LAW SOCIETY
Newfoundland & Labrador

December 1, 2020

Via Email: admin@nlatippareview.ca

ATIPPA Statutory Review 2020 Committee
Access to Information and Protection of Privacy Statutory Review 2020
3rd Floor, Beothuck Building
20 Crosbie Place
St. John's, NL
A1B 3Y8
Attn: The Honourable David B. Orsborn (Chair)

Dear Honourable David B. Orsborn:

Re: Law Society Submissions Regarding the Access to Information and Protection of Privacy Statutory Review 2020

As you may know, the Law Society has, on two occasions, intervened on matters before the Supreme Court of Newfoundland and Labrador (the "Supreme Court") relating to the authority of the Information and Privacy Commissioner (the "Commissioner") to compel production of documents that are subject to solicitor-client privilege (see Supreme Court file numbers: 2018 04G 0170 and 2019 01G 5743).

The facts of Supreme Court file number: 2018 04G 0170 rendered the issue moot (as the documentation was disclosed to the Commissioner at first instance). Supreme Court file number 2019 01G 5743 has not yet been determined.

The purpose of these submissions is to highlight the Law Society's concerns relating to s. 97 of the *Access to Information and Protection of Privacy Act, 2015* (the "Act"). These submissions mirror the position taken by the Law Society before the Supreme Court. We have attached our factum in that matter for your consideration; we would request that the factum remain confidential.

Solicitor-Client Privilege is a Fundamental Rule of Law:

As a starting point, any decision, including a legislative decision, affecting the disclosure or compellability of solicitor-client privileged information must take into consideration the significance of the privilege to the justice system in Canada as well as the implications it will have on the providers of such advice, solicitors.

The importance of solicitor-client privilege cannot be overstated. It is not only a rule of evidence but a substantive principle of law that is fundamental to the justice system in Canada.

> **Reference:** *Lavalée, Racket & Heintz v. Canada (Attorney General)*, 2002 SCC 61 at para. 49.

The significance of solicitor-client privilege was expanded upon in *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*:

> 9 Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
> >
> > (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36)

> **Reference:** *Blood Tribe Department of Health v. Canada (Privacy Commissioner), 2008 SCC 44*, at para. 9.

Typically speaking, the privilege "belongs to the client and can only be asserted or waived by the client through his or her informed consent".

> **Reference:** *Lavallée, supra,* at para. 39.

However, the Supreme Court of Canada has determined that "subject to constitutional limitations, legislatures can pierce solicitor-client privilege by statute."

> **Reference:** *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, at para. 71.

<u>Lawyers' Ethical Obligation to Maintain Solicitor-Client Privilege:</u>

All practicing lawyers are subject to the provisions of the Law Society's Code of Professional Conduct (the "Code") relating to confidentiality.
Section 3.3-1 of the Code states:

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client; (b) required by law or a court to do so; (c) required to deliver the information to the Law Society; or (d) otherwise permitted by this rule.

Reference: *Code of Professional Conduct*, The Law Society of Newfoundland and Labrador, effective 1 January 2013, s. 3.3-1, **Tab 2**.

It is imperative that exceptions to solicitor-client privilege must be clear and unambiguous so that lawyers may: i) properly advise their clients with respect to the creation of "records" under the Act; ii) properly advise their clients with respect to required disclosure under the Act; and iii) comply with their legal and ethical obligations relating to the privilege.

Section 97 of the Act:

Section 97 of the Act states:

Production of documents

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

(a) paragraph 5 (1)(c), (d), (e), (f), (g), (h) or (i);
(b) subsection 7 (2);
(c) another Act or regulation; or
(d) a privilege under the law of evidence.

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

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

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

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

(a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege;
(b) the head of the public body has a reasonable basis for concern about the security of another record and the Commissioner agrees there is a reasonable basis for concern; or
(c) it is not practicable to make a copy of the record.

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

In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, the Supreme Court of Canada held that:

> 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 (S.C.C.), at para. 33; *Lavallee, Rackel & Heintz*, 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.

Reference: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, at paras. 28-29.

The Commissioner has taken the position that s. 97 of the Act explicitly authorizes the Commissioner to require production of records claimed to be subject to solicitor-client privilege from a public body.

The Law Society, as well as the parties opposing the Commissioner in the above-noted cases (the City of Corner Brook and the Government of Newfoundland and Labrador) have taken a contrary position, notwithstanding the fact that the Law Society has acknowledged that the historical evidence existing regarding legislative intent suggests that the legislature did, in fact, intend to permit the Commissioner to compel production of records claimed to be subject to solicitor-client privilege.

The Law Society appreciates the purposes of the Act to facilitate access to information and increase transparency in government and public bodies; however, these purposes must be balanced against the fundamental nature of solicitor-client privilege to the justice system.

The Law Society respectfully submits that the Commissioner does not need the authority to compel the production of records claimed to be subject to solicitor-client privilege to perform their duties under the Act.

In *Newfoundland & Labrador (Attorney General) v. Newfoundland & Labrador (Information and Privacy Commissioner)*, the Court of Appeal of Newfoundland and Labrador found that:

> The purpose of ATIPPA is to create an alternative to the courts. This goal would be defeated if the Commissioner cannot review denials of access to requested records where solicitor-client privilege is claimed and was forced to resort to applications to court to compel production.
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> **Reference:** *Newfoundland & Labrador (Attorney General) v. Newfoundland & Labrador (Information & Privacy Commissioner)*, 2011 NLCA 69, at para. 78.

With respect, this finding fails to take into account the fact that:

> ...a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.
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> **Reference:** *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44, at para. 22.

Further, the potential that the government and/or a public body may be required to disclose solicitor-client privileged information to the Commissioner could have a chilling effect on the manner in which legal advice is recorded.

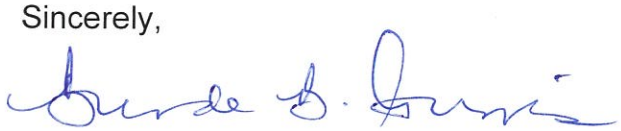
Conclusion:

In light of the foregoing, the Law Society suggests that it would be appropriate for the Committee to consider whether the ambiguity regarding the compellability of documents subject to solicitor-client privilege in s. 97 of the Act should be clarified.

The Law Society respectfully submits that the Committee should recommend that issues regarding the disclosure of solicitor-client privilege should be addressed by the Court, not the Commissioner.

Thank-you for the opportunity to make these submissions.

Sincerely,



BRENDA B. GRIMES, QC
EXECUTIVE DIRECTOR