ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2017-D-01

July 31, 2017

UNIVERSITY OF CALGARY

Case File Number F4833

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to her former employer the University of Calgary under the *Freedom of Information and Protection of Privacy Act* (the Act or the FOIP Act), for information about herself held in specified locations. The University located records and provided some of them, but withheld others in reliance on a number of exceptions to disclosure in the Act. The Applicant requested a review.

With regard to records withheld in reliance on section 27(1)(a) of the Act (approximately 100 pages), the adjudicator formerly hearing this matter decided he was unable to determine whether these records were covered by solicitor-client privilege without reviewing them, and he issued a Notice to Produce Records to the University.

The University brought an application for judicial review of the previous adjudicator's decision to issue the Notice to Produce, on the basis the FOIP Act does not confer power on the Commissioner or delegated adjudicators to compel records over which solicitor-client privilege has been claimed. The issue was ultimately resolved by the Supreme Court of Canada, which held, in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, that the Commissioner does not have the power to compel such records.

As the inquiry in this matter had not been completed, the Commissioner delegated her powers to decide the issue in the inquiry to a different adjudicator.

The University of Calgary took the position that the question of whether the records had been properly withheld from an applicant by the University of Calgary in reliance on section 27(1)(a) had already been decided by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*.

This decision addresses this position. The adjudicator held that the Supreme Court had not already made a decision about whether privilege had been properly claimed over all the records at issue.

Because the matter was raised before the Court during an interim step in the inquiry, a reviewable decision on this issue had not yet been made by the adjudicator. Therefore, it could not be said the Supreme Court had reviewed it and substituted its own decision for that of the adjudicator. As a final decision on the privilege claim had not yet been made, and the inquiry had not been concluded, the adjudicator was under a duty to do these things.

However, the Supreme Court had expressed its view in *Alberta (Information and Privacy Commissioner) v. University of Calgary* that even had the previous adjudicator had the power to do so, given the materials the University had provided to him, and in the absence of evidence or argument to contradict the claim of privilege, he should not have required production of the records. The adjudicator regarded this statement as an expression of the Court's opinion that in these circumstances the records should be found to be subject to solicitor-client privilege, and that she is bound to make the decision in a particular way with respect to records to which this opinion of the Supreme Court applies.

However, the Supreme Court's attention had not been drawn to facts and argument provided by the Applicant which reasonably raised the possibility there had been communications between the University and its in-house counsel, that were made before the Applicant's lawsuit had been anticipated, and could have related to matters involving policy or other aspects of the University's business, rather than legal advice. It was thus possible there were records among those withheld as privileged, respecting which evidence and arguments had been presented by the Applicant to contradict the privilege claim.

The adjudicator concluded that the Court's comments would not be applicable to such records, if any, among the withheld records. Therefore, with respect to any communications between the University and its in-house counsel made before the lawsuit had been anticipated, the adjudicator said she would provide the University with a further opportunity to provide information, including information in relation to the considerations the Supreme Court of Canada had set out for records involving in-house counsel in *Pritchard v. Ontario (Human Rights Commission).*

With respect to records consisting of communications between counsel (both in-house and external) and the University which related to the lawsuit or the anticipated lawsuit, as the Applicant had presented no evidence or argument to contradict the claim of privilege

for such records, the adjudicator said she would be bound by the comments of the Supreme Court to conclude they are privileged.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27(1)(a), 53(2), 69(3), 72(1), 75; *Interpretation Act*, R.S.A. 2000, c. I-8, ss. 35, 36; Rules of Court, AR 124/2010; ss. 5.7, 5.8, 15.2(2), 15.6, 15.12.

Orders Cited: AB: Order F2010-022.

Court Cases Cited: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *Dorchak v. Krupka* 1997 ABCA 89; *Broers v. Real Estate Council of Alberta*, 2010 ABQB 774; *Canadian Natural Resources Ltd. v. ShawCor Ltd*., 2014 ABCA 289; *McDonald v. Brookfield Asset Management Inc.* [2015] A.J. No. 531, 2015 ABQB 281.

Policies Cited: AB: Office of the Information and Privacy Commissioner (Alberta), Solicitor-Client Privilege Adjudication Protocol (Edmonton: October 24, 2008).

I. BACKGROUND

[para 1] The Applicant made a request to her former employer the University of Calgary under the *Freedom of Information and Protection of Privacy Act* (the Act or the FOIP Act). She asked for information held by various other employees, a Wellness Centre and a doctor associated with the Wellness Centre. The University provided some of the requested records, but withheld others relying on a number of exceptions to disclosure under the Act, including section 27(1)(a) (privileged information, etc.).

[para 2] The Applicant requested a review of the University's decisions to withhold information.

[para 3] The adjudicator formerly delegated to hear this matter requested further information from the University as to the reasons for its claim of privilege in reliance on section 27(1)(a). Following further correspondence, the adjudicator concluded it was necessary to issue a Notice to Produce Records to the University for records that had been withheld under section 27(1)(a). The Notice was issued on October 20, 2010.

[para 4] The University brought an application for judicial review relative to the adjudicator's decision to issue a Notice to Produce, on the basis the FOIP Act does not confer power on the Commissioner or delegated adjudicators to compel records over which solicitor-client privilege has been claimed. This application proceeded through the Court of Queen's Bench and the Court of Appeal, and culminated in the decision of the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53. The Supreme Court held that the Commissioner does not have power to compel records over which solicitor-client privilege has been claimed.

[para 5] In Order F2010-022, the previous adjudicator dealt with whether records had been properly withheld under exceptions to access other than section 27(1)(a), but he did not deal with whether records had been properly withheld under that provision. With regard to the latter, he reserved jurisdiction to decide whether solicitor-client privilege applied to records withheld in reliance on section 27(1)(a), pending the outcome of the application for judicial review.

[para 6] After the Supreme Court issued its decision, the Commissioner delegated the authority to me to finally decide the question that had been raised by the Applicant, of whether the University had properly applied section 27(1)(a) of the Act to the records it had withheld under this provision.

[para 7] Accordingly, I wrote to the parties on January 31, 2017, as follows:

> **Re: Completion of Inquiry F4833**
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> Information and Privacy Commissioner Jill Clayton has delegated to me the authority to complete Inquiry #F4833, as Adjudicator Raaflaub is no longer with the Commissioner's Office.
>
> The Supreme Court overturned the Adjudicator's production order for the records over which solicitor-client privilege was being claimed, on the basis that section 56(3) of the FOIP Act did not confer power on the Commissioner to order production of such records.
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> The Supreme Court also commented that the University of Calgary had met the requirements of the law as stated in *Dorchak v. Krupka* [1997] A.J. No. 308 as to the evidence that needed to be tendered in making a claim of solicitor-client privilege in the context of civil litigation. The Court said that as this case set out the applicable law at the time, the Adjudicator erred in not taking the University's evidence as sufficient to establish the claim.
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> However, the decision of whether the University of Calgary properly withheld records that the Public Body claims are subject to solicitor-client privilege had not been decided when the case came before the Court. The substantive question that was raised by [the Applicant] is one that the Commissioner has a duty to decide, and this has not yet been done.
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> There have been further developments in the related law, in particular, the decision of the Alberta Court of Appeal in *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289. This case changed the requirements as to the evidence that needs to be tendered in making a claim of solicitor-client privilege in the context of civil litigation. It is not clear what bearing the Supreme Court's comments as to what it would have been proper for the Adjudicator to decide under the earlier law have upon a decision still to be made, when the law has changed in the interim.
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> On the basis of the *ShawCor* decision and that in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809 (pertaining to situations involving in-house legal counsel), as well as the Supreme Court's indication that the law as to how claims of

privilege are to be made in civil litigation applies when the Commissioner is deciding whether records are subject to solicitor-client privilege, the Commissioner's Office has recently issued a Privilege Practice Note. This Note, which I attach, sets out the kind of evidence now needed to enable the determination of whether records are subject to the claimed privilege, as this is prescribed in the cases cited above.

Before now making the decision as to whether the records remaining at issue may be withheld on the basis they are subject to solicitor-client privilege, I am giving the parties an opportunity to provide submissions regarding the law applicable to the decision I am to make. The University may also provide any evidence it has that meets the requirements of the cases cited in the Practice Note (if it wishes to make its submissions *in camera* it should do so in accordance with the attached procedures).

[para 8] The University responded as set out below. (I have inserted the italicised portions to provide more precise details of the contents of the portions of the University's submissions to the previous adjudicator to which it refers in its reply to me):

This is further to your advice that the Office of the Information and Privacy Commissioner is proceeding with Inquiry #F4833.

The University considers Inquiry #F4833 fully adjudicated because of the extensive Judicial Review applications in the Court of Queen's Bench and Court of Appeal and the subsequent ruling by the Supreme Court of Canada.

EVIDENCE ESTABLISHED A PROPER CLAIM

A review of your file will substantiate that extensive evidence was provided by the University to the previous Adjudicator, all of which validated the University's claim of solicitor-client privilege over the documents. For your easy reference, this evidence included:

a. Sworn affidavit from [the University's Access and Privacy Coordinator (the APC)] affirming the solicitor-client nature of the documents based on information from the University's general counsel and external counsel. (August 3, 2010)

[This affidavit was attached to and referenced in the University's initial submission. The first two paragraphs under the heading "Solicitor Client Privilege" in this affidavit noted that a copy of the Applicant's lawsuit, and the University's Statement of Defence, were being appended. The third paragraph stated the following:

> *University Legal Services and external legal counsel have advised various University officials about the Applicant's employment with the University. I am advised by the University's General Counsel and do verily believe that solicitor/client privilege has been asserted over the communications given and received by the University's lawyers in respect of this matter.]*

b. Preparation of written submissions to the adjudicator confirming solicitor- client privilege (August 4, 2010).

[Under the Heading "Summary of Arguments" this submission stated: "The University claims solicitor-client privilege over records involving the University's General Counsel and the University's external legal counsel" Under the Heading "Section 27", the submission stated that "Communications involving legal counsel have been withheld on the basis of solicitor-client privilege. These pages are: RECORDS SUBJECT TO SOLICITOR CLIENT PRIVILEGE". The heading is followed by a one-column chart of 31 rows, listing individual page numbers or groups of page numbers.]

c. Letter from the Provost and Senior Vice President, dated October 5, 2010 asserting (as client) that the communications were subject to solicitor-client privilege and privilege would not be waived.

[This letter stated in part:

> *As you know from reviewing [the APC's] affidavit, [the Applicant] had commenced a multi-million dollar law suit against the University of Calgary. This law suit is being vigorously defended.*
>
> *The communication between the University of Calgary and its legal advisers is the subject-matter of solicitor-client privilege as recognized in the common law for centuries, by the Supreme Court of Canada in the Blood Indian Tribe decision [2008] S.C.R. 574 and also in Section 27 of the FOIP Act.*
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> *The University of Calgary will not waive the privilege on the records identified in [the APC's] affidavit.]*

d. Letter from McCarthy Tetrault dated October 12, 2010 further explaining why the documents were considered solicitor-client privileged.

[The first paragraph of this letter included the following statement: "The University must defend itself against the multiple legal matters commenced by [the Applicant] and in so doing, must rely on solicitor-client privilege to ensure that communications involving the University General Counsel and its external counsel, for the purposes of giving advice and understanding the issues, remain confidential."

Parts of McCarthy Tetrault's letter were responses to the Applicant's contention that the University was required to provide the records over which privilege had been claimed to the adjudicator for his review, which the University disputed. It also pointed out that the privilege belongs to the University as client, not to its legal counsel, so that it was appropriate for the chief operating officer of the University to be claiming in (this was a reference to the letter in item c.)

The letter of October 12, 2010 also stated the following: "Because [the Applicant] has a $2 million lawsuit against the University and has initiated

numerous other legal disputes, it is not surprising that a chief operating officer would exercise the right to invoke solicitor-client privilege."

The external counsel's letter also responded to the Applicant's submission that privilege could not be claimed because the law suit was not filed until after many of the records had been created, and after the FOIP request was made. The letter pointed out that "solicitor-client communication in anticipation of litigation is equally protected under the common law", and did not commence only after the law suit had been filed.

The letter of October 12, 2010 also stated that "[The Provost's] reply was suitable for the purposes of re-asserting solicitor-client privilege, which was originally set out in [the APC's] affidavit, which was sent out in the previous response to the Commission".

The letter concluded with the statement that "There can be no clearer case where solicitor-client privilege needs to be fiercely invoked and defended, in light of [the Applicant's] $2 million plus lawsuit and her other multiple legal issues which she has raised against the University.]

e. Affidavit from [University's Human Resources Consultant] (Dept. of Human Resources) reaffirming that the documents in question were solicitor-client privileged and involved communication from the University's general counsel and external counsel.

[This affidavit postdates the previous adjudicator's decision to issue the Notice to Produce, and was provided for the first time to the Alberta Court of Queen's Bench during the judicial review process.]

It was very clear to the Supreme Court of Canada that the University provided more than sufficient evidence to substantiate its claim of solicitor-client privilege over the documents. The Supreme Court of Canada held:

> [127] "... the evidence filed with the Commissioner met the three part tests set out in. *Solosky v. The Queen*.... the evidence - in particular the letter by the University's external legal counsel - clearly asserts that the documents are communications between solicitor (the University's external legal counsel) and client (the University's general counsel, on behalf of the University); which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties."
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> [128) "... the Commissioner made a reviewable error by ordering production in the face of the evidence submitted in relation to the claim of privilege."
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> [137] "As noted by Justices Cote and Cromwell, even if section 56(3) had allowed the Commissioner to order production of documents protected by solicitor-client privilege, the University of Calgary had provided sufficient justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta..."

There was no need for the Adjudicator to undertake any further investigation and there is no basis for you to investigate either.

FAILURE OF [the Applicant] TO CHALLENGE

Additionally, it is to be noted that [the Applicant] failed to provide any evidence whatsoever to assert that solicitor-client privilege had been improperly claimed by the University. The Supreme Court of Canada clearly viewed [the Applicant's] failure to provide such evidence as an additional basis to conclude that solicitor-client privilege had been properly claimed by the University. In that regard, the Supreme Court of Canada wrote:

> "[68] ....The Commissioner argues she has an adjudicative function akin to that of a superior court, to determine whether a public body has validly claimed solicitor-client privilege. As this Court found in *Blood Tribe,* however, even courts will decline to review solicitor-client documents to ensure the privilege is properly asserted, unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue (para. 17, citing *Ansell Canada Inc. v. IONS World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct.) Gen. Div.)), at para. 20) ....
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> [69] The delegate found that because the University failed to present evidence of its claim of solicitor-client privilege as required by the Protocol, it was necessary for the delegate to review the records. However, the Protocol is not law, and was not enacted by the Legislature. Rather, it is a guide established by the Commissioner to assist adjudicators and public bodies.
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> [70] … No evidence or argument was made to suggest that solicitor client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue."

CONCLUSION

It is clear, from the University's evidence previously submitted together with the recent Supreme Court of Canada ruling, that the issue of solicitor-client privilege claim over the records in Inquiry #F4833 is complete. The extensive evidence substantiated the claim for solicitor-client privilege over the records. As a matter of law, the request for more information and disclosure of the records was unnecessary and was unreasonable.
In light of the ruling by the Alberta Court of Appeal and the Supreme Court of Canada, the Adjudicator, having performed her duties and her decision having been now reviewed and determined, has no further need nor authority to continue with Inquiry #F4833. The issue, amongst other reasons, is *res judicata.* There is no legal basis for the continuation of this Inquiry.

We await your confirmation that Inquiry #F4833 is complete and the file is closed.

[para 9] The Applicant also provided an extensive submission in response to my letter of January 31, 2017. In it she set out reasons why she believes some of the withheld records may not be subject to solicitor-client privilege, including that her FOIP access request

predated her civil suit, and that because the University's in-house counsel had functions in addition to providing legal advice (for example, that this counsel was "involved in functionary policy and procedures that went beyond the scope of the definition of counsel activities")[1], some of the records withheld on the basis of privilege may not fall within the privilege exception.

II. ISSUES

[para 10] Because the University makes the argument that I do not have authority to decide the question of whether it properly applied section 27 of the Act (privileged information, etc.) to the records/information because the Supreme Court of Canada has already decided it, I will deal with this question as a preliminary matter, in this decision.

III. DISCUSSION OF ISSUES

Did the Supreme Court of Canada finally decide the question of whether the University properly applied section 27(1)(a) of the Act (privileged information, etc.) to the records/information it withheld in reliance on this section?

[para 11] For the reasons given below, I have decided the Supreme Court did not make a final decision about whether the University properly applied section 27(1)(a) to the records still at issue, and I am under a duty to make it. (However, before I do so, I will provide the University with a further opportunity to provide submissions and evidence, given it may have assumed that I would accept its submissions and treat the matter as having been finally determined by the Supreme Court.)

[para 12] The question the Commissioner put to the Supreme Court in her appeal from the Alberta Court of Appeal's decision is whether she has power under section 56(3) to compel the production of records over which solicitor-client privilege has been claimed. The Court said the Commissioner does not have this power.

The Supreme Court's comments about the adjudicator's decision to order production

[para 13] The Court also commented on questions that arose in the present proceedings but had not been stated as issues by the Commissioner in her appeal. These comments related to whether given the evidence the University had provided to the previous adjudicator regarding the privileged status of the records, it had been necessary for him to "review the records". The Court said that given the form and content of the assertions of the University regarding the privileged status of the records, in the circumstances of there being no evidence or argument to the contrary, the previous adjudicator should not have

[1] Applicant's submission of March 15, 2017, page 10.

asked for the records, but should instead have accepted the assertions, and undertaken no further review of the claim that solicitor-client privilege applied to the withheld material.[2]

[para 14] Writing for the majority, Madame Justice Côté stated the following (at paras 69 and 70):

> The delegate found that because the University failed to present evidence of its claim of solicitor-client privilege as required by the Protocol,[[3]] it was necessary for the delegate to review the records. However, the Protocol is not law, and was not enacted by the legislature. Rather, it is a guide established by the Commissioner to assist adjudicators and public bodies.
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> At the time of the Commissioner's request for disclosure, the prevailing authority in Alberta in civil litigation allowed a party to bundle and identify solicitor-client privileged documents by document numbers, as the University had done (see *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81). No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.

[para 15] Similarly, Justice Cromwell stated (at para 127):

> The appellant conceded in the hearing before this Court that the University's claim of privilege complied with the requirements of Alberta civil litigation practice at the time, which was governed by *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81. While I understand that these requirements have since evolved in light of the subsequent decision by the Alberta Court of Appeal in *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, 580 A.R. 265, it was, in my view, a reviewable error for the Commissioner's delegate to impose a more onerous standard on the University in relation to its assertion of privilege than that applicable in civil litigation before the courts. This conclusion is reinforced by the fact that the evidence filed with the Commissioner met the three-part test set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. The evidence — in particular the letter by the University's external legal counsel — clearly asserts that the documents are communications between solicitor (the University's external legal counsel) and client (the University's General Counsel, on behalf of the University);

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[2] Insofar as the Supreme Court commented as to the decision that the adjudicator ought to have made, the Court implicitly acknowledged that the decision as to whether the records are privileged is to be made by the adjudicator, and that even though the records themselves need not be provided by the public body, the decision can be made on the basis of other materials put forward by the parties.

[3] This refers to the Solicitor-Client Privilege Adjudication Protocol which was developed by this office for parties to follow when claiming privilege over records. The Protocol included a form for describing the records in a way that established they were privileged, but did not disclose the privileged content, so as to ensure that all other available means of obtaining the evidence necessary for making the determination would be exhausted before records would be required. The Protocol has since been replaced with a practice note that removes the element in the former Protocol that permitted the Commissioner to require production of the records if not satisfied by the evidence of privilege that had been presented by the party that has withheld the information.

> which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

[para 16] Dealing with these same questions, Justice Abella said (at para 137):

> As noted by Justices Côté and Cromwell, even if s. 56(3) had allowed the Commissioner to order production of documents protected by solicitor-client privilege, the University of Calgary had provided sufficient justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta. The Commissioner should have exercised her discretion in a manner that interfered with solicitor-client privilege only to the extent absolutely necessary to achieve the ends sought by the *Freedom of Information and Protection of Privacy Act.*

[para 17] Because a reviewable decision as to whether the records were privileged had not yet been made, it cannot be said the Supreme Court was reviewing it and substituting its own decision. The comments of the Majority were in relation to a decision the adjudicator had already made – his order to produce records – rather than in relation to the question he had not yet decided, of whether the records were privileged.

[para 18] However, in making these comments the Court at the same time expressed its opinion that the information the University had provided would be sufficient, in the absence of evidence and arguments to the contrary, for the adjudicator to also find the records to be privileged. I believe these comments have a powerfully persuasive effect, indeed a binding one, with regard to what the final decision relative to such facts is to be.

The Supreme Court's comments about the applicability of the Rules of Court

[para 19] The Court's statements also indicate that the law relating to objections to the production of records for which privilege is claimed that was relevant to the question before the adjudicator was the law as it existed at the time the adjudicator made his production order, as set out in the former Rules of Court and interpreted in *Dorchak v. Krupka*.[4]

[para 20] All three Justices also noted that the law in Alberta has since changed, which is a reference to the fact that the Alberta Court of Appeal decided in 2014 (*Canadian Natural Resources Ltd. v. ShawCor Ltd*., 2014 ABCA 289), based in part on the introduction in 2010 of new Rules (Rules 5.7 and 5.8), that records over which privilege is claimed in a civil suit must be described in an affidavit "in a way that,

[4] *Dorchak v. Krupka* 1997 ABCA 89 held that records for which privilege is claimed could be numbered in bundles, and that the precise privilege being claimed had to be named for each distinct bundle. The Court of Appeal also said that while the records do not need to be individually described, "[t]he affidavit ... shall state ...[which documents] the party objects to produce and the grounds for any such objection", and "the reasons must be fairly precise, and must recite enough facts to trigger privilege". The Court illustrated these points by noting that the specific kind of privilege must be indicated for each bundle. It also said: "Nor is it enough to speak of communications with a solicitor; one must swear that they were for the purpose of getting advice."

without revealing information that is privileged, indicates how the record fits within the claimed privilege", and the description must be sufficient "to assist other parties in assessing the validity of that claim".

[para 21] All of the statements of the Court quoted above indicate that the rules as to what is to be contained in affidavits of records in civil proceedings (as set out in the Alberta Rules of Court and interpreted by the courts) have some application, or application by way of analogy, when the question arises under the FOIP Act as to whether solicitor-client privilege has been properly claimed, and accordingly, whether the exception under section 27(1)(a) applies as justification for withholding the records.

[para 22] Indeed, the Supreme Court referred to the former Rules of Court and the *Dorchak v. Krupka* case as grounding its comments that, given the information the adjudicator had received from the parties, which met these rules, not only should he not have ordered production of the records, he should not have *"reviewed the claim"*. As noted above, this also suggests that given what the University had provided to him, in the circumstances of there being no contrary evidence, the adjudicator's decision as to whether privilege had been properly claimed should be that the claim had been proper.

The Supreme Court's comments about there being no evidence or arguments that privilege had been improperly claimed

[para 23] At the same time, however, the Majority's judgment expressly based this view not only on the information the University had provided to the adjudicator (which in the Court's view met the requirements of the former Rules of Court), but also on the idea that "[n]o evidence or argument was made to suggest that solicitor client privilege had been falsely claimed by the University". (While the Court refers to the absence of any argument that the privilege had been *falsely* claimed, I do not believe this refers to an argument that there had been deliberate deceit; rather, I believe the Court is referring to the absence of any suggestion that in the circumstances, it may not have been *appropriate* to claim privilege.)

[para 24] This view of the Supreme Court about this factual point may have been based or based in part on the University's statement in its Factum that "[the Applicant] provided no evidence or submissions to the delegate that cast any doubt on the veracity of the University's assertion of privilege".[5] The University also refers to and relies upon this idea in its most recent submissions in this inquiry, quoted above, where it states: "Additionally, it is to be noted that [the Applicant] failed to provide any evidence whatsoever to assert that solicitor-client privilege had been improperly claimed by the University", and notes the Supreme Court's comments about this.

[5] See para 15 of the University's Factum to the Supreme Court of Canada. The University had also noted at para 10 that the Applicant had not challenged the University's claim of privilege over records during the *litigation* proceedings.

The Applicant's submissions to the previous adjudicator about whether privilege was properly claimed

[para 25] However, in fact, such an argument had been made by the Applicant, and evidence (about the timing of her request) provided. In her rebuttal submission to the adjudicator, which he received before ordering the production of the records, the Applicant had said:

> With respect to the exceptions made under Section 27, it is important to note that these records all pertain to the year prior to the launch of the lawsuit. [The dates for the requested information specified in the Access Request were from August 1, 2007 to the date of the request, October 20, 2008.] The suit was not contemplated until October of 2008, and the final decision made shortly after the launch of the FOIP request. The University cannot withhold documents on the basis that "privilege" applies because they anticipated a lawsuit, since none was contemplated when the document was written.[[6]]

[para 26] In the Applicant's recent submissions at this present stage of the inquiry, she also points out that the University's in-house legal counsel performs many functions besides providing legal advice, and suggests this could have been this counsel's role with respect to some of the documents with which the counsel was involved.[7]

[para 27] Possibly the University's statement that "[n]o evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University" was meant to convey not that the Applicant had made no argument challenging the propriety of the University's claim of privilege, but that she had made no *credible* argument to that effect. The University did provide a submission to the previous adjudicator that responded to the Applicant's point about timing, when it said that "solicitor-client communication in anticipation of litigation is equally protected under the common law", and commented that privilege does not commence only after the law suit had been filed, because a suit can be anticipated before the claim is filed.

[para 28] It is notable, though, that while the Applicant's access request was for records dated between August 1, 2007 (two days after she entered her employment contract on July 30, 2007) and October 20, 2008 (the date of her access request) the University's own evidence[8] indicates it did not become concerned about a lawsuit until August of 2008.

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[6] Applicant's rebuttal submission of August 16, 2010, at p. 5.

[7] The full text of this part of the Applicant's submissions, and the reasons I believe it must now be considered, are set out below at paras 33 to 35.

[8] Such evidence is found in the affidavit submitted by the University to the Court of Queen's Bench in the first stage of the judicial review proceedings, in support of its claim of privilege. This affidavit states (at para 10):

> By August, 2008, as [the Applicant's] workplace issues were better understood it became necessary for me and the members of the UCQ Human Resources Department to seek legal advice

The Applicant's point about the time frame of her request may be taken as a suggestion that some of the records withheld as privileged may have been created at some earlier point during the one year period prior to the time (August 2008) when the University may have first *anticipated* a lawsuit, and may relate to matters other than the subject of the lawsuit. The University's response to the Applicant's concerns about timing is thus not a complete answer to her suggestion that some of the records over which privilege is claimed may not have related to the lawsuit or other legal disputes she had raised, but to other matters.

[para 29] Had the Supreme Court been made aware of Applicant's point (that there was a relatively significant period in which advice might have been given to the University by counsel about matters relating to the Applicant other than her lawsuit) the Court's attention might have been drawn to the part of the APC's affidavit which speaks of some of the advice given by counsel to the University having been given *by its in-house counsel* – a circumstance calling for the consideration of the factors set out by the Supreme Court of Canada in the *Pritchard* case.[9] As already set out above, the APC's affidavit stated the following:

> University Legal Services and external legal counsel have advised various University officials about the Applicant's employment with the University. I am advised by the University's General Counsel and do verily believe that solicitor/client privilege has been asserted over the communications given and received by the University's lawyers in respect of this matter.[10]

This affidavit speaks of in-house counsel ("University Legal Services") providing advice about the Applicant's employment *to various University officials*.

[para 30] As just noted, the involvement of in-house counsel as the provider of the advice to the University is significant in light of pronouncements of the Supreme Court in *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 80. In this case, the Supreme Court of Canada recognized that in-house lawyers may be called upon to give policy or business advice, which is not legal advice. Thus, when advice sought from or given by an in-house or government lawyer is at issue, it is necessary to consider whether the advice being given was legal advice, and this question may need to be informed by evidence. The Court said:

> due to the complexity and the legalistic nature of the issues. By August 2008 [the Applicant] had threatened legal action against the University and her lawyers began writing to UCQ.

[9] This case is discussed further below.

[10] Had the Court been aware of the timing of the request it might also have given greater consideration to the fact, discussed further below, that the affiant does not herself state that the advice given was "legal advice", but swears only that she had been advised that solicitor-client privilege had been "asserted" over the communications.

> 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.

[para 31] As well, evidence submitted in earlier stages of this inquiry[11] reveals that prior to the time the lawsuit was instigated or anticipated, the Applicant had been involved together with other employees in expressing her concerns about working conditions on the campus. Again, this raises the possibility that advice was given by in-house counsel about matters involving the Applicant which at the time were unconnected to her lawsuit (which was for constructive dismissal and damages for alleged emotional injury from the way her employment issues had been dealt with). Given the potentially multi-faceted role of in-house counsel, it is conceivable some of the advice may have involved policy considerations or advice about non-legal questions relating to the University's affairs as they involved the Applicant and others, rather than legal ones.

[para 32] Thus, the Applicant's point which focuses on the time-frame of her request, when taken together with

- the statement in the CPA's affidavit about advice being given to various University officials by its internal counsel, and
- other evidence that was provided to the adjudicator about University matters in which the Applicant was involved that may not have related to the lawsuit

raises the reasonable possibility that some of the advice that was given by in-house counsel in relation to the Applicant and her concerns may have been about matters arising at an earlier stage, and concerning different subject matters, than the subject matter of the lawsuit, and may not all have been legal advice.[12]

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[11] The Applicant's statement of claim in her lawsuit, which was appended to the affidavit of the APC, discusses these events (which occurred in April, 2008), at paras 18 to 20.

[12] I have also noted that in the affidavit of the University's Human Resources Consultant which the University submitted to the Court of Queen's Bench in support of its claim of privilege states:

> By August 2008, as [the Applicant's] workplace issues were better understood it became necessary or me and the members of the UCQ Human Resources Department to seek legal advice due to the complexity and the legalistic nature of the issues. By August 2008, [the Applicant] had threatened legal action against the University and her lawyers began writing to UCQ.

However, this statement does not preclude the possibility that advice from in-house counsel relating to the Applicant's employment was sought earlier and involved policy questions or other matters of University business which drew on the counsel's University-related experience rather than on her legal expertise.

The Applicant's recent submissions

[para 33] In her recent submissions of March 15, 2017, the Applicant has raised this issue more directly, pointing to what she believes to be non-legal employment responsibilities of the University's general counsel. She states (at page 10):

> The University of Calgary's in-house counsel wears several hats - as is probably the case with many public institutions covered by FOIP. In this instance, the University's lawyer was involved in functionary policy and procedures that went beyond the scope of the definition of counsel activities: she was sporadically cc'd on regular correspondence; she was a voting member of the Joint Oversight Board of the Qatar project on behalf of the University; she was providing oversight to the FOIP Officer at the University throughout this process; she was also acting as the named "head" of the University through the FOIP process (she held this role until the Provost sent a letter stating that he was "head" of the University - which wasn't factually true); as well as providing ongoing perfunctory policy advice for the University and its staff on a myriad of issues.
>
> Not all of these activities are covered by solicitor/client privilege. Given her involvement in my personal issues, and given her role on the Board of Directors in Qatar, and given the sequence of events, there should have been a significant body of documents returned through the FOIP process that would show her listed her as a recipient or a contributor. There wasn't. Additionally, it seems odd that *none* of the 100+ pages of documents being withheld were the product of the University's counsel wearing one of her 'other hats'.

[para 34] Possibly the Applicant is suggesting that, given the in-house counsel's various roles as the Applicant understands them, there would be correspondence by which the in-house counsel would have been kept up-to-date on and involved in matters concerning the Applicant in the counsel's non-legal capacities, or relating to matters at an early stage in the Applicant's employment; because such correspondence likely existed but none was provided to her, such records may have been (inappropriately) withheld as subject to privilege.

[para 35] The Applicant did not make the submission quoted above to the previous adjudicator. However, in the earlier stage of this proceeding, there was still potentially an ability in the previous adjudicator to review the records to assess the nature of the advice the in-house counsel was giving. From the Applicant's standpoint, it was less pressing, at that time, that information that would allow an assessment of the nature of the advice to be made be provided by the parties. I believe the Applicant's submissions that she has made in the present circumstances, in which this assessment can only be made on the basis of information provided by her and by the University, must necessarily now be considered.

[para 36] I am not aware of the source or reliability of the Applicant's knowledge about the role of internal counsel; nor has the University had an opportunity to counter the Applicant's points or explain that even if they are true, none of the records involving the in-house counsel relating to the Applicant were other than legal advice. However, the

Applicant has provided some evidence that internal counsel had such other roles, and of the reasons for her belief that counsel may have had some involvement in that capacity relative to the Applicant.

[para 37] In summary, the Applicant's point regarding the time frame of her request brings into focus the possibility that some of the advice was non-lawsuit-related and non-legal advice relating to the Applicant provided by the in-house counsel. The Applicant's more recent submissions add support to this possibility.

The parties' right to make representations

[para 38] My duties under the Act require me to provide the person who made the access request (among others) with the opportunity to make representations (section 69(3)). While the Applicant had made both initial and rebuttal submissions to the previous adjudicator, as already noted, the inquiry had at that time only reached the stage of an interim procedural decision. Further, the Applicant had made her submissions without knowing that the adjudicator would be unable to review the records to assess whether their content was privileged; therefore, she did not know that a finding that the records were to be disclosed because they are not privileged might depend on evidence or arguments that she could present. In other words, at the time, the Applicant had not been fully aware of the case she had to meet in making her submissions. I believe I have a duty to consider the submissions she has now made at this final stage of the inquiry after she has been fully apprised of the case she has to meet.

Does the doctrine of res judicata apply?

[para 39] Further with regard to the University's objection to my authority to now decide if privilege was properly claimed, I have considered the University's argument that the issue is *res judicata* because already decided by the Supreme Court.

[para 40] In *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 the Supreme Court of Canada discussed the two elements of *res judicata*, "issue estoppel" and "cause of action estoppel". The headnote states:

> There is a distinction between the "cause of action estoppel" where another action is brought for the same cause of action as has been the subject of previous adjudication, and "issue estoppel" where, the cause of action being different, some point or issue of fact has already been decided." The requirements of issue estoppel are (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. The determination on which it is sought to found the estoppel must be so fundamental to the substantive decision that the latter cannot stand without the former.

In McDonald v. Brookfield Asset Management Inc. [2015] A.J. No. 531, the Alberta Court of Queen's Bench commented about "cause of action estoppel" as follows:

> Cause of action estoppel arises where a question has been the subject of a final judicial decision involving the same parties where the basis of the subsequent cause of action was or could have been argued in the prior action if the parties had exercised reasonable diligence: *574095 Alberta Ltd v Hamilton Brothers Exploration Co***,** 2002 ABQB 238, 319 AR 119.

[para 41] The University did not explain which aspect of the doctrine of *res judicata* it was relying on. However, either branch of the doctrine requires that an issue has already been finally decided.

[para 42] In the present case, as noted earlier, the matter brought before the Supreme Court was brought during an interim phase of the inquiry. At that point, no final decision as to whether the records were privileged, which the Supreme Court (or the Courts below it) could have been called upon to review, had been reached by the adjudicator. This was therefore not a question which the Commissioner could have had placed before the Supreme Court of Canada in the appeal, and she did not do so.[13] While the Supreme Court made comments relevant to what the final decision ought to be in specified circumstances, the specified circumstances (that there be no contrary evidence or arguments) did not exist with respect to all of the records at issue. It can therefore not be said that the Court finally decided the question for all the records. Because the doctrine of *res judicata* arises only when the final decision on an issue has already been made, I do not believe it arises in the present case.

[para 43] As also noted above, however, the Supreme Court's comments have implications for the decision that is yet to be made, whether or not the comments are part of the *ratio* of the decision on the issue the Commissioner put before the Court. Indeed, to the extent the comments relate to the situation presently before me, I believe these comments are binding for the decision I am to make.

[para 44] However, to the extent the Supreme Court's comments were made relative to circumstances different from those that presently obtain, I do not believe they may be relied on to determine the decision that is still to be made.

Conclusion as to whether I must make a decision respecting the privileged status of the withheld records

[para 45] In my view the Supreme Court has not already made a final decision about whether privilege had been properly claimed over all the records.

para 46] Because the matter was raised before the Court during an interim step in the inquiry, a reviewable decision on this issue had not yet been made by the adjudicator.

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[13] The Commissioner also did not appeal the decision of the Courts below as to whether it had been necessary for the adjudicator to require production of the records. The only decision about that issue made by the Courts below was that of the Court of Queen's Bench, which agreed with the adjudicator that he did not have enough evidence to decide the question without the records. The Court of Appeal did not address the question.

Therefore, it could not be said the Supreme Court had reviewed it and substituted its own decision for that of the adjudicator.

[para 47] In the course of deciding the issue that had been presented to it (as to whether the Commissioner has the power to review privileged records), the Supreme Court commented that because the University's claim of privilege was presented in conformity with the former Rules *and no counter-argument was made or evidence presented*, the claim required no further review. It does not follow from this, however, that privilege claims that meet the Rules are necessarily to be taken as conclusive. The Supreme Court restricted its comments as to when such privilege claims may be relied upon in this way to circumstances in which there is nothing to suggest the claim was improper.

[para 48] In the present case, as discussed above, some of the records over which privilege was claimed involve advice provided to the University by in-house counsel, and may pre-date the point at which litigation was anticipated, and be in relation to matters unconnected to the lawsuit. With respect to any such records, the circumstances described by the Supreme Court of Canada in the *Pritchard* case – the possibility that the advice that was given was not legal advice – arises, and requires consideration.

[para 49] Moreover, the Applicant had not been in a position to make representations with a complete awareness of the case she had to meet when the Supreme Court made its comments, and I believe the submissions she has now made must also be considered.

[para 50] As a decision has not been made taking all relevant submissions and other relevant considerations into account, the question of whether the University properly claimed privilege over all the records is still to be decided. The Commissioner, and I as her delegate, have a duty under section 72(1) of the Act to dispose of the issues in an inquiry by making a final decision about this issue, and an order.

[para 51] However, in making this decision, I will regard myself as bound by the Supreme Court's comments as to how it is to be made with respect to those of the withheld records to which the Court's comments apply – that is, to records other than those (if any) described at para 48 above. The Applicant having presented no evidence or argument to contradict the University's claim of privilege over any of the records other than these, I will accept that privilege was properly claimed over those of the records that do not fall within the description. (Without more information, however, I do not know which of the withheld records these are, or if none of them fall within the description, that that is so.)

The significance of the 2010 change to the Rules of Court

[para 52] As noted above, the Supreme Court of Canada made it clear that the Alberta Rules of Court relating to claims of privilege in civil proceedings bear on the issue I am to decide. I must consider the significance of the fact that, while in the Court's view the University's justifications for applying section 27(1)(a) met the requirements of the

former Rules of Court, as the Supreme Court itself noted, the law has since changed.[14] I gave the parties the opportunity to comment on this question, but neither party did so.

[para 53] The new Rules 5.7 and 5.8 were made effective November 10, 2010. They have been interpreted by the Alberta Court of Appeal in *Canadian Natural Resources Ltd. v. ShawCor Ltd., (supra).* The Court stated (at paras 42-43):

> …Therefore, in explaining the grounds for claiming privilege over a specific record, a party will necessarily need to provide sufficient information about that record that, short of disclosing privileged information, shows why the claimed privilege is applicable to it. Depending on the circumstances, this may require more or less than the "brief description" contemplated under Rule 5.7(1)(b) although we expect that oftentimes the brief description will suffice.
>
> Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged. …

[para 54] In the present case the request for access was made and the FOIP proceeding before this office was initiated before the Rule was enacted, but in my view, for the reasons set out above, the final decision on the privilege question is presently pending. Are the new Rules about claims of privilege, or the former ones, relevant in this final phase of the inquiry?

[para 55] The transitional provisions from the new Alberta Rules of Court provide some guidance, The relevant provisions state:

> *15.1 In this Part,*
>
> > *(a) "existing proceeding" means a court proceeding commenced but not concluded under the former rules; …*
>
> *New rules apply to existing proceedings*
> *15.2(1) Except as otherwise provided in an enactment, by this Part or by an order under rule 15.6 [Resolution of difficulty or doubt], these rules apply to every existing proceeding.*
>
> *(2) Every order or judgment made under the former rules and everything done in the course of an existing proceeding is to be considered to have been done under these rules and has the same effect under these rules as it had under the former rules.*

[14] As noted, the Rules apply to civil court proceedings and thus do not apply by their own terms, but the Supreme Court of Canada's comments make it clear that the principles from these Rules apply. It is therefore important to consider whether it is the principles from the new or the old Rules that are to be given this kind of application.

Resolution of difficulty or doubt
15.6 If there is doubt about the application or operation of these rules to an existing proceeding or if any difficulty, injustice or impossibility arises as a result of this Part, a party may apply to the Court for directions or an order, or the Court may make an order, with respect to any matter it considers appropriate in the circumstances, including:

> *(a) suspending the operation of any rule and substituting one or more former rules, with or without modification, for particular purposes or proceedings or any aspect of them;*
>
> *(b) modifying the application or operation of these rules in particular circumstances or for particular purposes.*

New test or criteria
15.12 Where these rules impose a new test, provide new criteria or provide an additional ground for making an application in an existing proceeding, these rules apply in respect of the application if the application was made but has not been heard prior to the coming into force of these rules.

[para 56] Both new Rules 15.2(2) and 15.12 potentially bear on the question.

[para 57] According to transitional Rule 15.2(2), anything done under the former Rules is to have the same effect under the new Rules as it had under the former Rules. Under different circumstances (ones in which there was nothing to contradict the claim of privilege), this directive might mean that because (as the Supreme Court affirmed) the information respecting the claim of privilege that was provided to the previous adjudicator under the former Rules met those Rules, the effect would be that no more information would be called for before accepting the claim. However, the former Rules did not require that a privilege claim that met the Rules needed to be taken as conclusive; this would be the case only of there were nothing to contradict it. As explained above, in the present circumstances, there are considerations that make it necessary to require further information with respect to the advice respecting the Applicant's employment that was provided to the University by its in-house counsel. Therefore, even if it is the former Rules for claims of privilege that apply to the present situation, I do not believe the result is that I must accept the claim of privilege over all the records in the present circumstances, and ask for nothing further from the University.

[para 58] As to transitional Rule 15.12, according to this provision, where the new rules impose a new test, provide new criteria or provide an additional ground for making an application in an existing proceeding, these new rules apply in respect of the application if the application was made but has not been heard prior to the coming into force of these rules. There are two points of uncertainty about whether and how this transitional rule applies.

[para 59] First, it is uncertain whether the issue in the present case has been *heard* within the terms of Rule 15.12. In *Broers v. Real Estate Council of Alberta*, 2010 ABQB

774, the Court said a matter had been heard when the written submissions had been provided and received before the new Rules came into effect. Here, the University had presented its materials in support of the "application" (if it is properly considered such) to the previous adjudicator, and the Applicant had made both an initial and a rebuttal submission (but she had done so while unaware that the records themselves would not be available for the adjudicator to review). Her additional submission has been made since the new Rules have come into effect. (I believe the better view is that the matter had not been fully heard when the new Rules came into effect.)

[para 60] Second, it is unclear if it is correct to regard the affidavit claiming privilege as an "application" (possibly it is an application to have the privilege claim accepted). If it is, then the new Rules respecting claims of privilege (Rules 5.7 and 5.8), as interpreted by the Court of Appeal in the *Shawcor* case, apply, and the new test or criteria would be that the information must at this stage in the proceeding go beyond merely saying that the privilege applies, and be sufficient to enable both the Applicant and the decision-maker to make an assessment about the claim.

[para 61] Provisions in the Alberta *Interpretation Act* may also have some bearing, and may possibly supplement the transitional provisions in the Rules to the extent they do not provide sufficient guidance. Sections 35 and 36 of the *Interpretation Act* provide as follows:

> *35(1) When an enactment is repealed in whole or in part, the repeal does not*
>
> *(a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect,*
>
> *(b) affect the previous operation of the enactment so repealed or anything done or suffered under it,*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,*
>
> *(d) affect any offence committed against or a contravention of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed, or*
>
> *(e) affect any investigation, proceeding or remedy in respect of the right, privilege, obligation, liability, penalty, forfeiture or punishment.*
>
> *(2) An investigation, proceeding or remedy described in subsection (1)(e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.*
>
> *36(1) If an enactment is repealed and a new enactment is substituted for it,*
>
> *…*

> *(b) every proceeding commenced under the repealed enactment shall be continued under and in conformity with the new enactment so far as may be consistent with the new enactment;*
>
> *(c) the procedure established by the new enactment shall be followed as far as it can be adapted*
>
> > *i) in the enforcement of rights existing or accruing under the repealed enactment, and*
> >
> > *…*
> >
> > *(iii) in a proceeding in relation to matters that have happened before the repeal;*

[para 62] The application of these *Interpretation Act* provisions would require consideration of whether the new Rules effected a substantive or merely a procedural change, and if the former, whether operation of the new Rules would impermissibly affect a right that had vested under the former Rules.

[para 63] I do not believe it is necessary for me to resolve all of these issues, however. Regardless of which transitional Rule governs, and of whether it is the former Rules or the new Rules respecting privilege claims that apply (or apply by way of analogy) to the present situation, I believe the result for the present purpose is the same.

[para 64] In the present circumstances I believe it highly likely that many of the records are subject to solicitor-client privilege. However, the privilege claim is over the entirety of the withheld records. Assuming the APC's affidavit to be accurate, some of these records involve advice provided to the University by its in-house counsel, and there is a reasonable possibility that they pre-date the point at which litigation was anticipated and relate to other matters.

[para 65] Having regard to these circumstances, neither the former nor the current Rules of Court would require me to take as conclusive the information already presented by the University for all the records. I must ask for more information before I can be satisfied that *all* the records are subject to solicitor-client privilege, if they are.

The assertions of solicitor-client privilege that have already been made

[para 66] In its Factum for the Supreme Court of Canada, the University stated that each of the University's documents which it provided to the previous adjudicator for the purpose of affirming its claim of solicitor-client privilege

> "asserted (or, in the case of the Access and Privacy Coordinator, swore under oath) that all of the records in question involved solicitor-client communications for the purpose of giving or receiving legal advice." (Factum para 18)

[para 67] I have reviewed the material presented by the University to the adjudicator, as well as the subsequent affidavit the University provided to the Court of Queen's Bench and has provided to me, and note that none of these documents makes a direct assertion

that every record being withheld actually involved the seeking or giving of legal advice (either in relation to the lawsuit, to other legal disputes commenced by the Applicant, or to employment issue concerning her). I understand that all of these issues had arisen. However, each of the University's submissions is somewhat oblique in terms of what the records actually entailed.[15]

[para 68] However, the University's materials that it had presented to the previous adjudicator were before the Supreme Court. As the Court came to the conclusion that the former Rules had been met on the basis of these materials, I accept that they had been.

The provision of advice by in-house counsel

[para 69] However, as discussed at length above, the Applicant has raised the possibility some of the communications between the University's legal counsel and University officials might consist discussions of policy or other of the University's affairs involving the Applicant, rather than legal advice. This may be more likely relative to advice given, if any, prior to the point at which the University anticipated litigation and hence was providing advice about the actual or anticipated law suit.

[para 70] I would, therefore, ask the University to have regard to *Pritchard v. Ontario (Human Rights Commission)*, in which the Supreme Court of Canada recognized that when advice sought from or given by an in-house or government lawyer is at issue, it is necessary to consider whether the advice being given was legal advice, and this question may need to be informed by evidence regarding the circumstances and subject matter of the advice. This is because in-house lawyers may be called upon to give policy or business advice, which is not legal advice. The Court said:

[15] To illustrate, in the case of the APC's affidavit, the APC swears that advice about these matters has been given, and that she is advised that solicitor-client privilege over communications in respect of these matters has been *asserted*, but she does not swear directly that the withheld communications consist of the seeking or giving of legal advice about these matters (or discussions about the advice as part of the continuum of communications). It does not necessarily follow from the assertion that advice (without specifying legal advice) was given about the Applicant's employment, and that solicitor-client privilege is asserted over the communications given and received about this matter (presumably referring to the Applicant's employment) that each of the communications over which solicitor-client privilege was being claimed entailed the seeking or giving of legal advice. Even if one assumed on the basis of the APC's affidavit that it is the University's General Counsel who was "asserting" the privilege (in contrast to her advising the APC that someone else was asserting it or had formerly asserted it), one cannot be sure whether she was making a generalized statement about the communications, or that she or anyone else had reviewed each of them and was satisfied that each was covered by solicitor-client privilege. Neither does the APC's affidavit say (though this may be the case) that when she is referring to an "assertion", she is referring to a sworn Affidavit of Records in the lawsuit. Even if one could infer this, is it not possible to say what form the assertion of privilege in such an affidavit took, or whether it met the requirements of the Rules of Court.

> 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.

[para 71] The Applicant has provided some evidence that the nature of the University's legal counsel's advice relative to her may have involved non-legal issues. If this is not the case, the University is in a position to say it is not, and to confirm that all of the communications contained in the withheld records that took place between the University and its in-house counsel consist of legal advice rather than merely policy advice. Dates the advice was given would be helpful to create the necessary context for advice given relative to the lawsuit. For advice, if any, which pre-dated the anticipation of the lawsuit, some information suggesting the circumstances called for *legal* advice in contrast to policy advice would also be helpful, to the extent such information can be given without revealing the advice.

The provision of advice by external counsel

[para 72] With respect to the advice provided by external counsel, I believe I am bound by the comments of the Supreme Court that the materials presented by the University met the former Rules of Court. I already know that some of the advice by external counsel concerned the Applicant's lawsuit. The University also adverts to advice given with respect to other 'legal disputes' the Applicant had raised. However, there is nothing in the submissions of the Applicant, either in what she presented to the previous adjudicator, nor in the submissions she has made to me, that challenge the idea that the advice *given by external counsel* about her lawsuit or other legal disputes she had raised was other than legal advice. Therefore, I believe the Supreme Court's comments require me to be satisfied from the University's materials that communications other than where in-house counsel was involved in matters predating or not related to the lawsuit, were for the purpose of providing or receiving legal advice. It follows that for advice other than that given by in-house counsel, further evidence is not required.

[para 73] Despite this, however, it would be most helpful if, in addition to providing further information about the nature of advice given by in-house counsel specifically, the University would provide an affidavit by someone who has also reviewed all the communications involving *external* counsel, and who is able to directly attest that all these records consisted of the giving and seeking of legal advice; (alternatively, they may be part of the continuum of communications with respect to the advice). If any of the legal advice given by the external legal counsel related to 'legal disputes' other than the Applicant's lawsuit, additional information that permits the assessment of this claim, as required by the new Rules of Court as interpreted in the *Shawcor* case, would also be of great assistance, for example, some indication of the context or nature of the 'legal dispute' to which the advice related which does not itself reveal the advice. All such submissions could be made *in camera.*

[para 74] I have already asked for more evidence once, which the University declined to provide, possibly because it assumed I would accept its position that the Supreme Court has already decided the issue. However, as I have not accepted this position, I will give the University an opportunity to provide me with further evidence and/or arguments. I will also give the Applicant an opportunity to provide a rebuttal to anything the University provides, other than submissions I accept from the University *in camera*.

[para 75] Thereafter, I will review the totality of the University's submissions and the Applicant's responses relative to the privilege question. This will include the information the University has already provided, the evidence and arguments made by the Applicant both initially and in her recent submission, the evidence that is before me regarding the Applicant's employment issues throughout the period of her employment, any new evidence or arguments, and the comments relative to these questions already made by the Supreme Court of Canada, to decide whether the University has met its burden of proving the records are all subject to solicitor-client privilege.

IV. DECISION

[para 76] I find I have the duty to conclude this inquiry by making a final decision as to whether the University properly claimed solicitor-client privilege over all the records it withheld under section 27(1)(a) of the FOIP Act.

[para 77] Before making this decision I will give the parties a further opportunity to provide evidence and arguments about this issue, as described in para 74 above. I ask the University to provide any further submissions it has by September 22, 2017.

Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication