Court of Appeal File No. C70333

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

AUDITOR GENERAL OF ONTARIO

Appellant (Applicant)

- and -

LAURENTIAN UNIVERSITY OF SUDBURY

Respondent (Respondent)

- and -

THE ADVOCATES' SOCIETY

Intervener

FACTUM OF THE INTERVENER, THE ADVOCATES' SOCIETY

November 1, 2022

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FACTUM OF THE INTERVENER

PART I - OVERVIEW - NATURE OF CASE AND ISSUES

1. This appeal raises important questions of privilege, and the circumstances in which such privilege may be abrogated by statute.

2. In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, the Supreme Court of Canada held:

> Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [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.[1]

[1] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para 9, [2008] 2 S.C.R. 574 [*Blood Tribe*].

3. The Advocates' Society intervenes only with respect to the following issue: does section 10 of the *Auditor General Act* (the "Act") abrogate privilege, such that the Auditor General may compel production of and access to documents that would otherwise be subject to solicitor-client, litigation, or settlement privilege?

4. The Society takes no formal position on the outcome of the appeal; however, it submits that:

(a) The law is well-settled, and indicates that privilege cannot be set aside by inference, but only by legislative language that is clear, explicit, and unequivocal;[2]

(b) The provisions of the Act in question (section 10 and section 27.1)[3] contain no such clear, explicit and unequivocal language; and

(c) Accordingly, no such abrogation exists.

5. In making these submissions, The Advocates' Society acknowledges that the Appellant, the Auditor General of Ontario, performs a very important public service role, as did the administrative agencies involved in *Blood Tribe*[4] and *Lizotte v. Aviva Insurance Company of Canada*.[5] The Auditor General's office serves the people of Ontario, including by holding broader

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[2] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras 2 and 28, [2016] 2 S.C.R. 555 [*University of Calgary*].
[3] *The Auditor General Act*, R.S.O. 1990, c. A.35 [*the Act*].
[4] *Blood Tribe*, at para 2.
[5] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para 6, [2016] 2 SCR 521 [*Lizotte*].

public sector organizations, such as universities, accountable for financial responsibility and transparency.[6]

6. However, this appeal should not be seen as a contest between the Auditor General's important public service role on the one hand, and privilege on the other. Privilege "is not a lawyer's 'trick' to avoid proper scrutiny of her client's conduct, or the steps taken on his or her behalf during the retainer". Rather, it is a critical civil right.[7]

7. The Advocates' Society therefore asks this Court to find that the Act does not contain the explicit language necessary to abrogate privilege, and that this Court continue to jealously guard a client's privilege, as an important civil and legal right, and a principle of fundamental justice in Canadian law.[8]

PART II - SUMMARY OF FACTS

8. The Advocates' Society was granted intervenor status in this appeal pursuant to an Order of this Court dated September 12, 2022.

9. The Advocates' Society was established in 1963 as an Ontario-wide professional association for trial and appellate lawyers in Ontario. Over more than 50 years, The Advocates' Society has steadily grown its membership and now represents over 6,000 advocates across the country.

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[6] The Act, s. 2(1); Affidavit of Bonnie Lysyk, sworn September 28, 2021, Exhibit C, Appellant's Appeal Book and Compendium, at 183.
[7] *British Columbia (Auditor General) v. British Columbia (Attorney General)*, 2013 BCSC 98 at paras 23 to 25.
[8] *University of Calgary*, at para 41.

10. The Advocates' Society's mandate includes advocacy education, legal reform, protection of the rights of litigants, protection of the public's right to representation by an independent bar, and the promotion of access to, and improvement of, the administration of justice.

11. The Advocates' Society's mandate extends to assisting courts by intervening in court proceedings that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court systems.

12. The Advocates' Society takes no position on the facts of this case.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Statutory Language Purporting To Abrogate Privilege Must Be Clear And Express

13. The law is well-settled that to compel the disclosure of otherwise privileged communications requires express statutory language that evinces a clear intent to abrogate solicitor-client, litigation, or settlement privilege.[9]

14. In *Blood Tribe*, the Supreme Court of Canada held:

> … solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" …
>
> To give effect to this fundamental policy of the law, legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client privileged documents.[10]

15. The Supreme Court repeated this principle in *University of Calgary*:

> To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be

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[9] *Blood Tribe*, at para 11; *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para 25, [2016] 1 S.C.R. 381 [*Thompson*]; *University of Calgary*, at para 28; *Lizotte*, at paras 5, 63, 64.
[10] *Blood Tribe*, at paras 10 and 11.

> interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so.[11]

16. In *Lizotte*, the Supreme Court confirmed that the requirements established in *Blood Tribe* also apply to litigation privilege:[12]

> The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of "any … document" without further precision, it does not have the effect of abrogating the privilege.[13]

17. Also in *Lizotte*, the Supreme Court noted that this Court has held that settlement privilege, like litigation privilege, cannot be abrogated without clear and explicit language.[14]

B. The Fundamental Nature of Privilege

18. This narrow approach to abrogation of privilege flows from the crucial role of privilege in our legal system.

19. In *University of Calgary*, the Supreme Court noted the fundamental nature of solicitor-client privilege to the proper functioning of our legal system, and its status as a cornerstone of access to justice:

> It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice (*Blood Tribe*, at para. 9). Lawyers have the unique role of providing advice to clients within a complex legal system (*McClure*, at para. 2). Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive (see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46). It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances" (*Pritchard*, at para. 17).[15]

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[11] *University of Calgary*, at para 28.
[12] *Lizotte*, at paras 5, 63, 64.
[13] *Lizotte*, at para 5.
[14] *Lizotte*, at para 16.
[15] *University of Calgary*, at para 34.

20. The Supreme Court has also held that, like solicitor-client privilege, settlement privilege[16] and litigation privilege[17] are fundamental to the proper functioning of our legal system.

C. The Relevant Provisions of the Act Do Not Abrogate Privilege

21. The Auditor General does not dispute that clear, explicit, and unequivocal language is required to abrogate privilege; rather, she claims that such language is found in sections 10 and 27.1 of the Act.

22. To the contrary, the language of these sections is exactly the sort of general production provision found in the decisions in *Blood Tribe*, *Lizotte*, and *University of Calgary*, all of which found the provisions at issue lacked the explicit language necessary to abrogate privilege.[18]

23. In *Blood Tribe*, section 12 of the *Personal Information Protection and Electronic Documents Act* gave the Privacy Commissioner the power to compel production of "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".[19]

24. Despite the Commissioner's broad power to compel "any records … to the same extent as a superior court of record", the Supreme Court found this to be a general production provision that did not specifically indicate that the production must include records for which solicitor-client privilege was claimed.[20]

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[16] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para 1, [2013] 2 SCR 623.
[17] *Lizotte*, at para 64.
[18] *Blood Tribe*, at para 21; *Lizotte*, at paras 66, 67; *University of Calgary*, at para 37.
[19] *Blood Tribe*, at para 21.
[20] *Blood Tribe*, at para 21.

25. Similarly, in *University of Calgary*, the Supreme Court found that section 56 of the *Freedom of Information and Protection of Privacy Act*, which required a public body to produce to the Commissioner records "[d]espite … any privilege of the law of evidence", was not sufficiently clear to permit an infringement of solicitor-client privilege.[21]

26. Finally, in *Lizotte*, the Supreme Court held that section 337 of the *Act respecting the distribution of financial products and services*, which authorized the syndic to request production of "any … document", was even less specific than the provision in *Blood Tribe*, and was therefore also a general production provision that could not be interpreted to require production of solicitor-client privileged records.[22]

27. In this appeal, the Act provides that:

(a) every grant recipient "shall give the Auditor General the information … that the Auditor General believes to be necessary to perform his or her duties under this Act";[23]

(b) the Auditor General "is entitled to have free access to all … things or property belonging to a … grant recipient";[24] and

(c) a "disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege, or settlement privilege".[25]

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[21] *University of Calgary*, at para 37.
[22] *Lizotte*, at paras 66, 67.
[23] The Act, section 10(1).
[24] The Act, section 10(2).
[25] The Act., section 10(3).

28. While section 10 does contemplate the *possible* disclosure of privileged information, nowhere in this section (or anywhere else) does the Act provide the Auditor General with specific authority to *compel* disclosure of such information.

29. As in *Blood Tribe*, "the authority to *receive* a broad range of evidence cannot be read to empower the [Auditor General] to *compel production* of solicitor-client records from an unwilling respondent".[26]

30. As in *Lizotte*, a "provision that merely refers to the production of 'any … document' does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege".[27]

31. Further, as the Chief Justice properly found in the decision below:

> … it would be inexplicable if s. 10 required the disclosure of privileged information when the summons power set out in s. 11 – an escalated means of investigation – cannot compel such disclosure. It would indeed by highly unusual if the Auditor were … able to compel privileged information from LU under s. 10, but not from its President pursuant to a summons…[28]

32. Section 27.1 of the Act does not alter this analysis. This section merely obligates the Auditor General to preserve the secrecy of any evidence received (not compelled),[29] including any information or documents disclosed under section 10 that are subject to solicitor-client privilege, litigation privilege, or settlement privilege.[30]

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[26] *Blood Tribe*, at para 21, (emphasis in original).
[27] *Lizotte*, at para 67.
[28] *Auditor General of Ontario v. Laurentian University of Sudbury*, 2022 ONSC 109, para 81, Appellant's Appeal Book and Compendium, at p. 29.
[29] The Act, section 27.1(1) and (2).
[30] The Act, section 27.1(3).

33. In short, reading the words of these provisions 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,[31] none of the provisions, when read alone or in the context of the entire scheme, explicitly compel the disclosure of privileged records.

34. Legislative debates and history cannot – and should not – operate on their own to create an abrogation of privilege where no express language to do so exists.

35. The Supreme Court of Canada made this point in *Canada (National Revenue) v. Thompson*:

> … 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.**[32] [emphasis added]

36. On its face, the Act clearly provides only a general disclosure provision similar to that in *Blood Tribe*, *University of Calgary*, and *Lizotte*, and procedures for dealing with privileged information and documents, if these are voluntarily or mistakenly provided.

37. No contrary intention can be inferred from the nature of the statutory scheme or its legislative history. Even if the Act were not sufficiently clear on its face (which it is), any debate must be resolved in favour of preserving the privileges.

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[31] *University of Calgary*, at para 61.
[32] *Thompson*, at para 25.

38. Accordingly, The Advocates' Society asks that this Court find that:

(a) The law is well-settled, and indicates that privilege cannot be set aside by inference, but only by legislative language that is clear, explicit, and unequivocal;

(b) The provisions of the Act in question contain no such clear, explicit and unequivocal language; and

(c) Accordingly, no such abrogation exists.

PART IV - ORDER REQUESTED

39. The Society seeks no costs and requests that no costs be assessed against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2022.

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CERTIFICATE

I estimate that 15 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 1st day of November, 2022.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574.

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

3. *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521.

4. *British Columbia (Auditor General) v. British Columbia (Attorney General)*, 2013 BCSC 98.

5. *Canada (National Revenue) v. Thompson,* 2016 SCC 21, [2016] 1 S.C.R. 381.

6. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 SCR 623.

7. *Auditor General of Ontario v. Laurentian University of Sudbury*, 2022 ONSC 109.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Auditor General Act

R.S.O. 1990, CHAPTER A.35

Consolidation Period: From December 6, 2018 to the e-Laws currency date.
Last amendment: 2018, c. 17, Sched. 3.
…

Auditor General

2 (1) There shall be an Auditor General who is an officer of the Assembly. 2018, c. 17, Sched. 3, s. 2.

…

Duty to furnish information

10 (1) Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.

…

Access to records

(2) The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.

…

No waiver of privilege

(3) A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege. 2004, c. 17, s. 13.

…

Duty of confidentiality

27.1 (1) The Auditor General, the Deputy Auditor General, the Advertising Commissioner, the Commissioner of the Environment appointed under section 50 of the *Environmental Bill of Rights, 1993*, each employee of the Office of the Auditor General and any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act. 2004, c. 17, s. 28; 2004, c. 20, s. 13 (7); 2018, c. 17, Sched. 3, s. 5.

Same

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate to another person any matter described in subsection (1) except as may be required in connection with the administration of this Act or any proceedings under this Act or under the *Criminal Code* (Canada). 2004, c. 17, s. 28.

…

Same

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege. 2004, c. 17, s. 28.

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