COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lamarche v. British Columbia (Securities Commission),* 2025 BCCA 146

Date: 20250505
Docket: CA50004

Between:

Jean Andrew Lamarche

Appellant
(Plaintiff)

And

British Columbia Securities Commission, Attorney General of British Columbia and

Respondent
(Defendants)

And

Attorney General of Canada

Respondent
(Pursuant to the *Constitutional Question Act*)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated June 28, 2024 (*Lamarche v. British Columbia (Securities Commission)*, 2024 BCSC 1137, Vancouver Docket S236673).

Counsel for the Appellant:	J. Narwal, K.C.
Counsel for the Respondent, British Columbia Securities Commission:	M.S. Smith
Counsel for the Respondent, Attorney General of British Columbia:	J.G. Penner

Place and Date of Hearing:	Vancouver, British Columbia January 10, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 5, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

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

Summary:

The appellant's email records, some of which he claims are subject to solicitor-client privilege, were seized as part of an investigation by the Securities Commission, pursuant to s. 144 of the Securities Act. The appellant brought a Notice of Civil Claim against the Commission, alleging Charter breaches and breaches of the Privacy Act. On an application brought by the Commission, the chambers judge stayed the appellant's constitutional claims until the ongoing administrative process at the Commission concludes; she also struck the appellant's claims under the Privacy Act.

Held: Appeal allowed in part. While the judge did not err in staying the appellant's constitutional claims, she erred in striking his claims under the Privacy Act. However, those claims should likewise be stayed until the Commission's process is completed.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal arises from an application brought by the British Columbia Securities and Exchange Commission (the "Commission") to stay and strike portions of the Notice of Civil Claim ("NOCC") filed by the appellant, Jean Andre Lamarche, given the Commission's ongoing administrative process and its submission that certain of Mr. Lamarche's claims disclosed no reasonable cause of action.

[2] The chambers judge granted the relief sought, and Mr. Lamarche appeals to this Court.

[3] In December 2022, the Commission issued a Notice of Hearing to Mr. Lamarche, which alleged that he had engaged in unregistered trading and advising contrary to the *Securities Act,* R.S.B.C. 1996, c. 418 (the *Act*). Mr. Lamarche subsequently learned, through the Commission's disclosure, that it had requested and obtained his email records from Shaw Communications Inc. ("Shaw"), from June 1, 2017, to November 23, 2020, pursuant to s. 144 of the *Act,* which provides, in part:

> **144** (1) An investigator appointed under section 142, 143.1 or 147 has the same power
>
> (a) to summon and enforce the attendance of witnesses,

> (b) to compel witnesses to give evidence on oath or in any other manner,
>
> (b.1) to compel witnesses to preserve records and things or classes of records and things, and
>
> (c) to compel witnesses to provide information or to produce records and things and classes of records and things
>
> as the Supreme Court has for the trial of civil actions.
>
> …

[4] Although Mr. Lamarche had legal representation, there were no limitations or restrictions applied to the records request to protect solicitor-client privilege. He subsequently brought the underlying action, seeking a declaration pursuant to s. 52 of the *Constitution Act, 1982*, that s. 144 of the *Act* is unconstitutional to the extent that it creates an impermissible risk that communications subject to solicitor-client privilege will be compromised. He further claimed violations of his ss. 7 and 8 *Charter* rights, and sought *Charter* damages, damages pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373, and punitive damages.

[5] In its application to have the NOCC struck or stayed, the Commission's position was that it is an impartial, quasi-judicial body with authority to adjudicate the legal issues raised by Mr. Lamarche (with the exception of issuing a general declaration of invalidity pursuant to s. 52 of the *Constitution Act, 1982*), and that Mr. Lamarche should not be permitted to "take an end run" around the administrative process by bringing an action before the Commission's process had concluded. The Commission also submitted that Mr. Lamarche's claims for damages—including punitive damages, *Charter* damages, and damages pursuant to the *Privacy Act*—should be struck pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the *Rules*).

[6] For the reasons that follow, I would grant the appeal to the limited extent of setting aside the judge's order striking Mr. Lamarche's claims under the *Privacy Act*. I would dismiss the other grounds of appeal.

The Chambers Judgment

[7] The chambers judge's reasons are indexed as *Lamarche v. British Columbia (Securities Commission),* 2024 BCSC 1137.

[8] The judge began by summarizing the statutory framework, noting that in its regulatory role with respect to capital markets in British Columbia, the Commission has an enforcement division as well as a separate tribunal. The tribunal is empowered to hear and decide legal questions, including constitutional ones, arising within the Commission's statutory mandate, pursuant to s. 4.1 of the *Act* and *s.* 43 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 (the *ATA*).

[9] Noting what she described as the general rule that "absent exceptional circumstances, litigants should exhaust administrative remedies before applying to court for a remedy" (at para. 19, citing *C.B. Powell Limited v. Canada (Border Services Agency),* 2010 FCA 61), the judge approached the question of whether to stay Mr. Lamarche's constitutional claims under Rule 9-5(1)(b) as depending on whether "exceptional circumstances" were present: at para. 28. She referred to this Court's decision in *Chu v. British Columbia (Police Complaint Commission)*, 2021 BCCA 174, for the "six factors typically canvassed in assessing exceptionality" (at para. 21):

> [66] Factors to consider in determining whether the Court's discretion to intervene early, which have been described under the rubric of "special" or "exceptional circumstances", may include hardship or prejudice to the applicant; waste of resources; delay if judicial review proceeds; fragmentation of proceedings; the strength of the case; and the statutory context …
>
> [Citations omitted; emphasis added.]

[10] Considering the factors set out in *Chu,* the judge reached the following conclusions:

a) Statutory context: the judge found that the statutory context did not militate towards a finding of exceptionality: at paras. 37–47. This conclusion was premised on her findings that the Commission's tribunal is competent to adjudicate claims of confidentiality and privilege (citing this Court's

decision in *A.B. v. B.C. Securities Commission,* 2004 BCCA 249, as an example of a litigant being barred from circumventing the administrative process prior to its completion, notwithstanding that their claim related to solicitor-client privilege) and that, while the Commission cannot issue a declaration of invalidity, it may still "refuse to give effect to legislation it considers unconstitutional": at para. 42.

b) Strength of the case: while the judge was satisfied that Mr. Lamarche had established a *prima facie* case against the constitutionality of s. 144 of the *Act,* she emphasised that other "cases where a constitutional infringement had already allegedly occurred…[have not been] considered exceptional". She was of the view that Mr. Lamarche's case was not "so strong as to render it exceptional": at paras. 51–54.

c) Fragmentation of proceedings: the judge found that this factor militated against a finding of exceptionality: at paras. 55–60, citing *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 at para. 46. Relatedly, the judge also found that the factor of resource waste and delay militated against a finding of exceptionality: at paras. 61–63.

d) Hardship or prejudice: although the judge accepted that the fact that "the applicable statutory appeal is by leave [to the Court of Appeal]…could be said to invite some prejudice" to Mr. Lamarche, this was not, in her view, sufficient grounds for a finding of exceptionality: at para. 64. Similarly, while Mr. Lamarche would not be able to, if successful, receive the remedy of a declaration of general invalidity, for the reasons given elsewhere the judge maintained that this was "not a bar to the matter proceeding at the Commission": at paras. 64–65.

[11] Having "considered and applied the factors from *Chu*", the judge decided that Mr. Lamarche's circumstances were not exceptional and that, accordingly, he would

first have to exhaust the Commission's process before turning to the courts: at para. 67. Accordingly, she stayed Mr. Lamarche's constitutional claims.

[12] I will address the judge's reasons striking Mr. Lamarche's claims under the *Privacy Act* below.

Issues and Standard of Review

[13] I would summarize the issues on appeal as being whether the judge erred:

a) In her identification and application of the correct test for declining jurisdiction over the constitutional claims, that is, in approaching the question from the perspective of prematurity (according to the *Chu* factors) as opposed to a failure to exhaust adequate internal remedies;

b) In her application of the *Chu* factors; and

c) In striking Mr. Lamarche's claims under the *Privacy Act.*

[14] These issues attract different standards of review. Decisions made pursuant to Rule 9-5(1)(b)—pursuant to which the judge found that Mr. Lamarche's claim was "unnecessary" and therefore should be stayed—are discretionary in nature: *FORCOMP Forest Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 15. Such a decision will not be overturned unless the judge gave insufficient or no weight to relevant considerations, relied on a palpable and overriding error of fact, or was so clearly wrong as to amount to an injustice: *British Columbia (Director of Civil Forfeiture) v. Conrad*, 2024 BCCA 10 at para. 52. The standard of review that applies to a judge's determination, pursuant to Rule 9-5(1)(a), that a pleading does not disclose a reasonable cause of action is correctness: *E.B. v. British Columbia (Child, Family and Community Services)*, 2021 BCCA 47 at para. 31.

Issue #1: Whether the Judge Identified and Applied the Correct Test for Declining Jurisdiction Over the Constitutional Claims

The Parties' Positions

[15] Mr. Lamarche argues that the judge incorrectly limited her analysis of the "proper forum" in which to hear his claims to the issue of prematurity, and, in so doing, failed to engage with the "separate and key issue of adequate remedy". He also submits that the judge incorrectly analyzed his claims under the framework from *Chu,* and that prematurity and the presence or absence of adequate alternative remedies are legally distinct; in his submission, relying on *Saskatoon (City) v. Wal-Mart Canada Corp.,* 2019 SKCA 3 at paras. 78–80 and *McDowell v. Automatic Princess Holdings, LLC*, 2017 FCA 126 at paras. 26–28, the judge's "conflation" of these two doctrines amounts to an error of law.

[16] He says that the judge erred in relying on *Chu,* in that the decision "dealt solely with the issue of prematurity". He points to the Supreme Court of Canada's decision in *Strickland v. Canada (Attorney General),* 2015 SCC 37, as properly describing the factors that are relevant to the doctrine of adequate alternative remedies and submits that the judge "clearly misdirected herself" in failing to consider the following through the lens of "adequate remedy and appropriate forum":

a) Mr. Lamarche's claim raises questions of solicitor-client privilege;

b) In his view, the Commission cannot have jurisdiction to adjudicate those claims, because solicitor-client privilege cannot be abrogated by inference, and nothing in the *Act* or any other statute expressly permits the Commission to do so; and

c) The fact that the Commission cannot make a declaration of general invalidity militates, in his view, in favour of the balance of convenience permitting his claims to proceed before a judge prior to the conclusion of the Commission's process.

[17] The Commission's position is that the judge applied the correct test in reaching her decision to stay Mr. Lamarche's constitutional claims and did not fail to give weight to any relevant considerations. It argues that although the judge used the word "premature" on one occasion and referred to *Chu,* her discretionary decision to decline jurisdiction over the constitutional claims (pending the completion of the administrative process) was clearly made under the doctrine of the exhaustion of alternative remedies. At no point, it says, did the judge expressly or implicitly find that Mr. Lamarche's claims were premature.

[18] The Commission, stressing its special expertise in interpreting its home statute, submits that it has jurisdiction to hear the constitutional claims and that while it cannot issue a declaration of invalidity, it can decline to apply a law it considers to be unconstitutional and provide individualized relief under s. 24(1) of the *Charter*. It emphasizes that disputes under the *Charter,* especially in regulatory contexts, do not take place in a vacuum, and that the courts' ability to effectively adjudicate Mr. Lamarche's challenge to s. 144 of the *Act* will be improved by having the benefit of the record compiled at the Commission.

[19] The Province adopts the Commission's submissions and also submits that there is no basis upon which to "elevate" issues of solicitor-client privilege above constitutional issues generally. It says that Mr. Lamarche's arguments as to the balance of convenience are flawed in that they presuppose that the Commission lacks jurisdiction and that he will be unsuccessful in his claims before it.

Discussion

Prematurity/Adequate Alternative Remedies

[20] I first observe that the judge began her analysis of this issue with a review of *C.B. Powell.* In *C.B. Powell,* as the judge noted, the Federal Court of Appeal emphasized that certain administrative law principles relating to when an individual may seek relief in court—exhaustion, adequate alternative remedies, non-fragmentation, the rule against interlocutory judicial review, and prematurity—are all animated by a more basic principle: "absent exceptional circumstances, parties

cannot proceed to the court system until the administrative process has run its course": *C.B. Powell* at para. 31. This default position of judicial restraint is animated by various considerations, including administrative competency and regulatory experience, resource efficiency, and improvements to the record that will ultimately go before the court, an especially important consideration in constitutional cases: on this last point, see *Nova Scotia (Worker's Compensation Board) v. Martin,* 2003 SCC 54 at para. 24.

[21] At the apex of these considerations is what could be termed the "exceptional circumstances" rule, which speaks to respect, on the part of the courts, for the legislature's decision to confer authority and jurisdiction upon a specialist administrative body. While this does not equate to decisions of administrative bodies being immune from meaningful review, it does mean that, absent exceptional circumstances, the administrative decision-maker gets to "go first". In my view, this proposition, which the judge identified at para. 31 of her reasons, finds ample support in the cases that the judge relied upon in her reasons.

[22] It is noteworthy that this general presumption in favour of permitting the administrative process to run its course prior to judicial intervention forms a part of the jurisprudence of *both* the doctrines of prematurity and exhaustion of internal remedies: see, for example, *Smolensky v. British Columbia Securities Commission*, 2004 BCCA 81 at para. 6; *DioGuardi Tax Law v. Law Society of Upper Canada*, 2015 ONSC 3430, aff'd 2016 ONCA 531, leave to appeal to the Supreme Court of Canada refused. This point was expressly recognized in *Chu,* which cited *C.B. Powell* for the proposition that the "prematurity principle's underlying aims overlap with those of similar doctrines, like the adequate alternative remedies doctrine": *Chu* at para. 65. This Court went on to describe the factors a court should "consider in determining whether to exercise the Court's discretion to intervene early": at para. 66. The general principles that apply in the exercise of this discretion also apply to constitutional issues: *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *R v. Conway*, 2010 SCC 22.

[23] Accordingly, while Mr. Lamarche may be technically correct in submitting that *Chu* was "about" prematurity in the sense that those were the facts of that case, the factors identified in *Chu* may nonetheless be relevant *wherever* a court considers whether to intervene "early", that is, before the administrative process has run its full course. Viewed from this perspective, I would disagree with Mr. Lamarche when he submits in his factum that "*Chu* dealt solely with the issue of prematurity".

[24] For these reasons, I cannot accede to the submission that the judge erred in approaching the question of whether Mr. Lamarche's constitutional claims should be stayed through the lens of the factors identified in *Chu.*

[25] Mr. Lamarche has submitted that the judge should have followed *Strickland* rather than *Chu.* While I have concluded that the judge did *not* err insofar as she relied on *Chu,* I would add that the analysis she undertook is also entirely in keeping with the considerations identified in *Strickland.* This further supports, in my view, the proposition that the related doctrines of exhaustion of internal remedies, adequate alternative remedies, prematurity, and the like, share a common basis in principle.

[26] In *Strickland,* at para. 42, the Court identified a number of "considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application"[1]:

a) the convenience of the alternative remedy;

b) the nature of the error alleged;

c) the nature of the other forum that could deal with the issue, including its remedial capacity;

d) the existence of adequate and effective recourse in the forum in which litigation is already taking place;

e) expeditiousness; the relative expertise of the alternative decision-maker;

f) the economical use of judicial resources; and

[1] Mr. Lamarche did not seek judicial review; he initiated a private action by means of a NOCC.

g) cost.

[27] Ultimately, the Court in *Strickland* stressed that these factors do not amount to a "checklist": at para. 43. Rather, a form of "balancing exercise" is to be undertaken with reference to these (and potentially other) factors, with a view to the "purposes and policy considerations underpinning the legislative scheme in issue": at para. 44. In particular, at para. 44, the Court adopted the following description of what goes into a court's decision to deny relief:

> While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief.
>
> [Emphasis in original].

[28] *Strickland*, then, is another example of the respectful stance towards the administrative process that was described in *C.B. Powell* and *Chu.* Far from constituting entirely different frameworks, the doctrines that describe the courts' discretion to prevent a litigant from seeking relief in court prior to the conclusion of the administrative process are further examples of the broader principle that courts should respect the legislature's decision to constitute, and confer authority and jurisdiction upon, specialist administrative bodies, and so should refrain from exercising jurisdiction until the administrative process has concluded. As with most principled rules, there are exceptions—in this case, that there may be "exceptional circumstances", as recognized in *C.B. Powell, Chu,* and the other authorities to which the judge referred, that permit a litigant to seek early relief in the courts.

[29] In my view, Mr. Lamarche has failed to establish that the judge erred in principle in either identifying the proper framework or in approaching her analysis through the lens of the factors set out in *Chu.*

[30] The judge carefully considered the Commission's remedial capacity and jurisdiction, and was alive to its unique expertise in securities regulation. She

considered the difficulties and potentially unnecessary expenditure of judicial resources that would follow from bifurcating the proceedings, and, under the auspices of her overall analysis of whether "exceptional circumstances" had been established, considered the balance of convenience and implicitly held that it did not tilt in Mr. Lamarche's favour. Whether viewed through the lens of *Strickland* or *Chu*, the judge's analysis engaged properly with the question before her.

[31] Before concluding on the first ground of appeal, I will briefly address the appellant's argument that the Commission has no jurisdiction to adjudicate a claim of privilege, and that this factor militates against a stay of the court proceeding. Like the chambers judge, I consider it unnecessary to determine the Commission's jurisdiction to adjudicate privilege claims in order to decide the issues raised by the appellant. The Commission undeniably does have jurisdiction to determine the issues of statutory interpretation and constitutional law that are raised. Depending on the outcome of those issues, the specific claims of privilege may (or may not) require resolution. The Commission would then have to determine its own jurisdiction to adjudicate the claims of privilege, and potentially refer questions of solicitor-client privilege to the court to determine depending on the Commission's answer to the jurisdictional issue. The Commission points to s. 43(2) of the *ATA* in support of its ability to refer such questions to the court:

> **Discretion to refer questions of law to court**
>
> **43** …
>
> (2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.
>
> [Emphasis added.]

[32] The Commission submits that the process before it would, accordingly, proceed in stages. The first stage of the process would involve the Commission deciding three issues. First, as a matter of statutory interpretation, did s. 144 of the *Act* permit the Commission to seize the records in the manner they did? Second, if so, is s. 144 unconstitutional? Third, if the provision is not found to be

unconstitutional, perhaps as a result of the Commission demonstrating that it has established a constitutionally compliant process for protecting potentially privileged records, then was the proper process followed in this case? I would note that this "first stage" would not involve the Commission reviewing the disputed records to adjudicate Mr. Lamarche's claims of privilege.

[33] The Commission's position is that it should resolve these issues in the first instance because: (1) the *Act* is its home statute, and it has the presumptive expertise to interpret it; and (2) the constitutional issues Mr. Lamarche has raised will require evidence about, amongst other matters, what it referred to at the hearing of this appeal as the Commission's "protocol" for the seizure of documents alleged to subject to solicitor-client privilege. I would note there was no evidence in the record as to what that protocol consists of. The Commission says this evidence should be led before its Tribunal, at first instance, because it relates to its regulatory process.

[34] The question of whether it is necessary for the Commission to adjudicate the specific claims of privilege depends on the outcome of the issues at the first stage of the process. For example, if the Commission concluded that s. 144 of the *Act* did not authorize the seizure of the documents, either as a matter of statutory interpretation or because the provision is unconstitutional, it may be that the documents would have to be returned to the appellant. I am reluctant to engage in further speculation about what might flow from a decision on the issues at the first stage, because the remedial implications of any decision by the Commission is also a matter within the Commission's jurisdiction.

[35] It may be that the Commission will have to decide a fourth issue, concerning its own jurisdiction to adjudicate the privilege claims. Of course, the Commission can also make this decision without reviewing the documents. If the Commission determines that it does not have jurisdiction, it may refer questions of solicitor-client privilege to the court under s. 43(2) of the *ATA*.

[36] While some fragmentation may occur, it seems to me that there is considerable benefit to having the Commission decide the statutory interpretation

and constitutional issues at first instance, within the ambit of its experience in interpreting and applying its home statute. In fact, while this is ultimately for the Commission to decide, there would appear to be certain advantages to be gained by the Commission rendering one decision addressing all of the issues I outlined above, being: (1) the statutory interpretation of s. 144 of the *Act*; (2) the constitutional issues raised by Mr. Lamarche; and (3) the Commission's jurisdiction to review the records for privilege. As I have noted, all of these issues can be determined without the need for the Commission to review the documents for privilege.

[37] If the appellant wishes to challenge the Commission's decision on these issues, he can seek leave to this Court pursuant to s. 167(1) of the *Act*.

[38] For the foregoing reasons, I would not accede to the first ground of appeal.

Issue #2: Whether the Judge Erred in Applying the *Chu* Factors to the Question of Exhaustion of Internal Remedies

[39] Mr. Lamarche argues that insofar as the judge relied on the *Chu* factors, even if this itself was not an error, she erred in attributing insufficient weight to certain of those factors.

[40] This ground of appeal can be dealt with summarily.

[41] As I have observed, a discretionary decision may be vulnerable to appellate intervention where the judge gave "no or insufficient weight to a relevant consideration": *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27. This is not, however, an invitation to engage in a general reweighing of the factors considered by the judge below.

[42] There is considerable overlap between this ground of appeal and the first ground advanced by Mr. Lamarche. For the reasons set out above, I would also conclude that no reviewable error has been identified and I would dismiss this ground of appeal. In my view, the judge gave clear, cogent, and persuasive reasons for her conclusions in respect of the *Chu* factors, and considered—either implicitly or

explicitly—each of the considerations raised on appeal by Mr. Lamarche. I see no error in her decision.

Issue #3: Whether the Judge Erred in Striking the Appellant's Claims Under the *Privacy Act*

[43] The final issue that remains to be considered is whether the judge erred in striking Mr. Lamarche's claims for damages under the *Privacy Act* as disclosing no reasonable cause of action. The test for whether a pleading discloses no reasonable cause of action is whether it is "plain and obvious" that the claim will fail: *E.B.* at para. 34. The judge's conclusion on this issue is reviewable on a standard of correctness.

Positions of the Parties

[44] Mr. Lamarche submits that the judge erred in striking these claims because it is a well-established principle that a sufficient degree of recklessness is incompatible with a finding of good faith and the facts he has pleaded "clearly permit an inference of bad faith based on recklessness". He takes issue with the distinction the judge drew between a claim based on a breach of solicitor-client privilege and one based on a breach of privacy, and says that s. 144 of the *Act* cannot authorize seizure of records subject to solicitor-client privilege. Finally, he argues that the judge's third reason for striking his claim—the absence of material facts in the pleadings—is untenable in light of a proper understanding of the relevant legal principles. He argues that insofar as the judge erred in striking his claim for damages under the *Privacy Act,* she also erred in striking his claim for punitive damages.

[45] The Commission, supported by the Province, submits that the judge made no reviewable error in striking Mr. Lamarche's claims under the *Privacy Act.* It says that the partially immunizing provisions in the *Act* and the *Privacy Act,* as well as the authorities that outline what must be established to rebut an immunity that is conditional on good faith, set a very high standard of pleading, which Mr. Lamarche failed to meet.

Discussion

[46] As I have noted, to successfully challenge the partial immunity conferred upon the Commission by the *Act,* Mr. Lamarche will have to establish that the Commission did not act "in good faith": *Act*: s. 170(1)(c). In order to surpass the partial immunity described by the *Privacy Act,* he will need to establish either that: (1) the Commission did not act while "engaged in an investigation in the course of [its] duty under a law in force in British Columbia"; or (2) that the act or conduct complained of was "disproportionate to the gravity of the crime or matter subject to investigation": *Privacy Act, s.* 2(2).

[47] Mr. Lamarche will also have to establish the elements of the statutory tort set out in s. 1 of the *Privacy Act* by proving that the Commission "willfully and without a claim of right" violated his privacy: s. 1(1) of the *Privacy Act*. Section 2 of the *Privacy Act* sets out that the nature and degree of privacy to which Mr. Lamarche can be said to have been entitled is that "which is reasonable in the circumstances", and s. 3 instructs that in "determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties".

[48] I will deal first with the provision in the *Act* that shields the Commission from liability for acts or conduct done in good faith. While this Court has yet to definitively interpret s. 170 of the *Act,* I am guided by our decision in *Walkom v. Law Society of British Columbia,* 2019 BCCA 391. In *Walkom*, this Court considered the pleading requirements relating to a statutory immunity, similar to s. 170, set out in s. 86 of the *Legal Profession Act,* S.B.C. 1998, c. 9 (the *LPA*), which provides that no "action for damages lies against a person, for anything done or not done in good faith while acting or purporting to act on behalf" of the Law Society or under the *LPA.* The plaintiff's failure to plead "a lack of good faith" was fatal to his claim against the Law Society; this Court expressly chose to articulate the statutory immunity set out in s. 86 of the *LPA* in terms of "an absence of good faith, rather than the presence of bad faith": *Walkom* at para. 32.

[49] Without purporting to decide whether under s. 170 of the *Act* the absence of good faith necessitates a finding (and so a pleading) of bad faith, I will proceed upon the judge's determination that this is so, which finds some support in the case law (*Deep v. College of Physicians and Surgeons,* 2010 ONSC 5248 as cited in e.g., *Forum National Investments Ltd. v. British Columbia Securities Commission,* 2021 BCSC 1050 at paras. 72–74). While *Walkom* may appear to suggest an alternative path, the issue in this case can be disposed of without specifically addressing this question, which in my view should be left for another day.

[50] While the facts as pleaded should be taken as true for the purposes of an application to strike, the judge was correct in observing that a suitably "skeptical analysis" is appropriate where it is claimed that government officials have taken actions in bad faith: *Stephen v. HMTQ,* 2008 BCSC 1656 at para. 49; *Forum National Investments* at para. 66. In particular, this requires pleading specific material facts to ground an allegation of bad faith. The assertion of bad faith in general is not sufficient.

[51] Respectfully, I do not agree with the judge that Mr. Lamarche has failed to plead a factual foundation that, if true, could ground a finding of bad faith. The NOCC provides:

> 8. The Commission knew or ought to have known that the data provided by Shaw contained communications subject to solicitor-client privilege.
>
> …
>
> 10. The Commission failed to implement an effective protocol to ensure the protection of the Plaintiff's solicitor-client communications, which at a minimum required the Commission to (a) seal the records being examined, (b) notify the privilege holder, and (c) apply to assess the claim of solicitor-client privilege. This failure, coupled with deliberate and intentional acts by the Commission in seizing, searching, retaining, accessing and using the privileged communications constitute actions and omissions that are not done in good faith.
>
> [Emphasis added.]

[52] I would note that the three acts that Mr. Lamarche says constitute the "minimum" of an effective protocol to ensure the protection of solicitor-client privilege correspond to the framework identified by the Supreme Court of Canada in *Lavallee,*

Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink, 2002 SCC 61 [*Lavallee*].

[53] In *Lavallee,* the Court identified a series of principles it said were "meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege": at para. 49. *Lavallee* itself was concerned with searches by the police within the criminal context, but subsequent cases have relied upon it in the administrative and civil contexts: see, e.g., *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.,* 2006 SCC 36 at para. 39; *R v. Douglas,* 2017 MBCA 63; *Canada (Procureur général) c. Chambre des notaires du Québec*, 2014 QCCA 552.

[54] As I understand Mr. Lamarche's position—as identified by the facts he has pleaded in the NOCC and in the legal basis he sets out therein—it is that the Commission did not act in good faith insofar as it failed to adhere to the minimum standards which apply in order to protect solicitor-client privilege. On appeal, he urges that it is well-established that a sufficient degree of recklessness by a public actor can ground an inference of bad faith. Without purporting to comment on the ultimate merits of Mr. Lamarche's claims, there is some support for his legal position in the authorities: see, in particular, *Finney v. Barreau du Québec,* 2004 SCC 36, where a partial immunity for actions in "good faith" under s. 193 of Quebec's *Professional Code* was interpreted as not applying to acts that are seriously careless or reckless, these being understood as falling under the concept of "bad faith": *Hinse v. Canada (Attorney General),* 2015 SCC 35; *Horne v. Queen Elizabeth II Health Sciences Centre,* 2018 NSCA 20.

[55] In my view, Mr. Lamarche has pleaded material facts that, if true, could be capable in law of grounding a finding of bad faith. He pleads that the Commission failed to do three specific things (described in his pleadings, excerpted above) and that this failure, as a matter of law, amounted to a reckless disregard for the relevant legal standards and the importance of solicitor-client privilege. I interpret this argument as potentially speaking to what the Commission acknowledges is one way

to avoid the application of an immunity conditional on good faith, being "knowledge of circumstances"—in this case, the law surrounding the protection of solicitor-client privilege—"which ought to put the defendant with that knowledge on inquiry": *Madadi v. British Columbia,* 2018 BCSC 1891 at para. 51. I cannot say that Mr. Lamarche's claim, understood in these terms, is "bound to fail".

[56] The judge identified two other reasons as the basis for striking Mr. Lamarche's *Privacy Act* claim:

> [80] Second, in respect of s. 2(2)(d)(ii) of the *Privacy Act*, the applicable tortious act would be violating the privacy of the plaintiff; it is not the violation or infringement of SCP even if such an infringement could—in theory—simultaneously occur. To this extent, the recourse the plaintiff seeks relates precisely to the alleged access, retaining, and use of materials from Shaw, but the purpose of s. 1 of the *Privacy Act* is not to facilitate damages for breaches of the *Charter*. It is not disputed that this seizure of the materials from Shaw was authorized under s. 144 of the *Securities Act* even if, ultimately, that provision is found to be unconstitutional. To this extent, it would be a violation of privacy—the alleged seizure and review of the materials form Shaw—and not a violation of SCP that would weigh in the proportionality analysis. That allegedly tortious act is the exact sort of conduct contemplated by s. 2(2)(d)(ii) of the *Privacy Act* as not being a violation of privacy.
>
> [Emphasis added.]

[57] Respectfully, while I have some difficulty in interpreting this paragraph, it appears that the judge has concluded that the *Privacy Act* is not to be used as a vehicle to facilitate damages for breaches of the *Charter*. Thus, to the extent that Mr. Lamarche's complaint relates to a breach of solicitor-client privilege, it is not properly brought under the *Privacy Act.* A breach of solicitor-client privilege, in the judge's view, is distinct from an actionable invasion of privacy. In addition, s. 144 of the *Act,* on its face, authorized the Commission's seizure of the records from Shaw; as such, the only remaining issue under the *Privacy Act* would be proportionality. It seems that, implicitly, the judge must have been of the view that there was no basis for Mr. Lamarche to argue that the Commission acted in a disproportionate manner, although this is not explicitly stated in her reasons.

[58] Parenthetically on the issue of proportionality, I would note that solicitor-client privilege (outside of some exceedingly narrow contexts, for instance, where there is a serious, clear, and imminent risk to public safety) is an exception to the more familiar "balancing of interests" that permeates many areas of the law, including the partial immunity conferred by s. 2(2) of the *Privacy Act*. As the Supreme Court of Canada held in *Goodis* at para. 17, the question whether to disclose records subject to solicitor-client privilege does not involve a case-by-case balancing of interests; the privilege is as close to absolute as possible: citing *Lavallee* at para. 36; *Blood Tribe* at para. 9. There thus seems to me to be a legal—not a factual—question, in need of resolution, as to how to reconcile the *Privacy Act's* reference to proportionality with the near-absolute nature of solicitor-client privilege. Without purporting to comment on the merits of the underlying claim, it seems at least arguable that the unique constitutional nature of solicitor-client privilege mandates an interpretation of the *Privacy Act* that only recognizes breaches of the privilege as proportionate in a very narrow, exceptional set of circumstances.

[59] Furthermore, in my view, the judge was incorrect to distinguish solicitor-client privilege and privacy interests in the narrow manner she did. Solicitor-client privilege encompasses and is animated by a set of values extending *beyond* privacy, but privacy is nevertheless among its constituent values: "confidential communications to a lawyer represent an important exercise of the right to privacy", and are protected under s. 8 of the *Charter*: *Lavallee* at paras. 49–50; see also Mahmud Jamal (writing before his appointment to the bench) and Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) 20 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 213.

[60] I would add that the judge, in my view, was incorrect to conclude, without citing any authority, that the *Privacy Act* cannot ground claims the basis of which would also ground a claim for a breach of the *Charter.* This conclusion appears contrary to *Insurance Corporation of British Columbia v. Ari,* 2023 BCCA 331, in which this Court held that allegations of "s. 8 *Charter* breaches and tort breaches of

privacy are not separate and mutually exclusive silos of analysis": at paras. 41–94, and para. 71 in particular.

[61] The judge's third reason for striking Mr. Lamarche's *Privacy Act* claim was that "there is a lack of material facts pleaded and I find that there is no reasonable claim": at para. 81. The judge did not elaborate on this point, but, for the reasons I have stated, this finding cannot be sustained.

[62] One final point to be addressed is s. 1 of the *Privacy Act's* requirement that the breach of privacy occur "without claim of right", which has been interpreted as meaning without "an honest belief in a state of facts which, if it existed, would be legal justification or excuse": *St. Pierre v. Pacific Newspaper Group Inc. and Skulsky*, 2006 BCSC 241 at paras. 49–50. Mr. Lamarche argues, in his factum, that:

> …The privacy interests supporting solicitor-client privilege are so obvious in Canadian law that the Commission patently could not have an "honest belief" that it was justified in seizing privileged communications without adequate (or any) safeguards in place.
>
> [Emphasis added.]

[63] Given the legal—and indeed cultural—significance that attaches to solicitor-client privilege, I cannot say that this argument is "bound to fail"; it seems that there is, at least, an argument to be made on this point. Accordingly, I would set aside the portion of the judge's order striking Mr. Lamarche's claims under the *Privacy Act* and his associated claims for punitive damages.

[64] Mr. Lamarche notes that if these claims are allowed to proceed, there will be a bifurcation and potential duplication of proceedings, since the *Privacy Act* claim and the constitutional claims necessarily cover substantially similar factual and legal ground. He advances this as a reason for this Court to overturn the judge's stay of the constitutional claims. In my view, given the elevated costs, both to the parties and the legal system more generally, that inevitably result where proceedings are duplicated and the fact that Mr. Lamarche's claims under the *Privacy Act* are so closely related to the issues that will be adjudicated by the Commission, it would be in the interests of justice to stay Mr. Lamarche's claims under the *Privacy Act* until

the Commission's process is complete. I would make this order pursuant to Rule 9-5(1)(b) of the *Rules* and ss. 24 and 25 of the *Court of Appeal Act,* S.B.C. 2021, c. 6.

Conclusion

[65] I would grant the appeal to the extent that the judge's order striking Mr. Lamarche's claims under the *Privacy Act*, and his associated claims for punitive damages, is set aside. I would otherwise dismiss the appeal.

[66] In light of the divided success on appeal, I would make no order as to costs in this Court.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Horsman"