to an affected group of people or to an applicant”), it affords no protection for even the most sensitive documents. *FIPPA* provides that the privilege is preserved while the information is in the hands of the Commissioner, but does not purport to restrict or regulate the disclosure of that information by the Commissioner. The Commissioner may be presumed to be an advocate for disclosure. *FIPPA*

provides (in s. 42) that the Commissioner is "generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved", and the purposes of *FIPPA* (as described in s. 2) are:

> to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the right of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.

[56] *FIPPA* does not establish an institution or office administering and enforcing a regulatory program to address the competing claims of solicitor-client privilege and the public interest in access to information. I agree with the Ministry's submission that *FIPPA* contemplates that the applicable public body will engage in that balancing exercise when determining whether preservation of its privilege outweighs the public interest in access to information, by providing that the head of a public body *may* rely upon privilege as the basis for a refusal to disclose information.

[57] As I have noted above, s. 44 has no application unless relied upon in support of an investigation, audit or inquiry properly undertaken by the Commissioner. The question in *University of Calgary* was whether the information sought was, in fact, privileged from production. The judgments address the ability of the Alberta Commissioner to order the production for inspection of documents for the purpose of weighing an assertion of privilege. The statements in *obiter* in Cromwell J.'s opinion support the conclusion that s. 44(1) permits the Commissioner to order the production of information that *may fall within* the solicitor-client privilege exception of s. 14. However, the issue before the Court in *University of Calgary* was not the same as in the present case: whether s. 25 of *FIPPA* imposes a duty upon public bodies to disclose information that is without doubt subject to solicitor-client privilege to the

public, to an affected group of people or to an applicant, as applicable, whenever the disclosure is “clearly in the public interest”.

[58] Bearing in mind that s. 25 must be read in the context of the entire statutory scheme, however, we must consider whether the provisions of s. 44 are only consistent with a more expansive reading of s. 25. In my opinion, the Ministry is correct to say we should not read into s. 25 an intention to *abrogate* privilege because of the existence of a provision *protecting* the privilege: s. 44(2.1), which provides that solicitor-client privilege *is not affected* by disclosure of privileged records to the Commissioner.

[59] While the express reference to the disclosure of privileged records to the Commissioner as a result of an order under s. 44(1) may suggest that the Commissioner can order the production of privileged records (the conclusion reached by Cromwell J. in *University of Calgary*), it is also clear, as demonstrated in this case, that a broad production order may result in the inadvertent production of privileged records. For that reason, s. 44(2.1) may be considered to offer additional protection of privileged documents, rather than to abrogate the privilege.

[60] Moreover, as the Ministry observes, the Legislature expressly considered which exceptions would yield to a disclosure order made by the Commissioner; s. 44(1)(b) provides that the Commissioner may make an order requiring a person to produce a record containing personal information, expressly overriding the disclosure exception in s. 22(1).

[61] I see no reason why we should draw the inference sought by IndigiNews when the Legislature did not expressly refer to solicitor-client privilege in s. 25, and did not expressly override s. 14 in s. 44.

[62] IndigiNews argues that, short of using the actual words “despite solicitor-client privilege” in s. 25, the Legislature’s intent to override solicitor-client privilege could not be clearer. That argument leads to the question posed by the majority in *University of Calgary* at para. 52: (to paraphrase) given that the Legislature turned

its mind to the specific issue of solicitor-client privilege and was alive to its significance (by referring to it with precise language, in this case, in s. 14 of *FIPPA*), why did it not use equally precise language that would set aside the privilege, if that is what it had intended?

[63] With respect, I would not read into s. 25 of *FIPPA* the public interest override of solicitor-client privilege described by the chambers judge. The provision, considered in its full context, does not contain the clear, explicit and unequivocal language required to evince unambiguous legislative intent to override solicitor-client privilege. Therefore, s. 25 does not compel public bodies to disclose information which is subject to the privilege. Further, in my view, there is no free-standing authority vested in the Commissioner to order the head of a public body to disclose to the public, to an affected group of people or to an applicant, as applicable, information that is subject to solicitor-client privilege.

V. Conclusion

[64] For the above reasons, I would allow the appeal and make an order quashing the portion of the Commissioner's order addressing ss. 25 and 44 of *FIPPA*.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Voith"

I agree:

"The Honourable Madam Justice Horsman"