QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 140**

Date:	**2017 05 17**
Docket:	QBG 1773 of 2016
Judicial Centre:	Saskatoon

BETWEEN:

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER, SASKATCHEWAN

APPLICANT

\- and -

THE UNIVERSITY OF SASKATCHEWAN

RESPONDENT

Counsel:

Jason W. Mohrbutter	for the applicant
John R. Beckman, Q.C. and Robert J. Affleck	for the respondent

DECISION
May 17, 2017

MILLS J.

Introduction

[1] This case involves the interpretation of *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [*Act*] or [*LAFOIPA*]. The University of Saskatchewan [University] is a designated local authority within

faxed to Counsel - May 17/17 - AD

the meaning of the *Act*. The initial applicant has made an application to the University to obtain certain records under its control and possession. The University has refused to give the individual access to certain records on the basis that the record contains information that is subject to solicitor-client privilege.

[2] The initial applicant was not satisfied with the decision of the University and applied to the Office of the Information and Privacy Commissioner [Commissioner] for a review of the University's decision. The Commissioner embarked upon a review and advised the University to produce the records that were claimed to be subject of solicitor-client privilege for the Commissioner's review. The University refused. The Commissioner brought this application by originating notice to compel production of the records it seeks.

[3] The applicable sections of the *Act* are as follows:

> 6(1) An applicant shall:
> (a) make the application in the prescribed form to the local authority in which the record containing the information is kept; and
> (b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record.
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> 21 A head may refuse to give access to a record that:
> (a) contains information that is subject to solicitor-client privilege;
> (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or
> (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.
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> ...
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> 38(1) Where:
> (a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;

(b) a head fails to respond to an application for access to a record within the required time; or
(c) an applicant requests a correction of personal information pursuant to clause 31(1)(a) and the correction is not made; the applicant may apply in the prescribed form and manner to the commissioner for a review of the matter.

...

39(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.

...

42(1) The commissioner shall conduct every review in private.
(2) The:
(a) person who applies for a review;
(b) third party or applicant who is entitled to notice pursuant to section 41; and
(c) head whose decision is the subject of a review; are entitled to make representations to the commissioner in the course of the review.
(3) No one is entitled as of right:
(a) to be present during a review; or
(b) before or after a review:
(i) to have access to; or
(ii) to comment on; representations made to the commissioner by any other person.

43(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:
(a) require to be produced and examine any record that is in the possession or under the control of a local authority; and
(b) enter and inspect any premises occupied by a local authority.
(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:
(a) to give oral or written evidence on oath or affirmation; and
(b) to produce any documents or things; that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.
(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

Factual Background

[4] An individual who has a dispute with the University made the appropriate application to the University under s. 6 of the *Act*. The University without identifying specific records advised the initial applicant in general terms that certain records included information that was subject to solicitor-client privilege and therefore refused to provide any further information about the record, relying on s. 21 of the *Act*. The initial applicant was unhappy with the response and applied to the Commissioner named under the *Act* to review the decision of the University pursuant to s. 38 of the *Act*.

[5] As part of the Commissioner's review, his initial letter to the University stated:

> At this point, we will not require a copy of the records upon which solicitor-client privilege is claimed. We will accept a submission that includes evidence that will assist the Commissioner in verifying that these records are subject to solicitor-client privilege.

An exchange of correspondence between the University and the Commissioner ensued.

[6] Kevin Smith, an employee of the University, was charged with the responsibility of having the University comply with the requirements of the *Act* regarding disclosure. He provided an affidavit to the Commissioner's office which stated in part:

> I am advised by Robert J. Affleck, our legal counsel, and do verily believe it to be true that documents were withheld due to their impact on other legal matters involving [redacted]. Specifically, Robert J. Affleck advised that some of the documents are the subject of solicitor-client privilege, and I do verily believe the same to be true.

[7] The Commissioner responded with various concerns: firstly, that the affidavit was on information and belief and not taken by someone who was a lawyer. The Commissioner would have preferred an affidavit sworn by Mr. Affleck that the documents were truly the subject of solicitor-client privilege. Secondly, the response indicated that some of the records were subject to solicitor-client privilege. The Commissioner did not know which of those records were subject to the privilege. The Commissioner stated that no list of the documents for which solicitor-client privilege was claimed had been provided. The Commissioner stated that it could not tell if Mr. Smith had reviewed any of the documents in question that were being asserted were subject to the privilege. The Commissioner went on to state that in a regular court proceeding the party claiming solicitor-client privilege would still have to list the documents and the opposing party would still have an opportunity to review the list and where appropriate apply to the Court for an order to produce. The University did not follow this process.

[8] Given the position of the University, the Commissioner then asked that the actual documents that were claimed to be subject of solicitor-client privilege be produced. The Commissioner provided details of its general practice as it relates to refusal to release records on the basis of solicitor-client privilege. The Commissioner's office deposed that other entities provided the Commissioner with actual copies of the records to review. Once the Commissioner's office had reviewed the records, it provided a report as required by the *Act* and made recommendations regarding those records. The Commissioner's office has no legislative authority to order release of the records but can only make non-binding recommendations regarding their release. The Commissioner's office indicated that its current practice is to securely destroy the records following the closing of its file.

[9] The Commissioner's office stated that the practice included a notion that the delivery of the contested records would not amount to a waiver of solicitor-client privilege, and the sole purpose for providing the records was to allow the Commissioner to determine if the exemption was applicable. The Commissioner's office advised the University of its current practice.

[10] The University's solicitor took umbrage with the demand for the records. He noted that the Commissioner's office had changed its position from seeking information to clarify whether the documents were probably subject to solicitor-client privilege to the position that the actual records would have to be produced. The University's response was that they had not been aware of any basis by which the Commissioner's office believed solicitor-client privilege was not properly invoked.

[11] Practically the Commissioner's office now seeks the actual records in order to determine if solicitor-client privilege applies to them. The University states that it has complied with the *Act* by asserting solicitor-client privilege, providing an exemption to those documents, and it need do nothing further.

The Law

[12] There is a significant amount of jurisprudence dealing with the issue of solicitor-client privilege as it relates to freedom of information legislation. Both sides are on common ground that it is a matter of statutory interpretation of the *Act* that will determine what access, if any, the Commissioner's office has to the actual documents it seeks over which solicitor-client privilege is claimed. The most important sections in dealing with this are s. 21 and s. 43 previously produced.

[13] The approach to statutory interpretation has been provided in substantially the same terms by all levels of court throughout Canada. I find it best to refer to the Saskatchewan Court of Appeal comment in *Saskatchewan (Ministry of Energy and Resources) v Areva Resources Canada Inc.*, 2013 SKCA 79, 417 Sask R 182.

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> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
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> ...

Wisely quoting from LeBel J. in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

[14] This application has been percolating for a long period of time. It was originally brought in February 2016 and was adjourned *sine die* by consent to await a decision involving the Alberta Privacy Commissioner and the University of Calgary which had yet to be decided. That decision, *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555 [*University of Calgary*], was rendered but did not settle the issue between the parties.

[15] The Commissioner points to the comments of our Court of Appeal in *General Motors Acceptance Corp. of Canada v Saskatchewan Government Insurance* (1993), 109 DLR (4th) 129 at 135 (Sask QB), giving understanding for the need for disclosure of local authority records.

> The *Act's* basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the *Act*, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the *Act*. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a

> meaningful reach and application. The *Act* provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The *Act's* broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.

[16] The Commissioner argues that although the *Act* has changed, its purpose is reflected in s. 5 of the current *Act* which states:

> 5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a local authority.

[17] The Commissioner points to s. 51 of the *Act* that places the onus on the local authority to establish why access will not be granted.

> 51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[18] The Supreme Court of Canada in *University of Calgary* was dealing with an interpretation of the Alberta Act which stated:

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> Despite any other enactment of 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) or (2).

[19] The Supreme Court ruled that a privilege of the law of evidence did not include solicitor-client privilege. Having come to that determination was an easy matter for the Supreme Court in speaking about the importance of solicitor-client privilege to rule that the clear wording of the statute did not include solicitor-client privilege and therefore the records need not be disclosed. In reinforcing its decision,

the Supreme Court contrasted different wording in the Alberta legislation dealing with the question of privilege. This is identified at para. 53 of the decision.

> 53 In addition, the use of the term "privilege of the law of evidence" in s. 56(3) in contrast to "legal privilege" in s. 27(1) is significant, since legislatures are presumed to use expressions consistently within a statute (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at s.8.36). Therefore, where different terms are used in a single piece of legislation, they must be understood to have different meanings; otherwise the legislature would have employed only one term or the other (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 81; *R. v. Barnier*, [1980] 1 S.C.R. 1124, at pp. 1135-36). If the legislature intended to allow the Commissioner to compel the production of documents over which solicitor-client privilege is asserted under s. 56(3), it could have done so using the words it used in s. 27(1) rather than the phrase "privilege of the law of evidence".

[20] The Supreme Court has stated that legal privilege is sufficient to include solicitor-client privilege. Section 43 of the Saskatchewan Act refers to "any privilege available at law". This phrase clearly includes the concept of legal privilege and so therefore solicitor-client privilege.

[21] I say this after reviewing para. 61 of *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521, where a general statement of the importance of solicitor-client privilege is accompanied by the comment that the exact term solicitor-client privilege need not be used.

> 61 This being said, Blood Tribe represents neither a return to the "plain meaning rule" nor an abandonment of the modern approach to statutory interpretation, the goal of which is not to focus solely on the specific words of the provision, but to read the words "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; Blood Tribe, at para. 26. First of all, the legislature does not necessarily have to use the term "solicitor-client privilege" in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the

> privilege. Next, even where there is a specific reference to solicitor-client privilege, the chosen words must nevertheless be interpreted in order to determine whether there is in fact an abrogation and, if so, to assess its scope. The Court recently applied this modern approach to a statute that expressly abrogated solicitor-client privilege in order to determine its meaning and scope in *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at paras. 22-34. But in accordance with Blood Tribe, unless clear, explicit and unequivocal language has been used to abrogate solicitor-client privilege, it must be concluded that the privilege has not been abrogated.

[22] I have determined that s. 43(1) grants the Commissioner the power "in the same manner and to the same extent as the court" to obtain information necessary to determine whether a claim of solicitor-client privilege under s. 21 of the *Act* is well-founded.

[23] The Commissioner has taken the position that their practice has been that all other parties they have dealt with voluntarily provided the records in that first instance which are then destroyed after the file is closed in order to preserve their integrity. While that may be a matter of practice, it is not a matter of legislation. It should be noted that in the *University of Calgary* case the University did provide information respecting the documentation over which solicitor-client privilege was claimed as required by the Alberta civil rules of court in force at that time.

[24] That should be contrasted with this case in which the Commissioner's office did not request the records initially but rather only basic information that would assist the Commissioner in determining if solicitor-client privilege applied without actually reviewing the documents. That I believe is proper. The Commissioner is not required under s. 43 to demand production of the potentially privileged documents. The initial approach, following the approach taken by this Court in such determinations, was found in *Rekken Estate v Health Region #1*, 2012 SKQB 19, 390 Sask R 95.

> 3 This Court's decision in *Schlechter v. Schlechter* (1988), 73 Sask.R. 13, [1988] S.J. No. 701 (QL) (Sask.Q.B.) indicates that a party must disclose any document relevant to the action. Where production is objected to on the basis of privilege, the statement as to documents must identify the documents sufficiently so to enable the opposite party to know what documents are being referred to, and to enable an order for their production to be enforced if the claim for privilege is unfounded.
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> 4 In *Brewster v. Quayle Agencies Inc.* 2008 SKQB 137, 332 Sask.R. 192, this Court went on to indicate that the description of a document for which litigation privilege is claimed must provide details that will allow the document to be identified, and must provide information that will permit the chambers judge to determine whether a prima face case for privilege exists. However, it is clear that no details need to be provided which would enable the opposite party to discover indirectly the contents of the privileged documents, as opposed to their existence and location.

[25] In many circumstances an affidavit including the described information and claiming solicitor-client privilege based on it would be sufficient for the Commissioner to make a determination. If, however, that information is not sufficient, the Commissioner does have the power under s. 43 to demand the actual document for the purpose of examination on a document-by-document basis as to whether or not the claim for solicitor-client privilege is well-founded. The *Act* does not allow the Commissioner to release such documentation to the initial applicant seeking the review.

[26] The University argued that the proper procedure upon its bald claim that the records were the subject of solicitor-client privilege would nevertheless be subject to examination under the *Act* if the initial applicant wished to by resorting to an application under s. 47 of the *Act* which reads:

> 47(1) On an appeal, the court:
> (a) shall determine the matter de novo; and
> (b) may examine any record in camera in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.

> (2) Notwithstanding any other Act or any privilege that is available at law, the court may, on an appeal, examine any record in the possession or under the control of a local authority and no information shall be withheld from the court on any grounds.
> (3) The court shall take every reasonable precaution, including, where appropriate, receiving representations ex parte and conducting hearings in camera, to avoid disclosure by the court or any person of:
> (a) any information or other material if the nature of the information or material could justify a refusal by a head to give access to a record or part of a record; or
> (b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.
> (4) The court may disclose to the Attorney General for Saskatchewan or the Attorney General of Canada information that relates to the commission of an offence against:
> (a) an Act or a regulation; or
> (b) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; by an officer or employee of a local authority if, in the opinion of the court, there is evidence of the commission of the offence.
> (5) Where a head has refused to give access to a record or part of it, the court, if it determines that the head is not authorized to refuse to give access to the information or part of it, shall:
> (a) order the head to give the applicant access to the record or part of it, subject to any conditions that the court considers appropriate; or
> (b) make any other order that the court considers appropriate.
> (6) Where the court finds that a record falls within an exemption, the court shall not order the head to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head to refuse to give access to the record.

[27] The power of the Court to examine under s. 47 whether a claim for an exemption of solicitor-client privilege can be sustained comes with the additional review power that "no information shall be withheld from the court on any grounds". The fact that an appeal is available and the Court can examine the actual records does not mean that the Commissioner cannot. It is a question of statutory interpretation, and if the Commissioner has the authority to examine the actual records to determine if solicitor-client privilege applies, there is no need to compel an original applicant to follow a different process. An appeal to the Court under s. 46 of the *Act* is not taken by the Commissioner, and the Commissioner is not entitled to be a party to an appeal.

That means the original applicant is left with launching an appeal to the Court of Queen's Bench on their own for the purpose of obtaining a ruling on whether certain documents are protected by solicitor-client privilege. From a practical perspective, an original applicant who was relying on the expertise and authority of the Commissioner will now have to hire their own lawyer to launch an appeal at what will be significant expense and delay. The University's approach would constrain the objectives of the *Act*.

[28] The University raised a second issue in response to the Commissioner's application. The University served a notice of constitutional challenge pursuant to *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. The notice was served upon the government, which chose not to appear and argue the issue. The University took the position that s. 43 of the *Act* offends ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. The University in its brief of law in support of this position deals extensively with the breach of s. 8 of the *Charter* – "Everyone has the right to be secure against unreasonable search or seizure". The University does not offer any alternative argument with respect to the application of s. 7 of the *Charter*, and I will deal with the alleged breach of s. 7 in the same fashion as the University has.

[29] The position of the Commissioner on this issue is threefold: firstly, s. 8 does not apply to the University in the circumstances of this case; secondly, the University has no reasonable expectation of privacy; and thirdly, if there has been a breach of the s. 8 rights by s. 43 of *LAFOIPA*, such infringement is allowed by the application of s. 1 of the *Charter*.

(1) Section 8 does not apply to the University in the circumstances of this case

[30] The Commissioner argues that the *Charter* protects citizens from various forms of government action. The Commissioner simply states that the *Charter* serves to protect persons from the government. It does not protect the government from itself. The University argues that it is not the government within the context of *LAFOIPA*. The Commissioner argues that the University can be considered a government for specific purposes, relying on *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 47. It is stated that "Indeed, it may be the particular entities will be subject to *Charter* scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as 'governmental' *per se*".

[31] The local authorities covered by *LAFOIPA* are all creatures of the Legislature and I can take judicial notice that in some part obtain their funding from the provincial government. It is equally obvious that they do not obtain all their funding from the provincial government and that clearly they act autonomously from the direction of the government in some respects. The local authorities in the context *LAFOIPA* are public institutions by virtue of obtaining their right to exist and significant funding from the Legislature.

[32] The Commissioner argues that when one looks at the broader goal of the *Act*, that is public transparency and accountability for the actions and decision-making processes in public bodies, the argument becomes much stronger. The Commissioner argues that the University when providing documents to ensure the government goals of transparency and accountability are acting in a governmental role.

[33] Neither the Commissioner nor the University have been able to provide a court case in which a publically funded university has advanced a *Charter* right. The Commissioner points to the *University of Calgary* decision from the Supreme Court as a perfect example of this. In that case solicitor-client privilege was protected as a result of applying common principles of statutory interpretation. There was no attempt by the *University of Calgary* or any of the intervenors to raise any issue with respect to a breach of the ss. 7 or 8 *Charter* rights.

[34] The Commissioner goes on to argue that this anomaly is even more telling when one looks at the sister cases of *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 SCR 336 [*Chambre des notaires*], and *Canada (National Revenue) v Thompson*, 2016 SCC 21, [2016] 1 SCR 381 [*Thompson*]. The *Chambre des notaires* case dealt with the issue of whether ss. 231 and 232 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), purporting to eliminate solicitor-client privilege was a breach of s. 8 of the *Charter*. The Supreme Court found it was. The *Thompson* decision dealing with the same section of the *Income Tax Act* came before the Supreme Court of Canada on the question of whether the wording of the *Income Tax Act* as it defines solicitor-client privilege was sufficient to abrogate a person's entitlement to claim that privilege. The Court found that the clear wording of the *Income Tax Act* was sufficient to abrogate solicitor-client privilege.

[35] In *Thompson* the issue of s. 8 had been raised before the initial motions judge, but the matter had not been appealed on that basis. The Supreme Court of Canada did not hear argument on the issue of s. 8 in the *Thompson* case. Nevertheless, having essentially ruled in favour of the Minister of National Revenue on the issue of the scope of the legislation, it said that on the reasoning in the *Chambre des notaires* case s. 8 would come into play in respect of *Thompson* preventing the Minister from obtaining solicitor-client records from him.

[36] The Commissioner argues that if the Supreme Court was prepared to invoke s. 8 of its own volition in *Thompson*, it surely would have done the same in *University of Calgary* if it was applicable. *Thompson* was rendered in June of 2016, and the *University of Calgary* decision was rendered in November of 2016, so it cannot be said that the Supreme Court had not put its mind to the issue in the context of solicitor-client privilege and s. 8. The Commissioner argues that this must mean all the parties accepted that the University had no standing to allege a *Charter* right breach.

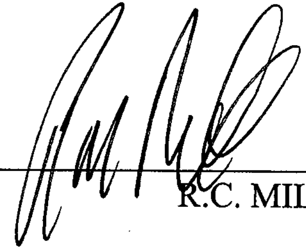
[37] I am not prepared to accept that reasoning. There may be a number of reasons why the University of Calgary chose not to rely on the *Charter*, even if it felt it could do so. Those reasons may be of a legal, political or technical nature. The bottom line that arises is that the Supreme Court of Canada did not comment one way or the other as to the ability of the University of Calgary to raise a potential s. 8 *Charter* breach under their freedom of information legislation.

[38] While I do not accept the extrapolation of the Supreme Court's various decisions as requested by the Commissioner, I do accept the general proposition that in the circumstances of the application of *LAFOIPA*, the University is fulfilling a governmental role in providing information that ensures public transparency and accountability. For that reason I find that the constitutional question is not properly before this Court as the University is attempting to rely on a *Charter* right that is not available to it while it exercises a governmental function in the context of *LAFOIPA*.

[39] This issue obviously was of some importance to both the Office of the Commissioner and the University, and it did relate to an important legal concept involving solicitor-client privilege. The necessity for the court application by the Commissioner, however, arose primarily because the University refused to provide

basic information about the documents sought to be held back on the initial request of the Commissioner. Even in the *University of Calgary* case, relied on heavily by the University, that institution provided information consistent with the civil rules of court. This University instead provided a response that led to ambiguity about whether there was any legitimate claim for seeking privilege resulting in a rejection by this Court of their entire position.

[40] With respect to the issue of costs, I note that under Schedule I B, Column 3, items 6 and 7, the costs awarded to the successful applicant, the Commissioner, are in the sum of $8,000 and therefore that amount of costs is awarded to the Commissioner's office payable by the University.



J.

R.C. MILLS