THE CANADIAN
BAR ASSOCIATION
Newfoundland & Labrador Branch

Access to Information and Protection of Privacy Statutory Review 2020
3rd Floor, Beothuk Building
20 Crosbie Place
St. John's, NL A1B 3Y8

Via Email: admin@nlatippareview.ca

November 30, 2020

Attention: The Honourable David B. Orsborn (Chair)
Subject: *Access to Information and Protection of Privacy Act, 2015*, Review

The Canadian Bar Association – Newfoundland and Labrador Branch (CBA-NL) is pleased to provide this contribution to the *Access to Information and Protection of Privacy Act, 2015*, Review.

The Canadian Bar Association is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, including 350 members in this province, with a mandate to seek improvements in the law and the administration of justice.

In consultation with CBA-NL members, we are pleased to provide this submission based on what we have heard. Our members have identified specific concerns with the existing *Act*, most notably around solicitor-client privilege, which is the focus of this submission.

CBA-NL appreciates the opportunity to comment on the *Access to Information and Protection of Privacy Act, 2015*. We trust our comments are helpful and would be pleased to offer further details if necessary.

Respectfully submitted,

(original copy signed by)
Koren Thomson
Chair, CBA-NL Privacy and Access Law Section

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PRIVILEGE AND THE *ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, 2015*

In consultation with our membership, CBA-NL has identified concerns with the *Access to Information and Protection of Privacy Act, 2015*. The concerns of our members centre on three points:

1. The potential for the Information and Privacy Commissioner to review documents over which a public body claims solicitor-client or litigation privilege;

2. The potential for disclosure of such privileged information to be subject to the Commissioner's quasi-order making powers or a Court order requiring production notwithstanding a valid claim of privilege on the basis of the "public interest override"; and,

3. The absence of a clause specifically authorizing a public body to refuse production on the basis of settlement privilege.

The Review of Privileged Information

The Information and Privacy Commissioner of Newfoundland and Labrador takes the position that he is able to compel production of, and review, solicitor-client and litigation privileged records to determine if a claim of privilege applies. The members of CBA-NL are of the view that the legislation does not support this purported power to compel production, nor should the legislation contain such a provision.

The Commissioner's power to compel production of records is found in section 97, which states:

> *97. (1) This section and section 98 apply to a record notwithstanding*
>
> *(a) paragraph 5 (1)(c), (d), (e), (f), (g), (h) or (i);*
>
> *(b) subsection 7 (2);*
>
> *(c) another Act or regulation; or*
>
> *(d) a privilege under the law of evidence.*
>
> *(2) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the Public Inquiries Act, 2006 .*
>
> *(3) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.*

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(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;

(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or

(c) it is not practicable to make a copy of the record.

(6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5).

The only subsection that supports the Commissioner's position is subsection 97(1)(d). However, the Supreme Court of Canada determined that the same language in Alberta's *Freedom of Information and Protection of Privacy Act* did not empower the Alberta Information and Privacy Commissioner to compel production of privileged records. The Court stated:

> *The expression "any privilege of the law of evidence" does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. Solicitor-client privilege is no longer merely a privilege of the law of evidence, but a substantive right that is fundamental to the proper functioning of our legal system. The disclosure of documents pursuant to a statutorily established access to information regime, separate from a judicial proceeding, engages solicitor-client privilege in its substantive, rather than evidentiary, context. To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. Section 56(3) does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. This interpretive approach is not a renunciation of the modern approach to statutory interpretation, but recognizes legislative respect for fundamental values.* (*Information and Privacy Commissioner* v. *University of Calgary*, 2016 SCC 53)

The Supreme Court reached a similar conclusion with respect to litigation privilege in *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52. In each case, the legislation failed to evince a clear and unambiguous legislative intention to abrogate privilege.

Based on the foregoing, and notwithstanding that production to the Commissioner would not, technically, impact a claim of privilege (s 100(2)), CBA-NL maintains that based upon the wording of s 97(1)(d), the Commissioner cannot force public bodies to turn over records that are subject to solicitor-client or litigation privilege.

Nor should the Commissioner have such a power of production.

CBA-NL acknowledges that a limitation on access to records for which privilege is claimed, may complicate the Commissioner's "oversight" of the access to information regime. However, such a complication does not warrant providing the Commissioner with the power to compel production of privileged records.

The Commissioner is not an independent adjudicator like a Court. Under section 3 of the legislation, the Commissioner is tasked with advocating on behalf of access. Furthermore, the Commissioner has an automatic right of intervention **as a party** to applications to the Supreme Court for declarations by public bodies (section 50(4)), and appeals to the Supreme Court by access to information applicants and third parties (section 56(3)). And this right of intervention **as a party** applies even when there has been a complaint to the Commissioner, an investigation by the Commissioner, and a report issued by the Commissioner. In short, the legislation mandates a role for the Commissioner that may be – and often is -- adverse in interest to the public body. Requiring disclosure to the Commissioner in those circumstances amounts to an infringement of solicitor-client and litigation privilege. The scenario is not dissimilar to that described by the Supreme Court of Canada in *University of Calgary*, when it stated the following:

> [35] Further, solicitor-client privilege belongs to the client, not to the lawyer (*Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 48; *Blood Tribe*, at para. 9). Seen through the eyes of the client, compelled disclosure to an administrative officer alone constitutes an infringement of the privilege (*Blood Tribe*, at para. 21). Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, regardless of whether or not the Commissioner may disclose the information onward to the applicant.
>
> [36] In this regard, it is noteworthy that the Commissioner is not an impartial adjudicator of the same nature as a court. *FOIPP* empowers the Commissioner to exercise both adjudicative and investigatory functions. Unlike a court, the Commissioner can become adverse in interest to a public body. The Commissioner may take a public body to court and become a party in litigation against a public body that refuses to disclose

> information. These features of the Commissioner's powers further indicate that disclosure to the Commissioner is itself an infringement of solicitor-client privilege. (emphasis added)

In order guard against this fundamental unfairness, and the damage it causes to the effective administration of justice, CBA-NL respectfully requests that the power to review solicitor-client and litigation privileged materials be reserved solely for the Supreme Court of Newfoundland and Labrador – a court of inherent jurisdiction and the only impartial decision-maker under the legislation.

The Application of the Public Interest Override to Privileged Information

Also of concern to our members is the application of the public interest override to privileged information. Subsection 9(1) of the legislation provides that discretionary exceptions to access do not apply "where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception." The inclusion of subsection 30(1) in 9(2) creates a "public interest override" test to be determined by the Court, or the Commissioner if his review of the records is permitted. Once a claim of privilege is "overridden", solicitor-client privilege or litigation privilege cannot be reinstated or reasserted in a legal proceeding.

With this in mind, our members are of the view that the public interest override should not apply to privileged information. In this respect, a requirement to consider the public interest is redundant. In the Wells Report, there was an acknowledgment that the Supreme Court of Canada's decision in the *Criminal Lawyers Association* indicates that there is a public interest analysis already built into decisions regarding the exercise of discretionary exceptions to access, including those pertaining to privilege (at p. 73). As a result, application of the public interest override test serves only to add the additional ability of a third party to question whether reliance on the exception is justified and to order disclosure notwithstanding an otherwise valid claim of privilege.

This potential for intrusion on privilege is unparalleled. Except for case law piercing privilege for limited and specific reasons, there is no precedent in Canada for a public body to be subject to the risk of having its solicitor-client or litigation privileged records released upon the decision of a third party. The resulting potential for injury to privilege and the administration of justice as a whole, is obvious when consideration of the importance of these principles is taken into account.

In *University of Calgary,* the Supreme Court of Canada emphasized the significance of solicitor-client privilege:

> *[24] The importance of solicitor-client privilege to our justice system cannot be overstated. . .*
>
> *[34] It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole… Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their*

> *lawyers, which compromises the quality of the legal advice they receive. […] It is therefore in the public interest to protect solicitor-client privilege.*

Similarly, with respect to litigation privilege, the Court stated the following in *Lizotte:*

> [*64] There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct. Nonetheless, like solicitor-client privilege, litigation privilege is "fundamental to the proper functioning of our legal system" (Blood Tribe, at para. 9). It is central to the adversarial system that Quebec shares with the other provinces. As a number of courts have already pointed out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: Penetanguishene Mental Health Centre v. Ontario, 2010 ONCA 197, 260 O.A.C. 125, at para. 39; Slocan Forest Products Ltd. v. Trapper Enterprises Ltd., 2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it.

A requirement to release solicitor-client privileged or litigation privileged materials at the determination of a third party who is a stranger to the privilege is fundamentally inconsistent with the nature of the privilege itself. As a result, on behalf of our membership, we respectfully request that the legislation be amended to remove the application of the public interest override section to litigation and solicitor client privileged information.

Settlement Privilege Should be Protected

The Commissioner is of the view that the legislation is a complete code, and since it does not specifically refer to settlement privilege, public bodies are not able to rely upon the privilege to refuse to disclose settlement privileged records (Report A-2018-022). Our members have concerns that this is a misinterpretation of the legislation which ought to be rectified.

In *Magnotta Winery Corporation,* 2010 ONCA 681, the Ontario Court of Appeal indicated that as a fundamental common law privilege, settlement privilege ought not to be considered abrogated absent "clear and explicit statutory language." In coming to this conclusion, the Court emphasized that the "public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation" (at para 36). The Court's approach is consistent with the British Columbia Supreme Court's approach to settlement privilege in *Richmond (City) v Campbell*, 2017 BCSC 331, and

the Supreme Court's approach to solicitor client privilege in *University of Calgary*, and its approach to litigation privilege in *Lizotte.*

With the foregoing in mind, and on behalf of our members, we respectfully request that the legislation be amended to specifically include settlement privilege within the scope of the section for legal advice, the section 30(1) exception respecting solicitor-client and litigation privileged records.

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