

Supreme Court Judgments

Alberta (Information and Privacy Commissioner) v. University of Calgary

Collection: Supreme Court Judgments

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Report: [2016] 2 SCR 555

Case number: 36460

Judges: Abella, Rosalie Silberman; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément; Côté, Suzanne

On appeal from: Alberta

Subjects: Administrative law

Notes: SCC Case Information: [36460](#)



SUPREME COURT OF CANADA

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

APPEAL HEARD: April 1, 2016
JUDGMENT RENDERED: November 25, 2016
DOCKET: 36460

BETWEEN:

Information and Privacy Commissioner of Alberta
Appellant

and

Board of Governors of the University of Calgary
Respondent

- and -

Law Society of Alberta, British Columbia

**Freedom of Information and Privacy Association,
Information and Privacy Commissioner of Ontario,
Information and Privacy Commissioner for British Columbia,
Information and Privacy Commissioner for the
Province of Newfoundland and Labrador,
Advocates' Society, Federation of Law Societies of Canada,
Canadian Bar Association, Information Commissioner of Canada,
Privacy Commissioner of Canada, Manitoba Ombudsman,
Northwest Territories Information and Privacy Commissioner,
Nova Scotia Information and Privacy Commissioner [Review Officer],
Nunavut Information and Privacy Commissioner,
Saskatchewan Information and Privacy Commissioner,
Yukon Ombudsman and Information and Privacy Commissioner and
Criminal Lawyers' Association**
Interveners

CORAM: Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

REASONS FOR JUDGMENT: Côté J. (Moldaver, Karakatsanis, Wagner, and Gascon JJ.
(paras. 1 to 71) concurring)

PARTIALLY CONCURRING Cromwell J.
REASONS:
(paras. 72 to 129)

PARTIALLY CONCURRING Abella J.
REASONS:
(paras. 130 to 138)

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

Information and Privacy Commissioner of Alberta

Appellant

v.

Board of Governors of the University of Calgary

Respondent

and

**Law Society of Alberta, British Columbia
Freedom of Information and Privacy Association,
Information and Privacy Commissioner of Ontario,
Information and Privacy Commissioner for British Columbia,
Information and Privacy Commissioner for the
Province of Newfoundland and Labrador,
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Canadian Bar Association, Information Commissioner of Canada,
Privacy Commissioner of Canada, Manitoba Ombudsman,
Northwest Territories Information and Privacy Commissioner,
Nova Scotia Information and Privacy Commissioner [Review Officer],
Nunavut Information and Privacy Commissioner,
Saskatchewan Information and Privacy Commissioner,
Yukon Ombudsman and Information and Privacy Commissioner and
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Interveners

Indexed as: Alberta (Information and Privacy Commissioner) v. University of Calgary

2016 SCC 53

File No.: 36460.

2016: April 1; 2016: November 25.

Present: Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Privacy — Investigation of complaints — Powers of Information and Privacy Commissioner — Production of documents — Solicitor–client privilege — Dismissed employee filing complaint with Commissioner and seeking access to her personal employment information — Employer claiming solicitor–client privilege over some documents — Whether statutory provision which requires public body to produce records to Commissioner “[d]espite . . . any privilege of the law of evidence” allows Commissioner to review documents over which solicitor–client privilege is claimed — If so, whether Commissioner made reviewable error by ordering production of documents — Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F–25, s. 56(3).

Administrative law — Judicial review — Standard of review — Information and Privacy Commissioner — Standard of review applicable to Commissioner’s decision to compel production of records over which solicitor–client privilege is asserted — Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F–25, s. 56(3).

In the context of a constructive dismissal claim, a delegate of the Information and Privacy Commissioner of Alberta ordered the production of records over which the University of Calgary had claimed solicitor–client privilege. The delegate was acting in accordance with the Office of the Commissioner’s “Solicitor–Client Privilege Adjudication Protocol”, which required the provision of a copy of “the records at issue” or two copies of “an affidavit or unsworn evidence verifying solicitor–client privilege over the records” to substantiate the claim of solicitor–client privilege. In compliance with the law and the practice regarding identification of solicitor–client privileged documents in civil litigation in Alberta at that time, the University provided a list of documents identified by page numbers, along with a sworn affidavit indicating solicitor–client privilege had been asserted over the records.

After a further request to substantiate the claim of privilege, the delegate issued a Notice to Produce Records under s. 56(3) of the *Freedom of Information and Protection of Privacy Act* (“FOIPP”). Under that section, a public body must produce required records to the Commissioner

“[d]espite . . . any privilege of the law of evidence”. The University sought judicial review of the delegate’s decision to issue the Notice. On judicial review, the Commissioner’s decision was upheld, but on appeal, it was found that “any privilege of the law of evidence”, as used in s. 56(3), did not refer to solicitor–client privilege.

Held: The appeal should be dismissed.

Per Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.: Whether s. 56(3) of *FOIPP* allows the review of documents over which solicitor–client privilege is claimed is a question of central importance to the legal system as a whole and outside the Commissioner’s specialized area of expertise. The question of what statutory language is sufficient to authorize administrative tribunals to infringe solicitor–client privilege is one that has potentially wide implications on other statutes. Therefore, the applicable standard of review is correctness for both (i) the decision that the Commissioner has the authority to require the production of records over which solicitor–client privilege is asserted, and (ii) the decision to issue the Notice to Produce Records.

The expression “any privilege of the law of evidence” does not require a public body to produce to the Commissioner documents over which solicitor–client privilege is claimed. Solicitor–client privilege is no longer merely a privilege of the law of evidence, but a substantive right that is fundamental to the proper functioning of our legal system. The disclosure of documents pursuant to a statutorily established access to information regime, separate from a judicial proceeding, engages solicitor–client privilege in its substantive, rather than evidentiary, context. To give effect to solicitor–client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. Section 56(3) does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor–client privilege. This interpretive approach is not a renunciation of the modern approach to statutory interpretation, but recognizes legislative respect for fundamental values.

Reading s. 56(3) in the context of the statute as a whole supports the conclusion that the legislature did not intend to set aside solicitor–client privilege. First, s. 27(1) of *FOIPP* unequivocally establishes that a public body may refuse to disclose “information that is subject to any type of legal privilege, including solicitor–client privilege”. Second, this interpretation is coherent. “[P]rivilege of the law of evidence”, as referenced in s. 56(3), are a narrower category falling within the scope of the broader category of “legal privilege”, as laid out in s. 27(1). Read together, therefore, these two sections provide that a public body can refuse to disclose documents subject to any “legal privilege”, while the Commissioner can obtain production of those documents over which a “privilege of the law of evidence” is asserted in order to adjudicate the claims of privilege. Third, given its fundamental importance, one would expect that if the legislature had intended to set aside solicitor–client privilege, it would have legislated safeguards to ensure that solicitor–client privileged documents are not disclosed in a manner that compromises the substantive right or addressed whether disclosure of solicitor–client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person.

Lastly, even if the language of s. 56(3) did clearly evince legislative intent to set aside solicitor–client privilege, this was not an appropriate case in which to order production to the Commissioner. Although the delegate found that it was necessary to review the records because the University failed to present evidence of its claim of solicitor–client privilege as required by the Protocol, the Protocol is not law. Rather, it is a guide established by the Commissioner to assist adjudicators and public bodies. At the time, the prevailing authority in Alberta in civil litigation allowed a party to bundle and identify solicitor–client privileged documents by document numbers, and no evidence or argument was made to suggest that solicitor–client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.

Per Cromwell J.: The express language and the full context of s. 56(3) of the *Freedom of Information and Protection of Privacy Act* demonstrate that the legislature intended to abrogate

solicitor–client privilege to the extent of permitting the Commissioner to order production of records over which solicitor–client privilege is asserted when necessary to adjudicate the validity of that claim. Section 56(3) explicitly grants that authority “[d]espite . . . any privilege of the law of evidence”, and to hold that solicitor–client privilege is a legal privilege but not a “privilege of the law of evidence” in *FOIPP* is not justified.

The grammatical and ordinary meaning of the words “any privilege of the law of evidence” in s. 56(3) includes solicitor–client privilege. Solicitor–client privilege is both an evidentiary privilege and a substantive principle, but, as the University is seeking immunity from forced production by virtue of the Commissioner’s statutory powers, the evidentiary privilege is at issue here. The fact that s. 27(1) of *FOIPP* specifically includes the words “solicitor–client privilege” does not detract from this interpretation of s. 56(3) because these provisions perform different functions. Section 27(1) sets out a number of grounds upon which a public body can refuse to order disclosure, whereas s. 56 provides what the Commissioner can and cannot do in the context of conducting an inquiry. Nothing in either section can be read as saying that the Commissioner is prevented from ordering the production of documents subject to a claim of solicitor–client privilege in the context of answering all questions of law and fact that arise in the course of an inquiry.

This interpretation is also supported by a number of contextual factors. First, the statutory scheme unambiguously supports the view that the legislature intended the Commissioner to have the powers required to decide whether or not records should be produced by a public body — including ruling on claims of privilege — subject to judicial review of the exercise of those powers. Specifically, *FOIPP* provides a detailed, self–contained process for the disclosure of information to an applicant, and the Commissioner would not be able to fulfill this statutory mandate without the power to review a claim of solicitor–client privilege.

Second, none of the factors that weigh against a finding that a statute abrogates solicitor–client privilege are in play here: the Commissioner has adjudicative powers; the

Commissioner does not appear on behalf of the complainant; and the language used in s. 56(3) is not open-textured language governing production of documents. On the contrary, s. 56(3) expressly provides that the power to order production applies notwithstanding any privilege of the law of evidence.

Finally, the debates leading up to the enactment of the first version of *FOIPP* support an interpretation of s. 56(3) as abrogating solicitor-client privilege, as does the fact that the same expression in the parallel British Columbia legislation clearly includes solicitor-client privilege.

Even though the Commissioner has the authority to compel production for review of records over which solicitor-client privilege is asserted and assuming, without deciding, that the correctness standard of review applies, she made a reviewable error to order production in the face of the evidence submitted in relation to the claim of privilege. The University's claim of privilege complied with the requirements of Alberta civil litigation practice at the time, and it was a reviewable error for the Commissioner's delegate to impose a more onerous standard on the University in relation to its assertion of privilege than that applicable in civil litigation before the courts. The evidence filed with the Commissioner clearly asserts that the documents are communications between solicitor and client which entails the seeking or giving of legal advice, and which is intended to be confidential by the parties.

Per Abella J.: The standard of review in this case should be reasonableness in accordance with this Court's jurisprudence reviewing decisions of Information and Privacy Commissioners, including decisions involving solicitor-client privilege. The question in this case does not fall within any of the categories which attract correctness review under *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. On the contrary, the Commissioner is interpreting her home statute, which includes the express mandate to consider the application of solicitor-client privilege. This is classic "reasonableness review" territory.

But the Commissioner's decision to order disclosure was unreasonable. The Commissioner should have exercised her discretion in a manner that interfered with solicitor-client privilege only to the extent absolutely necessary to achieve the ends sought by her enabling legislation. In ordering disclosure, she did not sufficiently take into account the fact that the University provided adequate justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta.

Cases Cited

By Côté J.

Applied: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, 226 D.L.R. (4th) 20; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *R. v. Barnier*, [1980] 1 S.C.R. 1124; *Ansell*

Canada Inc. v. Ions World Corp. (1998), 28 C.P.C. (4th) 60; *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81.

By Cromwell J.

Applied: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; **referred to:** *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Newfoundland and Labrador (Attorney General) v. Information and Privacy Commissioner (Nfld. and Lab.)*, 2011 NLCA 69, 314 Nfld. & P.E.I.R. 305; *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23; *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81; *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, 580 A.R. 265; *Solosky v. The Queen*, [1980] 1 S.C.R. 821.

By Abella J.

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3;

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381.

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Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, ss. 2(c), (e), 7, 27, 53 (1)(a), 56, 58, 59(1), (4), 65(1), 69(1), 70, 72(1), (2)(a), 73.

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APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Bielby and Brown JJ.A.), 2015 ABCA 118, 602 A.R. 35, 647 W.A.C. 35, 12 Alta. L.R. (6th) 272, 81 Admin. L.R. (5th) 257, 382 D.L.R. (4th) 299, [2015] 7 W.W.R. 213, [2015] A.J. No. 348 (QL), 2015 CarswellAlta 574 (WL Can.), setting aside a decision of Jones J., 2013 ABQB 652, 90 Alta. L.R. (5th) 94, 574 A.R. 137, 66 Admin. L.R. (5th) 254, [2013] A.J. No. 1233 (QL), 2013 CarswellAlta 2198 (WL Can.). Appeal dismissed.

Glenn Solomon, Q.C., and *Elizabeth Aspinall*, for the appellant.

Robert W. Calvert, Q.C., and *Michael D. A. Ford, Q.C.*, for the respondent.

David Phillip Jones, Q.C., and *Victoria A. Jones*, for the intervener the Law Society of Alberta.

Written submissions only by *Michael A. Feder* and *Emily MacKinnon*, for the intervener the British Columbia Freedom of Information and Privacy Association.

Lawren Murray and *David Goodis*, for the intervener the Information and Privacy Commissioner of Ontario.

Ivan Bernardo, Q.C., Gerald Chipeur, Q.C., and Jill W. Wilkie, for the intervener the Information and Privacy Commissioner for British Columbia.

Andrew A. Fitzgerald, for the intervener the Information and Privacy Commissioner for the Province of Newfoundland and Labrador.

Perry R. Mack, Q.C., for the intervener the Advocates' Society.

Mahmud Jamal and David Rankin, for the intervener the Federation of Law Societies of Canada.

Michele H. Hollins, Q.C., James L. Lebo, Q.C., and Jason L. Wilkins, for the intervener the Canadian Bar Association.

Marlys A. Edwardh, Daniel Sheppard, Regan Morris, Diane Therrien and Aditya Ramachandran, for the interveners the Information Commissioner of Canada, the Privacy Commissioner of Canada, the Manitoba Ombudsman, the Northwest Territories Information and Privacy Commissioner, the Nova Scotia Information and Privacy Commissioner [Review Officer], the Nunavut Information and Privacy Commissioner, the Saskatchewan Information and Privacy Commissioner and the Yukon Ombudsman and Information and Privacy Commissioner.

Written submissions only by *Brian Gover, Justin Safayeni and Carlo Di Carlo*, for the intervener the Criminal Lawyers' Association.

The judgment of Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ. was delivered by

CÔTÉ J. —

I. Overview

[1] This case involves a judicial review of a decision pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“*FOIPP*”). A delegate of the Information and Privacy Commissioner of Alberta (“Commissioner”) ordered the production of records over which solicitor-client privilege was claimed in order to verify that the privilege was properly asserted. At the heart of this appeal is whether s. 56(3) of *FOIPP*, which requires a public body to produce required records to the Commissioner “[d]espite . . . any privilege of the law of evidence”, allows the Commissioner and her delegates to review documents over which solicitor-client privilege is claimed.

[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”. Moreover, a reading of s. 56(3) in the context of the statute as a whole also supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. Further, even if s. 56(3) could be construed as authorizing the Commissioner to review documents over which privilege is claimed, this was not an appropriate case in which to order production of the documents for review. Consequently, I would dismiss the appeal.

II. Facts

[3] The University of Calgary (“University”) was sued by a former employee who brought a claim of constructive dismissal. In October 2008, the former employee made a request for access to information under s. 7 of *FOIPP*, seeking records about her in the University’s possession.

[4] The University provided some records in response to the request, but claimed solicitor-client privilege over other records. In March 2009, the former employee brought an application under *FOIPP* seeking production of the withheld records. A delegate of the Commissioner (“delegate”) conducted an inquiry on the matter, acting in accordance with the Office of the Commissioner’s “Solicitor-Client Privilege Adjudication Protocol” (“Protocol”) (online). The Protocol states how, according to the Office of the Commissioner, claims of solicitor-client privilege can be substantiated without revealing the details of the communications. Basing himself on the Protocol, the delegate issued a Notice of Inquiry instructing the University to provide a copy of “the records at issue” or two copies of “an affidavit or unsworn evidence verifying solicitor-client privilege over the records”.

[5] In August 2010, the University declined to provide a copy of the withheld records, and instead provided a list of documents identified by page numbers only. This way of proceeding complied with the law and the practice regarding identification of solicitor-client privileged documents in civil litigation in Alberta at that time. The University also provided a sworn affidavit from its Access and Privacy Coordinator indicating solicitor-client privilege had been asserted over the records. Later, the University further provided a letter from its Provost and Vice-President (Academic), asserting solicitor-client privilege over the records.

[6] In September 2010, the delegate directed the University to substantiate its claim of solicitor-client privilege by either providing him with a copy of the records, or providing additional information regarding the records at issue, including, for example, the date and length of the record, and some information regarding the author and addressee.

[7] The University did not comply with either direction. As a result, the delegate issued a Notice to Produce Records under s. 56(3) of *FOIPP*, requiring the University to produce the documents for review. Section 56(3) reads:

(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) or (2).

[8] The University again did not comply, and in October 2010 sought judicial review of the delegate's decision to issue the Notice to Produce Records. This is the matter on appeal.

[9] It is noteworthy that the applicant, the former employee, is not a party to the present appeal. Her litigation against the University concluded in 2012 and she has had no involvement in the matter since then (2012 ABQB 342, 545 A.R. 110). Therefore, the claim for production is moot at this time.

III. Decisions Below

A. *Information and Privacy Commissioner of Alberta*

[10] In his decision rendered October 20, 2010, the delegate required the University to produce a copy of the records over which solicitor-client privilege was claimed, to allow the delegate to determine whether solicitor-client privilege had been properly asserted. The delegate concluded that this case was an exceptional one, as the University of Calgary had failed to present adequate evidence of its claim of solicitor-client privilege, and therefore it was necessary to review the records in question to determine whether the University had properly withheld the records.

B. *Alberta Court of Queen's Bench, 2013 ABQB 652, 574 A.R. 137*

[11] On judicial review, Justice Jones first concluded that the appropriate standard of review was correctness. He applied the modern approach to statutory interpretation and found that s. 56(3) of *FOIPP* permits the Commissioner to compel the production of disputed records to verify claims of solicitor-client privilege. He reviewed the jurisprudence on similar provisions in other statutes, and concluded that the Alberta legislature's intent in enacting *FOIPP* was clear. The application judge also found that the provisions of *FOIPP* do not work together effectively unless the Commissioner has the power to compel the production of information over which privilege is alleged since *FOIPP* provides no other mechanism to review that type of claim.

[12] The application judge then considered the delegate's exercise of the power to compel the production of the documents. He found that the delegate had correctly issued the notice, noting that the University had refused to substantiate in any other way its claims of solicitor-client privilege. Overall, he concluded the delegate's approach established "a framework that interferes with the confidentiality and privilege only to the extent absolutely necessary" (para. 233).

C. *Alberta Court of Appeal, 2015 ABCA 118, 602 A.R. 35*

[13] The Court of Appeal allowed the University's appeal, concluding that the Commissioner did not have statutory authority to compel the production of records over which solicitor-client privilege was asserted. It agreed with the application judge that the applicable standard of review was correctness. Regarding statutory interpretation, however, the Court of Appeal held that *Blood Tribe* ousts the modern approach to statutory interpretation where solicitor-client privilege is at stake. Instead, the rule of strict construction applies, which requires clear, explicit and specific reference to solicitor-client privilege.

[14] Following the rule of strict construction, the Court of Appeal concluded that an inference would need to be drawn to conclude that "any privilege of the law of evidence" refers to

solicitor-client privilege. Therefore, the language of s. 56(3) was found to be not sufficiently specific to evince clear legislative intent.

[15] The Court of Appeal also observed that a number of contextual factors supported its conclusion. First, neither the Commissioner nor her delegate needed to be a lawyer and could lack the legal training necessary to adjudicate claims of solicitor-client privilege. Second, *FOIPP* authorized the Commissioner to disclose information relating to the commission of an offence to the Minister of Justice and the Attorney General. Third, s. 38(3) of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, which applies to law firms, also permits the Commissioner to require the production of records “[n]otwithstanding . . . any privilege of the law of evidence”. The Court of Appeal noted that allowing solicitor-client privilege to be infringed in that context would be undesirable.

IV. Issues

[16] This appeal raises the following questions:

1. What is the appropriate standard of review applicable to the Commissioner’s decision?
2. What approach to statutory interpretation applies to provisions purporting to abrogate, pierce, set aside or infringe solicitor-client privilege?
3. Does s. 56(3) of *FOIPP* require a public body to produce to the Commissioner records over which solicitor-client privilege is claimed?

V. Submissions of the Parties

A. *Information and Privacy Commissioner of Alberta*

[17] The Commissioner argues that the appropriate standard of review is reasonableness. Regarding statutory interpretation, she submits a purposive analysis should be applied. In brief, the Commissioner takes the position that s. 56(3) of *FOIPP* expressly grants her the power to review records over which solicitor-client privilege is claimed. She argues that solicitor-client privilege is a privilege of the law of evidence; thus the words “any privilege of the law of evidence” in s. 56(3) clearly abrogate solicitor-client privilege. The Commissioner submits that the substantive nature of solicitor-client privilege does not preclude this interpretation, and she argues that a contextual analysis supports her position.

B. *Board of Governors of the University of Calgary*

[18] In contrast, the University’s Board of Governors argues that the appropriate standard of review is correctness. Regarding statutory interpretation, it submits that express, clear and precise words are necessary to permit the Commissioner to pierce solicitor-client privilege. The University’s Board of Governors’ primary argument is that s. 56(3) does not contain express words to that effect since solicitor-client privilege has been elevated from a rule of evidence to a substantive and fundamental rule of law. In the alternative, the University’s Board of Governors submits that even if s. 56(3) could be construed as expressly giving the Commissioner the power to pierce solicitor-client privilege, disclosure was not appropriate in this case. The University’s Board of Governors also argues that a contextual analysis supports its position.

VI. Analysis

A. *Standard of Review*

[19] The application judge and the Court of Appeal concluded that the applicable standard of review was correctness. I agree.

[20] Whether *FOIPP* allows solicitor-client privilege to be set aside is a question of central importance to the legal system as a whole and outside the Commissioner's specialized area of expertise. As this Court said in *Blood Tribe*, solicitor-client privilege is "fundamental to the proper functioning of our legal system" (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 46; see also *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at para. 17). Further, as the Court of Appeal observed, the question of what statutory language is sufficient to authorize administrative tribunals to infringe solicitor-client privilege is a question that has potentially wide implications on other statutes.

[21] In *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, Rothstein J., writing for the Court, discussed how a question of statutory interpretation that does *not* have wide implications on other statutes would *not* be of central importance to the legal system as a whole and would thus attract a reasonableness standard. Paragraph 60 of *National Railway* reads as follows:

This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the [[Canada Transportation Act, S.C. 1996, c. 10](#) ("CTA")]. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the [CTA](#) and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under [s. 120.1\(1\)](#). This question does not have precedential value outside of issues arising under this statutory scheme.

Conversely, it follows that where — as in this case — the question *does* have wide implications on other statutes, the appropriate standard of review is correctness.

[22] In addition, there is nothing to suggest that the Commissioner has particular expertise with respect to solicitor-client privilege, an issue which has traditionally been adjudicated by courts (see *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, 226 D.L.R. (4th) 20, at para. 25). Therefore, the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 60), for both (i) the decision that the Commissioner has the authority to require the production of records over which solicitor-client privilege is asserted, and (ii) the decision to issue the Notice to Produce Records.

[23] My colleague Justice Abella thinks otherwise. Drawing from six judgments of this Court involving disclosure decisions by Information and Privacy Commissioners, she suggests that there is a “clear lineage” of cases dictating that the standard of review in this appeal should be reasonableness. With respect, I cannot agree.

[24] Of the six decisions identified by Abella J., only two mention solicitor-client privilege. One of them is *Blood Tribe*, in which Binnie J. in effect reviewed the impugned decision on the standard of correctness, although he did not expressly state so. The other is *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, which addressed, as a secondary issue, whether the Assistant Commissioner properly exercised his discretion under a provision explicitly permitting him to exempt from disclosure documents subject to solicitor-client privilege. That was it. Resolution of that question had few ramifications on the principle of solicitor-client privilege and its application beyond the particular exercise of discretion in that case.

[25] The question here is different. It does not just ask whether the Commissioner exercised her discretion appropriately in the instant case. It asks whether the phrase “privilege of the law of evidence” suffices to identify, for the purpose of abrogation, the substantive features of solicitor-client privilege. This necessitates an inquiry into both the substantive and evidentiary qualities of the privilege.

[26] The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole. In *R. v. Gruenke*, [1991] 3 S.C.R. 263, Chief Justice Lamer described its rationale as follows:

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication [Emphasis added; p. 289.]

[27] Having determined that the applicable standard of review is correctness, I now proceed to apply this standard to the decision at hand.

B. *Principles of Statutory Interpretation*

[28] To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. The privilege cannot be set aside by inference (*Blood Tribe*, at para. 11; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, at para. 33; *Lavallee*, at para. 18). As this Court affirmed in *Thompson*:

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

[29] I would also add that this requirement is not a renunciation of the modern approach to statutory interpretation. Indeed, on my reading, *Blood Tribe* does not preclude using a full modern approach to interpret words purportedly abrogating privilege. Rather than supporting adoption of a strict construction rule, the analysis conducted in *Blood Tribe* reflects what is essentially the modern approach to statutory interpretation when dealing with solicitor-client privilege, insofar as it recognizes legislative respect for fundamental values. The modern approach was followed by this Court in *Thompson*, and the same approach is followed here. Therefore, in no way is this Court returning to the plain meaning rule or abandoning the modern approach.

C. *Freedom of Information and Protection of Privacy Act*

[30] Access to information is an important element of a modern democratic society. As this Court stated in *Criminal Lawyers' Association*:

Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance. [para. 1]

[31] One of the purposes of *FOIPP* is “to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body” (s. 2(c)). As the language of s. 2(c) reveals, the statute does not grant unfettered access to records; requests for access are subject to certain exceptions.

[32] *FOIPP* also creates a process for conducting “independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act” (s. 2(e)). In this regard, a person making a request for access to a record “may ask the Commissioner to review any decision, act or failure to act” of the head of a public body relating to the request (s. 65(1)). The

Commissioner's responsibilities include conducting investigations to ensure compliance with *FOIPP* (s. 53(1)(a)) and conducting inquiries to deal with requests for a review (s. 69(1)).

[33] At the heart of this appeal is s. 56(3) of *FOIPP*. Section 56 reads as follows:

56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

(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) or (2).

The primary issue in this case is whether s. 56(3) of *FOIPP* requires a public body to produce to the Commissioner records over which solicitor-client privilege is claimed, to review the validity of the claim. This appeal therefore deals with the obligation of the University to disclose solicitor-client privileged documents to the Commissioner for review. This appeal does not raise the issue of whether the Commissioner may order the disclosure of solicitor-client privileged documents to the applicant.

D. *Solicitor-Client Privilege*

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

privilege. For this reason, “privilege is jealously guarded and should only be set aside in the most unusual circumstances” (*Pritchard*, at para. 17).

[35] Further, solicitor-client privilege belongs to the client, not to the lawyer (*Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, at para. 48; *Blood Tribe*, at para. 9). Seen through the eyes of the client, compelled disclosure to an administrative officer alone constitutes an infringement of the privilege (*Blood Tribe*, at para. 21). Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, regardless of whether or not the Commissioner may disclose the information onward to the applicant.

[36] In this regard, it is noteworthy that the Commissioner is not an impartial adjudicator of the same nature as a court. *FOIPP* empowers the Commissioner to exercise both adjudicative and investigatory functions. Unlike a court, the Commissioner can become adverse in interest to a public body. The Commissioner may take a public body to court and become a party in litigation against a public body that refuses to disclose information. These features of the Commissioner’s powers further indicate that disclosure to the Commissioner is itself an infringement of solicitor-client privilege.

E. *Application*

[37] The key issue in this case is whether s. 56(3) of *FOIPP*, which requires a public body to produce to the Commissioner records “[d]espite . . . any privilege of the law of evidence”, allows the Commissioner to review documents that the University claims are protected by solicitor-client privilege. I conclude that “any privilege of the law of evidence” is not sufficiently clear and precise to set aside or permit an infringement of solicitor-client privilege.

(1) Solicitor-Client Privilege Is Not Merely a Rule of Evidence

[38] First, it is well established that solicitor-client privilege has evolved from a rule of evidence to a rule of substance (*Blood Tribe*, at para. 10; *Thompson*, at para. 17; *Chambre des notaires*, at para. 28). Further, as indicated above, some even suggest that the Court has granted it a quasi-constitutional status.

[39] Formerly, solicitor-client privilege as a rule of evidence meant that a client and his or her lawyer were not required to tender confidential communications into evidence in a judicial proceeding (*Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 876, citing R. Cross, *Cross on Evidence* (5th ed. 1979), at p. 282). As R. D. Manes and M. P. Silver state in *Solicitor-Client Privilege in Canadian Law* (1993), at p. 2:

The origin of the law of privilege goes back to Tudor times in England, and originated as a respect for the oath and honour of a lawyer who was duty-bound to guard the client's secrets. At first, the duty was restricted to an exemption only from testimonial compulsion, that is, the right of the lawyer or client to refuse to testify in court regarding confidential communications. [Emphasis added; footnote omitted.]

In its early days, solicitor-client privilege was restricted in operation to an exemption from testimonial compulsion (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 834).

[40] As early as *Solosky*, however, this Court recognized that solicitor-client privilege had been placed “on a new plane”, and extended beyond the courtroom context (p. 836). Two years later, in *Descôteaux*, this Court elaborated on solicitor-client privilege as a substantive rule and formulated it as follows:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [p. 875]

Thus, the substantive rule expanded the circumstances in which solicitor-client privilege applies, and also introduced protections governing when the privilege can be abrogated, set aside or infringed.

[41] Following *Descôteaux*, this Court has found solicitor-client privilege to apply in circumstances outside the courtroom, including search and seizure of documents in a lawyer's office (*Lavallee; Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401) and disclosure of documents in the context of access to information legislation (*Blood Tribe; Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Criminal Lawyers' Association*). In its modern form, solicitor-client privilege is not merely a rule of evidence; it is "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" (*Lavallee*, at para. 49).

[42] I find that the present case engages solicitor-client privilege in its substantive, rather than evidentiary, context. This case is not occupied with the tendering of privileged materials as evidence in a judicial proceeding. Rather, it deals with disclosure of documents pursuant to a statutorily established access to information regime, separate from a legal proceeding. While it is true that the person who applied for the information was initially seeking the information for use as evidence in separate litigation against the University, her lawsuit has since ended. In addition, the Privacy Commissioner is not seeking to review the solicitor-client privileged information as evidence in order to decide a legal dispute. The disclosure of the information in this context is therefore not

related to the “evidentiary privilege”. Rather, disclosure in this case is more akin to the review of mail being delivered to prison inmates, which this Court addressed in *Solosky*. In that case, as it was described in *Descôteaux*, the Court “applied a standard that has nothing to do with the rule of evidence . . . since there was never any question of testimony before a tribunal or court” (p. 875). Equally, the absence of such a question here highlights the engagement of solicitor-client privilege in its substantive, rather than evidentiary, role.

[43] This Court has repeatedly affirmed 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 (*Chambre des notaires*, at para. 28, citing *Lavallee*, at paras. 36-37, *McClure*, at para. 35, *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, at para. 27, and *Goodis*, at para. 15). Within the evidentiary context of criminal proceedings, for example, the substantive nature of solicitor-client privilege has been interpreted as meaning the privilege only yields in “certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis” (*McClure*, at para. 35). These limited categories, which will only be satisfied in rare circumstances, include the accused’s right to make full answer and defence (*McClure*; *Brown*) and where public safety is at stake (*Smith*).

[44] Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression “privilege of the law of evidence” does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of “privilege of the law of evidence”.

[45] In this regard, it is noteworthy that s. 56(3) of *FOIPP* was first enacted in its present form in 1994, in the *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, s. 54(3). At that time, the elevation of solicitor-client privilege from a privilege of the law of evidence into a substantive privilege had been well established in the jurisprudence for over a decade.

(2) *Blood Tribe Does Not Stand for the Proposition That Solicitor-Client Privilege Is a “Privilege of the Law of Evidence”*

[46] The Commissioner argues that, according to *Blood Tribe*, the phrase “any privilege of the law of evidence” is sufficiently clear and precise to abrogate solicitor-client privilege. In *Blood Tribe*, the provision at issue was s. 12 of the *Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5* (“*PIPEDA*”), which permitted the Privacy Commissioner of Canada to compel the production of any record “in the same manner and to the same extent as a superior court of record” (now s. 12.1; see *S.C. 2010, c. 23, s. 83*). This Court concluded that s. 12 of *PIPEDA* amounted to a general production provision and was not sufficiently express to abrogate solicitor-client privilege (para. 21).

[47] In *Blood Tribe*, the Privacy Commissioner of Canada argued that her investigatory powers under *PIPEDA* should be interpreted consistently with her powers under the *Privacy Act, R.S.C. 1985, c. P-21*, which allowed her to examine information notwithstanding “any privilege under the law of evidence” (s. 34(2)). Justice Binnie, writing for the Court, rejected this argument. He observed that the Privacy Commissioner of Canada’s powers under *PIPEDA* and the *Privacy Act* were not the same since, unlike the general production provision in *PIPEDA, s. 34(2)* of the *Privacy Act* contained “explicit language granting access to confidences” (para. 28).

[48] In this appeal, the Commissioner now argues that s. 34(2) of the *Privacy Act*, which Justice Binnie observed contained “explicit language granting access to confidences”, is very similar to the provision presently at issue. *Section 34(2)* of the *Privacy Act* reads as follows:

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen’s Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

[49] I do not accept the Commissioner’s argument that *Blood Tribe* supports her interpretation, for two reasons. First, this Court specifically acknowledged in *Blood Tribe* that the scope of [s. 34\(2\)](#) of the *Privacy Act* was not at issue, and that “[t]he proper interpretation of [s. 34\(2\)](#) must await a case in which it is squarely raised” (para. 29). In *Blood Tribe*, this Court turned to [s. 34\(2\)](#) merely to demonstrate that the powers of the Privacy Commissioner of Canada were not the same under *PIPEDA* and the *Privacy Act* in response to an argument raised by the Privacy Commissioner (paras. 28-29). The Court in *Blood Tribe* did not lay out definitive criteria with respect to the words contained in [s. 34\(2\)](#) of the *Privacy Act*.

[50] Second, while the terms “privilege under the law of evidence” or “privilege of the law of evidence” contain explicit language granting access to some confidences, as Justice Binnie acknowledged, I am of the view that they do not clearly set aside or permit to infringe solicitor-client privilege. As I have discussed, solicitor-client privilege is not merely a rule of evidence, having been elevated to a rule of substance. Further, a contextual interpretation of s. 56(3) within the scheme of *FOIPP* supports the conclusion that the legislature did not intend to set aside solicitor-client privilege.

(3) The Statutory Scheme Supports a Finding That Solicitor-Client Privilege Is Not Set Aside

[51] In addition to the lack of clear, explicit and unequivocal language in the provision, a reading of s. 56(3) in the context of the statute as a whole supports the conclusion that the legislature did not intend to set aside solicitor-client privilege.

[52] First, s. 27(1) of *FOIPP* unequivocally establishes that a public body may refuse to disclose solicitor-client privileged documents:

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,

Section 27(1) recognizes and protects a public body’s right to solicitor-client privilege, using the term “solicitor-client privilege”. This indicates that the legislature had turned its mind to the specific issue of solicitor-client privilege and was alive to its significance. If the legislature had intended s. 56(3) to compel a public body to produce to the Commissioner documents over which solicitor-client privilege is asserted, it could have used clear, explicit and unequivocal language, as it did in s. 27(1) of the same statute where it granted public bodies a right to assert solicitor-client privilege over information. When setting out the Commissioner’s production powers, the legislation did not use equally precise language that would set aside the privilege for the Commissioner, or permit her to infringe it.

[53] In addition, the use of the term “privilege of the law of evidence” in s. 56(3) in contrast to “legal privilege” in s. 27(1) is significant, since legislatures are presumed to use expressions consistently within a statute (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §8.36). Therefore, where different terms are used in a single piece of legislation, they must be understood to have different meanings; otherwise the legislature would have employed only one term or the other (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 81; *R. v. Barnier*, [1980] 1 S.C.R. 1124, at pp. 1135-36). If the legislature intended to allow the Commissioner to compel the production of documents over which solicitor-client privilege is asserted under s. 56(3), it could have done so using the words it used in s. 27(1) rather than the phrase “privilege of the law of evidence”.

[54] Second, this interpretation is a coherent one. In the context of *FOIPP*, the term “legal privilege” is a broader category than “privilege of the law of evidence”. As Professor Sullivan states, “[t]he purpose of a list of examples following the word ‘including’ is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included” (§4.39). In the case of s. 27(1), the general language of the phrase “any type of legal privilege” is followed by “including solicitor-client privilege or parliamentary privilege” to ensure that those two sources of privilege, among the most highly protected privileges, are included. This provision clearly demonstrates the legislature’s intent to protect a broad range of privileged documents from forced disclosure by a public body to an applicant.

[55] “[A]ny privilege of the law of evidence” is a narrower category falling within the scope of “legal privilege”. Under s. 56(3), a public body is required to produce to the Commissioner documents over which a “privilege of the law of evidence” is claimed to assess the validity of the privilege.

[56] Read together, ss. 27(1) and 56(3) provide that a public body can refuse to disclose documents subject to any “legal privilege”. The Commissioner can obtain production of some privileged documents for review, namely those over which a “privilege of the law of evidence” is asserted, and can adjudicate claims of privilege in those cases.

[57] Solicitor-client privilege is clearly a “legal privilege” under s. 27(1), but not clearly a “privilege of the law of evidence” under s. 56(3). As discussed, the expression “privilege of the law of evidence” is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. 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.

[58] Third, 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 that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. In addition, there is no provision in *FOIPP* addressing whether disclosure of solicitor-client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person. The absence from *FOIPP* of any guidance on when and to what extent solicitor-client privilege may be set aside suggests that the legislature did not intend to pierce the privilege.

[59] Overall, this does not mean that an applicant does not have recourse to other means to seek disclosure of documents over which solicitor-client privilege is claimed. It is noteworthy that, in this case, the applicant had the opportunity to do so through the courts in the context of the action she brought against the University. In the course of that action, however, she did not make such a request.

[60] I agree with my colleague Justice Cromwell that parallel legislation may assist in the interpretation of statutes. But words and phrases cannot be extricated from their specific statutory context and cross-applied automatically to other legislation. A closer look at British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 44(3), in comparison with the statute at hand, demonstrates significant differences between the operational frameworks of the Alberta and British Columbia statutes, including with respect to the powers of the Commissioner:

The Alberta Statute

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Powers of Commissioner in conducting investigations or inquiries

56(1) In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

(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) or (2).

The British Columbia Statute

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).

[61] Unlike the legislation at hand, s. 44 of the British Columbia Act does not give the Commissioner broad powers to compel the production of records. Significantly, the British Columbia

Commissioner does not have all the “powers, privileges and immunities of a commissioner under the *Public Inquiries Act*”. Instead, under s. 44(2) of the British Columbia statute, much of that power resides in a court of inherent jurisdiction — the traditional arbiter of solicitor-client privilege. Consequently, it is difficult to conceive a reading of s. 44(3) of the British Columbia Act that would ascribe to the British Columbia Commissioner the type of power the appellant Commissioner here purports to have without rendering s. 44(2) of the British Columbia statute nugatory.

[62] Further, nowhere in the British Columbia statute does the legislator reference “legal privilege” or the fact that solicitor-client privilege is a legal privilege. The interpretative conflict that is at the heart of this case therefore does not arise in the context of the British Columbia Act.

[63] The modern approach to statutory interpretation requires legislative texts to be read in their entire context. And resort to other texts from different jurisdictions may be helpful in determining what that entire context is. But resort to parallel legislation does not trump other principles of statutory interpretation. Certainly, it would not trump the principle, explained at para. 53 above, that legislatures are presumed to use expressions consistently within an enactment. Indeed, as Professor Sullivan writes, “[o]bviously, the statutes of different jurisdictions cannot be regarded as constituting a single enactment” (§13.42).

[64] In my view, that resort must be made to an anterior provision of the British Columbia Act, s. 44(2), to shed light on the meaning of the phrase “privilege of the law evidence” appearing in s. 44(3) of that Act, hurts, rather than helps, the argument that this phrase is sufficiently clear, explicit and unequivocal to capture solicitor-client privilege. Indeed, if it were so clear, explicit and unequivocal, then s. 44(2.1) would be rendered largely meaningless. Moreover, that this anterior provision vests much of the production power in a court — as opposed to a commissioner with powers equivalent to those existing under the *Public Inquiries Act* — in a manner consistent with legislative respect for fundamental values, also militates against the appellant Commissioner’s desired interpretation in the case at hand. In fact, the very same contextual considerations operate against the

appellant Commissioner in the case before us: an anterior provision, s. 27(1), explicitly permits a public body to refuse to produce documents covered by solicitor-client privilege with reference to the distinct concept of “legal privilege”, and the fact that the Commissioner need never ask a court to compel production of privileged documents would be inconsistent with the presumption of legislative respect for fundamental values.

[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.

[66] I conclude this section in saying a word about the strict construction approach adopted by the Court of Appeal. While its approach bears some similarity with mine, I am not prepared, given the reasons expressed above, to say that *Blood Tribe* ousts the modern approach to statutory interpretation.

(4) Even if There Was Clear and Unambiguous Legislative Intent, This Was Not an Appropriate Case in Which to Order Disclosure

[67] Lastly, even if the language of s. 56(3) did clearly evince legislative intent to set aside solicitor-client privilege, I would find that this was not an appropriate case in which to order production to the Commissioner.

[68] The Commissioner argues she has an adjudicative function akin to that of a superior court, to determine whether a public body has validly claimed solicitor-client privilege. As this Court found in *Blood Tribe*, however, even courts will decline to review solicitor-client documents to ensure the privilege is properly asserted unless there is evidence or argument establishing the

necessity of doing so to fairly decide the issue (para. 17, citing *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen. Div.)), at para. 20).

[69] The delegate found that because the University failed to present evidence of its claim of solicitor-client privilege as required by the Protocol, it was necessary for the delegate to review the records. However, the Protocol is not law, and was not enacted by the legislature. Rather, it is a guide established by the Commissioner to assist adjudicators and public bodies.

[70] At the time of the Commissioner's request for disclosure, the prevailing authority in Alberta in civil litigation allowed a party to bundle and identify solicitor-client privileged documents by document numbers, as the University had done (see *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81). No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.

VII. Conclusion

[71] Subject to constitutional limitations, legislatures can pierce solicitor-client privilege by statute. However, the language of the provision must be explicit and evince a clear and unambiguous legislative intent to do so. In the present case, there is no such language. For the above reasons, I would dismiss the appeal and award costs to the Board of Governors of the University of Calgary throughout.

The following are the reasons delivered by

CROMWELL J. —

I. Introduction

[72] I agree with my colleague Justice Côté that the appeal must be dismissed. But I do not agree that, under Alberta’s *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“*FOIPP*”), the Information and Privacy Commissioner lacks the authority to compel production for review of records over which solicitor-client privilege is asserted. The Commissioner has the authority to order a public body to produce for review any record required by the Commissioner “[d]espite . . . any privilege of the law of evidence”: s. 56(3). This, in my view, is an explicit legislative grant of power which should be respected, not evaded.

[73] Whatever other principles and presumptions of statutory interpretation are engaged, statutory interpretation must be anchored in the words chosen by the legislature read in their full context. In my respectful view, to hold as my colleague Justice Côté would that solicitor-client privilege is a “legal privilege” but not a “privilege of the law of evidence” in *FOIPP* is not justified by the text or context of the legislation or by the principle of interpretation that the legislature must use clear language to authorize any abrogation of solicitor-client privilege. Rather, the words of the enactment, read in context, evince a clear intention to permit the Commissioner, subject to judicial review, to order production for inspection of records over which solicitor-client privilege is claimed. To hold otherwise abandons the modern approach to statutory interpretation repeatedly endorsed by the Court and, under the guise of “restrictive” interpretation, undermines legislative policy choices which, absent constitutional constraint, legislatures are entitled to make.

II. Issues

[74] There are three questions for decision:

1. What is the appropriate standard of review?
2. Does *FOIPP* abrogate solicitor-client privilege?

3. Did the Commissioner's delegate make a reviewable error in ordering production?

III. Analysis

A. *What Is the Appropriate Standard of Review?*

[75] For the purposes of my reasons, I will assume without deciding that the correctness standard of review applies to the question of whether the Commissioner may order production of a record over which solicitor-client privilege is claimed in order to determine whether the claim of privilege is well founded.

B. *Does FOIPP Abrogate Solicitor-Client Privilege?*

(1) Introduction

[76] In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, this Court held that “legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively”: para. 11. Solicitor-client privilege cannot be “abrogated by inference” and “[o]pen-textured language governing production of documents will be read *not* to include solicitor-client documents”: para. 11 (emphasis in original); see also *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at paras. 23-25.

[77] While this, of course, is an important holding, we must note that what was in issue in *Blood Tribe* has virtually nothing in common with this appeal. The contention in *Blood Tribe* was that the Privacy Commissioner, by virtue of general language authorizing the production of records, had routine access to privileged material even when privilege was properly claimed: paras. 16-17. That is the context in which the Court held that broad language must be read restrictively and that open-

textured production powers should not be read as permitting production of privileged material. The Court expressly accepted the submission of the Attorney General of Canada that the ordinary and grammatical meaning of the words, taken in their full and proper context, did not support the Privacy Commissioner’s position in that case: para. 26. Moreover, the Court noted that, in contrast to the Privacy Commissioner’s powers under the federal [Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5](#) (“[PIPEDA](#)”), which were in issue in *Blood Tribe*, the [Privacy Act, R.S.C. 1985, c. P-21](#), used “explicit language granting access to confidences”: para. 28. The [Privacy Act](#) language was, in relevant respects, identical to the language in the Alberta statute before us in this case: the [Privacy Act](#) authorized the Privacy Commissioner to examine any information “[n]otwithstanding . . . any privilege under the law of evidence” [s. 34\(2\)](#)).

[78] When applying presumptions of legislative intent, we do not abandon the modern approach to statutory interpretation to which the Court has been for so long and so consistently committed. Consequently, determining whether the legislature has expressed with sufficient clarity the intent to rebut a presumption of legislative intent requires the application of the modern approach to statutory interpretation. By focusing the analysis on the modern approach to statutory interpretation to determine if the legislature intended to displace a presumption, one broadens the inquiry from a focus on the plain meaning of the text to one that considers the entire context in which the words of the statute find themselves. General language in relation to production, as required by *Blood Tribe*, will be read restrictively to exclude abrogation by inference. But the “modern” approach is used to determine whether the statutory text, read in its full context, evinces with the required clarity the intention to abrogate privilege.

[79] In my opinion, the legislature expressly provided for the abrogation of solicitor-client privilege in s. 56(3) of *FOIPP* by authorizing the Commissioner to order production of records over which solicitor-client privilege is asserted in order to determine whether the claim is well founded. This is apparent on the grammatical and ordinary meaning of the words “any privilege of the law of evidence”. This interpretation is also supported by the contextual factors that are to be

considered in statutory interpretation pursuant to *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. This conclusion is, in my respectful view, fully consistent with *Blood Tribe*: this interpretation does not abrogate privilege by inference, but with unmistakable clarity by virtue of express legislative direction.

(2) Grammatical and Ordinary Meaning of “Any Privilege of the Law of Evidence”

[80] Section 56(3) reads:

(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) or (2).

[81] The respondent argues that “any privilege of the law of evidence” does not include solicitor-client privilege because solicitor-client privilege is not simply an evidential privilege, but also a substantive rule of law. While I, of course, agree that solicitor-client privilege has become a substantive — indeed, a constitutional — principle, it is also an evidentiary privilege captured by the statutory words in this context. Moreover, as I explain, what is at issue here is the evidentiary component of solicitor-client privilege.

[82] This Court has found that solicitor-client privilege is *both* an evidentiary privilege and a substantive principle. In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, Arbour J. explained that “[s]olicitor-client privilege is a rule of evidence”: para. 49. Similarly, in *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, the Court observed that the case law “establishes the fundamental importance of solicitor-client privilege as an evidentiary rule, a civil right of supreme importance and a principle of fundamental justice”: para. 34 (emphasis added). In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, Lamer J. described solicitor-client

privilege as a “rule of evidence”, which “had also since given rise to a substantive rule”: pp. 872 and 875. Solicitor-client privilege is thus both a rule of evidence and a substantive rule.

[83] Other appeal courts have arrived at this conclusion with respect to similar language in other statutes.

[84] For example, in *Newfoundland and Labrador (Attorney General) v. Information and Privacy Commissioner (Nfld. and Lab.)*, 2011 NLCA 69, 314 Nfld. & P.E.I.R. 305, the Newfoundland and Labrador Court of Appeal concluded that the words “a privilege under the law of evidence” in s. 52 of the *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, were “sufficiently clear to abrogate solicitor-client privilege, as this is a privilege recognized under the law of evidence”: para. 45. In *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127, the Federal Court of Appeal concluded that the language “any privilege under the law of evidence . . . clearly gives the Court authority to interfere with solicitor-client confidentiality”: para. 11 (emphasis deleted).

[85] This interpretation of s. 56(3) of *FOIPP* also finds support in doctrine. Professor A. M. Dodek, for example, describes solicitor-client privilege as being “part of a family of evidentiary privileges”: *Solicitor-Client Privilege* (2014), at p. 26. He observes that

[i]t would be absurd to assert that such language [any privilege under the law of evidence] excludes solicitor-client privilege because it has become more than a privilege under the law of evidence. Consistent with the modern approach to statutory interpretation, “privilege under the law of evidence” should be given a consistent approach throughout the statute book. Unless it indicates otherwise, this phrase should be interpreted to include solicitor-client privilege. [Footnotes omitted; p. 379.]

[86] In *The Law of Privilege in Canada* (loose-leaf), R. W. Hubbard, S. Magotiaux and S. M. Duncan note that “solicitor-client privilege has now been extended to a substantive legal right”: p. 11-4.1 (emphasis added). The authors also note that “privileges such as solicitor-client are more than

evidentiary rules that preclude the admissibility of evidence; they also bestow substantive rights”: pp. 1-3 (emphasis added). Similarly, in *The Law of Evidence in Canada* (4th ed. 2014), S. N. Lederman, A. W. Bryant and M. K. Fuerst explain that “solicitor-client privilege was long considered to be a testimonial privilege in that it could only be asserted at trial”: p. 952. However, subsequent decisions “have extended the time when privilege may be claimed”, which is “part of the trend towards a broader concept of solicitor-client privilege”: pp. 952-53 (emphasis added).

[87] Moreover — and contrary to the position adopted by my colleague Justice Côté — it is the evidentiary privilege that is in issue here. What is claimed by the respondent is immunity from forced production by virtue of the Commissioner’s statutory powers. We are thus concerned with a claim of protection from disclosure required by legal authority, a matter falling squarely within the evidentiary privilege expressly referred to in the statutory language: Dodek, at p. 16; *Lavallee*, at paras. 13-14.

[88] The respondent points out that s. 27(1)(a) of the statute specifically includes the words “solicitor-client privilege” and that s. 56(3) does not purport to override that provision but implicitly accepts it. While the words “solicitor-client privilege” are used elsewhere in the statute, this does not detract from the interpretation of s. 56(3) that I would adopt. Section 27(1)(a) provides:

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,

[89] Sections 27(1)(a) and 56(3) of the statute perform different functions. Thus, while s. 27(1)(a) specifically refers to solicitor-client privilege, this does not mean that s. 56(3) is to be interpreted as precluding the Commissioner from ordering production of documents subject to solicitor-client privilege. In any case, s. 27 expressly includes solicitor-client privilege within the ambit of “any type of legal privilege”.

[90] Section 27(1)(a) falls under the marginal note “Privileged information” and under the division of the statute entitled “Exceptions to Disclosure”. Section 27(1) sets out a number of grounds upon which a public body can refuse to order disclosure. However, it does not provide that the Commissioner is prevented from reviewing a public body’s claim that one of these grounds for exception to disclosure properly applies. Rather, s. 27(1) provides explicit guidance to public bodies on what grounds they can assert to resist disclosure.

[91] Section 56, on the other hand, falls under the marginal note “Powers of Commissioner in conducting investigations or inquiries” and under the part of the statute entitled “Office and Powers of Information and Privacy Commissioner”. Section 56 provides what the Commissioner can and cannot do in the context of conducting an inquiry. There is nothing in this provision, or under s. 27 (1), that can be read as saying that the Commissioner is prevented from ordering the production of documents subject to a claim of solicitor-client privilege in the context of answering all questions of law and fact that arise in the course of an inquiry.

[92] I cannot accept that we should read this statute as saying that solicitor-client privilege is a type of legal privilege (as is clear from s. 27) but that solicitor-client privilege is not a “privilege of the law of evidence” (the language used in s. 56(3)). As all of the authorities make clear, solicitor-client privilege is a “privilege of the law of evidence” and all such privileges are “legal privileges”.

[93] In summary, the grammatical and ordinary meaning of “any privilege of the law of evidence” includes solicitor-client privilege. The legislature has, as required by *Blood Tribe*, used appropriate language to clearly show its intention: solicitor-client privilege is abrogated for the purposes of permitting the Commissioner to inspect documents over which privilege is claimed in order to allow the validity of the claim to be assessed.

[94] This conclusion is also supported by a number of contextual factors that I will now review.

(3) Contextual Factors

(a) *The Statutory Context Under FOIPP*

[95] As we shall see, the statutory scheme under *FOIPP* provides a detailed, self-contained process for the disclosure of information to an applicant. This statutory scheme vests the Commissioner with expansive, robust and streamlined review powers to decide whether a public body is required to disclose records. Absent the power to review a claim of solicitor-client privilege, the Commissioner would not be able to fulfill this statutory mandate. Importantly, the Commissioner’s decisions are subject to judicial review.

[96] *FOIPP*’s aim is to provide a broad right of access to information and it sets up the Commissioner, subject to judicial review, as the authority who decides whether access will be granted.

[97] This broad right of access to information is subject to defined limitations in *FOIPP*. Relevant to this appeal, for example, s. 27(1)(a) provides that the head of a public body can refuse to disclose to an applicant “information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege”.

[98] *FOIPP* also sets out the powers of the Commissioner in conducting investigations or inquiries. Section 56(1) provides that the Commissioner has “all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*”, R.S.A. 2000, c. P-39, and the powers under s. 56(2). Section 56(2) provides that the Commissioner can require “any record to be produced . . . whether or not the record is subject to the provisions of this Act”. Section 56(3), as noted above, further provides that a public body “must produce to the Commissioner” any document required under s. 56(1) and (2) “[d]espite any other enactment or any privilege of the law of evidence”.

[99] *FOIPP* protects privileged information. Section 58 specifies that “[a]nything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court”. Further, s. 59(1) states that the Commissioner and her delegates “must not disclose any information obtained in performing their duties, powers and functions under this Act” except in limited instances.

[100] *FOIPP* also describes the process for reviews and complaints. Section 65(1) provides that a person who requests access from a public body can ask the Commissioner to review “any decision, act or failure to act of the head that relates to the request”. Section 69(1) provides that, unless the Commissioner refuses to conduct an inquiry under s. 70, “the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry”. Under s. 72(1), the Commissioner, on finishing an inquiry, “must dispose of the issues by making an order under this section”. Section 72(2)(a) provides that the Commissioner can “require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access”. Finally, s. 73 provides that the Commissioner’s decision is final, although the decision is subject to judicial review.

[101] The respondent raises a contextual argument based on s. 59(4) of *FOIPP* which provided, at the relevant time:

(4) The Commissioner may disclose to the Minister of Justice and Attorney General information relating to the commission of an offence against an enactment of Alberta or Canada if the Commissioner considers there is evidence of an offence.

[102] The respondent submits that if s. 56(3) empowers the Commissioner to order production of material over which solicitor-client privilege is asserted, then it would follow that s. 59(4) would allow the Commissioner to share that privileged information with the Minister of Justice and Attorney General, if the Commissioner thought that it contained evidence of an offence.

[103] This submission must be rejected: it contradicts rather than supports the respondent's position on s. 56(3). The respondent maintains that the statutory language of s. 56(3) is not clear enough to abrogate privilege because it refers only to any privilege of the law of the evidence. But then the respondent claims that s. 59(4), which makes no mention of privilege at all, means that the Commissioner may share privileged information if it discloses evidence of an offence. That interpretation is contrary to the basic and unchallenged principle that clear language is needed to abrogate privilege. There is nothing in the general language of s. 59(4) or the surrounding statutory context that supports an interpretation allowing the abrogation of solicitor-client privilege through disclosure by the Commissioner to the Minister of Justice or the Attorney General. Section 59(4) contributes nothing to the proper interpretation of s. 56(3).

[104] The statutory scheme, therefore, unambiguously supports the view that the legislature intended the Commissioner to have the powers required to decide whether or not records should be produced by a public body — including ruling on claims of privilege — subject to judicial review of the exercise of those powers.

(b) *The Statutory Scheme at Issue in Blood Tribe*

[105] I have already briefly mentioned how *FOIPP* is markedly different, in relation to the review of claims of solicitor-client privilege, from the legislation that was the subject of the Court's decision in *Blood Tribe*. It will be worthwhile to expand on this point.

[106] In *Blood Tribe*, this Court noted a number of concerns with the statutory scheme established under [PIPEDA](#) in concluding that the statute did not abrogate solicitor-client privilege, namely:

- A court's power to review disputed claims of privilege derived "from its power to adjudicate disputed claims over legal rights", which the Privacy Commissioner did not have: para. 22.

- The Privacy Commissioner could become “adverse in interest to the party whose documents she wants to access”, which is not true of a court. The Privacy Commissioner could take a resisting party to court, and could also decide to share compelled information with prosecutorial authorities: para. 23.
- The language granting the power was expressed in general language and it was the “generality of the language . . . which does not advert to issues raised by solicitor-client privilege” that shows the importance of the principle against abrogation of privilege by inference: para. 26 (emphasis deleted).

[107] The statutory scheme at issue in this appeal does not give rise to these concerns.

[108] First, *FOIPP* gives the Commissioner adjudicative powers. Section 69(1) of the legislation provides that the Commissioner “must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry”. If the Commissioner is deprived of the power to order production of documents to review a claim of solicitor-client privilege, the Commissioner is clearly not able to “decide all questions of fact and law”. The legislative history of the statute, discussed below, also supports a finding that the legislature vested the Commissioner with adjudicative powers.

[109] As Professor Dodek observes, in light of *Blood Tribe*, conferring adjudicative powers on the Privacy Commissioner is a key factor in finding that a statute allows for the abrogation of solicitor-client privilege: p. 368. As he notes, “*Blood Tribe* itself suggests that privacy or information commissioners performing adjudicative functions are empowered to access allegedly privileged documents in order to adjudicate privilege claims”: p. 377. Professor Dodek further maintains that “an adjudicative body must be taken to have the power to determine privilege claims as part of its adjudicative functions”: p. 369. He uses as an example the Federal Court, which is a statutory court

yet has no express power to abrogate solicitor-client privilege. He suggests that the power to adjudicate privilege claims “is part of the power of adjudication”: p. 369.

[110] Second, the Commissioner does not become adverse in interest to a party in the sense described in *Blood Tribe*. Under s. 15 of [PIPEDA](#), the Privacy Commissioner may appear before the Federal Court on behalf of the complainant. There is no similar provision under the statute at issue here. While the Commissioner can be named as a party in the judicial review, the Commissioner is not appearing *on behalf of* the complainant in such a context.

[111] Third, the language used in s. 56(3) is not “[o]pen-textured language governing production of documents” as was the provision in issue in *Blood Tribe*: para. 11. On the contrary, s. 56(3) expressly provides that the power to order production applies notwithstanding any privilege of the law of evidence. Further, accepting that solicitor-client privilege is both a legal privilege *and* a substantive principle, the use of the words “solicitor-client privilege” under s. 27(1) does not mean that the language “any privilege of the law of evidence” excludes solicitor-client privilege. On the contrary, the statutory language states that solicitor-client privilege is included in the general term “any type of legal privilege”.

[112] In conclusion, the statutory context here demonstrates that the legislature intended for the abrogation of solicitor-client privilege. None of the factors listed in *Blood Tribe* as weighing against a finding that the statute abrogated solicitor-client privilege is in play here.

(c) *Legislative History of FOIPP*

[113] While the legislative history reveals very little as to the specific intention of the legislature with regards to the issue of whether the Commissioner can order the production of documents subject to solicitor-client privilege under s. 56(3), the debates leading up to the enactment of the first version of the legislation show that the legislature intended the Commissioner to have

robust adjudicative powers^[1] and that this adjudicative process was to be streamlined to ensure accessibility and reduce delay.^[2] This further supports an interpretation of s. 56(3) as abrogating solicitor-client privilege.

(d) *Parallel Legislation*

[114] Legislation in other jurisdictions dealing with similar subject matters — sometimes referred to as parallel legislation — can be a helpful part of the legislative context: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§13.41 to 13.51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paras. 57-60. For example, it is generally desirable to have a consistent interpretation of similar language used in statutes in different Canadian jurisdictions dealing with the same subject matter: see, e.g., *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 195. In this case, the parallel British Columbia legislation sheds some light on the interpretative issue at hand.

[115] The British Columbia statute provides, in terms nearly identical to s. 56(3) of the Alberta legislation, that “[d]espite . . . 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)”: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 44 (3). Section 44(1)(b) authorizes the Commissioner to “make an order requiring a person to . . . produce for the commissioner a record in the custody or under the control of the person”. Section 44(2)(a) permits the Commissioner to apply to the Supreme Court of British Columbia for an order “directing a person to comply with an order made under subsection (1)”. Note that the power of the court under s. 44(2)(a) is limited to “directing a person to comply with an order made under subsection (1)”, that is *an order of the Commissioner*. Thus, it is the Commissioner’s order that the court is permitted to enforce under s. 44(2).

[116] The statute was amended in 2003 to provide, at s. 44(2.1), that, where a record subject to solicitor-client privilege is produced to the Commissioner at the Commissioner's request or "under subsection (1)", the solicitor-client privilege of the record is not affected by the disclosure: *Freedom of Information and Protection of Privacy Amendment Act, 2003*, S.B.C. 2003, c. 5, s. 15; and see *Public Inquiry Act*, S.B.C. 2007, c. 9, s. 76, amending s. 44 of the *Freedom of Information and Protection of Privacy Act*, but not in relevant respects. An order under s. 44(1) is, as noted, an order of the Commissioner to produce a record. In other words, the amendment provides that production of a record subject to solicitor-client privilege as ordered by the Commissioner does not constitute a waiver of the privilege.

[117] The premise of the amendment — and this is the important point — is that records subject to solicitor-client privilege fall within the Commissioner's powers under s. 44(1) and (3) to order production notwithstanding "any privilege of the law of evidence". Otherwise, the amendment dealing with waiver of solicitor-client privilege would be meaningless in relation to records ordered produced by the Commissioner under s. 44(1). The amendment (s. 44(2.1)) refers specifically to solicitor-client privileged records that a person "discloses . . . at the request of the commissioner, or under subsection (1)". The legislature must have assumed that s. 44(1) permits the Commissioner to require production of solicitor-client privileged records. Otherwise, there could be no record subject to solicitor-client privilege disclosed to the Commissioner under s. 44(1) to which the amendment could refer.

[118] This amendment thus makes it clear that the British Columbia legislature, in requiring records to be produced to the Commissioner notwithstanding "any privilege of the law of evidence" in s. 44(3), assumed that phrase to refer to records subject to solicitor-client privilege. This seems to me to answer Justice Côté's contention that the expression "privilege of the law of evidence" is not sufficiently "clear, explicit and unequivocal" to refer to solicitor-client privilege: para. 44.

[119] The appellant's position is that the expression "any privilege of the law of evidence" excludes solicitor-client privilege in *FOIPP*. But the fact that the same expression in the parallel British Columbia legislation clearly *includes* solicitor-client privilege adds credence to the view that the phrase includes solicitor-client privilege in *both* statutes. And we should reflect carefully on the implications of holding, as Justice Côté would, that identical words in two pieces of legislation dealing with the same subject matter both do and do not refer to solicitor-client privilege, depending on drafting nuances that reveal no difference in substance.

(4) Conclusion

[120] The grammatical and ordinary meaning of the language of s. 56(3) of the legislation, the statutory context and the legislative history all support the conclusion that the legislature expressed a clear intention to allow the Commissioner and his or her delegates to order the production of documents subject to solicitor-client privilege in the course of an inquiry in order to assess the claim of privilege.

C. *Did the Commissioner's Delegate Make a Reviewable Error in Ordering Production?*

[121] Having found that s. 56(3) of *FOIPP* allows the Commissioner to abrogate solicitor-client privilege, we must decide whether the Commissioner's delegate made a reviewable error by ordering production of the documents subject to a claim of solicitor-client privilege in the circumstances. This Court's jurisprudence imposes a requirement that solicitor-client privilege should only be abrogated when it is absolutely necessary to do so in order to achieve the ends sought by the enabling legislation. As Binnie J. noted in *Blood Tribe*, "[e]ven courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue": para. 17.

[122] The University submitted a sworn affidavit by the Commissioner in August 2010. In the affidavit, the Commissioner swore that University Legal Services and external legal counsel advised various University officials about the applicant's employment history with the University. She swore that she was advised by the University's General Counsel and believed that solicitor-client privilege had been asserted over the communications given and received by the University lawyers in respect of this matter. Attached as an exhibit to the affidavit was a chart identifying the page numbers over which solicitor-client privilege was being asserted. Nothing other than page numbers described these documents.

[123] The following day, the respondent filed written submissions with the Commissioner. The University submitted that it was claiming solicitor-client privilege over records involving the University's General Counsel and the University's external legal counsel. The University reproduced the chart of page numbers subject to solicitor-client privilege, submitting that they were communications involving legal counsel which were being withheld on the basis of solicitor-client privilege.

[124] The Commissioner's delegate sent the respondent a letter requesting further information and evidence on the privilege issue in September 2010. The delegate asked the respondent to complete the record form for each record or to provide information requested in the record form in another format. In response, the University's Provost and Vice-President (Academic) filed a letter with the Commissioner. In the letter, he explained that the applicant had started a multi-million dollar lawsuit against the University, which was being vigorously defended. He noted that the "communication between the University of Calgary and its legal advisors" was the "subject matter of solicitor-client privilege as recognized in the common law for centuries, by the Supreme Court of Canada in the *Blood Indian Tribe* decision . . . and also in Section 27 of the FOIP Act". He also affirmed that the University would not waive privilege on the records identified by the Commissioner in her affidavit.

[125] The University's external counsel also filed a letter with the Commissioner. In the letter, he stated that the "University must defend itself against the multiple legal matters commenced by [the applicant] and in so doing, must rely on solicitor-client privilege to ensure that communications involving the University General Counsel and its external counsel, for the purposes of giving advice and understanding the issues, remain confidential".

[126] The Commissioner's delegate required the University to produce the records over which solicitor-client privilege was claimed. The delegate explained that production was required because the University had failed to provide adequate evidence of a claim of solicitor-client privilege.

[127] The appellant conceded in the hearing before this Court that the University's claim of privilege complied with the requirements of Alberta civil litigation practice at the time, which was governed by *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81. While I understand that these requirements have since evolved in light of the subsequent decision by the Alberta Court of Appeal in *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, 580 A.R. 265, it was, in my view, a reviewable error for the Commissioner's delegate to impose a more onerous standard on the University in relation to its assertion of privilege than that applicable in civil litigation before the courts. This conclusion is reinforced by the fact that the evidence filed with the Commissioner met the three-part test set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. The evidence — in particular the letter by the University's external legal counsel — clearly asserts that the documents are communications between solicitor (the University's external legal counsel) and client (the University's General Counsel, on behalf of the University); which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

IV. Disposition

[128] The express language and the full context of s. 56(3) of *FOIPP* demonstrate that the legislature intended to abrogate solicitor-client privilege to the extent of permitting the Commissioner

to order production of records over which solicitor-client privilege is asserted when necessary to adjudicate the validity of that claim. However, the Commissioner made a reviewable error by ordering production in the face of the evidence submitted in relation to the claim of privilege.

[129] I would dismiss the appeal with costs to the University throughout.

The following are the reasons delivered by

[130] ABELLA J. — Most legal decisions made by tribunals touch on important legal questions, such as limitation periods in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, or estoppel in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616. They have been found nonetheless to fall within the reasonableness test created in *Dunsmuir* for adjudicators applying their expertise in interpreting their own specialized mandates. We have not, before this case, excavated the legal concept from its statutory context in order to give it the singular stature *Dunsmuir* says attracts correctness.

[131] This Court has decided six cases in recent years involving disclosure decisions by Information and Privacy Commissioners. In two of them — *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 — there was no reference to the standard of review. In the four remaining — *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674; *John Doe v. Ontario (Finance)*, [2014] 2 S.C.R. 3; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815 — the standard of review was held to be reasonableness. In the 2010 case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, a Commissioner's decision was reviewed on the reasonableness standard, even though the issue involved the disclosure of documents covered by solicitor-client privilege.

[132] In each case, a Commissioner was interpreting his or her home statute. Under *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and its progeny, that means the standard of review is reasonableness unless the question raised falls into one of the categories to which the correctness standard applies, such as questions of central importance to the legal system as a whole which are outside the tribunal's expertise.

[133] Despite this clear lineage, we now find ourselves being asked to depart from what has been the accepted path for Information and Privacy Commissioners applying their specialized expertise in interpreting their own statutes, including when solicitor-client privilege is at issue, and asked to follow a new route for no discernible reason.

[134] Solicitor-client privilege is neither more nor less important now than it was when we decided all of the previous cases under a reasonableness standard. That standard applied because, as here, the issue, while important, was well within the statutory mandate the Commissioner works with on a daily basis. It falls, in other words, within her expertise.

[135] The Commissioner's mandate is to monitor the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, and ensure that its purposes are achieved. The *Act* gives individuals access to certain types of information held by public bodies, subject to specific exceptions. One of those exceptions is solicitor-client privilege, as set out in s. 27(1)(a) of the *Act* which states:

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,

It seems to me to be logically questionable to conclude that even though the legislature has given the Commissioner the express mandate to consider the application of solicitor-client privilege, it is

nonetheless deemed to be outside her expertise. Such an approach inexplicably eliminates the conjunctive “and” from the *Dunsmuir* test that requires that the issue be both of central importance to the legal system *and* outside the expertise of the adjudicator. It also has the disruptive potential for rendering meaningless the presumption of deference to home statute expertise.

[136] Moreover, she is not being asked to explain the content of solicitor-client privilege for the whole legal system, she is being asked to apply it in the context of one provision — s. 56(3) — of the *Freedom of Information and Protection of Privacy Act*, her enabling legislation. This is classic “reasonableness review” territory.

[137] In my view, however, the Commissioner’s decision to order disclosure was unreasonable because it did not sufficiently take into account how solicitor-client privilege works or why (see *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809; *Canada (National Revenue) v. Thompson*, [2016] 1 S.C.R. 381; and *Blood Tribe*). As noted by Justices Côté and Cromwell, even if s. 56(3) had allowed the Commissioner to order production of documents protected by solicitor-client privilege, the University of Calgary had provided sufficient justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta. The Commissioner should have exercised her discretion in a manner that interfered with solicitor-client privilege only to the extent absolutely necessary to achieve the ends sought by the *Freedom of Information and Protection of Privacy Act*.

[138] The importance and breadth of this privilege should have framed the Commissioner’s interpretation of s. 56(3) to preclude disclosure. Because it did not, I agree that the decision should be set aside.

Appeal dismissed with costs.

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Solicitors for the respondent: DLA Piper (Canada), Calgary.

Solicitors for the intervener the Law Society of Alberta: de Villars Jones, Edmonton.

Solicitors for the intervener the British Columbia Freedom of Information and Privacy Association: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitors for the intervener the Information and Privacy Commissioner for British Columbia: Miller Thomson, Calgary.

Solicitors for the intervener the Information and Privacy Commissioner for the Province of Newfoundland and Labrador: Lewis, Sinnott, Shortall, St. John's.

Solicitors for the intervener the Advocates' Society: Peacock Linder Halt & Mack, Calgary.

Solicitors for the intervener the Federation of Law Societies of Canada: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Canadian Bar Association: Dunphy Best Blocksom, Calgary; McLennan Ross, Calgary.

Solicitors for the interveners the Information Commissioner of Canada, the Privacy Commissioner of Canada, the Manitoba Ombudsman, the Northwest Territories Information and Privacy Commissioner, the Nova Scotia Information and Privacy Commissioner [Review Officer], the

Nunavut Information and Privacy Commissioner, the Saskatchewan Information and Privacy Commissioner and the Yukon Ombudsman and Information and Privacy Commissioner: Goldblatt Partners, Toronto; Office of the Privacy Commissioner of Canada, Gatineau; Office of the Information Commissioner of Canada, Gatineau.

Solicitors for the intervener the Criminal Lawyers' Association: Stockwoods, Toronto.

[1] On April 11, 1994, Mr. Klein, who was the Premier of Alberta at the time, observed that “the commissioner will have absolute authority. If any member or if any department head or official refuses to release information and an appeal is then made to the commissioner and the commissioner says, ‘You must release that,’ then that must be done” (*Alberta Hansard*, 2nd Sess., 23rd Leg., at p. 1052). Mr. Rostad agreed, noting: “The Premier is absolutely correct that the commissioner does have adjudicative powers, that he can mandate a ruling, and in fact there is appeal to the Court of Appeal or Queen’s Bench only when the commissioner is head of a particular department himself, which happens to be the information and privacy department or section” (p. 1052 (emphasis added)).

[2] Dr. Massey, on April 18, 1994, observed that the all-party panel that produced a report of recommendations to the legislature suggested that “there should be no general power of appeal from the decision of the commissioner, only limited power of judicial review if it were alleged that the commissioner had exceeded his or her jurisdiction” (*Alberta Hansard*, 2nd Sess., 23rd Leg., at p. 1239). Dr. Massey was concerned with a provision in the bill creating a right of appeal to the Queen’s Bench judge as an adjudicator. He thought this was problematic because “it allows the government to delay compliance with an order to disclose information, as we have seen with the federal Information Commissioner” (p. 1239). Similarly, on that same date, Mr. Kirkland observed that a right to appeal to the Queen’s Bench as a judge or adjudicator created two problems: “It allows a delay as far as being forthcoming with the information, which is incorrect as timely submission of the information is extremely important, and that delaying tactic should not be available. The other thing it does is that it has a tendency to drive up the cost of extracting information. If a private citizen has to pay the cost to withstand the appeal of a government that doesn’t want to release information, then that private citizen will endure considerable expense, and that in itself is a deterrent” (p. 1240). On May 5, 1994, Mr. Dickson discussed proposed amendments to the bill. He observed that the all-party panel clearly recommended to the government “that there would be no right of appeal from a decision of the commissioner because in places where there is that right of appeal, we’ve seen abuse, we’ve seen delay, we’ve seen costs which become a significant barrier to Albertans getting access” (p. 1752). He notes further on, in response to the proposed amendment which he thinks addresses the concern about a right to appeal, “If there’s ever a question of reviewing this at some point and somebody gets into looking at *Hansard*, they will see that this was clearly the intention: that the only right of review is if the complaint or the concern relates to something that the commissioner does within his own small office or department. That’s the only time that would apply” (p. 1752).