



November 25, 2020

The Honourable David B. Orsborn, Committee Chair
Access to Information and Protective of Privacy Act
Statutory Review 2020
3rd Floor, Beothuck Building, 20 Crosbie Road
St. John's, NL A1B 3Y8

Dear Mr. Justice Orsborn:

Thank you for the opportunity to provide input into a review of the Access to Information and Protection of Privacy Act. (ATIPPA). Our municipality has undertaken an extensive review of the legislation and submit the following comments and recommendations.

Firstly, a line by line review of all sections of the Act was conducted. A summary of our recommendations/proposed changes is attached in Schedule "A".

As a public body with limited financial resources, there are often administrative challenges in processing ATIPPA requests. With the unpredictability of the volume, number and timing of ATIPPA requests many municipalities do not have the financial capability to dedicate a full-time staff person to solely deal with the responsibilities of the Act. In the case of Corner Brook, the City Clerk is appointed as ATIPPA Coordinator and the City Manager is appointed ATIPPA Head. While we fully agree with the principles of ATIPPA we would recommend that there be a balance between the right of access and the daily operation of public bodies. In this regard we would recommend consideration that more provisions be put in place to address competing priorities faced by public bodies, particularly municipalities. Some suggestions include:

1. Limit the number of concurrent requests to allow for a reasonable service workload
2. Determine clearer standards for vexatious appeals.
3. If an applicant to an ATIPPA request is involved in litigation against a public body they should be prohibited from submitting an ATIPPA request on the same topic.
4. That consideration be given to extending the time limits for responding to requests.

In regards to fees, we fully concur that fees should not be a barrier to access, however we do believe that consideration be given to implementing a fee structure for chargeable time. When processing an ATIPPA request considerable time is allocated to reviewing the records, consulting with the applicant, third parties and/or within the public body. For larger ATIPPA requests with hundreds of pages of documents it is very time consuming reviewing, vetting and redacting documents. Perhaps a fee structure can be implemented based upon the number of pages responsive to the request.

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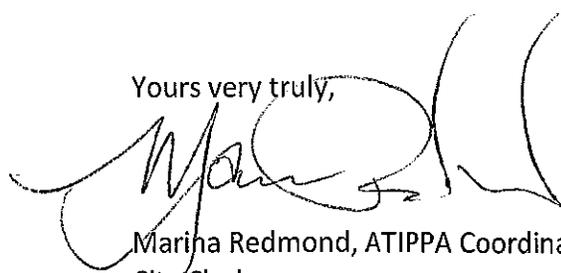


On an annual basis the City of Corner Brook typically processes in the vicinity of 12 to 15 Atippa requests. The magnitude of the applications vary with some taking a minimum amount of time and others can be quite challenging and consume a significant amount of staff time. The staff from the ATIPPA and OIPC offices have been valuable resources in providing guidance in applying the legislation. Where possible I would encourage that the provincial government provide additional financial and training support so that municipalities have the adequate resources to respond to ATIPPA requests as efficiently as possible without passing on the cost to the public. As a suggestion, it would be beneficial if municipalities could avail of IT/IM solutions through the provincial government central purchasing branch (Public Procurement Agency). While this issue may be outside the scope of the statutory review, it does highlight some of the challenges public body employees face in processing requests. Many municipalities do not have in-house expertise in the information management field. I believe some of the challenges with processing ATIPPA requests could be reduced if all public bodies were equipped with the resources to manage ATIPPA requests.

Attached to our submission is a judgement of Justice Garrett Handrigan in regards to a court case between the City of Corner Brook and the Privacy Commissioner. This particular case was a very contentious issue between our organization and the OIPC. The City of Corner Brook was very fortunate to have a lawyer on staff to challenge the OIPC decision. Many times smaller public bodies do not have the benefit of a solicitor and solely rely on the advice/recommendations of ATIPPA and OIPC staff. It is important that provisions are in place to protect public body staff who may not have the qualified staff resources to fully interpret the Act. In regards to Justice Handrigan's ruling we also recommend that Section 97 and 98 of the Act be amended to reflect his judgement. The amended sections should include a provision that when claiming client solicitor privilege or litigation brief privilege that the head of the public body or its solicitor be required to provide to the OIPC a letter or affidavit listing the documents, it claims s.30 privilege and why, and if the OIPC is not satisfied then an application could be brought to court for judicial review of the documents.

Thank you again for the opportunity to provide comments on the ATIPP Act. If you require clarification on any part of our submission we would certainly be willing to discuss in order to provide more context to our comments.

Yours very truly,

A handwritten signature in black ink, appearing to read "Marina Redmond", written over a white background.

Marina Redmond, ATIPPA Coordinator
City Clerk

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**City of Corner Brook Submission
ATIPPA Statutory Review 2020
Review of Sections of the Act**

Schedule A

s.2-(i)	Definition of employee needs to be clarified to accord with common law as to when a person is an employee versus an independent contractor. It should only apply to persons retained under "a contract of service" with the public body (i.e. an employee) and not to persons who are retained under a "contract for services" (i.e. an independent contractor).
s.2 (u)	Suggest an exception for -- "personal information" -- that generally states if the information is publicly available with the knowledge or consent of the person it is no longer "personal information." (For example if they have their name, address and phone number listed in a phone directory it is in the public domain and no longer personal information).
S.2(u) (viii) and (ix)	Both these sections are a little confusing and require clarity.
S. 2 (n)	Definition of law enforcement needs to be clarified to confirm if Municipal Enforcement Officers are included in the definition of policing.
s.3 (1) (c)	This section should be expanded to clarify protection of litigation and solicitor client privilege, as well as court files and police records. I would add to this section the protection of the administration of justice
s.3(f) (i)	The wording "advocate" is problematic. They cannot be both an unbiased and independent body conducting investigations and making findings and also be an "advocate". I would change the wording so the oversight agency has the role to balance interests of parties with regard to access to information; protection of privacy and exemptions to those privileges as well as addressing administrative burdens; etc., of public bodies in answering requests. It comes down to a fair and equitable interpretation of the provisions of the ATIPPA .
s.15 & 16	The timelines are incredibly short for larger requests. We would recommend amending to provide a right to more time based on such factors as number of pages, amount of vetting, need to notify third parties, whether exceptions may apply, etc. Perhaps 20 days for every 100 pages of responding documents would be a good starting point.
s.21	The Commission should have guidelines that apply to all these requests to make their responses consistent to all public bodies and all requests.

	Particularly 21 (a) “unreasonable interference” and 21(c) (iii) “excessively broad” are quite vague need to be better defined in the Act or have corresponding guidelines for their use.
s.23	The Commissioner should have guidelines as to certain circumstances when it would be considered “reasonable and necessary” for example number of pages in responding docs, exemptions applicable, TP notices/permissions for release required, vetting required, etc.
s.25 (2)	Public Body should be able to charge time for reviewing/vetting documents, not just “locating” them. Being able to charge fees will at least recoup some of the costs of the obligations imposed on municipalities under this Act.
s.33	workplace investigation – Should highlight that this provision to provide does not supersede other exemptions to provision of information , particularly the exemptions in s.30, 37 & 40.
s.39(1)	Recommend adding clarification at the end of the section that this provision does not apply to information provided to a public body in an open bid (or perhaps even any public procurement process) under the Public Procurement Act.
37(1a)	In a recent decision from the privacy commissioner Report 2020-012, the Commissioner ruled (paragraph 20) that public bodies cannot rely on speculation of harm that may befall on an employee. The test for section 37(1)(a) does not require an actual threat to have occurred but only a reasonable expectation that the disclosure could threaten safety. The wording in the Act seems contrary to the Commissioner’s ruling.
s.43-47	Investigation provisions need to be revamped. From our experience when we went through this process the OIPC acted as an “advocate” for the applicant, using the provisions regarding onus of proof being on the municipality to avoid their duties to conduct a formal investigation. Once they get to the investigation stage the onus should be on the OIPC to conduct a fair and impartial investigation as a thorough and unbiased truth-seeking endeavor, not as an advocate for either side. See recommendation under s.3(f) (i)
s.45 (1)	Would recommend changing “may” to “shall.”
s.50-51	Currently if a public body does not agree with OIPC recommendation it has to apply to court for a declaration to not follow the recommendation. The onus should be on OIPC to bring court application to enforce its recommendations if it so desires, without the City losing its ability to contest the OIPC recommendations.
s.56(1)	Notice of appeal should name the public body (City of Corner Brook) not the head of the public body as the respondent.

s.62	Recommend adding an exception that where information is already in the public domain there is no reason the City should not be able to collect the information when its available to other people/businesses, provided that the reason for collection is justified
s.73(4)	There should be a finite time limit for filing complaints. Commissioner should not be able to extend at their absolute discretion. I would suggest a limit of 2 years maximum. The Limitations Act would generally be 2 years for this type of matter)
s.75	Would recommend changing "may" to "shall."
s.78-80	Same issues with Sections 50-51. Onus should be on OIPC to bring matter to court if they want it enforced and a public body should not lose right to contest validity of its recommendations by not making application for declaration. Also, need to close the loop hole where OIPC framed it as a s.76 (2) recommendation so the City would have no recourse to appeal the Commissioners findings and recommendations following its formal investigation. In one case the city was involved in... the OIPC stated only s.76 (1) recommendations could be subject to review and the court agreed.... See attached.
s.86	This section indicates the commissioner has same status as deputy minister however commissioner position is locked in for 6 years. Need procedure to file & hear complaints against commissioner when there are issues during his/her tenure.
s.97, 98	These section needs to be changed to accord with the current law in relation to solicitor-client and litigation privilege. OIPC cannot demand access to review documents per Supreme Court of Canada decision <i>Alberta(Information & Privacy Commissioner) v. University of Calgary 2016 SCC 53</i> . (And of course the Supreme court of NL decision on City of Corner Brook/OIPC and Law Society 2020-NL-SC37) The section should now require the head of the public body or its solicitor to provide to the OIPC a letter or affidavit listing the documents, it claims s.30 privilege and why, and if the OIPC is not satisfied then an application could be brought to court for judicial review of the documents.



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2020 NLSC 37

Date: March 3, 2020

Docket: 201804G0170

BETWEEN:

CITY OF CORNER BROOK

APPLICANT

AND:

**OFFICE OF THE INFORMATION AND
PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR**

FIRST INTERVENOR

AND:

**THE LAW SOCIETY OF
NEWFOUNDLAND AND LABRADOR**

SECOND INTERVENOR

Before: Justice Garrett A. Handrigan

Place of Hearing: Corner Brook, Newfoundland and Labrador

Date of Hearing: November 14, 2019

Summary:

The City of Corner Brook applied for a declaration under section 50(2) of the *Access to Information and Protection of Privacy Act* that it did not have to comply with a recommendation from the Privacy Commissioner to disclose

to a complainant documents over which the City claimed solicitor-client and/or litigation privilege.

The Court agreed with the City. It found litigation privilege and solicitor-client privilege applied to the documents. However, as to litigation privilege it found that the litigation the City apprehended when it started to deal with the complainant in July 2014 is over, so the privilege has lapsed. As to solicitor-client privilege, it found that the privilege still applies, and the City is right to withhold the documents from the complainant. It ordered the parties to bear their own costs.

Appearances:

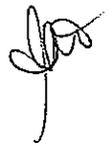
Lorilee A. Sharpe	Appearing on behalf of the Applicant
Andrew A. Fitzgerald	Appearing on behalf of the First Intervenor
Aimee N. Rowe	Appearing on behalf of the Second Intervenor

Authorities Cited:

CASES CONSIDERED: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31; *R. v. McClure*, 2001 SCC 14

STATUTES CONSIDERED: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2

TEXTS CONSIDERED: Wigmore, John Henry, *Evidence in Trials at Common Law*, vol. 8, revised by John T. McNaughton, Boston: Little, Brown 1961



REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] On August 7, 2018 the City of Corner Brook applied to this Court, for a:

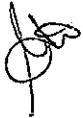
...declaration...pursuant to section 50 (2) of the *Access to Information and Protection of Privacy Act, 2015*...that the City is not required to comply with the recommendations of the Information and Privacy Commissioner (the “Commissioner”) on the grounds that the City is authorized to refuse access to the records or parts of the records in accordance with section 30 [of the *Act*].

(Paragraph 27 of the Originating Application)

[2] The City refers to “recommendations” the Commissioner made to the City that it provide Ron Jesseau, a resident of Corner Brook, with “any documentation on file in regards to an employee(s) having concerns working with Ron’s Backhoe Service or Ki’ Nap Tia’m Enterprises Inc...” (paragraph 2(b) of the Originating Application).

[3] Mr. Jesseau first asked for these records on March 5, 2018 and then followed up with a revised request the next day, on March 6, 2018. The City advised Mr. Jesseau on April 4, 2018 that it would not provide most of the records he asked for on March 6, 2018, relying on solicitor-client and/or litigation privilege; whereupon Mr. Jesseau complained to the Commissioner. The Commissioner notified the City of Mr. Jesseau’s complaint on May 1, 2018 and tried, albeit unsuccessfully, to informally resolve the disclosure issues with the City.

[4] The Commissioner investigated the City’s refusal under section 44(4) of the *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2 (“*ATIPPA*”) and issued Report A-2018-017 on July 24, 2018. The Commissioner recommended that the City provide Mr. Jesseau with all but a few of the documents he asked for; and, the Commissioner said further that the City should



“...apply [to this Court] for a declaration if the City did not wish to comply with the recommendations in the report” (paragraph 2(h) of the Originating Application).

[5] On October 10, 2018 the Commissioner gave the Court “...notice of his intention to intervene in...” the originating application that the City filed on August 7, 2018. On October 11, 2018 the Law Society of Newfoundland and Labrador also applied for leave to intervene in the application. This Court granted the Law Society leave on November 9, 2018. I heard the City’s application on November 14, 2019 and reserved my judgment until now.

THE ISSUE

[6] Should the City of Corner Brook comply with the Commissioner’s recommendation that it release most of the documents to Ron Jesseau that he requested on March 6, 2018?

THE LAW

Statute

[7] The City relies on section 50(2) of *ATIPPA*. It reads:

50(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

(a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;



(b) the head of the public body is required under this Part to refuse access to the record or part of the record...

[8] Section 50(1) of *ATIPPA*, referred to in section 50(2) reads:

50(1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

(a) grant the applicant access to the record or part of the record...

[9] The City also relies on section 30 of *ATIPPA*. It reads:

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

[10] Meanwhile, the Privacy Commissioner relies on section 33(3) of *ATIPPA*. It reads:

33(3) The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).

[11] Section 33(2) refers to "...all relevant information created or gathered for the purpose of a workplace investigation".

[12] The Commissioner says the City did a "workplace investigation" when it dealt with Mr. Jesseau. Section 33(1)(c) of *ATIPPA* defines "workplace investigation" as

33(1)(c) ... an investigation related to

(i) the conduct of an employee in the workplace,

(ii) harassment, or



(iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public which may give rise to progressive discipline or corrective action by the public body employer.

[13] In quoting from the legislation above, I have included only those parts of the sections I refer to from *ATIPPA* that are relevant to this application.

Case Law – Solicitor-Client Privilege

[14] The City claims solicitor-client privilege over all documents that the Commissioner recommends the City disclose to Mr. Jesseau. The City also believes that the Commissioner "...has taken a very narrow approach to assessing which documents qualify as solicitor-client privileged" (paragraph 19 of the City's Memorandum of Fact and Law).

[15] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, the Supreme Court of Canada dealt with solicitor-client privilege as an aspect of applications under privacy legislation. In that case, a former employee of the university claimed against the university for constructive dismissal. She filed a request with the university under the Alberta privacy legislation, asking for records the university had in its possession.

[16] The university provided some records but withheld others, claiming solicitor-client privilege over them. Alberta's Office of Information and Privacy Commissioner got involved when the employee brought an application under Alberta legislation seeking production of the records the university withheld. The Privacy Commissioner gave the university several options for dealing with the records, but the university did not comply, and the Privacy Commissioner issued a Notice to Produce under the legislation. The university did not comply with the Notice but applied to Court, as the City did here, to review the Privacy Commissioner's actions.



[17] The Alberta Court of Queen's Bench, at first instance, upheld the Privacy Commissioner's actions. The university appealed to the Alberta Court of Appeal. It set aside the trial judge's decision and found that "...the Commissioner did not have statutory authority to compel the production of records over which solicitor-client privilege was asserted" (*University of Calgary*, paragraph 13). The Privacy Commissioner appealed to the Supreme Court of Canada.

[18] Côté, J. for the majority of the Court, dismissed the appeal. He concluded that section 56(3) of the Alberta privacy legislation, "...which requires a public body to produce records to the Commissioner '[d]espite...any privilege of the law of evidence' " (*University of Calgary*, paragraph 1) did not require the public body to produce to the Commissioner documents over which solicitor-client privilege is claimed.

[19] The learned justice said of solicitor-client privilege:

- It is a "substantive rule rather than merely an evidentiary rule" (paragraph 44).
- "[S]ome even suggest that the Court has granted it ...[solicitor-client privilege] a quasi-constitutional status" (paragraph 38).
- "It is indisputable that solicitor-client privilege is fundamental to our legal system and a cornerstone of access to justice" (paragraph 34).
- Solicitor-client privilege assures a "confidentiality [without which], people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive" (paragraph 34).
- "[S]olicitor-client privilege belongs to the client, not the lawyer" (paragraph 35).
- "[T]he [Privacy] Commissioner is not an impartial adjudicator of the same nature as a court" (paragraph 36).



- “[C]ompelled 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” (paragraph 35).

[20] How to interpret statutes, particularly in determining whether statutory provisions abrogate solicitor-client privilege, is also of importance in this matter. Of statutory interpretation, especially in this context, Côté, J. had this to say in *University of Calgary*:

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.

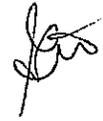
...[I]t is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision actually does so. Such intent cannot be simply inferred from the nature of the statutory scheme or its legislative 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”: paragraph 28, (quoting from paragraph 25 of *Canada (National Revenue) v. Thompson*, [2016] 1 SCR 381).

[21] The language in question must be read:

“...in the context of the statute as a whole [to see if it] supports the conclusion that the legislature did not intend to set aside solicitor-client privilege” (paragraph 51 of *Alberta v. University of Calgary*).

[22] At paragraph 60 of *University of Calgary*, it states:

...[P]arallel 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.



[23] At paragraph 29 of *University of Calgary*, it states that:

...the modern approach to statutory interpretation will still be invoked "...to interpret words purportedly abrogating [solicitor-client] privilege.

Case Law – Litigation Privilege

[24] The Supreme Court of Canada dealt with litigation privilege in *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52. While conducting an inquiry into a claim's adjuster, the assistant syndic of the Chambre de l'assurance de dommages de Quebec, instructed Aviva Insurance to send her one of its insured's complete file. The syndic relied on legislative authority for her request.

[25] Aviva Insurance produced some documents from the insured's file but withheld others, claiming either solicitor-client privilege or litigation privilege. The syndic applied to the Quebec Superior Court for a declaratory judgment to deal with Aviva Insurance's privilege claim. In court, the syndic conceded that Aviva Insurance could assert solicitor-client privilege against her, but she maintained that litigation privilege did not apply.

[26] The Superior Court concluded that the legislation on which the syndic relied could not abrogate litigation privilege in the absence of an express provision, which the legislation on which she relied did not have. The Quebec Court of Appeal dismissed the syndic's appeal, as did the Supreme Court of Canada.

[27] In *Lizotte*, Gascon, J. wrote for the Supreme Court. Of litigation privilege, he said, amongst other things:

19 [Litigation privilege] gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples...are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts.



[28] At paragraph 22, Gascon, J. cites the Supreme Court of Canada case of *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, as follows:

22 [S]olicitor-client privilege and litigation privilege are distinguishable. ...

- The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process;
- Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends”;
- Litigation privilege applies to unrepresented parties, even when there is no need to protect access to legal services;
- Litigation privilege applies to non-confidential documents”;
- Litigation privilege is not directed at communications between solicitors and clients as such”.

[29] At paragraph 24, Gascon, J. continues from paragraph 31 of *Blank* that:

24 Solicitor-client privilege and litigation privilege also “...have some characteristics in common. For example,...the two privileges ‘serve a common cause: The secure and effective administration of justice according to law’.

31 [Litigation privilege] ...is subject to clearly defined exceptions, not a case-by-case balancing test....

33...[L]itigation privilege is a class privilege”.

36 [Litigation privilege] ...is recognized by the common law courts, and it gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation

41...[T]he exceptions that apply to solicitor-client privilege are all applicable to litigation privilege, given that solicitor-client privilege is the ‘highest privilege recognized by the courts’. These include the exceptions relating to public safety, to the innocence of the accused and to criminal communications.... They also include the exception...for ‘evidence of the claimant party’s abuse of process or similar blameworthy conduct’.



47...[L]itigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation”.

64...[L]itigation privilege, like solicitor-client privilege, cannot be abrogated by inference and...clear, explicit and unequivocal language is required in order to lift it”.

Case Law – Solicitor-Client Privilege and In-House Counsel

[30] In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, the Supreme Court of Canada left no doubt that solicitor-client privilege extends to communications between in-house counsel and her client, or as here, between the City Solicitor and City Council. Major, J. had this to say about how the privilege arises and its scope:

21. Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private practice. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that she is in-house counsel does not remove the privilege or change its nature:

[31] But the learned justice introduced this caveat:

20. Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered ...

[32] This is the law I will apply to the issue I stated earlier. I turn now to analyze that issue, starting with the background to it.

ANALYSIS

Background

[33] The City of Corner Brook maintains a hired equipment list of private contractors it calls in as needed when the demand for services exceeds its ability to meet the demand with its own fleet. Ron Jesseau owned a backhoe in 2014 and he was on the list. Rayna Luther is a professional engineer. She worked for the City of Corner Brook from 2010 to 2016. During that time, she was Assistant Director of Infrastructure & Public Works, with responsibility for all public works staff.

[34] Ms. Luther described how the call-in hired-equipment list worked, in paragraph 5 of an affidavit she filed in support of the City's application. She also noted that Mr. Jesseau complained he was getting passed over by the City and she explained why:

The City had a list of backhoes that were called in on the basis of how high their hourly rates are (lowest hourly rates being ranked highest on the call in list) and Mr. Jesseau claimed there were backhoes lower on the call in list that were wrongfully being called in ahead of him so he was seeking compensation for income lost as a result of being skipped over on the list. The list is compiled through the public tendering process and the City had been passing over Mr. Jesseau due to his inability to perform certain types of backhoe work safely and efficiently.

[35] Mr. Jesseau took various steps to inform the City, first that he was dissatisfied with their call-in practices and then that he intended to seek compensation for lost income. For example, he told Ms. Luther when he was in her office on July 21, 2014, "...that he had a lawyer and would be suing the City" (Ms. Luther's affidavit, paragraph 5).

[36] He sent an email to the Mayor on the same date:



Mr. Mayor,

Today there are three private backhoes working for the City of Corner Brook. I'm number 2 on the hire list. I haven't received a call back from the City.

Todate, I have not received a reply from my last e-mail to you and council.

I can not seek legal advice until you reply to me about my concerns.

I would appreciate a reply and I'm seeking full compensation for the hours I have lost todote.

[37] On August 1, 2014 Mr. Jesseau sent this email to the Mayor:

Mr. Mayor,

It is my understanding Mr. Keith Costello [Superintendent of Water & Sewer] have singled me out and instructed city foreman(s) to by pass me when hiring backhoes.

I understand you will be back in the city after Sunday.

I would appreciate a meeting with yourself and any city staff to ascertain why I am being passed over.

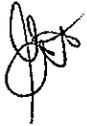
A few days ago I spoke with the city lawyer [Lorilee A. Sharpe, City Solicitor] advising that I am in the process of taking the city to court. There have been remarks made to me and other city staff that my backhoe is "an Indian backhoe, paid for by tax payers money, an he shouldn't be getting any work".

I will ask the courts to be fully reimbursed for monies lost and I will ask the Human Rights Commissioner to investigate other matters.

[38] On September 27, 2014, Mr. Jesseau sent another email to the Mayor and this time, to the members of the City Council, as well:

Att: Mr. Mayor & Council:

Mr. Mayor this is my 4th e-mail to you and council regarding my backhoe being, (number 2 on the hire list), passed over for work with the City of Corner Brook.



Last fall when I placed a bid for my backhoe hire with the City of Corner Brook my backhoe placed 4th (Ron's Backhoe Service) and I had a very busy winter.

My backhoe placed 2nd on the spring/summer list under my aboriginal company (Ki'nap Tia'm Enterprises Inc.).

Mr. Keith Costello, a city supervisor made a comments to people working under him about "the Indian backhoe". People standing near by plus the city workers heard the comment.

Bob Batstone was operating an excavator for Bill Parrott hired out to the city and working on Griffin Drive near Dr. French's property. Bob Batstone asked who was loading the material at Bartlett's for Griffin Drive. Dennis Penney replied "the Indian Backhoe". Dennis's comments mirrored Keith Costello's comments.

I have been advised by legal council to make application to Human Rights. I'm am currently writing my story to Human Rights and I would appreciate Mr. Mayor in you providing the number of hours I have been passed over during this spring and summer.

I will also be tracking further losses.

Thank you for your understanding,

Ron Jesseau.

[39] I note that the preceding emails were attached as Exhibits "A", "B" and "C" to an affidavit that Dale Park filed to support the City's application. Mr. Park noted in his affidavit that he has held various positions with the City of Corner Brook, including Director of Corporate Services or Director of Finance & Administration (same position except a name change occurred). He was also Acting City Manager from May 2018 to February 2019 and for approximately five months in 2014.

[40] It does not appear that Mr. Jesseau made any claim against the City for the income he claims he lost from being passed over on the call-in list. However, he followed up on his intention to complain to the provincial Human Rights Commission; filing two complaints, the first on March 5, 2015 and the other on April 17, 2015. The Commission dismissed the first complaint on January 23, 2019 and the other complaint on August 6, 2015.

[41] In his March 5, 2015 complaint, Mr. Jesseau alluded to the “Indian Backhoe” comment that he attributed to Keith Costello in the email he sent to the Mayor and City Council on September 27, 2014: “I believe that Mr. Costello’s attitude changed towards my business after I changed its name to reflect my ancestry. I believe his ‘Indian Backhoe’ comment is tantamount to a racial slur and I believe that his attitude towards me is the reason why I have received very few calls for business” (A copy of the complaint is attached as Exhibit “D” to Dale Park’s affidavit).

[42] On January 23, 2019, the Human Rights Commission wrote to the City to advise that Mr. Jesseau’s file was considered by:

...Commissioners at a meeting held in St. John’s on January 17, 2019. The Commission, after reviewing materials filed by the Complainant and the Respondent(s) and the Report prepared by the Commission staff, has determined that there is insufficient evidence to proceed to a Board of Inquiry.

[43] Mr. Jesseau also alleged in his April 17, 2015 complaint to the Commission that Keith Costello passed over his name on the call-in list because Mr. Costello looked upon Mr. Jesseau’s equipment as the “Indian Backhoe”. However, the focus of the April 17, 2015 complaint was a specific incident that occurred on February 7, 2015. Mr. Jesseau and his backhoe were under hire to the City for snow clearing at the time. However, Rayna Luther, Assistant Director of Infrastructure and Public Works, observed Mr. Jesseau’s backhoe parked in an area which was not on the list of areas Mr. Jesseau had been hired to clear. Ms. Luther also noted that Mr. Jesseau occupied the cab of the machine and that he was lying prone when she saw him, with his feet resting on the steering wheel.

[44] The Executive Director of the Human Rights Commission wrote to the City Solicitor for Corner Brook on August 6, 2015, advising that the Commission dismissed Mr. Jesseau’s second complaint (the Commission dealt with it first although it was the second one it actually received from Mr. Jesseau). The Executive Director noted in her correspondence that Mr. Jesseau alleged that Ms. Luther’s actions were in retaliation for his threat in the summer of 2014 to complain to the Commission about the City’s discriminatory call-in practice. The Executive Director noted that Mr. Jesseau did not make the complaint until “...March 2015,

and therefore, [the complaint] could not be the subject of retaliation in February 2015" (A copy of the correspondence is attached as Exhibit "D" to Dale Park's affidavit).

[45] It is sufficient to say that the City took Mr. Jesseau's allegations very seriously. They noted particularly his claims that he was going to sue the City for lost income and complain to the Human Rights Commission about discriminatory hiring practices based on his ethnicity and social background. In the event, the City turned the matter over to the City Solicitor and directed her to oversee all aspects of the City's response to Mr. Jesseau's claims.

[46] Dale Park was Director of Corporate Services and Acting City Manager at the time of Mr. Jesseau's complaints in 2014. In his role as Director of Corporate Services, Mr. Park was then and is now responsible for the City's Legal, Human Resources, Business, Treasury, Lands and IT Departments. The City Solicitor reports to Mr. Park. This is how Mr. Park described his reaction to Mr. Jesseau's complaints in the affidavit he filed in support of the City's application:

7. When there is a complaint concerning behaviour of a City staff person I would normally assign someone from our Human Resources department to conduct an investigation. As such, after receiving the complaint of August 1, 2014 wherein Mr. Jesseau raised allegations of racism by City Staff, I initially referred him to the City's Human Resources Manager. However, shortly after (within hours) I decided it would be best for the City Solicitor to handle the matter of Mr. Jesseau's complaint against the employee as well, as it was all connected with the threats of legal actions that the City Solicitor was already handling and I didn't want any staff meeting with Mr. Jesseau without the City's lawyer present.

[47] Further in the same affidavit, Mr. Park offered this rationale for engaging the City Solicitor. At paragraph 8:

8. As I considered this matter to be more a legal one rather than an employment matter, I chose to assign the City Solicitor to conduct an investigation and to provide a report, recommendation and assessment of damages if any, to the Corner Brook City Council.



[48] He also noted the extent of the authority he delegated to the City Solicitor:

9. I first assigned the matter to the City Solicitor on July 22, 2014 [one day after Mr. Jesseau threatened legal action against the City in an email to the Mayor on July 21, 2014] and gave her complete authority to review and gather information from staff as needed to provide an informed legal assessment. As this matter involved informational services staff, our Assistant Director of Operation Services at that time, Ms. Rayna Luther, was tasked with ensuring public works staff were available for interview with the City Solicitor and that they gathered and provided any documents or other information that was either requested by or that would be beneficial to the City Solicitor in assessing the City's case and preparing the City's defense

[49] According to Mr. Park, the City Solicitor, at paragraph 10:

...concluded her investigation and legal assessment and provided me with a report containing her findings on February 10, 2015, along with a draft letter to the complainant and some witness statements.

[50] The solicitor-client privilege that the City claims over the documents Mr. Jesseau is looking for relates to the period of July 22, 2014, the date on which Mr. Park assigned Mr. Jesseau's complaint to the City Solicitor; and February 17, 2015, the date on which the City Solicitor reported the findings of her investigation to the City Council. During that time, the City Solicitor was heavily involved in analyzing and assessing the several aspects of Mr. Jesseau's complaint.

[51] This is how the City described the City Solicitor's role in the Brief it filed in support of its application:

10. In the course of the City Solicitor handling this matter, the City Solicitor gathered information from the Complainant [Ron Jesseau], met with various witnesses, consulted with and was consulted by various staff members and witnesses through email correspondence, phone calls and in-person meetings and wrote notes in the solicitors own hand of meetings and conversations as well as the solicitors own work product file notes. The solicitor also drafted affidavits for the witnesses and requested retrieval of various information and documentation from



staff members (which requests were sometimes delegated to other staff members for retrieval/response).

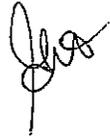
[52] The City also detailed the City Solicitor's mandate in its Brief, at paragraph 9:

The dominant purpose of the investigation was to provide the City with a legal opinion on whether there was validity to the various threats of legal action and whether the City may be at risk of paying damages to the Complainant and if so to quantify that risk.

[53] Finally, the City noted the nature of the report that the City Solicitor provided to the City Council on February 7, 2015, after she completed her investigation. At paragraph 12 she stated:

The report contains legal summary, assessment, and recommendations not only in relation to the allegations concerning employee misconduct but also in relation to the allegations concerning breaches of contract and human rights violations as well as concerns respecting the Complainants inability to operate his equipment safely and efficiently. The Solicitors role in this investigation was clearly not restricted to discipline of an employee but encapsulated contract law, public procurement, occupational health and safety, human rights, as well as labour & employment.

[54] This is the background to the issue I stated earlier in these reasons. I turn now to discuss all aspects of that issue against this background, starting with litigation privilege.



DISCUSSION

Litigation Privilege

[55] In *Lizotte*, the Supreme Court of Canada said that documents and communications which are created predominantly to prepare for litigation are immune from disclosure because of litigation privilege. It offered as “classic examples” of such materials “the lawyer’s file and oral or written communications between a lawyer and third parties, such as witnesses or experts”.

[56] The City of Corner Brook was in litigation mode vis-à-vis Mr. Jesseau on July 21, 2014. Mr. Jesseau sent an email to the Mayor on that day noting that the City passed over him on the equipment call-in list and hired other contractors who ranked lower on the City’s call-in list than he did. He also advised that he would seek “legal advice” after the Mayor responded to him and that he was “seeking full compensation for the hours I have lost todate”.

[57] The City’s Assistant Director of Infrastructure & Public Works, Rayna Luther, met with Mr. Jesseau the same day and sent an email to Dale Park, Director of Corporate Services for the City and Acting City Manager, after her meeting in which she advised:

Mr. Ron Jesseau came to see me this afternoon and stated that he sent the Mayor and Council an email this morning requesting an explanation in writing regarding why he is being skipped over on the hired equipment list. He also informed me that he has a lawyer and will be suing the City for money lost as a result of being skipped over on the list.

[58] On July 22, 2014, the day after she met with Mr. Jesseau, Ms. Luther met with the City Solicitor to discuss a response to Mr. Jesseau. Ms. Luther informed the City Solicitor that Mr. Jesseau asked her when they met for “something in writing from the City to give to his lawyer” (paragraph 3 of the City’s Memorandum of Fact and Law). Ms. Luther contacted a public works supervisor with the City after she met



with the City Solicitor looking for information to prepare for the letter that Ms. Luther would write to Mr. Jesseau. She met again with the City Solicitor on July 23, 2014 and then wrote the letter to Mr. Jesseau that is attached as Tab 2 to the affidavit that Dale Park provided in support of the City's application.

[59] Ms. Luther's letter, on letterhead of the City of Corner Brook, is addressed to "Ron Jesseau, Ki'Nap Tia'm Enterprises Inc" and is written on a "without prejudice" basis. Ms. Luther notes the terms of the standing offer for equipment services that Mr. Jesseau bid on when he offered his equipment to the City and, in particular, the stipulation that "City Foreman shall be the sole judge as to an operator's suitability". She also noted that:

[s]uperintendents, foremen and workers in Public Works and Water and Sewer have expressed concerns, with specific examples, regarding your ability to safely and efficiently operate a backhoe". She concludes her letter with this direction: "As you have indicated that you may be commencing legal action, you or your lawyer may contact the City's lawyer, Lorilee Sharpe at 639-1641 should you wish to proceed in that manner.

[60] When Mr. Jesseau contacted the City again on August 1, 2014 in an email to the Mayor, he seems to have changed his tact somewhat. While he notes that "I spoke with the city lawyer advising I am in the process of taking the city to court", he added this qualifier to his complaint: "There have been remarks made to me and other by city staff that my backhoe is 'an Indian backhoe, paid for by tax payers money, an he shouldn't be getting any work'". Thus, Mr. Jesseau was not only going to "...ask the courts to be fully reimbursed for monies lost", but "...I will ask the Human Rights Commission to investigate other matters".

[61] Mr. Jesseau seems to have moved even further into the "Human Rights" aspect of his complaint by the time he sent his next email to the Mayor and the Councilors on September 27, 2014. He says, in particular, he seems to have gotten more work from the City when he operated as "Ron's Backhoe Service" than when he registered his backhoe "...under my aboriginal company (Ki'Nap Tia'm Enterprises Inc.)". And by then, Mr. Jesseau was telling the City that "I have been advised by legal council to make application to Human Rights". He wanted information about "...the number of hours I have been passed over during the spring



and summer”; and he wanted the Council to know that “I will also be tracking further losses”.

[62] By February 17, 2015 when the City Solicitor completed her investigation and reported her findings to Council, the City seems to have adopted Mr. Jesseau’s focus on the human rights’ aspect of his complaint as well. The Mayor wrote a “without prejudice” letter to Mr. Jesseau on that date which began: “I write further to your complaint to the City in which you allege having been passed over for work due to your status as a Qualipu member” (Underlining mine). I note, of course, that Mr. Jesseau filed two complaints with the Human Rights Commission, the first on March 5, 2015 and the other on April 17, 2015. The Commission dismissed the first complaint on January 23, 2019 and the other complaint on August 6, 2015.

[63] It is indisputable that the City was fully engaged in litigation mode from July 21, 2014 when Mr. Jesseau first complained about being passed over on the call-in list until at least February 17, 2015, when the City Solicitor ended her investigation and the Mayor wrote to Mr. Jesseau to say the city found no evidence that he had been “...passed over for work on the call-in list due to racial discrimination”. It is also fair to say that the City remained in a lesser, though vigilant litigation mode for another four years, until the Human Rights Commission ended the proceedings that Mr. Jesseau had initiated before the Commission on January 23, 2019.

[64] These are the factors that support my observation:

- Mr. Jesseau indicated that he was consulting legal counsel and intended to sue the City for lost income by being passed over on the call-in list;
- Mr. Jesseau threatened (and followed up on his threat) to complain to the Human Rights Commission that the City’s call-in practices were influenced by his membership in the Qualipu nation;
- The City deferred to the City Solicitor in its interactions with Mr. Jesseau and directed her either to vet, or actually draft all correspondence it sent to him;

- The City required the City Solicitor to prepare staff for meetings with Mr. Jesseau, to attend those meetings where practicable and to debrief staff after they met with Mr. Jesseau; and
- Correspondence the City sent to Mr. Jesseau issued on a “without prejudice” basis.

[65] Mr. Jesseau seems have shifted from, as I noted above, complaining that the City passed over him on the call-in list for no apparent reason to alleging racial discrimination as the City’s reason for doing so. The City always maintained that they called him less often than he expected because it was concerned about his ability to operate the equipment safely and efficiently and that there were jobs they did not consider him suitable to do. However, at the root of Mr. Jesseau’s complaint, whatever the reason he was passed over, was his claim that he was losing money and he wanted redress for his loss whether in court or through the Human Rights Commission. So, the City faced possible civil litigation from Mr. Jesseau for his loss of income, as much as it did his complaints to the Human Rights Commission.

[66] The City’s apprehension of being engaged in litigation, of one form or another was reasonable in the circumstances. Regrettably, the City found itself in the place the Supreme Court of Canada contemplated in *Blank*, at paragraph 34, when it articulated the rationale for litigation privilege:

34 The purpose of the litigation privilege, I repeat, is to create a “zone of privacy” in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification. But to borrow a phrase, the litigation is never over until it is over: It cannot be said to have “terminated”, in any meaningful sense of that term where litigants or related parties remain locked in what is essentially the same legal combat.

[67] I note, as stated in the preceding quotation, that litigation privilege ceases when the litigation with which it is associated ends. It is safe to say that the litigation between Mr. Jesseau and the City of Corner Brook has ended. The Human Rights Commission dismissed both of his complaints, one quite quickly, more than 4½ years ago now, and the other just over a year ago in January 2019. There is no

indication that Mr. Jesseau sought judicial review of either decision and it is quite unlikely that he still has the option to do so in either matter.

[68] It is equally improbable that Mr. Jesseau will start a civil claim against the City for damages because of lost income. Such a claim might be time-barred in the event, depending, of course, on the cause of action that Mr. Jesseau relied on. However, based on my review of this matter, it appears that Mr. Jesseau's claim would be based on his belief that the City discriminated against him because of his indigenous background. He put forward that belief in the complaints that he made to the Human Rights Commission and it rejected his belief as a basis for complaint in each instance.

[69] As well, the City has maintained steadfastly that it was concerned for Mr. Jesseau's safety, the safety of its employees who worked near Mr. Jesseau when he was operating equipment, and other members of the public who might be endangered by him. The City said those concerns, as well as Mr. Jesseau's low productivity, were the reasons it did not hire him. Mr. Jesseau did not respond to the City's claims that he was a poor operator or that he produced little work with his equipment, but simply shifted the focus of his complaints to discrimination. There may be merit to the City's concerns over Mr. Jesseau's competence and Mr. Jesseau knows it and that is why Mr. Jesseau did not initiate other proceedings. After a lapse of 5½ years it is improbable he will do so now.

[70] Overall, I am satisfied that the litigation the City apprehended when it started to deal with Mr. Jesseau in July 2014 is over. Thus, the City's work product between July 2014 and February 2015, which the City Solicitor either generated herself or others produced at her direction is no longer privileged. The litigation has ended and, to quote from the Supreme Court of Canada in *Blank*, "...the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification". The material which Mr. Jesseau was asking for and which the Privacy Commissioner recommended the City to provide to him is no longer protected by litigation privilege.

[71] In his assessment of the City's response to Mr. Jesseau's claim that the City deliberately passed him over on the call-in equipment list, the Privacy Commissioner characterized the investigation the City Solicitor undertook as a "workplace investigation", as defined in section 33 of *ATIPPA*. In the result, the Privacy Commissioner contended that the investigation was not related to any litigation so that the work product was not covered by litigation privilege. He said the City should, with a few exceptions which the Privacy Commissioner accepted were legal advice the City Solicitor provided, release to Mr. Jesseau all other documents and communications.

[72] I need not consider the Privacy Commissioner's belief that the City Solicitor conducted a workplace investigation because I find that litigation privilege no longer applies. However, I will come back to it shortly in the context of solicitor-client privilege, to which it is more relevant; because if the documents are covered by solicitor-client privilege, it still applies to them.

Solicitor-client Privilege

[73] In *R. v. McClure*, 2001 SCC 14, the Supreme Court of Canada adopted this statement from Wigmore, John Henry, *Evidence in Trials at Common Law*, vol. 8, Revised by John T. McNaughton, Boston: Little, Brown 1961, to describe when solicitor-client privilege arises: " 'When legal advice is sought of any kind from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived', quoted in paragraph 36 of *McClure*. It added this further observation: "...[O]nly communications made for the legitimate purpose of obtaining lawful professional advice or assistance are privileged, paragraph 37 of *McClure*."

[74] In the Memorandum of Fact and Law that the City filed to support its application, it submitted at paragraph 19 that the Privacy Commissioner:

...has taken a very narrow approach to assessing which documents qualify as solicitor-client privileged.



[75] It offered this for the effect of the Privacy Commissioner's approach:

The result of this has been a recommendation that the City disclose documents and communications between lawyer and client wherein the lawyer was gathering (and client providing), information on which to formulate a legal opinion and defence, including notes written by the lawyer in her own hand from meetings and telephone conferences with the client and emails from client containing information pertinent to the lawyers (sic) legal assessment and the clients (sic) defence.

[76] The difference between the Privacy Commissioner and the City comes down to this: The City saw itself in litigation mode so that virtually all its efforts were directed towards assessing the legal implications of Mr. Jesseau's claims and preparing to defend those claims, in whatever forum Mr. Jesseau brought them. The Privacy Commissioner recognized there were several instances in which the City Solicitor provided legal advice to her client, the City; but overall the Privacy Commissioner believed that the City conducted a workplace investigation when it addressed Mr. Jesseau's complaints, regardless if the City Solicitor or another led the effort.

[77] Section 33 of *ATIPPA* defines "workplace investigation" as:

33(1)(c) "workplace investigation" means an investigation related to

- (i) the conduct of an employee in the workplace,
- (ii) harassment, or
- (iii) events related to the interaction of an employee in the public body's workplace with another employee or a member of the public

which may give rise to progressive discipline or corrective action by the public body employer.

[78] Section 33(2) says that "(t)he head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation". However, section 33(3) makes this exception to the prohibition in section 33(2): "The head of a public body shall disclose to an applicant

who is a party to a workplace investigation the information referred to in subsection (2)" (underlining mine).

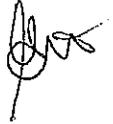
[79] The Privacy Commissioner's logic flows this way: The City undertook a workplace investigation when it acted on Mr. Jesseau's complaints and was not preparing for apprehended litigation; the documents and communications the City generated during its investigation and relied upon to deal with Mr. Jesseau's complaints were not protected by solicitor-client privilege; and because Mr. Jesseau was a party to the workplace investigation, by section 33(2) he is entitled to "all relevant information created or gathered for the purpose of..[that] workplace investigation".

[80] Some factors that courts apply to determine if the work-product of a workplace investigation is privileged include the timing of the investigation, who called for the investigation and why it proceeded and who carried out the investigation. However, the most important consideration is the dominant purpose of the investigation. Let me consider these factors.

Timing

[81] Ron Jesseau contacted the City for the first time on July 21, 2014 to complain about being passed over on call-in list. He sent an email to the Mayor that day and also met with Rayna Luther, then the City's Assistant Director of Infrastructure & Public Works. He made it clear that he had consulted a lawyer and that he intended to sue the City for income he claims he lost when the City passed him over on the call-in list.

[82] Ms. Luther met with the City Solicitor the next day to get her help in writing a letter to Mr. Jesseau that he could review with his lawyer. From that time forward, until the City Solicitor filed her report with City Council in February 2015, the City Solicitor was engaged in all aspects of the City's dealings with Mr. Jesseau, sometimes dealing directly with him, but mostly overseeing the contact that other city staff or councilors had with Mr. Jesseau.



Who Called for the Investigation

[83] Dale Park, the Acting City Manager and Director of Corporate Services or Director of Finance & Administration (to whom the City Solicitor reported) called for the City Solicitor to oversee all dealings with Mr. Jesseau. This is how Mr. Park described his directive to the City Solicitor in paragraph 9 of the affidavit he provided in support of the City's application:

9. I first assigned the matter to the City Solicitor on July 22, 2014 and gave her complete authority to interview and gather information and documentation from staff as needed to provide an informed legal assessment.

Why the Investigation Proceeded & Who Carried it Out

[84] Mr. Park also explained why he referred the matter to the City Solicitor:

7. When there is a complaint concerning behaviour of a City staff person I would normally assign someone from our Human Resources department to conduct an investigation. As such, after receiving the complaint on August 1, 2014, wherein Mr. Jesseau raised allegations of racism by City Staff, I initially referred him to the City's Human Resources Manager. However, shortly after (within hours) I decided it would be best for the City Solicitor to handle the matter of Mr. Jesseau's complaint against the employee as well, as it was connected with the threats of legal actions that the City Solicitor was already handling and I didn't want any City staff meeting with Mr. Jesseau without the City's lawyer present.

Dominant Purpose of the Investigation

[85] Paragraph 8 of Mr. Park's affidavit makes it clear that the dominant purpose of the City Solicitor's investigation was to prepare for the legal proceedings Mr. Jesseau threatened to bring against the City. While the City took Mr. Jesseau's allegations of racism very seriously, it was immediately and primarily focused on the threatened legal proceedings:



8. As I considered the matter to be a legal one rather than an employment matter, I chose to assign the City Solicitor to conduct an investigation and to provide a report, recommendation an assessment of damages, if any, to Corner Brook City Council. The complainant, Mr. Ronald Jesseau had not only made complaints to the City concerning alleged racist remarks by City staff, he had also threatened to bring a claim for damages against the City in relation to his having lost income due to not being called in for work on the City's hired equipment list and had threatened a claim for damages through the Human Rights Commission and the courts. There had also been occupational health and safety concerns raised by staff with regard to Mr. Jesseau's ability to operate his backhoe. We needed to know if Mr. Jesseau had any legitimate legal action(s) against the City and, if so how much the City might be at risk of having to pay. We also needed to know if the City should continue to not call in Mr. Jesseau for backhoe work in the interim. The City is required to set aside a reserve each year for any legal claims for which it may reasonably be required to pay out damages and we must provide a list of outstanding legal matters along with their approximate dollar value to our auditor annually.

[86] It bears noting as well that Mr. Jesseau's allegations of racism had a "legal" aspect to them in that he advised the City he was going to complain to the Human Rights Commission, and he followed up on his advice with two formal complaints.

[87] Overall, I am satisfied that the City Solicitor's investigation and report to City Council was not a workplace investigation. It was first and foremost a rigorous assessment of the liabilities that the City might have to Mr. Jesseau because of his threatened legal actions. Let me summarize my reasons for this finding:

- The Acting City Manager directed the City Solicitor to investigate Mr. Jesseau's complaints immediately as the City received them;
- The Acting City Manager directed the City Solicitor to do the investigation, not someone from its Human Resources Department;
- The City informed all staff who might communicate with Mr. Jesseau to involve the City Solicitor in those contacts, whether to have her present at their meetings, to vet their correspondence to Mr. Jesseau or to advise them how to engage with him;



- Dale Park, the Acting City Manager considered Mr. Jesseau's complaints a legal, not an employment issue; and
- The City Solicitor's investigation was the City's response to the apprehended litigation that Mr. Jesseau threatened to bring against it.

[88] Thus, I find that the work-product of the City Solicitor's investigation is protected by solicitor-client privilege. Mr. Jesseau cannot require the City to disclose it to him under section 33(3) of *ATIPPA*.

[89] Two groups of documents exist regarding Mr. Jesseau's interactions with the City of Corner Brook. The first comprises "Records Sent to the OIPC [Office of the Information and Privacy Commissioner] June 1, 2018" and the other "Records Inspected [by the OIPC] at the City Office June 6, 2018".

[90] Of the first group, the Record noted to be pages #1-4, and described as "HRC Complaint Response" is not in issue in this application, in that Mr. Jesseau received it, as "Note #1" on the bottom of the page says: "HRC Complaint Responses. Complainant [Mr. Jesseau] already has been provided with these documents in the course of the HRC complaint process. They should therefore be disclosed in response to the access request".

[91] Of the remaining documents in the first group, Marina Redmond, the City Clerk of the City of Corner Brook, identifies those for which the City claims solicitor-client privilege in Exhibit "C" to her affidavit of February 1, 2019. Four are subject to the privilege and the City need not disclose them to Mr. Jesseau. They are: Documents #'d, 34, 46, 50, 72 and 73. The City claims litigation privilege, not solicitor-client privilege, over the remaining documents in the first group; but litigation privilege has now ended so these documents must be disclosed to Mr. Jesseau.

[92] A representative of the OIPC examined the other group of documents at the City's office on June 8, 2018. There are thirty-two of them. The Privacy Commissioner recommends that the City provide all but four of them to Mr. Jesseau. The four the Commissioner excepted have Record ID's, "D", "I", "O" and "R". For those that the Commissioner agrees that the City may withhold them and offers as the reason for his recommendation: "**Withhold – s. 30 (legal advice)**" (Bold in original). There is a fifth document, Record ID, "A" that the Commissioner recommends that the City disclose, except for its conclusion. This is the actual recommendation the Commissioner provided for this document: "**Disclose except for conclusion – s. 30 (legal advice)**" (Bold in original).

[93] I agree with the Commissioner's recommendation for the first four the City may withhold and for the reason he gives. They are clearly covered by solicitor-client privilege. As to the fifth document, I have reviewed its contents carefully and I do not accept the Commissioner's recommendation to withhold a part of it but disclose the rest. Let me explain why.

[94] Record ID, "A" is the report that the City Solicitor provided to the City on February 10, 2015. The City Solicitor called it the "Report of Investigative Findings", comprising background information, Mr. Jesseau's complaint, the issues she addressed and her findings. Ultimately, the City Solicitor offers her "Conclusion/Recommendation" to the City. She based her conclusion and recommendation on the work she carried out to address Mr. Jesseau's complaints about his loss of work and racial discrimination and his threat to bring legal proceedings against the City to seek redress for them. The City, her client, directed the City Solicitor to undertake that work on its behalf, to report on her work and to advise it how to respond to Mr. Jesseau.

[95] The body of the report informs the City Solicitor's conclusion and recommendation and is the working product of her efforts from July 2014 to February 2015. It cannot be divorced from her conclusion and recommendation and it should not be released. To release the body of the report would be tantamount to releasing what the Commissioner accepts the City can withhold: In effect, the City Solicitor's conclusion and recommendation flow from the remainder of the report.

It supports and underscores them; and they are implicit in what the City Solicitor wrote in the body of the report, especially in the section she called “Findings”.

[96] Twenty-six of the other twenty-seven documents were also critical to the generation of the City Solicitor’s February 10, 2015 “Report”. They are:

- Affidavits of several City employees (Dennis Penney & Keith Costello), drafted with the help of the City Solicitor after she interviewed them about their dealings with Mr. Jesseau;
- Handwritten notes (eleven) the City Solicitor made during her investigation from her meetings with various City employees; and
- Emails (fourteen) to and from the City Solicitor and City employees, and some amongst City employees, all involving Mr. Jesseau’s complaints.

[97] Of the handwritten notes, one, Record ID, “J” should be disclosed to Mr. Jesseau, in that he appears to have signed it.

[98] As to the remaining handwritten notes, the Privacy Commissioner refers to most of them as containing “Factual information” to justify their disclosure. However, this is precisely the information the City Solicitor was compiling to formulate the City’s response to Mr. Jesseau. The same applies to the affidavits from Dennis Penney and Keith Costello, as well as the many emails that staff exchanged with either with the City Solicitor, or between themselves on her behalf and at her direction.

[99] Record ID, “S” is dated August 18, 2015 and Record ID, “Q” is dated August 17, 2015. On the explanatory notes “S” is stated to be a response to “Q”, the earlier one being an email from the City Solicitor to City employees and the latter being their response to the City Solicitor’s email to them. It is noted the City Solicitor was requesting information from them relating to the hours that Mr. Jesseau worked. The



dates of those emails are beyond February 2015, when the City Solicitor filed her Report with the City. However, they are protected by solicitor-client privilege which as here, when established, continues indefinitely.

[100] I acknowledge from reviewing all the records that some of them may not address matters between the City and Mr. Jesseau that are especially controversial. However, they reflect the consultative and investigative process the City Solicitor engaged in at the City's direction and on its behalf as her client. She asked for as much detail as the staff could provide to inform her of the relationship between Mr. Jesseau and the City and she expected the staff to be candid and forthright with her.

[101] Similarly, the staff advised the City Solicitor and responded to her inquiries believing what they told her was privileged and would not be disclosed. This is the essence of solicitor-client privilege. The assumption of non-disclosure that the City Solicitor, the City and its staff made in the free flow of information between them underpins the privilege. Let me express it more eloquently by paraphrasing what the Supreme Court of Canada said about the privilege in the quotation from *McClure* that I used earlier in these reasons: When legal advice is sought of any kind from the City Solicitor in her capacity as such, the communications relating to that purpose, made in confidence by the City and its staff, are at the City's instance permanently protected from disclosure by the City or by the City Solicitor, except the protection be waived.

[102] Overall, I am satisfied that solicitor-client privilege applies to all thirty-one of the thirty-two "Records inspected at City Office June 6, 2018", encompassing Record ID's, "A" to "F1". The City has not waived the privilege and it was right not to accept the Privacy Commissioner's recommendation to provide them to Mr. Jesseau. The exception, of course, is Record ID, "J".

[103] The City's right to withhold the records is affirmed by section 30 of *ATIPPA*. As the section applies to a public body, of which the City of Corner Brook is one, it reads:

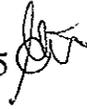
30.(1)The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege...of a public body.

[104] For greater certainty, I offer the following table to confirm the documents over which the City has solicitor-client privilege and which it may withhold from disclosure to Ron Jesseau, notwithstanding the Privacy Commissioner's recommendation that the City should disclose most of them of Mr. Jesseau:

Records Sent to Privacy Commissioner on June 1, 2018	
Record ID	Description
#34 (Dec. 15, 2014)	Email from City Manager's Assistant to City Solicitor providing documents and requesting legal work with respect to the documents.
#46 (Sept. 4, 2014)	Email from Assistant Director to City Solicitor & 2 others providing information regarding Mr. Jesseau and the City's hired equipment list.
#50 (July 21, 2014)	Email from Assistant Directors to City Solicitor with subject title "Ron Jesseau Lawsuit" providing information on a meeting that she had with Mr. Jesseau.
#72, 73 (Oct. 3, 6, 2014)	Email correspondence from Mayor to City Director and copied to Assistant Director providing detailed information on the progress of her investigation into the Ron Jesso complaint including detailed information that City Solicitor had received for further interviews and documentation, and discussion of possible defence.
Records Inspected at City Office June 6, 2018	
Record ID	Description
A	Investigative Report Prepared by the City Solicitor dated February 10, 2015
B	Affidavit of Dennis Penney
C	Affidavit of Keith Costello
D	Draft Letter from the Mayor to Ron Jesseau (drafted by solicitor) outlining findings of investigation and conclusions reached by solicitor
E	Handwritten notes of City Solicitor (undated)
F	Handwritten notes of City Solicitor dated September 15, 2014
G	Handwritten notes of City Solicitor dated February 7, 2015
H	Handwritten notes of City Solicitor (undated)

I	Handwritten notes of City Solicitor (undated)
K	Handwritten notes of City Solicitor dated September 11, 2014
L	Handwritten notes of City Solicitor dated November 7, 2014
M	Handwritten notes of City Solicitor dated September 5, 2014
N	Handwritten notes of City Solicitor dated October 30, 2014
O	Handwritten notes of City Solicitor dated July 22, 2014
P	Handwritten notes of City Solicitor (undated)
Q	Email dated August 17, 2015 from City Solicitor to City employees, requesting information relating to the hours worked by Ron Jesseau
R	Email dated October 15, 2014 from City Solicitor to City employee(s) discussing possible witnesses and interview arrangements
S	Email dated August 18, 2015 from City employee(s) to City Solicitor responding to email of August 17, 2015 from the City Solicitor
T	Handwritten notes of City Solicitor dated April 27, 2015
U	Email dated September 4, 2014 between City employees
V	Email dated September 8, 2014 between City employees
W	Email dated September 10, 2014 from City employees to City Solicitor
X	Email dated September 10, 2014 from City employees to City Solicitor
Y	Email dated September 4, 2014 from City employees to City Solicitor and others
Z	Email dated August 1, 2014 between City employees
AI	Email dated July 22, 2014 between City employees
BI	Email dated July 24, 2014 from City employee to City Solicitor
CI	Email dated May 7, 2014 between City employees
DI	Email May 8, 2014 between City employees
EI	Email dated May 9, 2014 between City employees
FI	Email dated August 4, 2014 from City employees to City Solicitor



One Other Matter

[105] In the Originating Application the City filed on August 7, 2018, the City asked in its “Relief Sought” for a “...declaration...that the City is not required to comply with the recommendations of the Information and Privacy Commissioner on the grounds that the City is authorized to refuse access to the records or parts of the records in accordance with section 30 [of *ATIPPA*]”. The City expanded the relief it was seeking in the Memorandum of Fact and Law that it filed in support of its application.

[106] In particular, the City asked the Court to declare: “**THAT** the Privacy Commissioner has no authority under *ATIPPA* to demand production or review of documents over which solicitor-client privilege or litigation privilege has been claimed by a public body”. The City addressed this request in its Memorandum of Fact and Law and the Privacy Commissioner responded to it in his Memorandum of Law and Argument.

[107] However, the City’s request for the further declaration is not before me by the Originating Application. As well, counsel for the Privacy Commissioner noted in his Memorandum of Law and Argument that the right of the Commissioner to examine records held by a public body, even those over which privilege is claimed, is moot in this case. That is so, because the City allowed the Commissioner access to the records. The City sent some of the records to the Commissioner on June 1, 2018 and one of his staff attended at the City’s offices in Corner Brook on June 8, 2018 and examined others.

[108] Otherwise, it is difficult to deal with the added request for relief because of the dearth of background information to support it. I note, for example, that neither the “Material Facts” that the City sets out in its Originating Application nor the “Material Facts” that appear in the City’s Memorandum of Fact and Law refers to the Privacy Commissioner’s request for the City to produce the records for his inspection. Rayna Luther and Dale Park each filed detailed affidavits with helpful attachments, but they did not address the production and review issue in their affidavits, nor do the attachments to their affidavits deal with it.



[109] Marina Redmond refers to producing the records to the Privacy Commissioner in her affidavit of February 1, 2019 but she does so to address City's claim of solicitor-client privilege and not production and review by the Commissioner per se. Ms. Redmond filed a supplemental affidavit on November 13, 2019, responding to an affidavit that Sean Murray filed on behalf of the Privacy Commissioner in which Mr. Murray addresses producing the records for the Privacy Commissioner's inspection. I note as well that the Privacy Commissioner went into the production and review issue at length in his Memorandum of Law and Argument, but his submissions relate to the authority of the Commissioner to demand production and not the logistics of production or context for doing so.

[110] Overall, I will not deal with the issue. Aside from the issue being moot, I lack sufficient background information to allow me to decide it. The production and review issue does not lend itself to a yes/no answer. It requires a more fulsome development to tease out the when, where, how, why and by whom of production and review; if, of course, the Privacy Commissioner has the authority to demand the production and review of privileged documents in the first instance. I am unable to do that further development on what the parties have put before me in this matter.

COSTS

[111] The City has requested its costs. The Privacy Commissioner disagrees. He notes that he has a statutory right to intervene, that his role is not adversarial, and that he intervened to assist the Court in how to interpret *ATIPPA*. I agree with the Commissioner. Each party will bear its own costs.

SUMMARY AND DISPOSITION

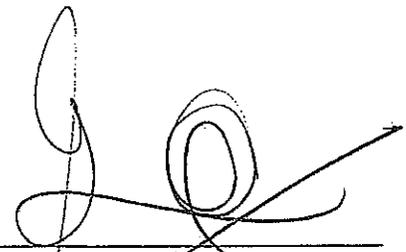
[112] The City of Corner Brook applied for a declaration under section 50(2) of the *Access to Information and Protection of Privacy Act*, that it did not have to comply with a recommendation from the Privacy Commissioner to disclose to a complainant documents over which the City claimed solicitor-client and/or litigation privilege.

[113] The Court agreed with the City. It found litigation privilege and solicitor-client privilege applied to the documents. However, as to litigation privilege it found that the litigation the City apprehended when it started to deal with the complainant in July 2014 is over, so the privilege has lapsed. As to solicitor-client privilege, it found that the privilege still applies, and the City is right to withhold the documents from the complainant. It ordered the parties to bear their own costs.

ORDER

[114] In the result, I order that:

- 1) Solicitor-client privilege and litigation privilege applied to most of the documents the Privacy Commissioner recommended the City disclose to Ron Jesseau.
- 2) Litigation privilege has lapsed and no longer applies to the documents.
- 3) Solicitor-client privilege still applies to those documents listed in the table that appears within these reasons.
- 4) The City does not have to comply with the Privacy Commissioner's recommendation to disclose the documents listed in the table to Ron Jesseau.
- 5) The parties will bear their own costs.



GARRETT A. HANDRIGAN
Justice

