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Order F18-35

MINISTRY OF ATTORNEY GENERAL

Chelsea Lott
Adjudicator

August 14, 2018

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Summary: The applicant requested the total amount of legal costs incurred by the Province in a high profile lawsuit. The Ministry of Attorney General withheld the information on the basis of s. 14 (solicitor client privilege). The adjudicator held that the presumption that the requested information was protected by solicitor client privilege had been rebutted and required the information to be disclosed to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14.

INTRODUCTION

[1] This order arises out of the Canadian Constitution Foundation's (CCF) request to the Ministry of Attorney General (Ministry) for information about the Province's total litigation costs for *Cambie Surgeries Corporation v British Columbia (Attorney General)* (Cambie Litigation).¹

[2] The Ministry created a record in response to the request but refused to disclose it on the basis that s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) applied. The CCF asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter and it proceeded to inquiry.

¹ *Cambie Surgeries Corporation v British Columbia (Attorney General)*, Vancouver S090663 (BCSC).

[3] This order is issued concurrently with Order F18-36 which also involves information concerning legal costs for the Cambie Litigation. The record at issue in Order F18-36 contains detailed information regarding the Province's costs of the litigation between January 1, 2016 and April 11, 2017.

Preliminary matter – the information in dispute

[4] On January 18, 2017, the CCF requested:

the cost of litigation... This would include lawyers' salaries, courtroom and other litigation fees, document production cost and other case-related expenses and disbursements, witness fees and disbursements...and any and all other information assigning any cost to the Government connected in any way to the litigation of this case...the information in the records sought would relate to cost incurred since 2009...²

[5] In its initial response to the applicant's request, the Ministry created a one page record containing information about its litigation costs for a one year period, including a breakdown of fees and disbursements by category.³ In its inquiry submissions, CCF indicated that it was seeking only "the decontextualized sum total cost of...litigation."⁴

[6] Following the close of inquiry, I wrote to the parties seeking clarification about the information in dispute. From their responses, I determined that the Ministry had misinterpreted CCF's access request as being limited to information covering a one year period.⁵ As a result, I asked the Ministry to provide a response to CCF's request for the Province's total litigation costs since 2009. The Ministry created a record which provided the cost of litigation for the period January 1, 2009 to January 18, 2017. Although CCF was just seeking the total costs, the Ministry created a record which also included a breakdown of legal fees. The Ministry is withholding the record under s. 14 of FIPPA.⁶

[7] CCF has clarified that it seeks only the total costs since 2009, and not the particulars of that cost. Therefore, I will only make a determination regarding the Ministry's decision to withhold the total cost under s. 14.

² Investigator's fact report.

³ Affidavit of supervising counsel for the Ministry's legal services branch, Lawyer L at para. 3 (Affidavit of Lawyer L). The information covered the period January 1, 2016 to January 18, 2017.

⁴ CCF submissions at paras. 40. See also CCF's submissions at paras. 8, 12, 28, 38, 43, 45, 46 and 50–51 clarifying that it was only seeking the total costs.

⁵ My letter dated April 27, 2018. Ministry letter dated April 30, 2018. CCF letter received May 1, 2018.

⁶ My letter dated May 7, 2018.

ISSUE

[8] The issue is whether the Ministry is authorized to refuse to disclose the information in dispute under s. 14 of FIPPA. Under s. 57, the Ministry has the burden of proving that the applicant has no right of access to the information under s. 14.

DISCUSSION

Background

[9] The Cambie Litigation is a proceeding before the British Columbia Supreme Court concerning the constitutionality of sections of the *Medicare Protection Act* in the face of wait times for public health care. CCF is a charity, “dedicated to defending constitutional rights and freedoms.”⁷ CCF is providing financial and legal support to the plaintiffs in the Cambie Litigation.⁸ The trial commenced in September 2016.⁹ In April 2017, the plaintiffs requested an adjournment to raise funds.¹⁰ The trial recommenced on April 9, 2018.¹¹ The matter is over 100 days into trial.¹²

Solicitor client privilege

[10] Section 14 of FIPPA authorizes the head of a public body to refuse to disclose information that is subject to solicitor client privilege. Solicitor client privilege is a fundamental, substantive right of the client based on the unique relationship between a solicitor and client.¹³

[11] A lawyer’s bill arises out of what transpires in the solicitor client relationship.¹⁴ The account reflects work done on behalf of the client which involves communications that are privileged.¹⁵ Thus, the courts have held that there is a presumption that lawyers’ billing information is privileged. However, the presumption may be rebutted if it is established that there is no reasonable possibility that disclosure would directly or indirectly reveal privileged communications. The test for whether privileged communications could be

⁷ Affidavit of Lawyer L, exhibit B.

⁸ *Ibid*, exhibit E.

⁹ Neither party has advised of the date that trial actually started but reported decisions indicate the trial was underway by this date. See *Cambie Surgeries Corporation*, 2016 BCSC 1686 at para. 4.

¹⁰ Affidavit of Lawyer L, exhibit D.

¹¹ *Cambie Surgeries Corporation*, 2018 BCSC 749 at para. 7.

¹² *Cambie Surgeries Corporation*, 2018 BCSC 1063 at para. 3.

¹³ *Solosky v The Queen*, (1979) [1980] 1 SCR 821 at p. 839, 1979 CanLII 9 (SCC).

¹⁴ *Maranda v Richer*, 2003 SCC 67 at para. 32 [*Maranda*].

¹⁵ *Donell v GJB Enterprises Inc*, 2012 BCCA 135 at para. 59 [*Donell*].

revealed must be considered from the perspective of whether an “assiduous inquirer” could deduce, infer or otherwise acquire privileged communications.¹⁶

[12] The Ministry refers to authorities in which legal fees, without any description of the corresponding legal services, were held to be privileged when the fees related to a single, ongoing proceeding.¹⁷ The Ministry argues that these decisions of the British Columbia Supreme Court and the OIPC are dispositive of the present inquiry. The Ministry stresses that consistency requires that I arrive at the same result.

[13] While similar circumstances exist in the present inquiry, i.e. the fees relate to a matter before the court, I do not consider myself bound to reach the same result. As will be discussed, appellate decisions support CCF’s argument that there is no reasonable possibility that the decontextualized legal cost at issue could reveal privileged communications. In addition, the authorities cited by the Ministry can be distinguished based on the unique circumstances of the Cambie Litigation.

[14] I will start by addressing the BC Supreme Court and OIPC authorities that the Ministry says are dispositive of this inquiry. Next, I will discuss what the appellate level cases say about legal fees which are unaccompanied by details about the corresponding legal services. Finally, I will consider what, if any, conclusions might be drawn by an “assiduous inquirer” about the disputed legal cost in this case.

BCSC and OIPC decisions

[15] In *Corp. of the District of North Vancouver v BC (The Information and Privacy Commissioner) [District of North Vancouver]*, the court found that the presumption that legal fees were privileged was not rebutted. The case involved the name of the law firm and the sum total of their billing unaccompanied by any description of the services provided. The access request was made in the context of an ongoing nuisance action against North Vancouver. The chambers judge theorized that the applicant could gain insight into “detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated” and therefore the amount of legal fees was privileged.¹⁸ The court set out examples of what information might be gleaned from a lump sum for interim legal services:

- the state of preparation of a party for trial;

¹⁶ *Ibid* at paras. 58–59. See also *School District No. 49 (Central Coast) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at paras. 104–106 [*Central Coast*].

¹⁷ *Corp. of the District of North Vancouver v BC (The Information and Privacy Commissioner)*, 1996 CanLII 521 (BC SC) [*District of North Vancouver*]; *Central Coast, ibid*; Order F16-35, 2016 BCIPC 39.

¹⁸ *Ibid* at paras. 48.

- whether the expense of expert opinion evidence had been incurred;
- whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
- where co-defendants are involved whether it appears one might be relying upon the other to carry the defence burden;
- whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;
- whether legal accounts were being paid on an interim basis and whether payments were relatively current;
- what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.¹⁹

[16] In *School District No. 49 (Central Coast) v British Columbia (Information and Privacy Commissioner)* [Central Coast] the applicant requested the total amount of legal fees paid by a School Board while the applicant had ongoing legal proceedings against the School Board.²⁰ The court adopted the analysis from *District of North Vancouver* in concluding that the fees were subject to solicitor client privilege.²¹

[17] More recently, in *Richmond (City) v Campbell*, the BC Supreme Court overturned a decision of the OIPC requiring the City of Richmond disclose its total legal fees spent defending two employment harassment claims which had settled.²² The access applicant had an active grievance against the city. The court again relied on *District of North Vancouver* (as well as *Central Coast*) in reaching its decision.²³ The court concluded that the information was privileged because it could reveal how vigorously the city defended such claims and how much the city was willing spend on legal fees before settling the claims. The court said that disclosing this information could prejudice the city when defending similar claims.

[18] Turning to OIPC decisions, in Order F16-35, the adjudicator held that the total legal fees the City of Burnaby was billed for litigation surrounding the Trans Mountain pipeline was privileged. The adjudicator considered it significant that the fees covered a 21-month time frame and might be linked to identifiable steps in the litigation.²⁴

¹⁹ *Ibid* at para. 49.

²⁰ *Central Coast*, *supra* note 16.

²¹ *Ibid*. The court adopted *District of North Vancouver* (*supra* note 17) at paras. 132–134. See para. 3 regarding the context of the access requests.

²² *Richmond (City) v Campbell*, 2017 BCSC 331 [*Richmond (City)*].

²³ *Ibid* at paras. 80–81.

²⁴ Order F16-35, *supra* note 17 at para. 18.

[19] The Ministry argues that “Order F15-64 is dispositive of the issue in dispute.”²⁵ At issue in that case were the total legal fees paid to Ministry counsel during an eleven month period to provide legal services related to investigation into a health data breach. The adjudicator noted that the fees could pertain to one or more legal matters. She concluded that the presumption that the fees were privileged had been rebutted and concluded that, “given its non-specific and aggregate nature, the LSB fees do not disclose anything about privileged communications regarding legal advice sought and received or the Ministry’s litigation strategy.”²⁶ It is not clear how Order F15-64 supports the Ministry’s argument.

[20] In Order F13-03, the adjudicator held that monthly legal accounts were subject to privilege.²⁷ She further stated that the dollar amounts could not be severed from the remaining information in the accounts because the entire account was privileged. Even if the dollar amounts could be disclosed in isolation, the adjudicator concluded that there was a reasonable possibility that the dollar amounts alone, would reveal privilege communications. Unlike Order F13-03, I am not considering monthly legal accounts between solicitor and client. In contrast, at issue are fees covering an eight year period in a record which was created by the Ministry in response to an access request. These circumstances distinguish Order F13-03 from the present inquiry.

[21] Order F11-26 is notable because in that instance, the Ministry chose to disclose the total of its legal bills for a specific case.²⁸ The dispute was over the invoice dates and the fees and disbursements associated with each invoice. The Ministry does not address why it agreed to disclose its total fees in that case but it takes a different position now regarding the same type of information.²⁹ While the Ministry is not bound by its position in previous inquiries, the Ministry presently relies on Order F11-26, and without any explanation, the fact that the Ministry disclosed aggregate legal fees in a similar case diminishes its argument that disclosure of such information would “undermine the sanctity of the solicitor client relationship.”³⁰

Appellate decisions

[22] The authorities cited by the Ministry stem from the *District of North Vancouver*, a 1996 decision which preceded more recent appellate decisions which have found that legal fees, unaccompanied by other detail, would not reveal solicitor client communications. In my view, *District of North Vancouver* and the other authorities the Ministry cites in support of its argument, can be

²⁵ Ministry reply submissions at para. 4.

²⁶ Order F15-64, 2015 BCIPC 70 at para. 25.

²⁷ Order F13-03, 2013 BCIPC 3.

²⁸ Order F11-26, 2011 BCIPC 32.

²⁹ Ministry submissions at para. 4.27.

³⁰ *Ibid* at para. 4.37.

distinguished based on appellate authorities on the issue, which I turn to address.

[23] In *Kruger Inc. v Kruco Inc.* [*Kruco*], LeBel J as he then was, concluded that information contained in billings, without any details concerning the nature of the services rendered, was not protected by solicitor client privilege in Quebec law.³¹ In other words, the bare amount of legal fees is not privileged.

[24] Subsequently, in *Maranda v Richer* [*Maranda*], the Supreme Court of Canada held that the gross amount of fees and disbursements, in the context of a criminal investigation and prosecution, was presumptively covered by solicitor client privilege.³² In a later decision, *R v Cunningham*, the court clarified that in *Maranda*, the fact that the information could be prejudicial to the accused was essential to its finding that the amount of legal fees was presumptively privileged. Specifically, the police could use the information to piece together the client's whereabouts and use that evidence to charge and/or convict the client.³³ In other words, disclosing the legal fees could cause potential jeopardy to the client.

[25] In *Maranda*, LeBel J, writing for the majority, was careful to distinguish between the significance of disclosing legal fees in the criminal context versus other circumstances:

Because this Court is dealing here with a criminal case, we must not overestimate the authority of *Kruco* or of other judgments that may have been rendered in civil or commercial cases. ... An application by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.³⁴

[26] In *Maranda*, the presumption that the amount paid for legal fees was privileged was not rebutted because of the possible prejudice to the client, i.e., infringement of his constitutional rights. The court in *Maranda* did not consider whether there was a reasonable possibility that disclosure would directly or indirectly reveal solicitor client communications. However, other appellate decisions have considered that factor, and they cast doubt on whether bare legal fees would reveal such communications.

[27] In *Wong v Luu*, our Court of Appeal explained that a lawyer's bills are presumptively privileged, "because they are ordinarily descriptive; by recording the work done by the solicitor, they disclose the client's instructions, which the client cannot be compelled to divulge and the confidentiality of which the solicitor

³¹ *Kruger Inc v Kruco Inc*, 1988 CanLII 962 (QC CA), as described in *Maranda*, *supra* note 14 at para. 27. I was unable to locate an English translation of *Kruco*.

³² *Maranda*, *supra* note 14 at paras. 28–29 and 33.

³³ *R v Cunningham*, 2010 SCC 10 at para. 28.

³⁴ *Maranda*, *supra* note 14 at para. 29.

is obliged to protect.”³⁵ In other words, it is the description of the legal services which would reveal solicitor client communications. The court concluded that in the circumstances of that case, the amounts paid by a particular client for legal services out of a lawyer’s trust account would not reveal solicitor client communications. It said:

While in some cases knowing the amount spent on legal services in relation to a particular matter or issue will give the recipient of that information some insight into the solicitor-client relationship, no significant insight is gained by the disclosure ordered in this case. It cannot be said that deductive reasoning will permit the recipient of the records of trust transactions in the period from August 1, 2011 to July 31, 2013 to learn anything of value with respect to the solicitor-client relationship....³⁶

[28] Decisions of the Ontario and Alberta Courts of Appeal have also concluded that the total amount of legal fees, without anymore, would not reveal solicitor client communications.

[29] In *Gault Estate v Gault Estate*, the Alberta Court of Appeal held that an estate must disclose its gross amount of legal fees in the context of ongoing estate litigation. In reaching its conclusion, the court expressly rejected *District of North Vancouver* in commenting that, “[i]n the abstract, the type of conjecture engaged in in [*District of North Vancouver*] seems an unlikely source of useful or prejudicial information.”³⁷

[30] In *Ontario (Ministry of the Attorney General) v Ontario (Assistant Information and Privacy Commissioner)*, the court upheld two orders of the Ontario Information and Privacy Commissioner which required disclosure of legal fees. The first order required the attorney general to disclose the total amount of legal fees paid to two lawyers who acted for intervenors in Paul Bernardo’s criminal proceeding. The second required disclosure of the payments (and payment dates) to four lawyers who had acted for Mr. Bernardo in the appeal of his murder convictions. The court found that no solicitor client communications would be revealed by the legal fees being disclosed in either case. It reasoned that there was no reasonable possibility of communications being revealed:

³⁵ *Wong v Luu*, 2015 BCCA 159 at para. 38.

³⁶ *Ibid* at para. 43. Two other BC Court of Appeal decisions have some relevance. In *Donell*, *supra* note 15, the Court of Appeal found that some entries in a trust ledger were privileged but did not identify the nature of the entries which it found were privileged (paras. 64-66). In *Legal Services Society v British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, the court held that the names of certain legal aid billers were privileged because the information could identify their clients as being funded by legal aid when combined with the amounts billed, which had been disclosed. The court did not consider whether any solicitor client communications might be revealed by the *amounts* billed.

³⁷ *Gault Estate v Gault Estate*, 2016 ABCA 208 at para. 23.

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. . . .³⁸

[31] The Ministry has stressed that in cases involving ongoing proceedings, the courts and the OIPC have consistently held that the legal fees incurred by a party would reveal inferences about a client's instructions and legal strategy. However, the cases it cites did not turn on whether or not there were ongoing proceedings, rather they stem from *District of North Vancouver*, in which the court listed a number of possible inferences which could be drawn from legal fees. The appellate decisions which have been issued after *District of North Vancouver* suggest that there is no reasonable possibility that the detailed inferences from *District of North Vancouver* could be gleaned from a party's bare legal fees.

[32] In any event, the Cambie Litigation is unique, and can be distinguished from the cases relied on by the Ministry. I turn now to consider whether disclosure of the Province's cost of litigation in the circumstances of this case would directly or indirectly reveal privileged communications.³⁹

The parties' submissions

[33] The Ministry argues that disclosure of the total legal costs could lead to a number of inferences regarding privileged matters. It also asserts that the information could be used by the plaintiffs to the prejudice of the Province.

[34] CCF argues that the Ministry has not established how, in the particular circumstances of this case, knowing the decontextualized cost of litigation could provide any useful insight into the Province's litigation strategy or communications with its solicitors. On this point, CCF states:

Indeed, if seeking decontextualized budget information – literally one number with no accompanying information – about the total cost of litigation in a long-running and very public constitutional litigation is not a circumstance in which the presumption is properly rebutted, it is difficult to imagine under what circumstances it would be. And yet every court has said that there are circumstances in which it might be. The CCF submits these must be those circumstances.⁴⁰

³⁸ *Ontario (Ministry of the Attorney General) v Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA) at para. 13.

³⁹ Neither party addressed whether the information in dispute was presumptively privileged, however, I am satisfied that it is, as it relates to legal services.

⁴⁰ CCF submissions at para. 43.

[35] CCF says that knowing whether the total cost to date are “\$8 million or \$12 million or \$20 million” may prove embarrassing for the Province, but will not reveal privileged communications.⁴¹

[36] In reply, the Ministry submits that CCF has failed to provide any sworn evidence to counter the Ministry’s evidence “that inferences could be made regarding the import of the case to the Province and, consequently, the Province’s intention with respect to its defence strategy in the litigation.”⁴²

Analysis

[37] I will briefly address the Ministry’s suggestion that CCF is required to submit evidence to counter the Ministry’s evidence. In essence, the Ministry suggests that CCF has an evidentiary burden to rebut the presumption that privilege applies. This issue was conclusively decided in *Central Coast* where a similar argument was made in circumstances where the applicant provided no evidence or argument.⁴³ The court held that in such cases it is open to the commissioner to take, “the nature and context of the information into account in determining if a claim of privilege should be upheld....”⁴⁴ That is what I have done here.

1. Inferences from total costs

[38] The Ministry has alleged that a number of inferences could be drawn from the litigation cost. The Province’s lead counsel for the Cambie Litigation asserts that disclosing the litigation cost could lead to accurate inferences regarding:

- the Province’s state of preparation;
- the amount of resources it is willing to spend on the litigation;
- whether the Province believes that the case involves “hotly contested issues” on which the law is unclear or the elaboration of new principles of law;
- the importance of the case to the Province;
- whether the Province has front loaded or back loaded the cost of litigation, which would reveal the Province’s belief about the strength of its position and if the case would resolve early;
- the amount of time spent by lawyers and “non-lawyer resources” preparing for the litigation and conducting document discovery; and
- the amount of resources the Province was willing to spend to defend the litigation.⁴⁵

⁴¹ CCF submissions at para. 39.

⁴² Ministry reply submissions at paras. 1 and 2.

⁴³ *Central Coast*, *supra* note 16 at paras. 114–115.

⁴⁴ *Ibid* at para. 113.

⁴⁵ Affidavit of Lawyer J at paras. 8, 9, 10, 13 and 14.

[39] I agree, for the most part, with CCF’s submission that the Ministry has only provided “a list of theoretical concerns copied-and-pasted from an unrelated case” which do not apply in the present circumstances.⁴⁶

[40] The Ministry suggests that disclosing the cost of litigation could reveal the importance of the case to the Province or whether the Province believes that the case will “involve hotly contested issues, novel issues or unclear areas of the law.”⁴⁷ However, these “inferences” are self-evident. The Cambie Litigation is a landmark constitutional case, it is not plausible that the litigation is unimportant to the Province or that the Province does not believe the case involves unique issues.

[41] The Ministry’s own evidence is that the litigation is “highly contentious.”⁴⁸ This is supported by the number of reported decisions arising out of the litigation, which numbered 48 by the close of submissions, including a 135-page decision on evidentiary issues.⁴⁹ The Ministry has also provided a *Globe and Mail* article about the case, in which a journalist reported that, “the province offered no apologies for ‘vigorously’ defending the public system.”⁵⁰ Counsel for the Province is quoted in the article stating that a victory for the plaintiffs would “violate the fundamental principles on which the province’s universal health-care system is founded.”⁵¹ It is evident from the public record that the case is hard fought and important to both sides.

[42] The Ministry’s evidence is that its litigation cost could reveal its “state of preparation,” which I assume means preparation for trial.⁵² However, as the parties are already in the thick of trial, the Province’s amount of preparation must be evident to the plaintiffs. Further, the total dollar amount would not reveal, as the Ministry suggests, whether the Province “front loaded” the cost of litigation and, as a result, its views on the case’s strength and whether compromise was a serious prospect. The information in dispute covers the cost from the start of litigation in 2009 to January 18, 2017, well after the trial commenced in September 2016.⁵³ As the figure covers eight years, from the start of the lawsuit well into trial, the applicant would have no idea what, if any, part of the cost was “front loaded.”

[43] The Ministry suggests that the information in dispute could reveal the amount of time spent by lawyers and “non-lawyer resources” preparing for the

⁴⁶ CCF submissions at para. 41.

⁴⁷ Ministry submissions at paras. 4.32.

⁴⁸ Affidavit of Lawyer L at para. 5; Affidavit of Lawyer J at para. 8.

⁴⁹ Submissions closed June 8, 2018. The 135-page decision is *Cambie Surgeries Corporation*, 2018 BCSC 514.

⁵⁰ Affidavit of Lawyer L, exhibit E.

⁵¹ *Ibid.*

⁵² Affidavit of Lawyer J at para. 8.

⁵³ See: *Cambie Surgeries Corporation*, 2016 BCSC 1686 at para. 4.

litigation and conducting document discovery. However, it would not be possible to deduce the time billed by particular resources because the cost of litigation is a blend of a variety of expenses.

[44] The Ministry's evidence is that the litigation cost includes both fee and disbursement information for more than one file (i.e., "for files relating to the Cambie Litigation, including files pertaining to specific matters relating to that litigation.")⁵⁴ Further, the Ministry's submissions indicate that the litigation cost includes billings from different professionals, more specifically, lawyers, junior lawyers, paralegals, articling students, any external counsel retainers and expert witness fees.⁵⁵ At least six lawyers are on record representing the Province, and the Province has submitted evidence from a supervising lawyer.⁵⁶ Suffice it to say that numerous professionals, who charge at different rates, have worked on the Cambie Litigation on behalf of the Province. The plaintiffs would not gain any insight into how particular resources are being used from the lump sum figure.

[45] The Province's counsel goes further to argue that simply the amount of resources the Province spent up to a certain point in the case is a matter subject to solicitor client privilege.⁵⁷ However, the assertion that legal fees are always protected by solicitor client privilege is not supported by the case law. The issue is whether the figure would reveal solicitor client communications.

[46] Counsel further asserts that the figure would reveal how much the Province was willing to spend in the future on the litigation. However, the litigation cost would not reveal how much the Province is willing to spend to defend the lawsuit as it is an interim figure. The figure covers cost up to January 2017, but the case has been ongoing since then, and the Province is presumably incurring significant further costs. The Ministry has not suggested, and I consider it unlikely given the uniqueness of the case, that the interim figure could be compared to costs for other litigation to discern legal strategy.

[47] The Ministry also argues that the potential for revealing privileged information is heightened in this case because there is another inquiry before the Commissioner involving costs of the Cambie Litigation for a different period of time. The Ministry suggests that should the OIPC order disclosure of litigation cost for two different time frames, it "would enable inferences to be drawn with respect to the Province's litigation strategy for those phases."⁵⁸ The Ministry's argument presumes that the Commissioner would order disclosure of litigation costs in both inquiries. I have considered the impact of disclosure in both cases

⁵⁴ Affidavit of Lawyer J at para. 7.

⁵⁵ Ministry submissions at para. 4.02.

⁵⁶ See *Cambie Surgeries Corporation*: 2014 BCSC 361; 2017 BCSC 115; 2018 BCSC 859; 2018 BCSC 760. Affidavit of Lawyer L at para. 2.

⁵⁷ Affidavit of Lawyer J at para. 8.

⁵⁸ Affidavit of Lawyer J at para. 15.

and have concluded in Order F18-36 that the Ministry is not required to disclose the information in issue, so this argument is moot.

2. *Prejudice to the Province*

[48] The Ministry argues that the information could be used by the plaintiffs to gain an advantage in the litigation. The Ministry has not explained what advantage the plaintiffs might gain nor is it plain and obvious.

[49] The Ministry submitted evidence *in camera* about how disclosing the fee information would prejudice the Province.⁵⁹ With regards to the information in paragraph 17 of Lawyer J's affidavit, this inference would be obvious to anyone with knowledge of the litigation. In any event, the legal cost would not reveal such information because it is a blend of a variety of expenses.

[50] The suggested harm in the last sentence contained in paragraph 19 of Lawyer J's affidavit presupposes opposing legal counsel will act contrary to professional ethics, and I find that this is unlikely to happen. Further, the Province has the ability to address the situation should it occur.

Summary

[51] The purpose of solicitor client privilege is to ensure that clients are not reluctant to obtain legal advice and to foster the proper taking and giving of legal advice.⁶⁰ Disclosing the gross cost to the Province of legal services for the Cambie Litigation will not violate the Province's right to communicate in confidence with legal advisors, or have a chilling effect on that right. That is because I am satisfied that there is no reasonable possibility that the litigation cost would reveal anything about the communications between the Ministry counsel and the Province or the Province's legal strategy.

[52] I have considered the Ministry's arguments about what types of inferences could be drawn from the litigation cost in this case and how disclosure might prejudice the Province. In my view, given the nature of the litigation, i.e., a landmark constitutional case, the stage of the proceedings, the variety of costs represented in the sum total, in combination with information available on the public record, any conclusions which might be drawn from the litigation cost would already be evident to anyone knowledgeable about the litigation.

[53] The parties to the litigation have undoubtedly incurred substantial legal fees. Disclosure of the exact figure would only confirm what is already in public record – that the Province is “vigorously” defending this important constitutional

⁵⁹ Affidavit of Lawyer J at paras. 17–19.

⁶⁰ *British Columbia (Attorney General) v Davies*, 2009 BCCA 337 at para. 105, leave to appeal dismissed 2010 CanLII 17152 (SCC).

case. As a result, I find that the presumption that the litigation cost is privileged has been rebutted and the Ministry cannot rely on s. 14 to withhold the figure.

CONCLUSION

[54] For the reasons stated above, pursuant to s. 58 of FIPPA I require the Ministry to give the applicant access to the total cost of litigation contained in the record by September 26, 2018. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the record.

August 14, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

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