CITATION: Auditor General of Ontario v. Laurentian University of Sudbury, 2022 ONSC 109
COURT FILE NO.: CV-21-00669471-00CL
DATE: 2022-01-12

SUPERIOR OF JUSTICE - ONTARIO

RE: Auditor General of Ontario, Applicant

AND:

Laurentian University of Sudbury, Respondent

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Richard Dearden, Heather Fisher and Sarah Boucaud,* for the Auditor General of Ontario

Brian Gover, Fredrick R. Schumann, for Laurentian University of Sudbury

D.J. Miller, for Laurentian University of Sudbury (Insolvency Counsel)

Danielle Stampley, for Laurentian University Staff Union

HEARD: December 6, 2021

ENDORSEMENT

Background

[1] The Auditor General of Ontario (the "Auditor") brings this application for:

(a) a Declaration that every grant recipient is required to give the Auditor the information and records described in s. 10(1) of the *Auditor General Act*, R.S.O. 1990, c. A.35 (as amended) (the "Act"), including information and records that are subject to solicitor-client privilege, litigation privilege, or settlement privilege;

(b) a Declaration that the Auditor has a right to free and unfettered access to the information and records described in s. 10(2) of the Act that are subject to solicitor-client privilege, litigation privilege, or settlement privilege.

[2] The issues that require determination arose when the Ontario Standing Committee on Public Accounts passed a motion requesting that the Auditor conduct a value-for-money audit on the operations of Laurentian University of Sudbury ("LU") for the period of 2010 to 2020.

[3] The Auditor is an Officer of the Legislative Assembly of Ontario. The Office of the Auditor is an independent, non-partisan Office of the Legislative Assembly of Ontario.

[4] LU is a grant recipient that has received annual grants from the Government of Ontario.

[5] The Auditor has requested that LU provide it with access to its privileged information and records.

[6] LU takes the position that the Auditor does not have the right to access privileged information.

[7] This application seeks a statutory interpretation of s. 10 of the Act. Specifically, the issue is whether s. 10 confers on the Auditor the authority to access and require production of privileged information and documents from a grant recipient.

[8] The relevant provisions of the Act are set out below:

> **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**
>
> 10 (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**
>
> 10(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.
>
> **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.

Duty of confidentiality

27.1 (1) The Auditor General, the Deputy Auditor General, the Advertising Commissioner, the Commissioner of the Environment appointed under section 50 of the *Environmental Bill of Rights, 1993*, each employee of the Office of the Auditor General and any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act. 2004, c. 17, s. 28; 2004, c. 20, s. 13(7); 2018, c. 17, Sched. 3, s. 5.

Same

(2) Subject to subsection (3) the persons required to preserve secrecy under subsection (1) shall not communicate to another person any matter described in subsection (1) except as may be required in connection with the administration of this Act or any proceedings under this Act or under the *Criminal Code (Canada)*. 2004, c. 17, s. 28.

Same

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or documents disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege. 2004, c. 17, s. 28.

[9] The Auditor takes the position that ss. 10 and 27.1 of the Act expressly, clearly, and unambiguously confer on the Auditor the authority to access and require production of privileged information and documents from a grant recipient and a broader public sector organization such as LU.

[10] LU takes the position that s. 10 of the Act does not evince the clear, explicit, and unequivocal legislative intention that is required 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 (whether inadvertent or intentional) does not have the effect of waiving privilege as against third parties.

[11] For the following reasons, the Application is resolved in favour of LU.

Position of the Auditor

[12] The Auditor takes the position that legislatures can pierce solicitor-client privilege by statute and the Legislature has done so in s. 10 of the Act. The Auditor acknowledges that the language of the provision must be explicit and evince a clear and unambiguous intent to abrogate privilege: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 ("*Alberta*"), at para. 71. The Auditor also acknowledges that solicitor-client privilege cannot be set aside by inference. Express words are necessary to pierce solicitor-client privilege and open-textured language will not be read to include solicitor-client privileged documents: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 ("*Blood Tribe*"), at para. 11.

[13] The Auditor submits that a legislature does not necessarily have to use the term "solicitor-client privilege" in order to abrogate the privilege. An abrogation of privilege can be clear, explicit, and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege: *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52, at para. 61.

[14] The Auditor submits that looking at the legislative history of the Act and the text of the Act, the Legislature clearly intended that the disclosures made to the Auditor under s. 10 include privileged information and documents.

[15] In 2004, the Legislature enacted Bill 18, which repealed s. 10 of the *Audit Act* and replaced it with ss. 10(1), 10(2), and 10(3) of the Act. The *Audit Act* was renamed the *Auditor General Act*.

[16] The Legislature added two new provisions to the Act that address information and documents subject to solicitor-client privilege, litigation privilege, and settlement privilege, namely, s. 10(3) (no waiver of the privileges) and s. 27.1(3) (secrecy of the privileged disclosures made under s. 10).

[17] The 2004 amendments also added into s. 10(2) that the Auditor is "entitled to have free access" to, *inter alia*, an audit subject's files and all other papers, things, or property (compared to "the Auditor shall be given access" accorded by the former s. 10 of the *Audit Act*).

[18] From the standpoint of the Auditor, ss. 10 and 27.1 are not general open-textured provisions and the new subsections entitle the Auditor to compel production of and have free access to an audit subject's files and all other papers, things, or property, including those subject to privilege.

[19] The Auditor submits that s. 10 of the Act must be read in its entire context, in its grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 118, the modern approach to statutory interpretation was summarized as requiring consideration of the "text, context and purpose" of the legislation.

[20] Section 10(1) of the Act requires that a grant recipient "shall give the Auditor General" the information that the Auditor believes is necessary to perform the audit.

[21] This duty and obligation to give information to the Auditor is followed by s. 10(2), which provides that the Auditor is "entitled to have free access" to an audit subject's files and all other papers, things, or property belonging to or used by a grant recipient.

[22] Further, s. 10(3) safeguards the mandatory disclosures made to the Auditor under ss. 10(1) and (2) by providing that those disclosures do not constitute a waiver of privilege.

[23] The Auditor submits that the "no waiver of privilege" safeguard provided by s. 10(3) is inextricably linked to the disclosures made to the Auditor under s. 10(1) and (2) and submits that the Legislature clearly intended that disclosures made under these subsections include information and documents subject to solicitor-client privilege, litigation privilege, and settlement privilege by directly safeguarding those disclosures through s. 10(3).

[24] Further, the disclosures under ss. 10(1) and (2) are mandatory and an audit subject is not provided a choice to consent to the disclosure of privileged documents. Had the legislature intended to require a grant recipient's consent for the disclosures, the Legislature would have expressly said so, as it did in s. 27.1(3).

[25] In addition, an interpretation that the disclosures do not include a grant recipient's privileged information and documents would be absurd because s. 10(3) speaks directly to the privileges attached to those disclosures.

[26] Subsection 10(3) would be rendered meaningless in relation to the disclosures made to the Auditor under ss. 10(1) and (2) if those mandatory disclosures did not include privileged documents because s. 10(3)'s "no waiver of privilege" safeguard only applies to disclosures made to the Auditor under ss. 10(1) and (2).

[27] The Auditor further submits that the Legislature clearly intended that the disclosures made to the Auditor under s. 10 of the Act include privileged information and documents because s. 27.1(3) unambiguously says so.

[28] The Auditor submits that the Legislature imposed the secrecy obligation on the Auditor and its staff over information and documents disclosed under s. 10 that are subject to solicitor-client privilege because the mandatory disclosures under ss. 10(1) and (2) include a grant recipient's privileged information and documents. An interpretation that disclosures under ss. 10(1) and (2) do not include privileged information and documents is incompatible with the express words in s. 27.1(3) that mandate secrecy over privileged information and documents.

[29] The Auditor goes on to submit that an indicia of legislative intent to pierce solicitor-client privilege is whether the Legislature put in place safeguards to ensure that privileged documents are not disclosed in a manner that compromises the substantive right. The Act contains two safeguards that ensure that privileged documents are not disclosed in a manner that compromises the privileges. Subsection 10(3) ensures the privileged information disclosed to the Auditor under s. 10 does not constitute a waiver of privilege and subsection 27.1(3) ensures that the Auditor and the office of the Auditor maintains the secrecy of privileged documents.

[30] The Auditor referenced the legislative evolution of s. 10 of the Act as well as extrinsic aids such as the Interim Protocol On Access By The Office of the Provincial Auditor of Ontario to Privileged Documents (July 2003); the 2003 Handbook for Interaction with the Office of the Provincial Auditor of Ontario (November 2003); the 2006 Handbook for Interaction with the Auditor General of Ontario; and the Ontario Public Sector Guide for Interaction with the Office of the Auditor General: Value-for-Money Audits (April 2019) (the "OPS Guide"), in an effort to support its position. These submissions are addressed in the section below.

Position of LU

[31] As stated above, LU takes the position that s. 10 of the Act does not evince a clear, explicit, and unequivocal intention to abrogate privilege.

[32] LU takes issue with the Auditor's arguments that the legislative evolution of the Act demonstrates a clear and unambiguous intention to abrogate privilege. LU submits that the Act's legislative history instead supports an interpretation that the Legislature did not intend to abrogate privilege.

[33] Prior to Bill 18's passage, s. 10 of the *Audit Act* did not specifically refer to privileged information. There is no suggestion by the Auditor that it could compel audit subjects to provide privileged information under the former s. 10. Consequently, the Auditor focused on the 2004 amendments, and in particular, the amendments to ss. 10 and 27.1, to establish its position.

[34] In 2001, 2002, and 2003, three attempts were made to amend the *Audit Act*. All three would have changed the language of s. 10 but none referred expressly to privilege or contained a provision resembling s. 10(3). None of these bills were passed by the Legislature.

[35] In December 2003, Bill 18 was introduced. From the standpoint of LU, two points about Bill 18 need to be emphasized:

(a) MPPs from both the government and Official Opposition understood Bill 18 as being substantially similar to the prior unsuccessful bills introduced; and

(b) there is no indication in the Hansard Debates on Bill 18 that it was ever intended to abrogate privilege. The only time privilege is mentioned anywhere in the Debates is when opposition MPPs stated that the new legislation will prevent waiver of privilege.

[36] Bill 18 extended the Act's coverage to include the broader public sector, including universities and hospitals. LU contends that if the legislature intended to abrogate privilege, a

fundamental civil and constitutional right, for broad sectors of the Ontario economy that are not part of government and that had not previously been subject to the Auditor's oversight, one would expect discussion in the legislature about this step. Such discussion did not take place.

[37] The Auditor submits that the debates in the Legislature leading up to the enactment of the 2004 *Audit Act* demonstrate that the Legislature intended to bestow on the Auditor robust audit powers regarding value-for-money audits of universities.

[38] The Auditor references three excerpts from Hansard Debates (Bill 18) on December 9, 2003, April 19, 2004 and May 17, 2004, which are summarized at paragraphs 54-59 of the Auditor's factum.

[39] Each excerpt references an expanded mandate and requirement to provide the Auditor with access to information and records.

[40] However, LU points out that there is no suggestion in the debates that Bill 18 was ever intended to abrogate privilege. The only time privilege is mentioned in the debates is when opposition MPPs stated that the new legislation will prevent waiver of privilege.

[41] The court can consider Hansard Debates to ascertain the background and purpose of the legislation. The Supreme Court of Canada has noted: "However, such references will not be helpful in interpreting the words of a legislative provision when the references are themselves ambiguous: *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, at para. 47.

[42] With respect to the extrinsic aids referenced by the Auditor in para. 30 above, the Interim Protocol (2003) and the Handbook of Interaction (2003) predate Bill 18. The Legislature, in considering Bill 18, had the opportunity to squarely address the issue of abrogating privilege. The Handbook (2006) comments on s. 10(3) and repeats many of the arguments made by the Auditor referenced in the preceding section. LU points out that the OPS Guide (2019) was not signed by anyone at LU, nor is there any evidence that LU or any other university ever agreed to be bound by it. Further, there is no evidence that the OPS Guide was ever provided to LU, before or after it was signed, until the Auditor sent it to LU's President on August 30, 2021, well after the disagreement about privilege had arisen. LU submits that this suggests the Auditor did not consider the OPS Guide to be a particularly relevant aid for interpreting s. 10.

[43] Finally, the OPS Guide does not expressly state that s. 10 requires audit subjects to provide all privileged documentation to the Auditor. In any event, the OPS Guide is just a guideline, not a legally binding document. LU asserts that the OPS Guide should be given no weight in the court's interpretation of s. 10.

[44] LU's primary submission is that the text and scheme of the Act do not demonstrate a clear and unambiguous legislative intent to abrogate privilege.

[45] LU submits that because solicitor-client privilege is so fundamentally important to our legal system, legislation purporting to limit or deny it will be interpreted restrictively and the language of such a provision "must be explicit and evince a clear and unambiguous legislative intent to do so": *Alberta*, at paras. 28 and 71.

[46] LU argues that the same interpretive principles apply to litigation privilege and settlement privilege.

[47] LU relies on the following principles laid down by the Supreme Court in respect of solicitor-client privilege:

> 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": *Alberta* at para. 41; see also *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 ("*Chambre des notaires*"), at paras. 5 and 28.
>
> It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice: *Alberta*, at para. 34.
>
> [A]s a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary: *Alberta*, at para. 43.

[48] LU states that the language of s. 10 does not expressly say that an audit subject must disclose privileged information. Sections 10(1) and (2) are general disclosure provisions that do not mention privilege. As a result, they cannot be interpreted to compel the disclosure of privileged information as "privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents": *Blood Tribe*, at para. 11.

[49] Where s. 10 does refer to privilege, in s. 10(3), it is not to compel disclosure of privileged information. Rather, it is to ensure that where privileged information is disclosed, whether intentionally or inadvertently, it is not construed as a waiver of privilege.

[50] LU notes that the Auditor places great weight on the words in s. 10(3), "disclosure to the Auditor General under subsections (1) or (2)." The Auditor argues that because these sections create mandatory duties of disclosure, s. 10(3) must mean that ss. 10(1) and (2) require the disclosure of privileged information. LU submits that this is a multi-step argument that requires reading the statute to mean something that it does not expressly say.

[51] LU provides examples that it submits show that where the Legislature truly intends to abrogate privilege, it uses express language:

> (a) *Law Society Act*, R.S.O. 1990, c. L. 8, 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";
>
> (b) *Health Insurance Act*, R.S.O. 1990 c. H.6, 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"; and

> (c) *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A, 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…"

[52] LU points out that such language could have been introduced in s. 10 of the Act if the Legislature's intention had truly been to abrogate privilege.

[53] Importantly, LU points out that where the Nova Scotia Legislature intended to grant its Auditor General the power to compel privileged information, it used more 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 record 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: *Auditor General Act*, S.N.S. 2010, c. 33, s. 14(1).

[54] Not surprisingly, LU argues that this is the sort of "clear, explicit, and unambiguous" language that would have been required to abrogate privilege in the Act.

[55] In the absence of the direct and express language that exists in other statutes, the Auditor seeks an inference that ss. 10(1) and (2) require disclosure of privileged information, not on their own, but only when read in light of ss. 10(3) and 27.1(3). LU submits that this argument, based on inference rather than clear and explicit intention, is insufficient to abrogate privilege. As the Court held in *Blood Tribe*, "privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents": *Blood Tribe*, at para. 11. LU submits that ss. 10(1) and (2) are open-textured and the court cannot infer from the words "under subsections (1) and (2)" in s. 10(3) that the legislature intended to completely abrogate privilege.

[56] LU argues that it is more plausible that by those words, the Legislature merely intended to refer to disclosure to the Auditor when describing the circumstances that will not result in a waiver of privilege.

[57] LU also points out that 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.

[58] Section 11 of the Act gives the Auditor the power to examine "any person" under oath, and s. 11(2) provides that s. 33 of the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6 "applies to the examination." In turn, s. 33 of the *Public Inquiries Act, 2009* provides in s. 33(13) that

"nothing is admissible in evidence at an inquiry that would be in admissible in a court by reason of any privilege under the law of evidence." Accordingly, s. 11 of the Act cannot be used to compel privileged information.

[59] LU argues that it would be incongruous if the Legislature chose to give the Auditor the power to compel privileged information under s. 10, but not under s. 11. Indeed, one would expect that a summons would be an escalated means of investigation, to be used where s. 10 did not achieve compliance.

[60] As a result, 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.

[61] In summary, LU takes the position that the 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 if they so choose, by clarifying that doing so does not waive privilege.

Analysis

[62] There is no debate with respect to the importance of solicitor-client privilege. It is, as submitted by LU, "a civil right of supreme importance in the Canadian justice system": *Chambre des notaires*, at para. 5. Further, to remain effective, it "must remain as close to absolute as possible and should not be interfered with unless absolutely necessary": *Alberta*, at para. 43.

[63] There is also no debate that legislatures can pierce solicitor-client privilege by statute. However, the language of any statutory provision must be explicit and demonstrate a clear and unambiguous intent to do so: *Alberta*, at para. 17. Further, solicitor-client privilege cannot be set aside by inference and express words are necessary in order to pierce it. Open-textured language will not be read to include solicitor-client privilege: *Blood Tribe*, at para. 11. The same principles also apply to litigation privilege and settlement privilege.

[64] The question for determination is whether ss. 10 and 27.1 of the Act demonstrate a clear, explicit, and unambiguous intention to abrogate solicitor-client privilege, litigation privilege, and settlement privilege.

[65] Prior to the 2004 amendments, there was no statutory provision in the *Audit Act* abrogating solicitor-client privilege. The question is whether the amendments had the effect of abrogating solicitor-client privilege, litigation privilege, or settlement privilege.

[66] It is instructive to look at the legislative history behind the passage of Bill 18. As noted by LU, three prior attempts were made to amend the *Audit Act*, including s. 10. None referred expressly to privilege or contained anything resembling s. 10(3).

[67] The debates from December 2003, when Bill 18 was introduced, indicate that Bill 18 was understood as being substantially similar to the previous bills and there was no reference to any intention to abrogate privilege.

[68] The absence of any reference to the intention to abrogate solicitor-client privilege in the debates leads to the conclusion that the references to the Hansard Debates are of no assistance to the Auditor.

[69] Counsel to the Auditor also referenced the extrinsic aids referenced at para. 30 above as evidence of an interpretation that favours the Auditor's position.

[70] In my view, these references do not assist the Auditor The comments in the 2003 documents are not reflected in Bill 18. The comments in the 2006 document are incorporated into the Auditor's submissions, and the submissions of LU in paras. 42 and 43 above are a complete answer to the Auditor's submissions. Further, the OPS Guide is not a legally binding document. It is not law and provides no evidence of legislative intention.

[71] It follows that this application must be determined on the wording of ss. 10 and 27.1 of the Act.

[72] To state the obvious, the Legislature could have adopted the route followed by the Province of Nova Scotia and enacted legislation that clearly expressed an unambiguous intention to abrogate solicitor-client privilege. It did not do so.

[73] The question remains whether through the efforts of ss. 10(3) and s. 27, the Legislature has in fact addressed the issue in a clear and unambiguous manner.

[74] In my view, s. 10 falls short of evincing an intention to abrogate privilege in a clear and unambiguous manner. Section 10 does not clearly state that an audit subject must disclose privileged information. Further, s. 10(1) and (2) do not mention privilege. At best, they are general disclosure provisions and, in my view, cannot be interpreted as authorizing the Auditor to access or compel the disclosure of privileged information.

[75] There are references in ss. 10(3) and 27.1(3) to privilege. However, these provisions do not compel disclosure of privileged information. Section 10(3) addresses a situation where privileged information is disclosed, whether inadvertently or with the consent of the privilege holder, and confirms that this does not constitute a waiver of privilege. Section 27.1(3) contemplates the same situation and ensures that privilege is maintained by obligating the Auditor and the Auditor's staff to maintain secrecy over the privileged information and documents. Neither s. 10(3) nor s. 27.1(3) are rendered meaningless if ss. 10(1) and (2) do not compel disclosure of privileged information. As argued by LU, s. 10(3) and s. 27.11(3) ensure that where privileged information is disclosed, whether intentionally or inadvertently, it is not construed as a waiver of privilege.

[76] The Auditor submits that the words of s. 10(3), "disclosure to the Auditor General under subsection (1) or (2)" are significant because ss. 10(1) and (2) create mandatory duties of disclosure and s. 10(3) must therefore mean that ss. 10(1) and (2) mandate the disclosure of privileged information. In my view, however, this argument cannot succeed as it requires reading into the statute something that is not expressly stated. This is contrary to the required direction to interpretation set forth in *Blood Tribe*. Open-textured language governing production of documents will be read not to include solicitor-client documents.

[77] To repeat, at best, ss. 10(1) and (2) are general disclosure provisions that cannot be interpreted as authorizing the Auditor to access or compel the disclosure of privileged information.

[78] In arriving at this conclusion, I have taken into account that where the Legislature truly intends to abrogate privilege, it has done so in express language. Examples of this are the *Law Society Act*, the *Health Insurance Act*, and the *Archives and Recordkeeping Act, 2006*. It is trite to state that such language could have been introduced in s. 10 of the Act if the Legislature's intention had been to abrogate privilege.

[79] Another example of where express language has been used to compel privileged information is in the *Auditor General Act (Nova Scotia)*. Had it intended to abrogate privilege, the Legislature would have used this or similar language.

[80] In the absence of direct and express language, the Auditor's argument relies on the inference that ss. 10(1) and (2) require disclosure of solicitor-client information, not on their own, but only when read together with ss. 10(3) and 27.1(3). As noted above, ss. 10(3) and 27.1(3) do not compel this interpretation and privilege cannot be abrogated by inference.

[81] I also accept LU's submission that looking more broadly at the Act, it would be inexplicable if s. 10 required the disclosure of privileged information when the summons power set out in s. 11 – an escalated means of investigation – cannot compel such disclosure. It would indeed be highly unusual if the Auditor were be able to compel privileged information from LU under s. 10, but not from its President pursuant to a summons served on the President.

[82] LU also argued that if s. 10 of the Act did abrogate privilege as the Auditor contends, it would be unconstitutional. In view of my conclusions, it is not necessary for me to address this issue. I also note that there is no evidence that the Attorney General was served with a Notice of Constitutional Question as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[83] In the result, I have concluded that the provisions of the Act, and in particular s. 10, do not demonstrate a clear and unambiguous intent to abrogate solicitor-client privilege.

[84] Accordingly, this Application is resolved as follows:

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

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

[85] Costs are payable to LU in the agreed-upon amount of $25,000.

[86] I thank counsel for their exceptional submissions.

Chief Justice G.B. Morawetz

Date: January 12, 2022