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COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1603-0148 AC
TRIAL COURT FILE NUMBER:	1603-03547
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF AN INVESTIGATION BY THE MINISTRY OF LABOUR PURSUANT TO THE ALBERTA OCCUPATIONAL HEALTH AND SAFETY ACT, RSA 2000, C.0-2, AS AMENDED
PLAINTIFF/APPLICANT:	HER MAJESTY THE QUEEN IN THE RIGHT OF ALBERTA
STATUS ON APPEAL:	APPELLANT
DEFENDANT/RESPONDENT:	SUNCOR ENERGY INC.
STATUS ON APPEAL:	RESPONDENT
DEFENDANT/RESPONDENT:	RICHARD HOWDEN, JIM HARRIS, COREY BLACK, ANDREW ROBINSON, PATRICK FORTUNE, JUAN BRACHO, WAYNE MACDONALD, BERISLAV SAMARDZIC, RYAN TARKOWSKI, CATHERINE CANNING and RICHARD LOISELLE
STATUS ON APPEAL:	NOT PARTIES TO THE APPEAL
INTERVENOR:	THE ADVOCATES' SOCIETY
STATUS ON APPEAL:	INTERVENOR
DOCUMENT	**FACTUM OF THE INTERVENOR**

Appeal from the Order of
The Honourable Mr. Justice D.J. Manderscheid
Dated the 10th day of May, 2016
Filed the 12th day of July, 2016

FACTUM OF THE INTERVENOR

For the Intervenor:
JENSEN SHAWA SOLOMON DUGUID HAWKES LLP
Barristers
800, 304 - 8 Avenue SW
Calgary, Alberta T2P 1C2

Carsten Jensen QC, FCIArb / Erin J. Baker
Ph: 403 571 1526 / 403 571 0744
Fax: 403 571 1528
Email: jensenc@jssbarristers.ca /
bakere@jssbarristers.ca

For the Appellant:
FIELD LLP
2000, 10235 – 101 Street
Edmonton, Alberta T5J 3G1

Derek A. Cranna / Sharon A. Roberts
Ph: 780-423-3003
Fax: 780-428-9329
Email: dcranna@fieldlaw.com /
sroberts@fieldlaw.com

For the Respondent:
MCLENNAN ROSS LLP
600, 12220 Stony Plain Road
Edmonton, Alberta T5N 3Y4
Ph: 780-482-9290
Fax: 780-733-9725
Email: dmyrol@mross.com

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Ph: 403 571 1526 / 403 571 0744
Fax: 403 571 1528
Email: jensenc@jssbarristers.ca /
bakere@jssbarristers.ca

For the Appellant:
FIELD LLP
2000, 10235 – 101 Street
Edmonton, Alberta T5J 3G1

Derek A. Cranna / Sharon A. Roberts
Ph: 780-423-3003
Fax: 780-428-9329
Email: dcranna@fieldlaw.com /
sroberts@fieldlaw.com

For the Respondent:
MCLENNAN ROSS LLP
600, 12220 Stony Plain Road
Edmonton, Alberta T5N 3Y4
Ph: 780-482-9290
Fax: 780-733-9725
Email: dmyrol@mross.com

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PART 1 FACTS

1. The Intervenor, The Advocates' Society, was granted intervenor status in this appeal pursuant to an Order of this Court dated November 22, 2016.

2. The Advocates' Society relies on the summaries of the facts of this matter as set out in the Reasons for Judgment of the Honourable Mr. Justice D.J. Manderscheid and as set out in the Factum filed by the Respondent, Suncor Energy Inc. ("**Suncor**").

3. The Advocates' Society sought to intervene in this matter in order to provide input with respect to the public interest and policy considerations associated with this appeal. While The Advocates' Society takes no position on the outcome of the appeal, it submits that the preservation of both solicitor-client privilege and litigation privilege is of fundamental importance and is essential to the proper functioning of the legal system and the administration of justice. Legislative incursions on solicitor-client privilege and litigation privilege must be rare exceptions to the principles underlying the protection of the privilege, and must be clearly articulated.

4. The issue in this case, and therefore on this appeal, is whether litigation privilege and solicitor-client privilege can protect from disclosure information and records collected during an internal investigation, where the party asserting privilege had a statutory obligation to conduct an investigation and prepare a report.[1]

5. This appeal is particularly timely given that the Supreme Court of Canada recently released two decisions which address the importance of both solicitor-client and litigation privilege in Canada.[2] The Advocates' Society respectfully submits that the Decision of the Honourable Mr. Justice D.J. Manderscheid under appeal is completely consistent with these cases and the current state of the law respecting privilege.

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[1] *Alberta v. Suncor Energy Inc.*, 2016 ABQB 264 (CanLII) ("**Decision**"), at para. 31 [Appeal Record ("**AR**"), F14].
[2] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 ("***Lizotte***") [Respondent's Book of Authorities ("**RBA**"), TAB 1]; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 ("***U of C***") [RBA, TAB 2].

6. Moreover, while the decisions in *Lizotte and U of C* provide guidance in addressing the importance of privilege to our legal system, this appeal provides an opportunity to this Honourable Court to address the importance of both solicitor-client and litigation privilege in an instance in which a statute requires that documents and a report be prepared during the course of a mandatory investigation. This would allow this Honourable Court to effectively "close the loop" in relation to the importance of privilege.

7. While the Appellant and Respondent are focused on the specific statutory provisions in question and the outcome of this appeal, The Advocates' Society seeks to address these issues from a broader perspective. We recognize the importance of this appeal for the law respecting occupational health and safety. Beyond that, this case has much farther reaching consequences, given its potential impact on claims for privilege in contexts where investigations are statutorily mandated, including securities, environmental and utilities regulation.

PART 2 ISSUES ON APPEAL

8. The Advocates' Society's position is that express statutory language is required in order to abrogate both litigation privilege and solicitor-client privilege. Both litigation privilege and solicitor-client privilege are already justified by the public interest and subject to extensive internal balancing. Privilege is not abrogated solely because a statute requires that an investigation take place and a report be prepared. To do so would fundamentally impact not only a party's ability to complete thorough investigations, but would also impair the ability of counsel to advise parties involved in those investigations and make recommendations.

9. The Advocates' Society takes no position on the ultimate disposition of the appeal.

PART 3 STANDARD OF REVIEW

10. The Advocates' Society adopts the standards of review as set out in the Factum filed by the Respondent, Suncor.

PART 4 ARGUMENT

A. Litigation Privilege Protects and Finds Justification in the Public Interest

11. Litigation privilege exists because it serves a compelling public interest that justifies withholding certain materials.[3] This interest does not become less important when disclosure is sought for the purpose of a regulatory investigation, rather than a court proceeding.

12. While efforts to assert or protect a claim of privilege are often portrayed by those seeking to vitiate the privilege as efforts to impair the truth-seeking objective of litigation or regulatory investigations, it is The Advocates' Society's position that no such conflict exists. Litigation privilege "serves the secure and effective administration of justice according to law"[4], by protecting a zone of privacy in which parties can prepare in a regulatory or adversarial system and can conduct early and thorough investigation of the case.[5]

13. By its nature, litigation privilege is a reconciliation of competing values and its built-in limits reflect this. Litigation privilege is limited by its purpose - materials must have been prepared for the dominant purpose of litigation. For these reasons, care must be taken not to create a false dichotomy between the responsibilities of the parties under the *OHS Act* in the public interest, and litigation privilege as protecting "private" interests. Both schemes protect vital public interests. The scope of litigation privilege is the result of a balancing exercise that should not be set aside absent express statutory language.

14. Furthermore, The Advocates' Society submits that the Court should continue to formally recognize litigation privilege as a class privilege, as the Supreme Court of Canada recently held in *Lizotte*.[6] While the law of privilege has undoubtedly been profoundly shaped by the *Wigmore* principles, it has moved beyond the traditional *Wigmore* relationship justification in determining how and when a given privilege applies.

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[3] *A.M. v Ryan,* [1997] 1 S.C.R. 157, para. 19 [The Advocates' Society's Authorities ("**TASA**"), TAB 1].
[4] *Blank v Canada (Minister of Justice),* 2006 SCC 39, para. 31 [Appellant's Book of Authorities ("**ABA**"), TAB 12].
[5] *College of Physicians of BC v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, para. 30 [RBA, TAB 13].
[6] *Lizotte, supra,* at para 63 [RBA, TAB 1].

15. At its core, litigation privilege protects work-product, the dominant purpose of which relates to litigation. It protects a party from having its own labours used against it; it does not protect underlying facts.[7] Statutory bodies are thus not prevented from investigating underlying facts, which, presumably, are at the heart of their investigation.

16. In this respect, litigation privilege must receive the same treatment as solicitor-client and settlement privilege. Although litigation privilege and solicitor-client privilege are conceptually distinct, they operate in overlapping zones. Where a lawyer is involved, much of what is covered by litigation privilege may also be covered by solicitor-client privilege. At the same time, the fulsome investigation of the strengths and weaknesses of one's case in the zone of privacy is essential to the early and fair resolution of disputes.

B. Solicitor-Client Privilege is Fundamental to the Administration of Justice and the Protection of Parties

17. Solicitor-client privilege has long been recognized as being fundamental to the proper functioning of the legal system and the due administration of justice.[8] Given the complex array of statutory and common law and regulatory rules, principles and procedures which comprise the legal system, persons (including corporations) regularly turn to legal counsel for assistance for a variety of reasons:

(a) To achieve compliance with legal obligations and requirements;

(b) To facilitate attainment of business and personal goals and objectives;

(c) To manage and solve problems;

(d) To understand and enforce rights;

(e) To advocate a position in civil or regulatory forums; and

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[7] *Susan Hosiery Ltd. v Minister of National Revenue*, [1969] 2 Ex. C.R. 27, paras. 9-10 [TASA, TAB 2].

[8] *Solosky v The Queen*, [1980] 1 SCR 821, para. 21 (***"Solosky"***) [TASA, TAB 3]; *Descoteaux v Mierzwinski* [1982] 1 SCR 860, paras. 14 and 71 (***"Descoteaux"***) [TASA, TAB 4]; *Lavallee, Rackel & Heinz v Canada (Attorney General)*, 2002 SCC 61 [RBA, TAB 6]; *Pritchard v Ontario (Human Rights Commission)* [2004] 1 SCR 809, paras. 14-18 (***"Pritchard"***) [TASA, TAB 5]; *Privacy Commissioner of Canada v Blood Tribe Department of Health*, [2008] SCR 574 paras. 9-11 (***"Blood Tribe"***) [RBA, TAB 4]; *Attorney General of Canada v Federation of Law Societies of Canada*, [2015] 1 SCR 401, paras. 1, 36-39, 44 (***"Federation"***) [TASA, TAB 6].

(f) To defend and protect a person's interests against the state in criminal, quasi criminal or administrative proceedings.

18. In order for communications between a client and his or her solicitor to be full and frank, the client must have comfort and assurance that no portions of those communications will be disclosed outside of the solicitor-client relationship without the client's consent. As Mr. Justice Binnie articulated in *Blood Tribe:*

> Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice...Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible".
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
>
> *(R. v. McClure,* [2001] 1S.C.R. 445, 2001 SCC, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General),* [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36)
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.[9]

19. The near absolute nature of solicitor-client privilege is of as much significance to the solicitor as it is to the client. A lawyer is unlikely to be as candid in his communications with the client without the comfort that the advice will be protected from disclosure, except with the consent of the client. A lack of candor on the part of the lawyer, in turn, would undermine the client's ability to make informed decisions affecting its legal interests.

20. Recent case law, including decisions of the Supreme Court of Canada, confirms that solicitor-client privilege is "a principle of fundamental justice and a civil right of supreme importance in Canadian law", elevating the privilege to constitutional-like standing.[10]

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[9] *Blood Tribe, supra,* para. 9 [RBA, TAB 4].

21. Given the fundamental importance of solicitor-client privilege, this Court has repeatedly affirmed it to be a rule of substance, not merely a rule of evidence. As Justice Dickson, noted in *Solosky*:

> Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits...[11]

22. Mr. Justice Lamer further developed the concept in *Descoteaux:*

> It is quite apparent that the Court in that case *[Solosky]* applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, has also since given rise to a substantive rule.
>
> It would, I think, be useful for us to formulate this substantive rule, as judges formerly did with the rule of evidence; it could, in my view, be stated as follows:
>
> > 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
> >
> > 2. Unless the law provides otherwise, when and to the extent the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
> >
> > 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of the means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

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[10] *Lavallee,* supra, para. 36 [RBA, TAB 6]; *R v McClure* [2001] 1 SCR 445, para. 2 (***"McClure"***) [TASA, TAB 7].
[11] *Solosky, supra,* para. 25 [TASA, TAB 4].

> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.[12]

23. These authorities were most recently canvassed in *U of C,* which confirms that solicitor-client privilege "is no longer merely a privilege of the law of evidence, having evolved into a substantive protection."[13]

24. Given the substantive quality of solicitor-client privilege, this Court has consistently ruled that any law enacted to interfere with that important right must be drafted to impinge on solicitor-client privilege only to the extent absolutely necessary to achieve the end sought by the enabling legislation. A statutory provision that lacks minimal intrusions and corresponding safeguards fails to meet the standards imposed by the Supreme Court of Canada.

25. As was pointed out by Justice Binnie in *Blood Tribe,*

> Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue: see e.g. *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen.Div.)), at para. 20. In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work.[14]

C. Express Statutory Language is Required to Abrogate or Preclude Privilege, Regardless of a Statute's Public Policy Objectives

26. Express language is required to abrogate solicitor-client and litigation privilege by statute, no matter how important the statute's public policy goals.

27. A heightened obligation for explicit language is required since, as stated at the outset, privileges exist because a compelling public interest has already justified the withholding of

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[12] *Descoteaux, supra*, paras. 26-27 [TASA, TAB 5]; See also *Lavallee, supra*, para. 16 [RBA, TAB 6]; *Goodis v Ontario (Ministry of Correctional Services)*, [2006] 2 SCR 32, paras. 14-16 and 20-21 [TASA, TAB 8]; and *Blood Tribe, supra*, paras. 10-11 [RBA, TAB 4].

[13] *U of C, supra,* paras 2, 43-44 [RBA, TAB 2].

[14] *Blood Tribe, supra*, para. 17 [RBA, TAB 6]. This view of the Privacy Commissioner was rejected by the Supreme Court of Canada; See also *Canadian Natural Resources Ltd v ShawCor Ltd.*, 2014 ABCA 289, paras. 64-65 (**"CNRL"**) [ABA, TAB 9]; *Jacobson v Atlas Copco Canada Inc.*, 2015 ONSC 4, para. 14 (**"Jacobson"**) [TASA, TAB 9]; *Bradley v Guarantee Co. of North America* 2011 ONSC 5712, paras. 22, 25-26 (**"Bradley"**) [TASA, TAB 10].

potentially relevant evidence, in spite of the compelling public interest in full disclosure and the search for the truth.

28. In *U of C*, the Supreme Court recently reiterated that in order for solicitor-client privilege to be abrogated by statute, clear, explicit, and unequivocal language must be used. The Court held that a legislative provision requiring the production of documents "[d]espite ... any privilege of the law of evidence" was not sufficient in identifying the substantive features of solicitor-client privilege, and therefore was not sufficiently clear in demonstrating legislative intent to abrogate solicitor-client privilege.[15] Similarly, in *Blood Tribe,* the Supreme Court of Canada held that express statutory language is required in order to abrogate solicitor-client privilege.[16]

29. While solicitor-client privilege undoubtedly occupies a special position in Canadian law, it is clear from the case law that the requirement for express language has been applied to other privileges and circumstances, including litigation privilege.[17] In *Lizotte,* the Court found that the requirement for "clear and explicit" language to abrogate solicitor-client privilege through statute applies "with equal force to litigation privilege".[18] The analytical approach to determining when a privilege is abrogated should not simply be assimilated with the general rule of statutory interpretation that applies in respect of the common law, *i.e.* that statutory provisions are presumed not to implicitly alter existing legal principles.[19]

30. In addition, The Advocates' Society submits that the application of a restrictive approach to interpretation is not dependent on a preliminary finding of ambiguity in the statute. A strict interpretative approach is to be performed whenever a statutory incursion of privilege is asserted. The seminal cases regarding legislative incursion of privilege articulate the application

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[15] *U of C, supra*, para 44 [RBA, TAB 2].
[16] *Blood Tribe, supra,* para 2 [RBA, TAB 4].
[17] Respondent's Factum, paras. 41 to 46.
[18] *Lizotte, supra,* para 63 [RBA, TAB 1].
[19] R. Sullivan, *Sullivan on the Construction of Statutes,* 6th ed., (Markham: LexisNexis Canada Inc., 2014), §17.5 [TASA, TAB 11].

of a restrictive approach as inextricable to the overall analysis, not just in instances where ambiguity is first identified.[20]

31. Further, as explained in *Lizotte,* the use of a strict interpretive approach does not contradict the modern approach to statutory interpretation, which seeks to read the words of an act "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": strictly interpreting Parliament's intention to abrogate legal privilege does not require the use of specific words, but rather clear, unequivocal and explicit language.[21] A strict interpretation of provisions that purport to set aside privilege also recognizes "legislative respect for fundamental values", which is consistent with the modern approach to statutory interpretation.[22] This is the case even if the legislation purporting to abrogate privilege serves to protect the public.[23]

D. Statutory Language in the *OHS Act* is Insufficient to Abrogate or Preclude Privilege

32. This appeal is about whether, when a statute requires that an investigation be carried out, litigation privilege and solicitor-client privilege can protect documents and reports created during the investigation. In the present case, the question is whether litigation and solicitor-client privilege has been abrogated by statute: specifically, whether Sections 18 and 19 of the *OHS Act,* which impose a statutory obligation to "carry out an investigation into the circumstances surrounding the serious injury or accident and the corrective action..." and "...prepare a report outlining the circumstances of the serious injury or accident and the corrective action..."[24] abrogate the responder's ability to refuse to communicate information or documents on the basis of litigation privilege or solicitor-client privilege.

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[20] *Descoteaux, supra*, paras. 26-27 [TASA, TAB 4]; *Lavallee, supra*, paras. 36-37 [RBA, TAB 6]; *Goodis, supra*, paras. 14-16 and 20-21 [TASA, TAB 8]; *Blood Tribe, supra*, para. 17 [RBA, TAB 4]. While these cases address solicitor-client privilege in particular, given the findings in *Lizotte*, The Advocates' Society submits that a strict interpretive approach should also to be applied to litigation privilege.

[21] *Lizotte, supra*, para 61 [RBA, TAB 1].

[22] *U of C, supra*, para 29 [RBA, TAB 2].

[23] *Ibid.* at paras 55-59 [RBA, TAB 2].

[24] *Occupational Health and Safety Act,* RSA 2000, c O-2, s. 18(3) (***"OHS Act"***) [ABA, TAB 1].

33. The language of the *OHS Act* is not sufficiently clear and unambiguous as to abrogate either litigation or solicitor-client privilege.

34. In *Blood Tribe*, the statutory provision at issue empowered the investigator to obtain all the evidence he or she wished to obtain, "whether or not it is or would be admissible in a court of law" and "in the same manner and to the same extent as a superior court of record".[25] In that case, in which the statutory wording was similar to that at issue in this appeal, the Court did not find that privilege had been abrogated.

E. A Requirement for Express Abrogation Does Not Paralyze Investigations

35. Requiring litigation and solicitor-client privilege to be abrogated expressly does not mean that regulatory investigations in respect of which claims of privilege are asserted will be paralyzed. Indeed, in many cases, when the content of that which litigation privilege protects is examined carefully, it is clear that there is no actual conflict between litigation privilege and an investigative role. The fact that an investigation is mandated by statute is irrelevant to the functional analysis of the lawyer's role and the protection of materials gathered where litigation was in reasonable prospect.[26]

36. In any event, in *Lizotte,* the Court held that litigation privilege, like solicitor-client privilege, may be subject to certain narrow and specific exceptions, if required in the interest of justice. As indicated by the Supreme Court in *Lizotte*:

> What must be done therefore is to identify, where appropriate, specific exceptions to litigation privilege rather than conducting a balancing exercise in each case...[27]

37. Recognizing exceptions to litigation privilege in clearly defined, exceptional circumstances is more in keeping with the jurisprudence than the Appellant's approach, which

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[25] *Blood Tribe, supra*, para 2, as referenced in *Lizotte, supra*, para. 66 [RBA, TAB 1].
[26] *College of Physicians and Surgeons (British Columbia) v British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, (*"College"*), paras. 39 and 72 [RBA, TAB 13].
[27] *Ibid,* at para. 41 [RBA, TAB 13].

presumes that justice requires setting aside litigation privilege anytime a statutory body with a mission to protect the public exercises its investigative powers.

38. The statutory context may certainly be relevant in determining whether an exception to litigation privilege should be made in specific circumstances, but courts should not be required to re-weigh the overall goals of each privilege against the overall goals of every statute requiring disclosure in order to determine whether the privilege applies at all.

39. In *Lizotte,* the Supreme Court held that exceptions to litigation privilege should be "based on narrow classes that apply in specific circumstances," similar to those recognized with regard to solicitor-client privilege, and not based on balancing exercises – balancing is already built into the test for litigation privilege in any event.[28] This approach takes the public interest purpose of the regulator into account, but without allowing it to be paramount and thereby effectively abrogating privilege.

40. Where an exception to privilege is granted, courts should further attempt to limit the impacts of disclosure on the party who has been ordered to disclose through appropriate confidentiality orders. As discussed in *Lizotte*, a statutory body's ability to keep information confidential should not, however, be determinative.[29]

F. The Wide-Reaching Implications of this Decision

41. Statutorily mandated investigations are contemplated not just in the realm of occupational health and safety law but also in various other areas, most notably those set out in the *Police Act*.[30] Taking these provisions into consideration, and the way that investigation and legal preparation is carried out in general, it is clear that this appeal has far reaching implications.

42. This appeal will affect legislative provisions requiring investigation in three important ways. First, this case is distinct from *Lizotte* in that the Appellant argues not only that a

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[28] *Lizotte, supra*, para 42 [RBA, TAB 1].
[29] *Lizotte, supra*, para. 31 [RBA, TAB 1].
[30] *Police Act,* RSA 2000, c P-17, s. 45(0.1) [TASA, TAB 12].

legislative provision abrogates privilege, but that it precludes litigation privilege on the basis that the dominant purpose of a mandated investigation cannot be anticipated litigation.

43. The Advocates' Society submits that the same interpretive principles that are applied to legislation purporting to abrogate privilege recently espoused in *Lizotte* should also be applied to legislation purporting to preclude the existence of privilege at the outset.

44. Second, the Court's interpretation of the ambiguity or clarity of abrogating language in the *OHS Act* will affect the interpretation of similar language in other legislation. For example, as in the *OHS Act,* s. 45(0.1) of the *Police Act* mandates that the chief of police investigate complaints against the chief or individual police officers. This section applies to RCMP officers, as well as regional, municipal, or provincial officers – even if established provincially. This Court's interpretation of the provisions in the *OHS Act* will undoubtedly affect the interpretation of s. 45(0.1) of the *Police Act,* and clarifying exceptions to litigation privilege will also affect the interplay between the *Police Act,* solicitor-client privilege, and litigation privilege.

45. Other legislative provisions will be affected as well. Affected legislation includes the *Protection for Persons in Care Act,* which allows an investigator to enter premises with permission, and once there to "access all records that could be relevant to the investigation...".[31] Similarly, the *Environmental Protection and Enhancement Act* allows investigators to use, record, or reproduce records.[32] Lastly, the *Alberta Utilities Commission Act* permits the Market Surveillance Administrator to access computer systems and other records with "reasonable and probable grounds".[33] It provides guidance for records over which solicitor-client privilege is claimed, but not litigation privilege.

46. Third, in the recent case of *Lizotte,* the Supreme Court recognized that exceptions to litigation privilege should not be based on individual balancing in each case, but rather the adoption of recognized, narrow and specific exceptions. However, it left the "adoption of such

[31] SA 2009, c P-29.1, s. 12(1) [TASA, TAB 13].
[32] RSA 2000, c E-12, s. 198 [TASA, TAB 14].
[33] SA 2007, c-37.2, ss. 42-50 [TASA, TAB 15].

an exception and a detailed analysis of the conditions for its application for a later date."[34] The Court had this to say about the adoption of specific exceptions to litigation privilege:

> The idea of an exception based on urgency and necessity is of course appealing. It would help compensate for the fact that, even though litigation privilege is temporary, it may sometimes delay access to certain documents that another party urgently needs in order to prevent serious harm. Such an exception would be based on criteria such as the need to obtain evidence to prevent serious harm, the impossibility of obtaining it by other means and the urgency of obtaining it before the [translation] "natural" lapsing of the effects of litigation privilege.

47. The Appellant argues that litigation privilege should be set aside when a statutory body requires investigations in the public interest – but that would entail "excessively broad balancing" which was expressly rejected by the Supreme Court.[35]

48. There is a need and opportunity for this court to further clarify which exceptional circumstances would justify the setting aside of litigation privilege in a narrow category of cases.

49. While the *OHS Act* directs that an investigation be completed and a report prepared, and while it is clear that factual documentation must be produced during an investigation, there is no basis upon which the privilege that attaches to certain records prepared during the course of the investigation should be abrogated.

G. Conclusion

50. The public policy justifications for privilege are well-established. Solicitor-client privilege protects the confidentiality of the solicitor-client relationship, "a necessary and essential condition of the effective administration of justice"[36]. Moreover, because each privilege serves different societal interests, each reflects an intrinsic balance that is tailored to the public interest it is meant to promote and protect. Solicitor-client privilege lasts forever, but is limited to

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[34] *Lizotte, supra,* para. 45 [RBA, TAB 1].
[35] *Ibid.* at para. 44 [RBA, TAB 1].
[36] *Blank, supra,* para. 25 [ABA, TAB 12].

communications between lawyer and client for the purpose of obtaining legal advice;[37] litigation privilege is limited to materials the dominant purpose of which relates to litigation, but it is not limited to solicitor-client communications or even to confidential communications, and it ceases to apply once current or anticipated litigation (and closely related litigation) has come to an end.[38]

51. The Advocates' Society submits that this Honourable Court should endeavour to uphold the consistent message that has been conveyed by the courts, in particular with the release of the *Lizotte* and *U of C* decisions: that privilege is of the utmost importance to the functioning of the legal system and should not be abrogated absent clear and unequivocal statutory direction to do so.

PART 5 RELIEF SOUGHT

52. The Advocates' Society takes no position on the disposition of the appeal.

53. The Advocates' Society seeks no order as to costs, and asks that no award of costs be made against it.

Estimate of time required for oral argument: 20 minutes.

Respectfully submitted this 6th day of January, 2017.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Carsten Jensen QC, FCIArb / Erin J. Baker
Counsel for the Intervenor, The Advocates' Society

[37] *Blood Tribe, supra*, para. 10 [RBA, TAB 4].
[38] *Blank, supra*, paras. 60, 34, 32 [ABA, TAB 12].

TABLE OF AUTHORITIES

1. *A.M. v Ryan,* [1997] 1 S.C.R. 157
2. *Susan Hosiery Ltd. v Minister of National Revenue,* [1969] 2 Ex. C.R. 27
3. *Solosky v The Queen,* [1980] 1 SCR 821
4. *Descoteaux v Mierzwinski,* [1982] 1 SCR 860
5. *Pritchard v Ontario (Human Rights Commission),* [2004] 1 SCR 809
6. *Attorney General of Canada v Federation of Law Societies of Canada,* [2015] 1 SCR 401
7. *R v McClure,* [2001] 1 SCR 445
8. *Goodis v Ontario (Ministry of Correctional Services),* [2006] 2 SCR 32
9. *Jacobson v Atlas Copco Canada Inc.,* 2015 ONSC 4
10. *Bradley v Guarantee Co. of North America,* 2011 ONSC 5712
11. R. Sullivan, *Sullivan on the Construction of Statutes,* 6th ed., (Markham: LexisNexis Canada Inc., 2014)
12. *Police Act,* RSA 2000, c P-17, s. 45(0.1)
13. *Protection for Persons in Care Act,* SA 2009, c P-29.1, s. 12(1)
14. *Environmental Protection and Enhancement Act,* RSA 2000, c E-12, s. 198
15. *Alberta Utilities Commission Act,* SA 2007, c-37.2, ss. 42-50