IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Justice and Public Safety)*, 2023 NLCA 27
Date: September 7, 2023
Docket Number: 202201H0023

BETWEEN:

MICHAEL HARVEY, in his capacity as The Information and Privacy Commissioner of Newfoundland and Labrador — APPELLANT

AND:

HIS MAJESTY THE KING IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by the Minister of Justice and Public Safety — FIRST RESPONDENT

AND:

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR — SECOND RESPONDENT

Coram: G.D. Butler, F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201901G5743 (2022 NLSC 59)

Appeal Heard: June 7, 2023
Judgment Rendered: September 7, 2023

Reasons for Judgment by: G.D. Butler J.A.
Concurred in by: F.J. Knickle and K.J. O'Brien JJ.A.

Counsel for the Appellant: Andrew A. Fitzgerald K.C.
Counsel for the First Respondent: David G. Rodgers and Chelsey Buggie
Counsel for the Second Respondent: Aimee N. Rowe

Authorities Cited:

CASES CITED: *Newfoundland and Labrador (Attorney General) v. Information and Privacy Commissioner (Nfld. And Lab.)*, 2011 NLCA 69, 314 Nfld. & P.E.I.R. 305; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, 371 Nfld. & P.E.I.R. 137; *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209; *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner*), 2023 BCSC 1179; *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, leave to appeal to SCC refused, 29390 (20 March 2003); *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660; *Alexion Pharmaceuticals Inc. v. Attorney General of Canada and Minister of Health for British Columbia*, 2021 FCA 157, leave to appeal to SCC refused, 39858 (24 March 2022); *MediaQMI inc. v. Kamel*, 2021 SCC 23; *Perka v. The Queen*, [1984] 2 S.C.R. 232.

STATUTES CONSIDERED: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 42(1), 44(4), 47, 50, 43(1), 117, 97, 30, 100, 102, 9(3), 52; *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as it appeared from December 10, 2013 to May 31, 2015, sections 43(1), 52(3), 52(2); *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, sections 56(3), 27(1); *Canadian Charter of Rights and Freedoms*; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, sections 25, 44, 14, .

STATUTES REFERENCED: *Narcotic Control Act*, RSC 1970, c. N-1, section 2, Schedule: item 3.

TEXTS CONSIDERED: Pierre-André Côté, with the collaboration of Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed and translated by Steven Sacks (Toronto, ON: Carswell, 2011); Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis Canada, 2022).

OTHER: Newfoundland and Labrador, Independent Statutory Review Committee, *Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*, (March 2015) (Chair: Clyde K. Wells); Bill 29, *An Act to Amend the Access to Information and Protection of Privacy Act*, 1st Sess, 47th Leg, Newfoundland and Labrador, 2012 (assented to 27 June 2012), SNL 2012, c. 25, section 20.

G.D. Butler J.A.:

INTRODUCTION

[1] The question to be addressed on this appeal is whether the applications judge erred in finding that the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2 ("*ATIPPA 2015*") did not authorize the Information and Privacy Commissioner (the "Commissioner") to compel the Minister of Justice and Public Safety (the "Minister") to produce records claimed to be subject to solicitor-client privilege and that therefore the Minister need not comply with the Commissioner's recommendation that such records be disclosed to the applicant.

[2] On April 1, 2019, the Minister received an access to information request from an applicant seeking records relative to a complaint about environmental violations. The Minister replied to the applicant disclosing all relevant documents with the exception of those withheld under subsections 30(1)(a) and (b) of *ATIPPA 2015* which reads:

> 30. (1) The head of a public body may refuse to disclose to an applicant information
>
> (a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

> (b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

[3] On May 16, 2019, the Commissioner received a complaint from the applicant pursuant to subsection 42(1) of *ATIPPA 2015* in relation to the Minister's refusal to disclose these records.

[4] On May 17, 2019, the Commissioner advised the Minister of the Complaint. The letter inferred that relying upon subsection 97(3) of *ATIPPA 2015*, the Commissioner requested the Minister provide the Commissioner with "a complete copy of the records responsive to the request" and "make representations justifying [the Minister's] reliance on any exceptions to disclosure [the Minister had] claimed". The Minister's reply on June 3, 2019 advised (in relevant part) that pursuant to subsections 30(1)(a) and (b) of *ATIPPA 2015*, "a significant portion of the records were withheld as legal advice" involving communications between the Department of Justice and the Minister of the Environment (Appeal Book, Tab I, at 54, Tab J, at 60-61).

[5] The Commissioner took the position that the Minister had provided no justification for refusing to provide the withheld records and enquired whether the Minister's concerns could be addressed under subsection 97(5) of *ATIPPA 2015* by an examination of the records by the Commissioner at a site determined by the Minister. In response, the Minister advised that it was of the opinion that *ATIPPA 2015* did not support mandatory production by a public body to the Commissioner of solicitor-client privileged records.

[6] In an attempt to resolve the dispute, correspondence continued to be exchanged between the Commissioner and the Minister until July 3, 2019. This was unsuccessful and the file was referred to formal investigation in accordance with subsection 44(4) of *ATIPPA 2015* (Appeal Book, Tabs K-O).

[7] At the conclusion of his investigation, pursuant to section 47 of *ATIPPA 2015*, the Commissioner recommended that the Minister "disclose to the Applicant all of the records and other information withheld from the Applicant under section 30 of the *Act*" (Appeal Book, Tab P, at 96, para. 44(b)).

[8] In response, on September 4, 2019, the Minister filed an Originating Application with the Supreme Court of Newfoundland and Labrador seeking a

declaration pursuant to section 50 of *ATIPPA 2015* that it need not follow the Commissioner's recommendations.

[9] On March 31, 2022, the applications judge determined that the Commissioner did not have authority to "compel disclosure of solicitor-client records" and that therefore the Minister "need not comply with the Commissioner's recommendation" for disclosure to the applicant (*Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner*), 2022 NLSC 59, at paras. 65, 79).

[10] In the alternative, the applications judge concluded that the Minister had met the burden placed upon him under subsection 43(1) of *ATIPPA 2015* to establish that the applicant had no right to access the solicitor-client privileged records (Applications Judge's Decision, at paras. 72-78).

[11] The Commissioner appeals.

BACKGROUND

Legislative history of *ATIPPA 2015*

[12] In this province, access to information and protection of privacy legislation requires periodic appointment of a review committee (*ATIPPA 2015*, at s. 117). The committee that is relevant to this case was established in March 2014 (the "Wells Committee") to conduct an independent and comprehensive review of the *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1 as it appeared from December 10, 2013 to May 31, 2015 ("*ATIPPA 2002*"), and provide recommendations to the province arising from the review. The report "*Report of the 2014 Statutory Review of the Access to Information and Protection of Privacy Act*" is hereinafter referred to as the "Wells Report".

[13] The scope of the Wells Committee review included "Assessment of the 'Right of Access' (Part II) and 'Exceptions to Access provisions' (Part III)," of the legislation then in place, "to determine whether these provisions support the purpose and intent of the legislation or whether changes to these provisions should be considered" (Wells Report, Vol. 2, at 3).

[14] The Wells Committee noted that prior to 2012, subsection 43(1) of *ATIPPA 2002* provided for a general right for any requestor who was refused access to a

record, to ask the Commissioner to review the decision and did not preclude examination by the Commissioner of records in respect of which solicitor-client privilege was claimed. Subsection 52(3) of *ATIPPA 2002* required a public body to produce to the Commissioner a record required notwithstanding "a privilege under the law of evidence" (Wells Report, Vol. 2, at 113).

[15] In October 2011, this Court interpreted "a privilege under the law of evidence" in subsection 52(3) of *ATIPPA 2002* to include solicitor-client privilege (*Newfoundland and Labrador (Attorney General) v. Information and Privacy Commissioner (Nfld. & Lab.)*, 2011 NLCA 69, 314 Nfld. & P.E.I.R. 305, at paras. 73-79 (the "NLCA 2011 Decision")). In this regard, it distinguished *ATIPPA 2002* from the *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5 ("PIPEDA"), the language of which had been determined in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, to be too general to abrogate solicitor-client privilege.

[16] In 2012, as a consequence of section 20 of Bill 29, an *Act to Amend the Access to Information and Protection of Privacy Act*, the Commissioner's right to require that a record be produced to determine that it is solicitor-client privileged was removed by virtue of a revision to subsection 43(1) (Wells Report, Vol. 2, at 109, 113).

[17] Of relevance to the issues to be determined on this appeal, the Wells Report Recommendation 23 read:

> 23. The *Act* have no restriction on the right of the Commissioner to require production of any record for which solicitor-client privilege has been claimed and the Commissioner considers relevant to an investigation of a complaint.

(Wells Report, Vol. 2, at 121)

[18] The Wells Report attached a draft Bill for presentation to the House of Assembly for consideration. This included a draft section 97 entitled "Production of Documents" which is reflected verbatim in section 97 of *ATIPPA 2015* (Wells Report, Vol. 2, at 393-394).

[19] In recommending as it did, the Wells Committee relied upon this Court's conclusion in the NLCA 2011 Decision that the phrase "a privilege under the law of evidence" as used in subsection 52(3) of *ATIPPA 2002*, in effect before Bill

29, included solicitor-client privilege (Wells Report, Vol. 2, at 114, citing the NLCA 2011 Decision, at paras. 75, 78-79).

[20] A comparison of the above referenced sections as they were worded before Bill 29, after Bill 29, and in *ATIPPA 2015* is attached at Appendix I.

The Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v. University of Calgary* on November 25, 2016

[21] As the applications judge noted, after *ATIPPA 2015* was passed, the Supreme Court of Canada released its decision in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555. At issue was whether subsection 56(3) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25 ("*FOIPP*") entitled the Alberta Privacy Commissioner to order the production of records over which solicitor-client privilege was claimed in order to verify that the privilege was properly asserted.

[22] Subsection 56(3) of *FOIPP* read:

> Despite any other enactment **or any privilege of the law of evidence**, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).
>
> (Emphasis added.)

[23] The majority characterized the question to be addressed as "… whether the phrase "privilege of the law of evidence" suffices to identify, for the purpose of abrogation, the substantive features of solicitor-client privilege." The Court concluded that this "necessitates an inquiry into both the substantive and evidentiary qualities of the privilege" (para. 25).

[24] Unlike this Court in the NLCA 2011 Decision, the majority held that the phrase "privilege of the law of evidence" was insufficient to abrogate solicitor-client privilege. The majority held:

> [2] I conclude that s. 56(3) does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, solicitor-client privilege cannot be set aside by inference

> but only by legislative language that is clear, explicit and unequivocal. In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection. Therefore, I am of the view that solicitor-client privilege is not captured by the expression "privilege of the law of evidence". …

[25] As the applications judge acknowledged, the within case arose because the 2015 amendments had reinstated the language previously interpreted by this Court to include solicitor-client privilege, but the interpretation of a similar provision in parallel legislation had subsequently progressed through the Alberta Courts to the Supreme Court of Canada with a different result (Applications Judge's Decision, at paras. 20-29, 35, 63).

ISSUES

[26] In assessing whether the applications judge erred in finding that *ATIPPA 2015* did not authorize the Commissioner to compel the Minister to produce records claimed to be subject to solicitor-client privilege, the Court shall address the parties submissions on:

1. The essential nature and fundamental role of solicitor-client privilege; and

2. Whether *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 is distinguishable on the basis of:

    a. A different statutory scheme;

    b. Evidence of a clear policy choice of this Province's legislature; or

    c. The doctrine of *contemporanea expositio*.

STANDARD OF REVIEW

[27] The interpretation of a statute is a question of law subject to the correctness standard of review (*Corporate Express Canada Inc. v. Memorial University of*

Newfoundland, 2015 NLCA 52, 371 Nfld. & P.E.I.R. 137, at para. 16). Therefore, the question of whether the applications judge erred in his interpretation of *ATIPPA 2015* is addressed on a standard of correctness.

ANALYSIS

ISSUE 1: The essential nature and fundamental role of solicitor-client privilege

[28] As the applications judge noted, this case arose because the Supreme Court of Canada in *Calgary* interpreted a phrase similar to "a privilege under the law of evidence", differently than this Court had in the NLCA 2011 Decision (Applications Judge's Decision, at paras. 20-29, 35, 63).

[29] The issue in *Calgary* was whether subsection 56(3) of *FOIPP* entitled the Alberta Privacy Commissioner to order production of solicitor-client records. The Court found the language of *FOIPP* insufficient to abrogate the privilege.

[30] In concluding as it did in *Calgary*, the Court considered the origins and development of solicitor-client privilege. The Court reasoned that solicitor-client privilege had evolved from a rule of evidence to a rule of substance. The rule is no longer restricted to an exemption only from testimonial compulsion but has been extended beyond the courtroom context to become a substantive rule which applies to disclosure of documents in the context of access to information legislation (paras. 38-41).

[31] The Court concluded that in its modern form, solicitor-client privilege is "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" (para. 41, citing *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49).

[32] The Court determined that the facts in *Calgary* engaged "solicitor-client privilege in its substantive, rather than evidentiary, context" and that "as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary" (paras. 42-43).

[33] The Court concluded that "privilege of the law of evidence" in subsection 56(3) of *FOIPP* did not adequately describe the broader substantive interests protected by solicitor-client privilege and that therefore the expression was not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege (para. 44).

[34] The question before this Court is the same as it was in *Calgary*, namely, does the Commissioner have the right to compel production of solicitor-client records. I would conclude therefore that the facts of this case also engage solicitor-client privilege in its substantive context and that as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary. The applications judge recognized this at paragraph 42 of his decision.

[35] The Minister and the Law Society of Newfoundland and Labrador consider the *Calgary* decision to be determinative of this appeal because subsection 97(1)(d) of *ATIPPA 2015* mirrors the language used in subsection 56(3) of the *FOIPP*. They assert that *Calgary* established that the phrase "any privilege of the law of evidence" does not meet the standard of "clear, explicit and unequivocal" language needed to set aside solicitor-client privilege. They submit that the applications judge correctly concluded that an inference (disapproved by the Supreme Court of Canada in *Blood Tribe* and *Calgary*) would need to be drawn to favour the Commissioner's position.

[36] The Commissioner asserts that *Calgary* was neither a constitutional decision nor a *Charter* challenge and therefore its precedential value is limited to the interpretation of a provincial statute in Alberta. In particular, the Commissioner asserts that:

1. *Calgary* is distinguishable because *ATIPPA 2015* is a different statutory scheme which contains the clear, explicit and unequivocal language required to abrogate solicitor-client privilege with legislative safeguards respecting the production of solicitor-client privileged records;

2. Unlike *Calgary*, there is evidence of clear legislative intent for the abrogation of solicitor-client privilege in *ATIPPA 2015*; and

3. The doctrine of c*ontemporanea expositio* supports the Commissioners interpretation of "a privilege under the law of evidence" in *ATIPPA 2015*, to include solicitor-client privilege.

[37] These arguments are addressed below.

ISSUE 2(a): Whether *Calgary* is distinguishable on the basis of a different statutory scheme

(i) Is the language of *ATIPPA 2015* clear, explicit and unequivocal?

[38] Sections 30, 97 and 100 of *ATIPPA 2015* provide:

30. (1) The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

97. (1) This section and section 98 apply to a record notwithstanding

(a) paragraph 5 (1)(c), (d), (e), (f), (g), (h) or (i);

(b) subsection 7 (2);

(c) another Act or regulation; or

(d) a privilege under the law of evidence.

(2) The commissioner has the powers, privileges and immunities that are or may be conferred on a commissioner under the *Public Inquiries Act, 2006*.

(3) 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.

(4) As soon as possible and in any event not later than 10 business days after a request is made by the commissioner, the head of a public body shall produce to the commissioner a record or a copy of a record required under this section.

(5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to **solicitor and client privilege** or litigation privilege;

(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or

(c) it is not practicable to make a copy of the record.

(6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5).

100.(1)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 are privileged in the same manner as if they were said, supplied or produced in a proceeding in a court.

(2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.

(Emphasis added.)

[39] As is apparent, subsection 97(1)(d) references "a privilege under the law of evidence" whereas subsections 30(1)(a), 97(5)(a) and 100(2) reference "solicitor and client privilege".

[40] The similarities in the language of the impugned sections of *FOIPP* and *ATIPPA 2015* were acknowledged by the applications judge at paragraphs 50-53 of his decision.

[41] First, the language of subsection 56(3) of *FOIPP* and subsections 97(1)(d) and 97(3) of *ATIPPA 2015* are similar as reflected below:

> 56 (3) Despite any other enactment or **any privilege of the law of evidence,** a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsections (1) or (2).
>
> 97. (1) This section and section 98 apply to a record notwithstanding
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> …
>
> (d) **a privilege under the law of evidence**
>
> …
>
> (3) 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.
>
> …
>
> (Emphasis added.)

[42] These subsections entitle the Alberta and Newfoundland and Labrador Commissioners respectively, to compel the production of **any record** to the Commissioner for review.

[43] In addition, the language of subsection 27(1) of *FOIPP* and subsection 30(1)(a) of *ATIPPA 2015* are similar as reflected below:

> 27 (1) The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege, ...

> 30. (1) The head of a public body may refuse to disclose to an applicant information
>
> > (a) that is subject to solicitor and client privilege or litigation privilege of a public body; …

[44] These provisions entitle the head of a public body in Alberta and Newfoundland and Labrador respectively to refuse to disclose to an applicant information subject to solicitor-client privilege.

[45] In *Calgary*, the Court addressed the *FOIPP* statutory scheme and concluded that it did not support the Commissioner's right to compel production of records claimed to be solicitor-client privileged. One of the reasons for this was that the legislature used inconsistent language in the impugned sections. Specifically, subsection 27(1) of *FOIPP* referenced "solicitor-client privilege" whereas subsection 56(3) used "privilege of the law of evidence". The Court found the inconsistency in language to be significant since legislatures are presumed to use expressions consistently within a statute and therefore where different terms are used in a single piece of legislation, they must be understood to have different meanings (*Calgary*, at para. 53).

[46] Inconsistent language is similarly reflected in the impugned sections of *ATIPPA 2015*. Subsection 30(1)(a) of *ATIPPA 2015* gives the public body the right to refuse to disclose information that is subject to "solicitor and client privilege". However, the Commissioner may require a public body to produce a record notwithstanding "a privilege under the law of evidence" under subsection 97(1)(d). Had this province's legislature intended to allow the Commissioner to compel the production of documents over which solicitor-client privilege is asserted in subsection 97(1)(d), it could have done so using the words it used in subsection 30(1)(a) rather than the phrase "a privilege under the law of evidence".

[47] *Calgary* concluded on this point:

> [57] … Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

[48] The applications judge addressed the Commissioner's assertion that *FOIPP* did not contain a provision equivalent to subsection 97(5) of *ATIPPA*

2015. It provides that the public body "may require the commissioner to examine the original record at a site determined by the head where (a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege … ." The applications judge determined that subsection 97(5)(a) could be interpreted to apply when a public body voluntarily discloses solicitor-client records for the Commissioner's inspection. Applying *Calgary*, he decided that the Commissioner's position would require the applications judge to infer the legislative intent to abrogate solicitor-client privilege. He concluded, correctly in my view, that this was inappropriate because the language of subsection 97(5)(a) was not sufficiently clear (Applications Judge's Decision, at paras. 44, 47-48).

[49] As a result of the inconsistent phrases used in subsection 30(1)(a) and 97(1)(d) and the potential alternative interpretations of subsection 97(5), I would agree with the applications judge that the language of *ATIPPA 2015* is not clear, explicit and unequivocal.

(ii) Lack of legislative safeguards

[50] In *Calgary*, the Court concluded that "given its fundamental importance, one would expect that if the legislature had intended to set aside solicitor-client privilege, it would have legislated certain safeguards to ensure solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right" (para. 58). While *ATIPPA 2015* provides some legislative safeguards, as addressed below, I find them insufficient to ensure that such records are not disclosed in this manner.

[51] I will address first the Commissioner's assertion that, unlike *FOIPP*, subsection 100(2) of *ATIPPA 2015* provides that the privilege for solicitor-client records is not affected by their production to the Commissioner. As the applications judge noted in this case, citing *Calgary*:

> [55] … The disclosure to the Commissioner *is* the breach of privilege. It does not matter if the Commissioner decides to recommend disclosure. It does not matter that section 100(2) of *ATIPPA 2015* preserves the privilege with respect to the rest of the world. Privilege is lost to the Commissioner who, as the Supreme Court of Canada said, may have an adverse interest to the Department (*University of Calgary* at para. 35).
>
> (Emphasis in original.)

[52] It is possible that the withheld records may relate to advice on an access to information issue in which case the Commissioner may have an adverse interest (*Calgary*, at para. 36). There is no safeguard against the possibility of this conflict within subsection 100(2).

[53] Secondly, the Commissioner references section 102 of *ATIPPA 2015*, which provides:

> 102.(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) any information or other material if the nature of the information or material could justify a refusal by a head of a public body to give access to a record or part of a record;
>
> (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 17 (2);
>
> (c) any information contained in a report or notice made under section 4 or 7 of the *Patient Safety Act*; or
>
> (d) any information, including a record, that is prepared for the use of, or collected, compiled or prepared by, a committee referred to in subsection 8.1(1) of the *Evidence Act* for the purpose of carrying out its duties.
>
> (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 another matter before a court referred to in subsection 99 (1).

[54] Subsection (1) constrains the Commissioner generally from disclosing "information obtained in performing duties or exercising powers under this *Act*, except as provided in subsections (2) to (5)". Subsections (2)(a), (2)(b), (4), and (5) authorize the Commissioner to disclose information in particular circumstances, notwithstanding the general prohibition of subsection (1).

[55] Subsection (3) specifically constrains the Commissioner's ability to disclose documents "[i]n conducting an investigation and in performing a duty or exercising a power" under *ATIPPA 2015,* but does not reference solicitor-client privileged records.

[56] To the extent that subsection (3)(a) references "any information" that "could justify a refusal by a head of a public body to give access to a record", this provision would have to be interpreted with sections 30(1)(a) and 97 which I have addressed previously and concluded are unclear. It would also have to be interpreted with subsections 102(2)(b), (4) and (5).

[57] I would reserve a full interpretation of section 102 for a case where it is directly in issue and fully argued before the Court. For present purposes, it is sufficient to note that it does not explicitly safeguard against the disclosure by the Commissioner of solicitor-client privileged documents.

[58] Finally, similar to *Calgary*, the public body refused to produce the records to the Commissioner under section 30 of *ATIPPA 2015* (*FOIPP*, at s. 27(1)), and as a result, the records were not examined by the Commissioner. The difference however is that in *Calgary* the Alberta Privacy Commissioner's decision (to compel production) proceeded to judicial review and ultimately to the Alberta Court of Appeal. Here, the public body's refusal to produce records was the subject of a complaint and a subsequent investigation by the Commissioner who recommended production. The facts of this case therefore engage both the Commissioner's right to compel production of solicitor-client privileged records to himself for review under section 97 and his right to recommend production of solicitor-client records (that he has not reviewed) to an applicant directly under section 47.

[59] This distinction is important because under subsections 47(a) and (b) of *ATIPPA 2015*, the Commissioner's authority following an investigation into a public body's refusal to grant access to a record is constrained to recommending that the head of the public body grant or refuse access to the record or reconsider its decision. Section 50 of *ATIPPA 2015* addresses applications to court arising from a recommendation of the Commissioner under section 47 that the head of the public body "grant **the applicant** access to the record" (emphasis added).

[60] Consistent with these sections, the Commissioner's recommendation in this case was that "the Department disclose **to the Applicant** all of the records and other information withheld from the Applicant under section 30 of the Act" (emphasis added, Appeal Book, Tab P, at 96). The applications judge therefore considered whether the Minister was required to comply with this recommendation.

[61] *ATIPPA 2015* contains **no** legislative safeguards whatsoever respecting disclosure of solicitor-client privileged records that the Commissioner has not examined, **to an applicant**.

[62] I would conclude therefore that *ATIPPA 2015* contains insufficient legislative safeguards to ensure that solicitor-client privileged records are not disclosed in a manner that compromises the substantive right (*Calgary*, at para. 58).

(iii) *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner*) 2023 BCSC 1179

[63] Subsequent to the hearing of this appeal the Commissioner sought leave to file for the Court's consideration the decision in *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner*), 2023 BCSC 1179, which was decided on July 11, 2023. The Court agreed with this request and received briefs from all parties on the relevance and application of the decision.

[64] At issue in the *British Columbia* case was whether either section 25 or 44 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ("*FIPPA*") authorized production of records that a public body has refused to disclose on the basis of solicitor-client privilege (para. 18). An adjudicator (acting

on behalf of the British Columbia Commissioner), decided that she did not have sufficient evidence to decide whether section 25 required disclosure of the records and therefore made an order under section 44 requiring the public body disclose the records to her (para. 5).

[65] The public body sought judicial review of the adjudicator's decision and the British Columbia Supreme Court dismissed the application concluding that subsection 25(2) compelled the public body to disclose information subject to solicitor-client privilege and also that subsection 44(1) gave the Commissioner the power to compel production of solicitor-client privileged records (paras. 43, 53).

[66] In the course of its reasons, the British Columbia Supreme Court also relied upon section 14 of *FIPPA*. The three sections state as follows:

> **Legal advice**
>
> **14** The head of a public body may refuse to disclose to an applicant information that is subject **to solicitor client privilege**.
>
> **Information must be disclosed if in the public interest**
>
> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
>
> (a) any third party to whom the information relates, and
>
> (b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

Powers of commissioner in conducting investigations, audits or inquiries

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;

(b) **produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.**

(2) The commissioner may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) If a person discloses a record that is subject to **solicitor client privilege** to the commissioner at the request of the commissioner, or **under subsection (1)**, the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any **privilege of the law of evidence**, a public body must produce to the commissioner within 10 days any record or a copy of any record required under **subsection (1)**.

(3.1) The commissioner may require a person to attempt to resolve the person's request for review or complaint against a public body in the way directed by the commissioner before the commissioner begins or continues an investigation under section 42 or an inquiry under section 56.

> (3.2) Subsection (3.1) applies whether or not a mediator has been authorized under section 55.
>
> (4) If a public body is required to produce a record under subsection (1) and it is not practicable to make a copy of the record, the head of that public body may require the commissioner to examine the original at its site.
>
> (5) After completing a review or investigating a complaint, the commissioner must return any record or any copy of any record produced under subsection (3) by the public body.

[67] Section 14 of *FIPPA* is almost identical to subsection 30(1)(a) of *ATIPPA 2015* and subsection 27(1)(a) of *FOIPP*. All three provisions permit the head of a public body to refuse to disclose to an applicant information that is subject to solicitor-client privilege.

[68] Section 25 of *FIPPA* creates a public interest override requiring disclosure "to the public, to an affected group of people or to an applicant" of information that is either "(a) about a risk of significant harm to the environment or to the health or safety of the public or group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest." The equivalent provision in *ATIPPA 2015* is subsection 9(3), which was not relevant to this appeal and was therefore not addressed. I would conclude therefore that (with one exception) the comments made and conclusions drawn by the British Columbia Supreme Court at paragraphs 24-43 on the public interest override provision are not pertinent to this case.

[69] The exception is the British Columbia Supreme Court's conclusion that subsection 56(3) of *FOIPP* is not akin to section 25 of *FIPPA* (para. 36). I agree. Section 25 of *FIPPA*, like subsection 9(3) of *ATIPPA 2015* are exceptional sections providing an override application in limited circumstance such as health and safety of the public.

[70] Respecting the British Columbia Supreme Court's reasoning on section 44 of *FIPPA*, the court found the language of subsection 44(2.1) to be a clear, express and unequivocal abrogation of solicitor-client privilege because it explicitly referenced records subject to solicitor-client privilege ordered to be produced by the Commissioner "under subsection (1)" (para. 49). The equivalent section in *ATIPPA 2015* is subsection 100(2) and it does not directly reference records required to be produced by the Commissioner under subsection 97(1)(d) or 97(3).

This is a key distinction between *FIPPA* subsection 44(2.1) and *ATIPPA 2015* subsection 100(2).

[71] I note as well that the British Columbia Supreme Court agreed with the adjudicator's conclusion that subsection 44(2.1) abrogated solicitor-client privilege. In doing so, the adjudicator had relied upon the reasons of Cromwell J. in *Calgary* (para. 50).

[72] The British Columbia Supreme Court referenced Cromwell J.'s judgment as "concurring" with the majority. However, while Cromwell J. concurred in the result, Cromwell J. disagreed with the majority on the primary issue of whether the Commissioner had authority to compel production for review of records over which solicitor-client privilege is asserted. He found that the language of subsection 56(3) of *FOIPP* demonstrated that the legislature intended to abrogate solicitor-client privilege. Cromwell J.'s decision to dismiss the appeal was based upon his conclusion that the Commissioner made a reviewable error by imposing a more onerous standard on the university in relation to its assertion of privilege. (*Calgary*, at paras. 72, 128).

[73] It is the majority decision in *Calgary* that, unless distinguishable, is binding on this Court on the primary issue.

[74] The majority decision written by Côté J. reviewed *FIPPA* as parallel legislation and concluded:

> [65] Therefore, assuming — without deciding — that, even if the phrase "privilege of the law of evidence" would be understood to include solicitor-client privilege once it is coloured by the relevant contextual considerations arising from the framework of the British Columbia Act, it cannot, so coloured, be imported into the Alberta statute with equivalent effect.

[75] I would conclude that the British Columbia Supreme Court's decision does not support a finding that the statutory scheme of *ATIPPA 2015* abrogates solicitor-client privilege to the extent of permitting the Commissioner to order production of records over which solicitor-client privilege is asserted.

ISSUE 2(b): Evidence of a clear policy choice of this Province's legislature

[76] Relying upon *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124, leave to appeal to SCC

refused, 29390 (20 March 2003), at paragraphs 22-23, the Commissioner asserts that the sections upon which he relies must be interpreted in a manner that best ensures the attainment of their objects, which requires consideration of the problem or mischief that the legislature was asked to remedy.

[77] In this respect, the Commissioner submitted that it was the clear intention of the legislature to permit the Commissioner to compel, for his review, production of documents alleged to be protected by solicitor-client privilege. The Commissioner presented extensive evidence of the legislative history pertaining to *ATIPPA 2015* which I have summarized in the Background portion of this Decision.

[78] The applications judge referred to the legislative history and was aware that prior to Bill 29, pursuant to subsection 52(3) of *ATIPPA 2002*, the Commissioner held the authority to compel production for his review, records claimed to be subject to solicitor-client privilege. He also acknowledged that section 20 of Bill 29 changed *ATIPPA 2002* and removed the Commissioner's authority in this regard but that the Wells Committee recommended the authority be restored (Applications Judge's Decision, at paras. 32-33).

[79] I accept that "prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to" a statute (Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed and translated by Steven Sacks (Toronto, ON: Carswell, 2011) at 457-458; and *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at 667).

[80] However, interpretation of the relevant *ATIPPA 2015* provisions requires a determination of the meaning of the various sections, not what was said about them prior to their enactment (*Alexion Pharmaceuticals Inc. v. Attorney General of Canada and Minister of Health for British Columbia*, 2021 FCA 157, leave to appeal to SCC refused, 39858 (24 March 2022), at para. 53; and *MediaQMI inc. v. Kamel*, 2021 SCC 23, at paras. 37-38). The Wells Committee recognized this at page 113, noting that "the courts will be the interpreters of the legislation, and it is reasonable to expect that the principles" that the Supreme Court identified in the jurisprudence reviewed by the Wells Committee "will be applied".

[81] This evidence of legislative history supports the intent of the legislature to restore the Commissioner's authority to compel production of solicitor-client

records for his review. However, this fact does not change the interpretation of the statute.

[82] The evidence of legislative review and recommendations for change to the impugned sections does not alter my conclusion that the inconsistent language in *ATIPPA 2015* (subsections 30(1), 97(1)(d), (3), (5) and (6)) does not meet the standard of clear, explicit and unequivocal language required to abrogate solicitor-client privilege as a substantive right.

ISSUE 2(c): The doctrine of *contemporanea expositio*/contemporaneous exposition

[83] The Commissioner relies upon this doctrine as defined in *Perka v. The Queen*, [1984] 2 S.C.R. 232, at 264-265:

> The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed…" *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242 (*per* Lord Esher, M.R.). See also Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; *Maxwell on the Interpretation of Statutes, supra,* at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".
>
> This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted. In *Gambart v. Ball* (1863), 32 L.J.C.P. 166, for example, it was held that the *Engraving Copyright Act* of 1735, which prohibited unauthorized engraving or "in any other manner" copying prints and engravings, applied to photographic reproduction—a process invented more than one hundred years after the Act was passed. (See also Maxwell, *supra,* at pp. 102 and 243-44.) This kind of interpretive approach is most likely to be taken, however, with legislative language that is broad or "open-textured". It is appropriate, as the judgments of Viscount Sankey in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, and Viscount Jowitt in *Attorney-General for Ontario v. Attorney-General for Canada* (the *Privy Council Appeals Reference*), [1947] A.C. 127, indicate, to the interpretation of the words in constitutional documents, whose meaning must be capable of growth and development to meet changing circumstances. But where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted. …

[84] The Commissioner asserts that when *ATIPPA 2015* was passed, the phrase a "privilege under the law of evidence" in *ATIPPA 2002* had been interpreted by this Court in the NLCA 2011 Decision, to include solicitor-client privileged documents and therefore that the phrase a "privilege under the law of evidence" must now be ascribed the meaning it was given by this Court in the NLCA 2011 Decision.

[85] I disagree with the Commissioner's position on the application of this doctrine.

[86] Firstly, the doctrine of *contemporanea expositio* was not referenced by the Court in *Calgary*. Instead, *Calgary* endorsed the modern approach to statutory interpretation: 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 (*Calgary*, at paras. 29, 63). In applying this approach on this appeal, I have concluded that other rules of construction, including the presumption of consistent expression, assist. As previously noted, the legislature specifically used the term "solicitor and client privilege" in subsection 30(1)(a) of *ATIPPA 2015*, and even elsewhere within section 97 (s. 97(5)(a)). Applying this rule of construction, the meaning of the phrase "a privilege under the law of evidence" in subsection 97(1)(d) would remain unclear. The abrogation of solicitor-client privilege requires clear, explicit and unequivocal language.

[87] Secondly, Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto, ON: LexisNexis Canada, 2022) at page 173, explains the development of the doctrine of *contemporanea expositio* in response to problems encountered in interpreting ancient statutes:

> The doctrine of contemporaneous exposition was developed by British courts as a response to problems encountered in interpreting ancient statutes. Because, until recently at least, Canadian jurisdictions undertook regular statute revisions, such problems have been less likely to arise in Canada. Nonetheless, in constructing legislation, Canadian courts may look to contemporaneous exposition and afford it significant weight, if in the circumstances it is appropriate to do so.

[88] *ATIPPA 2015* is not an ancient statute, and in this Province, access to information and protection of privacy legislation has received regular periodic review as addressed earlier in this decision. The legislature has had the benefit of

the Court's decision in *Calgary* since 2016 but has not modified subsection 97(1)(d) of *ATIPPA 2015*.

[89] Thirdly, the issue in *Perka* was the meaning of a technical or scientific term, specifically, the phrase "*Cannabis sativa L."* as used in the *Narcotic Control Act*, RSC 1970, c. N-1, section 2, Schedule: item 3. The Court accepted that it was "well established that technical and scientific terms which appear in statutes should be given their technical or scientific meaning" (264).

[90] The appellants had been charged with importing cannabis into Canada and relied upon a "botanical defence", arguing that the Crown failed to prove that the ship's cargo was "*Cannabis sativa L*." At trial, the parties agreed that the term "*Cannabis sativa L*." should be assigned its scientific meaning but disputed "when, in temporal terms, that meaning should be fixed" (264). Relying on the doctrine of *contemporanea expositio*, the Court upheld the trial judge's withdrawal of the "botanical defence", and held that the phrase "*Cannabis sativa L."* in the *Narcotic Control Act* was meant to embrace all forms of cannabis. When the *Narcotic Control Act* was passed in 1961, the botanical scientific community were virtually unanimous that cannabis consisted of only one species. The Court held that when the legislature has chosen a specific scientific or technical term to represent a specific and particular class of things, it would be counter to Parliament's intent to give new meaning to that term whenever consensus shifts among the relevant scientific community (264-266).

[91] Unlike the term being interpreted in *Perka*, the phrase "a privilege under the law of evidence" as used in subsection 97(1)(d) of *ATIPPA 2015* is not a "specific scientific or technical term" for which the Court must assign a particular meaning. While the meaning of the phrase may have been understood (in this jurisdiction) in one sense when *ATIPPA 2015* was passed, the Supreme Court of Canada has determined that solicitor-client privilege is no longer merely a "privilege of the law of evidence" but a substantive rule, "an important civil and legal right, and a principle of fundamental justice in Canadian law" (*Calgary*, at para. 41). The language required to abrogate a privilege of this nature must be explicit.

[92] Finally, as the Court noted in *Perka* at page 265, a static approach to the "interpretation of the words in constitutional documents" is inappropriate because their "meaning must be capable of growth and development to meet changing circumstances". While *ATIPPA 2015* is not a constitutional document, the Court

in *Calgary* stressed that solicitor-client privilege "has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy" (para. 20). I would conclude therefore that application of the *contemporanea expositio* doctrine to the interpretation of the impugned sections of *ATIPPA 2015* would be inconsistent with the constitutional dimensions of solicitor-client privilege.

[93] For these reasons, I would conclude that it is inappropriate to apply the doctrine of *contemporanea expositio* in this case.

CONCLUSION

[94] Therefore, notwithstanding that *Calgary* was neither a constitutional case nor a *Charter* challenge, and despite evidence of legislative review and recommendations for change to the impugned sections of *ATIPPA 2015*, I would agree with the applications judge that the language of *ATIPPA 2015* is not sufficiently clear, explicit and unequivocal to set aside solicitor-client privilege.

[95] For the reasons stated herein, I would conclude that the applications judge did not err in determining that the Commissioner lacked authority to compel production of documents over which the Minister asserted solicitor-client privilege and that therefore the Minister did not need to comply with the Commissioner's recommendation for disclosure to the applicant.

[96] While the applications judge acknowledged that, given his decision on the interpretation of the *ATIPPA 2015*, he did not need to address the question of whether the Commissioner was entitled to receive the records in this instance, he nevertheless addressed the question. Since I have found no error in the applications judge's conclusion that the Commissioner did not have authority to compel production of solicitor-client records, it is unnecessary for this Court to address this question.

[97] In closing, I would note as the Court did in *Calgary* at paragraph 59, that the Court's conclusion on the Commissioner's inability to compel production of records subject to solicitor-client privilege does not leave an applicant without recourse when a public body refuses to produce solicitor-client records. In such an instance, an applicant can appeal the refusal directly to the Supreme Court of Newfoundland and Labrador, under section 52 of *ATIPPA 2015* and adjudication

of issues associated with the claim of solicitor-client privilege would, as is traditional, be addressed by the courts.

DISPOSITION

[98] I would dismiss the appeal. All parties agree that there should be no order as to costs.

_____
G. D. Butler J.A.

I Concur:_____
F. J. Knickle J.A.

I Concur:_____
K. J. O'Brien J.A

Appendix I

***Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as it appeared on 1 April 2011**	**Bill 29, *An Act to amend the Access to Information and Protection of Privacy Act*, 1st Sess, 47th Leg, Newfoundland and Labrador, 2012 (assented to 27 June 2012), SNL 2012, c 25.**	***Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2**
Review and appeal **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. **Production of documents** **52.** (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.	**20. Subsection 43(1) of the Act is repealed and the following substituted:** **Review and appeal** **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, except where the refusal by the head of the public body to disclose records or parts of them is (a) due to the record being an official cabinet record under section 18; or (b) based on solicitor and client privilege under section 21.	**Legal advice** **30.** (1) The head of a public body may refuse to disclose to an applicant information (a) that is subject to solicitor and client privilege or litigation privilege of a public body; or (b) that would disclose legal opinions provided to a public body by a law officer of the Crown. **Production of documents** **97.** (1) This section and section 98 apply to a record notwithstanding (d) a privilege under the law of evidence. (3) 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. (5) The head of a public body may require the commissioner to examine the original record at a site determined by the head where (a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;

		(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or (c) it is not practicable to make a copy of the record. (6) The head of a public body shall not place a condition on the ability of the commissioner to access or examine a record required under this section, other than that provided in subsection (5). **Privilege** **100.** (1) 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 are privileged in the same manner as if they were said, supplied or produced in a proceeding in a court. (2) The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner.