

QBG 1773 of 2016 – JCS

The Office of the Information and Privacy Commissioner, Saskatchewan v The University of Saskatchewan

Jason W. Mohrbutter

for the applicant

John R. Beckman, Q.C., and Robert J. Affleck

for the respondent

FIAT - September 6, 2018

MILLS J.

[1] The Commissioner brought an application by way of originating notice to compel the University to comply with *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [LAFOIP], by providing documentation to the Commissioner.

[2] The central issue in the application was whether LAFOIP abrogated the common law principle of solicitor-client privilege such as to compel the University to comply with the request by the Commissioner.

[3] The application was decided by me in favour of the Commissioner. I awarded costs under Schedule I “B” in the sum of \$8,000.00 in favour of the Commissioner.

[4] The University appealed to the Court of Appeal. The Court of Appeal upheld the interpretation of LAFOIP as it related to the interpretation of the *Act* regarding solicitor-client privilege but agreed with the University in its argument that the Commissioner should not have required production of the records in the fashion it had suggested. The Court of Appeal, on the costs issue, stated: “I conclude, for the reasons given above, that the University’s appeal must be allowed. It is entitled to costs in the usual way.”

[5] The University has taxed its costs in the Court of Appeal. An issue has arisen as to the proper approach for costs in the Court of Queen’s Bench. The University takes the position that it should follow as a matter of course that it is entitled to costs in the Court of Queen’s Bench fixed in the amount of \$8,000.00. The Commissioner takes the position that costs are an open issue for this court to determine and that no costs should be awarded to either party.

[6] Counsel advises that they have not been able to locate a decision that gives guidance as to what the Court of Appeal means when it grants costs in the usual way. Only the Court of Appeal knows what it meant in that decision. From the standpoint of a practical approach, counsel has requested that I make a determination as to the costs, rather than refer the matter back to the Court of Appeal for clarification.

[7] As I indicated, the primary focus of the application and the arguments surrounding the issue of production of documents was the extent to which *LAFOIP* abrogated the common law principles of solicitor-client privilege. The University's position with the Commissioner and before this court was that *LAFOIP* did not allow the Commissioner to examine documents over which solicitor-client privilege was claimed. The issue was one of general importance to the Commissioner and, presumably, to the University. The specific file before me was the means by which the Commissioner wished to test the parameters of his authority regarding production of documents over which solicitor-client privilege was claimed. The University did not give an inch in its argument, maintaining throughout that once solicitor-client privilege was invoked, the Commissioner had no right to review the documents. On this particular issue, the Commissioner was correct both in chambers and in front of the Court of Appeal. The Commissioner was incorrect in its approach in this specific case. In reviewing the affidavit material and correspondence between the parties as part of the chambers application, it became clear to me that if the University had accepted the law as pronounced by the Court of Appeal, it would have taken a different approach to the issue of solicitor-client privilege. The University's initial approach as to the interpretation of *LAFOIP* resulted in the Commissioner taking an approach that the Court of Appeal found untenable.

[8] In the factual circumstances of this case, it is my determination that applying the decision of the Court of Appeal as to the law, no costs should be awarded to either party at the Court of Queen's Bench on the chambers application.



J.
R.C. Mills