Court of Appeal for Saskatchewan

Docket: CACV3083

Citation: *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34

Date: 2018-05-16

Between:

The University of Saskatchewan

Appellant
(Respondent)

And

The Office of the Information and Privacy Commissioner, Saskatchewan

Respondent
(Applicant)

And

Attorney General for Saskatchewan

Intervenor

Before:	Richards C.J.S., Caldwell and Schwann JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Chief Justice Richards
In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Madam Justice Schwann
On Appeal From:	2017 SKQB 140, Saskatoon
Appeal Heard:	October 19, 2017
Counsel:	John Beckman, Q.C., and Robert Affleck for the Appellant Jason Mohrbutter and Joanne Colledge-Miller for the Respondent Alan Jacobson for the Intervenor

Richards C.J.S.

I. INTRODUCTION

[1] This appeal involves an examination of how the authority of the Information and Privacy Commissioner to require the production of documents intersects with solicitor-client privilege.

[2] The University of Saskatchewan is a "local authority" within the meaning of that term as it is employed in *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [*LAFOIPA*].

[3] An individual involved in a controversy with the University filed an access to information request with it. The University refused to divulge some of the records in issue, citing solicitor-client privilege. The applicant then asked the Commissioner to review the matter. In the course of conducting the review, the Commissioner requested the University to produce the records in relation to which privilege had been asserted so he could confirm if they were, in fact, privileged.

[4] The University refused to comply with the Commissioner's request and he therefore asked the Court of Queen's Bench for an order directing the University to produce the records. The University responded by arguing, among other things, that (a) properly construed, *LAFOIPA* does not give the Commissioner the authority to require the production of records subject to a claim of solicitor-client privilege, (b) if *LAFOIPA* does confer such an authority on the Commissioner, he should not have exercised it here, and (c) if *LAFOIPA* empowers the Commissioner to demand production of records said to be subject to solicitor-client privilege, then *LAFOIPA* violates the protection against unreasonable search and seizure guaranteed by s. 8 of the *Charter*.

[5] The Chambers judge held that *LAFOIPA* gave the Commissioner the authority to require the production of the records in issue. He also concluded the constitutional issue raised by the University was not properly before him because the University exercised a governmental function under *LAFOIPA* and, therefore, could not rely on the *Charter*. The Chambers judge did not deal directly or expressly with the argument that, even if the Commissioner had the general

authority to demand the production of the records in question, he should not have asked for them in the circumstances of this case.

[6] The University appeals from the decision of the Chambers judge.

[7] As explained below, the University's appeal must be allowed. The Chambers judge correctly determined that, in general terms, s. 43(1) of *LAFOIPA* empowers the Commissioner to require the production of records claimed to be subject to solicitor-client privilege. However, he erred in concluding the Commissioner had acted appropriately in requesting records of that kind in the circumstances of this case. It is unnecessary to deal with the University's *Charter* argument.

II. AN OVERVIEW OF *LAFOIPA*

[8] *LAFOIPA* applies to "local authorities". Such authorities include, by way of example, boards of education, boards of public libraries, and the provincial health authority. By virtue of s. 2(f)(xi) of *LAFOIPA*, the University of Saskatchewan is also a local authority.

[9] *LAFOIPA* is concerned with access to records. "Record" is defined in s. 2(j) to mean "a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records".

[10] Subject to the provisions of *LAFOIPA* itself, every person must be permitted access to records in the possession of a local authority if he or she makes the required application (s. 5).

[11] *LAFOIPA* sets out a variety of exceptions to the general principle of access. These relate to, for instance, records obtained in confidence from other governments (s. 13), records that, if released, would prejudice law enforcement operations (s. 14), and records that contain advice from officials (s. 16).

[12] One of the exceptions to the right of access is designed to protect solicitor-client privilege. Section 21 of *LAFOIPA* does this by providing as follows:

> 21 A head may refuse to give access to a record that:

> (a) contains any information that is subject to any privilege that is available at law, including 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.

[13] Applications for access to records must be made in the prescribed form to the local authority (s. 6(1)). When an application is made, the head of the local authority considers the application and then adopts one of several courses of action including providing access to the record on payment of the prescribed fee or refusing access to the record. If access is refused, the head must set out the reason for the refusal by identifying the specific provision of *LAFOIPA* on which the refusal is based (s. 7).

[14] When an applicant is not satisfied with the decision of the head of a local authority, he or she may apply to the Commissioner for a review (s. 38). Where the Commissioner concludes there are reasonable grounds to review any matter set out in such an application, he must conduct a review (s. 39). Section 39 reads as follows:

> 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.
>
> (2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:
>
> > (a) is frivolous or vexatious;
> >
> > (a.1) does not affect the applicant or individual personally;
> >
> > (a.2) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;
> >
> > (a.3) concerns a local authority that has an internal review process that has not been used;
> >
> > (a.4) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;
> >
> > (a.5) may be considered pursuant to another Act that provides a review or other mechanism to challenge a local authority's decision with respect to the collection, amendment, use or disclosure of personal information and that review or mechanism has not been used;
> >
> > (a.6) does not contain sufficient evidence;
> >
> > (a.7) has already been the subject of a report pursuant to section 44 by the commissioner;

(b) is not made in good faith; or

(c) concerns a trivial matter.

[15] The powers of the Commissioner in conducting a review are set out in s. 43 of *LAFOIPA*. They include the power to require the production of a record. Section 43 is reproduced below:

> 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.

[16] The Commissioner has no authority to compel a head to produce a record to an applicant. Rather, the Commissioner provides a report on the completion of his review (s. 44(1)). In the report, the Commissioner may make recommendations with respect to any matter that was under review (s. 44(3)). The report is provided to both the head and the applicant (s. 44(2)). Within 30 days of receiving the report, the head must make a decision to either follow the recommendation of the Commissioner or make "any other decision that the head considers appropriate" (s. 45(a)). Within 30 days after receiving the decision of the head in this regard, an applicant may appeal the decision to the Court of Queen's Bench (s. 46(1)).

[17] Appeals to the Court of Queen's Bench are *de novo*. The Court may examine any record *in camera* to determine on the merits whether it may be withheld pursuant to *LAFOIPA* (s. 47).

III. BASIC FACTUAL BACKGROUND

[18] In April of 2015, an applicant adverse in interest to the University in various legal proceedings filed an access to information request pursuant to *LAFOIPA*. He sought electronic correspondence referring either to him, his employment history with the University, or a harassment complaint he had filed. The request was worded as follows:

> All correspondence in electronic form sent or received (including those deleted from her e-mail mailbox) by [name of the Dean of the University of Saskatchewan Library] that includes a reference to me by name (i.e.: "[full name of applicant]", or "[first name of applicant]", and/or "[last name of applicant]"), and/or a reference to my employment history (including changes to my employment positions held by me with the University of Saskatchewan), and/or a reference to the harassment complaint filed by me" [*sic*] for the time period of March 1, 2014-April 24, 2015.

[19] The University provided records in response to the applicant's request, except those it said were covered by exemptions found in *LAFOIPA*.

[20] The applicant was not satisfied with the University's response and, as was his right, he sought a review pursuant to s. 38 of *LAFOIPA*. On August 14, 2015, the Commissioner wrote to the University to advise of the review. In that regard, and referring to s. 43 of *LAFOIPA*, the Commissioner requested copies of all of the records in issue.

[21] The University took the position that it was not required to provide the Commissioner with the records. Then, in mid-September of 2015, the Commissioner's office advised that it would not insist on seeing the records in relation to which solicitor-client privilege was being claimed and, by way of an ambiguously-worded alternative, said it would accept evidence that would assist the Commissioner to determine the merits of the claim for privilege. In response, the University provided an affidavit from one of its officials saying merely that he, the official, had been advised by counsel that "some of the documents are the subject of solicitor-client privilege".

[22] The Commissioner advised that the affidavit did not allow him to determine if solicitor-client privilege was applicable to the records in question and reverted to the position that he was entitled to see the records. The University continued with its stance that the Commissioner did not need to review the records themselves and, ultimately, the Commissioner issued a formal Notice to Produce Records. It required production of all records responsive to the applicant's request over which solicitor-client privilege was being claimed.

[23] The University did not comply with the Notice to Produce Records.

[24] The Commissioner filed an Originating Application dated January 15, 2016. In it, he sought an order directing the University to comply with the Notice to Produce Records "for the

limited purpose of permitting the Commissioner to determine whether the Records are properly subject to [the solicitor-client exemption]".

IV. THE CHAMBERS DECISION

[25] The Chambers judge granted the order sought by the Commissioner. He interpreted s. 43(1) of *LAFOIPA* as empowering the Commissioner to require the production of records in relation to which solicitor-client privilege had been asserted. In so doing, the Chambers judge rejected the University's argument that *LAFOIPA* was not worded sufficiently clearly to effect such a result. At the same time, the Chambers judge also seemed to say a request for records subject to a claim of solicitor-client privilege would be appropriate only where the Commissioner had first asked for basic information about the records and considered the privilege claim in light of such information.

[26] The Chambers judge rejected the University's argument that, if *LAFOIPA* allowed the Commissioner to require the production of privileged records, it violated the protection against unreasonable search and seizure guaranteed by s. 8 of the *Charter*. He reasoned that, in providing information pursuant to *LAFOIPA*, the University was fulfilling a governmental role and therefore could not rely on the *Charter*.

[27] The Chambers judge did not deal directly with the question of whether, assuming s. 43(1) empowered the Commissioner to demand the production of records subject to a claim of privilege, he should have made such a demand on the facts of this case.

V. ANALYSIS

[28] The University takes issue with the decision of the Chambers judge on a variety of fronts but its position can be reduced to three lines of argument:

(a) *LAFOIPA* does not empower the Commissioner to require the production of records in relation to which solicitor-client privilege has been claimed;

(b) if *LAFOIPA* empowers the Commissioner to require the production of records in relation to which solicitor-client privilege has been claimed, the Commissioner erred by demanding production in the circumstances of this case; and

(c) if *LAFOIPA* empowers the Commissioner to require the production of records in relation to which solicitor-client privilege has been claimed, it violates s. 8 of the *Charter*.

I will address each of these arguments in turn.

A. Does *LAFOIPA* empower the Commissioner to require production of the records subject to a claim of solicitor-client privilege?

[29] Solicitor-client privilege is essential to the proper functioning of our legal system. It ensures that individuals seeking assistance from lawyers can speak candidly and freely and thereby obtain effective advice. Absent the assurance of the confidentiality offered by the privilege, the ability of the citizenry to navigate through the shoals of the law would be severely compromised. See: *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9, [2008] 2 SCR 574 [*Blood Tribe*]; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 34, [2016] 2 SCR 555 [*University of Calgary*]. As a result, solicitor-client privilege must offer a strong assurance of confidentiality. As stated in *R v McClure*, 2001 SCC 14 at para 35, [2001] 1 SCR 445 [*McClure*]:

> ... [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[30] Solicitor-client privilege is more than a rule of evidence. It also has a substantive dimension that operates outside of the courtroom and whenever communications flow between a client and a lawyer acting in his or her capacity as a lawyer. See: *Foster Wheeler Power Co. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18 at para 34, [2004] 1 SCR 456; *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61 at para 49, [2002] 3 SCR 209 [*Lavallee*]; *Maranda v Richer*, 2003 SCC 67 at para 11, [2003] 3 SCR 193; *Solosky v The Queen* (1979), [1980] 1 SCR 821 at 839; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at

875 [*Descôteaux*]; *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at paras 8 and 84, [2015] 1 SCR 401.

[31] Solicitor-client privilege is not absolute. It can be limited or abrogated by statute. The Supreme Court has repeatedly made this clear. See, for example: *McLure* at para 34; *Lavallee* at para 18; *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 25, [2016] 1 SCR 381 [*Thompson*].

[32] Nonetheless, the cornerstone importance of solicitor-client privilege is reflected in the approach the Supreme Court has taken to the interpretation of legislative provisions touching on it. A statute purporting to limit or abrogate the privilege must be interpreted "restrictively" and must demonstrate "a clear and unambiguous legislative intent to do so" before it will be given any such effect. See: *University of Calgary* at para 28.

[33] It follows from all of this that solicitor-client privilege cannot be set aside by inference. The Supreme Court made the point this way in *Thompson*, as quoted at paragraph 28 of *University of Calgary*:

> … it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect. [para 25]

[34] All of that said, a legislature does not have to expressly use the words "solicitor-client privilege" in a statute to limit or abrogate the privilege. In the end, the effect of any statutory provision will depend on how clearly a legislative intention to affect the privilege is expressed. The words of the Supreme Court in *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521, are instructive on this front:

> [61] … 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.
>
> (Emphasis added)

See also: *Law Society of Saskatchewan v Merchant*, 2008 SKCA 128 at paras 46–52, 300 DLR (4th) 462.

[35] With this jurisprudential background in place, I turn now to the interpretation of *LAFOIPA*. This exercise must begin with the words of the *Act* and a consideration of their ordinary and grammatical meaning.

[36] The key provision of *LAFOIPA* for purposes of this appeal is, of course, s. 43. For ease of reference, I reproduce ss. 43(1) and (2) again here:

> 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.

[37] The plain meaning of s. 43(1) – "[n]otwithstanding any other Act or any privilege available at law" – is self-evidently broad. The reference to *any* privilege available at law is clear and doubtless embraces solicitor-client privilege. In this regard, *LAFOIPA* is very different than the legislation considered by the Supreme Court in *University of Calgary*. The words in issue there were to the effect that a public body had to produce records to the Commissioner "[d]espite any other enactment or *any privilege of the law of evidence*". The Court noted that solicitor-client privilege has a substantive aspect and is not merely an evidentiary rule. As a result, it held that the phrase "privilege of the law of evidence" was not sufficiently clear and unequivocal to reveal a legislative intention to set aside solicitor-client privilege.

[38] Thus, in my view, there can be no doubt that, as a matter of ordinary and grammatical meaning, the reference to "any privilege available at law" in s. 43(1) includes all aspects of solicitor-client privilege.

[39] However, in interpreting s. 43(1), it is also necessary to consider the contextual factors relevant to its construction.

[40] As explained above, *LAFOIPA* establishes a statutory scheme to operationalize the right to access the records held by local authorities. The Commissioner is a central actor in this scheme and, simply put, one of his key roles is to facilitate a streamlined and simplified review of questions concerning whether a local authority is obliged to grant access to a record.

[41] In my assessment, the University's interpretation of s. 43(1) is broadly inconsistent with *LAFOIPA*'s objectives. On its approach, an applicant who is denied access to a record on the basis of a claim of solicitor-client privilege will not have the comfort of knowing the Commissioner has reviewed the record and considered whether the claim is warranted even in extreme circumstances where, on the face of things, there appears to have been a clear error in asserting the privilege. Rather, according to the University, regardless of the apparent problems with a claim of solicitor-client privilege, the applicant's sole means of being satisfied the claim has been properly asserted would be by way of an appeal to the Court of Queen's Bench pursuant to s. 46 of *LAFOIPA*. Only by virtue of such an appeal, with its attendant delays, costs, and formalities, would an applicant be able to have an assurance that *LAFOIPA* has been properly applied and administered. In general terms, this fits uncomfortably with the overall thrust of *LAFOIPA* which, as indicated, contemplates expeditious reviews of such matters by the Commissioner.

[42] For its part, the University points to two specific contextual features of *LAFOIPA* to advance its interpretation of s. 43(1). Its key argument in this regard involves s. 47(2). That provision concerns appeals to the Court of Queen's Bench by an applicant or a third party who wishes to contest a decision of a head to either grant or refuse access to a record. Section 47(2) reads as follows:

> (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.

[43] The University notes that s. 47(2), while employing the same words "[n]otwithstanding … any privilege that is available at law" as are found in s. 43(1), also goes on to provide "no information shall be withheld from the court on any grounds". It suggests that, if "any privilege available at law" includes solicitor-client privilege, then the words "no information shall be withheld from the court on any grounds" in s. 47(2) would be mere surplusage.

[44] I see little merit in this line of reasoning. Section 47(2) does not conclude by saying "no *record* shall be withheld from the court on any grounds". Rather, it says no *information* shall be withheld on any grounds. The employment of these different terms in the same subsection – "information" versus "record" – is significant. It suggests rather clearly that the "no information shall be withheld from the court on any grounds" provision does not refer to records said to be subject to solicitor-client privilege.

[45] By way of contextual considerations, the University also notes s. 47(3) of *LAFOIPA*. This provision indicates that, on an appeal to the Court of Queen's Bench, the Court must take "every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the court" of information which a head could refuse to disclose or information as to whether a record exists. The University points to the lack of any parallel provision in *LAFOIPA* requiring the Commissioner to prevent the disclosure of information and suggests this means *LAFOIPA* does not contemplate the Commissioner dealing with, or having access to, records subject to solicitor-client privilege.

[46] The full answer to this argument is found in s. 48 of *LAFOIPA*. It adopts ss. 45 to 47 of *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, and makes those provisions applicable in proceedings under *LAFOIPA*. Section 46 prohibits the Commissioner from disclosing any information that comes to his knowledge in the exercise of his responsibilities. It also imposes an obligation on the Commissioner to take every reasonable precaution to avoid disclosure of, and directs him not to disclose, the same kinds of information referred to in s. 47(3) of *LAFOIPA*. In other words, *LAFOIPA does* impose confidentiality obligations on the Commissioner. Those obligations, both in and of themselves and in comparison to the obligations imposed on the courts in the context of appeals, are consistent with the notion that the Commissioner is entitled to require the production of records subject to solicitor-client privilege.

[47] In the end, therefore, I see nothing in the statutory context in which s. 43(1) of *LAFOIPA* is found to suggest it should be given anything other than its ordinary and grammatical meaning. As a result, I conclude that s. 43(1) empowers the Commissioner to require the production of records subject to, or said to be subject to, solicitor-client privilege. The Chambers judge made no error in his conclusion on this front.

B. Should the Commissioner have required production of the records?

[48] The University's second argument is that, even if *LAFOIPA* allows the Commissioner to require the production of records in respect of which solicitor-client privilege has been asserted, this was not an appropriate case for the Commissioner to have exercised his authority in that regard. It contends the Chambers judge erred in concluding otherwise.

[49] The touchstone principle engaged by this branch of the University's submission has been clearly established by the Supreme Court. A discretionary statutory authority to abrogate solicitor-client privilege must be exercised so as to interfere with the privilege only to the extent "absolutely necessary" to achieve the goals of the legislation in question. In *Descôteaux*, Lamer J., for a unanimous Court, said this at page 875:

> …
>
> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.
>
> (Emphasis added)

See also: *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras 14–21, [2006] 2 SCR 32 [*Goodis*]; *Thompson* at para 18.

[50] Significantly, the "absolutely necessary" concept is very demanding. In *Goodis*, Rothstein J. explained that "[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case" (para 20).

[51] I note here, as well, that solicitor-client privilege belongs to the client, in this case the University. See: *Blood Tribe* at para 9. It follows that, seen through the University's eyes, disclosure of records to the Commissioner, even for the limited purpose of verifying the merits of the claim of solicitor-client privilege, is by definition a violation of the privilege.

[52] The Supreme Court's decision in *University of Calgary* offers a helpful illustration of the "absolutely necessary" principle at work. In that case, the University of Calgary claimed solicitor-client privilege over records involving communications between it and its general and external counsel. In asserting the privilege, the University provided a list of documents identified by page numbers only. This way of presenting a claim for privilege complied with the requirements of Alberta civil litigation practice at the time. The Information and Privacy Commissioner's delegate then directed the University to substantiate its privilege claim by either providing him with a copy of the records in issue or providing additional information about the records including, for example, the date and length of each record and some information about the author and the addressee. The University did not comply and, as a result, the Commissioner's delegate issued a Notice to Produce Records. In response, the University sought judicial review of the delegate's decision to issue the Notice.

[53] The Supreme Court found the Commissioner's delegate had erred in requesting production of the records in issue. Justice Côté, writing for the majority of the Court, noted that the University of Calgary's failure to present evidence of its privilege claim in the format required by the Commissioner's protocol was of no ultimate significance because the protocol had no legal status. Rather, it was merely a guide established by the Commissioner. Justice Côté went on to underline that the prevailing Alberta civil law authority at the time allowed parties to identify solicitor-client privileged documents by number. She found the Commissioner's delegate had acted improperly by demanding copies of the records in issue and concluded her analysis by saying this:

> [70] … No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.

Justice Cromwell, writing in dissent but not on this point, arrived at the same conclusion.

[54] In the present appeal, the University contends it is under the *University of Calgary* umbrella. It says this is so because it claimed solicitor-client privilege in relation to the records in issue and because, given there was no argument or evidence to the effect privilege had been improperly asserted, the Commissioner should not have required production of the records. Although I cannot accept all of the particulars of the University's argument, I agree with its bottom line. In my respectful view, the Chambers judge erred in his analysis by failing to examine the dealings between the University and the Commissioner through the lens of the "absolutely necessary" principle.

[55] As noted above, the applicant asked the University for electronic correspondence referring either to him, his employment history, or a harassment complaint he had filed. The head of the University disclosed some of the records covered by the request but did not disclose those falling under various *LAFOIPA* exemptions. The applicant, acting pursuant to s. 38 of *LAFOIPA*, then sought a review by the Commissioner of the decision made by the head. The review application itself was not presented to the Chambers judge and we know nothing of the applicant's reasons for asking for a review. As a result, it is necessary to proceed on the basis that the review was not motivated by any particular concern about the claim of solicitor-client privilege or by any specific assertion or argument that the privilege had not been properly claimed. If any such considerations were at play here, they should have been put before the Chambers judge by the Commissioner.

[56] Communications followed between counsel for the University, on the one hand, and the Commissioner and his office, on the other. The material before the Court does not paint a complete picture of those communications.

[57] I should perhaps note here that the Commissioner appears to have had a general practice of asking for a production of records said to be subject to solicitor-client privilege. I say this because, in his letter of November 30, 2015, discussed below, the Commissioner wrote, "I wish to emphasize that in asking you for copies of the records over which you claim solicitor-client privilege have [*sic*] been a long standing practice of the office and all lawyers dealing with our office have, during my time, complied with that request".

[58] With this observation having been made as an aside, I return to the main story line. Counsel for the University wrote to the Commissioner on September 4, 2015, to submit that the University was not required to provide the records to which it had denied access. The letter itself is not included in the materials before this Court.

[59] In response, on September 11, 2015, the Commissioner's office indicated to counsel for the University that it would not require the records in relation to which solicitor-client privilege was claimed and, instead, would accept evidence that would assist the Commissioner in determining the propriety of the privilege claim. The email read as follows:

> I've discussed your letter with the Commissioner. 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.
>
> The submission should also address the other issues involved in this review. Please provide a submission, index of records, and the records (where other exemptions besides subsection 21 of LA FOIP was applied) by September 28, 2015. I draw your attention to my office's resource *What to Expect During a Review with the IPC: A Resource for Public Bodies and Trustees* that provides guidance on how to prepare a submission, index of records, and the records.
>
> (Emphasis in original)

The "index of records" referred to in this correspondence appears to be a document quite similar to the affidavit of documents contemplated by *Queen's Bench Rule* 5-8.

[60] As is apparent, the letter from the Commissioner's office was not drafted clearly. It could have been read as meaning the Commissioner was looking for evidence to verify the records claimed to be subject to solicitor-client privilege were in fact privileged and that, separately and distinctly, he was also asking both for the records falling outside of the solicitor-client privilege claim and for an index of those records. Alternatively, the letter could have been interpreted as meaning the Commissioner was asking for an index of *all* ostensibly exempt records, including those said to be the subject of solicitor-client privilege and, as well, asking that the records not subject to solicitor-client privilege be disclosed to him.

[61] In any event, apparently without seeking any clarification of the September 11, 2015, email, counsel for the University responded to the Commissioner by providing him with no more than an affidavit sworn by [redacted], the University's Manager of Contracts and Legal Services. In relevant part, the affidavit said this:

> 4. 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 [the applicant]. 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.
>
> (Emphasis added)

[62] For perhaps understandable reasons, this did not satisfy the Commissioner. He replied by way of a letter dated November 4, 2015, saying [redacted] affidavit did not allow him to determine if solicitor-client privilege was being properly invoked. However, the Commissioner then dug in. Rather than asking more unambiguously or directly for something in the nature of the "index of records" referred to in the September 11, 2015, email or an affidavit of documents in the form prescribed by *Queen's Bench Rule* 5-8, he returned directly to his original position and requested production of the records. The essential parts of the Commissioner's letter are reproduced below:

> …
>
> The affidavit is insufficient for my office to determine that solicitor-client privilege is applicable to the records at issue.
>
> First, there was no affidavit sworn by Mr. Affleck. The affidavit was taken by a person who is not practicing as a lawyer and is swearing to information he has been told. Second, it suggests that some of the records are subject to solicitor-client privilege. My office does not know which ones and in fact no list of the documents over which solicitor-client privilege is claimed has ever been provided. My office cannot tell whether [redacted] reviewed the documents in question. Thus, the approach by the U of S to support solicitor-client privilege is inadequate.
>
> In a regular court proceeding, a party claiming solicitor-client privilege would still list those documents in a statement as to documents. The opposing party would still have an opportunity to review that list and where appropriate, apply to the court for an order to produce. This minimum requirement does not come close in [redacted] affidavit.
>
> Therefore, I respectfully request and ask that the U of S re-consider its position and provide my office with a copy of the records over which it asserts solicitor-client privilege. …
>
> …
>
> Since 1992, government institutions and local authorities have been providing my office with documents over which they claim solicitor-client privilege. Our office reviews those documents, writes a report and current practice is the responsive record is destroyed. It is rather impossible to determine whether an exemption of solicitor-client privilege exists on a document which one has never seen.
>
> …
>
> (Emphasis added)

[63] The University then responded in kind. Instead of seeking some sort of middle ground or offering to produce an index of records or an affidavit of documents, counsel for the University replied to the Commissioner on November 12, 2015, and advised that the University did not share the opinion that a review of the records was necessary. Counsel stated "[w]e have not been made aware of any basis for which your office believes solicitor-client privilege has not been properly invoked".

[64] This led the Commissioner, on November 16, 2015, to reiterate his request for the University to provide copies of the records in relation to which it claimed solicitor-client privilege. The Commissioner advised that, if the records in question were not made available, he would have no choice but to make a court application to compel their production.

[65] On November 30, 2015, the Commissioner issued a formal Notice to Produce Records to the University's designated *LAFOIPA* head. It required the production, by December 7, 2015, of "all records over which you have claimed solicitor-client privilege which are responsive to [the applicant's access to information request]". The Notice was accompanied by a covering letter from the Commissioner reading, in relevant part, as follows:

> … It is clear from your last telephone message that your client is not prepared to supply my office with the records requested. I wish to emphasize that in asking you for copies of the records over which you claim solicitor-client privilege have been a long standing practice of the office and all lawyers dealing with our office have, during my time, complied with that request.
>
> …
>
> Also our office has a policy that as soon as the review is complete, the record provided to the office is destroyed. Alternatively, you could request return of the record as soon as my office has reviewed it. All of this is done because my office has a healthy respect for records which are subject to solicitor-client privilege.
>
> The difficulty with your client's position is that it is impossible to determine whether the exemption of solicitor-client privilege applies without reviewing the record.
>
> …
>
> (Emphasis added)

[66] The saga did not end there. The University has appended a document entitled "Review Report 153-2015 Part I" to its factum. The same document was also attached to the brief that the University filed with the Chambers judge. The Report was signed by the Commissioner on May 24, 2016, well prior to the date this matter was argued in Chambers. It was presumably prepared in partial discharge of the Commissioner's obligation, under s. 44 of *LAFOIPA*, to provide a

written recommendation on completion of the review requested by an applicant pursuant to s. 38 of that *Act*. The Commissioner has taken no objection to the Report being before the Court.

[67] The Report describes itself as being "Part I of a report which deals with the portion of the record which is not impacted by a claim of solicitor-client privilege". It indicates that the portion of the record concerning solicitor-client privilege will be dealt with in a subsequent Part II. The Report then goes on to deal with numerous emails withheld in whole or in part by the University pursuant to various provisions of *LAFOIPA*: s. 14(1)(d) (injurious to the conduct of legal proceedings), s. 16(1)(a) (advice, proposals, recommendations, analyses or policy options), s. 16(1)(b) (consultations or deliberations), s. 28(1) (personal information), and s. 30(2) (evaluative material).

[68] The University explains that [redacted] affidavit referring to "some" records being subject to solicitor-client privilege was provided before lines were being drawn in its dealings with the Commissioner between records said to be subject to solicitor-client privilege and records withheld from disclosure for the reasons canvassed in the Report. This is somewhat difficult to understand given that the September 11, 2015, email from the Commissioner's office, written before the [redacted] affidavit was sworn, drew such a distinction. However, and in any event, it seems clear that, as of the date of the Chambers hearing, the University was refusing to disclose to the Commissioner only those records in relation to which it was claiming solicitor-client privilege.

[69] With the benefit of this factual background, it is now appropriate to consider the nature of the review that the Commissioner was obliged to conduct pursuant to s. 39 of *LAFOIPA*. More particularly, the question here is whether, given the situation he faced, it was "absolutely necessary" for the Commissioner to examine the records said to be subject to solicitor-client privilege in order to discharge his obligations under s. 39.

[70] The essential contours of the term "review" as it is used in s. 39 are not difficult to map. A review rather obviously contemplates something in the nature of an assessment, examination or reconsideration of the decision of a head of a local authority. The purpose of any such exercise is to ensure local authorities administer the *LAFOIPA* access to information regime properly. In this regard, the content or nature of an appropriate review will necessarily be a function of the

issues at stake and the concerns expressed by the applicant in, or in connection with, his or her request for the review. With respect to a review rooted in a denial of access based on a claim of solicitor-client privilege, the character of the review will have to reflect the special place solicitor-client privilege occupies in our legal system and the "absolutely necessary" principle discussed above.

[71] The tug-of-war between the University and the Commissioner in this case took place against the background of a situation where the Commissioner understood the applicant to have been engaged in legal proceedings against the University on several fronts. Paragraph 23 of the Commissioner's Report, referred to above at paragraph 66, summarizes those proceedings by saying the applicant had:

> • Threatened a civil lawsuit for his removal from the position of Associate Dean;
>
> • Filed a harassment complaint pursuant to the Occupational Health and Safety provisions of *The Saskatchewan Employment Act* (the "OH&S Complaint"), which has resulted in an investigation;
>
> • Grieved a subsequent change in his employment duties within the library; and
>
> • Filed a complaint that the University retaliated against him for the OH&S Complaint.

[72] The knowledge of these various legal engagements no doubt indicated to the Commissioner that at least some documents subject to solicitor-client privilege would almost inevitably fall within the scope of the applicant's access to information request. In other words, there was certainly no basis in fact to suggest the University's claim of privilege was ill-founded in a general or overall sense. Moreover, there is no suggestion here that anyone, including the applicant, was arguing the University had inappropriately asserted its privilege in relation to particular records.

[73] As a result, it must be taken that the Commissioner was seeking access to the records in question simply because the University had said those records existed and because his office had an established practice of asking for such records in the course of conducting a review pursuant to s. 39 of *LAFOIPA*. Significantly, and as noted, the Commissioner was not attempting to work through a specific complaint or argument that the privilege was being improperly asserted by the University. Further, he was not following up on something in the facts suggesting the privilege claim was inappropriate. In all of those circumstances, the "absolutely necessary" principle

precluded the Commissioner from proceeding as he did to demand production of the records in issue. Let me explain this more fully.

[74] I begin by acknowledging that, in the absence of anything suggesting the University's assertion of privilege was ill-founded, it could be argued the Commissioner was obliged to simply end his inquiry on receipt of [redacted] affidavit, i.e., it could be argued the Commissioner should have contented himself with the University's general declaration that it was denying access to "some" records because they were subject to solicitor-client privilege. However, in my view, such an approach would not give appropriate or reasonable scope to the Commissioner's authority to conduct a review. In order to gain a proper measure of confidence that a claim of solicitor-client privilege is being asserted validly, the Commissioner must be able, at his discretion, to go beyond a statement by a local authority amounting to little more than "trust us". The Commissioner must also be able to request information that falls short of disclosing the records in issue, or otherwise piercing solicitor-client privilege, but that nonetheless helps him to satisfy himself that the privilege claim is being advanced legitimately.

[75] The approach taken to solicitor-client privilege in the civil procedure context is instructive on this front. A litigant is not entitled to simply declare he or she has some undisclosed number of undescribed documents that are being withheld from production because they are subject to solicitor-client privilege. A naked "trust me" is not enough. Rather, as required by Rule 5-6, the litigant must prepare an affidavit of documents as *per* Form 5-6. Form 5-6 does not prescribe the format of the part of the affidavit dealing with claims of solicitor-client privilege in detail but it does require a "list" of such documents. Queen's Bench case law has filled out the picture and provided that the description of a document for which privilege is claimed must provide sufficient detail to identify the document and to allow a Chambers judge to determine whether a *prima facie* case for the claim of privilege has been made out. The usual or best practice is that, in relation to each record, an affidavit will contain such things as (a) the date of the record, (b) whether the record is a letter, a memo, a fax, and so forth, (c) the author of the record, (d) the recipient of the record, and (e) whether the record is an original or a copy. See, for example: *Brewster v Quayle Agencies Inc.*, 2008 SKQB 137 at para 6, 332 Sask R 192.

[76] All of this means there was an obvious step the Commissioner could have taken in this case short of demanding production of the records themselves. If he considered [redacted] affidavit to be inadequate, the Commissioner could have clarified his request and expressly requested an "index of records" or the creation of something in the nature of the affidavit of documents used in the civil litigation context. Having unambiguously asked for an "index of records" or something similar, the Commissioner should have then held off requesting the records themselves until he had received and reviewed this extra information from the University. It might well have answered whatever questions he had about the privilege claim.

[77] But, rather than providing clarification and asking the University to provide this additional level of information, the Commissioner reverted to requiring production of the records. In short, by choosing not to carefully follow up on what might be called the index of records or the affidavit of documents step, the Commissioner failed to proceed in a fashion that interfered with solicitor-client privilege only to the extent absolutely necessary.

[78] I am bolstered in my thinking on this point by the Supreme Court's decision in *Blood Tribe*. It concerned a situation where an employee who had been dismissed from her job asked for access to her personal file. The employer denied the request and the employee then filed a complaint with the Privacy Commissioner pursuant to the *Personal Information Protection and Electronic Document Act*, SC 2000, c 5 [*PIPEDA*]. The Privacy Commissioner requested the records in issue. The employer declined to produce a "bundle of letters" over which it asserted solicitor-client privilege. The Privacy Commissioner ordered production of the privileged documents on the theory that she had to be certain that the solicitor-client privilege exemption was being properly invoked. In this regard, the Privacy Commissioner relied on what was then s. 12(1) of the *PIPEDA*, which read as follows:

> 12 (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may
>
> > (a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;
> >
> > ...

> (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;
>
> ...

[79] Justice Binnie, writing for a unanimous Court, observed that the Privacy Commissioner's position was grounded on an overly-broad conception of when it was appropriate for her to abrogate solicitor-client privilege. Justice Binnie said this:

> [16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer *did*, not about the legal advice (if any) upon which the employer did it.
>
> [17] The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue: see e.g. *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen. Div.)), at para. 20. In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work.
>
> (Emphasis added)

[80] The Supreme Court's reasoning in *University of Calgary* was to a similar effect. As noted above, in that case the University of Calgary had provided disclosure in keeping with the prevailing rules of civil procedure. In finding the Commissioner's delegate had erred by demanding production of privileged documents, the Court stressed there had been no evidence or argument to suggest solicitor-client privilege had been falsely claimed.

[81] Let me recap. The Commissioner must be taken to have known from the various proceedings between the applicant and the University that it was almost certain the applicant's access request included records subject to solicitor-client privilege. The University then asserted solicitor-client privilege in relation to some records. There was nothing revealed by the circumstances – the applicant's application or the underlying facts – to suggest the privilege was being improperly claimed by the University.

[82] If he was unsatisfied by the University's naked declaration that "some" documents were subject to solicitor-client privilege, the Commissioner should have interpreted his obligation to conduct a review under s. 39 of *LAFOIPA* as requiring him to begin by asking for further particulars about the records said to be privileged. I am referring here to the Commissioner seeking an "index of records" or something in the nature of an affidavit as to documents. But, this having been said, let me note as well that there is no magic in the precise format or detail of any such documents. The real point is that the Commissioner could have sought information, short of the records themselves, that would have shed light on the question of whether the University was properly asserting a privilege claim.

[83] In my respectful view, the Commissioner was not entitled to request the records in issue simply because that was his usual practice or because, in response to an ambiguously worded letter from the Commissioner's office, the University had chosen to provide an affidavit averring, only in general terms, that some records were privileged. To repeat, if he was not satisfied with the University's affidavit, the Commissioner should have been at pains to exhaust all options short of demanding production of the records in issue. He could have done this by giving the University a clear and unambiguous opportunity to provide, by way of something in the nature of an index of records or affidavit of documents, additional information about such things as the number and nature of the records in question. Only if the University had failed to respond to a reasonable request for such additional information, or if that information or some surrounding circumstance had revealed a reasonable basis for questioning the claim of privilege, should the Commissioner have taken the step of seeking the records themselves.

[84] In the end, therefore, I conclude the Chambers judge erred by sustaining the Commissioner's request for the production of records claimed by the University to be subject to solicitor-client privilege. I appreciate that this line of analysis imposes a rather exacting burden on the Commissioner when it comes to the discharge of his obligations under s. 39 of *LAFOIPA*. However, this is what the "absolutely necessary" principle demands.

C. Does section 43(1) of *LAFOIPA* offend the *Charter*?

[85] The University's final argument is that, if s. 43(1) of *LAFOIPA* empowers the Commissioner to require the production of records claimed to be the subject of solicitor-client privilege, it violates s. 8 of the *Charter* and is therefore unconstitutional.

[86] In view of my finding that the Commissioner erred in seeking production of the records subject to the claim of privilege, I need not deal with this argument in order to decide the University's appeal. Accordingly, in keeping with the notion that courts should decide constitutional questions only when necessary, I choose not to address the issues raised by the University on this front. See: *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 6.

VI. CONCLUSION

[87] I conclude, for the reasons given above, that the University's appeal must be allowed. It is entitled to costs in the usual way.

"Richards C.J.S."

Richards C.J.S.

I concur. "Schwann J.A."

for Caldwell J.A.

I concur. "Schwann J.A."

Schwann J.A.