Court File No. CV-21-00669471-00CL

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE AUDITOR GENERAL OF ONTARIO

Applicant

and

LAURENTIAN UNIVERSITY OF SUDBURY

Respondent

FACTUM OF THE RESPONDENT, LAURENTIAN UNIVERSITY OF SUDBURY

November 29, 2021

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PART I - INTRODUCTION

1. Solicitor-client privilege is "a civil right of supreme importance in the Canadian justice system."[1] To remain effective, it "must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."[2] Legislation is presumed not to abrogate such fundamental civil rights. Any statutory provision that allegedly does so will be examined to see whether it evidences a "clear, explicit and unequivocal" intention to do so.[3]

2. Section 10 of the *Auditor General Act* does not evidence a clear, explicit, and unequivocal intention to abrogate privilege. Rather, ss. 10(1) and (2) are general disclosure provisions that do not specifically address privilege, and so cannot abrogate it. Subsection 10(3) exists simply to ensure that the disclosure of privileged information to the Auditor General (whether inadvertent or intentional) does not have the effect of *waiving* privilege as against third parties.

3. Where the Ontario Legislature intends to abrogate privilege, it does so in much more explicit terms.[4] Similarly, where a Canadian province intends to authorize its Auditor General to compel the production of privileged information, it does so in unmistakeable terms.[5]

4. Further, if s. 10 did abrogate privilege, it would face strict *Charter* scrutiny under ss. 7 and 8, which it could not survive. The Auditor General's interpretation would interfere with privilege much more than is "absolutely necessary." Since the legislature is presumed to enact constitutional legislation, it must be presumed to have intended *not* to abrogate privilege in s. 10.

5. Accordingly, the Application should be resolved with a declaration that s. 10 does not compel audit subjects to disclose privileged information to the Auditor General.

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[1] *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336 ("**Chambre des notaires**") at para 5 , Respondent's Book of Authorities ("**RBOA**"), Tab 1.
[2] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 ("**Alberta**") at para 43, RBOA, Tab 2.
[3] *Ibid* at para 2.
[4] E.g. *Law Society Act*, RSO 1990, c L.8, s. 49.8; the *Health Insurance Act*, RSO 1990 c H.6, s. 43.1(6); *Archives and Recordkeeping Act, 2006*, SO 2006, c 34, Sch A, s. 8(4).
[5] See *Auditor General Act*, SNS 2010, C 33, s. 14(1).

PART II - SUMMARY OF FACTS

6. First of all, the University objects in the strongest possible terms to the allegation in the Auditor General's factum that it has "created a culture of fear to talk to the OAGO."[6] The Auditor General made this bald assertion in her cross-examination, completely spontaneously, in purported answer to the question "You decided on August 15th not to pursue privileged information?"[7] Accordingly, there was no way for the University to respond.

7. The Auditor General's allegation was incorrect. The University has provided access to all staff for interviews with the Auditor General. The allegation that it has created a "culture of fear" is appears to be based purely on the University's direction to its staff *that they not disclose privileged information*. That direction was entirely appropriate.

A. The Auditor General's requests for privileged information from Laurentian

8. This application arises out of the value-for-money audit of the respondent, Laurentian University of Sudbury by the applicant, the Auditor General of Ontario. The value-for-money audit, in turn, arose following the application of Laurentian for insolvency protection and restructuring under the *Companies' Creditors Arrangement Act*.

9. In response to the University's insolvency, the Ontario Legislature's Standing Committee on Public Accounts asked the Auditor General to conduct a value-for-money audit "on Laurentian University's operations from the period of 2010 to 2020."[8]

10. In her audit, the Auditor General has requested numerous categories of documents that would contain privileged information, including:

(a) All *in camera* briefing packages for the Board of Governors and its committees from 2010 to present;[9]

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[6] Applicant's factum, paragraph 18.
[7] Lysyk Cross, page 94.
[8] Hansard transcript, Standing Committee on Public Accounts, April 28, 2021, Exhibit "A" to the affidavit of Bonnie Lysyk ("**Lysyk Affidavit**"), Application Record pp34-37.

(b) All emails from 2013 to present of various University staff, including its former General Counsel (until July 2021), its current President, and its former Presidents;[10]

(c) The entire electronic storage areas of various University departments, including Legal/General Counsel, Corporate Secretary, and Board of Governors;[11] and

(d) All emails between Laurentian personnel and with the domain sudburylaw.com, which is a law firm that has clients who are employed at the University.[12]

11. The Auditor General's position is that s. 10 entitles her to see the communications between Laurentian personnel and the lawyers at Thornton Grout Finnigan LLP who are representing Laurentian in the *CCAA* proceeding.[13] She also asserts that she is entitled to see communications between Laurentian personnel and the lawyers at Stockwoods LLP who are advising the University in relation to her value-for-money audit, and representing it in this very application.[14]

12. There is no evidence that the Auditor General *needs* privileged information to perform this, or any other, value-for-money audit. Indeed, the evidence is to the contrary: in this audit, on August 15, 2021, she formally decided "**not** to legally pursue the production of privileged documents", stating that she would "conduct her audit using information and documents that she **voluntarily** receives from Laurentian University."[15]

13. Although, in the midst of the disagreement about privilege, the Auditor General issued a summons under s. 11 of the *Auditor General Act* requiring Dr Robert Haché, the University's

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[9] Summons to Dr Robert Haché, Exhibit "C" to the affidavit of Ephry Mudryk ("**Mudryk Affidavit**") and Exhibit "A" to the affidavit of Martin Laferrière ("**Laferrière Affidavit**").
[10] Exhibit "A" to the Laferrière Affidavit, Responding Record, p50.
[11] Laferrière Affidavit at para 10.
[12] Laferrière Affidavit at para 5.
[13] Lysyk Cross, p100 line 2 – p101 line 13.
[14] Lysyk Cross, p101 line 14 to p102 line 6.
[15] Mudryk Affidavit, exhibit "I".

President and Vice Chancellor, to produce documents,[16] she now concedes that the summons power *cannot* be used to compel privileged information.[17]

B. The Auditor General's interpretation of s. 10, and use of privileged information

14. The Auditor General's position in this application is that she is entitled under s. 10 of the *Auditor General Act* to compel privileged information from audit subjects.[18]

15. According to the Auditor General, refusing to provide privileged information constitutes the offence of obstruction under s. 11.2 of the *Auditor General Act*.[19] Obstruction is punishable by up to one year in prison. Directors or officers who "knowingly concur" in obstruction by their corporation also face up to one year in prison.[20]

16. The Auditor General testified that her office makes "no distinction between privileged and non-privileged" information, and that their practice is to ask for "all information."[21] She and her staff do not distinguish between asking for privileged information and asking for non-privileged information.[22] They simply ask for "all information."[23]

17. Further, the Auditor General takes the position that she is entitled to compel privileged information *outside* the time period stipulated by the Standing Committee (2010-2020). She has requested emails and other information up to the present, because of the alleged "pushback" she received from Laurentian.[24] In her view, it seems, not providing privileged information, while Laurentian was in the midst of litigation over its very survival, was a suspicious act that warranted expanding the temporal scope of the audit.

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[16] Mudryk Affidavit, exhibit "C"; letter from Bonnie Lysyk regarding summons and privileged information, Mudryk Affidavit, exhibit "E".
[17] Mudryk Affidavit, paragraph 10 and Lysyk Cross, p79 line 9 – p81 line 3.
[18] Notice of Application, prayer for relief.
[19] Mudryk Affidavit, exhibit "G"; Lysyk Cross, p83 line 17 – p84 line 25.
[20] *Auditor General Act*, s. 11.2(2).
[21] Cross-examination of Bonnie Lysyk ("**Lysyk Cross**"), p31 lines 5-6 and p34 lines 18-19.
[22] Lysyk Cross, p33 line 21 – p 34 line 21; see also p35 line 3 – 19.
[23] Lysyk Cross, p17 line 10 – p19 line 25.
[24] Lysyk Cross, pp24-29.

18. When the Auditor General receives privileged information, it becomes part of her working papers.[25] It is stored in her office.[26] There is no evidence of special protections for it. The Auditor General and her staff read the privileged information.[27] Staff who are working on the audit can access the privileged information.[28] About ten staff members have worked on the Laurentian audit to date.[29]

19. The Auditor General and her staff "use that [privileged] information … to understand the context and inform our audits."[30] They then prepare and publish a report which, according to her website, "usually gets a great deal of attention from media and the public."[31]

20. Although the Auditor General initially claimed, under oath, that all other audit subjects have *always* provided all privileged information,[32] it turns out that that is not actually the case: in a 2019 audit, the Ministry of the Attorney General denied the Auditor General access to privileged information in files for criminal prosecutions.[33] She did not insist on access, and instead used her "discretion" to deal with the situation with a "a scope limitation."[34]

21. In her cross-examination, the Auditor General used the Ministry of the Attorney General itself as an example of a government department that provided "all information."[35] She later claimed, in respect of the 2019 audit, "I had forgot about this situation."[36]

22. Regardless, the Auditor General's position remains that s. 10 entitles her to access *all* privileged information, even the files of Crown Attorneys for ongoing criminal cases.[37] Indeed, that would be the consequence of making the declaration that she seeks in this application.

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[25] Lysyk Cross, p37 lines 12-24.
[26] Lysyk Cross, p37 line 25 – p38 line 2.
[27] Lysyk Cross, p20, lines 1-4.
[28] Lysyk Cross, p38 line 3-11.
[29] Lysyk Cross, p12-16.
[30] Lysyk Cross, p34 line 23 – p35 line 2. See also p20 line 7 – p21 line 23.
[31] Lysyk Cross, p8 line 22 – p11 line 7.
[32] Lysyk Cross, p11 lines 8 – p12 line 12.
[33] Exhibit 1 to the Lysyk Cross, p156.
[34] Lysyk Cross, p62 line 8 to p63 line 1.
[35] Lysyk Cross, p35 line 9-19.
[36] Lysyk Cross, p65 line 9 – p66 line 1.

C. The passage of Bill 18

23. The Ontario Legislature amended the *Audit Act* in 2004 by passing Bill 18, the *Audit Statute Law Amendment Act*. Bill 18 renamed the statute as the *Auditor General Act*.

24. Prior to Bill 18's passage, s. 10 of the *Audit Act* did not refer specifically to privileged information. There is no suggestion by the Auditor General that it compelled audit subjects to provide privileged information. Rather, the Auditor General focuses on the 2004 amendments, and, in particular, s. 10(3), as creating that compulsion.

25. Even though the *Audit Act* did not require audit subjects to produce privileged information, government departments did provide privileged information to the Auditor General (then called the Provincial Auditor). This practice is apparent from the 2003 guidance documents in the Auditor General's affidavit, at exhibits "K" and "L". In other words, the government voluntarily provided privileged information to the Provincial Auditor *despite*, not because, of the former s. 10.

26. In 2001, 2002, and 2003, three unsuccessful attempts were made to amend the *Audit Act*. All three would have changed the language of s. 10, but none would have referred expressly to privilege or contained anything resembling s. 10(3):

(a) In 2001, Liberal MPP John Gerretsen introduced Bill 5. If passed, it would have amended s. 10 to create s. 10(1) and s. 10(2) that exactly match the modern Act, but it did not contain s. 10(3).[38]

(b) In 2002, Progressive Conservative MPP John O'Toole introduced Bill 218. Like Mr Gerretsen's Bill 5, it would have amended s. 10 to create s. 10(1) and s. 10(2) that exactly match the modern Act, without including s. 10(3).[39]

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[37] Lysyk Cross, p66 line 2 – p70 line 20.
[38] Bill 5, *Audit Statute Law Amendment Act, 2002*, 3rd Sess, 37th Leg, Ontario, 2002, https://www.ola.org/en/legislative-business/bills/parliament-37/session-3/bill-5, RBOA, Tab 3.
[39] Bill 218, *Audit Amendment Act, 2002*, 3rd Sess, 37th Leg, Ontario, 2002, https://www.ola.org/en/legislative-business/bills/parliament-37/session-3/bill-218. RBOA, Tab 4.

(c) In 2003, Mr Gerretsen introduced Bill 6, which in material part mirrored Bill 5 and Bill 218. Like them, it did not contain s. 10(3).[40]

27. Then, in December 2003, the Honourable Greg Sorbara, the Minister of Finance in the new Liberal government, introduced Bill 18. Two important points about Bill 18 need to be emphasized:

(a) MPPs from both the government and Official Opposition understood Bill 18 as substantially similar to the prior unsuccessful bills introduced by their respective parties:

(i) For the Liberals, MPP Mike Colle stated: "I remember the origins of this when [MPP John Gerretsen] would constantly ask in opposition that this kind of legislation be brought forward. We made that commitment in our platform, we made that commitment in opposition, and we are now bringing Bill 18 forward."[41]

(ii) For the Conservatives, MPP John O'Toole stated that Bill 18 is "almost a word-for-word lift" of Bill 218, and that it "really does replicate" Bill 218.[42]

However, recall that those predecessor bills did *not* expressly refer to privilege, and did *not* contain s. 10(3). It can be seen that the legislators who passed Bill 18 did not intend it to substantively affect privilege.

(b) There is absolutely *no* suggestion in the Hansard debates on Bill 18 that it was ever intended to abrogate privilege, i.e. to **require** audit subjects to provide privileged information to the Auditor General. In fact, the Minister of Finance's remarks in introducing the bill do not mention privilege at all. The only times privilege is mentioned anywhere in the debates are when opposition MPPs stated that the new legislation will *prevent waiver* of privilege.[43]

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[40] Bill 6, *Audit Statute Law Amendment Act, 2003*, 4th Sess, 37th Leg, Ontario, 2003, https://www.ola.org/en/legislative-business/bills/parliament-37/session-4/bill-6. RBOA, Tab 5.
[41] Hansard, April 19, 2004, p1586, Application Record p100.
[42] Hansard, April 19, 2004, p1587 and p1589, Application Record, p101 and p103.
[43] Several opposition MPPs made remarks along the following lines: "The new section 10 gives the Auditor General broad access to information and specifies that disclosure to the Auditor General does not constitute a waiver of

D. The OPS Guide

28. The Auditor General asserts that a guidance document, the OPS Guide, is evidence of her preferred interpretation of s. 10.[44]

29. While the OPS Guide was signed by the Auditor General and the Secretary of the Cabinet, it was not signed by anyone at Laurentian or any other university, nor is there any evidence that Laurentian or any other university ever agreed to be bound by it.[45]

30. In fact, there is no evidence that the OPS Guide was ever provided to Laurentian, before or after it was signed, until the Auditor General sent it to the University's president on August 30, 2021.[46] That was well after the disagreement about privilege had arisen,[47] after many communications on the subject, after the parties had held an initial case conference on the subject, and after the Auditor General had formally committed not to seek privileged information from Laurentian. This shows that, even for the Auditor General herself, the OPS Guide was not a particularly relevant document to the interpretation of s. 10.[48]

31. In any event, the OPS Guide is just that – a guideline, not a legally binding document. A protocol or guide published to assist parties, but not adopted by the legislature, is not law.[49] It provides no evidence of legislative intention.

32. Even the OPS Guide does not expressly say that s. 10 requires audit subjects to provide all privileged documentation to the Auditor General.

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solicitor-client privilege, litigation privilege or settlement privilege. This clause will have to be explored in detail to see its effect on the use of the information given to the Auditor General." E.g. Hansard, April 19, 2004, p1590 (MPP Joseph Tascona) and p1591 (MPP Laurie Scott), AR p104 and p105; Hansard, May 17, 2004, p2306 (MPP Norm Miller), AR p122.

[44] Lysyk Affidavit, exhibit "C".

[45] Lysyk Cross, p40 line 5 – p45 line 5.

[46] Lysyk Cross, p45 line 13 – p47 line 16.

[47] See Mudryk Affidavit, exhibit "A" (privilege disagreement had arisen by August 5).

[48] See Lysyk Cross, p49 line 9 to p52 line 14.

[49] *Alberta*, 2016 SCC 53 at para 69, RBOA, Tab 2.

33. If the OPS Guide meant what the Auditor General says, then in 2019 the Ministry of the Attorney General would have had to grant her access to privileged information, but it did not.[50]

34. The OPS Guide should be given no weight in the court's interpretation of s. 10.

PART III - STATEMENT OF ISSUES, LAW AND AUTHORITIES

A. To abrogate privilege, a provision must show a clear and unambiguous legislative intention to do so

35. The Supreme Court has laid down the following principles about solicitor-client privilege:

> "Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive."[51]
>
> "The main rationale for professional secrecy [is] the need to maintain a legal system that ensures that individuals have access to specialists who will represent their interests and with whom they can be completely honest about their legal problems and needs."[52]
>
> "In its modern form, solicitor-client privilege is not merely a rule of evidence; it is 'a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law.'"[53]
>
> "It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice."[54]
>
> Privilege "is a civil right of supreme importance in the Canadian justice system."[55]
>
> "Professional secrecy is generally seen as a fundamental and substantive rule of law."[56]
>
> "All information protected by the solicitor-client privilege is out of reach for the state. … [A]ny privileged information acquired by the state without the consent of

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[50] The MAG audit finished in fall 2019 (Exhibit 1 to Lysyk Cross) and the OPS Guide was finalized in April 2019 (Lysyk Affidavit, exhibit "C"). See Lysyk Cross, p73 line 3 to p76 line 6.
[51] *Alberta* at para 34, RBOA, Tab 2.
[52] *Chambre des notaires* at para 83, RBOA, Tab 1.
[53] *Alberta* at para 41, RBOA, Tab 2; *Chambre des notaires*, 2016 SCC 20, [2016] 1 S.C.R. 336 at paras 5 and 28 , RBOA, Tab 1. *Canada (National Revenue) v Thompson*, 2016 SCC 21, [2016] 1 SCR 381 ("**Thompson**") at para 17, RBOA, Tab 6.
[54] *Alberta* at para 34, RBOA, Tab 2.
[55] *Chambre des notaires*, 2016 SCC 20, [2016] 1 S.C.R. 336 at para 5, RBOA, Tab 1.
[56] *Ibid* at para 28.

> the privilege holder is information that the state is not entitled to as a rule of fundamental justice."[57]
>
> "Privilege is jealously guarded and should only be set aside in the most unusual circumstances."[58]
>
> Privilege "has deep significance and a unique status in our legal system."[59]
>
> "As a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."[60]

36. Because privilege is so fundamentally important to our legal system, legislation purporting to limit or deny it will be interpreted restrictively.[61] The language of such a provision "must be explicit and evidence a clear and unambiguous legislative intent to do so."[62] Where the provision is not clear, it must be interpreted as not stripping privilege from communications or documents that it would normally protect.[63]

37. This approach to solicitor-client privilege is consistent with the modern approach to statutory interpretation, which requires courts to read the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[64]

38. The same interpretation principles apply to litigation privilege and settlement privilege. They, like solicitor-client privilege, are class privileges, not case-by-case privileges. That is, they "entail a presumption of immunity from disclosure once the conditions for [their] application have

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[57] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61 (CanLII), [2002] 3 SCR 209* ("**Lavallee**") at para 24, RBOA, Tab 7.
[58] *Alberta* at para 34, RBOA, Tab 2.
[59] *Chambre des notaires* at para 28 , RBOA, Tab 1.
[60] *Alberta* at para 43, RBOA, Tab 2; *Chambre des notaires*, 2016 SCC 20, [2016] 1 S.C.R. 336 at para 28, RBOA, Tab 1; *Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7 (CanLII), [2015] 1 SCR 401* ("**Federation of Law Societies**") at para 44, RBOA, Tab 8; *Lavallee* at para 36, RBOA, Tab 7; *Thompson* at para 18, RBOA, Tab 6.
[61] *Ibid* at para 24.
[62] *Alberta* at paras 28 and 71, RBOA, Tab 2.
[63] *Thompson*, 2016 SCC 21, [2016] 1 SCR 381 at para 25, RBOA, Tab 6; *Alberta* at para 28, RBOA, Tab 2.
[64] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 ("**Lizotte**") at para 61, RBOA, Tab 9.

been met."[65] As common-law class privileges, they can only be abrogated by legislation if there is clear and explicit language showing an intention to do so.[66]

B. The *Auditor General Act* does not demonstrate a clear and unambiguous legislative intent to abrogate privilege

(i) The words of the Auditor General Act *do not demonstrate a clear and unambiguous intention to abrogate privilege*

39. The language of s. 10 itself does not expressly say that an audit subject must disclose privileged information.

40. Rather, s. 10(1) and (2) are general disclosure provisions that do not mention privilege at all. They cannot be interpreted to compel the disclosure of privileged information: "privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents."[67]

41. Where s. 10 does refer to privilege, in subsection (3), it is still not to *compel disclosure* of privileged information. Rather, it is to ensure that *where privileged information is disclosed,* it is not construed as a waiver of privilege.

42. The Auditor General places a great deal of weight on the words in s. 10(3), "a disclosure to the Auditor General under subsection (1) or (2)." (emphasis added). She argues that, because subsections (1) and (2) create mandatory duties of disclosure, s. 10(3) must mean that ss. 10(1) and (2) require the disclosure of privileged information. This is a multi-step argument that requires reading the statute to mean something that it does not expressly say.

43. Where the Ontario Legislature truly intends to abrogate privilege, it does so in much more express language. The following are three examples:

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[65] *Lizotte* at paras 33-34, RBOA, Tab 9.
[66] *Lizotte* at paras 63-65, RBOA Tab 9. See also *Liquor Control Board of Ontario v Magnotta Winery Corporation*, 2010 ONCA 681 at paras 36-38, RBOA, Tab 10.
[67] *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 ("**Blood Tribe**") at para 11, RBOA, Tab 11.

(a) ***Law Society Act*, s. 49.8(1)**: "A person who is required under section 42, 49.2, 49.3 or 49.15 to provide information or to produce documents shall comply with the requirement even if the information or documents are privileged or confidential."[68]

(b) ***Health Insurance Act*, s. 43.1(6)**: "Subsections (1) and (5) apply even if the information reported is confidential or privileged and despite any Act, regulation or other law prohibiting disclosure of the information."[69]

(c) ***Archives and Recordkeeping Act, 2006*, s. 8(4)**: "Despite any other Act or privilege, the Archivist shall have access to any public record for the purpose of exercising or performing the Archivist's powers or duties under this Act…"[70]

44. Such language could have been introduced in s. 10 of the *Auditor General Act*, if the Legislature's intention had truly been to abrogate privilege.

45. Where the Nova Scotia legislature intended to grant to its Auditor General the power to compel privileged information, it used equally express language:

> 14 (1) Notwithstanding the *Freedom of Information and Protection of Privacy Act* or any other legislation, **and notwithstanding any other rights of privacy, confidentiality or privilege, including solicitor-client privilege, litigation privilege, settlement privilege and public interest immunity**, the Auditor General has the right of unrestricted access, at all times, to all records of any auditable entity, including the right to copy such records and to any things or property belonging to or used by any auditable entity, and every officer, employee and agent of any auditable entity shall forthwith provide the Auditor General any such information or explanations, or information concerning its duties, activities, organization and methods of operation, that the Auditor General believes to be necessary to perform the Auditor General's duties under this Act.[71]

46. This is the sort of "clear, explicit, and unambiguous" language that would have been required to abrogate privilege in the *Auditor General Act.*

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[68] *Law Society Act*, RSO 1990, c L.8, s. 49.8(1).
[69] *Health Insurance Act*, RSO 1990 c H.6, s. 43.1(6).
[70] *Archives and Recordkeeping Act*, 2006, SO 2006, c 34, Sch A, s. 8(4).
[71] *Auditor General Act*, SNS 2010, c 33, s. 14(1).

47. The Auditor General's argument amounts to bootstrapping. In the absence of direct and express language, as exists in several other statutes, she seeks an *inference* that ss. 10(1) and (2) require that disclosure, *not on their own* but *only* when read in light of s. 10(3).

48. This argument, based on inference rather than clear and explicit intention, is exactly the kind that is insufficient to abrogate privilege. To repeat the Supreme Court's words from *Blood Tribe*, "privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents."[72] Subsections 10(1) and (2) are open-textured, and the court cannot infer, from the offhand words in subsection (3), "under subsection (1) or (2)", that the legislature intended thereby to *completely abrogate privilege*. It is more plausible that by those words the legislature merely intended to *refer to* disclosure to the Auditor General when describing the circumstances that will not result in a *waiver* of privilege.

(ii) The statutory scheme does not demonstrate a clear and unambiguous intention to abrogate privilege

49. Looking more broadly at the *Auditor General Act*, it would be truly odd if s. 10 required the disclosure of privileged information. This is because the Act also contains a summons power that does *not* require such disclosure.[73]

50. Section 11 of the *Auditor General Act* gives the Auditor General the power to examine "any person" under oath, and subsection 11(2) provides that s. 33 of the *Public Inquiries Act, 2009* "applies to the examination." In turn, s. 33 of the *Public Inquiries Act, 2009* provides in subsection 33(13) that "nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence."

51. It would be incongruous if the Legislature chose to give the Auditor General the power to compel privileged information under s. 10, but not under s. 11. One would expect that, if she

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[72] *Blood Tribe* at para 11, RBOA, Tab 11.
[73] See Lysyk cross, p80 line 15 – p81 line 3.

needed access to privileged information, she should receive it no matter the procedural vehicle. Indeed, one would expect that a summons would be an *escalated* means of investigation, to be used where s. 10 did not achieve compliance. To allow the Auditor General *less access* under s. 11 than what is available under s. 10 would be inexplicable.

52. The Auditor General makes much of the reference in the legislative debates to s. 10 as a "powerful tool."[74] What her factum *omits* is the reference to s. 11 as *also* being a "powerful tool":

> Section 11 is the third tool that the Auditor General has to root out this malfeasance: "The Auditor General may examine any person on oath on any matter pertinent to an audit or examination." That is a powerful tool. …
>
> These are powerful tools to enable the Auditor General under Bill 18 to root out financial mismanagement and to hold all of us here in this Legislature from all parties, and hold the government, accountable to the taxpayers of Ontario. That's why I am proud to support Bill 18.[75]

53. Yet the Auditor General concedes that s. 11 *cannot* be used to compel privileged information. If s. 11 is a "powerful tool" even though it cannot reach privileged information, then calling s. 10 a "powerful tool" does *not* indicate that s.10 does reach privileged information.

54. In the context of this case, the Auditor General's interpretation of ss. 10 and 11 would have two absurd results:

(a) The Auditor General would be able to compel privileged information from the University under s. 10, but *not* from its President pursuant to the summons she served on August 11.[76]

(b) Sara Kunto, the University's former General Counsel, could speak freely about privileged information in a voluntary interview with the Auditor General, and the

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[74] Applicant's factum, paragraph 59.
[75] Hansard, May 17, 2004, p2311, AR p127.
[76] See Mudryk affidavit, exhibit "C", RR p13.

> University could not object. But the Auditor General could *not* compel that same information if the interview were conducted pursuant to a summons.[77]

55. The only interpretation of s. 10 that is consistent with the scheme of the Act is that it, like s. 11, does *not* compel the production of privileged information.

(iii) The legislative history of the Auditor General Act *does not demonstrate a clear and unambiguous intention to abrogate privilege*

56. The Auditor General's theory is that, in 2004, the Ontario Legislature changed the law to give the Auditor General "free access" to privileged information, and to compel all audit subjects to disclose privileged information to her.

57. It is noteworthy that, also in 2004, the Act was extended to cover the broader public sector, including universities and hospitals. So the Auditor General asserts that the Legislature intended to abrogate privilege, a fundamental civil and constitutional right, of broad sectors of the Ontario economy that are not part of government and that had not previously been subject to the Auditor General's oversight at all.

58. If this theory were correct, one would expect *some* discussion in the Legislature about this momentous step. One would also expect consultations with the legal profession, and submissions by the various legal professional organizations. Nothing of the sort occurred. The Minister of Finance, who introduced Bill 18, never mentioned any abrogation of privilege whatsoever. Neither did any of the various MPPs who addressed it.

59. Bill 18 never even went before the responsible legislative committee, the Standing Committee on the Legislative Assembly. It went straight to third reading without any committee consideration whatsoever.[78]

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[77] See Lysyk affidavit, exhibit "D", AR p70.

60. The only MPPs who mentioned s. 10(3) at all were Progressive Conservative opposition MPPs. And, when they did, it was to state that it *prevented waiver*.[79]

61. Further, as outlined above in the Facts section, MPPs from both the governing Liberals and the opposition Progressive Conservatives stated that Bill 18 was substantively identical to the predecessor bills that they had introduced in the previous years. None of those bills had addressed privilege. This is additional evidence that s. 10 was not intended to abrogate privilege.

62. In sum, given the legislative history, the far more persuasive interpretation of s. 10 is that it was simply intended to complement the existing practice whereby audit subjects *could* disclose privileged information to the Auditor General, by clarifying that doing so did not waive privilege.

(iv) The purpose of s. 10 does not demonstrate a clear intention to abrogate privilege

63. Nothing about the Auditor General's role requires access to privileged information.

64. The Auditor General will still have access to all an audit subject's non-privileged information, including all financial information. This will provide abundant information by which to judge whether public money was properly spent. She will also have access to any privileged information that an audit subject voluntarily provides.

65. The courts in the both the other provinces that have considered whether Auditors General can access privileged documents have ruled that they cannot.

66. In Nova Scotia, in an insurance action, the defendants sought from the Province privileged documents that it had produced to its Auditor General. The government argued that no waiver had occurred because it had been mandatory to give privileged information to the Auditor General. That province's Supreme Court disagreed, holding: "The difficulty with that aspect of the

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[78] See Hansard, November 18, 2004, https://www.ola.org/en/legislative-business/house-documents/parliament-38/session-1/2004-11-18/hansard#PARA338.

[79] Hansard, April 19, 2004, AR pp104 and 105; Hansard, May 17, 2004, AR p122.

Province's argument is that the Auditor General's power to compel production of documents does not extend to those protected by solicitor-client privilege."[80] (As stated above, after this case was decided, the Nova Scotia statute was amended to unmistakeably require the production of privileged information. No such language exists in the Ontario statute.)

67. In British Columbia, the Auditor General sought a declaration that it was entitled to privileged information from audit subjects. The Supreme Court of that province held:

> [P]rivilege does not act as a shield, obscuring from view matters that should be publically aired. But that is the reaction of many in this contest between those who assert the privilege and the Auditor General in his quest for "transparency" and "accountability".
>
> **Solicitor-client privilege is not a lawyer's "trick" to avoid proper scrutiny of her client's conduct or the steps taken on his or her behalf during the retainer, it is a critical civil right**. All citizens must be able to freely discuss their legal positions with their lawyers and to take frank advice thereon, secure in the knowledge that this relationship - that between solicitor and client - is as sacred as any secular business relationship can be.
>
> **It would be wrong to conclude that the result in this case represents the triumph of secrecy over transparency and accountability. It rather represents the reaffirmation of a principle which is a cornerstone value in our democracy and which has been so for hundreds of years**. While the privilege may be abrogated by legislation, clear and unambiguous language doing so is required and even then the legislation must be consistent with the *Charter*.[81]

68. The B.C. court also held that Auditors General do not require access to privileged information: "the Auditor General's submission that he inevitably requires complete and unfettered access to solicitor-client privileged materials simply to 'do his job', cannot be accepted."[82]

69. The Auditor General of Ontario has no demonstrated need for privileged information. In a 2019 audit, she demanded, but eventually proceeded without, access to privileged files of Crown

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[80] *Nova Scotia (Attorney General) v Royal & Sun Alliance Insurance Co. of Canada* (2000), 189 NSR (2d) 290 (SC) at para 25, RBOA, Tab 12.
[81] *British Columbia (Auditor General) v British Columbia (Attorney General)*, 2013 BCSC 98 at paras 23-25, RBOA, Tab 13.
[82] *Ibid* at para 139.

Attorneys for criminal cases. In the audit of Laurentian, the Auditor General formally advised in writing that she would not legally pursue access to privileged information, but would rely only on the information that Laurentian University produced voluntarily. She has testified that privileged information merely "informs" her work.[83] The overall conclusion is that she has no pressing need to see privileged information, but merely requests it because she asks for "all information." In other words, it seems borne more out of habit or convenience, than any real necessity.

C. If s. 10 of the Act did abrogate privilege as the Auditor General contends, it would be unconstitutional

70. As further reassurance that s. 10, correctly interpreted, does not compel audit subjects to provide privileged information, consider the constitutional implications if it did. If s. 10 abrogated privilege, it would be in flagrant violation of the *Charter of Rights*. The Legislature is presumed to enact constitutional legislation. This buttresses the alternative interpretation, which is that s. 10 does not abrogate privilege and, in particular, that s. 10(3) is meant to *prevent* waiver, rather than *compel* disclosure.

71. The Auditor General's interpretation of s. 10 would infringe two *Charter* rights, the right to be free from unreasonable search and seizure under s. 8, and the right not to be deprived of life, liberty and security of the person unless in accordance with the principles of fundamental justice, under s. 7.

(i) The right to freedom from unreasonable search and seizure under s. 8 would be engaged

72. If s. 10 compels disclosure of privileged information, it would engage s. 8 of the *Charter*.

73. There are two questions that must be answered to determine whether a government action infringes s. 8 of the *Charter*. The first is whether the government action intrudes upon a reasonable

[83] Lysyk Cross, p21 line 5 to 14.

expectation of privacy. If it does, it is a seizure within the meaning of s. 8. The second is whether the seizure is an unreasonable intrusion on that right to privacy.[84]

74. A legal requirement to produce documents is a seizure under s. 8 of the *Charter*.[85] It intrudes upon a reasonable expectation of privacy: the University has a reasonable expectation of privacy in its privileged information.

75. That expectation of privacy is not diminished by the regulatory context of s. 10. The reasonable expectation of privacy in information protected by privilege is *always* high, even though the infringement of privilege arises in a civil, administrative, or regulatory context.[86] "The main driver of that elevated expectation of privacy is the specially protected nature of the solicitor-client relationship, not the context in which the state seeks to intrude into that specially protected zone."[87] A balancing exercise under s. 8 will not be appropriate.[88]

(ii) The right to liberty under s. 7 would be engaged

76. A statutory requirement to disclose privileged information will engage s. 7 of the *Charter* if there is a penalty of imprisonment if a person does not comply with that requirement.[89]

77. The requirements in s. 10 engage s. 7 of the *Charter* because of s. 11.2, which creates the offence of "obstructing" the Auditor General. That offence is punishable by up to one year in prison. In this case, the Auditor General has asserted that the University's failure to provide privileged information constitutes the offence of obstruction.[90] If s. 10 requires audit subjects to provide privileged information, and if they commit an offence punishable by imprisonment if they do not, then s. 10 implicates the right to liberty.

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[84] *Chambre des notaires* at para 27, RBOA, Tab 1.
[85] *Ibid* at paras 6 and 27.
[86] *Ibid* at paras 30-39.
[87] *Federation of Law Societies* at para 38, RBOA, Tab 8.
[88] *Chambre des notaires* at para 37, RBOA, Tab 1.
[89] *Federation of Law Societies* at para 71, RBOA, Tab 8.
[90] Letter from Bonnie Lysyk to Dr Haché, August 11, 2021, Exhibit "G" to the Mudryk Affidavit, RR tab 1G, page 24. See also Lysyk cross, p82 line – p84 line 25.

78. Since solicitor-client privilege is a principle of fundamental justice, any legislative provision that abrogated it more than "absolutely necessary" and imposed penal sanctions would infringe the right to liberty not in accordance with the principles of fundamental justice.

79. That said, since s. 8 is also engaged, an independent s. 7 analysis may be unnecessary.[91]

(iii) Either the s. 7 or s. 8 infringement could not be justified

80. A legislative provision that, as a matter of statutory interpretation, *does* abrogate solicitor-client privilege, will be unconstitutional if it intrudes on the privilege more than is "absolutely necessary":

> Any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable. **Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case.** … A procedure will withstand *Charter* scrutiny only if its impact on the professional secrecy of legal advisers is minimal, as minimal impairment "has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege."[92]
>
> **A legislative provision cannot, by abrogating professional secrecy, authorize the state to gain access to information that is normally protected, where the abrogation is not absolutely necessary to achieve the purposes of the legislation**. If the provision does so, the seizure will be unreasonable and contrary to s. 8 of the *Charter*.[93]

81. Section 10, if interpreted as the Auditor General contends, would infringe privilege more than absolutely necessary. Such a provision not only violates s. 8 of the *Charter*, but also cannot be justified under s. 1.[94]

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[91] *Federation of Law Societies* at paras 33 and 73, RBOA, Tab 8; *Lavallee* at paras 34-35., RBOA, Tab 7.
[92] *Chambre des notaires* at para 38, RBOA, Tab 1. Also *Federation of Law Societies* at para 44, RBOA, Tab 8. See also *Thompson* at para 18, RBOA, Tab 6: an intrusion on solicitor-client privilege can be permitted "only if doing so is absolutely necessary to achieve the ends of the enabling legislation."
[93] *Chambre des notaires* at para 81, RBOA, Tab 1.
[94] *Ibid* at para 91.

(1) No requirement for notice to the privilege holder

82. A legislative scheme that infringes privilege must provide for notice to the privilege holder. Failure to do so is a serious constitutional flaw.[95]

83. The *Auditor General Act* does not provide for notice to any third-party privilege holders of demands that may result in their privileged information being disclosed to the Auditor General.

84. Here, such privilege holders include there are parties with whom the University may have had a common interest in litigation or another matter, whose lawyers worked with each other and shared privileged information. There are adverse parties who would jointly hold settlement privilege over settlement negotiations and agreements. And, there are staff members at Laurentian who may have communicated with their personal lawyers, for instance at Lacroix Lawyers, on their Laurentian email addresses.

85. Since the *Auditor General Act* does not provide for notice to privilege holders, it does not infringe privilege only to the extent "absolutely necessary."

(2) Disclosure required where not absolutely necessary

86. Second, s. 10 would require the disclosure of privileged information where it was not "absolutely necessary." Legislation that abrogates privilege must, to be constitutional, only permit it as a "measure of last resort."[96] Yet there is no requirement in s. 10 that the Auditor General must try to acquire information from non-privileged sources *before* demanding privileged information. Indeed, the Auditor General appears to demand privileged information as a "first resort." She asks for "all information" without distinguishing between what is privileged and non-privileged.[97]

87. If s. 10 applied to privileged information as the Auditor General contends, privileged information would have to be disclosed if "the **Auditor General believes** [it] to be necessary to

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[95] E.g. *Ibid* at paras 45-49.
[96] *Ibid* at para 58.
[97] Lysyk cross, p17 line 10 – p19 line 1.

perform his or her duties under this Act." The language appears to prioritize the subjective belief of the Auditor General. A "broad and undefined" power to compel privileged information will infringe s. 8 of the *Charter*.[98]

88. Here, indeed, the Auditor General has used s. 10 to demand a broad range and great quantity of privileged information, with no attempt to tailor her demands to what is truly necessary for her audit. She has even demanded documents *after* the date range imposed by the Standing Committee that authorized her audit. Such indiscriminate production of privileged information is antithetical to the constitutional law on privilege, but would be routine if the Auditor General's interpretation of s. 10 is correct.

89. Yet there is no indication that seeing privileged information is necessary, let alone *absolutely* necessary, to the Auditor General's function. She will still have access to all non-privileged information, including all financial records. In a 2019 audit, she completed her report and made recommendations after the Ministry of the Attorney General *refused* to provide privileged information. Earlier in the audit of Laurentian, she advised that she would proceed *without* privileged information. There is ample evidence that privileged information is *not* necessary to allow the Auditor General to discharge her statutory mandate. She simply requests it because she asks for "all information", not because it is "absolutely necessary."

(3) No mechanism to adjudicate disputes about privilege

90. Under the *Auditor General Act*, the Auditor General cannot disclose privileged information that is disclosed to her (s. 27.1(3)), including in her report. However, there is no mechanism to resolve the scenario where the Auditor General and audit subject disagree about whether particular information is privileged.

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[98] *Chambre des notaires* at para 78, RBOA, Tab 1.

91. The Nova Scotia statute, which expressly requires the disclosure of privileged information, provides for judicial review of disputes about privilege. Its s. 14(6) and (7) provide:

> (6) Where the Auditor General and the auditable entity are unable to agree as to what records are privileged records, either party may make an application to the Supreme Court to determine the matter.
>
> (7) Where an application has been made in accordance with subsection (6), the Auditor General shall not disclose the record in question until a determination has been made by the Supreme Court authorizing such disclosure.[99]

92. The Ontario Act entirely lacks any such mechanism. This is another piece of contextual evidence that the Ontario Legislature did not intend to abrogate privilege: another significant safeguard is missing.

(4) Duty of confidentiality does not mitigate infringement of privilege

93. Although there is a duty of confidentiality in respect of privileged information in s. 27.1 of the *Auditor General Act*, disclosure to the Auditor General and her staff still represents a significant intrusion on privilege. As the Supreme Court has recognized:

> Seen through the eyes of the client, **compelled disclosure to an administrative officer alone constitutes an infringement of the privilege** (*Blood Tribe*, at para. 21). Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, **regardless of whether or not the Commissioner may disclose the information onward to the applicant**.[100]

94. Disclosure to an administrative officer will infringe privilege even if they have a duty of confidentiality. The mere fact that such a duty may *reduce* the risk of harm by disclosure of privileged information does not *eliminate* that risk, nor does it mitigate the *inherent* infringement of privilege represented by disclosure to the officer.[101] In particular, while an investigator with a duty of confidentiality may be unable to *disclose* privileged information, the possibility of it being

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[99] *Auditor General Act*, SNS 2010, c 33, s. 14.
[100] *Alberta*, 2016 SCC 53 at para 35.
[101] *Lizotte* at paras 50-53, RBOA, Tab 9.

used by the investigator, even if only in the preparatory stages of her work, may still discourage parties from receiving legal advice.[102]

95. Those principles apply here: the Auditor General conceded that she and her staff "use" privileged information that is produced to them to "inform" their work.[103]

96. It is cold comfort to an audit subject, involved in life-or-death restructuring litigation and facing a demand for privileged information about that very litigation, that only ten or so people will read it, and that they are under a legal duty to keep it confidential. The mere review by those ten is itself an infringement of privilege, and there remains, despite the duty of confidentiality, a risk of unauthorized further disclosure. No oath can guarantee perfect compliance.

(5) Auditor General is an investigator who may become adverse

97. An infringement will be greater if the administrative officer is "not an impartial adjudicator of the same nature as a court." If the officer exercises "investigatory functions" or "can become adverse in interest" to the privilege holder, it will further indicate that disclosure infringes solicitor-client privilege.[104]

98. Applying these principles to the *Auditor General Act*, the Auditor General is not an impartial adjudicator. She obviously exercises investigatory functions. She can also become adverse in interest to the privilege holder, since she ultimately writes a report on its operations that may be critical and that often receives a great deal of media and public attention.[105]

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[102] See Lizotte at para 52, RBOA, Tab 9: "Moreover, even assuming that there is no risk that a syndic's inquiry will result in the disclosure of privileged documents, **the possibility of a party's work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done**. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality and discretion."
[103] Lysyk Cross, p34 line 23 – p35 line 2. See also p20 line 7 – p21 line 23.
[104] *Alberta*, 2016 SCC 53 at para 36.
[105] Lysyk cross, p8 line 26 to p11 line 7.

99. Further, if the Auditor General forms the belief that the audit subject is obstructing the audit under s. 11.2, she will be the complainant in an ensuing prosecution. She has already accused the University of obstructing the audit by not providing privileged information.

100. In sum, if the Auditor General's interpretation of s. 10 is correct, the provision suffers from serious constitutional defects. Since the Legislature is presumed to enact constitutional legislation, courts should prefer an interpretation of s. 10 that does not result in a constitutional infringement. This is another reason to prefer the interpretation of s. 10 that does not compel the disclosure of privileged information.

PART IV - ORDER REQUESTED

101. The Respondent respectfully requests that the Court resolve this Application as follows:

(a) Declare that s. 10(1) of the *Auditor General Act* does not require audit subjects to give the Auditor General information and records that are subject to solicitor-client privilege, litigation privilege, or settlement privilege;

(b) Declare that s. 10(2) of the *Auditor General Act* does not give the Auditor General a right to free and unfettered access to information and records that are subject to solicitor-client privilege, litigation privilege, or settlement privilege; and

(c) Award the respondent the costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2021.

Brian Gover

Fredrick R. Schumann

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 SCR 336
2. *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555
3. Bill 5, *Audit Statute Law Amendment Act, 2002*, 3rd Sess, 37th Leg, Ontario, 2002
4. Bill 218, *Audit Amendment Act, 2002*, 3rd Sess, 37th Leg, Ontario, 2002
5. Bill 6, *Audit Statute Law Amendment Act, 2003*, 4th Sess, 37th Leg, Ontario, 2003
6. *Canada (National Revenue) v Thompson*, 2016 SCC 21, [2016] 1 SCR 381
7. *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61 (CanLII), [2002] 3 SCR 209*
8. *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), [2015] 1 SCR 401
9. *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521
10. *Liquor Control Board of Ontario v Magnotta Winery Corporation*, 2010 ONCA 681
11. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, 2008 SCC 44
12. *Nova Scotia (Attorney General) v Royal & Sun Alliance Insurance Co. of Canada* (2000), 189 NSR (2d) 290 (SC)
13. *British Columbia (Auditor General) v British Columbia (Attorney General)*, 2013 BCSC 98

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Auditor General Act, RSO 1990, c A-35 (as amended)

Duty to furnish information

10 (1) Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.

Access to records

(2) The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.

No waiver of privilege

(3) A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege. 2004, c. 17, s. 13.

Power to examine on oath

11 (1) The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Act. 2004, c. 17, s. 13.

Application of *Public Inquiries Act, 2009*

(2) Section 33 of the Public Inquiries Act, 2009 applies to the examination by the Auditor General. 2009, c. 33, Sched. 6, s. 42.

Prohibition re obstruction

11.2 (1) No person shall obstruct the Auditor General or any member of the Office of the Auditor General in the performance of a special audit under section 9.1 or an examination under section 9.2 and no person shall conceal or destroy any books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property that the Auditor General considers to be relevant to the subject-matter of the special audit or examination. 2004, c. 17, s. 13.

Offence

(2) Every person who knowingly contravenes subsection (1) and every director or officer of a corporation who knowingly concurs in such a contravention is guilty of an offence and on conviction is liable to a fine of not more than $2,000 or imprisonment for a term of not more than one year, or both. 2004, c. 17, s. 13.

Penalty, corporation

(3) If a corporation is convicted of an offence under subsection (2), the maximum penalty that may be imposed on the corporation is $25,000. 2004, c. 17, s. 13.

***Auditor General Act*, SNS 2010, C 33, s. 14(1)**

Auditable entity

14 (1) Notwithstanding the *Freedom of Information and Protection of Privacy Act* or any other legislation, and notwithstanding any other rights of privacy, confidentiality or privilege, including solicitor-client privilege, litigation privilege, settlement privilege and public interest immunity, the Auditor General has the right of unrestricted access, at all times, to all records of any auditable entity, including the right to copy such records and to any things or property belonging to or used by any auditable entity, and every officer, employee and agent of any auditable entity shall forthwith provide the Auditor General any such information or explanations, or information concerning its duties, activities, organization and methods of operation, that the Auditor General believes to be necessary to perform the Auditor General's duties under this Act.

(5) A disclosure to the Auditor General under this Section does not constitute a waiver of privilege or immunity including solicitor-client privilege, litigation privilege, settlement privilege or public interest immunity.

(6) Where the Auditor General and the auditable entity are unable to agree as to what records are privileged records, either party may make an application to the Supreme Court to determine the matter.

(7) Where an application has been made in accordance with subsection (6), the Auditor General shall not disclose the record in question until a determination has been made by the Supreme Court authorizing such disclosure. 2010, c. 33, s. 14.

***Law Society Act*, RSO 1990, c L.8, s. 49.8**

Privilege

Disclosure despite privilege

49.8 (1) A person who is required under section 42, 49.2, 49.3 or 49.15 to provide information or to produce documents shall comply with the requirement even if the information or documents are privileged or confidential. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 44 (1).

***Health Insurance Act*, RSO 1990 c H.6, s. 43.1(6)**

Mandatory reporting

Subss. (1) and (5) prevail

43.1 (6) Subsections (1) and (5) apply even if the information reported is confidential or privileged and despite any Act, regulation or other law prohibiting disclosure of the information.

***Archives and Recordkeeping Act, 2006*, SO 2006, c 34, Sch A, s. 8(4)**

Archivist of Ontario

Access to records

8 (4) Despite any other Act or privilege, the Archivist shall have access to any public record for the purpose of exercising or performing the Archivist's powers or duties under this Act and, for greater certainty, nothing in the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* or the *Personal Health Information Protection Act*, 2004 prevents the Archivist from having such access. 2006, c. 34, Sched. A, s. 8 (4); 2019, c. 7, Sched. 3, s. 4.

***Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6**

Former Part II inquiries

Definition

33 (1) In this section,

"inquiry" includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable. 2009, c. 33, Sched. 6, s. 33 (1).

Standard procedure

(2) This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section. 2009, c. 33, Sched. 6, s. 33 (2).

Power to summon witnesses, papers, etc.

(3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

Privilege

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence. 2009, c. 33, Sched. 6, s. 33 (13).

AUDITOR GENERAL OF ONTARIO	and	LAURENTIAN UNIVERSITY OF SUDBURY	Court File No. CV-21-00669471-00CL
Applicant		Respondent	

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

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