

October 8, 2026

Via Email: ATIPPARreview@gov.nl.ca

Access to Information and Protection of Privacy Statutory Review 2025
2nd Floor, Beothuck Building
20 Crosbie Place,
St. John's, NL A1B 3Y8

Re: Statutory Review of the Access to Information and Protection of Privacy Act, 2015

We write further to your invitation to provide written submissions to the Statutory Review Committee on the *Access to Information and Protection of Privacy Act, 2015* (the "Act"). We understand that the Terms of Reference for the Committee include reviewing the 2020 Recommendations issued by David B. Orsborn for applicability or revision. The Law Society's submissions will focus on the following recommendation (and ss. 97 and 98 of the Act):

That the Act be amended to make it clear that the OIPC can require the production to it of records over which solicitor-client privilege is claimed when production is determined to be absolutely necessary to assess the claim for privilege, but no production may be ordered when the privilege relates to advice given in respect of an ATIPP matter. [Appendix K, s. 97]

That the Act be amended to provide that the commissioner's right of entry and examination and copying of a record does not extend to a record over which solicitor-client privilege is claimed. [Appendix K, s. 98]

Suggestion: That public bodies support claims of solicitor-client privilege with a solicitor's affidavit and a listing and description of each document.

As you may know, the Law Society filed written submissions, dated December 1, 2020, with the ATIPPA Statutory Review 2020 Committee and attended the public hearing. A copy of those submissions is attached for your consideration.

The Law Society endeavors to ensure that the law continues to respect solicitor-client privilege as a fundamental rule of law. This is consistent with lawyer's ethical obligations to maintain solicitor-client privilege and confidentiality (per s. 3.3-1 of the Code of Professional Conduct).

As outlined in our previous submissions, case-law highlights the importance of solicitor-client privilege not only as a rule of evidence but as a substantive principle of law that is fundamental

to the justice system in Canada (*Lavalée, Racket & Heintz v. Canada (Attorney General)*, 2002 SCC 61, at para. 49).

In *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2008 SCC 44, at para. 9), the Supreme Court of Canada noted that:

[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 *Lavalée, Racket & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36.)

The Law Society has intervened on 2 matters before the Court relating to the Commissioner's ability to compel the production of records claimed to be subject to solicitor-client privilege. One matter was rendered moot (as the records were disclosed at first instance).

In *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Justice and Public Safety)* (2023 NLCA 27), the Court of Appeal concluded that the Act (and s. 97 in particular) does not give the Commissioner the authority to compel the production of records claimed to be subject to solicitor-client privilege.

We highlight the lack of legislative safeguards for the protection of the privilege addressed in paragraphs 57 and 62 of the decision, which are not addressed by the recommendation that the Commissioner be granted the authority to compel such records:

- i) Section 102 of the Act "does not explicitly safeguard against the disclosure by the Commissioner of solicitor-client privileged documents" (see para. 57); and
- ii) The Act contains "no legislative safeguards whatsoever respecting disclosure of solicitor-client privileged records that the Commissioner has not examined to an applicant" (see para. 61).

Enabling the Commissioner to compel the production of solicitor-client privileged records implies that the Commissioner could have access to such records any time an information request is made. This is entirely contrary to existing caselaw suggesting the privilege should yield only in “certain clearly defined cases” outlined above.

Furthermore, the recommendation that the Commissioner be granted the authority to compel the production of solicitor-client privileged records when production is determined to be absolutely necessary to assess the claim for privilege” does not address the question of who will decide whether disclosure is “absolutely necessary” or how such a determination would be made.

It is likely that the Court will be called upon to address whether disclosure is “absolutely necessary”. The Commissioner could not make such a determination as they are not an “impartial adjudicator of the same nature as a court” (*Alberta (Information and Privacy Commissioner) v. University of Calgary* (2016 SCC 53, at para. 36). The Commissioner may not advise on privilege as neither they, nor their staff, are required to be practising members of the Law Society. Judicial economy suggests that the Court should address the real issue in dispute, whether the records are, in fact, subject to solicitor-client privilege.

This is supported by the Supreme Court of Canada’s comments in *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2008 SCC 44, at para. 22):

...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.

From a public policy perspective, amendments that would authorize the Commissioner to compel production of solicitor-client privileged records will have a chilling effect on the advice that public bodies receive and will disproportionately negative impact public bodies that have scarce resources.

An applicant who believes solicitor-client privilege is being inappropriately claimed does have recourse to the Court:

...the Commissioner's inability to compel production of records subject to solicitor client privilege does not leave an applicant without recourse when a public body refuses to produce solicitor-client records. In such an instance an applicant can appeal the refusal directly to the Supreme Court of Newfoundland and Labrador, under section 52 of ATIPPA 2015 and adjudication of issues associated with the claim of solicitor-client privilege would, as is traditional, be addressed by the court. (*Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Justice and Public Safety)* (2023 NLCA 27, at para. 97):



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The recommendation that “the Act be amended to provide that the commissioner’s right of entry and examination and copying of a record does not extend to a record over which solicitor-client privilege is claimed” does not sufficiently protect the inadvertent collection of privileged materials that may be present in a public body’s office. Regard should be had to the guidelines outlined in *Lavallee, Rackel & Heintz v. Canada (Attorney General)* (2002 SCC 61). Should entry be required where there is known to be solicitor-client privileged records, an independent third party (referee) should attend to ensure protection of the claimed privilege.

In light of the foregoing, the Law Society respectfully submits that the recommendations outlined in the Statutory Review 2020 Report relating to ss. 97 and 98 of the Act do not sufficiently ensure the protection of solicitor-client privilege as a fundamental rule of law that must remain as absolute as possible and, therefore, should not be incorporated into the Act.

Thank-you for the opportunity to make these submissions.

Sincerely,

Douglas Wright
President