

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: PRIVACY COMMISSIONER'S DECISION TO ORDER DISCLOSURE WAS UNREASONABLE AS IT DID NOT TAKE INTO ACCOUNT SOLICITOR-CLIENT PRIVILEGE

Administrative law – Decisions of administrative tribunals – Privacy commissioner – Freedom of information and protection of privacy – Disclosure of records – Public bodies – Solicitor-client privilege – Statutory interpretation; Judicial review – Compliance with legislation – Standard of review – Correctness – Privilege and immunity

[Alberta \(Information and Privacy Commissioner\) v. University of Calgary](#)

Freedom of information legislation that required a public body to produce records to the Information and Privacy Commissioner “despite...any privilege of the law of evidence” was not sufficiently clear and precise to set aside or permit an infringement of solicitor-client privilege.

[2016] S.C.J. No. 53

2016 SCC 53

Supreme Court of Canada

November 25, 2016

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

A plaintiff brought a claim for constructive dismissal against her former employer and made a request for records about her under s. 7 of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“*FOIPP*”). The respondent, and former employer, refused to produce records claiming solicitor-client privilege. A delegate of the Information and Privacy Commission of Alberta issued a Notice to Produce Records (the “Notice”) to the respondent under s. 56(3) of *FOIPP*, which requires a public body to produce records to the Commissioner “despite...any privilege of the law of evidence”. The respondent applied for judicial review of the delegate’s decision to issue the Notice.

Underlying Decisions

The court of first instance concluded that the appropriate standard of review is correctness. As for the delegate’s decision to issue the Notice, the court held that it minimally interfered with confidentiality and privilege and that the delegate correctly issued the Notice.

The Court of Appeal allowed the respondent’s appeal concluding that the language of s. 56(3) was not sufficiently specific to evince clear legislative intent that the Commissioner or its delegate may infringe solicitor-client privilege. Therefore, the Court of Appeal concluded that s. 56(3) does not authorize the Commissioner or its delegate to issue the Notice to compel production when solicitor-client privilege is claimed.

Supreme Court of Canada

The Supreme Court of Canada affirmed that the applicable standard of review is correctness; in part because the Commissioner did not have particular expertise with respect to solicitor-client privilege and because the issue in this case had wide implications on other statutes.

In addressing the key issue, whether s. 56(3) of *FOIPP* (which requires a public body to produce the Commissioner records “despite...any privilege of the law of evidence”) allows the Commissioner or its delegates to review documents that the respondent claims are protected by solicitor-client privilege. In dismissing the appeal, the court recognized that legislatures may pass statutes that pierce solicitor-client privilege in circumstances where the language of the provision is explicit and the legislative intent is clear and unambiguous. However, s. 56(3) was not sufficiently explicit nor did it evince a clear and unambiguous legislative intent.

Justice Cromwell agreed that the appeal must be dismissed; however, he disagreed that the Commissioner lacked the authority to compel production when solicitor-client privilege is claimed. The express language and context of s. 56(3) of *FOIPP* indicated that the legislature intended to abrogate solicitor-client privilege to permit the Commissioner to order production to adjudicate the validity of a claim. Despite that, Justice Cromwell held that the Commissioner made an error by ordering production while evidence was submitted in relation to the claim of privilege.

Justice Abella gave partially concurring reasons holding that the appropriate standard of review was reasonableness but concluded that the Commissioner’s decision to order disclosure was unreasonable as it did not take into account solicitor-client privilege.

This case was digested by [Jackson C. Doyle](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at jdoyle@harpergrey.com or review his biography at <http://www.harpergrey.com>.