

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2007-014**

October 10, 2008

**EDMONTON POLICE SERVICE**

Case File Number 3632

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the Act) to records relating to the source of payment to the law firm of Bennett Jones for legal services rendered in relation to complaints by the Edmonton Police Service (the Public Body) or its employees to the Law Society against the Applicant, the amount of the payments relating to each complaint and the budgetary item from which the payments were drawn.

The Public Body explained that the bills were paid under the Legal Advisors Section budget. However, the Public Body withheld the bills and other responsive records under section 27 of the Act on the basis that they were privileged.

The Applicant requested review of the Public Body's decision to withhold the information. The Public Body challenged the jurisdiction of the Adjudicator to conduct the inquiry. The Adjudicator decided that she had jurisdiction. In addition, she determined that disclosing the total amounts due, the firm letterhead, and the name and address of the Public Body from each bill of account would not enable the Applicant to acquire privileged communications. She decided that the Public Body was entitled to withhold all other information on the basis of section 27 of the Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 27, 32, 53, 69, 72; *Personal Information Protection Act* S.A. 2003, c.

P-6.5 s. 50; *Interpretation Act* R.S.A. 2000 c. I-8 ss. 10; Police Service Regulation Alberta Regulation 356/90 s. 7

**Authorities Cited: AB:** Orders 96-020, F2002-007, F2004-017, F2006-031

**Cases Cited:** *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499; *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162 ; *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4<sup>th</sup>) 693; *Stevens v. Canada (Prime Minister)* (C.A.) [1998] 4 F.C. 89; *Maranda v. Richer* [2003] 3. S.C.R. 193; *Ontario (Ministry of the Attorney General) v. Mitchinson* (2004), 239 D.L.R. (4th) 704; (2003), *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 14 B.C.L.R. (4th) 67; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44

## I. BACKGROUND

[para 1] The Applicant made an access request to the Public Body on December 9, 2005. He requested records relating to the source of payment to Bennett Jones for legal services rendered in relation to complaints by the Public Body or its employees to the Law Society against the Applicant, the amount of the payments in relation to each complaint and the budgetary item from which the payments were drawn.

[para 2] The Public Body advised the Applicant on January 27, 2006 that it was withholding all records relating to his request on the basis of section 27(1)(a) and (c) of the Act. The Public Body explained that the budgetary item from which the payments to the law firm of Bennett Jones were drawn was paid out of the Legal Advisors Section budget.

[para 3] On March 31, 2006 the Applicant requested that the Commissioner review the Public Body's decision to withhold the records.

[para 4] The Commissioner authorized mediation and advised the parties on April 3, 2006 that the anticipated date of completion of the inquiry was July 3, 2006, 94 days following the date of receipt of the request for review. The letter advised the parties that the Commissioner would extend the time, if more time was necessary to complete the review.

[para 5] Mediation was scheduled and was unsuccessful. On June 13, 2006, the Portfolio Officer advised the parties that the Commissioner considered the file closed. On August 4, 2006, the Applicant requested that the matter proceed to inquiry.

[para 6] A Notice of Inquiry was sent to the parties on February 20, 2007, advising the parties of the issues of the inquiry and requesting initial submissions by April 11, 2007. The parties were also provided the opportunity to provide rebuttal submissions by May 2, 2007. Both parties provided initial and rebuttal submissions.

[para 7] The Commissioner formally extended the time for completing the inquiry on August 2, 2007 and advised the parties that the anticipated date of completion for the inquiry was May 30, 2008. This anticipated date of completion was subsequently revised on June 24, 2008 to December 31, 2008.

[para 8] On March 18, 2008, the Public Body requested that a preliminary issue relating to the Commissioner's jurisdiction be added to the issues of inquiry. The Public Body requested time to prepare submissions on the issue.

[para 9] The issue was added to the inquiry and both parties were provided the opportunity to make submissions. Both parties provided submissions on the issue.

[para 10] On May 13, 2008, the Public Body provided the records at issue to me for my use during the inquiry.

## **II. RECORDS AT ISSUE**

[para 11] The Records at Issue can be broken down into two categories:

1. Bills of account from the law firm Bennett Jones, which include bills of account, covering letters and courier receipts
2. Internal correspondence of the Public Body, which includes internal memoranda and two emails

## **III. ISSUES**

**Preliminary Issue: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act*?**

**Issue A: Did the Public Body properly apply section 27(1)(a) and (c) of the Act (privileged information) to the records and information?**

**Issue B: Does section 32 of the Act (public interest) apply to the records and information?**

## **IV. DISCUSSION OF ISSUES**

**Preliminary Issue: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act* (the Act)?**

[para 12] The interpretation of the legislation in this Order as it relates to the issue of jurisdiction is consistent with that in a number of other Orders that are being issued at approximately the same time as this one, all of which decide challenges to the Commissioner's jurisdiction based on an alleged failure to comply with section 69(6) of the Act. In each case, the Commissioner or Adjudicator is responding to the same or very similar arguments that challenge jurisdiction. I will, for convenience, refer to some of the reasoning in Order F2006-031, as it is the first of these orders. Although Order F2006-031 precedes the present one in terms of its release date, I have decided that it is unnecessary to provide F2006-031 to the parties for comment, because both Order F2006-031 and this Order respond to the same legal arguments.

[para 13] Section 69 establishes the Commissioner's authority to conduct an inquiry and the process to be followed during an inquiry. It states:

*69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*

*(2) An inquiry under subsection (1) may be conducted in private.*

*(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

*(4) The Commissioner may decide whether the representations are to be made orally or in writing.*

*(5) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review may be represented at the inquiry by counsel or an agent.*

*(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*

- (a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*
- (b) provides an anticipated date for the completion of the review.*

[para 14] The Public Body argues that the Commissioner or his delegate has lost jurisdiction to conduct this inquiry. It takes the view that inquiries must be completed within 90 days after receiving a request for review unless the Commissioner extends the 90-day period within that time frame. Further, it contends that the Commissioner did not extend the 90-day period for completing the inquiry within the 90-day period. The Public Body relies on *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499 as authority for the position that the Commissioner has lost jurisdiction.

[para 15] The Public Body also brought to my attention a number of cases, in addition to *Kellogg Brown and Root* in which courts have found provisions to be mandatory or directory.

[para 16] The Applicant argues that failure to meet the time limit in section 69(6) is at most a technical delay, as there is nothing in the Act to prevent the Applicant from making another request for the information. He argues that failing to conduct the inquiry would bring the process into disrepute. He relies on *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162.

[para 17] An important distinction between *Kellogg Brown and Root* and the present case, other than that *Kellogg Brown and Root* is a decision interpreting section 50(5) of PIPA, rather than section 69(6) of the Act, is that the Commissioner did not formally extend the time to complete the inquiry in that case. In the present case, the Commissioner formally provided notice to the parties that he was extending the time to complete the inquiry and provided an anticipated date of completion for the inquiry. The issue for me to decide, therefore, is whether the Commissioner complied with section 69(6) when he extended the 90-day period.

[para 18] In *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162, on which the Applicant relies, the Court of Appeal considered whether the Calgary Police Commission could extend the time limit for laying charges after the statutory time limit had expired. Section 7(4) of the Police Service Regulation is silent as to whether a commission is required to extend the time limit before or after the expiry of the time limit in section 7(1).

[para 19] Section 7 of the Police Service Regulation states, in part:

*7(1) A police officer shall not be charged with contravening section 5 at any time after 6 months from the day that a complaint is made in accordance with section 43 of the Act...*

*(4) Notwithstanding that time limits are prescribed under this section, the commission may, if it is of the opinion that circumstances warrant it, extend any one or more of those time limits.*

[para 20] The Court of Appeal found that an overly technical approach to limitation periods did not accord with section 10 of the *Interpretation Act* RSA 2000 c. I-8, which states:

*10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.*

[para 21] Côté J.A. noted:

The question is whether the power in the Regulations to extend the time to lay charges can be exercised after the time has expired. The appellant submits that it cannot. The Regulation is silent on the question, saying nothing about the time of such an application or decision.

The appellant urges upon us the decision of the British Columbia Court of Appeal in *Cameron v. Law Society of British Columbia* (1991) 3 B.C.A.C. 35, 81 D.L.R. (4th) 484. We have two problems with it. The first is that the facts there were much more complex, and therefore we have some trouble extracting from it the propositions suggested by the appellant here. The one possibly applicable general proposition in it which we can find is its suggestion that strict, even technical construction, be given to penal statutes, citing an older English textbook. We do not believe that that is the proper approach to statutory interpretation in Canada today, particularly when the topic is a police discipline proceeding. It is also very hard to reconcile that technical approach with s. 10 of the Alberta *Interpretation Act*, especially its first eight words and its last eight words.

[para 22] The Court of Appeal found that interpreting section 7(4) as preventing a commission from extending the time limit in section 7(1) after the six-month period had expired would bring the police discipline process into disrepute. I adopt the reasoning of the Court of Appeal in *Manyfingers* to the extent that it found it appropriate to consider section 10 of the *Interpretation Act* and to adopt a purposive approach when interpreting a statutory provision that enables an administrative body to extend a limitation period.

[para 23] Section 69(6) states that an inquiry must be completed within 90 days of receiving the request for review unless the Commissioner extends the 90-day period with notice to the parties and provides an anticipated date for completion of the review. As the Commissioner notes in Order F2006-031, the provision does not explain what form notice of the extension of the 90-day period is to take, or, more importantly, *when* the Commissioner is to extend the 90-day period. The placement of the phrase “within 90 days” in the provision indicates that it refers to the completion of the inquiry, and not to the Commissioner’s power to extend the 90-day period in subsections 69(6)(a) and (b). I find that there is no express requirement in the legislation for the Commissioner to extend the 90-day period within 90 days of receiving an applicant’s request for review. I therefore find that it was open to the Commissioner to extend the time for completing the review and to provide an anticipated date of completion on August 2, 2007.

[para 24] Applying the reasoning of *Manyfingers*, any ambiguity in relation to when the Commissioner may extend the time to complete the inquiry under section 69(6) should be resolved in a way as to ensure the attainment of the objects of the Act, as required by section 10 of the *Interpretation Act*. The objects of the Act are set out in section 2, which state, in part:

2 *The purposes of this Act are...*

- (e) *to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

As a purpose of the Act is to provide for independent reviews of decisions made by public bodies under this Act, an interpretation of section 69(6) that ensures that this object is attained is to be preferred over one that does not. Section 69(6) is silent as to when the Commissioner must extend the 90-day period and reading in to the provision a requirement to extend the 90-day time period within 90 days would have the effect of defeating a purpose of the legislature in enacting the Act.

[para 25] In addition, provisions cannot be read in isolation, but in the context of an enactment as a whole. As the Commissioner noted in Order 2006-031, reading a requirement into section 69(6) that the 90-day period must be extended within 90 days would render the Commissioner's duty to conduct an inquiry in section 69(1) nugatory. Section 69(1) states:

*69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry. (Emphasis mine)*

[para 26] The Commissioner said in paragraph 120 of Order 2006-031:

If the effect of section 69(6) is to deprive me of jurisdiction if I do not complete an inquiry within 90 days and do not extend the time, I can avoid my duty by failing to do those things. A duty to conduct an inquiry becomes potentially meaningless if it can be defeated by the decision maker simply failing to conduct the inquiry or failing to extend the time. This leads to the conclusion that my duty to conduct an inquiry under the FOIP Act remains, whether or not the time limit in section 69(6) has been exceeded.

Interpreting section 69(6) as empowering the Commissioner to extend the 90-day period after the expiry of the 90-day period avoids conflict with section 69(1) and is supported by the wording of the provision.

[para 27] The Commissioner extended the time limit for completing the inquiry on August 2, 2007 and I find that the Act authorized the Commissioner to do so. Consequently, I have jurisdiction to conduct this inquiry.

[para 28] Further, the parties were advised on April 3, 2006 that the Commissioner anticipated that the inquiry would be completed on July 3, 2006; 94 days after the Commissioner received the Applicant's request for review. I note that in *Kellogg Brown and Root*, Belzil J. said:

The wording of s. 50(5) clearly signifies that the section was designed to give the Commissioner maximum flexibility and has a built-in saving provision in that if the inquiry cannot be completed within 90 days, the Commissioner merely has to give notice of an anticipated completion date.

Not only does the Commissioner control the timing, there is no need to set a definite response time but only an anticipated response time, which provides even more flexibility.

The Commissioner provided an anticipated date of completion within 90 days of receiving the request for review and the anticipated date of completion was outside the 90-day period. Consequently, I find that the Commissioner complied with the requirements set out by the Court in *Kellogg Brown and Root*.

[para 29] I have found that the requirements of section 69(6) have been met. However, if I am wrong on my factual finding that the requirements of section 69(6) have been met in this case, or if section 69(6) imposes a duty on the Commissioner that has not been met, then I adopt the reasoning of the Commissioner in Order F2006-031.

[para 30] In that order, the Commissioner decided that if section 69(6) imposes a duty on the Commissioner that has not been met, that section 69(6) is directory rather than mandatory for the following reasons:

The Legislature has entrusted me with the authority to protect those who deal with public bodies by ensuring that public bodies comply with the FOIP Act. There is a public interest at stake, as demonstrated by the stated objective of section 2(b) and the other objectives set out in section 2 of the FOIP Act. A decision that renders me without jurisdiction as a result of a breach of a technical timing requirement frustrates much of the intended purpose of the FOIP Act. It is difficult to imagine how the Legislature could have intended such a result. In my view, it would be contrary to the public interest to allow the purpose in section 2(b) and the other purposes in section 2 to be defeated by finding that section 69(6) is mandatory and that I lose jurisdiction if I do not comply with it.

Furthermore, although the Supreme Court of Canada in *Dagg* has not yet elevated the protection of privacy to constitutional status, the Supreme Court of Canada has recognized that it is worthy of constitutional protection (see above). In my view, it would be contrary to the public interest on this ground as well to allow the protection of privacy to be defeated by a finding that section 69(6) is mandatory.

[para 31] In the case before me, sections 2(a) and (e) of the Act are relevant. These provisions state:

*2 The purposes of this Act are*

- (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act...*
- (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

Two purposes in enacting the legislation are to grant a right of access to information and to provide independent reviews of decisions in relation to the right of access. These purposes, in addition to the Commissioner's authority under 53, suggest that the

legislature did not intend the Commissioner to lose jurisdiction as a consequence of non-compliance with any requirement to extend the time limit within 90 days of receiving the request for review. Further, given that section 69(1) of the Act creates a duty for the Commissioner to conduct an inquiry, I do not find that any delay in extending the time limit under section 69(6) is sufficient to relieve the Commissioner of his statutory duty under section 69(1). Consequently, I find that the legislature intended section 69(6) to be directory.

[para 32] In *Kellogg Brown and Root*, Belzil J. decided that all the circumstances must be considered, including the particular circumstances of the case in determining whether jurisdiction is lost. In support of applying this approach, the Commissioner considered *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4<sup>th</sup>) 693 in paragraphs 148 and 149 of Order F2006-031:

The court ... set out a non-exhaustive list of factors to be considered in determining whether non-compliance with an obligatory provision invalidates administrative action. Among these, the following factors are relevant in the present case:

ii) The seriousness of the breach of the statutory duty: a technical violation is an indicator that the court should not intervene, while a public authority that flouts the statutory requirement can expect judicial intervention.

iv) ..., the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.

In view of these developments in the law, if I am wrong in my conclusions that the requirements of section 69(6) of the FOIP Act were met in this case and that section 69(6) is directory rather than mandatory, I have no hesitation in applying the part of the reasoning in *Kellogg* that the circumstances of the particular case come into play in deciding whether jurisdiction would be lost by reason of a breach of section 69(6). I will, accordingly, analyze the case-specific circumstances, to decide whether the Legislature intended that jurisdiction should be lost by non-compliance in this case.

[para 33] In the present case, I find that if there has been a breach of statutory duty, it is technical in nature. The Applicant's request for review was received on March 31, 2006. As noted above, the Commissioner notified the parties that the anticipated date of completion would be July 3 2006. The Commissioner also advised the parties that he would formally extend the date for conducting the inquiry at a later date if it were necessary. While the portfolio officer's letter informing the Public Body that the file was closed could have led the Public Body to mistakenly assume that the Applicant had abandoned his request for review, the Public Body did not raise the officer's letter as an issue of concern, other than to note that the letter had been received. A notice of inquiry was sent to the parties on April 11, 2007 and the time for completing the inquiry was formally extended on August 2, 2007. The parties had been advised in advance that the inquiry would take longer than 90 days to complete and that the Commissioner would extend the time for conducting the inquiry if necessary. As the inquiry was not completed by July 3, 2006, the parties had notice that the Commissioner intended to extend the time.

Given that the parties were apprised that the inquiry would take longer than 90 days, and given that they had notice that the Commissioner intended to extend the time limit, I do not find that the fact that the Commissioner extended the time on August 2, 2007 rather than on June 29, 2006 anything more than a technical breach.

[para 34] The Public Body provided the affidavit of an employee in support of its jurisdictional argument. The author of the affidavit presents the opinion that it is important for the Commissioner to extend the time for completing an inquiry within the 90 day period so that the Public Body will be better able to allocate its resources. He explains that the potential detriment to the Public Body of failure to receive notice of the extension within 90 days is uncertainty as to whether the inquiry will proceed, uncertainty in relation to the timing of written submissions, uncertainty as to whether the Public Body has correctly interpreted the Act, stress and uncertainty for members, and delay of parallel proceedings. The Public Body also submitted the following:

Whether or not there are any alternative remedies available is not a proper factor to consider, since an examination of this factor is not helpful in clarifying legislative intent. Moreover, a consideration of this factor may lead to a situation where a legislative provision is found to be mandatory in one case, and directory in another. The legislature surely could not have intended such an absurd result.

Although EPS submits that this is not a proper factor to consider, in the present case, there is an alternative remedy available to the Applicant. In particular, if the Commissioner determines that the Commissioner has lost jurisdiction to proceed with the inquiry in this case, there is nothing precluding the Applicant from submitting another request for access the Report (sic) in question.

[para 35] In turn, the Applicant argues that a loss of the Commissioner's jurisdiction would result in increased delay, as the Applicant would be required to make his access request again, submit a new request for review, and cause all parties and the Commissioner to recommence the inquiry process.

[para 36] The Public Body appears to argue that I am bound by the result of *Kellogg Brown and Root*, but not by the application of legal principles in that case. I disagree with that approach to applying precedent. Rather, when applying precedent, it is important to consider the legal reasoning of the decision maker and the application of that reasoning to the issues and facts in the case.

[para 37] In paragraphs 76 – 78 of *Kellogg Brown and Root*, Belzil J. said:

It is also necessary to inquire as to whether alternative remedies are available to the complainant and affected organizations if the provision is interpreted to be mandatory.

While the complainant would lose his right under *PIPA* to have an inquiry proceed, it must not be overlooked that the complainant originally raised this issue as a human rights complaint, which can still be pursued. Moreover, as a union member, this matter could be pursued through grievance proceedings.

In contrast, KBR and Syncrude have no alternative remedies if the Commissioner's arguments are accepted in that on his interpretation of s. 50(5), they must simply wait, not knowing if they are in jeopardy and should be altering policies and procedures or creating them to avoid that jeopardy.

[para 38] Belzil J. found it necessary to consider whether there were alternative remedies available if he were to interpret section 50(5) of PIPA as mandatory. He determined that as the complainant in that case was entitled to have his complaint heard by a human rights tribunal, or alternatively, to have a grievance on the same issue decided by an arbitrator, that this was a factor weighing in favor of a finding that the provision was mandatory. In addition, he found that the organizations in that case did not have an alternative remedy, as they would have to continue to wait, not knowing whether their drug testing practices put them in jeopardy. He considered that this factor also weighed in favor of finding the provision mandatory.

[para 39] I do not consider restarting the application process to be an “alternative remedy.” Rather, it is the same remedy. In addition, review of the Public Body’s decision by this office is the only remedy available to the Applicant in this case. The Applicant has made a request for access to information under section 7 of the Act. There is no other means available to the Applicant to obtain the records he seeks. In contrast, the Court in *Kellogg Brown and Root* found that the complainant in that case had the opportunity to have the same complaint addressed under human rights legislation and through the grievance process.

[para 40] The fact that the same process remains available in the event of loss of jurisdiction speaks to the difficulty in adopting the Public Body’s narrow interpretation of section 69(6). Little would be gained by requiring the parties to duplicate their initial requests and decisions and go to further labour and expense through repetition of the inquiry process.

[para 41] The Court in *Kellogg Brown and Root* found that the delay suffered by the organizations in that case had put those organizations in jeopardy. Jeopardy, in law, is the risk of being convicted or punished in some way. An order of the Commissioner under the FOIP Act is not punitive in nature. While delay under the Act may prolong uncertainty as to whether a Public Body has made the right decision to withhold information when responding to an access request, this uncertainty does not amount to jeopardy.

[para 42] In the present circumstances, the parties have provided submissions and evidence to advance their cases. They have raised new issues and presented arguments in relation to them. If the Commissioner were to lose jurisdiction for failing to extend the time for completing the inquiry within the 90-day period, the resources the parties expended in preparing their cases would be wasted and the parties would be required to restart the process. A finding that there is a mandatory requirement to extend the 90-day period within the 90-day period would result in a dramatic increase to the time and resources expended by the Applicant, the Public Body, and this Office. Consequently, if section 69(6) imposes a duty on the Commissioner to extend the 90-day period within the 90-day period, I find that the legislature would not have intended a loss of jurisdiction to result from any failure to meet this requirement. Further, applying the reasoning in *Kellogg Brown and Root*, I find that the Applicant lacks an alternative remedy, while any

uncertainty experienced by the Public Body does not amount to jeopardy. Consequently, the facts in this case lead to the conclusion that the legislature did not intend non-compliance with section 69(6) to result in loss of jurisdiction in the circumstances.

**Issue A: Did the Public Body properly apply section 27(1)(a) and (c) of the Act (privileged information) to the records and information?**

[para 43] Section 27 of the Act grants public bodies the discretion to withhold privileged information. It states, in part:

- 27(1) The head of a public body may refuse to disclose to an applicant*
- (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
  - (b) information prepared by or for*
    - (i) the Minister of Justice and Attorney General,*
    - (ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
    - (iii) an agent or lawyer of a public body, in relation to a matter involving the provision of legal services, or*
  - (c) information in correspondence between*
    - (i) the Minister of Justice and Attorney General,*
    - (ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
    - (iii) an agent or lawyer of a public body, and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*

*(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body...*

The Public Body applied section 27 to withhold bills of account and internal correspondence in their entirety.

*Lawyers Bills of Account*

[para 44] The Public Body argues that solicitor client privilege applies to solicitor's statements of account, including detailed billing information and amounts billed. The Public Body relies on *Maranda v. Richer* [2003] 3 S.C.R. 193, *Stevens v. Canada (Prime Minister)* [1998] 4 F.C. 89 (CA) and Orders F2002-007 and F2004-017 as authority for this position.

[para 45] The Applicant argues that the acts of a lawyer are not privileged as acts do not involve the giving of advice. He contends that section 27 does not apply to the bills of account at issue.

[para 46] In *Maranda v. Richer*, [2003] 3 S.C.R. 193., Lebel J., writing for the majority of the Supreme Court of Canada, concluded:

However, the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege. Sopinka, Lederman and Bryant, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, §14.53):

The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitates a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the members of law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect. The applicable legislation and regulations include strict rules regarding accounting and record-keeping, an obligation to submit detailed accounts to the client, and mechanisms for resolving disputes that arise in that respect (*Act respecting the Barreau du Québec*, R.S.Q., c. B-1, s. 75; *By-law respecting accounting and trust accounts of advocates*, R.R.Q. 1981, c. B-1, r. 3; *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, ss. 3.03.03 and 3.08.05; *Regulation respecting the conciliation and arbitration procedure for the accounts of advocates*, (1994) 126 O.G. II, 4691). The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.

In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, *supra*, at paras. 4-5.

[para 47] In other words, the Supreme Court of Canada found that there is a presumption that lawyers' bills of account are subject to solicitor-client privilege because they arise from the solicitor-client relationship.

[para 48] In *Ontario (Ministry of the Attorney General) v. Mitchinson* (2004), 239 D.L.R. (4th) 704 Carnwath J. speaking for the Divisional Court noted that *Maranda* addresses the situation in which a search warrant was executed at a lawyer's office as part of a criminal investigation. The Court also noted that the presumption of privilege is rebuttable and said:

It can be argued that the conclusions of LeBel J. in *Maranda* must be confined to situations where the information sought is as a result of an application for search and seizure by the Crown in pursuing a criminal prosecution. It can also be argued that LeBel J.'s conclusions extend to every instance where there is a solicitor-client relationship. However, in either instance, I find it open to the court to rebut the presumption identified by LeBel J. and to conclude, in certain circumstances, that the gross amount of a lawyer's account is neutral information not subject to solicitor-client privilege.

The Divisional Court upheld a decision of the Ontario Office of the Information and Privacy Commissioner to order disclosure of the global amounts of fees paid to four lawyers for legal services provided to Paul Bernardo, as disclosing this information would not reveal privileged information.

[para 49] In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65, the Ontario Court of Appeal dismissed the Attorney General's appeal of the Divisional Court's decision in *Mitchinson*. The Court adopted the following approach to determining when legal fees are protected by privilege:

We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda v. LeBlanc, supra*, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.

*Maranda* arose in the context of a challenge to a search warrant issued in a criminal investigation. The court stresses the importance of the client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of that relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.

While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* 2003 BCCA 278, 226 D.L.R. (4<sup>th</sup>) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire *Act*.

We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on

this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.

The Divisional Court did not err in holding that the IPC correctly concluded that the information ordered disclosed was not subject to client/solicitor privilege.

[para 50] Similarly, in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2769 the Ontario Divisional Court upheld the decision of the Office of the Ontario Information and Privacy Commissioner to order disclosure of the total lines on legal bills paid by the Ministry of Community and Social Services in relation to two civil actions. In that case, the Court commented that *Maranda* had effectively overruled *Stevens* to the extent that *Stevens* held that lawyers' bills of account are subject to a blanket privilege. In addition, the Court recognized that *Maranda* had effectively rejected the "facts and acts" approach to determining whether lawyers' billings are privileged communications, adopting instead "a rebuttable presumption of privilege" test. The Court said:

Writing for the majority in *Maranda*, LeBel J. observed that courts have been divided on the question of whether information contained in legal billings is privileged. One line of cases supported the proposition that the amount of fees, with nothing more, is not a "communication" but rather a "fact" which is not subject to privilege unless the context dictated otherwise. Another line of cases, including *Stevens v. Canada*, held that a lawyer's bill is a communication expressive of the relationship between the solicitor and client and the amount of fees should always be protected by a blanket privilege given the ability of opposing counsel to sometimes extract privileged information from apparently neutral billing amounts.

With respect to such information, the Supreme Court rejected the fact/communication dichotomy and clearly established a new test for solicitor-client privilege for this kind of information. LeBel J. in *Maranda*, at paras. 28 to 34, in effect abandoned the absolutist approach taken by each line of cases and, instead, developed the "rebuttable presumption of privilege" test when a disclosure of lawyer's billing information is sought.

It is clear that *Maranda* overrules *Stevens* to the extent that the latter purported to recognize a blanket privilege for billing information.

[para 51] The case law establishes that lawyers' bills of account are presumed to be subject to solicitor-client privilege. However, the presumption is rebuttable. In an access request, the burden lies on the applicant to rebut the presumption. To determine whether the presumption is rebutted in this case, I will apply the test adopted by the British Columbia Court of Appeal in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 14 B.C.L.R. (4th) 67, and adopted by the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General)*: Is there a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege? If so, then the information is protected by solicitor-client privilege.

[para 52] While the burden of proof lies on the Applicant, an applicant is at a disadvantage in making arguments or presenting evidence in relation to records he or she is unable to see or know the contents of. I will therefore consider the evidence of the bills of account to determine whether the information the Applicant requested could enable him to acquire communications protected by privilege or is neutral information that would not.

[para 53] The Applicant has not in fact specifically requested Bennett Jones' bills of account, but asked for records containing information relating to the amounts paid by the Public Body in relation to complaints made about him to the Law Society. From his request and arguments, it is clear that he is not seeking any information from the bills of account other than the amounts billed.

[para 54] Having reviewed the information in the bills of account, I am satisfied that disclosing the total amount due, the firm letterhead, and the name and address of the Public Body from each bill of account would not enable the Applicant to acquire privileged communications. Disclosing this information will reveal that the law firm acted on behalf of the Public Body and the amount it billed for its services. That the law firm of Bennett Jones was retained by the Public Body was already known to the Applicant, as the law firm, at the direction of its client, represented the Public Body in its complaint against the Applicant. Any privilege attaching to the fact that the Public Body retained the law firm to represent it in proceedings before the Law Society was effectively waived when the law firm openly represented the Public Body before the Law Society at the direction of its client. Further, the fact that the Public Body retained the law firm was confirmed by the Public Body when it responded to the Applicant's access request. As the Applicant will not receive information relating to the dates of the bills of account, the services provided, or the individual lawyers providing the services, the total amount billed by the law firm remains neutral information from which the Applicant will be unable to glean information about advice received from counsel or the legal strategies employed by the Public Body.

[para 55] The Public Body also made arguments in relation to section 27(2) of the Act. The Public Body argues that the bills of account contain information relating to the solicitor as well as the client:

Section 27(2) provides that the head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body. It is submitted that in accordance with section 27(2) of the Act, the Public Body does not have discretion and must refuse to release the records. The information relating to its billing practices, clients, and financial circumstances is the personal information of the lawyers who rendered the accounts and cannot be released.

[para 56] The Public Body's interpretation relies on an overly broad reading of the phrase "information described in (1)(a) that relates to a person other than a public body" in section 27(2). Section 27(1)(a) does not relate to any information, but information that is the subject of privilege. While I agree that bills of account and other documents may

occasionally contain information about the lawyer or law firm that prepared them, I do not agree that any privilege attaching to them is the lawyer's. Instead, privilege belongs to the client. In *Stevens*, the Federal Court of Appeal explained the relationship between solicitor and client in the context of privilege:

The doctrine has evolved over the years. Nowadays any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. The great Dean Wigmore has explained the privilege as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the 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.

This is the basic rule as it applies in Canadian law today. The rationale of the privilege is to ensure that a client is free to tell his or her lawyer anything and everything that is pertinent to the case, without any fear that this information may subsequently be divulged and used against them. Without this freedom, there is the possibility that the lawyer may not have the benefit of all the relevant information, and may not be able to do his or her job effectively. And that possibility must be avoided as contrary to the interests of justice.

Clearly, solicitor-client privilege is that of the client rather than the solicitor.

[para 57] Under the Public Body's interpretation, section 27(1)(a), which is discretionary, would have no purpose, as it would always be mandatory to withhold privileged records under section 27(2) because they contain information about the lawyer who provided the advice or prepared the document. Instead, I interpret section 27(2) as preventing a public body from disclosing records containing privileged information when the privilege belongs to another. This interpretation is consistent with Order 96-020 as the former Commissioner found in that case that information was subject to privilege and that the privilege belonged to a person other than the Public Body.

[para 58] In arriving at this decision, I distinguish Order F2002-007 and F2004-017, on which the Public Body relies, on the basis that that the Commissioner did not have the benefit of *Maranda*, *Mitchinson*, and *Ontario (Attorney General)* when he decided them.

[para 59] As the Public Body is not entitled to withhold the total amounts of the bills on the basis of privilege, I find that the Public Body has not properly applied section 27(1)(a) to this information.

### *Internal Correspondence*

[para 60] Although the Public Body originally withheld records on the basis of section 27(1)(c), it provided no argument or evidence in relation to the application of this provision. Rather, it confined its arguments to sections 27(1)(a) and 27(2).

[para 61] The Public Body takes the position that the internal communications in question are subject to solicitor-client privilege because these records relate to the receipt

and payment of legal services. However, as noted above, bills of account are subject to a rebuttable presumption of privilege, and are not necessarily privileged in their entirety.

[para 62] In *Solosky v. The Queen*, [1980] 1 S.C.R. 821, Dickson J. (as he then was) confirmed the requirements of solicitor-client privilege:

...privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege—(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 63] I am satisfied that the internal correspondence is subject to solicitor-client privilege, but not for the reasons provided by the Public Body. The memoranda are communications from a legal advisor, who is a member of the bar, to the Public Body, and are legal advice. From the nature of the advice given, I infer that it was intended to be confidential between the lawyer and his client, the Public Body. Similarly, the two emails on file are subject to solicitor-client privilege as one is from an employee responding to an email from counsel and the other contains legal advice from counsel and indicates that it is intended to be privileged or confidential.

[para 64] The Public Body chose to withhold these records to protect information it wished to keep privileged. In my view, that is an appropriate purpose for exercising discretion under section 27(1)(a). Therefore, while the Public Body cannot rely on section 27 to withhold the total amounts due, the firm letterhead, and the name and address of the Public Body from the bills of account, it properly exercised its discretion to withhold the remaining information in the records at issue under section 27.

### **Issue B: Does section 32 of the Act (public interest) apply to the records and information?**

[para 65] As noted above, the Applicant requested only the total amounts billed by the law firm of Bennett Jones in relation to complaints about him to the Law Society. Further, he restricted his arguments in relation to section 32 to the total amounts billed. Since I have found that the Public Body must disclose the total amount of each bill of account to the Applicant, I need not consider whether section 32 also applies to that information. However, I will address the issue of whether it is in the public interest to disclose the remainder of the information, which I have already found to be subject to solicitor-client privilege.

[para 66] Section 32 states, in part:

*32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*

(a) *information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*

(b) *information the disclosure of which is, for any other reason, clearly in the public interest.*

Section 32 imposes a duty on the head of a public body to disclose information when it is in the public interest to do so. However, it is also important to recognize that there are also situations when the public interest is served by withholding information.

[para 67] I have already found that the remainder of the information at issue is subject to solicitor-client privilege. In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, Binnie J. commented on the importance of solicitor-client privilege:

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.

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.

The Court found that it is in the public interest to maintain solicitor-client confidentiality. Consequently, any public interest in disclosing solicitor-client communications must outweigh the public interest in maintaining the confidentiality of these communications.

[para 68] I find that the Applicant has not established that there is a public interest in disclosing the remaining information, or that any public interest in disclosing the remaining information outweighs the public interest in maintaining confidentiality of privileged communications.

## **V. ORDER**

[para 69] I make this Order under section 72 of the Act.

[para 70] I order the Public Body to disclose the following information in relation to the bills of account: the total amounts due, the firm letterhead, and the name and address of the Public Body. All other information may be severed.

[para 71] I further order the Public Body to notify me, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

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Teresa Cunningham  
Adjudicator