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Docket: 10/53
Citation: *Newfoundland and Labrador (Information and
Privacy Commissioner) v. Newfoundland and Labrador
(Attorney General)*, 2011 NLCA 69

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

THE INFORMATION AND PRIVACY
COMMISSIONER

APPELLANT

AND:

THE ATTORNEY GENERAL OF
NEWFOUNDLAND AND LABRADOR

RESPONDENT

Coram: Green, C.J.N.L., Rowe and Harrington, J.J.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division (General), 200901T1345

Reasons for Judgment by Harrington, J.A.
Concurred in by Green, C.J.N.L. and Rowe, J.A.

Appeal Heard: June 10, 2011
Judgment Rendered: October 26, 2011

Counsel for the Appellant: Anna Cook and Alex Templeton
Counsel for the Respondent: Rolf Pritchard, Q.C. and Denise Woodrow

Harrington, J.A.:

[1] This appeal arises from a declaration by an applications judge that s. 52 of the *Access to Information and Protection of Privacy Act*, SNL 2002, c.A-1.1, (ATIPPA) does not oblige the Department of Justice (DOJ) to produce for review certain records requested by the Commissioner (requested records) for the purpose of verification of a claim that the requested records are subject to solicitor-client privilege. For the reasons which follow, the declaration of an applications judge is set aside and an order is granted directing the DOJ to deliver the requested records to the Commissioner for review.

BACKGROUND

[2] In December, 2008, an employee of the DOJ (requester) sought access to certain documents in a file of a DOJ solicitor relating to an internal human resources issue affecting the requester. The requested records included copies of correspondence, notations and emails in the file and specifically involved communications among the Minister, Deputy Minister and other senior departmental officials.

[3] By reply correspondence dated January 26, 2009, the Deputy Minister and Deputy Attorney General, advised the requester that the application had been denied pursuant to section 21 of ATIPPA. The section provides:

21. The head of a public body may refuse to disclose to an applicant information

- (a) that is subject to solicitor and client privilege; or
- (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

[4] The requester then exercised her rights under subsection 43(1) of ATIPPA by requesting that the Commissioner review the DOJ's refusal to provide the records. Subsection 43(1) provides:

43.(1) A person who makes a request under this Act for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request.

[5] The Commissioner assigned an Access & Privacy Analyst (analyst) to review the DOJ's decision. The analyst sent a request dated February 4,

2009 to the DOJ requesting that it forward a complete copy of the requested records to her pursuant to subsection 52(3) of ATIPPA. Section 52 of ATIPPA provides:

52. (1) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act*.

(2) The commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced to the commissioner and may examine information in a record, including personal information.

(3) The head of a public body shall produce to the commissioner within 14 days a record or copy of a record required under this section, notwithstanding another Act or regulations or a privilege under the law of evidence.

(4) Where it is not practicable to make a copy of a record required under this section, the head of a public body may require the commissioner to examine the original at its site.

[6] The DOJ again refused the request by correspondence dated March 3, 2009 on the grounds that the requested records were subject to solicitor-client privilege.

[7] This denial was contested by the Commissioner by correspondence to the Minister dated March 11, 2009. The Commissioner took the view that subsection 52(3) empowered the Commissioner to review requested records over which solicitor-client privilege had been asserted to verify its validity. The Attorney-General subsequently filed an Originating Application in the Supreme Court of Newfoundland and Labrador, Trial Division on March 13, 2009 seeking a declaration that the requested records are not subject to review by the office of the Commissioner when solicitor-client privilege is claimed.

DECISION OF THE APPLICATIONS JUDGE – 2010 NLTD 31

[8] The sole issue on the application was whether the DOJ is obligated under subsection 52(3) of ATIPPA to produce to the Commissioner the requested records notwithstanding the DOJ's claim that the records are solicitor-client privileged. See Reasons of applications judge, 2010 NLTD 31 para. 13.

[9] The applications judge discussed the recent jurisprudence relating to solicitor-client privilege, recognizing its dual status as both a rule of evidence and one of substantive law. She noted the principle, enunciated in, *inter alia*, *Descôteaux et al. v. Mierzewski*, [1982] 1 S.C.R. 860, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574; 2008 SCC 44 and *R. v. Pritchard*, 2004 SCC 31 (collectively the “*Descôteaux* line of cases”), that legislation which may, if broadly construed, allows incursions on solicitor-client privilege must nevertheless be restrictively interpreted and an intention to permit such an incursion must be evidenced by clear statutory language.

[10] The applications judge held that the words, “[t]he commissioner may require any record in the custody or under the control of a public body that the commissioner considers relevant to an investigation to be produced” in subsection 52(2) of the ATIPPA amounted to open-textured language relating to the production of the requested records which should not be read to include documents subject to a claim of solicitor-client privilege. The applications judge went on to state that the words “privilege under the law of evidence”, found in subsection 52(3) of the ATIPPA, were insufficiently express to include solicitor-client privileged documents since the privilege was no longer just a rule of evidence, but a matter of substantive law. On a restrictive interpretation, she held that section 52 of ATIPPA did not clearly authorize the Commissioner to compel the production of the requested records.

[11] The applications judge further found that even if the court did not apply a restrictive interpretation, the true meaning of “privilege under the law of evidence”, under the interpretive approach mandated by section 16 of the *Interpretation Act*, RSNL 1990, c. I-19, which requires an examination of the objects of ATIPPA; the mischief sought to be remedied; the social context evidence; the language of ATIPPA and the language of section 52, did not encompass solicitor-client privilege in the circumstances of the requested records.

ISSUES

[12] The issues on this appeal are the following:

- (i) What is the applicable standard of review?
- (ii) What interpretative principles apply to s. 52 of ATIPPA?

- (iii) Did the applications judge err in concluding that the language of subsection 52(3) of ATIPPA does not empower the Commissioner to compel production for review of documents for which a claim of solicitor-client has been made and for the provision of an opinion regarding the validity of the claim?
- (iv) Is access for review to the requested records absolutely necessary to achieve the ends sought by the ATIPPA?

ANALYSIS

(i) Standard of Review

[13] The parties have agreed that the standard of review applicable to this appeal is one of correctness and I concur with that position. The sole issue here is a matter of the correct interpretation of statutory language where that language could potentially infringe a fundamental right, namely solicitor-client privilege. Thus a question of law is clearly engaged.

(ii) Other Relevant Statutory Provisions

[14] Section 42 of the Act provides that the office of the Commissioner is established and filled by the Lieutenant Governor-in-Council on the resolution of the House of Assembly. The Commissioner is an officer of the House of Assembly and by virtue of subsection 52(1): “has the powers, privileges and immunities that are conferred on a Commissioner under the *Public Inquiries Act*” [S.N.L. 2006, c.L-38.1].

[15] Section 3 of ATIPPA outlines the purposes of the statute as follows:

3.(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records;
- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- (c) specifying limited exceptions to the right of access;
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

- (e) providing for an independent review of decisions made by public bodies under this Act.

[16] Section 43 of ATIPPA provides for two possible routes of access to records for a requester:

- (i) a request to the Commissioner to review the government body's decision to refuse access or
- (ii) an appeal directly to the Trial Division.

[17] Subsection 54(2) of the Act provides:

The Commissioner, and a person acting for or under the direction of the Commissioner, shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the Commissioner in performing duties or exercising powers under this Act.

[18] Section 55 provides:

Where a person speaks to, supplies information to or produces a record during an investigation by the Commissioner under this Act, what he or she says, the information supplied and the record produced is privileged in the same manner as if it were said, supplied or produced in a proceeding in court.

[Underlining added.]

[19] Section 56 provides:

56. (1) The commissioner and a person acting for or under the direction of the commissioner, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose, information that is necessary to

- (a) perform a duty or exercise a power of the commissioner under this Act; or
- (b) establish the grounds for findings and recommendations contained in a report under this Act.

(3) In conducting an investigation and in performing a duty or exercising a power under this Act, the commissioner and a person acting for or under his or her direction, shall take reasonable precautions to avoid disclosing and shall not disclose

(a) information that the head of a public body is authorized or required to refuse to disclose under Part II or III; or

(b) the existence of information, where the head of a public body is authorized to refuse to confirm or deny that the information exists under subsection 12 (2).

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence under this or another Act of the province or Canada, where the commissioner has reason to believe an offence has been committed.

(5) The commissioner may disclose, or may authorize a person acting for or under his or her direction to disclose information in the course of a prosecution or an appeal referred to in subsection 54 (1).

[20] Section 49 provides:

(1) On completing a review, the commissioner shall

(a) prepare a report containing the commissioner's findings on the review and, where appropriate, his or her recommendations and the reasons for those recommendations; and

(b) send a copy of the report to the person requesting the review, the head of the public body concerned and a third party who was notified under section 47 .

(2) Where the commissioner does not make a recommendation to alter the decision, act or failure to act, the report shall include a notice to the person requesting the review of the right to appeal the decision to the court under section 60 and of the time limit for an appeal.

(iii) *Applicable Principles of Statutory Interpretation*

[21] The first step in the interpretation of section 52 of ATIPPA is determining which interpretive principles are applicable.

[22] The Commissioner contends that the applications judge failed to apply the modern approach to statutory interpretation mandated by *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. This approach requires that the words of ATIPPA be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the objects of the Act. That approach, the Commissioner argues, is supported by section 16 of the *Interpretation Act*, R.S.N.L. 1990, c. I-19 which directs that any statute or regulation should receive such "liberal construction and

interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning”.

[23] The Commissioner also acknowledges the restrictive approach mandated by the Supreme Court of Canada decision in *Blood Tribe* which requires that solicitor-client privilege cannot be abrogated by inference and that open-textured language governing the production of documents must be read so as not to include records subject to a claim of solicitor-client privilege. The DOJ relies on *Blood Tribe*, noting in its factum that “this Honourable Court is being asked to consider language that would allow an incursion on solicitor-client privilege and therefore section 52 of the ATIPPA must be interpreted restrictively.” The Commissioner accepts that “A legislative expression of intent to abrogate solicitor-client privilege must be clear and unequivocal” but argues that the language used in ATIPPA reaches the level of clarity necessary to result in abrogation of the privilege.

[24] With respect to the relevance of section 16 of the *Interpretation Act*, the DOJ argues that the decision in *Blood Tribe* is determinative of the issue. There the Supreme Court rejected the applicability of the federal *Interpretation Act*, declaring that the statute was one of “general application which does not address solicitor-client confidentiality.”

(a) The Modern Approach / Section 16 of the *Interpretation Act*

[25] The modern approach to statutory interpretation has been reiterated by the Supreme Court of Canada in a number of cases, including *Rizzo & Rizzo Shoes Ltd. (Re)*, *supra*, which as noted, has been relied on by the Commissioner. In *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; 2002 SCC 42, the Supreme Court of Canada stated:

[26] In Elmer Driedger’s definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

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.

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: [Citations omitted.] I note as well that, in the federal legislative context, this Court’s preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c.I-21, which provides that every enactment “is deemed remedial,

and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

[26] Section 16 of the *Interpretation Act*, RSNL 1990, c. I-19 is similarly consonant with the approach mandated by the Supreme Court of Canada. That section states:

16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

[27] As noted by the applications judge, the reasons of this Court in *Archean Resources Ltd. v. Newfoundland (Minister of Finance)* (2002), 215 Nfld. & P.E.I.R. 124; 2002 NFCA 43 provide guidance for determining the objects of legislation in accordance with its true meaning. Green J.A., as he then was, wrote:

[22] ...s. 16 directs the court to consider every provision “remedial” and to interpret it so that it “best” ensures the attainment of its “objects” according to its “true” meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or “mischief” to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court’s general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a “true” meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise...

[28] The approach mandated by the modern approach and section 16 of the *Interpretation Act* requires courts to go beyond the “plain meaning of the words” to give ATIPPA a contextual, purposive interpretation.

(b) Restrictive Interpretation of Legislation abrogating Claims of Solicitor and Client Privilege

[29] As both parties correctly acknowledged, the interpretive principle set out in the *Descôteaux* line of cases applies to the interpretation of section 52 of ATIPPA. This principle of interpretation was restated by Binnie J. in *Blood Tribe* at para. 11:

... [L]egislative 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 documents: *Lavallee*, at para. 18; *Pritchard*, at para 33...

[30] A strict or restrictive interpretation can only be resorted to, however, where multiple interpretations are possible following a contextual, purposive analysis. To this effect Binnie J. previously wrote in *Canada 3000 Inc. (Re)*, [2006] 1 S.C.R. 865; 2006 SCC 24, that:

[84] ... only if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as “strict construction”. The applicable principle is not “strict construction” but s. 12 of the *Interpretation Act*, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”; see *Bell ExpressVu*, at para. 28:

Other principles of interpretation — such as the strict construction of penal statutes and the “*Charter* values” presumption — only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46 ...)

[31] Even where a Court applies a restrictive interpretation and finds that a provision authorizes encroachment of solicitor-client confidentiality, the specific exercise of that authority must be “absolutely necessary to achieve the ends sought by the enabling legislation”; *Descôteaux* at p. 875.

(c) Purposive Approach to Interpretation of Section 52 of ATTIPPA

[32] Section 52 of ATIPPA must, in the first instance, be given a purposive construction in its entire context, and in its grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intention of the Legislature. Where this approach gives rise to two possible interpretations, one abrogating solicitor-client privilege and the other not, the court must favor that respecting solicitor-client privilege. Where the only possible interpretation is that permitting an abrogation of solicitor-client

privilege, the specific exercise of the authority must be absolutely necessary to achieve the ends sought by the enabling legislation.

[33] While Binnie J., in *Blood Tribe*, suggested that the federal *Interpretation Act* was of no assistance to the Privacy Commissioner in that case, this conclusion appears to have been in the context of the Privacy Commissioner's necessary implication argument in the absence of sufficiently express statutory language. In that respect, Justice Binnie stated:

[31] Reference was made to s. 31(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that:

31 ...

(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

The *Interpretation Act* is a statute of general application. It does not address solicitor-client confidences. The reality is that all of the appellant's arguments for "implied powers" or a "purposive interpretation" of *PIPEDA* are arguments for an abrogation by inference. The Privacy Commissioner's position is that her review of solicitor-client documents is "routinely necessary" in all cases where solicitor-client privilege is claimed. However, such routine access would contradict the principles explained in *Descôteaux* over 25 years ago:

When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that [solicitor-client] 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. [Emphasis added; p. 875.]

[34] I do not take this reasoning to mean that a court should not apply the modern approach to statutory interpretation as a preliminary step when attempting to determine what a particular *express* provision means. The admonition by the Supreme Court appears to hold that a court should avoid finding an implicit power to abrogate solicitor-client privilege based on a purposive interpretation of legislation. However, in this case, production of requested records under section 52 of ATIPPA to the Commissioner is expressly required regardless of any privilege under the law of evidence for the discharge of the Commissioner's explicit mandate to verify the privilege claim at the instigation of a requester under subsection 43(1) of ATTIPA.

(d) Is the Principle of Necessary Implication Applicable?

[35] The Commissioner argued in the alternative that the principle of necessary implication should be applied to support a finding that the relevant provisions of the Act implicitly and necessarily authorize the abrogation of solicitor-client privilege. In that respect, the Commissioner's counsel cited the reasons of Bastarache J. in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy) & Utilities Board (EUB)*, [2006] 1 S.C.R. 140 at para. 51:

The mandate of this Court is to determine and apply the intention of the legislature ... without crossing the line between judicial interpretation and legislative drafting ... That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

[36] With respect to this alternate submission, the Commissioner says that if the language of subsection 52(3) is insufficiently express to abrogate solicitor-client privilege, it may be necessary and permissible for the Commissioner to argue that in order to discharge his express mandate to verify whether or not a solicitor-client privilege claim is justified, he must have access to the requested records. In support of this proposition, the Commissioner relies upon *Law Society of Saskatchewan v. Merchant*, 2008 SKCA 128, *Stewart McKelvey Stirling Scales v. Nova Scotia Barristers' Society*, 2005 NSSC 258 and *R. v. Special Commissioner and Another, Ex P Morgan Grenfell & Co. Ltd.*, [2002] UKHL 21.

[37] This argument must fail for the reasons set out in para. 31 of *Blood Tribe*, excerpted above. A legislative mandate to determine whether or not a solicitor-client privilege claim is justified cannot be used to infer a power to compel production of solicitor-client privileged materials for review in a verification process. The Commissioner must be able to point to an explicit legislated power to compel production of the records for review of requested records which are subject to the claim of privilege.

[38] Nevertheless, the statutory mandate, as elucidated from the legislation, may inform the context of the express provision in question. I believe that this was the approach adopted in the *Merchant* decision rather than reliance upon a necessary implication approach. There, the Law Society of Saskatchewan sought to compel the production of solicitor-client privileged documents. The demand in that case was made pursuant to subsection 63(1) of *The Legal Profession Act, 1990*, S.S. 1990-91 c. L-10.1 which provided:

Every member and every person who keeps any of a member's records or other property shall comply with a demand of a person designated by the benchers to produce any of the member's records or other property that the person designated by the benchers reasonably believes are required for the purposes of an investigation pursuant to this Act.

[39] Arguably the plain meaning of the language employed could be described as open-textured and thus read not to include solicitor-client privileged documents. The Saskatchewan Court of Appeal, however, in holding that the provision empowered the benchers to compel the production of solicitor-client privileged materials, stated:

[51] As indicated, the statutory language in *Privacy Commissioner of Canada v. Blood Tribe Department of Health* and *Pritchard v. Ontario (Human Rights Commission)* is substantially different than the provisions at issue in this appeal. The wording of s. 63(1) of *The Legal Profession Act, 1990*, considered in its statutory context, clearly reveals a legislative intention that the Law Society be empowered to demand access to material subject to solicitor-client privilege. The phrase "... any of a member's records or other property...", when used in reference to the professional activities of a lawyer, must necessarily include privileged material.

[Underlining added.]

[40] The Court of Appeal there found that the only plausible interpretation of the express power given to the Law Society, given the context, was that the Law Society was empowered to demand access to materials subject to solicitor-client privilege. In my opinion, the Saskatchewan Court of Appeal did not base its decision on implicit authority in the legislation but rather a view that the provision of the legislation was sufficiently explicit in authorizing access to lawyers' records in the context of the governance role of that province's *Legal Profession Act*.

[41] To summarize the above, the appropriate analysis here requires that the Court find whether the power to compel the production of solicitor-client privileged records is expressly granted. The applicable interpretive principles are, as set out above, the modern approach to statutory interpretation and the restrictive approach mandated by the *Descôteaux* line of cases; the two are applied serially. The first step, therefore, is to consider whether a purposive, remedial construction of section 52 of the ATIPPA gives rise to two possible interpretations or whether, in this context, it is sufficiently express to give rise to only one possible interpretation.

(iv) *The Correct Interpretation*

[42] The Commissioner argues that the express wording of subsection 52(3) operates so as to abrogate solicitor-client privilege thus allowing the Commissioner access to requested records for the purpose of verifying the validity of such a privilege claim. Fundamental to this submission is the fact that the privilege still remains a law of evidence. While accepting the finding of the applications judge that solicitor-client privilege has been elevated under the laws of Canada beyond being a law of evidence to a status of substantive law, the language of subsection 52(3) of ATTIPA is sufficiently express to permit the piercing of solicitor-client privilege for the purpose of the Commissioner's review of the validity of the privilege claim.

[43] While the Commissioner relies on the wording of both subsection 52(2) and 52(3), he is correct where he states, "[s]ubsection 52(2) aside, the Commissioner submits that this Appeal raises squarely the issue of interpreting the words "... notwithstanding ... a privilege under the law of evidence" as they appear in subsection 52(3) of the ATIPPA. It is the resolution of that issue that is determinative of this appeal.

[44] The Attorney-General relies on the same line of reasoning as did the applications judge, namely, that solicitor-client privilege is distinguishable from other evidentiary privileges based upon its status as a substantive rule. The wording of subsection 52(3), as it refers only to privileges under the law of evidence, is said to be insufficiently express to abrogate the substantive rule articulated in the *Descôteaux* line of cases and the *Blood Tribe* decision of the Supreme Court.

(a) The Language Used

[45] The relevant portions of section 52 of ATIPPA read, “The commissioner may require any record... to be produced ... notwithstanding... a privilege under the law of evidence”. The words “notwithstanding... any privilege under the law of evidence” are sufficiently clear to abrogate solicitor-client privilege, as this is a privilege recognized under the law of evidence. The “law of evidence” is defined in Black’s Law Dictionary as “The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding”. Solicitor-client privilege is unquestionably a rule regulating the admissibility of what is offered as proof into the record of a legal proceeding.

[46] This, of course, does not end the inquiry. We must go beyond the words of the enactment to determine if the context and purpose of subsection 52(3), determined under the proper approach to statutory interpretation, lead us to a different result.

(b) Statutory Context

[47] The ATIPPA lists numerous grounds for objecting to production to a requestor, including solicitor-client privilege and cabinet confidences. The fact that the Commissioner may examine documents to determine if some types of privileges are properly claimed does not entitle him to examine documents to determine if solicitor-client privilege is properly claimed simply because it is one of the enumerated types of privilege. A similar argument was explicitly considered and rejected by Binnie J. in *Blood Tribe* at para 30.

[48] The legislation in issue in that case differs from the ATIPPA, however. Here, using the words, “notwithstanding... a privilege under the law of evidence” in subsection 52(3), after having previously enumerated a number of privileges which can be raised to object to production, suggests that “privilege” at least includes the enumerated privileges. In fact, it will be seen from the examination of the legislative history of the ATIPPA below that it can be concluded that the words “under the law of evidence” were not meant to restrictively qualify “privilege”. They were meant, rather, to expand “privilege” beyond the types of privilege specifically enumerated in the Act, to include any other privilege which could be raised at law and that might not have been in contemplation at the time of enactment.

(c) The Nature of Solicitor-Client Privilege

[49] The applications judge, as noted above, carried out an extensive review of the evolution of solicitor-client privilege in the case law. I adopt her review and for ease of reference reproduce her conclusion herein:

[38] It is apparent that describing solicitor-client privilege solely as a rule of evidence is inaccurate; it has long been significantly broadened in scope to a rule of substance with extensive application. Post-**Descôteaux**, the Supreme Court of Canada has clearly chosen to refer to the privilege as one of substance, not as a rule of evidence. Nevertheless, this does not necessarily eradicate application of the privilege as a rule of evidence. It is more accurate to consider the rule of evidence as one aspect of solicitor-client privilege. Solicitor-client privilege is a rule of substance; a broad concept of which one aspect is its application as a rule of evidence. The rule of evidence is not mutually exclusive from the rule of substance; rather, solicitor-client privilege as a rule of evidence is inclusive within its existence as a rule of substance.

[50] The applications judge held that the words “privilege under the law of evidence” could not include solicitor-client privilege, as it is not solely a rule of evidence. This ignores the fact that solicitor-client privilege may still be relied on by parties as a rule of evidence where what is sought is to compel the client or solicitor to tender the privileged document into evidence. In other words, the substantive rule, while having broad applications to situations wholly unrelated to evidentiary matters, still forms a part of the body of law known as the law of evidence.

[51] It is worth noting that subsection 52(3) does not use the language “notwithstanding a rule of evidence”. Rather, it states “a privilege under the law of evidence”. This is far broader and encompasses substantive rules which are recognized as having application under the law of evidence.

[52] The DOJ on this application is relying on solicitor-client privilege *qua* rule of evidence. It is objecting to the production of the requested records in a quasi-judicial, administrative proceeding, the goal of which is to determine whether the DOJ has properly asserted a claim to solicitor-client privilege. Thus, while solicitor-client privilege has evolved into a rule of substance, in this context where the rule is being relied upon in an attempt to exclude evidence from a legal proceeding, the words “notwithstanding... a privilege under the law of evidence” must be interpreted to abrogate the privilege.

(d) Legislative History and Purpose

[53] The Parliament of Canada and many of the provincial legislatures have enacted various pieces of access to information legislation granting access to citizens to personal information including documents and records collected and held by government officials, departments and agencies which may involve many subjects including the employment of public servants. The definition of “personal information” in s. 2(o) of the Act means “recorded information about an identifiable individual including opinions of a person about the individual or the individual’s personal views or opinions”.

[54] This application involves documents in the hands of a DOJ solicitor regarding an employment issue affecting a requester who is an employee of the department. Personnel related matters that may adversely affect public servants whether represented by a union or not, may have significant implications affecting career advancement, demotion, discipline and even termination. There is always a risk that internal management of documents may be affected by personal issues and even matters of political sensitivity. It would be too easy to have documents declared to be subject to solicitor-client privilege to delay resolution of a matter and to deter a public servant or citizen from pressing a claim for access to documents in court.

[55] In principle an employment file would likely contain documents (like pay stubs, memos, etc.) that on their face would not normally be considered solicitor-client privileged. Yet the DOJ in this case is claiming privilege for the whole file, not on a document-by-document basis. No affidavit was filed by the Minister with the commissioner identifying, generally, the type of documents in issue and explaining why particular ones met the test for solicitor-client privilege.

[56] The Commissioner’s role is designed to be a timely and inexpensive method of testing whether the DOJ has a legitimate claim to withhold particular information. The balancing safeguard regarding the integrity of an information withholding claim is that the opinion of the Commissioner is not binding. However, morale suasion will play a key part in the enforcement of the Commissioner’s opinion regardless of whether the matter is referred to a judge for a final determination.

[57] This analysis is supported by an examination of the purpose of ATIPPA which must begin by examining the statement of purpose set out in

section 3. (See para. 15, *supra*). The applications judge correctly pointed to the fact that subsection 3(1)(e) provides a mechanism of independent review which is particularly relevant to this case. Subsection 3(1)(a), however, is also relevant because a right of access to records is meaningless without a means of enforcing this right. As will be seen from an examination of the legislative history below, one of the aims of ATIPPA is to provide a timely and cost effective means of securing access to requested records.

[58] ATIPPA's predecessor was the *Freedom of Information Act*, RSNL 1990, c. F-25, which was similar in concept to legislation in other provinces which provided for the right of citizens to seek access and make demands for copies of records of personal information in records and documents maintained by government officials, departments and agencies. Where requests for such records were denied, the sole recourse of citizens making such requests was to the Court. The Court would be the sole arbitrator of a request for certain records should access be denied on the basis of, *inter alia*, solicitor-client privilege. In the course of performing that function, the court was entitled to examine the records in dispute to determine whether in fact solicitor-client privilege applied. In 2002, the *Freedom of Information Act* was repealed and replaced by ATIPPA.

[59] ATIPPA was debated and enacted by the provincial legislature following the receipt of a report titled *Striking the Balance: The Right to Know & the Right to Privacy*, vol. 1 (St. John's: July 2001) prepared by the Freedom of Information Review Committee established by the provincial legislature. One of the primary issues addressed in the report of the review committee was the relatively low number of requests made by members of the public. The committee expressed the view that the cost of any citizen taking a denied access request to the court was both time consuming and expensive and that an alternate method should be considered. At p. XV of the report, it states:

At present, the only option for a person who disagrees with a freedom of information decision is to launch an appeal to the Trial Division of the Newfoundland Supreme Court. Problems associated with using this process – particularly the costs and the length of time required – were frequently raised during the public consultations.

...

The Committee believes that the Newfoundland and Labrador legislation should provide an alternative to the courts, and recommends the establishment of the

office of Information and Privacy Commissioner, with the authority to investigate and mediate complaints, and to make recommendations. In addition, the Commissioner should have the discretion to take a denied request to court at public expense.

[60] At p. 37, it states:

To function effectively, the Information and Privacy Commissioner must have certain special powers and authority. The Commissioner must have the power to investigate requests for review and complaints under the Act, and these powers should be specified in the legislation. To conduct an effective investigation, the Information and Privacy Commissioner must be able to examine the information in question to determine if disclosure has been appropriately denied, or if personal privacy is threatened. Without such power, the Commissioner will be unable to make well-informed and considered decisions.

This power of review should operate notwithstanding any law or privilege that may be claimed for the information in question , such as Cabinet confidences. The Commissioner should be able to examine any requested record within a reasonable period of time, so that the time limits can be met.

Recommendation:

37. That the Information and Privacy Commissioner have investigative powers and the right to examine, during an investigation, any record that is the subject of a review request or complaint.

[Underlining added.]

[61] In response to this recommendation, section 42 of ATIPPA provides that the office of the Commissioner is established and filled by the Lieutenant Governor-in-Council on the resolution of the House of Assembly. The Commissioner is an officer of the House of Assembly and by virtue of subsection 52(1): “has the powers, privileges and immunities that are conferred on a Commissioner under the *Public Inquiries Act*” [S.N.L. 2006, c. P-38.1].

[62] The Commissioner’s role is to facilitate the effort of a requestor to seek access to information including records maintained by government departments and agencies and is effectively an ombudsman or liaison between the citizen and government in attempting to resolve the request by mediation or otherwise if documents or information known to be existing are being withheld in whole or in part for various reasons including a claim of solicitor-client privilege.

[63] During the second reading of ATIPPA in the House of Assembly, Kelvin Parsons, Q.C., the Attorney-General at the time, stated:

[A]t present, the only option under the Freedom of Information Act [the ATIPPA's predecessor] for a person who wishes to have a decision reviewed is to launch an appeal to the Trial Division of the Supreme Court of Newfoundland and Labrador. Indeed, this is one of the concerns most frequently voiced with respect to the current act. Costs of a court appeal are high and very often prohibitive. As well, by the time the court hears and decides on an appeal, the information may no longer be of use because of the time that has elapsed.

In general, the existing appeal process precludes any opportunity for the parties to reach an understanding or achieve a mutually acceptable resolution. Madam Speaker, to address this deficiency, the new act introduces an independent review officer to investigate and mediate complaints, and make recommendations to government and agencies. The model chosen is similar to that witnessed in Manitoba, Nova Scotia, New Brunswick, Saskatchewan and the federal government.

[Underlining added.]

[64] These sources of legislative history may be relied upon by a court in determining the proper interpretation of a statute; *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305; 2008 SCC 12. They are relevant and reliable. In *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: Lexis Nexis, 2008), the author notes at p. 614 that:

Formal and prepared statements by responsible ministers delivered to the legislature at second reading are the most frequently relied on legislative history, presumably because those statements are taken to express the government's intent. Although government intent is not the same as legislative intent, in a parliamentary system the government is most often the source of legislative impulse and the author of the legislative text. An explanation of the meaning or purpose of a text or its intended application is normally considered authoritative when it issues from the person who made the text as opposed to some third party.

The author continues at p. 615, stating:

The other main source of authority is expertise, whether legal expertise or expertise in a particular subject matter. This kind of authority is relied on by legislative committees in preparing legislative studies and recommendations and in considering bills... In a given case, the answer to a question proposed by a committee member might be the basis of an amendment accepted by the legislature. In such a case, a court might well assign significant weight to committee proceedings.

[65] Taken together, these sources help inform the background and purpose of the legislation, which is, *inter alia*, to provide for an independent review officer, as an alternative to the courts, who can undertake a timely and affordable first level review of all information request denials. A central aspect of this review is the ability to examine all documents, regardless of whether any form of privilege attaches to them. The legislative history clearly establishes an intent to eliminate any possible objections that might be raised to the delivery of documents to the Commissioner in the discharge of his statutory mandate. Read in that context, the words, “a privilege under the law of evidence” must be read as an attempt to expand the Commissioner’s powers to compel the production of documents to remove not only those objections enumerated in the ATIPPA but also any privilege recognized in the law of evidence that might be raised. They cannot have been intended to differentiate between some of the privileges enumerated in the ATIPPA, as found by the applications judge.

(v) *Judicial Interpretation of Related Statutes*

[66] The federal *Access to Information Act*, R.S.C. 1985, c. A-1, in force at the time the ATIPPA was enacted, employs similar wording. It provides at section 46 that:

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

[Underlining added.]

[67] In *Canada (Information Comm.) v. Canada (Min. of Environment)* (2000), 187 D.L.R. (4th) 127, the Federal Court of Appeal commented with respect to that section:

Section 46 expressly states that “notwithstanding any other Act of Parliament or *any privilege under the law of evidence*, the Court may... examine any record to which this Act applies that is under the control of a government institution, and *no such record may be withheld from the Court on any grounds*” [emphasis in original]. The Act clearly gives the Court authority to interfere with solicitor-client confidentiality.

[68] While section 46 refers to the powers of a court, as opposed to the federal Commissioner, the Federal Court of Appeal in interpreting the specific words of that section was of the view that they were sufficient to abrogate solicitor-client privilege. This is significant in that the Legislature here adopted very similar wording (albeit less broad, as the federal act added the words “no such record may be withheld from the Court on any ground” not included in ATIPPA) knowing that, in the opinion of the Federal Court of Appeal, these were sufficient to abrogate solicitor-client privilege.

[69] In *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673, the Federal Court of Appeal considered the ambit of the federal Information Commissioner’s power to compel the production of documents pursuant to subsection 36(2) of the federal *Access to Information Act*. That section reads:

36(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

[70] In that case the parties agreed that the production of responsive records subject to solicitor-client privilege could be compelled for review by the Commissioner, pursuant to subsection 36(2). The court stated:

At the outset, it is important to note that the appellants do not dispute that subsection 36(2) would defeat any claim of solicitor-client privilege under section 23 of the Act relating to records sought under the Act. The appellants accept that the Commissioner, when confronted with a refusal to disclose a record requested under the Act based on a section 23 exemption, must be able to review the record and verify that the exemption is properly claimed, and that subsection 36(2) provides the Commissioner with the authority to do so.

[71] While that case was not decided on the issue of whether subsection 36(2) empowered the Commissioner to compel the production of responsive records subject to solicitor-client privilege but rather focused on the production of documents ancillary to the responsive records, it is notable that both parties accepted that the provision was sufficient to do so.

[72] The Federal Court of Appeal, by way of *obiter dicta* appears to be consistent on this point: Section 46 and subsection 36(2) of the federal *Access to Information Act* empower the court and the Commissioner,

respectively, to compel the production of responsive records subject to a claim of solicitor-client privilege to verify the validity of the claim. As the language used in those provisions is similar to that found in subsection 52(3) of ATIPPA, this reasoning provides further support for the inclusion of solicitor-client privilege within the ambit of the words “privilege under the law of evidence”.

[73] It is useful at this point to distinguish ATIPPA from the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”), which was considered in *Blood Tribe*. Unlike the federal *Access to Information Act* which, as in the case of ATIPPA, deals with documents in the possession of the government, PIPEDA deals with information in the hands of the private sector.

[74] Section 12 of PIPEDA gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint “in the same manner and to the same extent as a superior court of record” and to “receive and accept any evidence and other information . . . whether or not it is or would be admissible in a court of law”. With respect to that language, Binnie J. stated:

[26] It is the very generality of the language of s. 12, which does *not* advert to issues raised by solicitor-client privilege, that shows the importance of *Pritchard*’s prohibition against abrogation by inference. A search of Parliament’s use of the expression “in the same manner and to the same extent” as a court reveals that there are about 14 other federal statutes with substantially identical wording to s. 12(1) *PIPEDA*, including the *Public Service Employment Act*, S.C. 2003, c. 22, s. 99; the *Lobbyists Registration Act*, R.S.C. 1985, c. 44 (4th Supp.), s. 10.4; the *Employment Equity Act*, S.C. 1995, c. 44, s. 29; the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 50; and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 50. Looking at these provisions in their different statutory contexts shows that it certainly cannot be said that in all these instances Parliament intended to abrogate solicitor-client privilege. As the intervenor Attorney General of Canada concedes in his factum:

. . . Parliament must be mindful of the importance of that privilege in the administration of justice. Consequently, if Parliament seeks to abrogate solicitor-client privilege it must do so in clear, precise and unequivocal language. Any ambiguity in the language of the legislation at issue must be resolved in favour of protecting the privilege and against any abrogation of the privilege. [para. 1]

Therefore, the Attorney General of Canada submits, “[t]he ordinary and grammatical meaning of the words used in s. 12(1) of *PIPEDA* taken in their full and proper context, do not support the conclusion of the Commissioner” (para. 2). I agree.

[75] Subsection 52(3) of ATIPPA, in contrast to PIPEDA, does advert to issues raised by privilege. While it does not employ the words “solicitor-client privilege”, I am satisfied that the words actually employed are not ambiguous and are sufficiently explicit to include that privilege.

[76] While this may be seen to be a significant infringement of a fundamental right, it is worth noting that solicitor-client privilege may bow to other interests in defined circumstances. Here the Legislature sought to advance the public’s interest in access to information in the hands of government actors and privacy. The importance of these interests is discussed at paras. 24 and 25 of *Lavigne v. Canada (Office of the Official Languages Commissioner)*, [2002] 2 S.C.R. 773.

[77] The right is further protected by the fact that the Commissioner’s decision is merely advisory (see section 49 of the ATIPPA, excerpted above). If the department head or the requester is not satisfied with the decision of the Commissioner, there is a right of appeal to the Trial Division. Further protection is also given by section 55 which preserves the privilege over documents in the hands of the Commissioner, to the same extent as if the documents had been tendered in court and subsection 54(2) which states that the Commissioner “shall not be required to give evidence in a court or in a proceeding about information that comes to the knowledge of the Commissioner in performing duties or exercising powers under this Act”. While in some cases the Commissioner may be able to disclose documents tendered to him, pursuant to section 56, that section should be read as being inapplicable to solicitor-client privileged documents. That section does not specifically address this privilege and does not explicitly authorize its abrogation, unlike section 52.

(vi) *Is Document Production Absolutely Necessary?*

[78] Having found that section 52 of ATIPPA authorizes the Commissioner to compel the production of responsive records subject to solicitor-client privilege, the Court must go on to determine whether the routine production of such records is absolutely necessary. The purpose of the legislation, described above, is to provide for an independent review

officer which can undertake a timely and affordable first level review of all information request denials. This access to justice rationale mandates that the Commissioner's routine exercise of his authority to review solicitor-client privileged materials is absolutely necessary. The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production.

[79] From the foregoing I conclude that the Legislature intended subsection 52(3) to enable the Commissioner to compel the production of responsive records that are subject to a claim of solicitor-client privilege. A practical view of the purpose of the legislation leads to the conclusion that this particular type of privilege is included in the phrase "a privilege under the law of evidence" under subsection 52(3) of ATIPPA.

[80] The following points are *obiter dicta*. They relate to matters that provided context for this decision. The Court is concerned by the possibility of misuse of authority conferred by the legislation. One form of misuse would be for the DOJ to claim a "blanket" privilege for files which, while they contain some privileged documents, also contain others for which privilege clearly does not attach. Another form of misuse of authority would arise if the Information Commissioner demanded to have documents produced that he could reasonably conclude, without inspecting them, were covered by solicitor-client privilege.

[81] If the Commissioner were to receive a letter (or possibly an affidavit) from a senior Justice official indicating that all materials were provided as per an access to information request save for documents containing legal advice (identified by subject matter, date and solicitor) could not the Commissioner reasonably rely on that to conclude that the documents in question are in fact privileged? Such an arrangement, it seems to me, should operate to deal with the vast majority of cases. And, in the few where the Commissioner felt compelled to pursue matters further, the discussion would be focused in a way that should assist reasoned consideration.

[82] The key to all this is good faith in the exercise of authority. With that comes mutual trust, by the Commissioner that senior Justice officials are being truthful and by Justice officials that the Commissioner will not unreasonably call for the production of legal opinions and advice. Cooperation should be the rule and litigation very much the exception.

[83] In the event the commissioner were to conclude, upon examination of documents that they were not subject to solicitor-client privilege, he should not disclose their contents in his resulting report in case the Minister wishes to challenge the conclusion in a court of law.

SUMMARY AND DISPOSITION

[84] For the foregoing reasons, I conclude that the learned applications judge erred in law in declaring that the Commissioner was not entitled to access to the requested records for review and verification of the claim to solicitor-client privilege by the Attorney-General. Section 52 of ATTIPA is unambiguous and explicitly permits the Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.

[85] The declaration by the applications judge is therefore set aside and the Attorney-General is directed to deliver the requested records to the Commissioner for review and verification of the privilege claim.

[86] Given the nature of the question for determination, each party shall bear their own costs in this Court and the court below.

M. F. Harrington, J.A.

I concur:

J.D. Green, C.J.N.L.

I concur:

M. Rowe, J.A.