

Developments in the Legal Profession: *Lizotte*, *Alberta* and *Green* and the Growing Power of Privilege and Professional Regulators

Brooke MacKenzie*

I. INTRODUCTION

All decisions of the Supreme Court of Canada are of interest to some lawyers, but only some are of interest to *all* lawyers. In its 2016-2017 term, the Supreme Court of Canada released three such decisions about the law governing lawyers and the legal profession: *Lizotte v. Aviva Insurance Company of Canada*,¹ in which the Court determined that a legislative provision requiring parties to produce “any required document” did not override litigation privilege; *Alberta (Information and Privacy Commissioner) v. University of Calgary*,² in which the majority held that a provision requiring a public body to produce records “[d]espite ... any privilege of the law of evidence” was insufficiently clear to abrogate solicitor-client privilege; and *Green v. Law Society of Manitoba*,³ in which a majority affirmed a Law Society’s authority to suspend lawyers who fail to satisfy mandatory continuing professional development requirements.

This article will discuss each of *Lizotte*, *Alberta* and *Green*, and their practical implications for the legal profession. Taken together, these decisions reveal the significant protection our courts accord to privilege —

* J.D., LL.M., of the Ontario Bar. Brooke MacKenzie is the OBA Foundation Chief Justice of Ontario Fellow in Legal Ethics and Professionalism Studies (2017-2018), and a litigator at MacKenzie Barristers P.C. in Toronto, where her practice focuses on civil appeals and professional responsibility and liability issues.

¹ [2016] S.C.J. No. 52, [2016] 2 S.C.R. 521, 2016 SCC 52 (S.C.C.) [hereinafter “*Lizotte*”].

² [2016] S.C.J. No. 53, [2016] 2 S.C.R. 555, 2016 SCC 53 (S.C.C.) [hereinafter “*Alberta*”].

³ [2017] S.C.J. No. 20, 2017 SCC 20 (S.C.C.) [hereinafter “*Green*”].

whether solicitor-client privilege or otherwise — as well as the extent of a Law Society’s authority to enact rules intended to serve its public interest mandate, and to suspend lawyers who fail to comply with them.

II. LITIGATION PRIVILEGE: *LIZOTTE v. AVIVA INSURANCE COMPANY OF CANADA*

1. Background

Ms. Lizotte was the assistant syndic of the Chambre de l’assurance de dommages (the “Chamber”), a self-regulating organization responsible for overseeing various professionals working in the insurance field. In 2011, in the course of an inquiry into a claims adjuster, she asked the respondent Aviva Insurance Company (“Aviva”) to send her a complete copy of its claim file respecting one of its insureds. Aviva complied in part, but refused to produce certain documents in the file on the basis they were protected by litigation privilege; the insured had commenced legal proceedings against Aviva to receive compensation. Lizotte thus brought a motion to compel production of these documents on the basis that the relevant statute⁴ required an insurer to “forward any required document or information concerning the activities of a representative” whose professional conduct is being investigated by the Chamber,⁵ asserting that this was sufficient to defeat the privilege.⁶ Both the Quebec Superior Court and Quebec Court of Appeal dismissed Lizotte’s motion, concluding that litigation privilege could not be abrogated by legislation absent a provision that expressly does so.⁷

Interestingly, the insured and Aviva had reached an out-of-court settlement in 2013, ending the litigation in question and, accordingly, the litigation privilege. Aviva sent the entire file to the Chamber as requested shortly thereafter. Despite the fact that the case was moot on its facts, Lizotte and the Chamber proceeded with the motion and subsequent appeals — and

⁴ *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2 [hereinafter “ADFPS”].

⁵ Section 337 of the ADFPS provides: “337. Insurers, firms, independent partnerships and mutual fund dealers and scholarship plan dealers registered in accordance with Title V of the Securities Act (chapter V-1.1) must, at the request of a syndic, *forward any required document or information concerning the activities of a representative.*” (emphasis added by Gascon J. of the judgment in *Lizotte*, *supra*, note 1, at para. 7).

⁶ *Lizotte*, *supra*, note 1, at paras. 2, 6-8.

⁷ *Id.*, at paras. 12-17.

the Supreme Court granted leave to appeal — to determine whether Aviva had been entitled to assert litigation privilege in the face of a provision requiring insurers to provide “any required document” to the Chamber.⁸

2. The Court’s Analysis

(a) *The Purpose and Scope of Litigation Privilege*

The Supreme Court’s unanimous decision in *Lizotte* was authored by Gascon J. He articulated the central issue on appeal as “whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language”.⁹

Before answering this question, however, the Court described the meaning, history and import of litigation privilege. Litigation privilege renders immune from disclosure documents created for the dominant purpose of preparing for litigation. The “classic examples” of items to which litigation privilege may attach are a lawyer’s file and communications between a lawyer and third parties, such as an expert witness. Litigation privilege is a common law rule linked to solicitor-client privilege and intended to ensure the proper conduct of trials.¹⁰ The former Exchequer Court of Canada explained the rationale for litigation privilege as follows:

... a lawyer’s preparation of his client’s case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation.¹¹

The Court acknowledged that there had historically been some confusion between solicitor-client privilege and litigation privilege, but held that the “clear differences” between the two have been settled

⁸ *Id.*, at paras. 9-11.

⁹ *Id.*, at para. 18.

¹⁰ *Id.*, at paras. 19-20.

¹¹ *Susan Hosiery Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1969] 2 Ex. C.R. 27, at 33-34, [1969] C.T.C. 353 (Ex. Ct.), cited in *Lizotte*, *supra*, note 1, at para. 20.

law since the Court's 2006 decision in *Blank v. Canada*.¹² The distinctions were identified in *Blank* as follows:

- * The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process*;
- * Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends;
- * Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services;
- * Litigation privilege applies to non-confidential documents;
- * Litigation privilege is not directed at communications between solicitors and clients as such.¹³

The Court in *Blank* also emphasized the limits of litigation privilege, including that, “[u]nlike the solicitor-client privilege, it is neither absolute in scope nor permanent in duration”, and that it covers only those documents whose “dominant purpose” is litigation (and not those for which litigation is a “substantial purpose”).¹⁴

While acknowledging that litigation privilege has a limited scope, the Court rejected Lizotte's arguments that, as a consequence, it should be subjected to a balancing test and yield to overriding public interests, and cannot be asserted against third parties to the litigation in question. On the contrary, the Court clarified that litigation privilege is a class privilege, subject to defined exceptions rather than case-by-case balancing, and can be asserted against third parties, even if they are public investigators with a duty of confidentiality.¹⁵

First, the Court held that litigation privilege is a “class privilege”, which gives rise to a presumption of non-disclosure, as opposed to a case-by-case privilege, which depends on a contextual analysis, including a balancing of the interests at stake.¹⁶

¹² *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39, [2006] 2 S.C.R. 319, 2006 SCC 39 (S.C.C.) [hereinafter “*Blank*”].

¹³ *Lizotte, supra*, note 1, at para. 22, citing *Blank, supra*, note 12, at paras. 27, 28, 32, 34, 36 (citations omitted).

¹⁴ *Id.*, at para. 23, citing *Blank, supra*, note 12, at paras. 37, 60.

¹⁵ *Id.*, at paras. 26-31.

¹⁶ *Id.*, at paras. 32-33.

The Court's reasons for characterizing litigation privilege as a class privilege are, respectfully, somewhat circular. It analogized litigation privilege to other class privileges (namely settlement privilege and informer privilege), observing that each "has long been recognized by the courts and has been considered to entail a presumption of immunity from disclosure once the conditions for its application have been met".¹⁷ Further, it held that various lower courts and academic authors had explicitly characterized litigation privilege as a class privilege.¹⁸ On those bases, the Court concluded that litigation privilege is a class privilege, recognized by common law courts, and giving rise to a presumption of inadmissibility.¹⁹

The Court's reasoning effectively affirms that litigation privilege is a rule driven by its outcome — an assurance that documents prepared for the purpose of litigation will be immune from disclosure — rather than the application of some overarching legal principle. The Court emphasized the uncertainty that would be created by permitting a case-by-case balancing approach to litigation privilege, as proposed by the Appellant, which the Court held "would undermine the confidence of those who are protected by the privilege".²⁰

Accordingly, the Court proceeded to hold that litigation privilege is subject only to specific identified exceptions: those exceptions that apply to solicitor-client privilege (*i.e.*, public safety, where an accused's innocence is at stake, and criminal communications), and one additional exception, identified in *Blank*, where there is "evidence of the claimant party's abuse of process or similar blameworthy conduct".²¹ While accepting as "appealing" the potential for an exception to litigation privilege based on urgency and necessity (which would in effect accelerate the "natural" lapsing of litigation privilege" upon the conclusion of the litigation in question), the Court declined to decide whether such an exception would be justified, as the record before it in *Lizotte* (an appeal from a declaratory judgment) was insufficient to determine the issue.²² "For now", the Court held, it would limit its analysis to the already-defined exceptions.²³

¹⁷ *Id.*, at para. 34.

¹⁸ *Id.*, at para. 35.

¹⁹ *Id.*, at paras. 32-36.

²⁰ *Id.*, at para. 40.

²¹ *Id.*, at para. 41; *Blank*, *supra*, note 12, at para. 44; *Smith v. Jones*, [1999] S.C.J. No. 15, [1999] 1 S.C.R. 455 (S.C.C.).

²² *Lizotte*, *supra*, note 1, at paras. 43-45.

²³ *Id.*, at para. 45.

Finally, the Court soundly rejected the Appellant's argument that litigation privilege could not be asserted against her because she was a third-party investigator rather than a party to the litigation in question, declaring decidedly that "litigation privilege can be asserted against anyone, including administrative or criminal investigators ...".²⁴ The Court explained that to permit the disclosure of otherwise protected documents to third parties who do not have a duty of confidentiality would undermine the privilege and could result in precisely the harm it seeks to avoid. Moreover, the Court held, even if the third party has a duty of confidentiality, "it is far from certain, in light of the open court principle, that the documents that would otherwise be protected by litigation privilege would not have ... to be disclosed in the course of [subsequent] proceedings".²⁵ Circumscribing the protection of litigation privilege in such a manner, it held, could create a chilling effect, which could discourage lawyers from putting their ideas and work product in writing out of fear it may be disclosed.²⁶ The Court adopted a statement by the United States Supreme Court about the chilling effect that would result from any uncertainty in the applicability of litigation privilege:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.²⁷

(b) Application in Lizotte

These principles about the significance of litigation privilege serve as the background for the Court's determination of the issue before it: "whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language".²⁸

As a general principle, legislatures are presumed *not* to intend to change existing common law rules, such as privilege, in the absence of a

²⁴ *Id.*, at para. 47.

²⁵ *Id.*, at paras. 48, 50.

²⁶ *Id.*, at paras. 52-53.

²⁷ *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947), at 510-11, cited in *Lizotte*, *supra*, note 1, at para. 53.

²⁸ *Lizotte*, *supra*, note 1, at para. 18.

clear provision to that effect.²⁹ In the case of “certain fundamental common law rules”, explicit language is required to oust the common law. This has been applied by the Supreme Court in respect of the general jurisdiction of provincial superior courts,³⁰ informer privilege³¹ and solicitor-client privilege.³²

Indeed, in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (“*Blood Tribe*”)—which was central to the Court’s decisions in both *Lizotte* and *Alberta*—the Court held that a public authority was not permitted to “pierce” solicitor-client privilege absent express words in the applicable legislation, holding that “Open-textured language governing production of documents [does] not ... include solicitor-client documents”; instead, the legislature must use “clear and explicit language” to abrogate solicitor-client privilege.³³ The Court in *Blood Tribe* emphasized that the privilege “cannot be abrogated by inference”, and added that any provisions that allow incursions on solicitor-client privilege must be interpreted restrictively.³⁴

The Court in *Lizotte* affirmed the reasoning in *Blood Tribe*, highlighting that it is consistent with the modern approach to statutory interpretation, which focuses on a provision’s entire context rather than the specific words used. The Court explained:

... 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.³⁵

The Court proceeded to extend the requirements discussed in *Blood Tribe* to litigation privilege. It did so on the basis that, like solicitor-client privilege, litigation privilege is also a class privilege serving an overriding

²⁹ *Id.*, at para. 56, citing *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] S.C.J. No. 42, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 39 (S.C.C.); *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at 1077 (S.C.C.); and R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014), at 504-505.

³⁰ *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at para. 46 (S.C.C.), citing *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at 87-88.

³¹ *Bisailon v. Keable*, [1983] S.C.J. No. 65, [1983] 2 S.C.R. 60, at 103 (S.C.C.).

³² *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] S.C.J. No. 45, [2008] 2 S.C.R. 574, 2008 SCC 44 (S.C.C.) [hereinafter “*Blood Tribe*”].

³³ *Blood Tribe*, *supra*, note 32, at paras. 2, 11, cited in *Lizotte*, *supra*, note 1, at para. 59.

³⁴ *Id.*

³⁵ *Lizotte*, *supra*, note 1, at para. 61.

public interest in “[t]he secure and effective administration of justice according to law” and “ensur[ing] the efficacy of the adversarial process”,³⁶ and is similarly “fundamental to the proper functioning of our legal system”.³⁷

As a result, litigation privilege cannot be abrogated by inference; clear, explicit and unequivocal language is required. As in *Blood Tribe*, the Court held in *Lizotte* a general production provision — in this case, requiring an insurer to provide to the Chamber “any required document” — is insufficiently clear to defeat the privilege.³⁸

III. SOLICITOR-CLIENT PRIVILEGE: ALBERTA (INFORMATION AND PRIVACY COMMISSIONER) v. UNIVERSITY OF CALGARY

The companion case to *Lizotte*, *Alberta (Information and Privacy Commissioner) v. University of Calgary* addressed the issue of what constitutes “clear, explicit and unequivocal” language sufficient to abrogate solicitor-client privilege. This time, the Court was not unanimous.

1. Background

Alberta arose out of a request for information under the *Freedom of Information and Protection of Privacy Act*³⁹ (the “FOIPP Act”) by a former employee of the University of Calgary (the “University”). The employee had commenced litigation against the University, and the University had claimed solicitor-client privilege in respect of some of the documents requested in that context. The employee attempted to get around this assertion of solicitor-client privilege by bringing a freedom of information application under the *FOIPP Act* seeking production of the withheld records.

Section 56(3) of the *FOIPP Act* permitted the Information and Privacy Commissioner of Alberta (the “Commissioner”) to deliver a notice that requires a public body to produce records to the Commissioner “[d]espite any other enactment or any privilege of the law of evidence”.⁴⁰ The Commissioner delivered such a notice to the University in order to review

³⁶ *Id.*, at para. 63, citing *Blank*, *supra*, note 12, at paras. 27, 31.

³⁷ *Lizotte*, *supra*, note 1, at para. 64, citing *Blood Tribe*, *supra*, note 32, at para. 9.

³⁸ *Id.*, at paras. 66-67.

³⁹ R.S.A. 2000, c. F-25 [hereinafter “FOIPP Act”].

⁴⁰ *FOIPP Act*, s. 56(3).

whether the University's assertion of solicitor-client privilege was substantiated. The University did not comply, and sought judicial review of the Commissioner's decision to deliver the notice.⁴¹

The courts below disagreed on the issue under appeal. The Alberta Court of Queen's Bench, applying a correctness standard of review, determined that the Commissioner had correctly issued the notice and that the phrase "despite ... any privilege of the law of evidence" in s. 56(3) was intended to include solicitor-client privilege in its ambit.⁴²

The Alberta Court of Appeal, on the other hand, held that the Commissioner did not have statutory authority to compel the production of records over which solicitor-client privilege was asserted. In the Court of Appeal's view, *Blood Tribe* ousted the modern approach to statutory interpretation where solicitor-client privilege is at stake, preferring the rule of strict construction, which requires clear, explicit and specific reference to solicitor-client privilege. As an inference would need to be drawn to conclude that "any privilege of the law of evidence" includes solicitor-client privilege, the Court of Appeal concluded that the provision was insufficiently specific to evince clear legislative intent to abrogate the privilege.⁴³

Interestingly, as in *Lizotte*, the issue being determined was moot at the time of the appeal. The litigation for which the former employee had requested the documents had concluded in 2012; she had no further need for the requested documents, and was no longer involved in the case.⁴⁴

2. The Court's Analysis

The majority reasons were authored by Côté J., with separate partially concurring reasons by Cromwell and Abella JJ. It is worth beginning our discussion of the Court's analyses by observing where the justices found common ground, and where their views diverged.

Each set of reasons addressed, as a preliminary issue, the appropriate standard of review to be applied to the Commissioner's decision; the majority held it was correctness, Cromwell J. assumed without deciding that it was correctness, and Abella J. dissented in part on the basis that the

⁴¹ *Alberta, supra*, note 2, at paras. 3-8, 10.

⁴² *University of Calgary v. J.R.*, [2013] A.J. No. 1233, 2013 ABQB 652, at para. 215 (Alta. Q.B.); *Alberta, supra*, note 2, at paras. 11-12.

⁴³ *University of Calgary v. R. (J.)*, [2015] A.J. No. 348, 2015 ABCA 118 (Alta. C.A.); *Alberta, supra*, note 2, at paras. 13-15.

⁴⁴ *Alberta, supra*, note 2, at para. 9.

case was a classic case for reasonableness review.⁴⁵ For the purposes of this article, which is intended to focus on the privilege issues at stake, we will leave an analysis of the standard of review issues for another day.

In any event, whether reviewing the Commissioner's decision on a correctness or reasonableness standard, all seven justices who participated in the appeal agreed that this was not an appropriate case for the Commissioner to order disclosure of documents over which solicitor-client privilege was asserted.⁴⁶ As succinctly explained by Abella J.:

... even if s. 56(3) had allowed the Commissioner to order production of documents protected by solicitor-client privilege, the University of Calgary had provided sufficient justification for solicitor-client privilege . . . The Commissioner should have exercised her discretion in a manner that interfered with solicitor-client privilege only to the extent absolutely necessary to achieve the ends sought by the [Act].⁴⁷

The Court was thus unanimous in the result on the facts, but diverged on how to get there.

The majority began its analysis by observing that it was building on its decision the previous year in *Canada (National Revenue) v. Thompson*,⁴⁸ which had affirmed *Blood Tribe*, stating:

... it 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. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, 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.⁴⁹

In contrast to the reasons of the Court of Appeal, the majority of the Supreme Court held that such an approach did *not* renounce or abandon the modern approach to statutory interpretation. It held that “the analysis conducted in *Blood Tribe* reflects what is essentially the modern approach to statutory interpretation when dealing with solicitor-client privilege,

⁴⁵ *Id.*, at paras. 19-27, *per* Côté J., para. 75, *per* Cromwell J., and paras. 130-136, *per* Abella J.

⁴⁶ *Id.*, at paras. 67-70, *per* Côté J., paras. 121-128, *per* Cromwell J., and paras. 137-138, *per* Abella J.

⁴⁷ *Id.*, at para. 137.

⁴⁸ [2015] S.C.J. No. 21, [2016] 1 S.C.R. 381, 2016 SCC 21 (S.C.C.) [hereinafter “*Thompson*”].

⁴⁹ *Id.*, at para. 25, cited in *Alberta*, *supra*, note 2, at para. 28 (emphasis added).

insofar as it recognizes legislative respect for fundamental values”.⁵⁰ This reasoning invites a few questions. What does it mean to be “*essentially* the modern approach”? Is the modern approach different when dealing with solicitor-client privilege (which is undoubtedly an important right) than it is when dealing with other subject matter? As will be discussed below, Cromwell J. vigorously disagreed with this view in his concurring reasons.

The majority proceeded to reaffirm various fundamental (and uncontroversial) principles, explaining that solicitor-client privilege “is fundamental to the proper functioning of our legal system and a cornerstone of access to justice”,⁵¹ “belongs to the client, not to the lawyer”,⁵² and is not only a rule of evidence, but is also a substantive right.⁵³

The latter point is particularly relevant in this case, as it formed the basis for disagreement between the majority and Cromwell J. Although it was common ground that solicitor-client privilege is a substantive right in addition to a rule of evidence, and applies both inside and outside of court,⁵⁴ the justices diverged on the issues of whether, in this case, privilege was invoked as a substantive right or as an evidentiary rule, and, in any event, whether this was relevant in interpreting the intent of the provision that purportedly abrogated the privilege.

For the majority, Côté J. wrote that solicitor-client privilege was asserted in its substantive, rather than evidentiary, form; the dispute concerned not the tendering of privileged materials as evidence in a judicial proceeding (notwithstanding the fact that the person requesting the documents requested them for the purpose of a judicial proceeding), but rather the disclosure of documents pursuant to a statutory access to information regime.⁵⁵ Accordingly, the majority held, the disclosure of privileged information in this context is not related to an “evidentiary

⁵⁰ *Alberta*, *supra*, note 2, at para. 29.

⁵¹ *Id.*, at para. 34, citing *Blood Tribe*, *supra*, note 32, at para. 9.

⁵² *Id.*, at para. 35, citing *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] S.C.J. No. 20, [2016] 1 S.C.R. 336, 2016 SCC 20, at para. 48 (S.C.C.) [hereinafter “*Chambre des notaires*”]; *Blood Tribe*, *supra*, note 32, at para. 9.

⁵³ *Id.*, at para. 38, citing *Blood Tribe*, *supra*, note 32, at para. 10; *Thompson*, *supra*, note 48, at para. 17; *Chambre des notaires*, *supra*, note 52, at para. 28.

⁵⁴ On this point, the majority cited a long line of cases in which the Supreme Court of Canada has previously held that solicitor-client privilege applies in circumstances outside the courtroom, including with respect to search and seizure of documents in a lawyer’s office, and disclosure of documents in response to access to information requests: see *Alberta*, *supra*, note 2, at para. 41.

⁵⁵ *Alberta*, *supra*, note 2, at para. 42.

privilege”.⁵⁶ Quoting the Court’s decision in *Descôteaux v. Mierzwinski*,⁵⁷ the majority observed that in this case the assertion of privilege “has nothing to do with the rule of evidence ... since there was never any question of testimony before a tribunal or court”.⁵⁸

Accordingly, the majority continued, the expression “privilege of the law of evidence” in section 56(3) of the *FOIPP Act* does not refer to “the broader substantive interests protected by solicitor-client privilege”, which it found to be at issue in this case.⁵⁹ The majority contrasted solicitor-client privilege, which exists as both an evidentiary rule and a substantive right, with other categories of privilege — spousal privilege, religious communication privilege, and settlement privilege — that can only be a “privilege of the law of evidence” because they operate only in the evidentiary context of court proceedings. It concluded that by referring simply to “privilege of the law of evidence”, the provision was not “sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege”.⁶⁰

The majority provided additional reasons for its interpretation, including that (1) a different provision of the *FOIPP Act*, section 27(1), specifically referred to “any type of legal privilege, including solicitor-client privilege ...”, suggesting that “privilege of the law of evidence” is a narrower category within “legal privilege”, which category does not include solicitor-client privilege;⁶¹ and (2) given the importance of solicitor-client privilege, “one would expect that” the legislature would have included certain safeguards to protect privileged documents from further disclosure, had they intended to set solicitor-client privilege aside.⁶²

Justice Cromwell, in lengthy concurring reasons, strongly disagreed with the majority on the proper interpretation of section 56(3), which, in his view, “is an explicit legislative grant of power which should be respected, not evaded”.⁶³

Justice Cromwell would have held that the express language and full context of section 56(3) demonstrate that the legislature intended to abrogate solicitor-client privilege, and he expressed concern that to hold otherwise “abandons the modern approach to statutory

⁵⁶ *Id.*

⁵⁷ [1982] S.C.J. No. 43, [1982] 1 S.C.R. 860 (S.C.C.) [hereinafter “*Descôteaux*”].

⁵⁸ *Alberta, supra*, note 2, at para. 42, citing *Descôteaux, supra*, note 57, at 875.

⁵⁹ *Id.*, at para. 44.

⁶⁰ *Id.*, at para. 44.

⁶¹ *Id.*, at paras. 51-57.

⁶² *Id.*, at para. 58.

⁶³ *Id.*, at para. 72.

interpretation repeatedly endorsed by the Court and, under the guise of ‘restrictive’ interpretation, undermines legislative policy choices which, absent constitutional constraint, legislatures are entitled to make”.⁶⁴

In Cromwell J.’s view, the legislature expressly provided for the abrogation of solicitor-client privilege in section 56(3) by authorizing the production of records despite “any privilege of the law of evidence”, because the grammatical and ordinary meaning of these words includes solicitor-client privilege. Justice Cromwell explained that this does not abrogate privilege by inference, which *Blood Tribe* clearly prohibits, but rather “with unmistakable clarity by virtue of express legislative direction”.⁶⁵ He distinguished the present case from *Blood Tribe*, in which the provision at issue authorized production using broad and general language, and emphasized that in *Blood Tribe* Binnie J. had specifically contrasted that general language with a provision in the federal *Privacy Act* that authorized the federal Privacy Commissioner to examine any information “[n]otwithstanding ... any privilege under the law of evidence”.⁶⁶ This wording was almost identical to section 56(3), and Binnie J. had held it constituted “explicit language granting access to confidences”.⁶⁷

Justice Cromwell squarely disagreed with the majority that solicitor-client privilege was being invoked as a substantive right; in his opinion, it was the evidentiary privilege that was at issue, because what was being claimed was immunity from forced disclosure required by a legal authority.⁶⁸ In Cromwell J.’s analysis, however, this was inconsequential. While agreeing that solicitor-client privilege is both a rule of evidence and a substantive rule, Cromwell J., citing doctrinal literature, conceptualized the evidentiary privilege as having been extended to include substantive rights *in addition* to existing evidentiary rights.⁶⁹ As a result, where evidentiary privilege is abrogated, solicitor-client privilege is abrogated, full stop, regardless of its asserted form — if the privilege is cut off at the root, there is no substantive right to protect.

⁶⁴ *Id.*, at para. 73.

⁶⁵ *Id.*, at para. 79.

⁶⁶ *Privacy Act*, R.S.C. 1985, c. P-21, s. 34(2).

⁶⁷ *Alberta*, *supra*, note 2, at para. 77, citing *Blood Tribe*, *supra*, note 32, at para. 28.

⁶⁸ *Id.*, at para. 87.

⁶⁹ *Id.*, at paras. 85-86, citing Professor A.M. Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis Canada, 2014), at 26; R.W. Hubbard, S. Magotiaux & S.M. Duncan, *The Law of Privilege in Canada*, loose-leaf (Toronto: Canada Law Book, 2006), at 1-3, 11-4.1; and S.N. Lederman, A.W. Bryant & M.K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada, 2014), at 952-53.

As a matter of statutory interpretation, Cromwell J. disagreed with the majority's holding that the use of the phrase "solicitor-client privilege" elsewhere in the *FOIPP Act* defeated his preferred interpretation, because that provision performed a different function than section 56(3).⁷⁰

In Cromwell J.'s view, both the express wording of the provision and its statutory context evince a clear intention on the part of the legislature to abrogate solicitor-client privilege, consistent with the Court's decision in *Blood Tribe*.

IV. DISCUSSION: PRIVILEGE IN THE SUPREME COURT OF CANADA, 2016-2017 TERM

The Supreme Court of Canada has shown great interest in privilege lately; its decisions in *Lizotte* and *Alberta* build on a number of recent cases underscoring the importance and scope of privilege, including *Thompson*,⁷¹ *Chambre des notaires*,⁷² and *Canada (Attorney General) v. Federation of Law Societies of Canada*.⁷³

In both *Lizotte* and *Alberta*, the Court held that impugned statutory provisions were insufficiently "clear, explicit and unequivocal"⁷⁴ to abrogate the privilege asserted. The decisions are nothing if not clear that this is the standard against which legislation purporting to abrogate privilege will be measured. Both build on *Blood Tribe*; *Lizotte* makes clear that this standard extends to litigation privilege as well as solicitor-client privilege, such that statutory language requiring the production of "any document" will be insufficient to abrogate either. *Alberta* adds to the jurisprudence by serving as an example of statutory language that is something more than general language about the production of documents, but not quite explicit in its reference to solicitor-client privilege.

Although in *Alberta* there was a stark difference of opinion between Côté J., for the majority, and Cromwell J. — each of whom authored lengthy explanations of their perspective on the appropriate interpretation of the legislature's intent in drafting section 56(3) — the law of the land is now clear: absent explicit and unequivocal language to the contrary, a statutory provision will be interpreted to preserve solicitor-client privilege.

⁷⁰ *Id.*, at paras. 88-91.

⁷¹ *Supra*, note 48.

⁷² *Supra*, note 52.

⁷³ [2015] S.C.J. No. 7, [2015] 1 S.C.R. 401, 2015 SCC 7 (S.C.C.).

⁷⁴ *Lizotte*, *supra*, note 1, at paras. 1, 5, 18, 61, 64, 67; *Alberta*, *supra*, note 2, at paras. 2, 44, 51, 64.

Some may view the majority's interpretation of section 56(3) as somewhat tortured — as a matter of common sense, it is entirely possible that when enacting the provision the legislature was of the view that the phrase “despite any privilege of the law of evidence” was sufficiently clear, explicit and unequivocal to override solicitor-client privilege, which is unquestionably a privilege of the law of evidence (even if not exclusively so). The majority justices, however, took seriously the Court's holdings in *Descôteaux* and *Blood Tribe* that statutory provisions purporting to interfere with privilege “must be interpreted restrictively”.⁷⁵ Legislatures are now on notice — the Court meant it when it said a statute must be “explicit” to abrogate solicitor-client privilege. A provision will be given an alternative interpretation if it is capable of one.

It is difficult, however, to reconcile the majority's interpretation of section 56(3) in *Alberta* with the Court's holding in *Lizotte* that

... 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.⁷⁶

Where the phrase “any privilege of the law of evidence” is held to be insufficiently clear and unambiguous to abrogate solicitor-client privilege, it is hard to imagine what language that does not specifically use the term “solicitor-client privilege” *would* be interpreted as referring unambiguously to the privilege. The majority's assertion that their interpretation is “essentially the modern approach of statutory interpretation when dealing with solicitor-client privilege” is unconvincing, and as noted above invites more questions than it resolves. There is merit to Cromwell J.'s concern that the majority's approach effectively ousts the modern approach to statutory interpretation in this particular context, in favour of a more restrictive approach.

As a practical matter, it is clear that legislatures hoping to test this passage of the Court's reasons in *Lizotte* with less-than-explicit language would do so at their peril — in light of the Court's holding in *Alberta*, a legislature intending to abrogate solicitor-client privilege would be wise to use the magic words “solicitor-client privilege” in their drafting.

⁷⁵ *Blood Tribe*, *supra*, note 32, at para. 11; *Descôteaux*, *supra*, note 57, at 875, cited in *Alberta*, *supra*, note 2, at para. 40.

⁷⁶ *Lizotte*, *supra*, note 1, at para. 61.

Moreover, one suspects that the Court's reasons in *Lizotte* could be a stepping stone to elevating litigation privilege beyond a mere "privilege of the law of evidence" to the status of "substantive right" enjoyed by solicitor-client privilege. The Court in *Lizotte* purports to eschew such thinking entirely, stating:

There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct.⁷⁷

Its reasons, however, beg the question of what practical differences remain between litigation privilege and solicitor-client privilege. There is no question that, unlike solicitor-client privilege, litigation privilege has a finite lifespan, and that more and different criteria must be met for litigation privilege to be recognized. Once the privilege is established, however, it is not clear that there is any real difference in the status accorded to solicitor-client privilege and litigation privilege during its lifespan. Both are "class privileges", not subject to a balancing test and not to be interfered with unless one of the very limited common-law exceptions are met, and both can be asserted as against the world, not just an adversary in litigation. Notably, the majority in *Alberta* did not use litigation privilege as one of its examples of a privilege that can only be a "privilege of the law of evidence".⁷⁸

In extending the reasoning in *Blood Tribe* regarding solicitor-client privilege to litigation privilege in *Lizotte*, the Court attributed significant importance to the justifications for litigation privilege, noting that, like solicitor-client privilege, litigation privilege serves an overriding public interest in "[t]he secure and effective administration of justice according to law" and "ensur[ing] the efficacy of the adversarial process",⁷⁹ and holding that it is similarly "fundamental to the proper functioning of our legal system".⁸⁰

Given these substantial similarities, it would be unsurprising if future litigants ask the Court to recognize that litigation privilege is also a

⁷⁷ *Id.*, at para. 64.

⁷⁸ See *Alberta*, *supra*, note 2, at para. 44.

⁷⁹ *Lizotte*, *supra*, note 1, at para. 63, citing *Blank*, *supra*, note 12, at paras. 27, 31.

⁸⁰ *Id.*, at para. 64, citing *Blood Tribe*, *supra*, note 32, at para. 9.

substantive right in addition to a rule of evidence — such that a provision requiring disclosure “despite ... any privilege of the law of evidence” might fail to abrogate litigation privilege, as well.

V. LEGAL PROFESSIONAL REGULATION:
GREEN v. LAW SOCIETY OF MANITOBA

1. Background

At issue in *Green* was whether the Law Society of Manitoba could require lawyers in the province to meet certain continuing professional development (“CPD”) requirements, failing which they would face a penalty of suspension.

The Law Society has a statutory responsibility to protect members of the public who seek to obtain legal services, including by establishing and enforcing educational standards for lawyers. The Law Society had previously attempted a voluntary CPD program in 2007, but found after a few years that it was not working — many lawyers reported no CPD activities or less than one hour per month. The Law Society thus considered a mandatory CPD program, consulting with its members over a one-year period.⁸¹

Following this consultation, the Law Society enacted Rules requiring practising members to complete 12 hours of CPD per year, failing which they may receive a warning that, if they do not comply within 60 days, they will be automatically suspended until they meet the requirements. Specifically, the Rules stated:

2-81.1(8) Commencing January 1, 2012, and subject to subsection (10), a practising lawyer must complete one hour of eligible activities for each month or part of a month in a calendar year during which the lawyer maintained active practising status . . .

. . .

2-81.1(12) Where a practising lawyer fails to comply with subsection (8), the chief executive officer may send a letter to the lawyer advising that he or she must comply with the requirements within 60 days from the date the letter is sent. A member who fails to comply within 60 days is automatically suspended from practising law until such time as the requirements have been met and a reinstatement fee paid.

⁸¹ *Green, supra*, note 3, at paras. 3, 6-8.

2-81.1(13) Where a member is suspended more than once for failing to comply with subsection (8), the chief executive officer may also refer the matter to the complaints investigation committee for its consideration.⁸²

Sidney Green was called to the bar in 1955, and had been a practising member of the Law Society for over 60 years. He was previously a bencher of the Law Society, and he had lectured and participated in various CPD activities.⁸³

Mr. Green did not report any CPD activities in either 2012 or 2013 following the imposition of the new CPD rules. On May 30, 2014 — one year and five months after Mr. Green had first failed to report CPD activities as required by the Rules — the CEO of the Law Society sent to Mr. Green the letter contemplated in section 2-81.1(12), informing him that he had 60 days to comply with the Rules, failing which he would be suspended from practising law until he complied.⁸⁴

Mr. Green did not complete the required CPD activities nor did he respond to the letter. He did not apply for judicial review of the decision to send him the letter, nor wait until 60 days had lapsed to bring an application judicial review of the Law Society's decision to suspend him for failing to complete his minimum CPD hours. Instead, Mr. Green applied to the Manitoba Court of Queen's Bench for declaratory relief, challenging the validity of these Rules.⁸⁵

Both the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal dismissed Mr. Green's challenge, finding that the Rules fell squarely within the Law Society's legislative mandate to establish standards for the education, professional responsibility and competence of lawyers,⁸⁶ and that the Law Society has the power to make an educational program mandatory and establish consequences for failing to comply with it.⁸⁷ The Court of Appeal further held that a suspension for failing to complete CPD requirements was an administrative decision that did not require the more extensive procedures applied for disciplinary proceedings for professional misconduct.⁸⁸

⁸² *Id.*, at para. 9.

⁸³ *Id.*, at para. 6.

⁸⁴ *Id.*, at para. 10.

⁸⁵ *Id.*, at para. 11.

⁸⁶ *Id.*, at para. 12, citing *Green v. Law Society of Manitoba*, [2014] M.J. No. 350, 2014 MBQB 249 (Man. Q.B.) and *The Legal Profession Act*, C.C.S.M. c. L107, s. 3(2) [hereinafter "*LPA*"].

⁸⁷ *Id.*, at para. 14, citing *Green v. Law Society of Manitoba*, [2015] M.J. No. 175, 2015 MBCA 67 (Man. C.A.) and *LPA*, s. 65.

⁸⁸ *Id.*, at para. 16.

2. The Court's Analysis

The majority and dissenting justices agreed that the standard of review for determining the validity of rules made by a law society is reasonableness.⁸⁹

The majority, whose reasons were authored by Wagner J. and agreed upon by McLachlin C.J.C. and Moldaver, Karakatsanis and Gascon JJ., held that the impugned Rules were reasonable in light of the objectives of the *Legal Profession Act* (the “LPA”). Fundamental to the majority’s analysis was the procedural context that brought the appeal before the Court. At the outset of its analysis, the majority held:

Mr. Green has challenged the impugned rules because he has no interest in complying with them ... He argues that the impugned rules are unfair because they impose a suspension without a right to a hearing or a right of appeal. Yet *Mr. Green has not applied for judicial review of the Law Society’s decision to suspend him. He has not complained that the Law Society treated him unfairly. Mr. Green is challenging these rules on these procedural grounds, not for fear of injustice.* He is simply not interested in attending a mandated number of CPD activities.⁹⁰

Before the Supreme Court, Mr. Green conceded that the Law Society has the authority to make rules establishing a CPD program, and to make that program mandatory.⁹¹ The only question for the Court’s determination was whether the impugned rules were unreasonable because they permit the imposition of a suspension for failing to comply with the mandatory rules.

In the majority’s view, the answer was clearly “yes”. The majority’s analysis followed a two-step approach; it first construed the scope of the Law Society’s statutory mandate, then turned to the reasonableness of the rules in light of this purposive construction.

The majority concluded that the objectives of the *LPA*, the words of the provisions at issue, and the statutory scheme as a whole supported an expansive construction of the Law Society’s rule-making authority.⁹² The majority observed, in particular, that the Law Society has a broad mandate to “uphold and protect the public interest”, which is coupled with a specific duty to establish standards for the education of persons practising law, and a permissive authority to establish a continuing legal

⁸⁹ *Id.*, at paras. 20-24, *per* Wagner J., para. 72, *per* Abella J. (dissenting).

⁹⁰ *Id.*, at para. 18 (emphasis added).

⁹¹ *Id.*, at para. 43.

⁹² *Id.*, at paras. 27-42.

education program.⁹³ The majority highlighted that section 65 of the *LPA* specifically empowers the Law Society “to establish consequences for contravening this Act or the rules”, noting, “This language could hardly be clearer”.⁹⁴

The majority concluded that the *LPA* provided clear authority for the Law Society to create a CPD program than can be enforced by means of suspension, and that the impugned rules were in keeping with the Law Society’s statutory mandate to protect the public interest.⁹⁵ The *LPA* is clear that the Law Society can set educational standards including mandatory CPD activities, and consequences are required for those who fail to adhere to such standards if they are to have an effect.⁹⁶

The majority’s reasons demonstrate that it was concerned with the practical implications of its construction of the Law Society’s authority. Justice Wagner emphasized that, “[a]s a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational”,⁹⁷ and continued:

A suspension is a reasonable way to ensure that lawyers comply with the CPD program’s educational requirements. Its purpose relates to compliance, not to punishment or professional competence. Other consequences, such as fines, may not ensure that the Law Society’s members comply with those requirements. An educational program that one can opt out of by paying a fine is not genuinely universal. I am mindful of the fact that in making these mandatory rules, the Law Society was responding to the reality that many lawyers in Manitoba had not complied with the CPD program when it was voluntary.⁹⁸

The majority firmly rejected Mr. Green’s argument that such a suspension under the rules interfered with his “common law right” to practise law, holding that the right to practise law is *not* a common law right but a right granted by statute and conditional on compliance with the rules made by the Law Society under the *LPA*. It reaffirmed the Court’s earlier holding in *Pearlman* that “the Law Society has total control over who can practise law in the province, over the conditions or requirements

⁹³ *Id.*, at paras. 29, 32.

⁹⁴ *Id.*, at para. 34, citing *LPA*, s. 65.

⁹⁵ *Id.*, at paras. 44-45.

⁹⁶ *Id.*, at para. 46.

⁹⁷ *Id.*, at para. 46.

⁹⁸ *Id.*, at para. 47.

placed upon those who practise and, perhaps most importantly, over the means of enforcing respect for those conditions or requirements”.⁹⁹

Importantly, the majority left for another day the question of whether a Law Society rule providing for the suspension of a member without a right to a hearing would be valid. It held that questions of procedural fairness were inappropriate in the context, as the appeal before them arose from an application for declaratory relief, and the “common law duty of procedural fairness applies only to a specific decision made by the Law Society that affects a lawyer’s interests”.¹⁰⁰ Mr. Green had not applied for judicial review of the Law Society’s specific decision to suspend him. The majority explained:

Had Mr. Green challenged the Law Society’s decision to suspend him instead of simply challenging the impugned rules, this Court could have examined the specific procedure that the Law Society followed in making its decision. If the Law Society’s decision was made in a manner that was not procedurally fair, the decision would then have been quashed. But the duty of fairness is engaged only if the Law Society makes a decision that affects the “rights, privileges or interests of an individual” by, for example, imposing a suspension, not when it acts in a legislative capacity to make rules of general application in the public interest.¹⁰¹

Considering the relevant provisions in the abstract, the majority concluded that the fact that the rules do not provide for a right to a hearing or appeal does not make them unreasonable.¹⁰² It explained that legislation and rules do not normally exhaustively provide for procedural rights, and statutory decision-makers can always provide for procedures in addition to those specifically provided so to ensure a fair process; it offered as an example the Law Society CEO’s letter in Mr. Green’s case, which was not only delivered more than a year after the initial failure to comply, but offered to grant reasonable extensions if requested.¹⁰³

⁹⁹ *Id.*, at para. 49, citing *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] S.C.J. No. 66, [1991] 2 S.C.R. 869, at 885 (S.C.C.).

¹⁰⁰ *Green, supra*, note 3, at para. 51.

¹⁰¹ *Id.*, at para. 54, citing *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 79 (S.C.C.) and *Knight v. Indian Head School Division No. 19*, [1990] S.C.J. No. 26, [1990] 1 S.C.R. 653, at 669 (S.C.C.).

¹⁰² *Green, supra*, note 3, at para. 52.

¹⁰³ *Id.*, at paras. 53, 57, 65.

The majority also emphasized that the suspension at issue was administrative, not disciplinary in nature. It highlighted that it the suspension was to be reported and recorded differently than disciplinary sanctions, and would not result in any disciplinary record or any residual punishment other than an administrative reinstatement fee — much like other administrative suspensions for a failure to pay mandatory licensing fees or to file an annual trust account report. The majority concluded that “[a] reasonable member of the public would understand that a temporary suspension for failing to complete CPD hours is not akin to a more serious disciplinary suspension.”¹⁰⁴

The dissenting justices, Abella and Côté JJ., accepted that the Law Society had the authority to require 12 hours of annual CPD and, theoretically, to suspend members who fail to comply with these requirements. Where the dissent departed from the majority was on the question of whether the Law Society could *automatically* suspend lawyers who fail to meet the CPD requirements.

In effect, the dissenting justices disagreed with the majority’s premise, finding a different issue to be “at the heart of this case”.¹⁰⁵ By focusing on the fairness of an automatic suspension, Justices Abella and Côté. took issue with the precise question the majority had left open for another day.

The dissent began by emphasizing that suspension is a serious *disciplinary* sanction. It is clear from their reasons that the dissenting justices drew no distinction between administrative and disciplinary Law Society sanctions. They appear to blur this line on the basis that the public would do the same, stating: “Public confidence in a lawyer’s professionalism is inevitably undermined when it learns that a lawyer has been suspended. The reason for the suspension does not magically transform a punitive consequence into an administrative one.”¹⁰⁶

Indeed, Abella J. stated plainly: “A suspension is a suspension is a suspension”.¹⁰⁷

The dissenting justices’ concern is that “[w]hen a lawyer is suspended, so is public confidence in him or her”;¹⁰⁸ it “brings automatic public opprobrium”, and doing so for a minor breach such as failing to attend classes puts the Law Society “in breach of its duty to protect the public from the needless erosion of trust in the professionalism of lawyers”.¹⁰⁹

¹⁰⁴ *Id.*, at paras. 59, 61, 62, citing *LPA*, s. 19(5), rr. 2-88, 2-91 and 5-47(10).

¹⁰⁵ *Id.*, at paras. 71-72, *per* Abella J. (dissenting).

¹⁰⁶ *Id.*, at para. 95, *per* Abella J. (dissenting).

¹⁰⁷ *Id.*, at para. 94, *per* Abella J. (dissenting).

¹⁰⁸ *Id.*, at para. 73, *per* Abella J. (dissenting).

¹⁰⁹ *Id.*, at paras. 74-75, *per* Abella J. (dissenting).

In their view, “a Law Society cannot enact rules which unreasonably undermine public confidence in lawyers”.¹¹⁰

In contrast to the majority’s position that procedural fairness issues could be reviewed only in the context of an application for judicial review of a specific decision, the dissenting justices were prepared to accept that a suspension for failing to comply with CPD requirements under the impugned rules would “[a]utomatically impos[e] one of the most serious possible sanctions.”¹¹¹ They relied upon the lack of discretion provided in the rule itself — particularly in contrast to similar rules in other provinces — without consideration of the application of this rule in this particular case.

The dissenting justices concluded:

While enhancing lawyers’ competence is essential, so is upholding the Law Society’s responsibility to protect the ability of lawyers to practise their profession with the public’s confidence, or, at least, not to attract its unwarranted loss. ... Because rule 2-81(12) unjustifiably undermines public confidence in a lawyer, it is inconsistent with the Law Society’s duty to protect the public interest.¹¹²

3. Discussion

The most obvious and immediate impact of the Court’s decision in *Green* is that our highest Court has confirmed that law societies may require lawyers to complete CPD activities, failing which we may face suspension.

Since the Court’s decision, Mr. Green has chosen to retire rather than complete his 12 annual CPD hours. He has stated that he challenged the Law Society’s rules and proceeded with his appeal because CPD activities were of “no value” to him.¹¹³

Mr. Green may well have had legitimate questions about the value of CPD activities to his practice. This is an issue on which many reasonable lawyers disagree, and there was no doubt that Mr. Green was an experienced and respected counsel with no history of disciplinary or

¹¹⁰ *Id.*, at para. 81, *per* Abella J. (dissenting).

¹¹¹ *Id.*, at para. 75, *per* Abella J. (dissenting).

¹¹² *Id.*, at paras. 96-97, *per* Abella J. (dissenting).

¹¹³ Katie May, “Lawyer retires after high court backs professional training”, *Winnipeg Free Press* (March 31, 2017), accessed October 9, 2017, online: <<https://www.winnipegfreepress.com/local/lawyer-retires-after-high-court-backs-professional-training-417745533.html>> [hereinafter “May, ‘Lawyer retires’”].

competence issues. The Court rightly held, however, that the question before it was not whether the CPD requirements in question were good policy — which is properly an issue for the Law Society and its benchers to determine — but whether the Law Society had the statutory authority to develop and enforce CPD rules as it had.

The time for Mr. Green to challenge the Law Society on this policy issue was during its lengthy consultation period — notably, the majority made a finding of fact that “Mr. Green made no submissions to the benchers on the proposed CPD requirements even though the Law Society had invited its members to do so.”¹¹⁴

By challenging the CPD requirements as he did — by applying for a declaration that they were invalid — Mr. Green’s challenge was doomed to fail (and, as discussed below, may have created obstacles for individuals seeking to challenge law societies’ authority in the future). Quite simply, he brought his challenge using the wrong procedure. The only question properly before the Court was that of vires: whether the Law Society had the statutory authority to enact these Rules, which it plainly did (as the majority noted, the language of the LPA “could hardly be clearer”).¹¹⁵ Respectfully, the dissenting justices could only find as they did by addressing the wrong question.

The Court’s decision raises numerous further issues, some of which are left unresolved because of the disagreement between the majority and dissenting justices.

First, the dissent missed the mark when it referred to the Law Society being “in breach of its duty to protect the public from the needless erosion of trust in the professionalism of lawyers”¹¹⁶ No such duty exists. More importantly, however, such a duty would not serve or protect the public interest, but would protect *lawyers* from losing the public’s trust in their professionalism. Indeed, the dissenting justices conclude that a Law Society must “exercise its mandate in a way that not only protects the ability of lawyers to act professionally, but that also reinforces the public’s perception that lawyers are behaving professionally... a Law Society cannot enact rules which unreasonably undermine public confidence in lawyers”¹¹⁷ At one point in their reasons the dissent specifically (and problematically)

¹¹⁴ *Green, supra*, note 3, at para. 8.

¹¹⁵ *Id.*, at para. 34, citing *LPA*, s. 65.

¹¹⁶ *Id.*, at para. 74, *per* Abella J. (dissenting).

¹¹⁷ *Id.*, at para. 81, *per* Abella J. (dissenting) (emphasis omitted).

refers to “the Law Society’s responsibility to protect the ability of lawyers to practise their profession with the public’s confidence”¹¹⁸.

Suggesting that the Law Society’s role is to protect lawyers from losing the public’s trust and confidence — as opposed to ensuring that those practising law have earned and are worthy of the public’s trust — undermines the Law Society’s statutory mandate “to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence”.¹¹⁹ While the dissenting justices’ intention, their reasoning risks confusing the role of a law society to protect the public interest by regulating lawyers with the role of a bar association to advance the interests of lawyers.

The majority’s reasons similarly confuse the issue by employing an imperfect analogy between Law Society Rules and municipal by-laws to determine the appropriate standard of review. Although the Law Society and its elected benchers owe a duty to the public interest first and foremost, the majority asserted that “reasonableness is the appropriate standard because many of the benchers of the Law Society are elected by and *accountable to members of the legal profession*”.¹²⁰ In so finding, the majority applied McLachlin C.J.C.’s comments in *Catalyst Paper* in the context of municipal by-laws that “... reasonableness means courts must respect the responsibility of elected representatives *to serve the people who elected them and to whom they are ultimately accountable*”.¹²¹

The majority may not have meant to imply that benchers’ duty is to the lawyers who voted for them (or who were eligible to vote for them) rather than the interests of the public at large, but that is at least an unintended consequence of its analysis. The majority’s reasons respecting standard of review¹²² — like those of the dissent on the Law

¹¹⁸ *Id.*, at para. 96, *per* Abella J. (dissenting).

¹¹⁹ *LSA*, s. 3(1), cited in *Green, supra*, note 3, at para. 29. Although this language derives from the enabling statute of the Law Society of Manitoba, similar language exists with respect to the statutory purposes of other provincial law societies; see, *e.g.*, *Law Society Act*, R.S.O. 1990 c. L.8, s. 4.2 (“The Society has a duty to protect the public interest”) and *Legal Profession Act*, S.B.C. 1998, c. 9, s. 3(b) (“It is the object and duty of the society to uphold and protect the public interest in the administration of justice by... ensuring the independence, integrity, honour and competence of lawyers ...”).

¹²⁰ *Green, supra*, note 3, at para. 23 (emphasis added).

¹²¹ *Id.*, at para. 23, citing *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] S.C.J. No. 2, [2012] 1 S.C.R. 5, 2012 SCC 2, at para. 19 (S.C.C.) (emphasis added).

¹²² One notes that, when it comes to the determination of the proper standard of review, nothing turns on this misplaced analogy. The majority provided various further reasons for finding that a reasonableness standard of review was appropriate in the circumstances, and there was no dissent on this point: see *Green, supra*, note 3, at para. 23.

Society's duty to protect public confidence in lawyers — leave the impression that Law Societies “serve” their lawyer members, when their enabling statutes — and public confidence in lawyers as a self-regulated profession — require benchers and Law Societies to put the public interest first.

Second, the dissenting justices' view that “a suspension is a suspension is a suspension” — that there is no distinction between a suspension for administrative issues and one imposed as a disciplinary sanction — is curious. The dissent opines that “[p]ublic confidence in a lawyer's professionalism is inevitably undermined when it learns that a lawyer has been suspended. The reason for the suspension does not magically transform a punitive consequence into an administrative one.”¹²³ Respectfully, this overlooks the facts, noted by the majority, that the Law Society does not notify the public and the profession for administrative suspensions in the same manner as for suspensions imposed as disciplinary action as a result of professionalism and competence complaints, and that administrative suspensions are not recorded in a lawyer's discipline history.¹²⁴ For practical purposes, where notice is given of administrative suspensions, it is specifically indicated that such suspensions were imposed for a failure to meet administrative requirements such as payment of annual fees or submission of necessary forms. To remedy an administrative suspension, all a lawyer must do is comply with the administrative requirement it has fallen short of — such as by paying the overdue fee, submitting the trust account form, or completing a few hours of CPD and reporting on it — and pay a small administration fee. To suggest that members of the public would not understand that this is qualitatively different from a lawyer being suspended by a complaints and investigation committee as a result of substantive concerns about his or her ability to practise law competently and with integrity does not give sufficient credit to the public's intellect.

Moreover, to suggest that the same or similar procedural safeguards should be put in place for the imposition of administrative suspensions as are in place for disciplinary sanctions is wholly impractical. One can only imagine the mountain of paperwork and unnecessary procedural wrangling that would be required if law societies had to treat every failure to report CPD hours or pay annual fees as a disciplinary matter, with the accordant robust participatory rights; it would create precisely

¹²³ *Green, supra*, note 3, at para. 95, *per* Abella J. (dissenting).

¹²⁴ *Id.*, at para. 61, citing r. 5-81(2).

the sort of “expand[ed] bureaucracy” that Mr. Green sought to avoid in bringing his challenge.¹²⁵ The Law Society has broad discretion to impose certain rules on lawyers to administer a self-governing profession in the public interest. The imposition of administrative suspensions — after having provided notice and an opportunity to comply — is a reasonable consequence intended to encourage compliance with these requirements. As observed by Wagner J., an unenforced standard is not a standard at all.¹²⁶

Although not an issue that arose in Mr. Green’s hearing before the Supreme Court of Canada, Professor Alice Woolley has raised a further professionalism concern arising from Mr. Green’s challenge. Before all levels of court in this matter, Mr. Green was represented by Charles Huband, who had served as a judge of the Manitoba Court of Appeal for 28 years.¹²⁷ While some provincial law societies prohibit retired superior court and appellate judges from appearing as counsel in any court or administrative tribunal without their express approval (which is granted only in exceptional circumstances),¹²⁸ at present, Manitoba’s *Code of Professional Conduct* does not contain such a prohibition. The Manitoba rule mirrors the Federation of Law Societies of Canada’s *Model Code of Professional Conduct*, which require only that retired judges wait three years to appear before the court of which the former judge was a member or any courts of inferior jurisdiction.¹²⁹

Having retired from the bench in 2007, Mr. Huband was entirely compliant with the relevant rules in acting as counsel for Mr. Green. As Professor Woolley has noted, however, these rules are insufficient to protect public confidence in the administration of justice, for a number of reasons. Judges have the unique opportunity to develop close relationships with other judges and gain intimate knowledge of how Canadian courts work — knowledge which is “literally inaccessible to the vast majority of other lawyers”.¹³⁰ To permit retired judges to appear

¹²⁵ May, “Lawyer retires”, *supra*, note 113.

¹²⁶ *Green*, *supra*, note 3, at para. 46.

¹²⁷ Taylor McCaffrey LLP, “Charles Huband”, online profile: <<http://www.tmlawyers.com/lawyer/charles-huband/>>. Credit is due to Professor Alice Woolley for making this observation and raising her concern with this issue in her blog post, “Justice for Some”, University of Calgary Faculty of Law *ABlawg* (April 13, 2017), accessed October 9, 2017, online: <<https://ablawg.ca/2017/04/13/justice-for-some/>> [hereinafter “Woolley, ‘Justice for Some’”].

¹²⁸ See, e.g., Law Society of Upper Canada *Rules of Professional Conduct*, online: <http://www.lsuc.on.ca/list.aspx?id=671#ch7_sec7-judges>.

¹²⁹ Federation of Law Societies, *Model Code of Professional Conduct*, online: <<http://flsc.ca/wp-content/uploads/2017/08/Model-Code-as-amended-March-2017-Final.pdf>>.

¹³⁰ Woolley, “Justice for Some”, *supra*, note 126.

as counsel before the court on which they sat and the court over which that court had jurisdiction, as Mr. Huband did, “provides one party to the proceeding with information and connections the other party cannot obtain, and reinforces the troubling advantages to the wealthy and the privileged that already inhere in our legal system”, and permits retired judges to profit from the time they spent in that office.¹³¹

In discussing a case about the public’s confidence in lawyers and the legal system, I would be remiss in failing to note the potential for Mr. Huband’s appearance in the courts below to diminish public confidence in the administration of justice. Like Professor Woolley, I am of the view that the Federation of Law Societies’ recent proposal¹³² to wholly prohibit former judges from appearing before the courts over which they presided would be a welcome development.

Finally, it will be most interesting to see whether courts accord the same deference to other administrative requirements imposed by law societies in the future. Of particular interest is the new requirement that licensees in Ontario create and report on a “Statement of Principles”, which has created some controversy. As part of its efforts to address the barriers faced by racialized licensees in the profession, Ontario’s Law Society recently announced it is requiring all lawyers “to create and abide by an individual Statement of Principles that acknowledges your obligation to promote equality, diversity and inclusion generally and in your behaviour towards colleagues, employees, clients and the public”.¹³³ The Law Society has provided templates of sample statements of principles for licensees to sign and adopt to satisfy this requirement, or they may create their own that meets the prescribed requirements.¹³⁴

While many Ontario lawyers, at the time of writing, either support this new professional obligation or intend to simply sign the template without incident, other licensees have taken issue with the new requirement, considering it to be “forced speech”. Professor Bruce Parry recently wrote that upon learning of the requirement to create a Statement of Principles for 2017, “My first instinct was to check my passport. Was I still in Canada, or had someone whisked me away to

¹³¹ *Id.*

¹³² Federation of Law Societies of Canada, *Model Code of Professional Conduct Consultation Report* (January 31, 2017), online: <<http://flsc.ca/wp-content/uploads/2014/10/Consultation-Report-Draft-Model-Code-Amendments-for-web-Jan2017-FINAL.pdf>>.

¹³³ Law Society of Upper Canada, “Statement of Principles”, accessed October 9, 2017, online: <<https://www.lsuc.on.ca/with.aspx?id=2147504036>>.

¹³⁴ *Id.*

North Korea, where people must say what officials want to hear?”, adding that they “might as well have announced that the thought police had taken over the Law Society of Upper Canada”.¹³⁵ Another law professor, Dr. Ryan Alford, filed an application to the Ontario Superior Court for a declaration that the Statement of Principles requirement is *ultra vires*, inoperative, and contrary to the *Charter of Rights and Freedoms*¹³⁶ (thus attacking the Statement of Principles in a manner procedurally similar to Mr. Green’s attack on mandatory CPD).

The question of the validity of a statutory provision as a matter of administrative law is, of course, distinct from the question of whether it is constitutionally valid in light of Charter guarantees such as freedom of expression, and at present there is no penalty of suspension (or any penalty, for that matter) prescribed for lawyers who do not complete and report on a Statement of Principles. We should expect, however, that in future cases LSUC law societies will be citing the majority’s decision in *Green* and relying on the broad scope granted to them to enact rules to protect the public interest, potentially including consequences of suspension for lawyers who fail to comply.

Before lawyers become overly concerned about the breadth of law societies’ authority, however, we must remember that the majority in *Green* declined to address whether an “automatic” suspension, as contemplated by the dissenting justices, would indeed be procedurally fair if challenged by means of a judicial review application. *Green* leaves open whether a suspension (or other administrative sanction) is indeed automatic where the rules governing it are silent as to participatory rights or procedural safeguards. The majority left this question to be decided in another case in which it arises on the factual matrix.¹³⁷ One suspects it will not be long before lawyers give the courts a reason to revisit this issue.

¹³⁵ Bruce Pardy, “Law society’s new policy compels speech, crossing line that must not be crossed”, *National Post* (October 3, 2017), accessed October 9, 2017, online: <<http://nationalpost.com/opinion/bruce-pardy-law-societys-new-policy-compels-speech-crossing-line-that-must-not-be-crossed>>.

¹³⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

¹³⁷ *Green*, *supra*, note 3, at paras. 53-57.

