THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 9, 2018

Via email: bwbarbour@gov.pe.ca

Blair Barbour
Department of Justice and Public Safety
4th Floor South, Shaw Building
PO Box 2000, 95 Rochford St.
Charlottetown, PE C1A 7N

Dear Mr. Barbour:

Re: Modernization of the FOIPP Act

We welcome this opportunity, on behalf of the Canadian Bar Association - Prince Edward Island Branch (PEI Branch) and the CBA Ethics Subcommittee, to comment on modernization of the *Freedom of Information and Protection of Privacy Act* (FOIPP Act). Our submission addresses questions raised in the consultation materials about solicitor-client privilege in the context of access to information and privacy legislation.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The PEI Branch represents some 150 members from across Prince Edward Island. The CBA Ethics Subcommittee explores issues and develops tools to assist lawyers with their ethical and professional responsibilities. These include a lawyer's legal and ethical professional responsibility to protect client confidentiality and the law related to solicitor-client privilege. We note that the CBA has appeared at the Supreme Court of Canada in all the major litigation on solicitor-client privilege over the last twenty years, including the case referenced in the consultation materials[1].

PEI FOIPP Act

The current FOIPP Act contains a right of access to records, with specified exceptions, including for solicitor-client privilege:

> **25. Privileged information**
>
> (1) The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;

[1] *Alberta (Information and Privacy Commissioner) v. University of Calgary,* [2016] 2 SCR 555, 2016 SCC 53. *(University of Calgary)*

(b) information prepared by or for

(i) the Minister of Justice and Public Safety and Attorney General,

(ii) an agent or lawyer of the Department of Justice and Public Safety, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services; or

(c) information in correspondence between

(i) the Minister of Justice and Public Safety and Attorney General,

(ii) an agent or lawyer of the Department of Justice and Public Safety, or

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Public Safety and Attorney General, the agent or lawyer.

Idem

(2) The head of a public body shall refuse to disclose information described in clause (1)(a) that relates to a person other than a public body.

However, the solicitor-client privilege issues raised in the consultation document arise from subsection 53(3) of the FOIPP Act.

53. Powers of Commissioner in conducting inquiries

(1) In conducting an investigation under clause 50(1)(a) or an inquiry under section 64 or in giving advice and recommendations under section 51, the Commissioner has all the powers, privileges and immunities of a commissioner under the Public Inquiries Act R.S.P.E.I. 1988, Cap. P-31 and the powers given by subsection (2).

Examination of records

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

Production of record

(3) Despite any other enactment or any privilege of the law of evidence, a public body shall produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

Purpose of Exception

The Supreme Court of Canada has stated that:

> The importance of solicitor-client privilege to our justice system cannot be overstated. 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.[2]

This is equally true where a government institution is the client. The quality of legal advice obtained by government will inevitably be compromised where the confidentiality of its solicitor-client communications cannot be assured.

The Supreme Court has acknowledged that "certain government functions and activities require privacy. This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions."[3]

The Current Debate

The importance of solicitor-client privilege is recognized in access to information and privacy laws across Canada. Current debates engage the question whether an information or privacy commissioner can, or should, have the authority to review records for the purpose of verifying a claim of solicitor-client privilege by the head of a public body.

The practicalities of privilege claims are not well understood. It is not enough to simply claim solicitor-client privilege. In the government context, the head of an institution has discretion to disclose privileged information, and in exercising their discretion must weigh various factors, including the public interest. Where the exception is claimed, the head is obliged to show that they were properly instructed on the requirements of privilege, that lawyers were involved, and that the records were maintained in confidence. Privilege must be claimed document by document, and sufficient detail must be given to support the claim.

In a litigation context, solicitor-client privilege is usually established by supplying an affidavit identifying the date, nature of the document, author and recipient. It is extremely rare for a judge to review the documents over which privilege is claimed in order to assess whether privilege applies. Where uncertain, a judge is more likely to order further details by affidavit than to review the actual documents in question.

Judges are independent and impartial adjudicators. Information and privacy commissioners are not. For that reason, we do not believe they should be empowered to review privileged documents. In the *University of Calgary* decision, the Supreme Court stated:

> … [i]t 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.

In this respect, the FOIPP Act is virtually identical to the Alberta legislation considered in the *University of Calgary* case, and the PEI Commissioner has both adjudicative and investigatory functions. Compelled disclosure of privileged information to the Commissioner, even for the limited

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2 Note 1, at paras. 26, 34.

3 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* [2010] 1 SCR 815, 2010 SCC 23, at para. 40.

purpose of verifying the privilege claim, is a serious intrusion on solicitor-client privilege. Compelled disclosure to a potential adversary is all the more serious.

The Law of Solicitor-Client Privilege

In *University of Calgary*, the Supreme Court of Canada commented:

> Subject to *constitutional limitations*, legislatures can pierce solicitor-client privilege by statute. However, the language of the provision must be explicit and evince a clear and unambiguous legislative intent to do so.[4] [emphasis added]

What more is required than explicit, clear and unambiguous language? Courts will presume legislative respect for fundamental values of the constitution, which include solicitor-client privilege. Legislation attempting to abrogate solicitor-client privilege must satisfy scrutiny that it is absolutely essential to achieve the purposes of the legislation, typically described as a measure of last resort. The approach taken must minimize the impairment or harm to the substantive right; safeguards are required.

In *University of Calgary*, the Supreme Court stated:

> … [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.[5]

The consultation paper specifically raises "concerns around the waiver of … privilege." In law, compelled disclosure of solicitor-client privileged records does not constitute a waiver. However, the Supreme Court has commented that any statutory authorization for the use of privileged records must address this issue, as one among other required safeguards.

Consistent with the Supreme Court of Canada decision in *Canada (Attorney General) v. Chambre des notaires du Québec (Chambre des Notaires)*, there must also be a meaningful opportunity for clients (as distinct from their lawyers) to assert and protect their claim of solicitor-client privilege.[6]

Consequences of Impairing Solicitor-Client Privilege

There are important consequences when solicitor-client privilege is not protected, even for the public sector. Today, legal advice is developed as part of a dynamic exchange between lawyer and client, and the advice given provides calculations of risk reflecting the complex, strategic considerations appropriate to the public sector context. It is essential that clients feel comfortable exploring a wide range of scenarios with their legal advisors, so that clients are fully informed of the legal dimensions of the decisions they make. If they cannot be confident about the protections of solicitor-client privilege, there will invariably be a chilling effect, to the detriment of the proper functioning of government.

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4 Note 1, at para. 71.

5 Note 1, at para. 58

6 [2016] 1 SCR 336, 2016 SCC 20 (CanLII)

Clients may avoid seeking legal advice. They may limit the information they disclose to their lawyers and subsequently diminish the quality of the advice they receive. Worse, concerns about disclosure of privileged records may encourage situations where advice is sought and received, but undocumented, contrary to the open government values underlying the FOIPP Act and which we support.

Conclusion

The Supreme Court of Canada's decision in *University of Calgary* clarifies that language like that contained in the FOIPP Act does not authorize the province's Information and Privacy Commissioner to review records that the head of a public body refuses to disclose on the basis of solicitor-client privilege. In our opinion, the policy question to be addressed is not "what statutory language will provide the Commissioner with this authority." Rather, the question to ask is whether this is absolutely necessary for the functioning of the FOIPP Act. We believe it is not.

We thank you for the opportunity to provide our comments. Please don't hesitate to contact us about this submission or for further comment on this important issue.

Yours sincerely,

(original letter signed by Tina Head for Darcia Senft and Krista J. MacKay)

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Chair, CBA Ethics Subcommittee

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