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No. S-1810373
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the decision of the Office of the Information and Privacy Commissioner for British Columbia, Order F18-35, dated August 14, 2018 and
in the Matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

BETWEEN:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

PETITIONER

AND:

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA AND THE CANADIAN CONSTITUTION FOUNDATION

RESPONDENTS

RESPONSE TO PETITION

Filed by: Canadian Constitution Foundation

THIS IS A RESPONSE TO: Petition filed September 25, 2018

Part 1: ORDERS CONSENTED TO

The Petition Respondent Canadian Constitutional Foundation ("CCF") consents to the granting of the orders set out in the following paragraphs of Part 1 of the Petition: None.

Part 2: ORDERS OPPOSED

The Petition Respondent CCF opposes the granting of the orders set out in paragraph 1 of Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Petition Respondent CCF takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the petition: None.

Part 4: FACTUAL BASIS

1. The Respondent Canadian Constitutional Foundation ("CCF") agrees with the facts set out in Order F18-35 of the Office of the Information and Privacy Commissioner for British Columbia, and adds the following additional facts.

2. CCF is a non-profit charitable foundation which raises funds, through charitable donations, for litigants who are pursuing meritorious constitutional challenges to governmental action under the *Canadian Charter of Rights and Freedoms* and who would not otherwise be able to afford the costs of their constitutional challenge.

3. The CCF also provides, on occasion, legal representation to constitutional litigants.

4. Over the past 16 years, the CCF has provided financial and/or legal assistance to litigants challenging the constitutionality of governmental action in more than 20 cases.

5. The *Charter* challenge to prohibitions on private health care in British Columbia, *Cambie Surgeries Corporation et al. v. Attorney General of British Columbia et al., BCSC File No. 2090663* ("*Cambie* Litigation"), is a constitutional challenge which is currently being supported financially by the CCF through collection and receipt of charitable donations.

6. CCF is not acting as legal counsel to the plaintiffs in the *Cambie* Litigation.

7. CCF strongly believes that the amount being spent by the British Columbia government to defend against the constitutional challenge brought by the Plaintiffs in the *Cambie* Litigation, in order to continue to prevent British Columbians from accessing timely medical care, is a matter of public interest to British Columbians and to Canadians generally.

8. CCF is not seeking this information in order to attempt to determine the "legal strategy" of the Attorney General of British Columbia in defending the constitutional claim or to assist anyone else in doing so.

9. CCF has previously made requests for disclosure of information of various kinds in the hands of public bodies under freedom of information statutes, including in Ontario and Alberta. The CCF has done so because it believes in the principle of government transparency on matters of public interest.

10. In this case, CCF sought disclosure only of the total sum spent by the BC Government on the *Cambie* case from 2009 to 2017. CCF does not seek to have that total global figure broken down by service provider, by year, by hourly rates, or in any other way.

11. CCF does not believe that the disclosure of the total global sum spent by the BC Government on the *Cambie* Litigation from 2009 to 2017 could possibly result in the CCF or any observer being able to determine any aspect of the Attorney General's strategy in defending the constitutional claim.

12. The Attorney General's assertions that this is possible are hypothetical or speculative.

Part 5: LEGAL BASIS

1. The purpose of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") is, inter alia, to "make public bodies more accountable to the public ... by ... giving the public a right of access to records".

2. The accountability of public bodies to the public is nowhere more important than with respect to the amount of taxpayer-funded public monies spent by the Government in defending against important constitutional challenges to government legislation.

3. Here, where the information in question are the costs incurred by a provincial government, in responding to an important *Charter* challenge to provincial legislation, which restricts access to medical care on a private pay basis, the public has an interest in knowing how much in the way of taxpayer's funds have been spent on the litigation.

4. Pursuant to s. 57(1) of *FIPPA*, it is up to the head of a public body to prove that the applicant has no right of access to the record or part of a record.

5. It is for a public body asserting solicitor-client privilege as an exemption to disclosure of records under s. 14 of *FIPPA* to demonstrate that the records are protected from disclosure for reason of solicitor-client privilege.

6. There is no blanket rule that litigation costs are always solicitor-client privileged. Rather, this is a rebuttable presumption, which requires analysis of whether the particular financial information sought to be disclosed will reveal details of the solicitor-client relationship.

7. The general principles applicable to a determination of whether legal costs information comes within the scope of solicitor-client privilege was enunciated by the Supreme Court of Canada in *Maranda v Richer*, (2003) 3 S.C.R. 193 ("*Maranda*"), albeit in the criminal context where the Crown was seeking a warrant to seize the records of the accused's defence counsel.

8. The Supreme Court later clarified that its decision in *Maranda* that the legal fees were covered by privilege was premised on its finding that disclosure of the legal fees information could be prejudicial to the accused in other ways: *R. v. Cunningham*, 2010 SCC 10 at para. 28.

9. As held by the BC Court of Appeal in *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 ("*Donell*"), in applying the exemption from disclosure based on solicitor client privilege found in s. 14 of *FIPPA*, there is a distinction between communications between a solicitor and his/her client, which are privileged, and facts, which are not privileged.

10. Further, while there is a presumption that that records relating to legal fees or costs are privileged, that presumption "may be rebutted if it is established that there is no reasonable possibility that disclosure will directly or indirectly reveal any communications protected by privilege".

Donell, at para. 59;

See also: *Legal Services Society v. Information and Privacy Commissioner of British Columbia*, (2003) 226 D.L.R. (4th) 20.

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

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

11. In *Donell*, the BC Court of Appeal explained how this rebuttable presumption operates when deciding whether solicitor-client privilege attaches to factual information about legal bills and accounts in a specific case. The Court stated that "[O]nce the *Maranda* analysis has determined that privilege is presumed", a court must then consider "whether there is a reasonable possibility that an assiduous inquirer could deduce, infer or otherwise acquire" from that factual information "communications that are protected by solicitor-client privilege".

12. In the *Donell* case itself, the Court of Appeal found that some of the lawyer's financial records at issue in the case before it were privileged and some were not. Specifically, a trust account ledger was presumed to be privileged because it "reflects the solicitor-client relationship and what transpires within it". However, financial records which did not reflect that relationship were not privileged.

13. In *Central Coast School District No. 49 v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 427 (*Central Coast*), the BC Supreme Court noted that appropriate approach to claims of solicitor client privilege under s. 14(1) of FIPPA is one that "protects the privilege but still permits the release of information where the claim of solicitor-client privilege is fanciful or merely theoretical".

14. The Court in *Central Coast* further held that the privilege will be rebutted where it is alleged without a proper basis, as directed by the Supreme Court of Canada in *Maranda*.

15. In this case, CCF seeks only a global figure representing the costs incurred by the Provincial Government in the *Cambie* Litigation over a nine-year period to mid-2017.

16. This information is of precisely the same nature as that which was voluntarily disclosed by the Ministry of Transportation and Highways in OIPC Order F11-26. In that case, the Ministry disclosed the name of the law firm and "the total amount of the legal bill ($700,985.67)".

17. In this case, the Attorney General did not provide to the OIPC and has not provided to the Court any evidence or basis upon which it could reasonably be found that knowledge of the total cost incurred by the Government with respect to the *Cambie* Litigation could result in any information about the Attorney General's litigation or trial strategy "being reasonably discerned from" such knowledge.

18. It is not sufficient for the purposes of *FIPPA* that the Attorney General simply assert theoretical or speculative concerns about the disclosure of the global sum spent by the Attorney General in this litigation.

19. There is no reasonable possibility that any observer, no matter how well-informed or careful, could determine or infer from the global sum spent by the Government of British Columbia on the *Cambie* Litigation, <u>any</u> information about the Attorney General's strategy in this litigation.

20. The Attorney General has not explained how the presumption of solicitor-client privilege applies to the "nature of the information" sought in "the circumstances or context of this case" – *i.e.* the total global sum spent by the Government of British Columbia on the *Cambie* Litigation over a nine-year period, which is what the Court of Appeal in *Donell* said was required from a party who is withholding responsive records.

21. The Attorney General's only apparent argument is that the *Cambie* Litigation is not yet over. However, this does not explain how the global amount of costs already incurred (now up to 18 months ago) could reveal any privileged information or communications.

22. Therefore, the CCF submits that the presumption of solicitor-client privilege does not apply in this case.

23. Even if the presumption does apply, the CCF submits that it has been rebutted.

24. Information about the total cost to Government (and thus to BC taxpayers) of the *Cambie* Litigation over a nine-year period does not, and cannot, "reveal any communication protected by the privilege", even to the most assiduous inquirer.

25. The Attorney's General "evidence" in support of the application of solicitor-client privilege is contained in the Affidavit of Jonathan Penner, which is Exhibit P to the Affidavit of Heather Lewis.

26. With respect, the assertions contained in Mr. Penner's Affidavit are entirely speculative and theoretical, particularly when it is understood that all that is sought to be disclosed is a single global figure representing the total costs incurred by the Government of British

Columbia in the Cambie Litigation over a nine-year period, with no other breakdown or specification.

27. For example, in Paragraph 14 of his Affidavit, Mr. Penner speculates about what could be gleaned or inferred from knowing that a party "front-loaded" its litigation spending, or limited its litigation spending early in the litigation process. However, the global sum information sought by the CCF in this case would not reveal any information about when the Attorney General incurred any particular proportion of its legal costs.

28. And, the trial had already been underway for several months when the CCF's access request was made, and for almost two years (with some adjournments) when the OIPC's decision was rendered.

29. The Government of British Columbia has stated publicly that it is sparing no resources in "vigorously" defending against the constitutional challenge brought by the Plaintiffs in the *Cambie* Litigation.

See OIPC Order F18-35, at para. 41 and footnote 50.

30. As further noted by the Information and Privacy Commissioner in its Order F18-35, it is self-evident that the Cambie Litigation is important to the Government of British Columbia. It is a landmark constitutional case, which is highly contentious and vigorously advanced by all parties.

31. The remainder of the Attorney General's rationales for the application of solicitor-client privilege to the global litigation costs sum for which disclosure is sought in this case are dealt with by the Information and Privacy Commissioner at paragraphs 40 to 50 of Order F18-35.

32. In the CCF's submission, the Information and Privacy Commissioner's reasoning in respect of these arguments is both compelling and correct, and the CCF adopts it wholly.

33. In summary, for all of the reasons set out herein and in Order F18-35 of the Information and Privacy Commissioner, the application for judicial review should be dismissed, with costs to the CCF, and Order F18-35 of the Information and Privacy Commissioner should be upheld.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Howard Anglin, sworn October 25, 2018.

2. Such other materials as the Respondent CCF may advise and the Honourable Court may permit.

The Petition Respondent estimates that the hearing of the petition will take**: 1 day.**

Date: October 25, 2018

Signature of Derek From
Counsel for Petition Respondent
CCF

The Petition Respondent's address for service:

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Attention: Derek From, Staff Lawyer