COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mitchinson v. The Owners, Strata Plan VR 1120,* 2024 BCCA 89

Date: 20240307
Docket: CA48780

Between:

Robert Mitchinson

Appellant
(Respondent)

And

The Owners, Strata Plan VR 1120

Respondent
(Petitioner)

And

The Civil Resolution Tribunal, The Human Rights Tribunal and Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 25, 2022 (*The Owners, Strata Plan VR 1120 v. Mitchinson*, 2022 BCSC 2054, Vancouver Docket S210324).

Counsel for the Appellant: M. Nied

Counsel for the Respondent, The Owners, Strata Plan VR 1120: P.J. Dougan

Counsel for the Respondent, The Civil Resolution Tribunal: Z.N. Rahman

Place and Date of Hearing: Vancouver, British Columbia
October 31, 2023

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Written Submissions Received on behalf of the Appellant:	February 16 and 29, 2024
Written Submission Received on behalf of the Respondent, The Owners, Strata Plan VR 1120:	February 22, 2024
Written Submission Received on behalf of the Respondent, The Civil Resolution Tribunal:	February 22, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 7, 2024

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher

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Summary:

The appellant, Mr. Mitchinson, owns a strata lot in the respondent strata development. The appellant filed an application pursuant to ss. *35(2) and 36(1) of the Strata Property Act, S.B.C. 1998, c. 43 [SPA], asking the Civil Resolution Tribunal to compel the strata corporation to produce legal opinions related to a human rights complaint brought against the strata. The strata refused, asserting solicitor-client privilege. However, the Tribunal ordered production of the legal opinions to the appellant because he was not a party to the human rights complaint. On judicial review, the judge held that the SPA's legislative purpose of providing transparency to strata lot owners should be balanced against protection of solicitor-client privilege, and on that basis, found that the strata could be compelled to disclose the legal opinions after the conclusion of the human rights litigation. The appellant appeals to this Court, arguing that the temporal limit imposed by the judge is unsupported by the text of the statute.*

Held: Appeal allowed, to the extent that both the orders of the judge below and of the CRT are set aside, and the appellant's application for production of legal opinions is dismissed. The Supreme Court of Canada's restrictive approach to statutory abrogation of solicitor-client privilege requires clear, unequivocal, and explicit legislative intent. Here, no provision of the SPA meets that demanding threshold. While the legislature did intend to promote transparency for strata lot owners, a legislative purpose cannot abrogate solicitor-client privilege without explicit statutory language to that effect. However, the judge's temporal limit is not supported by the language of the SPA, and therefore no disclosure of the legal opinions is required.

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Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

[1] The appellant, Robert Mitchinson, owns a strata lot in the respondent strata development (the “Strata”). The Strata is governed by a strata council (the “Strata Council”) in accordance with the provisions of the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*].

[2] In November 2019, the owners of a different strata lot in the Strata filed a complaint against the Strata with the British Columbia Human Rights Tribunal [HRT] under the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. Those owners alleged that the Strata discriminated against them by evicting them when they had a baby, thus increasing the number of occupants in their unit above the maximum number allowed.

[3] Mr. Mitchinson, who was supportive of those owners, requested that the Strata Council provide him with copies of all legal opinions it had obtained in relation to the HRT complaint (the “Legal Opinions”). The Strata Council refused.

[4] In April 2020, Mr. Mitchinson filed an application with the Civil Resolution Tribunal [CRT] seeking an order compelling the Strata Council to produce the Legal Opinions. On December 16, 2020, the CRT issued its decision granting Mr. Mitchinson’s application and ordering the Strata Council to produce the Legal Opinions within 14 days.

[5] The Strata applied for judicial review pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. An initial hearing of the judicial review petition at the Supreme Court of British Columbia resulted in an order remitting the matter to the CRT. This Court overturned that decision on appeal and sent the petition back for hearing before the Supreme Court: 2022 BCCA 189.

[6] The reviewing judge granted the review application. In doing so, she held that under the relevant provisions of the *SPA*, a strata owner in the position of

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Mr. Mitchinson is only entitled to disclosure of legal opinions obtained by the Strata when the litigation that is the subject of the legal opinion is fully resolved, including by exhausting all avenues of appeal.

[7] Mr. Mitchinson now appeals. He argues that the judge erred by creating a temporal limitation on disclosure because the *SPA*'s language does not support that interpretation. He asks this Court to set aside the judicial review decision and reinstate the decision of the CRT requiring production of the Legal Opinions without the temporal limitation.

[8] As I explain below, it is my view that the *SPA* cannot be interpreted to abrogate solicitor-client privilege and that both the order of the judge below and the CRT must be set aside. Given that none of the parties to the appeal sought such an order, we requested and received further written submissions on the application of the principles set out by the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, and related cases, to the interpretation of the provisions of the *SPA*.

[9] The basic underlying facts are set out above. To the extent that there are additional relevant facts, I will highlight those facts in the course of my analysis.

Legislation

[10] The following provisions of the *SPA* are relevant:

> **Strata corporation records**
>
> **35** (2) The strata corporation must retain copies of all of the following:
>
> …
>
> (h) any decision of an arbitrator or judge, or of the civil resolution tribunal, in a proceeding in which the strata corporation was a party, and any legal opinions obtained by the strata corporation;
>
> …

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> **Access to records**
>
> **36** (1) On receiving a request, the strata corporation must make the records and documents referred to in section 35 available for inspection by, and provide copies of them to,
>
> (a) an owner,
>
> …
>
> (3) The strata corporation must comply with a request under subsection (1), (1.1) or (2) within 2 weeks unless the request is in respect of bylaws or rules, in which case the strata corporation must comply with the request within one week.
>
> …
>
> **169** (1) If the strata corporation joins or sues an owner in the owner's capacity as owner or as owner developer, or if an owner sues the strata corporation, that owner
>
> …
>
> (b)does not, despite being an owner, have a right to information or documents relating to the suit, including legal opinions kept under section 35 (2) (h), and
>
> …

The CRT Decision: 2020 BCCRT 1420

[11] The CRT addressed a number of issues raised by the parties. On the specific issue of Mr. Mitchinson’s entitlement to disclosure of the Legal Opinions, the CRT relied on the decision in *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428*, 2009 BCSC 506 [*Azura SC*], appeal allowed in part, but not on this ground, 2010 BCCA 474. The CRT described the decision in *Azura SC* as follows:

> 43. In *Azura Management (Kelowna) Corp. v. The Owners, Strata Plan KAS 2428*, 2009 BCSC 506, the BCSC considered a case in which a strata lot owner sought disclosure of legal opinions about proceedings to which the owner was not a party. The BCSC concluded that SPA section 169(1)(b) does not extinguish the common law of solicitor-client privilege. However, the BCSC did not permit the strata to maintain solicitor-client privilege over the dispute between the strata corporation and another owner. The BCSC concluded that the proper approach was restricted access.
>
> 44. Specifically, the BCSC found it would be inappropriate for any owner to have unrestricted access to legal opinions because they could simply provide them to the owner involved in the dispute. The BCSC found that SPA section 36 could not have been intended to allow that to occur, but this concern did not justify denying access entirely. Rather, the BCSC concluded that it was appropriate to place restrictions on the owner’s access.

> Specifically, the BCSC said the owner and the owner's council [sic] could not share the legal opinions with any other person (paragraph 69).

[12] Applying *Azura SC*, the CRT held that because Mr. Mitchinson was not a party to the HRT proceeding, he was entitled to the Legal Opinions pursuant to ss. 35(2)(h) and 36 of the *SPA.* Consistent with the approach taken in *Azura SC,* the CRT ordered that Mr. Mitchinson cannot share or discuss the Legal Opinions with any other person or organization.

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Judicial Review: 2022 BCSC 2054

[13] As noted at the outset, the Strata's initial judicial review application resulted in an order remitting the mater to the CRT. The judge in that application found that the Strata raised new issues concerning the CRT's jurisdiction that had not been argued before the CRT. The judge therefore remitted the matter to the CRT for determination of those issues. On appeal, this Court disagreed with that decision, holding that the judge erred in remitting the matter rather than deciding it himself (at paras. 53–55). It is not necessary to review the findings in either of those decisions as they do not bear directly on the issues on this appeal.

[14] The hearing of the judicial review resulting in the decision under appeal took place over two days, July 18-19, 2022. In her reasons, rendered November 25, 2022, the judge said:

a) The central question on the review involved the extent to which ss. 35(2)(h) and 36 infringe the fundamental principle of solicitor-client privilege. This is a general question of law that is subject to review on a correctness standard (RFJ at paras. 56–57);

b) A strata corporation is a separate legal entity from the strata owners such that when the strata council retains legal counsel, it does so on behalf of its strata corporation which is the client. Each individual owner is not a client of that legal counsel (RFJ at paras. 70, 82). This aspect of the review decision is not under appeal;

c) *Azura SC* is not binding on the review judge because it is not apparent that the judge in *Azura SC* was provided with full submissions on: the importance of solicitor-client privilege as a fundamental principle of our legal system; the caution that courts should adopt when circumscribing solicitor-client privilege; and the proper statutory interpretation to be applied to the legislative provisions at issue (RFJ at para. 98);

d) Solicitor-client privilege may be set aside or abrogated by appropriate statutory language. If the statute in question admits of more than one possible interpretation, then the interpretation that limits the incursion on solicitor-client privilege must be favoured (RFJ at paras. 109, 112);

e) Sections 35(2)(h) and 36 of the *SPA* are intended to abrogate solicitor-client privilege to some extent. However, the language used is insufficient to abrogate solicitor-client privilege for all purposes. Rather, the sections must be interpreted to abrogate the strata corporation's solicitor-client privilege only to the extent that doing so does not compromise the Strata corporation's position in litigation against an owner (RFJ at para. 115);

f) It is unreasonable to conclude that unless s. 169(1)(b) of the *SPA* applies, all privileged legal opinions must be disclosed to any strata owner who requests them. Such an interpretation would not adequately protect solicitor-client privilege or litigation privilege (RFJ at para. 121);

g) It is not apparent that, in drafting the relevant provisions of the *SPA,* the legislature fully considered the necessity of protecting solicitor-client privilege as a fundamental principle of our legal system nor that the legislature correctly determined that the circumstances identified in s. 169(1)(b) were the only circumstances in which legal opinions should not be disclosed (RFJ at para. 122);

h) A more appropriate interpretation of the relevant sections is that legal opinions obtained by the strata council, on behalf of the strata corporation,

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should not be disclosed until a contemplated or ongoing dispute with either a third party or another strata owner is fully resolved and all avenues of appeal exhausted. This finding is consistent with reading s. 35(2)(h) in its entire context. That section groups legal opinions with decisions of an arbitrator or judge or the CRT in a proceeding in which the strata corporation was a party. The reference to a "decision" necessarily implies a final determination of a dispute, and postponing production of legal opinions until a dispute has been resolved is consistent with there having been a final determination (RFJ at paras. 123–124).

[15] Based on her analysis, the judge's order included the following terms:

> 2. The Petitioner [Strata] shall disclose to the Respondent Mr. Mitchinson the Legal Opinions sought within two weeks of the HRT dispute being finally resolved and all avenues of appeal from any Decision of the HRT have been fully exhausted [*sic*].
>
> 3. The Respondent Mr. Mitchinson is not to share or discuss the Legal Opinions with any other person or organization.

On Appeal

[16] Mr. Mitchinson alleges a single error on appeal, namely that the judge erred by creating a temporal limitation on the disclosure of legal opinions which is inconsistent with the *SPA*'s words and objective.

[17] The respondent Strata submits that the judge did not err. Rather, she struck an appropriate balance between the disclosure required by the *SPA* and protection of the fundamental principle of solicitor-client privilege.

Standard of Review

[18] On an appeal from a judicial review, the role of the appellate court is to determine whether the reviewing judge correctly applied the appropriate standard of review. In this sense, the appellate court "steps into the shoes" of the reviewing judge and focusses its attention on the administrative decision in issue: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247; *Agraira v. Canada*

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(Public Safety and Emergency Preparedness), 2013 SCC 36 at paras. 45–46; and *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 69.

[19] One exception to that principle is where the reviewing judge determined an issue or made an original finding of fact that was not before the administrative decision-maker. An appeal on such an issue engages the "usual" principles of appellate review: *Campbell v. The Bloom Group*, 2023 BCCA 84 at para. 11; *Amer v. Shaw Communications Canada Inc.*, 2023 FCA 237 at para. 52; and *Crook v. British Columbia (Director of Child, Family and Community Service)*, 2020 BCCA 192 at para. 35. Here, the judge identified the standard of review as correctness and neither party takes issue with that finding. The focus of this Court's analysis, then, is on the CRT's interpretation of the relevant statutory provisions. No deference is owed to either that decision or the reviewing judge's different interpretation, including the judge's imposition of a temporal limitation on Mr. Mitchinson's right to production of the Legal Opinions: *English v. Richmond (City)*, 2021 BCCA 442 at para. 55.

<u>Legal Framework</u>

[20] The interpretation of the provisions of the *SPA* is governed by the well-known and established modern approach to statutory interpretation. The words of a statute are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the statute and statutory objects and purposes: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. Statutory interpretation begins with the plain meaning of the text, but that plain meaning is not dispositive. The plain meaning must be "tested against the other indicators of legislative meaning—context, purpose, and relevant legal norms": *La Presse inc. v. Quebec*, 2023 SCC 22 at para. 23; and *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101 at paras. 39–41.

[21] As the judge explained, the analysis in this case engages issues of solicitor-client privilege, which is a fundamental, constitutionally-protected principle of our legal system and one to be jealously guarded: RFJ at paras. 101–102, citing

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Maranda v. Richer, 2003 SCC 67 at para. 22; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 892-93; *University of Calgary* at paras. 20, 26, 34; and *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at para. 85. See also: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*], where the Court held that the protection of solicitor-client privilege must be "as close to absolute as possible" in order to ensure public confidence in the legal system (at para. 9). The Supreme Court of Canada has emphasized that solicitor-client privilege will only rarely be punctured: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at paras. 59–60.

[22] It is not necessary to delve into the discussion of solicitor-client privilege as set out in these authorities in detail, as the propositions they stand for are well established and not in dispute. It is, however, useful to note the key principle of interpretation that necessarily follows: while solicitor-client privilege may be abrogated by statute, legislation appearing to do so must be interpreted restrictively and the language used must demonstrate a clear and unambiguous intent to do so. The privilege may not be set aside by inference: *University of Calgary* at para. 28; *Blood Tribe* at para. 11; and *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 33.

[23] Both parties also cite *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427, which was considered by the judge and is a useful authority. One of the issues before the court there was whether the Information and Privacy Commissioner appointed pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*] had jurisdiction to adjudicate claims of solicitor-client privilege made under s. 14 of the statute.

[24] The matter came before the Supreme Court by way of an application for judicial review of the Privacy Commissioner's determination that the applicant school board could not invoke s. 14 of the *FOIPPA* to withhold records relating to the expenditure of legal fees on the basis of solicitor-client privilege.

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[25] Justice Butler, as he then was, noted the potential conflict between the modern approach to statutory interpretation, which requires a broad, purposive and contextual interpretation of the statutory language, and the principles emanating from cases like *Blood Tribe* directing that legislation be interpreted restrictively to prevent incursions on solicitor-client privilege (at para. 48). Justice Butler approached that potential conflict as follows:

> [48] … I agree, however, with the statement expressed by the court in [*Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General*), 2011 NLCA 69 at paras. 29-32: a strict or restrictive interpretation will only be resorted to where there are multiple interpretations following a contextual, purposive analysis. If a purposive analysis yields an interpretation that authorizes encroachment of solicitor-client confidentiality, then the substantive rule requires a second step to the analysis. At the second step of the analysis, the court must be satisfied that the specific exercise of the authority is "absolutely necessary to achieve the ends sought by the enabling legislation": *Descôteaux* at 875.
>
> [49] Summarizing the proper approach, the first step is to consider whether a purposive, remedial construction of the express provisions of the *Act* gives rise to more than one possible interpretation. If the *Act* is capable of two interpretations, one involving the abrogation of solicitor-client privilege and the other not, the court must favour the interpretation that respects the privilege. If, however, there is only one possible interpretation, and that interpretation allows an incursion on solicitor-client privilege, then the court must be satisfied that the incursion is necessary to achieve the objects of the legislation. A restrictive interpretation is only necessary where the provisions of an *Act* are ambiguous and the court is required by the substantive rule to prevent an incursion into solicitor-client privilege.

[26] Applying this approach, Butler J. concluded that there was only one possible interpretation of the applicable *FOIPPA* provisions—that being that the legislature intended to give the Commissioner the power to adjudicate questions of solicitor-client privilege (at para. 50).

Analysis

[27] As a preliminary point, the judge observed that before her, the parties spent a significant portion of their submissions addressing the question of who is the "client" in respect of legal opinions obtained by the Strata Council (RFJ at para. 64).

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[28] The judge reviewed a number of relevant authorities as well as the provisions of the *SPA* and concluded that:

> [70] … a strata corporation is a separate legal entity from its owners, and …when the Strata council retains legal counsel, it does so on behalf of the legal entity that is a strata corporation. Simply put, the individual owners are not each clients of the legal counsel retained to represent council…

[29] Mr. Mitchinson does not challenge this finding on appeal. Thus, his principal argument is not that he was entitled to the Legal Opinions due to his status as a client of the lawyers who provided the Legal Opinions. Rather, he submits that the temporal limitation placed by the judge on the Strata Council's obligation to produce the Opinions is inconsistent with the clear language and legislative purpose of the *SPA*.

[30] Specifically, Mr. Mitchinson submits:

a) The combined effect of ss. 35(2)(h) and 36(1) and (3) of the *SPA* is that the Strata Council was required to produce the Legal Opinions within two weeks of receiving a disclosure request. The clear language of the *SPA* does not permit the temporal limitation imposed by the judge (or indeed any temporal limitation). The only limitation is that set out in s. 169(1)(b) which prohibits disclosure to owners engaged in litigation against the strata; and

b) The temporal limitation is also inconsistent with the legislative intention behind the *SPA* to provide transparency for strata owners so that they can properly understand their strata's legal position and assess whether the strata is being properly managed. This is important because the strata owners play an important role in the governance of the strata.

[31] The first step in the analysis is to determine whether the language used in the *SPA* demonstrates the requisite clear and unambiguous intention to abrogate solicitor-client privilege.

[32] The decision of the Supreme Court of Canada in *University of Calgary* provides useful guidance for approaching this question. There, a former employee of the university brought a claim for constructive dismissal. In conjunction with the claim, the former employee made a request for access to information pursuant to the Alberta *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 [*Act*], seeking the university's records about her. The university provided some records in response to the request but claimed solicitor-client privilege over others. She then applied for production of the withheld records. A delegate of the Information and Privacy Commissioner initiated an inquiry in accordance with the protocol established by the Commissioner for assessing claims of privilege. The university declined to produce copies of the allegedly privileged records which resulted in the delegate issuing a notice requiring production pursuant to s. 56(3) of the *Act*, which states:

> Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2). [Subsections (1) and (2) give the Commissioner the power to conduct inquiries and to require production of records].
>
> [Emphasis added.]

[33] The university sought judicial review of the delegate's decision to issue the notice. The reviewing judge upheld the delegate's decision (2013 ABQB 652), but the Alberta Court of Appeal subsequently allowed the appeal (2015 ABCA 118). The Court of Appeal held that the Commissioner lacked statutory authority to compel production of records over which solicitor-client privilege was asserted. Specifically, the Court held that disclosure would require an inference that "any privilege of the law of evidence", the phrase used in s. 56(3), refers to solicitor-client privilege. Given the Supreme Court of Canada's instruction that privilege cannot be abrogated by inference (*Blood Tribe* at para. 11), the language of s. 56(3) was found to lack the necessary clear legislative intent (at para. 59).

[34] The Supreme Court agreed with the Court of Appeal. Justice Côté, for the majority, held that the phrase "any privilege of the law of evidence" is not sufficiently

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clear and precise to set aside or permit an infringement of solicitor-client privilege (at para. 37). She reached this conclusion for a number of reasons:

a) Solicitor-client privilege has evolved from a rule of evidence to a rule of substance, which must remain as close to absolute as possible and which should not be interfered with unless absolutely necessary (at paras. 38, 43);

b) The expression “privilege of the law of evidence” does not adequately identify the broader substantive interests protected by solicitor-client privilege, thus it is not sufficiently “clear, explicit and unequivocal” to evince legislative intent to set aside solicitor-client privilege (at para. 44);

c) A reading of s. 56(3) in the context of the *Act* as a whole supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. For example, other sections of the *Act* (for example, s. 27(1)) explicitly provide that the head of a public body may refuse to disclose information that is subject to “any type of legal privilege, including solicitor-client privilege”. This is the type of clear, explicit and unequivocal language that is absent from s. 56(3) (at paras. 51–53); and

d) Had the legislature intended to set aside solicitor-client privilege, it would have included statutory safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. Further, the *Act* does not address whether disclosure of solicitor-client privileged documents to the Commission constitutes a waiver of privilege with respect to other persons. The absence of any such guidance in the statute suggests that the legislature did not intend to pierce the privilege (at para. 58).

[35] In considering whether statutory language is sufficiently clear to evince an intention to abrogate solicitor-client privilege, it is useful to also note the Supreme Court of Canada’s observation in *Lizotte* at para. 61 that:

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> …the legislature does not necessarily have to use the term ‘solicitor-client privilege” in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege.

[36] This statement, however, was not meant to usurp the principle established in *Blood Tribe* (at para. 11) that “privilege cannot be abrogated by inference”: *Ontario (Auditor General) v. Laurentian University*, 2023 ONCA 299 at para. 32. As further noted by the Court in *Laurentian University* at para. 32:

> Determining if there is another expression which unambiguously refers to privilege is a separate and distinct matter from making multi-level inferences about how provisions in a statute allow for the abrogation of privilege.

[37] This brings me back to the key question of whether the language used in the *SPA* is sufficiently clear, explicit and unequivocal to evince an intention to abrogate solicitor-client privilege. In my view, it is not. While I accept Mr. Mitchinson’s characterization that recent amendments to the *SPA* were intended to increase transparency around the management of a strata for the benefit of strata owners, that general objective cannot overcome the absence of clear language specifically addressing the issue of privilege. As the Court held in *University of Calgary* at para. 28, quoting from *Canada (National Revenue) v. Thompson*, 2016 SCC 21:

> [25] … [I]t is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. <u>Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history</u>, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect.
>
> [Emphasis added.]

[38] Respectfully, the reasons of the CRT do not engage fully with the fundamental question of whether the statutory language explicitly abrogates solicitor-client privilege.

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[39] As set out above, s. 35(2) of the *SPA* imposes a general obligation on a strata council to retain copies of various records, including under subsection (h): “any decision of an arbitrator or judge, or of the civil resolution tribunal, in a proceeding in which the strata corporation was a party, and any legal opinions obtained by the strata corporation”. Section 36(1) then requires production of the records upon request by a strata owner.

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[40] Neither section, read individually or in tandem, explicitly addresses the issue of solicitor-client privilege. In my view, inclusion of “legal opinions” in the list of records that must be retained, and produced on request, cannot to be interpreted as requiring the abrogation of privilege. Justice Burnyeat made this point in *Azura*:

> [67] The Legislature would have to have used very specific language in the Act before it would be clear that solicitor/client privilege could be waived or breached once a request was made under s. 36(2) of the Act. That very specific language has not been incorporated by the Legislature into this Act.

[41] The term “legal opinions” is not defined in the *SPA* but it can fairly be inferred that use of the term was intended to capture documents and/or communications containing legal advice. However, applying *University of Calgary* at para. 44 (see para. 34(b) above), the term “legal opinions” does not adequately identify the broader substantive interests protected by solicitor-client privilege. Therefore, the statutory language used by the *SPA* is not sufficiently “clear, explicit and unequivocal” to evince legislative intent to set aside solicitor-client privilege. Put another way, to find a legislative intention to abrogate solicitor-client privilege would require the Court to draw an inference from the general, open-textured language in ss. 35(2), 36(1), and 169(1). This, the Court cannot do.

[42] I also note, again drawing on *University of Calgary,* that the legislature has not legislated any safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. Nor does the *SPA* provide a mechanism for resolving disputes about whether a record is privileged or address whether disclosure of solicitor-client privileged documents to an owner under s. 36(1) constitutes a waiver of privilege with respect to other persons. As held

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by the Court in *University of Calgary*, the "absence…of any guidance on when and to what extent solicitor–client privilege may be set aside suggests that the legislature did not intend to pierce the privilege" (at para. 58).

[43] This can be contrasted with the powers accorded to the Information and Privacy Commissioner of British Columbia, which have been interpreted to compel production of documents subject to solicitor-client privilege, in part due to a provision that preserves the privilege on production: see *University of Calgary* at paras. 60, 64 and *School District No. 49* at paras. 52–53.

[44] As noted, Mr. Mitchinson submits that because s. 169(1)(b) contains a specific limitation on the production of records referred to in s. 35(2) (including legal opinions) to owners involved in litigation with the strata, it follows that the legislature must have intended that production of such records must be available to all other owners. I do not agree. Like s. 35(2), s. 169(1)(b) makes no mention of solicitor-client privilege. For example, it does not state that solicitor-client privilege is retained vis-à-vis owners involved in litigation with the strata, but waived in respect of all other owners, nor does it address the consequences of such a partial waiver. Further, this argument effectively asks the Court to infer, based upon the interplay between ss. 35(2), 36(1) and 169(1), rather than any explicit language, that the legislature intended to abrogate solicitor-client privilege. The court in *Laurentian University* rejected a similar argument on the basis that it "would require reading into the statute something that is not expressly there, contrary to the principles in *Blood Tribe*" (at para. 32). I reject this argument for the same reason.

[45] For all of the above reasons, I find that ss. 35(2)(h) and 36(1)(a), when read individually or together, are not sufficiently clear, explicit and unequivocal to evince an intention to abrogate solicitor-client privilege by requiring the Strata to produce records over which such privilege is claimed.

[46] In my view, this interpretation does not unduly impair the *SPA*'s objective of greater transparency for strata lot owners given the breadth of other records set out in s. 35(2) that are producible under s. 36(1). Nor does this interpretation render

meaningless the reference to “legal opinions” in s. 35(2)(h). It is open to the Strata, in response to a request from an owner, to voluntarily waive privilege over, and produce, legal opinions relating to matters that do not concern litigation or matters that are not contentious. It is also open to the Strata to waive privilege at the completion of a legal proceeding, as contemplated by the judge below.

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[47] This brings me to the judge’s imposition of a temporal limitation on the production of the Legal Opinions to Mr. Mitchinson. The judge described the interpretation supporting such a limitation as an appropriate balancing exercise. Specifically, the judge said:

> [125] I am satisfied that this is an appropriate statutory interpretation of these sections, which appropriately balances the protection of solicitor-client privilege and the interests of strata owners in understanding the legal positions the strata corporation is taking. To order immediate disclosure risks a significant dilution of solicitor-client privilege, and further risks the potential inadvertent waiver of privileged information to the detriment of the litigation strategy of the strata corporation. This would ultimately be to the detriment of strata owners. To be clear, I base this decision upon balancing the interests of strata owners in reviewing the privileged legal opinions their strata corporation obtains, with the importance of protecting and maintaining solicitor-client privilege as a fundamental principle of our rule of law.

[48] I do not disagree with the judge that this approach would strike a reasonable balance if, in fact, the legislature had enacted it. However, the legislature did not. In my respectful view, the interpretation adopted by the judge is not one that can be supported on the language of the *SPA* as currently drafted and in light of the restrictive approach to abrogating privilege emphasized by the Supreme Court of Canada. I reach this conclusion for the following reasons.

[49] First, I have already found that ss. 35(2) and 36(1)(a) do not require the abrogation of solicitor-client privilege. That finding does not change merely because production of the privileged records is delayed. Solicitor-client privilege is not time limited; rather it has an element of permanence to it. For example, privileged communications about litigation matters continue to be privileged after the completion of the litigation: *British Columbia (Attorney General) v. Canadian*

Constitution Foundation at para. 74; *and Blank v. Canada (Department of Justice)*, 2006 SCC 39 at para. 37.

[50] Indeed, the judge recognized this as reflected in her interpretation of s. 169(1)(b) that legal opinions relating to litigation between the strata and an owner are never producible to the involved owner (RFJ at para. 130(a)).

[51] Second, the Supreme Court of Canada has specifically rejected the balancing exercise engaged in by the judge. As stated in *R. v. McClure*, 2001 SCC 14 at para. 35:

> … solicitor-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.

See also: *Blood Tribe* at para. 9, *University of Calgary* at para. 43.

[52] Finally, by imposing the temporal limitation, the judge has effectively written into the *SPA* a requirement that was never intended by the legislature. As the judge noted, there was no evidence that the legislature ever considered the appropriate timing of disclosure for legal opinions (RFJ at para. 122). Respectfully, the judge's approach runs afoul of the well-established authorities holding that it is not the function of the court to rewrite legislation. As Justice Charron stated in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25:

> [40] The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.

[53] Similarly, in *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, Justice Binnie observed:

> [15] We cannot wish away the statutory language, however, much practical sense is reflected in the result reached by the courts below.

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See also: *R. v. McIntosh*, 1995 CanLII 124, [1995] 1 S.C.R. 686 at 701; *R. v. Hinchey*, [1996] 3 S.C.R. 1128 at 1137; and *R. v. Francisco*, 2023 BCCA 450 at para. 55.

[54] This principle applies with particular force to legislation alleged to abrogate solicitor-client privilege given the clear direction of the Supreme Court of Canada that solicitor-client privilege cannot be abrogated by inference, but only by clear, explicit and unequivocal language evincing the intention to do so.

[55] Both Justice Burnyeat in *Azura SC* (at para. 71) and the judge here (RFJ at para. 97) observed that it was "unfortunate" that the legislature did not enact separate provisions under s. 35(2) to deal with legal opinions obtained by a strata corporation. That term might also fairly apply to the results of this decision, at least from the perspective of strata owners. However, as set out in the authorities canvassed above, it is not the role of the Court to fill that legislative gap by effectively rewriting the legislation.

Conclusion

[56] For the reasons set out above, I find that ss. 35(2) and 36 of the *SPA* do not clearly, explicitly, and unequivocally evince a legislative intent requiring a strata to produce records over which it claims solicitor-client privilege.

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[57] I would therefore allow the appeal and set aside paras. 1–3 of the judge's order. However, rather than reinstating the decision of the CRT, I would also set aside paras. 1–2 of the order of the CRT dated December 16, 2020, and substitute an order that Mr. Mitchinson's application for production of the Legal Opinions is dismissed.

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"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Fisher"