Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-2483

## Appeal PA-020158-1

## Ministry of the Attorney General

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## NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> A breakdown of all money paid or owed to external legal firms such as Smith Lyons etc. related to the Walkerton Inquiry and the government's defence against the class-action suit arising out of the water disaster. Specific items sought include preparing the Premier for his testimony before said inquiry, billings related to the records search of the Premier's office related to the inquiry; similar legal expenses for Cabinet ministers Brenda Elliott and Norm Sterling; and any and all other related legal expenses flowing from the tragedy.

In response, the Ministry stated:

> Records responsive to your request have been located. These records are legal accounts and financial records and are subject to solicitor-client privilege. Accordingly, access is denied under section 19 of the *Act* as a ministry may refuse to disclose a record that is subject to solicitor-client privilege. In addition, access to a portion of these records is also denied under section 21 of the *Act* as a ministry shall refuse to disclose personal information where it constitutes an unjustified invasion of personal privacy.

The requester (now the appellant) appealed the Ministry's decision to this office.

During the mediation stage of the appeal the Ministry provided the appellant with an index of records containing a brief description of each record at issue in the appeal and which exemption(s) the Ministry relies on to deny access.

After reviewing the index, the appellant advised that he was not interested in pursuing access to any of the items in the index described as packing slips, correspondence, courier slips and fax cover sheets. Accordingly, these records are no longer at issue in the appeal.

The appellant clarified that he was seeking dollar figures for amounts of money that the Ontario government was billed and amounts paid in legal fees for the Walkerton Inquiry. In response, the Ministry agreed to create a record containing the amounts paid to various law firms in that regard but maintained its reliance on section 19 of the *Act* to withhold the record.

The newly created record was added as a record at issue in this appeal, and the Ministry claimed that it is exempt under section 19. The appellant was of the view that the newly created record would not contain the level of detail he is seeking and, for this reason, the other records remain at issue.

The appellant also advised, during mediation, that he relies on the section 23 "public interest override". This section may apply to override the application of section 21, but cannot override section 19.

Further mediation was not possible and the appeal moved to the adjudication stage. This office initially sent a Notice of Inquiry to the Ministry. In response, the Ministry submitted representations. This office then sent a Notice of Inquiry to the appellant, along with the non-confidential portions of the Ministry's representations. The appellant did not submit representations in response.

This office subsequently invited both the Ministry and the appellant to submit representations on the impact of two court decisions on this appeal. The first of these was the Supreme Court of Canada's decision in *Maranda v. Richer,* [2003] 3 S.C.R. 193 ("*Maranda*"), which deals with solicitor-client privilege and the amount of legal fees charged in connection with a criminal law matter. The second case was the Ontario Divisional Court's decision in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 779 ("*Attorney General # 1*"), in which the Court upheld two decisions of this office (Orders PO-1922 and PO-1952) which had found that the section 19 solicitor-client privilege exemption did not apply to specific records revealing amounts the Attorney General paid to lawyers for legal representation in a criminal law context.

The Ministry provided representations on the impact of these two court decisions. No representations were received from the appellant. The Ontario Court of Appeal subsequently granted the Ministry's motion for leave to appeal the Divisional Court's decision in *Attorney General # 1*. The access appeal under consideration in this order was then re-assigned to me to continue the inquiry. Because the subject matter of this access appeal is similar to the information at issue in *Attorney General # 1*, I placed this appeal on hold pending the Court of Appeal's decision in that case.

The Court of Appeal then released its decision in *Attorney General # 1* (reported at *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* [2005] O.J. No. 941 (C.A.)), in which it upheld the Divisional Court decision. I then invited five affected parties to submit representations on all issues. I also invited the Ministry to make additional representations on the issue of solicitor-client privilege in light of the Court of Appeal decision. The Ministry and four affected parties submitted representations. I then invited the appellant to submit representations on these issues. The appellant indicated that he would not provide representations.

These reasons are being issued concurrently with those in Appeal PA-020180-1 (Order PO-2484), which deals with closely related issues.

## RECORDS:

The records at issue in this appeal are described in an index provided to this office and the appellant. As noted above, the requested information was clarified during mediation as dollar figures for amounts of money that the Ontario government was billed and amounts paid in legal fees for the Walkerton Inquiry. The records described in the index as packing slips, correspondence, courier slips and fax cover sheets are no longer at issue. The remaining records

consist of statements of account, accounts rendered by law firms, background financial records relating to the statements of account, and other documents including invoices and receipts pertaining to disbursements. In addition, the one-page record created by the Ministry during mediation, containing a list of law firms and dollar figures, is at issue.

## DISCUSSION:

### SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that section 19 of the *Act* applies to exempt all of the records in their entirety. The affected parties who provided representations generally support the Ministry's position, although one of them did not object to disclosure of the total amount it had billed.

When the request and appeal in this matter were filed, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the version I have just quoted therefore applies in this appeal. In any event, the amendments, which address the addition of universities to the body of "institutions" subject to the *Act*, have no bearing in this case.

#### Ambit of branches 1 and 2

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1 derives from the first part of section 19, which permits the Ministry to refuse to disclose "a record that is subject to solicitor-client privilege". Previous orders of this office have described this branch as encompassing both solicitor-client privilege and litigation privilege. This approach is no longer viable.

The first direct indication that it might not be correct for this agency to continue to include litigation privilege within the ambit of "solicitor-client privilege" came in *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31 ("*Attorney General # 2*"). Justice Carthy, writing for the Court, stated (at paras. 10-11):

> The distinctions between the two types of privilege were thoroughly canvassed in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, 180 D.L.R. (4th) 241 (C.A.). At pp. 330-31 O.R., the following summary appears:

R.J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in Law in Transition: Evidence, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

Rationale for Litigation Privilege

Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect.

> The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect -- the adversary process -- among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.

> What is clear now, but perhaps [was] not so clear in 1987 [when the *Act* was under consideration by the Legislature], is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

Justice Carthy goes on to indicate that the words of branch 2 encompass "… the work product or litigation privilege which covers material going beyond solicitor-client confidences …" (para.12)

Referring to Justice Cathy's decision, in the *2005 Annotated Ontario Freedom of Information and Protection of Privacy Acts* by Colin H.H. McNairn and Christopher D. Woodbury (Toronto: Carswell, 2004) the authors comment as follows (at p. 166):

> … it would seem that the term "solicitor-client privilege" in the first part of section 19 should now be taken to embrace only solicitor-client communication privilege … but not litigation privilege …, a form of which is covered by the second part of section 19; see, particularly, [*Attorney General # 2*].

The views expressed by Justice Carthy in *Attorney General # 2* are further developed in *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) ("*Attorney General # 3*"). Justice Lane (writing for the Court) described section 19 as follows:

> This section is generally regarded as having two branches: the first is the exemption for documents covered by the well-known solicitor-client privilege; the second is the exemption created by all words following "privilege" and is similar to the common law "litigation privilege" protecting "solicitor's work product" or the "solicitor's brief". [para. 4]
>
> [T]he second branch of section 19 is not the source of litigation or "work product" privilege in the Crown brief. Litigation privilege grew out of solicitor-client privilege, but has a different policy justification. It is not related to the confidences between solicitor and client, but to the needs of the adversary system. Counsel must be free to make full and timely investigations, including obtaining information from third parties, statements from witnesses, and the like, without having to share the results with the opponent. Crown counsel's litigation brief enjoys the protection of this common law litigation privilege, subject to the over-

riding constitutional obligation to make disclosure to the accused imposed by *Stinchcombe*. … [para. 26]

It is clear from [*Attorney General # 2*] that the second branch of section 19, unlike the first, does not simply import the common law into FIPPA. The second branch does not even refer to the common law litigation privilege. This point was made by Carnwath J., for the Divisional Court, in [*Attorney General # 2*, cited as *Ontario (Attorney General) v. Big Canoe*, (2001) 208 D.L.R. (4th) 327 (Div. Ct.)] at paragraphs 31 and 32, where he said that while the extent of solicitor-client privilege in the first branch would vary as the common law evolved, the second branch was fixed by the words of the section. The language was clear and unambiguous: the head may refuse to disclose a record prepared as described in the statute. … [para. 27]

In my view, this comment shows that Carthy J.A. agreed that the second branch was not an importation of common law litigation privilege, but an enactment in its own right. His subsequent finding that, unlike litigation privilege, the statutory exemption did not terminate when the litigation terminated, is consistent with this view. [para. 28]

The decision of the Court of Appeal in [*Attorney General # 2*] was informed by a particular piece of legislative history, which the court concluded demonstrated that the intent of the legislation was that the branch 2 exemption should be permanent, as solicitor-client privilege is, and not die with the litigation as is the case with common-law litigation privilege. … [para. 29]

…[W]e must not commit the error of assuming that, because the documents described in the second branch would be privileged as work product at common law, all the law of litigation privilege applies … [para. 30]

*If the statute does not import the common law of litigation privilege, what does it do? In my view, it creates, for FIPPA purposes only, an exemption: a statutory discretionary power* in the head to withhold a certain class of document. … While, as noted earlier, this exemption is similar to the common law litigation privilege, they are not identical in origin, content or purpose. The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. … [para. 37, emphasis added.]

In my view, following the comments of the Ontario Court of Appeal in *Attorney General # 2* and, in particular, the further explanation and commentary by the Divisional Court in *Attorney General # 3*, it is no longer tenable to treat branch 1 as including not only common law "solicitor-client privilege" (sometimes also called "solicitor-client communication privilege"), as it clearly does, but also common law litigation privilege.

Accordingly, I have concluded that branch 1 must be treated as encompassing only solicitor-client privilege at common law, and *not* litigation privilege.

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Several decisions have excluded common law principles from limiting the scope of branch 2 (see *Attorney General # 2* and *Attorney General # 3* (both cited above)). However, decisions limiting branch 2 on the following common law grounds have been made or upheld by the Ontario courts:

- waiver of privilege (see *Ontario (Attorney General) v. Ontario (Big Canoe)*, [1997] O.J. No. 4495, upholding Order P-1342, which found that section 19 did not apply to certain records for which only branch 2 had been claimed – but see also the obiter comments of Lane J. at para. 34 of *Attorney General # 3*) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Attorney General # 3*).

**Branch 1: common law solicitor-client privilege**

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

As is apparent from the history of this matter, set out above under "Nature of the Appeal", the receipt of representations in this appeal proceeded over an extended period during which a number of relevant rulings were issued by the courts, necessitating invitations to provide further representations. In particular, the question of how solicitor-client privilege applies to information about legal invoices, and to legal fees and disbursements generally, has been the

subject of a number of recent cases including the judgments of the Quebec Court of Appeal and the Supreme Court of Canada in *Maranda*, and the judgments of Ontario's Divisional Court and Court of Appeal in *Attorney General # 1*. Given that the records at issue in this appeal either summarize legal billings by fiscal year and firm name, or consist of actual lawyers' invoices or related supporting records, the question of what standards apply in determining the issue of privilege in relation to lawyer's billing information is a significant one in assessing whether branch 1 of section 19 applies.

I will therefore discuss branch 1 of section 19 under the following main headings:

(1) What standards or criteria apply in the circumstances of this appeal to determine whether the records are subject to solicitor-client privilege and exempt under branch 1?

(2) Applying those standards to the records, are they subject to solicitor-client privilege and exempt under branch 1?

***What standards or criteria apply in the circumstances of this appeal to determine whether the records are subject to solicitor-client privilege and exempt under branch 1?***

*Lavallee* and *Descoteaux*

In its initial representations, the Ministry notes that in *Lavallee, Rackel & Heinz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada stated (at para. 36 of the judgment) that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance". The Ministry also references the "framework" of the solicitor-client relationship, outlined in the passage just quoted from *Descoteaux v. Mierzwinsky* (cited above). This submission is echoed by one of the affected parties, who cites the similar dicta in *Davies v. American Home Insurance Co.* (2002), 60 O.R. (3d) 512 (Sup. Ct.). I will be guided by the principles in these cases in making this decision.

*Maranda*

Introduction

As noted previously, this office invited the parties to provide supplementary representations on the Supreme Court of Canada's decision in *Maranda* (which was decided subsequent to the Ministry's initial representations in this appeal) as well as the Divisional Court decision in *Attorney General # 1*, which discusses *Maranda*.

When this inquiry began, the Quebec Court of Appeal decision in *Maranda* (cited at (2001), 161 C.C.C. (3d) 64) had not yet been reversed by the Supreme Court of Canada. The Quebec Court of Appeal judgment applied a contextual approach to the question of privilege in lawyers' account and billing information, but that approach was rejected by the Supreme Court. Because

this interpretation was essential to the parties' submissions on the Quebec Court of Appeal judgment, I will not reproduce or refer in detail to those submissions.

*Maranda* involved the search of a lawyer's office for documents relating to fees and disbursements charged to a client suspected of money laundering. The Supreme Court judgment in *Maranda* sets out a new approach for determining the application of privilege to lawyers' billing information. Unlike previous cases on this subject, the Supreme Court adopts the principle that information about lawyer's fees is presumptively privileged. The presumption of privilege is rebutted where the information is "neutral", i.e. does not disclose, either directly or inferentially, information that is subject to solicitor-client privilege.

In formulating this approach, the Supreme Court rejects the "facts" and "communications" distinction as the sole or primary basis for the rule in relation to privilege as applicable to lawyers' billing information. This distinction had been discussed in the context of legal billing information in *Stevens v. Canada (Privy Council)* (1998), 161 D.L.R. (4th) 85 (F.C.A.) ("*Stevens*", discussed in more detail below), and was also relied on by the Quebec Court of Appeal in that court's *Maranda* decision. The Supreme Court states (at paras. 30-33):

> [The] rule cannot be based on the distinction between facts and communication… The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence. It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communications…
>
> However, *the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege*.
>
> *The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements*.
>
> Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum…. [emphases added]

The Ministry submits that in *Maranda*, the Supreme Court "… rejected the argument that the amount of the fees and disbursements was a 'fact'". I disagree with this view. The Court

actually described "the bill itself and its payment" as a "fact", but found that this was not determinative because the rule about the application of privilege to legal fees and disbursements "… cannot be based on the distinction between facts and communications".

Does *Maranda* overrule *Stevens*?

The Ministry's initial representations refer to *Stevens* (cited above) in support of its position that a lawyer's statement of account is protected from disclosure by solicitor-client privilege. The Court in *Stevens* concluded that bills of account are privileged in their entirety.

*Stevens* predates both the Quebec Court of Appeal and the Supreme Court decisions in *Maranda*. In *Stevens*, the Federal Court of Appeal took a different approach to the "facts and communications" exception to privilege, in the context of a lawyer's account, than either the Quebec Court of Appeal or the Supreme Court in *Maranda*. The Federal Court states (at page 99 of *Stevens*):

> Thus statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged.

Further on in the judgment (at page 108), the Court explains the "facts" and "communications" distinction:

> It is true that interviewing a witness is an act of counsel, and that a statement to that effect on a bill of account is a statement of fact, but these are all acts and statements of fact that relate directly to the seeking, formulating or giving of legal advice. And when these facts or acts are communicated to the client they are privileged. This is so whether they are communicated verbally, by written correspondence, or by statement of account.

The Ministry seeks to preserve the application of *Stevens* in relation to actual invoices by distinguishing *Maranda* on the basis that it only applies to "amounts", not "invoices", which are dealt with in *Stevens*:

> [t]he bulk of the records at issue in this appeal are actual invoices. The *Maranda* decision, which is concerned only with the amount of fees and disbursements, does not affect the case law that confirms that privilege attaches to those direct communications (see *Stevens*, Order PO-1714).

This suggests that there is a straightforward and meaningful distinction to be drawn between bills of account and the "amount" of fees and disbursements paid. In my view, this distinction is not so easily drawn, nor is the potentially different treatment of similar information easy to explain or reconcile.

The difficulty of making such a distinction is illustrated by the following discussion of what was actually at issue in *Maranda* (at para. 24):

> … I will have to assume that the Crown is seeking only the raw data, the amount of the fees and disbursements. I have some doubts on that point, however, after reading the list of documents sought. The documents and information sought, in particular concerning Mr. Maranda's disbursement accounts, might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. In any event, I shall examine the issue in the terms defined by the parties, who assume that the information that the RCMP wanted was limited to the gross amount of the fees and disbursements billed by Mr. Maranda to his client, Mr. Charron.

In many instances, the source that reveals the amount of legal fees and disbursements would be a lawyers' invoice or bill of account.

Based on my review of *Maranda*, I am not persuaded that the Supreme Court endorsed a view of privilege that automatically protects solicitors' invoices in their entirety, including the amount of fees and disbursements, but applies the presumption/rebuttal approach to lawyers' fee and disbursement information in other kinds of records. A careful examination of the Court's discussion of the facts/communications distinction at paragraphs 30-33, which I have reproduced above, supports this view. The Court characterizes both "the bill of account and its payment" as a "fact" (para. 32). However, it says that the "fact" of the bill and its payment "cannot be separated from acts of communication", and then states the presumed privilege rule to deal with this type of information. In formulating the rule, the Court indicates that "[b]ecause of the difficulties inherent in determining the extent to which the information contained in *lawyers' bills of account* is neutral information, … recognizing a presumption that such information falls within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved." (para. 33, emphasis added) The Court's intention to include not only the amount of fees and disbursements actually paid in the presumptively privileged category, but also lawyers' bills of account, could not be more clearly stated.

Though the Ministry has not abandoned the distinction between amounts paid and actual invoices, its final submissions suggest that what matters is the nature of the information and what it communicates:

> … [the] protection of legal accounts is extended not simply because a record is labelled a "legal account" as opposed to some other kind of record. Indeed, the Supreme Court in *Maranda* rejected an approach based on whether information is labelled "a fact or an act". What is relevant is the nature of the information contained in the record, and whether it directly or indirectly would reveal information that is subject to solicitor-client privilege.

I agree. In my view, a distinction in the treatment of information about legal fees and disbursements based on whether it appears in an invoice or some other kind of record is untenable. I find that the distinction drawn by the Ministry does not provide a sound basis to distinguish *Maranda* from *Stevens* and allow the latter to continue to govern the application of privilege to solicitors' invoices as the Ministry submits. For these reasons, I have concluded that the *Maranda* decision overrules *Stevens* regarding the application of privilege to information about legal fees and disbursements.

Does *Maranda* apply outside the criminal law context?

During the inquiry, I also invited the parties to provide representations about whether *Maranda* applies outside the criminal law context in which it was decided. This question arises from the following comments by the Supreme Court in *Maranda* (at paras. 27-29):

> The Court of Appeal also relied on a decision, in which I wrote the reasons, where it had concluded that solicitor-client privilege, in Quebec law, did not protect the information contained in billings that did not contain any details concerning the nature of the services rendered (*Kruger Inc. v. Kruco Inc.*, [1988] R.J.Q. 2323 (C.A.)). …
>
> The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. In the context of criminal investigations and prosecutions, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination.
>
> Because this Court is dealing 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. *Kruco*, for example, dealt with a completely different, commercial law matter, one that was governed by the law of evidence and the civil procedure of Quebec. It involved a dispute between two groups of shareholders who claimed to be entitled to complete financial information concerning the company's affairs, including information about the lawyer's fees that some of them had allegedly arranged to be paid by the company in which they all held an interest. 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.

These reasons imply that the criminal law context of *Maranda* may have been an important influence on the approach adopted by the Court.

This issue was discussed in the judgments of the Divisional Court and the Court of Appeal on the judicial review of Orders PO-1922 and PO-1952 (*Attorney General # 1*). The Supreme Court judgment in *Maranda* was issued after Orders PO-1922 and PO-1952 themselves, but prior to the Divisional Court judgment, and was therefore discussed in some detail by the Divisional Court and Court of Appeal in *Attorney General # 1*.

As stated by Carnwath J. for the Divisional Court (at paras. 40 and 47 of the judgment):

> …excerpts from *Maranda* show that the Supreme Court of Canada was speaking of the protection of solicitor-client privilege within the context of an application for the issuance of a warrant for search and seizure of a lawyer's office in aid of a criminal prosecution. One must be wary of extrapolating from the judgment single sentences or paragraphs which would tend to support the proposition that the amount of a lawyer's fees and disbursements can never, under any circumstances, be disclosed in situations where the information is not sought for the purposes of a criminal prosecution. I conclude that the Commissioner's decisions in the two files must be viewed in their own context.
>
> It can be argued that the conclusions of LeBel J. in *Maranda* must be confined to situations where the information sought is as a result of an application for search and seizure by the Crown in pursuing a criminal prosecution. It can also be argued that LeBel J.'s conclusions extend to every instance where there is a solicitor-client relationship. However, in either instance, I find it open to the court to rebut the presumption identified by LeBel J. and to conclude, in certain circumstances, that the gross amount of a lawyer's account is neutral information not subject to solicitor-client privilege.

Confirming the decision of the Divisional Court, the Court of Appeal stated (at paras. 7-11):

> The IPC decided that information concerning the amounts paid for legal fees by the Attorney General pursuant to the court orders was not subject to client/solicitor privilege. In reaching that conclusion, he drew a distinction between facts which were not protected by the privilege and communications about facts which could be protected by the privilege. He placed the amount paid for legal fees by the Attorney General into the former category.
>
> Subsequent to the decision of the IPC, the Supreme Court of Canada released its reasons in *Maranda v. Richer*, [2003], 3 S.C.R. 193. Those reasons address the question of whether information as to the amount of fees paid is sheltered under the client/solicitor privilege. LeBel J., for the majority, eschewed the distinction between communications and facts. The Divisional Court had the benefit of *Maranda* in considering the application for judicial review from the decision of the IPC. The reasons of Carnwath J., dismissing the application, review the

> analysis in *Maranda* in some detail and apply that analysis to the information the IPC ordered disclosed.
>
> We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda*, supra, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.
>
> *Maranda* arose in the context of a challenge to a search warrant issued in a criminal investigation. The court stresses the importance of the client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of the relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.
>
> While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

The Ministry submits that "the Supreme Court did not hold that the scope or content of the privilege is different in the criminal law context". Further, the Ministry submits that *Maranda* applies equally to civil contexts because "the need for privilege exists whenever a client communicates with a lawyer for the purpose of obtaining legal advice, and transcends all areas of the law".

While I believe that a case could be made for applying the *Kruco* approach in the civil law context and the *Maranda* approach in the criminal law context, I have concluded that this is not an efficacious interpretation of the exemption. *Maranda* may be thought to offer a higher degree of protection than *Kruco* because of the presumption of privilege. But in either approach, neutral information (i.e. information that does not reveal anything in the nature of a privileged communication) will not be covered by solicitor-client privilege at common law.

To the extent that the *Maranda* presumption does offer higher protection, adopting that standard would also be consistent with the Supreme Court's dictum in *Lavallee* and other cases that intrusions on solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance, and that "minimal impairment" is the test by which the Courts will assess statutory incursions into privilege.

I have therefore decided that rather than applying different case law as between the civil and criminal law contexts, it is best to follow the approach taken by the Court of Appeal in *Attorney General # 1*, i.e., "[a]ssuming that *Maranda* … holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege *in all contexts*." [at para. 10 of the judgment, emphasis added.] This does not mean, however, that context is not a potentially relevant factor in deciding that information is neutral in a particular case (as noted by the Court of Appeal in *Attorney General # 1* at para. 11, quoted above).

*Attorney General # 1*

As noted above, *Attorney General # 1* arose from the judicial reviews of Orders PO-1922 and PO-1952. These orders dealt with records created by the Ministry to reflect the requested information, including global fee and disbursement figures, which in some cases identify the law firms involved and the amounts they charged. Both the Divisional Court and the Court of Appeal upheld the determinations in these two orders that this information was not privileged. The Supreme Court had not articulated its *Maranda* criteria when Orders PO-1922 and PO-1952 were issued, but both the Divisional Court and the Court of Appeal applied these criteria, finding that the presumption of privilege was rebutted because the information was neutral.

The Court of Appeal explains the test for rebuttal of the presumption as follows (at para. 12):

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

Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

*Legal Services Society* cases and *Municipal Insurance Assn.*

The Ministry's representations also refer to two decisions of the British Columbia Supreme Court, *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 and *Municipal Insurance Assn. Of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134. *Legal Services Society* relates to the amount of legal aid fees and disbursements paid to a lawyer for defending two accused individuals in separate matters. *Municipal Insurance Assn.* relates to a lump sum amount of fees and disbursements paid to date on behalf of a municipality engaged in defending a lawsuit. Both cases conclude that the fee information is privileged. *Legal Services Society* essentially holds that any information about a retainer is privileged, and because information about legal fees charged and paid falls into that category, it is privileged. *Municipal Insurance Assn.* makes the same finding, and also concludes that information about the interim fees and disbursements paid on behalf of the municipality could reveal information about the state of readiness for trial, and other aspects of the retainer.

As well, the Ministry makes several references to the British Columbia Court of Appeal decision in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (2003), 226 D.L.R. (4th) 20. That case dealt with an access request for a list of the top five billing lawyers to the British Columbia Legal Services Society in criminal law and immigration law, arranged by name and amount billed. The Society disclosed the amounts but not the lawyers' names, on the basis that privileged information (i.e., the fact that certain clients' retainers were funded by legal aid) could be revealed by disclosing the names. In reviewing the issue, the Court of Appeal stated:

> I accept that more than a mere fanciful or theoretical possibility of a breach of the privilege would have to exist before withholding the information could be justified. On the other hand, the importance of retaining the privilege in its full vigour suggests that [the Judge below] was correct in placing the focus not on the casual reader but on the "assiduous, vigorous seeker of information relation to clients".

The Court found that the information was privileged in that case because "[a]n assiduous reporter who is aware of long proceedings in the public courts could easily put this information together with the billing reports and deduce that particular clients were funded by legal aid". In assessing the impact of this case, it is important to bear in mind that dollar amounts had already been disclosed and were not at issue; the information at issue, consisting of counsels' names, was withheld because of the possibility that their disclosure could reveal that an individual's retainer was paid for by legal aid. As in *Municipal Insurance Assn.* and the first *Legal Services Society* case, therefore, the information was found to be privileged because it reveals details of the retainer. As well, this case demonstrates that the possibility of an "assiduous" information-seeker obtaining the information is a relevant factor in deciding whether a presumption of privilege has been rebutted.

In my view, however, the Supreme Court's decision in *Maranda* implicitly limits the impact of *Municipal Insurance Assn*. and the two *Legal Services Society* cases. One common thread in all three cases is that information about a retainer is privileged, and since the payment of fees relates to the retainer, information concerning that subject is privileged. The Supreme Court could have applied this approach in *Maranda*, but did not do so. Instead, it set up a rebuttable presumption of privilege and with it, the inherent possibility that records relating to lawyers' billing information may *not*, in fact, be privileged. Therefore, in my view, it would not be appropriate to simply apply these cases to the facts before me and conclude here, as well, that the information relates to the retainer and is automatically privileged for that reason. Instead, I will apply the approach in *Maranda*, also taken by the Ontario Court of Appeal in *Attorney General # 1*. This entails asking whether the presumption of privilege has been rebutted. In my view, the principal aspect of these decisions that remains pertinent is the discussion, in both *Municipal Insurance Assn.* and the British Columbia Court of Appeal's *Legal Services Society* decision, about the "assiduous" requester.

*Accounting Records vs. Invoices*

In its initial representations, the Ministry argues against an approach that makes a distinction between accounting records and invoices, as was done in Order MO-1465. The Ministry is concerned here with an approach that could see invoices as privileged, but not accounting records. In my view, *Maranda* resolves this issue. The distinction relied upon by the Ministry derives from the different treatment accorded to "facts" and "communications" under the law of privilege. As noted previously, in *Maranda* the Supreme Court decided that the distinction between facts and communications is not the sole or primary factor to consider in formulating a rule about privilege in relation to lawyers' billing information. Accordingly, in my view, the question of whether the records are accounting records (which this argument construes as a "fact") or bills of account (construed as a "communication") is irrelevant. Based on this same principle, the decision in Order MO-1465 should no longer be relied on.

*Conclusion*

As expressed above, *Maranda* overrules *Stevens* and is not limited to the criminal law context, and it limits the applicability of the three British Columbia cases referred to above. Accordingly, *Maranda* and its interpretation in *Attorney General # 1* represent the most authoritative law with respect to whether the amount paid for legal services, including actual invoices, is privileged. In determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains.

***Applying those standards to the records, are they subject to solicitor-client privilege and exempt under branch 1?***

In this case, the question of whether branch 1 of section 19 applies depends on whether the presumption of privilege is rebutted in relation to the records at issue. For this purpose, I will divide the records into the following four categories:

Category 1: The summary record created during mediation.

Category 2: Statements of Account issued by law firms to the Ontario Government for legal services in relation to the Walkerton water tragedy.

Category 3: Invoices provided to the government in support of disbursements billed by the law firms in their Category 2 statements of account.

Category 4: Background accounting records of several law firms regarding their Category 2 statements of account.

*Category 1: Summary record created during mediation*

This record sets out the global "legal costs" total figure, including both fees and disbursements, billed by several identified law firms in fiscal 00/01, and the same information regarding the same three firms plus an additional identified firm, in fiscal 01/02. An overall total for the two years, including all the firms, is also given. This record does not provide a breakdown by invoice or billing date (beyond identifying the fiscal year in question). No separate dollar amounts are provided for fees and disbursements; only one all-inclusive figure is shown for each firm in each of the two fiscal years.

One of the affected party law firms has no objection to disclosure of the total amount billed by it. The others do not address this particular subject, but maintain generally that their billing information is privileged.

In addressing this record, the Ministry makes three submissions:

1. The information is indistinguishable from the information found to be privileged in *Maranda*, and in *Legal Services Society*, and is distinguishable from the information in *Attorney General # 1* (all cases cited above);

2. Repeated access to information requests could be used to discern privileged information from ostensibly 'neutral' information. The information contained in the summary record, in combination with publicly available information, would allow reasonably educated

> conclusions to be drawn about details of retainers, instructions, and strategies regarding the legal proceedings; and
>
> 3. The appellant failed to rebut the presumption because the appellant did not submit any representations.

Regarding point 1 of the Ministry's submissions, the analysis in this case requires more than a simple comparison of the information in question with the information in *Legal Services Society*, *Maranda* and other cases. While such comparisons may be instructive, they are not determinative. The question is whether disclosure would reveal privileged information, and in particular, whether the presumption of privilege is therefore rebutted. The answer to that depends on the circumstances of each unique situation, and cannot be based on the mechanical application of the result in another case. As the Ontario Court of Appeal states in *Attorney General # 1* (in a passage quoted above), "we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege".

In any event, *Legal Services Society* is distinguishable on its facts because dollar amounts of legal fees were not at issue; the only issue was the identity of the lawyers involved, which was withheld to avoid disclosing that certain clients' retainers were paid for by legal aid. In the present case, by contrast, dollar figures *are* involved, and legal aid is not. More significantly, the approach in *Legal Services Society* to determining whether fee information is privileged has been altered by *Maranda*, and the impact of its analysis and conclusions is therefore limited, as discussed above, though its comments about knowledgeable requesters are still highly relevant.

With respect to *Maranda*, the Court's reasons indicate that the information at issue was sought for the purpose of proving a crime. In the present case, the records relate to the cost of government legal services in relation to an inquiry under the *Public Inquiries Act*. This is a significant distinction. In *Maranda*, the Supreme Court noted that the solution to the problem of determining how to assess whether billing information is privileged "in the context of criminal investigations and prosecutions … must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination". In the case of the Walkerton Inquiry, the request for access to the legal billing information is in no way related to proving that the lawyer's client has committed a crime.

A comparison of the information at issue in *Maranda* and this case is also somewhat difficult. As noted in a quotation from *Maranda* reproduced earlier in these reasons, the Court stated:

> I will have to assume that the Crown is seeking only the raw data, the amount of the fees and disbursements. I have some doubts on that point, however, after reading the list of documents sought. … In any event, I shall examine the issue in the terms defined by the parties, who assume that the information that the RCMP wanted was limited to the gross amount of the fees and disbursements billed….

From this description, it is not clear whether the information at issue was simply a global figure for fees and disbursements, nor whether a single document containing that information even existed. In my view, this makes any comparison of the information at issue in the two cases more difficult and less conclusive. It is simply not possible to equate them, and in any event, as I have said, the context of the two cases is very different. Also, as discussed earlier, the circumstances of each case must be carefully considered, and the result in one case should not be mechanically applied to the facts of another.

I am therefore not persuaded that the records should be found to remain privileged based simply on a factual comparison with *Maranda* or any other decision. Rather, the question is whether the presumption is rebutted in *this* case. I will consider this below.

The first point in the Ministry's representations also seeks to distinguish the information in the records at issue from the information in the records in *Attorney General # 1* because the records at issue contain law firm names. In this regard, I note that the names of all but one of the law firms are already publicly available through media publications (*Lawyers Weekly*, June 14, 2002; *National Post*, June 10, 2002). Furthermore, the existence of a solicitor-client relationship between an identified client and lawyer normally does not qualify for solicitor-client communication privilege because it does not consist of or reveal a "communication between solicitor and client" [see *Douglas v. Small* [1989] B.C.J. No. 1197 (S.C.), *Bank of Nova Scotia v. Simonot*, [1991] S.J. No. 606 (Q.B.), and J. Sopinka et al., *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), p. 639]. In my view, the fact that law firms are identified in the records does not add any weight to the Ministry's privilege arguments in the circumstances of this appeal.

In point 2 of the Ministry's submissions, the Ministry refers to the possibility of repeated requests as a possible way to discern privileged information. I am not in possession of any evidence about whether a new request would produce further information. Even if a further summary record were created and disclosed (and there is no indication at present that this could or would occur), I see no reasonable possibility that an "assiduous inquirer" would be able to glean information relating to privileged communications from a series of disclosures in this hypothetical situation. The summary record does not reveal any information regarding the services rendered, nor does it reveal any communication that would have stemmed from specific legal activities. The evidence here, including the nature of the summary record itself, points to a finding that the presumption has been rebutted with respect to this record.

I also note that in *Attorney General # 1* (cited above), the Court of Appeal found that a similar record was not privileged. That particular record disclosed information arguably more detailed than what is contained in the summary record in the appeal before me, since it includes a series of payments and their dates. As noted previously, although results in similar cases are not determinative, they can provide a helpful framework for the analysis. In reaching its conclusion, the Court of Appeal stated:

> [w]e see no reasonable possibility that any client/solicitor communication would 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 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 could do so in this case. For example, having regard to the information ordered disclosed by Order PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.

In my view, this analysis is also apt in the particular circumstances of the appeal before me with respect to the summary record. Based on the evidence, I am satisfied that there is no reasonable possibility that disclosing the summary record in this case would reveal anything about communications between the various lawyers and their clients concerning the inquiry. Again, this points to a conclusion that the presumption is rebutted with respect to this record.

Regarding point 3 of the Ministry's submissions, while the Court of Appeal did indicate in *Attorney General # 1* that "the onus lies on the requester to rebut the presumption", I also note that in the same case at Divisional Court, Carnwath J. found it "open to the court to rebut the presumption". The Divisional Court's decision that the presumption had been rebutted was upheld by the Court of Appeal. The entire discussion of the presumption and its rebuttal in that case was first developed by the Divisional Court, since this analysis arises from the Supreme Court's decision in *Maranda* which had not yet been released when the orders giving rise to these judgments were issued. The Divisional Court's decision, upheld by the Court of Appeal, is based on the nature of the information itself, not on any argument by the requester. (In fact, in one of the orders under review in *Attorney General # 1*, the requester had not provided representations at all – see Order PO-1922.) This demonstrates that the nature of the information and the circumstances and context of a particular case constitute evidence which might rebut the presumption. The fact that the appellant did not submit representations does not, in my view, remove the possibility that the presumption can be rebutted based on the totality of the evidence before the Commissioner.

As noted above, I have concluded that there is no reasonable possibility that privileged information could be revealed by disclosing the summary record in the circumstances of this appeal. I find that, based on the evidence before me, the summary record consists of neutral information and the presumption of privilege is therefore rebutted as regards that record. For that reason, it is not exempt under branch 1.

*Category 2: Statements of account issued by law firms*

The statements of account in the records at issue in this appeal contain narrative descriptions of services rendered and identify particular activities, who performed them and how much time was

spent on each. The Ministry and several of the affected party law firms submit that this information could directly or indirectly disclose privileged communications between the Ministry and the solicitors retained. I agree. There is no doubt that disclosing these records in their entirety would reveal privileged information.

However, I have also concluded in this instance that severing all but the firm name, date and the combined total for fees and disbursements in each invoice would protect confidential privileged information and avoid disclosures that could allow even an "assiduous requester" to gain access to privileged communications (such as, for example, instructions given by the client). As noted previously, most of the firm names have already been disclosed and, in any event, the identity of one's lawyer is generally not privileged. The government's extensive participation is well known. The dates of the Walkerton Inquiry hearings, and their outcome, are in the public domain and can be ascertained from the published report. As the Court of Appeal found in *Attorney General # 1*, there is in my view no "reasonable possibility" that any confidential solicitor-client communication could be revealed (even to the most "assiduous" requester) by disclosing the firm names, dates and global figures billed, nor could this information be connected with other available information order to draw an accurate inference about any such privileged communication. Accordingly, this information is "neutral" and the presumption of privilege is rebutted in relation to it.

Accordingly, I find that the category 2 records are subject to solicitor-client privilege and therefore exempt under branch 1, with the exception of the firm name, date and combined grand total of fees and disbursements in each invoice.

*Category 3: Invoices in support of disbursements billed by the law firms in their category 2 statements of account.*

The submissions of the Ministry concerning the category 2 records also cover this group of records. In my view, the information in these records is of a similar character to the information I found to be privileged in the invoices, in that it provides details about the activities undertaken by the law firms on behalf of their clients under their retainers in connection with the Walkerton matter, and would either directly or indirectly reveal privileged information.

Unlike the category 2 records, which were only partly subject to privilege, these records in their entirety reveal textured information about the solicitor-client relationship, which cannot be described as "neutral". In my view, the presumption is not rebutted for these records and they are subject to solicitor-client privilege in their entirety. I therefore find that they are exempt under branch 1 of section 19.

*Category 4: Background accounting records of several law firms regarding their category 2 statements of account.*

Again, the Ministry's submissions regarding the category 2 records also dealt with these records, which provide chronological and cumulative detail concerning hours spent by various staff

members, as well as detailed disbursement-related information. While the inclusion of these records in the category of solicitors' billing information intended to fall within the compass of *Maranda* may be arguable, I have nevertheless concluded that they provide details about the legal representation provided by the law firms to their clients and would either directly or indirectly reveal privileged information.

Therefore, as with the category 3 records, I find that the presumption is not rebutted. These records are subject to solicitor-client privilege at common law and exempt under branch 1 of section 19.

As I have found that the category 1 summary record and parts of the category 2 records are not exempt under branch 1, I will consider whether branch 2 applies to them.

**Branch 2 - statutory privileges**

Branch 2 is a statutory solicitor-client privilege that is available in the context of Crown counsel giving legal advice or conducting litigation. It arises from the last part of section 19, which refers to records "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation".

The Ministry submits that:

> there is no reference in Branch 2 to common-law principles of solicitor-client privilege. Equally, there is no requirement that the record be prepared for the 'dominant' purpose of litigation. The only question to be asked is whether the records at issue were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Further, the Ministry submits that:

> 'Crown counsel' includes any person acting in the capacity of legal advisor to an institution, including counsel retained from the private bar. [Order 52]
>
> …the records at issue in this appeal were prepared for Crown counsel to assist in giving legal advice or for use in litigation. Without litigation, these records would not have been created. Without the creation of these records and the resultant funding that they provide, counsel would not be able to give advice, or carry out litigation. In Order P-1551, which was decided prior to the Divisional Court's clarification of the scope of Branch 2, Inquiry Officer Holly Big Canoe stated that the litigation privilege includes "documents generated internally by the solicitor or the client… where the dominant purpose for which they were created or obtained is existing or reasonably contemplated litigation". It is submitted that this statement captures the records at issue in this appeal on any interpretation of Branch 2 of s. 19.

In my view, the category 1 summary record cannot be said to have been "prepared by or for Crown counsel"; the Ministry has provided no evidence about its creation, other than the fact that it was created during mediation for the purposes of this appeal. Even if the record did satisfy this requirement, however, there is also no evidence that it was prepared "for use in giving legal advice" or "in contemplation of or for use in litigation".

Based on the evidence provided, I find that the category 1 summary record is not exempt under either the advice or litigation aspect of branch 2.

The category 2 invoices, which I have found only partially exempt under branch 1, were prepared by outside law firms. I accept that the category 2 invoices were prepared by Crown counsel, given that external law firms may constitute "Crown counsel" when retained by a government Ministry (Order 52). In Order PO-2484, which is being released concurrently with this order, I dealt with similar arguments on the issue of whether branch 2 applies to internal invoices prepared by the Ministry and used to bill other ministries for legal services provided. I stated:

> While I agree with the Ministry that, but for the litigation, the records at issue would not have been created, this does not in my view lead to an automatic conclusion that they were prepared for use in giving legal advice or in contemplation of or for use in litigation. In my view, the conclusion on this point depends on the meaning of "for use in". I agree with the appellant that invoices are ancillary to the activities referred to in branch 2.
>
> This conclusion is reinforced by my decision in Order MO-2024-I. In that case, I had to determine whether similar information was excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* under section 52(3)1 of that statute, on the basis that the records were collected, prepared, maintained or used "in relation to" proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution. The record at issue was a two-page document containing payments made to a law firm on a series of dates, including a total amount, with respect to an action against the City by a former employee. Based on the nature of the request, however, only the total figure was at issue. I stated:
>
> > The question I must decide … is whether the connection between the record and the proceedings is strong enough to mean that the preparation or maintenance of the record was "in relation to" to the proceedings, which clearly hinges on the meaning of "in relation to".
> >
> > …

> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

Although the phrase, "in relation to" proceedings is different than "for use in" litigation, I believe they are close enough in meaning to make an analogy possible. If anything, "in relation to" is broader than "for use in" and would therefore capture even more information. As in Order MO-2024-I, there is no obvious relationship between the records at issue and the actual conduct of the litigation in this case. In my view, the Ministry's argument that, without the funding provided by charging fees it would not be able to continue providing legal representation, is irrelevant. It does not go to the question before me, namely, whether the records were prepared "for use in" litigation. Another way of asking this question is: were the records prepared *to be used in* actual or contemplated litigation. In my view, they were not.

I find that branch 2 does not apply to any part of the records.

In my view, precisely the same analysis applies to the invoices in this case. They were not prepared "for use in" giving legal advice, or in litigation. I find that branch 2 does not apply to the category 2 invoices.

I will now consider whether common law privilege has been lost in any of the records I have found to be exempt.

**Loss of privilege**

The only pertinent basis for possible loss of privilege that has been brought to my attention in this case is the disclosure of billing and/or payment information in the *Lawyers' Weekly*, the *National Post* and the Public Accounts of Ontario (as mentioned by the Ministry in its final submissions). The information disclosed in this manner consisted only of global amounts showing the total of fees and disbursements paid to particular firms, broken down by fiscal year.

The recent decision of the Divisional Court in *Attorney General # 3* (cited above) indicates, in what appears to be a reference to waiver under branch 2 only, that if "… the second branch of

section 19 is not a mere statement of the common law, but an enactment on its own, the exemption surely would have to be waived by the person having such authority: the head". I am in possession of no evidence to indicate that the head has waived privilege in relation to any of the records I have found to be exempt. In this case, however, I have applied branch 1. In my view, since branch 1 imports common law solicitor-client privilege, waiver that terminates solicitor-client privilege at common law must also be waiver for the purposes of branch 1. Because I have applied branch 1 in this case, I will consider whether there has been waiver at common law.

Waiver of privilege at common law is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege.

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example:

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

The Ministry submits that it has not expressly waived its privilege.

Further, the Ministry submits that there has been no implied waiver of privilege:

> The figures released to *The Lawyer's Weekly*, which are also found in the Public Accounts, do not necessarily relate to the fees expended on one particular matter.

Having reviewed the newspaper articles and the information in the Public Accounts of Ontario for fiscal year 2000-2001, it appears that the latter are the source of the published information. The Public Accounts simply report totals paid to government suppliers in each fiscal year and do

not refer to the nature of the services or what work was billed for. In these circumstances, I have difficulty concluding that any of these disclosures constitutes waiver at common law. Based on the material before me, I am not satisfied that the disclosure in these newspaper articles provides evidence of an intention to waive the privilege, nor does the act of disclosing this information, which derives from the Public Accounts of Ontario, suggest any such intention.

I find that waiver is not established in relation to the records which I have exempted under section 19.

**Exercise of Discretion**

With regard to the information I have found exempt under section 19, I am satisfied that the Ministry appropriately exercised its discretion to withhold it, given the importance of protecting solicitor-client confidences as underlined in *Lavallee*, *Descoteaux* and other cases.

**Conclusion**

To summarize, I find that the category 1 summary record is not exempt under section 19, nor are the firm name, date and combined grand total of fees and disbursements in each category 2 invoice. The remaining records and parts of records are exempt under branch 1 of section 19.

**PERSONAL PRIVACY**

The section 21(1) personal privacy exemption claimed by the Ministry applies only to information that qualifies as "personal information" under section 2(1) of the *Act*. I will consider the issues relating to personal privacy in relation to the category 1 summary record and the portions of the category 2 records that are not exempt, as I have withheld all the other records under section 19.

Section 2(1) defines personal information, in part, as "recorded information about an identifiable individual".

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-247, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Order P-1409, R-980015, PO-2225].

Information about an employee does not constitute that individual's personal information where that information relates to the individual's employment responsibilities or position. [Reconsideration Order R-980015, Order PO-1663, and Order PO-1959].

The Ministry submits that:

> Personal information about identifiable individuals appears throughout the records. This includes:
>
> 1. Individuals whose names are contained in invoices rendered to the law firms
>
>    i. This is information about the employment history of the individual named in the invoice or information relating to financial transactions in which the individual has been involved, and is captured by paragraph (b) of the definition of personal information
>
> 2. Phone numbers of individuals which are contained in the itemized legal accounts – financial as a result of disbursements for long distance charges
>
>    i. This information is obviously captured by paragraph (d) of the definition. The itemized legal accounts – financial do not contain the names of the individuals associated with these numbers, but the individuals could easily be identified through the use of reverse look-up services
>
> 3. Individuals, including employees, who were involved in the proceedings and whose names are referenced in the narrative portions of the statements of account
>
>    i. The fact that a named individual was involved in legal proceedings in any capacity and has been contacted by a lawyer, or is referred to in a lawyer's statement of account, constitutes the individual's personal information, and is captured by the introductory wording of the definition
>
> 4. Billing rates of individual lawyers contained in the statements of account
>
>    i. In Order PO-1705 it was held that the billing rates of individuals, even if employed by a company, satisfy the requirements of paragraph (b). Reference can also be made to Orders P-644 and P-1505

I do not agree with the Ministry's view that all of this constitutes personal information, since much if not all of it appears to relate to individuals only in their professional capacity. However,

I have already found that all of the portions of the records containing the information described in this submission are exempt in their entirety under section 19. I find that the information I have not exempted under section 19 (which consists of the firm names and dollar amounts in the category 1 summary record, and the firm name, date and combined grand total for fees and disbursements in each category 2 invoice) is not personal information. Because this is not personal information, it cannot be exempt under the "personal privacy" exemption in section 21(1). As no other exemptions have been claimed, I will order this information disclosed.

**PUBLIC INTEREST OVERRIDE**

The appellant relies on the section 23 "public interest override", which states:

> An exemption from disclosure of a record under section 13, 15, 17, 18, 20, 21, and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not provide for disclosure of records exempt under section 19, which is the only exemption I have applied in this case. It can apply to mandate disclosure of records otherwise exempt under section 21, but I have already found that this section does not apply.

Section 23 therefore has no application in the circumstances of this appeal.

**MANNER OF DISCLOSURE:**

If accomplished by conventional severance methods, the disclosure of the parts of the category 2 invoices that I have found not to be exempt could involve disparate pieces of information that are isolated on large sheets of paper. This would likely not be convenient for the Ministry or straightforward for the appellant to digest. The Ministry may, if it so chooses, disclose the information from the category 2 records by creating a composite record that shows all of the non-exempt information from each invoice, rather than severing all of them.

## ORDER:

1. I uphold the Ministry's decision to deny access to the category 2 records, except for the combined total figure for fees and disbursements, as well as the firm name and the date, in each category 2 invoice.

2. I further uphold the Ministry's decision to deny access to the category 3 and 4 records in their entirety.

3. I order the Ministry to disclose the category 1 summary record and the non-exempt information in the category 2 records to the appellant by sending copies to the appellant no later than **August 8, 2006**. If it so chooses, the Ministry may disclose the information

from the category 2 records by creating a composite record that shows all of the non-exempt information from each invoice, rather than severing all of the invoices.

4. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed pursuant to order provision 3.

Original signed by: July 17, 2006
John Higgins
Senior Adjudicator