Federal Court Cour fédérale

Date: 20250627

Docket: T-381-24

Citation: 2025 FC 1157

Ottawa, Ontario, June 27, 2025

PRESENT: Mr. Justice Norris

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

OSAMA EL-BAHNASAWY

Respondent

and

DIRECTOR OF PUBLIC PROSECUTIONS

Intervener

JUDGMENT AND REASONS

I. OVERVIEW

[1] On May 21, 2016, 18-year-old Abdulrahman El-Bahnasawy and his family left their home in Mississauga and headed for New York City for a Victoria Day long weekend holiday. They crossed the Canada/United States border without incident. When they pulled into their New Jersey hotel parking lot, suddenly their vehicle was surrounded by Federal Bureau of Investigation (FBI) agents. Abdulrahman was placed under arrest and taken away. Five months later, he pled guilty to seven criminal charges relating to a plot to carry out terrorist attacks in New York City during the summer of 2016 in support of the Islamic State of Iraq and al-Sham (ISIS). The evidence against Abdulrahman was drawn mainly from his online activities, including his communications with someone who turned out to be an undercover FBI operative.

[2] In December 2018, Abdulrahman was sentenced to 40 years in prison and a lifetime of supervised release. Since June 2021, he has been serving his sentence at the Administrative Maximum Facility, a “supermax” prison in Florence, Colorado.

[3] The day after Abdulrahman’s arrest, Royal Canadian Mounted Police (RCMP) officers searched his family’s home in Mississauga. The family would soon learn that the RCMP were cooperating with the FBI in the investigation of Abdulrahman before their trip to the United States.

[4] In August 2019, Abdulrahman’s father, Osama El-Bahnasawy, submitted a complaint to the Civilian Review and Complaints Commission (CRCC) for the RCMP. The complaint

contained three allegations concerning the RCMP's investigation of Abdulrahman: (1) that the RCMP had helped the FBI entrap Abdulrahman despite being aware of his mental health problems; (2) that the RCMP had taken advantage of Abdulrahman's unstable mental health; and (3) that the RCMP had obtained Abdulrahman's medical records from the Centre for Addiction and Mental Health (CAMH) in Toronto one week before his arrest and had then provided information from those records to the FBI. A key concern for the family was that, despite knowing about his youth and mental health challenges, the RCMP failed to intervene while Abdulrahman was still in Canada and, instead, allowed him to go to the United States, where he would be arrested and prosecuted under a legal system that is much harsher than Canada's and that has fewer protections for mentally ill defendants.

[5] After finding that the complaint concerned an activity that is closely related to national security, in September 2019, the CRCC referred it to the National Security and Intelligence Review Agency (NSIRA or the Review Agency), as required by subsection 45.53(4.1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (*RCMP Act*). The Review Agency assumed jurisdiction over the complaint in January 2020 and began an investigation.

[6] In the course of the investigation, the Review Agency (*per* Mr. Craig Forcese, Vice-Chair and Presiding Member) asked the RCMP to provide information in its possession or under its control relating to any legal advice the RCMP had received regarding its operations concerning Abdulrahman. Much to Member Forcese's surprise, the RCMP objected to producing any such information, maintaining that the Review Agency was not entitled to information protected by solicitor-client privilege in a complaint investigation.

[7] Rather than wait until the issue of access to solicitor-client privileged information could be resolved, in December 2022, Member Forcese provided a report to the Minister of Public Safety and the Commissioner of the RCMP setting out the findings and recommendations he was able to make based on the information available to him. Member Forcese found that, for the most part, the RCMP had acted appropriately given the constraints under which they were operating, including restrictions on the use of information shared with them by the FBI (sometimes referred to as the third party rule).

[8] A report dated October 12, 2023, setting out Member Forcese's findings and recommendations was eventually released to the complainant, Mr. El-Bahnasawy. Member Forcese stated: "I have decided [. . .] to issue this report in its present form, while reserving an ongoing investigation on those matters that may require consideration of information over which counsel for the RCMP claims solicitor-client privilege. In this respect, therefore, this report may not constitute the last word on the matters it addresses."

[9] In the report, Member Forcese explained why, in his view, the information he was seeking from the RCMP was relevant to the complaint. He also explained why, in his view, the Review Agency was entitled to solicitor-client privileged information under section 10 of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2 (*NSIRA Act*). Paragraph 10(d) of the *NSIRA Act* states that, in the investigation of a complaint involving the RCMP, the Review Agency is entitled to have timely access to any information that relates to the complaint and that is in the possession or under the control of the RCMP (as well as certain other agencies) "[d]espite any other Act of Parliament and any privilege under the law of evidence."

The sole exception to this right of access is Cabinet confidences. Given this, Member Forcese disagreed with the RCMP that it was entitled to withhold relevant information from the Review Agency on the basis that it is solicitor-client privileged.

[10] Member Forcese returned to this issue in a procedural ruling dated February 14, 2024. In that ruling, he elaborates on why, in his view, section 10 of the *NSIRA Act* entitles the Review Agency to information relevant to a complaint even if that information would otherwise be protected by solicitor-client privilege. He also explains why he rejected the view advanced by the RCMP that he was now *functus officio* and, therefore, lacked the legal authority to continue his investigation into the complaint. Given the RCMP's refusal to provide the information requested, Member Forcese concluded that it was necessary to issue a summons to compel its production.

[11] The Attorney General of Canada (AGC) has applied for judicial review of the decision to issue a summons to compel the production of solicitor-client privileged information from the RCMP. The AGC submits that Member Forcese erred in concluding that the Review Agency is entitled to such information under section 10 of the *NSIRA Act.* The AGC also submits that, in any event, the summons should be quashed because the Review Agency was *functus officio* when it purported to issue the summons.

[12] As I will explain in the reasons that follow, in my view, there is no basis to interfere with Member Forcese's decision to issue a summons to the RCMP to compel the production of solicitor-client privileged information. The determination that the Review Agency was not

functus officio when the summons was issued is reasonable. As well, I agree with Member Forcese's conclusion that section 10 of the *NSIRA Act* entitles the Review Agency to solicitor-client information in the context of a complaint investigation. Briefly, for this provision to grant the Review Agency a right of access to information protected by solicitor-client privilege, it must do so in terms that are clear, explicit, and unequivocal. Having considered the text, context, and purpose of the provision as well as its legislative history, I am satisfied that section 10 meets this standard. This application for judicial review will, therefore, be dismissed.

II. BACKGROUND

A. *Statutory Provisions*

[13] The Review Agency's general mandate is described in subsection 8(1) of the *NSIRA Act* as follows:

8 (1) The mandate of the Review Agency is to	**8 (1)** L'Office de surveillance a pour mandat :
(a) review any activity carried out by the Canadian Security Intelligence Service or the Communications Security Establishment;	**a)** d'examiner toute activité exercée par le Service canadien du renseignement de sécurité ou le Centre de la sécurité des télécommunications;
(b) review any activity carried out by a department that relates to national security or intelligence;	**b)** d'examiner l'exercice par les ministères de leurs activités liées à la sécurité nationale ou au renseignement;
(c) review any matter that relates to national security or intelligence that a minister	**c)** d'examiner les questions liées à la sécurité nationale ou au renseignement dont il est saisi par un ministre;

of the Crown refers to the Agency; and	
(d) investigate	**d)** de faire enquête sur :
(i) any complaint made under subsection 16(1), 17(1) or 18(3),	**(i)** les plaintes qu'il reçoit au titre des paragraphes 16(1), 17(1) ou 18(3),
(ii) any complaint referred to the Agency under subsection 45.53(4.1) or 45.67(2.1) of the *Royal Canadian Mounted Police Act*,	**(ii)** les plaintes qui lui sont renvoyées au titre des paragraphes 45.53(4.1) ou 45.67(2.1) de la *Loi sur la Gendarmerie royale du Canada*,
(iii) reports made to the Agency under section 19 of the *Citizenship Act*, and	**(iii)** les rapports qui lui sont adressés en vertu de l'article 19 de la *Loi sur la citoyenneté*,
(iv) matters referred to the Agency under section 45 of the *Canadian Human Rights Act*.	**(iv)** les affaires qui lui sont transmises en vertu de l'article 45 de la *Loi canadienne sur les droits de la personne*.

[14] As mentioned above, the present application relates to the investigation of a complaint referred to the Review Agency under subsection 45.53(4.1) of the *RCMP Act*. The Review Agency's authority to investigate the complaint is conferred by paragraph 8(1)(d)(ii) of the *NSIRA Act.*

[15] The Review Agency's right of access to information in relation to complaints investigations is set out in section 10 of the *NSIRA Act*. Paragraphs 10(a), (b) and (c) concern the Review Agency's right of access to information relating to complaints involving the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment (CSE), and

denials of security clearances. The Review Agency's right of access to information relating to a complaint against the RCMP is set out in paragraph 10(d). It provides as follows:

Right of access — complaints	**Droit d'accès — plaintes**
10 Despite any other Act of Parliament and any privilege under the law of evidence and subject to section 12, the Review Agency is entitled to have access in a timely manner to the following information:	**10** Malgré toute autre loi fédérale et toute immunité reconnue par le droit de la preuve et sous réserve de l'article 12, l'Office de surveillance a le droit d'avoir accès en temps opportun aux informations suivantes :
[. . .]	[. . .]
(d) in relation to a complaint referred to it under subsection 45.53(4.1) or 45.67(2.1) of the *Royal Canadian Mounted Police Act*, any information that relates to the complaint and that is in the possession or under the control of the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police established by subsection 45.29(1) of the *Royal Canadian Mounted Police Act*, the Royal Canadian Mounted Police, the Canadian Security Intelligence Service or the Communications Security Establishment.	**d)** relativement à une plainte qui lui est renvoyée au titre des paragraphes 45.53(4.1) ou 45.67(2.1) de la *Loi sur la Gendarmerie royale* du Canada, les informations liées à la plainte qui relèvent de la Commission civile d'examen et de traitement des plaintes relatives à la Gendarmerie royale du Canada, constituée par le paragraphe 45.29(1) de la *Loi sur la Gendarmerie royale du Canada*, de la Gendarmerie royale du Canada, du Service canadien du renseignement de sécurité ou du Centre de la sécurité des télécommunications ou qui sont en la possession de l'un d'eux.

[16] On the other hand, the Review Agency's right of access to information in relation to its review mandates is set out in section 9 of the *NSIRA Act*. It provides as follows:

Access to Information	**Accès à l'information**
Right of access — reviews	**Droit d'accès — examens**
9 (1) Despite any other Act of Parliament and subject to section 12, the Review Agency is entitled, in relation to its reviews, to have access in a timely manner to any information that is in the possession or under the control of any department.	**9 (1)** Malgré toute autre loi fédérale et sous réserve de l'article 12, l'Office de surveillance a le droit d'avoir accès, relativement aux examens qu'il effectue et en temps opportun, aux informations qui relèvent de tout ministère ou qui sont en la possession de tout ministère.
Protected information	**Informations protégées**
(2) Under subsection (1), the Review Agency is entitled to have access to information that is subject to any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.	**(2)** Le paragraphe (1) confère notamment à l'Office de surveillance le droit d'accès aux informations protégées par toute immunité reconnue par le droit de la preuve, par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.
For greater certainty	**Précision**
(3) For greater certainty, the disclosure to the Review Agency under this section of any information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that secrecy.	**(3)** Il est entendu que la communication à l'Office de surveillance, au titre du présent article, d'informations protégées par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige ne constitue pas une renonciation au secret professionnel ou au privilège.

[17] Section 11 of the *NSIRA Act* provides as follows in relation to both reviews and complaints investigations:

Documents and explanations	**Documents et explications**
11 (1) Under sections 9 and 10, the Review Agency is entitled to receive from the deputy head or employees of the department concerned any documents and explanations that the Agency deems necessary for the exercise of its powers and the performance of its duties and functions.	**11 (1)** Les articles 9 et 10 confèrent notamment à l'Office de surveillance le droit de recevoir de l'administrateur général et des employés du ministère en cause les documents et explications dont il estime avoir besoin dans l'exercice de ses attributions.
Decision — Review Agency	**Décision de l'Office de surveillance**
(2) For the purposes of sections 9 and 10, the Review Agency is entitled to decide whether information relates to the review or complaint in question.	**(2)** Pour l'application des articles 9 et 10, il appartient à l'Office de surveillance de décider si une information est liée à l'examen ou à la plainte en cause.
Inconsistency or conflict	**Incompatibilité ou conflit**
(3) In the event of any inconsistency or conflict between sections 9 and 10 and any provision of an Act of Parliament other than this Act, section 9 or 10 prevails to the extent of the inconsistency or conflict.	**(3)** Les articles 9 et 10 l'emportent en cas d'incompatibilité ou de conflit avec toute disposition d'une loi fédérale autre que la présente loi.

[18] Sections 9 and 10 of the *NSIRA Act* are both subject to section 12 of that Act. It provides as follows:

Exception	**Exception**
12 The Review Agency is not entitled to have access to a confidence of the Queen's Privy Council for Canada the	**12** L'Office de surveillance n'a pas un droit d'accès aux renseignements confidentiels du Conseil privé de la Reine

disclosure of which could be refused under section 39 of the *Canada Evidence Act*.	pour le Canada dont la divulgation pourrait être refusée au titre de l'article 39 de la *Loi sur la preuve au Canada*.

B. *The Review Agency's Request for Solicitor-Client Information*

[19] The RCMP disclosed evidence to the Review Agency relating to the present complaint in tranches. On several occasions, Member Forcese requested additional information. The information-gathering process was lengthy because of public health measures in place at the time as a result of the COVID-19 pandemic.

[20] By January 2022, Member Forcese was in a position to begin interviews with members of the RCMP. On January 10, 2022, the Registrar of the Review Agency emailed Derek Rasmussen, counsel with the Department of Justice who was acting for the RCMP in connection with the investigation, to begin making arrangements for the witness interviews. On behalf of Member Forcese, the Registrar identified ten general topics that may be covered in the interviews:

1. Investigative resources and techniques deployed against Abdulrahman El-Bahnasawy and his family;

2. The role of the age of the suspect when making investigative decisions;

3. RCMP's information sharing with the FBI, generally, and specifically the information sharing regarding Abdulrahman El-Bahnasawy's mental health;

4. The status and decision making regarding a production order for the CAMH records of Abdulrahman El-Bahnasawy;

5. The status of all judicial authorizations contemplated or obtained;

6. Where the RCMP obain[ed] the foreign mental health records of Abdulrahman El-Bahnasawy, and if any records were obtained from a source other than the residence of [redacted].

7. What if any discussions occurred with the FBI around Abdulrahman El-Bahnasawy's mental health and if arrangements were made with the FBI or the Federal Bureau of Prisons for Abdulrahman El-Bahnasawy's health care prior to his arrest;

8. Recapping the decision to allow Abdulrahman El-Bahnasawy to leave the jurisdiction for arrest by the FBI and whether the [redacted];

9. Recapping the decision making to not arrest or prosecute Abdulrahman El-Bahnasawy in Canada, and whether there are policies to guide that decision making;

10. If, how, or when the *Mutual Legal Assistance in Criminal Matters [Act]* was used or contemplated.

[21] The January 10, 2022, email also stated that Member Forcese was seeking additional documentary material for the investigation, if available, including "Any legal advice sought or obtained in relation to Abdulrahman El-Bahnasawy." The request expressly excluded "any legal advice obtained specific to this NSIRA complaint investigation."

[22] Mr. Rasmussen responded by letter dated January 21, 2022. In relation to the request for any legal advice sought or obtained in relation to Abdulrahman El-Bahnasawy, he wrote that the request was being considered "and further review of the RCMP's investigative file is required to determine if any responsive documentation exists."

[23] Mr. Rasmussen returned to the request for legal advice in a letter to the Review Agency dated April 11, 2022, stating that the RCMP would not produce any such information. He explained the RCMP's position as follows:

> In the above-noted correspondence [i.e. the January 10, 2022, email from the Registrar], NSIRA also seeks certain legal advice. Any such advice is covered by solicitor-client privilege. It is the Government of Canada's position that NSIRA does not have the statutory authority to access information protected by solicitor-client privilege in the context of a complaint under s. 10 of the NSIRA Act. Unlike the express and unequivocal right of access to solicitor-client information in the context of reviews under s. 9(2) of the Act, s. 10 provides NSIRA with no such authority to access solicitor-client privileged information.
>
> In addition, any legal advice responsive to this request was provided to the RCMP by counsel with the Public Prosecution Service of Canada (PPSC). It is subject to the solicitor-client privilege and the advice was tightly interwoven with an exercise of prosecutorial discretion, which includes an assessment of what is often a considerable list of variables set forth in law and policy. Such advice is embedded in the independence of the office of the DPP [Director of Public Prosecutions] – a constitutionally protected value – which is accountable to the Attorney General of Canada in Parliament through established channels and is not otherwise reviewable absent an abuse of process.

C. *Further Exchanges Regarding Solicitor-Client Privileged Information*

[24] The day after Mr. Rasmussen sent his letter of April 11, 2022, he spoke with NSIRA legal counsel and others on a conference call. During this call, NSIRA legal counsel pointed out that a document previously disclosed to the Review Agency by the RCMP contained information potentially protected by solicitor-client privilege. In a follow-up email dated April 20, 2022, NSIRA legal counsel raised the possibility that another previously disclosed document may also contain information potentially protected by solicitor-client privilege. NSIRA legal counsel

asked Mr. Rasmussen to confirm the RCMP's position regarding these documents, including whether it was prepared to waive any claim of solicitor-client privilege over these documents.

[25] In a letter to the Review Agency dated May 20, 2022, Mr. Rasmussen confirmed that the RCMP was claiming solicitor-client privilege over the entirety of one of the documents and over part of the other document identified by the Review Agency. He explained that these disclosures to the Review Agency had been inadvertent. Mr. Rasmussen requested that the documents be returned to the RCMP so that the solicitor-client privileged information could be redacted and the documents re-disclosed.

[26] Subsequently, at a meeting between NSIRA legal counsel and counsel from the Department of Justice on June 28, 2022, NSIRA legal counsel agreed that the previously disclosed solicitor-client privileged information would be purged from the Review Agency's records.

D. *The October 12, 2023, Report*

[27] The October 12, 2023, report is the Review Agency's report of its findings and recommendations to the complainant, Mr. El-Bahnasawy, pursuant to subsection 29(2) of the *NSIRA Act*. In this report, Member Forcese explained that he completed his Final Report in relation to the complaint on December 8, 2022. As required by paragraph 29(1)(c) of the *NSIRA Act*, on that date he provided the Minister of Public Safety and the Commissioner of the RCMP "with a report containing the findings of the investigation and any recommendations that the Agency considers appropriate."

[28] Subsection 29(2) of the *NSIRA Act* provides that, after completing a report under any of paragraphs 29(1)(a), (b), or (c), the Review Agency "must report the findings of the investigation to the complainant and may report to the complainant any recommendations it thinks fit." Paragraph 52(1)(b) of the Act states that, in preparing a report under subsection 29(2), the Review Agency must "consult with the deputy heads concerned" to ensure that the report does not "contain information the disclosure of which would be injurious to national security, national defence or international relations or is information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege." In the present case, the consultation process was lengthy because the RCMP sought significant redactions to the report based on the injury to national security it alleged would result from disclosure of information in breach of the third party rule. As a result, the subsection 29(2) report could not be released until October 12, 2023.

[29] As already noted, in this report, Member Forcese shared the findings and recommendations he had been able to make based on the information available to him. He also addressed the RCMP's objection to disclosing solicitor-client privileged information to the Review Agency. Member Forcese wrote:

> This matter should have been quickly resolved. Historically, NSIRA's predecessor organization, the Security Intelligence Review Committee, had access in its complaints investigations to solicitor-client privileged documents relating to operational legal advice (that is, advice given by lawyers to the service in question concerning the activity at issue in the complaint investigation, at times material to the investigation) [footnote omitted]. Until the sudden reversal noted above, NSIRA continued to receive information prepared by lawyers relevant to a matter it was investigating, other than information prepared for their clients in response to the investigation itself (litigation privileged material).

> However, counsel for the RCMP seemingly disputes NSIRA's entitlement to any solicitor-client privileged documents, including operational legal advice. In response to NSIRA's request for submissions, they claimed that the disclosure noted above was inadvertent and that the RCMP would like to maintain privilege over the document, and that it was the position of the RCMP that I did not have jurisdiction to see documents covered by solicitor-client privilege.

[30] Member Forcese made it clear that he did not accept the RCMP's position concerning the Review Agency's right of access to solicitor-client privileged information in complaints investigations, "one that reverses past practice." However, resolving this disagreement "will require legal process, and NSIRA is obliged to determine the best manner in which to proceed with such a resolution." Since this would likely result in further delay, Member Forcese decided to submit his report in its present form, while expressly reserving an ongoing investigation on those matters that may require him to consider information over which solicitor-client privilege had been claimed. As a result, the report he was releasing to Mr. El-Bahnasawy "may not constitute the last word on the matters it addresses."

[31] While not stating so expressly, the October 12, 2023, report implies that the report to the Minister and the Commissioner of the RCMP under subsection 29(1) of the Act contained a similar caveat. That this was in fact the case is confirmed in a December 22, 2023, procedural direction (discussed below), where Member Forcese states: "Given the RCMP's objection, I issued my reports in their present form, while reserving an ongoing investigation on those matters that may require consideration of information over which counsel for the RCMP claimed solicitor-client privilege [footnote omitted]." (I note parenthetically that the subsection 29(1) report is not part of the record on this application.)

[32] In the October 12, 2023, report, Member Forcese offered two arguments in support of his view that NSIRA is entitled to solicitor-client information in the possession or under the control of the RCMP that is relevant to a complaint investigation.

[33] First, as just noted, it had been the practice before the Security Intelligence Review Committee (SIRC) that it could obtain solicitor-client privileged information relevant to a complaint under investigation and that practice had continued before NSIRA, at least until the RCMP's objection in the present case. Member Forcese observed that the preamble to the *National Security Act, 2017*, SC 2019, c 13, within which the *NSIRA Act* was embedded, "makes clear Parliament's intent to enhance accountability and transparency, an intent now denied where the government reverses information access relative to what was available to NSIRA's predecessor."

[34] Second, paragraph 10(d) of the *NSIRA Act* specifically allows the Review Agency access to any relevant information in the possession or under the control of the RCMP despite "any privilege under the law of evidence." Subsection 52(1) of the same Act requires the redaction of solicitor-client information in reports to complainants stemming from investigations. In Member Forcese's view, the RCMP's position that the Review Agency is not entitled to solicitor-client privileged information gives rise to an incoherence in the statute: on the one hand, according to the RCMP, Parliament intended to deny NSIRA access to solicitor-client privileged information in complaints investigations while, on the other hand, simultaneously instructing NSIRA to redact solicitor-client information from its completed investigation reports – in other words, "to redact information that, in counsel's view, it cannot have anyway." In

Member Forcese's view, the RCMP's position was contrary to the principles of statutory interpretation, which include a presumption against incoherence.

[35] As will be seen below, Member Forcese reiterates and expands upon these arguments in his February 14, 2024, procedural ruling.

[36] Finally, Member Forcese explained why, in his view, any legal advice the RCMP may have sought on the issue of prosecution in Canada was relevant to his investigation. Without that information, he was unable to fully address the complainant's concerns about the RCMP's decision not to bring proceedings against Abdulrahman in Canada. Nor could he determine whether the RCMP had sought or followed any legal advice in this matter, which had a bearing on his assessment of their actions. Member Forcese stated: "This is regrettable as it will inevitably contribute to the doubts the Complainant has about the conduct of the RCMP in this matter."

E. *Subsequent Events*

[37] On November 23, 2023, Mr. El-Bahnasawy, together with his son Abdulrahman and his wife, Khdiga Metwally, commenced an application for judicial review in this Court (Court File No. T-2479-23). Among other relief, the applicants sought: (1) a declaration that paragraph 10(d) of the *NSIRA Act* granted the Review Agency a right to relevant information in the possession or under the control of the RCMP even if that information is protected by solicitor-client privilege; (2) an order requiring the Review Agency to exercise its power to compel the production of any such information from the RCMP pursuant to section 27 of the *NSIRA Act*; and (3) an order

requiring the Review Agency to prepare and issue a revised report in light of all relevant information, including any information that had previously been withheld from the Review Agency on grounds of solicitor-client privilege.

[38] The applicants included in their Notice of Application a request pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 (*FCR*) for a copy of the complete record considered by Member Forcese in preparing his report. This request, in turn, triggered an objection by the Review Agency under Rule 318 of the *FCR* on the basis that the tribunal record will attract non-disclosure claims under section 38 of the *Canada Evidence Act*, RSC 1985, c C-5 (*CEA*).

[39] On December 22, 2023, Member Forcese issued a procedural direction to the RCMP "regarding the next steps in this investigation." After setting out the background described above, including the fact that Mr. El-Bahnasawy and others had commenced an application for judicial review and that a concurrent application by the AGC under section 38.04 of the *CEA* to protect sensitive information from disclosure may be required, Member Forcese wrote: "This process runs the risk of being lengthy and will further delay resolution of this issue. I consider it in the public interest to formally crystalize the core matter of dispute: the discrete, legal question of the Review Agency's access to solicitor-client material in the course of complaints investigations under its Act."

[40] Accordingly, Member Forcese stated that he intended to continue "the ongoing investigation" into the areas he had expressly left open in the October 12, 2023, report. In the procedural ruling, Member Forcese stated "for greater certainty" that he deemed that any

solicitor-client information in the RCMP's possession relating to the issues under investigation "is requisite to the full investigation and consideration of the complaint." Without limiting the breadth of his request for relevant information, he identified three specific issues with respect to which he required further information in order to complete his investigation: (1) whether the RCMP sought and received legal advice on the prospect of bringing legal proceedings against Abdulrahman El-Bahnasawy in Canada, and whether the RCMP acted in accordance with any legal advice obtained; (2) whether the RCMP sought and received any legal advice in relation to its activities against Abdulrahman El-Bahnasawy, including with respect to any obligations that were owed to him as a Canadian national, as a minor, or as a person suffering a severe psychiatric illness (whether under the *Charter*, under other Canadian law, or under international human rights treaties) and whether the RCMP acted in accordance with that advice; and (3) whether the RCMP sought and received any legal advice regarding compliance with the *Privacy Act* before sharing reports concerning Abdulrahman El-Bahnasawy and members of his family with the FBI and whether the RCMP acted in accordance with that advice.
Member Forcese then reiterated his request under section 10 of the *NSIRA Act* for any legal advice sought or received by the RCMP in relation to Abdulrahman El-Bahnasawy (excluding any legal advice specific to the complaint investigation). Finally, he stated that, should the RCMP decline to produce this information by January 19, 2024, he would consider invoking paragraph 27(a) of the *NSIRA Act*, which empowers the Review Agency to compel the production of information by way of a summons.

[41] Alexander Gay, counsel with the Department of Justice, responded to the procedural direction on behalf of the RCMP by letter dated January 19, 2024. In summary, Mr. Gay stated:

(1) the RCMP reiterates its objection to producing solicitor-client information, which the Review Agency is not entitled to under section 10 of the *NSIRA Act*; (2) having issued its reports under section 29 of the *NSIRA Act*, any suggestion that the Review Agency "continues to have legislative authority to call on and consider privileged documents runs afoul of the concept of *functus officio*;" (3) the proper place to resolve the issue of the Review Agency's entitlement to solicitor-client information is before the Federal Court in the context of the recently commenced judicial review application; and (4) in the event that the Review Agency were to issue a summons to the RCMP seeking solicitor-client privileged information, the RCMP would move to set the summons aside.

[42] On February 2, 2024, the Review Agency shared a copy of Mr. Gay's letter with counsel for Mr. El-Bahnasawy and offered an opportunity to provide brief written submissions in response, particularly with respect to the argument that the Review Agency is *functus officio*. Those submissions were provided on February 12, 2024. On behalf of the complainant, counsel submitted that the Review Agency is entitled to solicitor-client privileged information when investigating complaints. Counsel also submitted that the Review Agency is not barred by the doctrine of *functus officio* from continuing with its investigation of the present complaint.

III. DECISION UNDER REVIEW

[43] In the February 14, 2024, procedural ruling, Member Forcese held that the Review Agency is entitled to access solicitor-client privileged information relevant to complaints investigations and, further, that the Review Agency is not *functus officio*. Accordingly, the Review Agency issued a summons to compel the production of the information Member Forcese

had requested from the RCMP. (The Review Agency is holding enforcement of the summons in abeyance pending the final determination of the present application.)

[44] Looking first at the Review Agency's right of access to solicitor-client privileged information under paragraph 10(d) of the *NSIRA Act*, Member Forcese began with the "modern principle" of statutory interpretation, which is that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at 41, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at 87). Whether a statute is being interpreted by a court or by an administrative decision maker, those who draft and enact statutes "expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 118). Thus, as Member Forcese recognized, an administrative decision maker's task "is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue" (*Vavilov*, at para 121).

[45] Considering the text of section 10(d) of the *NSIRA Act* in its statutory context, Member Forcese found that it granted a broad right of access to information in the possession or under the control of the RCMP, including solicitor-client privileged information. The right of access to relevant information is limited only by section 12 of the *NSIRA Act*, which expressly excludes Cabinet confidences but nothing else. Member Forcese wrote: "If Parliament intended the access to be subject to other limitations, it would have included language to that effect."

[46] Member Forcese acknowledged that, in *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, the Supreme Court of Canada had held that, under a similarly worded provision of the Alberta *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIPP*), the Information and Privacy Commissioner was not entitled to receive solicitor-client information.

[47] The majority (*per* Côté J) reached this conclusion because, as the Court had held in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, to give effect to solicitor-client privilege as a fundamental policy of the law, "legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so" (*University of Calgary*, at para 28). While the provision at issue in *University of Calgary* required a public body to produce required records to the Information and Privacy Commissioner "[d]espite . . . any privilege of the law of evidence," solicitor-client privilege is no longer merely a privilege under the law of evidence; it is also a substantive rule that protects solicitor-client communications outside of adjudicative proceedings. Justice Côté found that, by referring only to "any privilege of the law of evidence," the provision failed to evince "clear and unambiguous legislative intent to set aside solicitor-client privilege" (*University of Calgary*, at para 2).

[48] Member Forcese found that *University of Calgary* could be distinguished in two respects. First, unlike the matter before him, *University of Calgary* was "decided in the context of an access to information regime rather than an adjudicative or investigative proceeding in which solicitor-client information was material to the determination of facts." Justice Côté had found in

University of Calgary that that case "engages solicitor-client privilege in its substantive, rather than evidentiary, context" (*University of Calgary*, at para 42). This stood in contrast to complaints investigations by the Review Agency. Member Forcese wrote:

> Côté J.'s comments suggest that her interpretation of *FOIPP* would not necessarily apply in an adjudicative and investigative context where a tribunal (like the Review Agency) has court-like functions [footnote omitted]. Indeed, a full consideration of the adjudicative and investigative nature of complaints investigations under the *NSIRA Act* supports my conclusion that section 10 engages solicitor-client privilege in its evidentiary rather than substantive context. The Review Agency seeks information in the RCMP's possession to be considered as evidence of whether the RCMP sought, received, and followed legal advice in a criminal investigation that engaged complex legal issues.

[49] Relatedly, Member Forcese rejected the RCMP's submission that the difference in wording between sections 9 and 10 of the *NSIRA Act* confirmed that the Review Agency does not have access to solicitor-client privileged information in complaints investigations. In his view, the wording of section 9 reflects the fact that it was intended to abrogate solicitor-client privilege in the substantive, non-evidentiary context of reviews. Although section 9 refers expressly to solicitor-client privilege and section 10 refers, instead, to "any privilege of the law of evidence," Member Forcese found that it did not follow that the phrases meant different things. While it is true that, according to the presumption of consistent expression, "when different terms are used in a single piece of legislation, they must be understood to have different meanings" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81), Member Forcese found that either this presumption did not apply or it was rebutted because reviews and complaints investigations are "fundamentally different." He explained:

> Unlike complaints investigations, reviews are not quasi-judicial proceedings where parties tender evidence and the Review Agency adjudicates a legal dispute. Rather, it is a non-adjudicative process

> where the Review Agency has a broad mandate to review any activity carried out by a federal department related to national security or intelligence and report its findings and recommendations to the executive branch [footnote omitted]. Accordingly, I find that the different language in sections 9 and 10 was not intended to limit the Review Agency's access to information in complaints investigations.

[50] The second respect in which Member Forcese found that Review Agency complaints investigations differ from the regime considered in *University of Calgary* was the presence of legislative safeguards in the *NSIRA Act* to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right protected by the privilege. In *University of Calgary*, the Court found that the absence of such safeguards in *FOIPP* was another indication that the legislature did not intend to abrogate the privilege: see *University of Calgary*, at para 58.

[51] In contrast, the *NSIRA Act* contains safeguards to ensure that solicitor-client privileged information is not disclosed to anyone other than the Review Agency. Under subsection 25(1) of the Act, every investigation by the Review Agency is to be conducted in private. Under subsection 25(2), while the complainant has the right to present evidence to the Review Agency and to be heard personally or by counsel, no one (including the complainant) is entitled as of right to be present during, to have access to, or to comment on representations made to the Review Agency by any other person.

[52] Furthermore, as was also discussed in the October 12, 2023, report, paragraph 52(1)(b) of the *NSIRA Act* obliges the Review Agency to consult with the deputy heads in order to ensure that a report to a complainant under subsection 29(2) does not contain information "that is

subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege." In Member Forcese's view, it would be logically incoherent for Parliament to have intended to deny the Review Agency access to solicitor-client privilege while at the same time requiring such information to be redacted from a report. He wrote: "It is a principle of statutory interpretation that Parliament does not intend to produce absurd consequences [footnote omitted]. Thus, the only reasonable interpretation is that Parliament intended to give the Review Agency access to solicitor-client privileged information while protecting it from further disclosure."

[53] Member Forcese also found that the object and purpose of section 10 of the *NSIRA Act* supported his interpretation of the provision. The *NSIRA Act* was enacted as part of the *National Security Act, 2017* (Bill C-59, An Act respecting national security matters, 1st Sess, 42nd Parl, 2017 – Royal Assent June 21, 2019). In addition to making a number of other significant changes to Canada's national security framework, the *National Security Act, 2017* created the Review Agency to consolidate review and complaint investigation functions relating to national security in a single body. Member Forcese observed that the object and purpose of the legislation is reflected in the Preamble to the Act. He noted in particular that the Preamble states, among other things, that the fundamental responsibility of the Government of Canada to protect Canada's national security and the safety of Canadians must be carried out in accordance with the rule of law and in a manner that safeguards the rights and freedoms of Canadians and that respects the *Canadian Charter of Rights and Freedoms*. The Preamble also states that "enhanced accountability and transparency are vital to ensuring public trust and confidence in Government of Canada institutions that carry out national security or intelligence activities."

[54] With these purposes of the legislation in mind, Member Forcese wrote:

> The Review Agency is mandated to investigate complaints with respect to activities of national security and intelligence agencies. Because these activities are carried out in secret and impact Canadians' rights and freedoms, Parliament provided the Review Agency with broad access to information to ensure enhanced accountability. In many investigations, the lawfulness and reasonableness of these activities will engage complicated legal and jurisdictional questions, and it is incumbent upon the Review Agency to assess if the agency acted in accordance with, or contrary to, any legal advice it received. A blanket prohibition on this information would hinder the Review Agency's ability to meaningfully investigate complaints in a comprehensive manner. It would also frustrate Parliament's intention to create a system of enhanced accountability and transparency and to ensure public trust and confidence in Canada's national security institutions.

[55] Finally in this regard, Member Forcese found that, contrary to the RCMP's argument that the differences between sections 9 and 10 of the *NSIRA Act* implied that Parliament intended to give the Review Agency different rights of access to information depending on whether it was engaged in a review or a complaint investigation, the legislative history of the *NSIRA Act* indicated that "Parliament intended for the Review Agency to have unfettered access to all information except cabinet confidences in both investigations and reviews." (This legislative history will be discussed below.)

[56] Turning to the question of whether, as the RCMP contended, the Review Agency was *functus officio*, Member Forcese rejected the view that his jurisdiction to investigate the complaint was exhausted when he submitted and issued his reports under section 29 of the *NSIRA Act*.

[57] Quoting at length from *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848, Member Forcese acknowledged that the doctrine of *functus officio* can apply to administrative tribunals. He also acknowledged that, "as a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changed its mind, made an error within jurisdiction or because there has been a change of circumstances" (*Chandler*, at 861).

[58] *Chandler* also recognizes, however, that the application of the doctrine to administrative tribunals "must be more flexible and less formalistic in respect of decisions of administrative tribunals which are subject to appeal only on a point of law" (at 862). Thus, in addition to cases where the tribunal's enabling statute expressly authorizes the tribunal to reopen a matter, "if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task" (*ibid.*).

[59] Summarizing his understanding of the relevant jurisprudence, Member Forcese observed that an administrative decision maker should take a pragmatic approach when applying the doctrine of *functus officio*, where any unfairness to an individual caused by reopening a matter is weighed against the harm that would result if the tribunal did not fulfill its mandate. Under this approach, "the doctrine only applies where the benefit[s] of finality and certainty in decision making outweigh those of responsiveness to changing circumstances, new information and second thoughts [internal quotation marks and citation omitted]." In fact, as Member Forcese noted, the Federal Court has held that the doctrine does not apply in the context of investigations

that result in factual findings and recommendations as opposed to a binding decision: see *Cruickshank v Canada (Attorney General)*, 2004 FC 470 at paras 21-23. But even if the doctrine were to apply to investigations, a "high degree of flexibility" in its application would be called for (*Cruickshank*, at para 24).

[60] For three reasons, Member Forcese concluded that the doctrine of *functus officio* did not apply to the circumstances before him.

[61] First, he was not seeking to re-open his investigation or alter his previous findings. Rather, he was continuing an investigation into matters expressly left open in his reports because of the refusal of the RCMP to provide relevant information. While in some respects his reports were final (because they finally determined certain substantive issues), in other respects they were not (because they expressly left open certain other issues). In effect, he had bifurcated his investigation and would be issuing his final reports to the Minister and the Commissioner of the RCMP (under paragraph 29(1)(c)) and to the complainant (under subsection 29(2)) in stages. As a result, the doctrine of *functus officio* is not engaged.

[62] Second, this power to bifurcate issues and provide staged reports is consistent with the statutory scheme of the *NSIRA Act*. Member Forcese noted that section 7.1 of the Act provided that, "Subject to this Act, the Review Agency may determine the procedure to be followed in the exercise of its powers or the performance of any of its duties or functions." He rejected the RCMP's interpretation of section 29 of the *NSIRA Act*, according to which, since a report must be issued when an investigation is completed, issuing a report entailed that the investigation had

been completed. In other words, he did not agree that a report could be issued under section 29 *only if* the investigation had been completed. He therefore rejected the RCMP's submission that, because he had issued reports under section 29, he must have completed his investigation and, as a result, he was now *functus officio*.

[63] Third, Member Forcese found that, in any event, a strict application of the doctrine of *functus officio* in the present circumstances would be contrary to the public interest. He explained:

> As noted above, the object and purpose of the *NSIRA Act* is to provide enhanced accountability and transparency and to ensure public trust and confidence in Canada's national security institutions. To discharge its mandate, it is incumbent upon the Review Agency to investigate complaints in a complete and comprehensive manner after considering all relevant information in the possession and control of the agency being investigated. While there would be no unfairness to the RCMP in finishing the investigation, it would be deeply unfair to the Complainant if the RCMP benefitted from its own withholding of information to escape accountability. This would almost certainly contribute to the Complainant's doubts about the RCMP's conduct in this matter and the capacity of the Review Agency to hold them to account.

[64] In summary, Member Forcese was satisfied that he was not *functus officio* and, furthermore, that the Review Agency was entitled to additional relevant information in the possession or control of the RCMP, even if that information would otherwise be protected from disclosure by solicitor-client privilege. Since the RCMP was refusing to provide the information he had requested, Member Forcese concluded that a summons to compel its production should be issued pursuant to paragraph 27(a) of the *NSIRA Act*.

IV. STANDARD OF REVIEW

[65] This application for judicial review raises two issues: first, whether Member Forcese erred in concluding that he was not *functus officio* and, second, whether he erred in concluding that he was entitled to solicitor-client privileged information in the possession or control of the RCMP. These issues attract different standards of review.

[66] The parties agree, as do I, that Member Forcese's decision that he was not *functus officio* should be reviewed on a reasonableness standard (see *9209654 Canada Inc v Canada (Border Services Agency)*, 2022 FC 1390 at paras 20-22). A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para 85). When conducting reasonableness review, a reviewing court must take a "reasons first" approach that examines and evaluates the justification the administrative decision maker has given for its decision, always bearing in mind the history of the proceeding and the administrative context in which the decision was made (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 58-60). While it "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers," reasonableness review is nevertheless "a robust form of review" (*Vavilov*, at para 12; *Mason*, at para 63).

[67] On the other hand, the parties do not agree on the standard of review that applies to Member Forcese's determination that, in a complaint investigation, paragraph 10(d) of the *NSIRA Act* entitles the Review Agency to relevant solicitor-client privileged information in the

possession or under the control of the RCMP. The AGC submits that this issue should be determined on a correctness standard while the respondent submits that a reasonableness standard applies to this issue as well.

[68] I agree with the AGC.

[69] Whether section 10 of the *NSIRA Act* allows solicitor-client privilege to be set aside is a question of central importance to the legal system and, as such, the applicable standard of review is correctness: see *University of Calgary*, at paras 20-26; see also *Vavilov*, at paras 58-62. In *University of Calgary*, the majority specifically found that what statutory language is sufficient to limit solicitor-client privilege is a question that must be determined on a correctness standard because it is a question of central importance to the legal system as a whole. The correctness standard must be applied to this question to ensure "that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary" (*Vavilov*, at para 53). The respondent's efforts to show that this holding does not apply to the issue raised in the present case because, at best, this case only raises an issue of importance for a "niche" and highly specialized area of the law, and not for the legal system as a whole, are not persuasive.

[70] When applying the correctness standard, "the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view" (*Vavilov*, at para 54, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50). "While it should take the administrative decision maker's reasoning into account – and indeed, it may find that reasoning

persuasive and adopt it – the reviewing court is ultimately empowered to come to its own conclusion on the question" (*Vavilov*, at para 54).

V. ANALYSIS

A. *Was the Review Agency* functus officio *when it issued the summons?*

[71] As a general rule, once a decision maker has made a final decision in respect of a matter before it, the decision maker is *functus officio* (*Chandler*, at 861). As with courts, "there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals" (*ibid.*).

[72] The AGC submits that, when the Review Agency submitted its report to the Minister of Public Safety and to the Commissioner of the RCMP pursuant to paragraph 29(1)(c) of the *NSIRA Act*, it had fully discharged its mandate to investigate and report on the complaint. The AGC notes that the requirement that the Review Agency submit a report under paragraph 29(1)(c) is triggered "on completion of an investigation into a complaint." The AGC submits that, since the Review Agency submitted a report pursuant to this section, it must have completed its investigation into the complaint. With its investigation having been completed, the Review Agency is *functus officio.* It therefore lacked the authority to continue an investigation into the complaint; any steps it purported to take in this regard (including issuing the summons to the RCMP on February 14, 2024) are a nullity.

[73] I disagree. In my view, Member Forcese reasonably concluded that the doctrine of *functus officio* did not bar him from proceeding as he did.

[74] The AGC submits that the doctrine barred the Review Agency from taking any further steps in its investigation of the complaint because it had completed its investigation. According to the AGC, "There is nothing left to be decided regarding the substance of the Complainant's allegations and therefore the Review Agency is *functus*" (Applicant's Memorandum of Fact and Law, paragraph 83). Similarly, the AGC submits that the complainant's allegations "have been fully addressed in the Final Report, as the presiding member made findings regarding their merits" (Applicant's Memorandum of Fact and Law, paragraph 87).

[75] This is incorrect.

[76] As described in detail above, in his reports under subsections 29(1) and (2) of the *NSIRA Act*, Member Forcese expressly identified and left open specific issues on which he was unable to make findings or recommendations because of the refusal of the RCMP to provide him with information he had requested. Although he had completed his investigation of the complaint in certain respects, and had reported to the Minister and the Commissioner accordingly, he stated in his reports that he had not completed his investigation in these other respects. As he later explained in his February 14, 2024, procedural ruling rejecting the contention that he was now *functus officio*, he had effectively bifurcated the complaint. This is not a case where the administrative decision maker wishes to re-open the matter because it overlooked an issue or has changed its mind and the interest of finality may weigh more heavily.

[77] Section 7.1 of the *NSIRA Act* provides: “Subject to this Act, the Review Agency may determine the procedure to be followed in the exercise of its powers or the performance of any of its duties or functions.” While it is true that the *NSIRA Act* does not expressly grant the Review Agency the authority to bifurcate a complaint, it does not preclude this, either. Crucially, I am not persuaded that, as the AGC contends, section 29 of the *NSIRA Act* entails that a complaint investigation can only lead to a single report of findings and recommendations, and that bifurcating a complaint would therefore be inconsistent with the Act. While this may be the norm, and while this may be preferable, as the present case demonstrates, sometimes circumstances require a different approach.

[78] Having examined and evaluated Member Forcese’s justification for proceeding as he did, and bearing in mind the history of the proceeding and the administrative context in which the decision was made, I am satisfied that he proceeded reasonably. As just stated, in my view, the procedure he chose is not inconsistent with the *NSIRA Act*. The issues he left open were fairly raised by the proceeding, he was empowered by his enabling statute to dispose of them, yet circumstances did not permit their final resolution. The solution was to bifurcate the complaint with a view to preparing a second report for the Minister and the Commissioner if additional relevant information was eventually provided to the Review Agency. Proceeding in this way does not threaten the principle of finality or cause any unfairness to either party. There is no reasonable basis for the RCMP to be surprised that Member Forcese returned to issues he had expressly left open. As he said, his reports may not be the last word on the matters they addressed. On the other hand, delaying the submission of any report until the issue of access to solicitor-client privileged information was resolved could prejudice the complainant and would

arguably be contrary to the public interest as well. I am satisfied that, in the particular circumstances of this case, Member Forcese's determination of the procedure to follow in investigating and reporting on the complaint is reasonable.

[79] That being said, with the benefit of hindsight, the procedure he adopted was not ideal. Member Forcese was properly concerned about the delay that had accrued in the investigation of the complaint, which had been submitted to the CRCC in August 2019 and referred to the Review Agency the following month. For various reasons (including the onset of the COVID-19 pandemic), the investigation had encountered lengthy delays. Member Forcese was surprised by the RCMP's refusal to provide solicitor-client privileged information and was obviously frustrated that this would, in his view, impede a full investigation of the complaint. His wish to provide at least some answers to the complainant without further delay is certainly understandable. Nevertheless, proceeding as he did gave rise to several complications. First, there was confusion about the status of the October 12, 2023, report (something Member Forcese had to clarify in a subsequent communication). Second, bifurcating the complaint resulted in a fragmented judicial review process. To protect their interests, Mr. El-Bahnasawy and others had to commence an application for judicial review that may well prove to have been unnecessary (it is currently being held in abeyance). Third, by engaging with the matter again shortly after that judicial review application was commenced, Member Forcese created the unfortunate appearance that he was attempting to circumvent that application (even if his reasons for doing so were well intentioned). Finally, the procedure followed gave rise to the question of whether the Review Agency was *functus officio*, which then had to be adjudicated by Member Forcese and is now raised again in the present application, adding further uncertainty to the process.

[80] I would also note that other options that could have avoided all these difficulties were available to the Review Agency. One that readily comes to mind would have been to issue a summons when the RCMP first objected to producing solicitor-client information in April 2022. If the RCMP moved to set aside the summons, the issue of the Review Agency's entitlement could have been settled promptly by this Court, allowing the investigation to proceed to a conclusion based on the information the Review Agency was legally entitled to obtain. Another would have been to refer a question of law to this Court under subsection 18.3(1) of the *Federal Courts Act*, RSC 1985, c F-7, as soon as the RCMP objected to producing the information. Again with the benefit of hindsight, in addition to avoiding all the complications arising from how the Review Agency chose to proceed, it appears likely that doing either of these things would have resulted in the investigation being completed more expeditiously than has turned out to be the case (even if, as also seems likely, the RCMP continued to resist producing the information in question).

[81] Despite these difficulties, as I have said, I am satisfied that Member Forcese proceeded reasonably under a challenging set of circumstances. There is no basis to interfere.

B. *Is the Review Agency entitled to solicitor-client information in a complaint investigation?*

(1) Introduction

[82] The AGC submits that Member Forcese erred in concluding that, in connection with a complaint investigation, section 10 of the *NSIRA Act* entitles the Review Agency to obtain solicitor-client privileged information from the RCMP. The AGC submits that, while section 9 of

the *NSIRA Act* grants the Review Agency access to solicitor-client privileged information in the context of reviews, the same cannot be said about section 10 in relation to complaints investigations. According to the AGC, when section 10 is compared to section 9, it is evident that Parliament did not intend the Review Agency to be entitled to solicitor-client privileged information in complaints investigations.

[83] I do not agree that this is the correct interpretation of section 10 of the *NSIRA Act*.

[84] As I will explain, while there are significant differences between sections 9 and 10, I am not persuaded that they demonstrate that Parliament intended the Review Agency to have access to solicitor-client privileged information in the context of reviews but not in the context of complaints investigations. Rather, I agree with Member Forcese that these differences reflect the fact that reviews engage solicitor-client privilege in a substantive sense while complaints investigations only engage its protections as a rule of evidence. I am satisfied that section 10 limits the protections of solicitor-client privilege as a rule of evidence in complaints investigations (which is what would otherwise prevent the disclosure of such information in that context) and, as a result, the Review Agency is entitled to relevant solicitor-client privileged information in the possession or control of the body against which a complaint has been made. In my view, reading section 10 in the context of the statute as a whole – and not only in comparison with section 9 – supports this conclusion. This interpretation is also supported by the purpose of section 10, by the objectives of the *NSIRA Act* as a whole, and by the legislative history of that Act. Finally, I am not persuaded that the Review Agency being entitled to obtain solicitor-client

privileged information when investigating a complaint against the RCMP would encroach impermissibly on prosecutorial independence, as the intervener the DPP contends.

[85] Before turning to these matters, it is helpful to set out some general principles of statutory interpretation as well as some specific principles relating to statutes potentially affecting solicitor-client privilege.

(2) The Principles of Statutory Interpretation

[86] As stated above, the meaning of a statutory provision is determined by reference to its text, context and purpose. To repeat Driedger's oft-cited formulation of the modern principle of statutory interpretation, the words of a provision must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[87] This principle requires a court to interpret statutory language "according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*R v Downes*, 2023 SCC 6 at para 24, quoting *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10). That being said, it is not necessary to address text, context and purpose separately or in a formulaic way "since these elements are often closely related or interdependent" (*Piekut v Canada (National Revenue)*, 2025 SCC 13 at para 43).

[88] The modern approach recognizes that context must play an important role when a court construes the words of a statute (see *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at

para 27). Statutory interpretation "cannot be founded on the wording of legislation alone" because "words, like people, take their colour from their surroundings" (*Piekut*, at para 44, quoting *Rizzo & Rizzo Shoes*, at para 21, and *Bell ExpressVu*, at para 27). As a result, "the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning – context, purpose, and relevant legal norms" (*La Presse inc v Quebec*, 2023 SCC 22 at para 23; see also *R v Alex*, 2017 SCC 37 at para 31, and *Piekut*, at para 45). At the same time, "just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretive exercise" (*Piekut*, at para 45, quoting *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para 24).

[89] As the Supreme Court of Canada has also observed, "Many of the traditional rules of statutory interpretation are considered when applying the modern principle" (*Piekut*, at para 47). The Court adopted the following explanation by Professor Ruth Sullivan of the role these traditional rules play:

> . . . interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally acceptable result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes.
>
> (*Piekut*, at para 47, quoting R. Sullivan, *The Construction of Statutes* (7th ed 2022) at § 2.01[4])

[90] The Court has also adopted Professor Sullivan's summary of the prime directive in statutory interpretation:

> after taking into account all relevant and admissible considerations . . . the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of
> (a) its plausibility, that is, its compliance with the legislative text;
> (b) its efficacy, that is, its promotion of legislative intent; and
> (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.
>
> (*Piekut*, at para 49 quoting Sullivan (2022) at § 2.01[4])

(3) Interpretive Principles Relating to Statutes Affecting Solicitor-Client Privilege

[91] Solicitor-client privilege is fundamentally important to the justice system in Canada but it is not absolute (*R v McClure*, 2001 SCC 14 at para 4). Sometimes it must yield to other interests, whether as a matter of common law (e.g. when innocence is at stake in a criminal proceeding) or statutory law. As previously mentioned, to give effect to solicitor-client privilege as a fundamental policy of the law, "legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so" (*University of Calgary*, at para 28). In short, "solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal" (*University of Calgary*, at para 2).

[92] In *Blood Tribe*, Justice Binnie, writing for the Court, stated that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents [references

omitted]" (at para 24). (The issue in *Blood Tribe* was whether a statutory grant of authority to the Privacy Commissioner to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information . . . whether or not it is or would be admissible in a court of law" entitled the Commissioner to review documents for which solicitor-client privilege was claimed to determine whether the claim is justified. The Court held that this broad statutory language was insufficient to grant the Commissioner access to such documents.)

[93] Similarly, writing on behalf of the Court, Justice Wagner (as he then was) and Justice Gascon stated in *Canada (National Revenue) v Thompson*, 2016 SCC 21 (at para 25):

> . . . 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.

[94] In *University of Calgary*, after quoting this passage from *Thompson*, Justice Côté added that this requirement, which stemmed from *Blood Tribe*, "is not a renunciation of the modern approach to statutory interpretation," nor does it support a return to plain meaning or the adoption of a strict construction rule in this context (at para 29). On the contrary, in her view, *Blood Tribe* "does not preclude using a full modern approach to interpret words purportedly abrogating privilege" (*ibid.*). As she understood the analysis conducted in that case, it "reflects

what is essentially the modern approach to statutory interpretation when dealing with solicitor-client privilege, insofar as it recognizes legislative respect for fundamental values" (*ibid.*). Justice Côté found that this was the approach followed in *Thompson*, which had been decided a few months before *University of Calgary*, adding that "the same approach is followed here" (*ibid.*).

(4) Text and Context

[95] Paragraph 10(d) of the *NSIRA Act* provides that, when conducting an investigation relating a complaint against the RCMP, despite any other Act of Parliament "and any privilege under the law of evidence" ("*et toute immunité reconnue par le droit de la preuve*"), the Review Agency is entitled to have access in a timely way to any information relating to the complaint that is in the possession or under the control of the CRCC, the RCMP, CSIS or the CSE except Cabinet confidences. The same entitlement is granted with respect to investigations of complaints relating to CSIS and to the CSE (see paragraphs 10(a), (b) and (c) of the *NSIRA Act*).

[96] This application raises an apparently straightforward question: Does the phrase "any privilege of the law of evidence" include solicitor-client privilege? At first blush, the answer might seem obvious. Surely solicitor-client privilege is a privilege of the law of evidence. Like police informer privilege or the Wigmore test for case-by-case privilege, for example, solicitor-client privilege protects certain information from disclosure in a legal proceeding: see *Smith v Jones*, [1999] 1 SCR 455 at paras 45-47; and *R v McClure*, 2001 SCC 14 at paras 26-33. One might therefore think it is equally obvious that an adjudicative body that is granted access to information "despite any privilege of the law of evidence" is entitled to obtain information even

if it is protected by solicitor-client privilege (or by any other privilege of the law of evidence). As we have seen, this is how Member Forcese viewed the matter.

[97] The AGC emphasizes the following in submitting that Member Forcese's interpretation of section 10 of the *NSIRA Act* is incorrect.

[98] First, elsewhere in the *NSIRA Act* (including, crucially, in section 9), Parliament refers to solicitor-client privilege expressly but it does not do so in section 10. According to the presumption of consistent expression, the meaning of words used in statutes remains consistent because "the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes" (*Vavilov*, at para 44, citing R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014) at 217). Likewise, when Parliament has chosen to use different terms, it is presumed to have done so intentionally "in order to indicate different meanings" (*Agraira*, at para 81). This suggests that, when Parliament does not use the expression "solicitor-client privilege" in section 10 (unlike in section 9) and, instead, uses a different expression ("any privilege of the law of evidence"), Parliament must mean something different there. That is to say, the expression must not be referring to solicitor-client privilege.

[99] Second, subsection 9(2) of the *NSIRA Act* states that, in the context of a review, the Review Agency "is entitled to have access to information that is subject to any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege." The presumption against tautology – the presumption that the legislature "avoids superfluous or meaningless words, that it does not pointlessly repeat itself or

speak in vain" (*Thompson*, at para 32, quoting Sullivan (2014) at 211) – suggests that, in this context, "any privilege under the law of evidence" and solicitor-client privilege must be distinct concepts. In other words, at least in subsection 9(2) of the *NSIRA Act*, the former does not include the latter. Parliament must have included the additional words after "any privilege under the law of evidence" because they add something. The references to solicitor-client privilege (and so on) must play a specific role in advancing the legislative purpose that would otherwise be missing if they were not included and the provision referred only to "any privilege under the law of evidence" (see *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45; and *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at para 36). Notably, the expression "any privilege under the law of evidence" was not followed by the word "including". Drawing once more on the presumption of consistent expression, when the expression "any privilege of the law of evidence" appears again in section 10, it must not include solicitor-client privilege there, either.

[100] Third, one of the factors the Court considered when concluding in *University of Calgary* that the expression "any privilege under the law of evidence" was not intended to pierce solicitor-client privilege was the absence of a provision addressing whether disclosure of solicitor-client privileged documents to the Commissioner pursuant to the statute constitutes a waiver of privilege with respect to any other person: see *University of Calgary*, at para 58. Subsection 9(3) of the *NSIRA Act* states that the disclosure to the Review Agency under that section "of any information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that secrecy." In contrast, section 10 contains no such provision. According to the AGC, this

suggests that, while the entitlement to information under section 9 includes solicitor-client privileged information, the entitlement to information under section 10 does not.

[101] To summarize, Parliament described the Review Agency's entitlement to information differently, depending on whether the Agency is conducting a review (section 9) or investigating a complaint (section 10). According to the AGC, these differences suggest that, while Parliament intended the Review Agency to have access to solicitor-client privileged information when engaged in a review, it did not intend the Agency to have access to solicitor-client privileged information when investigating complaints. At the very least, when section 10 is read against the backdrop of section 9, it cannot be said that the provision clearly, explicitly and unequivocally sets aside solicitor-client privilege in complaints investigations.

[102] As I have already said, I would not infer from the differences between sections 9 and 10 of the *NSIRA Act* that Parliament intended the Review Agency to have access to solicitor-client privileged information only in reviews and not also in complaints investigations. In my view, the differences between the provisions do not reflect different legislative intents but, rather, the different ways solicitor-client privilege can be engaged by the Review Agency's activities, depending on whether the Review Agency is conducting a review or investigating a complaint. I agree with Member Forcese that reviews engage solicitor-client privilege in a substantive sense while complaints investigations engage it in an evidentiary sense. Given the holding of the Supreme Court of Canada in *University of Calgary*, the wording of section 9 was necessary to overcome the substantive protection of solicitor-client privilege in the review context. On the other hand, a request for information that will be used exclusively by the Review Agency in

investigating a complaint only engages solicitor-client privilege in its narrower evidentiary sense. In my view, the wording of section 10 of the *NSIRA Act* is legally sufficient to overcome this.

[103] Solicitor-client privilege was once only a rule of evidence but it has now evolved into a rule of substance as well (*University of Calgary*, at para 38, citing *Blood Tribe*, at para 10; *Thompson*, at para 17; and *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 at para 28). As a rule of evidence, solicitor-client privilege "meant that a client and his or her lawyer were not required to tender confidential communications into evidence in a judicial proceeding" (*University of Calgary*, at para 39). Beginning at least as early as *Solosky v The* Queen, [1980] 1 SCR 821, the traditional doctrine has been extended beyond the courtroom context and placed "on a new plane" (*Solosky*, at 836). While the doctrine still protects confidential communications between a lawyer and his or her client from disclosure in the context of litigation, it now protects those communications from disclosure outside that context as well (*University of Calgary*, at para 41).

[104] In *University of Calgary*, Justice Côté found that the request for documents over which solicitor-client privilege was claimed engaged the privilege in its substantive rather than evidentiary sense. Separate from any legal proceeding, a delegate of the Information and Privacy Commissioner had requested that the university produce certain documents it had refused to disclose in response to an access to information request on the basis that they were protected by solicitor-client privilege. The delegate requested the records in order to determine whether solicitor-client privilege had been properly asserted by the university. If the privilege was not properly claimed, then, other things being equal, the university would be required to disclose the

documents to the party who had requested them. As Justice Côté explained, the case "is not occupied with the tendering of privileged materials as evidence in a judicial proceeding. Rather, it deals with disclosure of documents pursuant to a statutorily established access to information regime, separate from a legal proceeding" (*University of Calgary*, at para 42). The Commissioner, she noted, "is not seeking to review the solicitor-client privileged information as evidence in order to decide a legal dispute" (*ibid.*). The absence of any question of testimony before a court or tribunal "highlights the engagement of solicitor-client privilege in its substantive, rather than evidentiary, role" (*ibid.*).

[105] It is interesting to note that, in his reasons concurring in the result, Justice Cromwell took the view that, contrary to the majority's conclusion, the Commissioner's request for documents only engaged solicitor-client privilege in its evidentiary sense. As he put it, "What is claimed by the respondent is immunity from forced production by virtue of the Commissioner's statutory powers. We are thus concerned with a claim of protection from disclosure required by legal authority, a matter falling squarely within the evidentiary privilege expressly referred to in the statutory language [references omitted]" (*University of Calgary*, at para 87). In his view, by enacting legislation authorizing the Commissioner to require production of documents despite "any privilege of the law of evidence," the legislature "expressed a clear intention to allow the Commissioner and his or her delegates to order the production of documents subject to solicitor-client privilege in the course of an inquiry in order to assess the claim of privilege" (at para 120). In other words, since only solicitor-client privilege as an evidentiary privilege was engaged, the statutory language was sufficient to overcome it.

[106] Returning to the majority's analysis, while Justice Côté found that other aspects of the statutory scheme supported her ultimate conclusion, it was fundamentally because solicitor-client privilege was engaged there in a substantive sense, and not in an evidentiary sense, that the statutory entitlement to information despite "any privilege of the law of evidence" was judged insufficient to give the Commissioner the authority to require production of the documents in question. Justice Côté's statement that "solicitor-client privilege is not captured by the expression 'privilege of the law of evidence'" (*University of Calgary*, at para 2) must be read in light of this context.

[107] I agree with Member Forcese that, in contrast to the regime in question in *University of Calgary*, the complaint investigation regime under the *NSIRA Act* engages solicitor-client privilege as an evidentiary rule and not in its substantive sense. When it investigates a complaint, the Review Agency is engaged in an adjudicative proceeding. In relation to a complaint, under section 27 of the *NSIRA Act*, the Review Agency has the power to summon and enforce the appearance of persons before the agency, as well as the power to compel witnesses to give oral and written evidence and to produce "the documents and things that the Agency deems requisite to the full investigation and consideration of the complaint in the same manner and to the same extent as a superior court of record." It also has the power to receive and accept the evidence and other information that it considers appropriate, "whether or not that evidence or information is or would be admissible in a court of law."

[108] In the present case, the Review Agency was seeking to obtain solicitor-client privileged information as evidence requisite to the full investigation and consideration of a complaint

against the RCMP in order to make findings with respect to that complaint and to make any recommendations it considered appropriate in this regard. Any privileged documents produced to the Review Agency might well speak for themselves (and could be received as such and relied on by the Review Agency) but they could also lead to the questioning of witnesses concerning the legal advice sought or obtained by the RCMP in connection with its investigation of Abdulrahman. Ordinarily, solicitor-client privilege as a rule of evidence would prevent the Review Agency from obtaining such information or inquiring into such matters. By providing that it can obtain information from the RCMP despite "any privilege under the law of evidence," paragraph 10(d) ensures that solicitor-client privilege claims will not impede the Review Agency in carrying out its statutory mandate of investigating and reporting on complaints against the RCMP in matters relating to national security.

[109] On the other hand, in conducting a review, a request for information by the Review Agency engages solicitor-client privilege in its substantive rather than evidentiary sense. As Member Forcese observed, unlike complaints investigations, "reviews are not quasi-judicial proceedings where parties tender evidence and the Review Agency adjudicates a legal dispute." Rather, a review is "a non-adjudicative process where the Review Agency has a broad mandate to review any activity carried out by a federal department related to national security or intelligence and report its findings and recommendations to the executive branch." This is why, following *University of Calgary*, the express language of section 9 of the *NSIRA Act* was required to ensure that, in conducting a review, the Review Agency had access to solicitor-client privileged information. (I will return to this point below when discussing the legislative history of the *NSIRA Act.*)

[110] The proposition that the specific language of section 9 is responsive to the fact that a review function engages solicitor-client privilege in a substantive rather than an evidentiary sense finds further support in the fact that very similar language is found in legislation governing other bodies with review-like mandates in the area of national security, as opposed to complaint adjudication mandates: see *National Security and Intelligence Committee of Parliamentarians Act*, SC 2017, c 15, section 13; and *Intelligence Commissioner Act*, SC 2019, c 13, s 50, section 23. The latter provision is particularly noteworthy because, like the *NSIRA Act*, it was enacted as part of the *National Security Act, 2017*. (I will return to this point as well in the next section.)

[111] Given this important difference between reviews and complaints investigations, and given the distinct purposes of sections 9 and 10 of the *NSIRA Act*, it does not follow from the fact that solicitor-client privilege is not captured by the expression "any privilege under the law of evidence" in section 9 of the *NSIRA Act* that it is not captured by the same expression in section 10, either. To conclude otherwise (as the AGC urges) is to fail to read the expressions in the contexts in which they appear, as the modern principle of statutory interpretation requires. Put another way, the presumption of consistent expression is rebutted here by another principle of interpretation, the requirement to read the words of a statute in context (see *R v Steele*, 2014 SCC 61 at para 51).

[112] In sum, I agree with Member Forcese that, given the specific context in which section 10 operates, as it is used there, the expression "any privilege under the law of evidence" encompasses solicitor-client privilege in its evidentiary sense (along with other privileges of the

law of evidence). I also agree with Member Forcese that, as a result, section 10 is legally sufficient to overcome any objection to producing relevant information to the Review Agency in the context of a complaint investigation on the basis that it is protected by solicitor-client privilege.

[113] This interpretation of section 10 is supported by other elements of the *NSIRA Act*. I would highlight four in particular.

[114] First, as already noted, paragraph 27(c) of the *NSIRA Act* provides that, in relation to the investigation of a complaint, the Review Agency has the power "to receive and accept the evidence and other information, whether on oath or by affidavit or otherwise, that the Agency considers appropriate, whether or not that evidence or information is or would be admissible in a court of law." Standing alone, this provision may well have been insufficient to grant the Review Agency access to solicitor-client privileged information (see *Blood Tribe*, at para 2). However, in combination, section 10 and paragraph 27(c) ensure that the Review Agency can obtain and make use of all evidence or other information that it deems requisite to the full investigation and consideration of a complaint (except Cabinet confidences).

[115] Second, as Member Forcese pointed out, paragraph 52(1)(b) requires that any solicitor-client privileged information be removed from any report of the investigation provided to the complainant. I agree that Parliament would not have enacted paragraph 52(1)(b) (at least insofar as it applies to reports under subsections 29(2) and (3)) if it did not contemplate that the Review Agency could have access to solicitor-client privileged information in complaints

investigations. Furthermore, this provision reinforces the fact that the Review Agency is adjudicating a complaint; it is not adjudicating a privilege claim. Despite disclosure of solicitor-client privileged information to the Review Agency, the privilege otherwise remains intact.

[116] Third, subsections 52(1), 25(1) (which requires that complaints investigations be conducted in private) and 25(2) (which provides that no party is entitled as of right to be present during, to have access to or to comment on representations made to the Review Agency by any other person) all help to ensure that any limitation on solicitor-client privilege is no greater than is required for the Review Agency to discharge its complaint investigation mandate fully and effectively. This stands in contrast to the statutory scheme in question in *University of Calgary*, which was found to contain no such safeguards (*University of Calgary*, at para 58). This lends further support to the conclusion that Parliament intended section 10 to set aside solicitor-client privilege in complaints investigations. Moreover, in my view, given all these protections, and given the specific use to which the Review Agency would put any privileged information it obtained, there was no need for Parliament to state "for greater certainty" that disclosure of solicitor-client privileged information to the Review Agency pursuant to section 10 did not constitute a waiver of that privilege, as it did with respect to section 9. In other words, I do not consider the absence of such a provision to weigh against the interpretation of section 10 adopted here.

[117] Fourth, the Review Agency's mandate includes reviewing "any activity carried out by a department that relates to national security or intelligence" (*NSIRA Act*, paragraph 8(1)(b)). The RCMP is a "department" under the Act (see *NSIRA Act*, section 2, *s.v.* "department" and

Financial Administration Act, RSC 1985, c F-11, Schedule I.1). As a result, it would be open to the Review Agency to undertake a review of the RCMP's activities in relation to Abdulrahman El-Bahnasawy on its own initiative, either in and of themselves or as part of a wider review of RCMP activities relating to national security. If it were to do so, there would be no question that, pursuant to section 9 of the *NSIRA Act*, the Review Agency would be entitled to relevant solicitor-client privileged information in the possession or under the control of the RCMP.

[118] In my view, it simply makes no sense that this would be the case but, in investigating a complaint relating to the very same activities, the Review Agency is not entitled to the very same information, as the AGC contends.

[119] The AGC attempts to distinguish the two situations by suggesting that solicitor-client information is relevant to a review but not to a complaint investigation. The AGC submits that the former deal with broader policies and institutional practices (which will presumably have been the subject of legal advice) while the latter involves adjudicating a specific dispute between the parties and any legal advice that may have been provided in relation to the activities that gave rise to the complaint will be irrelevant. According to the AGC, this explains why the Review Agency has access to legal advice in one context but not the other.

[120] I am unable to agree. Legal advice may or may not be relevant to a complaint; it all depends on the circumstances of the case. In the present case, Member Forcese provided a compelling explanation for why he considered the information he was seeking to be relevant to his investigation of the complaint. This is a determination he was entitled to make under

subsection 11(2) of the *NSIRA Act.* Moreover, as the Honourable Dennis O'Connor pointed out in his report *A New Review Mechanism for the RCMP's National Security Activities* (2006) (at 538), the Crown plays a critical role in criminal investigations relating to national security. To fully understand and assess the decisions the RCMP made in relation to a national security investigation like the one concerning Abdulrahman, it is necessary to know what legal advice they sought and, if advice was provided, whether they followed that advice. This is the case whether the Review Agency is examining the RCMP's national security activities in the context of a review or in the context of a complaint investigation. (Commissioner O'Connor's report will be discussed further below.)

[121] The AGC cites the Federal Court of Appeal's statement in *Canadian Security Intelligence Service Act (CA) (Re)*, 2021 FCA 92 (at para 172) that the fact that greater transparency on the part of intelligence agencies may be desirable, from a public perspective, "has no bearing on the contours of solicitor-client privilege." The AGC relies on this statement in arguing that, even in the national security context, solicitor-client privilege must be protected. In my view, the issues in that case are easily distinguishable from the ones raised here. The Federal Court of Appeal was not interpreting a provision in a statute whose very purpose is (as will be discussed below) to provide greater transparency in relation to national security and intelligence activities and where Parliament has abrogated solicitor-client privilege to ensure full and effective scrutiny of those activities.

[122] In short, I can discern no reason why Parliament would have granted the Review Agency a right to obtain solicitor-client information in a review but not in a complaint investigation when

the very same activities could be the subject of either a review or a complaint investigation and the very same information could be relevant to both of these mandates.

[123] In my view, the text and context of section 10 demonstrate Parliament's clear intent to limit the protections of solicitor-client privilege in respect of information relevant to a complaint investigation involving the RCMP. Further support for this conclusion is provided by the purpose of the *NSIRA Act* and its legislative history. I turn to this now.

(5) Legislative Purpose

[124] As the Supreme Court of Canada has observed, "Courts draw on a wide range of sources to determine legislative purpose, including an explicit statement of purpose in the legislation; the text, context and scheme of the legislation; legislative history and evolution; and extrinsic evidence, such as parliamentary debates (while remaining mindful of their limited reliability and weight)" (*Piekut*, at para 75, citing *R v Moriarity*, 2015 SCC 55 at paras 31-32, and other sources).

[125] In the present case, the interpretive exercise is assisted by the fact that the *National Security Act, 2017* (Bill C-59), which enacted the *NSIRA Act* and other legislation, contains explicit statements of purpose. As previously mentioned, the Preamble states, among other things, that the fundamental responsibility of the Government of Canada to protect Canada's national security and the safety of Canadians must be carried out in accordance with the rule of law and in a manner that safeguards the rights and freedoms of Canadians and that respects the *Charter*. The Preamble also states that "enhanced accountability and transparency are vital to

ensuring public trust and confidence in Government of Canada institutions that carry out national security or intelligence activities."

[126] This double objective of protecting Canadians while defending their rights and freedoms was highlighted in the parliamentary debates. For example, the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, addressed the purposes of the legislation at the Second Reading of Bill C-59. Speaking in support of a motion to refer the bill forthwith to the Standing Committee on Public Safety and National Security, after reviewing some of the background to the bill, including public consultations that had been conducted, Minister Goodale said:

> All of this fresh input was supplemented by earlier judicial inquiries by Iacobucci, O'Connor and Major, as well as several parliamentary proposals, certain court judgments, and reports from existing national security review bodies. It all helped to shape the legislation before us today, Bill C-59, the national security act of 2017.
>
> The measures in this bill cover three core themes, enhancing accountability and transparency, correcting problematic elements from the former Bill C-51 [*Anti-terrorism Act, 2015*, SC 2015, c 20], and updating our national security laws to ensure that our agencies can keep pace with evolving threats.
>
> One of the major advances in this legislation is the creation of the national security and intelligence review agency. This new body, which has been dubbed by some as a "super SIRC", will be mandated to review any activity carried out by any government department that relates to national security and intelligence, as well as any matters referred to it by the government. It will be able to investigate public complaints. It will specifically replace the existing review bodies for CSIS and the Communications Security Establishment, but it will also be authorized to examine security and intelligence activities throughout the government, including the Canada Border Services Agency.
>
> In this day and age, security operations regularly involve multiple departments and agencies. Therefore, effective accountability must

> not be limited to the silo of one particular institution. Rather, it must follow the trail wherever it leads. It must provide for comprehensive analysis and integrated findings and recommendations. That is exactly what Canadians will get from this new review agency.
>
> Bill C-59 also creates the brand new position of the intelligence commissioner, whose role will be to oversee and approve, or not approve, certain intelligence activities by CSIS and the CSE in advance. The intelligence commissioner will be a retired or supernumerary superior court judge whose decisions will be binding. In other words, if he or she says that a particular proposed operation is unreasonable or inappropriate, it will simply not proceed.
>
> Taken together, the new comprehensive review agency, the intelligence commissioner, and the new committee of parliamentarians [created in 2017 by the *National Security and Intelligence Committee of Parliamentarians Act*, cited above] will give Canada accountability mechanisms of unprecedented scope and depth. This something that Canadians have been calling for and those calls intensified when the former Bill C-51 was introduced. We heard them loud and clear during our consultations, and we are now putting these accountability measures in place.
>
> (House of Commons Debates, November 20, 2017, Volume 148, No 234, at 15267)

[127] Minister Goodale returned to these themes when he introduced Bill C-59 again on May 28, 2018, after the Standing Committee on Public Safety and National Security reported the results of its study of the bill to the House of Commons. (Some of the committee's proceedings are discussed in the next section.) Among other things, Minister Goodale observed that all of the public consultations concerning Bill C-59 had made one thing "perfectly clear": "Canadians want accountability. They want transparency and effectiveness from their security and intelligence agencies. They want all three of those things, accountability, transparency, and effectiveness, together. [. . .] Bill C-59 goes farther and better than any other piece of legislation

in Canadian history to accomplish those three things together." He added that he had no doubt that the work of the standing committee had strengthened and improved the legislation: "All the scrutiny and clause-by-clause analysis and consideration, all the debate around all of those various amendments has resulted in a better product." He also stated the following:

> One of the things I am most proud of with respect to Bill C-59 is how it represents a dynamic shift in the review and accountability structure for our entire national security apparatus. Currently, some of our agencies that deal in national security have a review body that examines their work. CSIS of course has the Security Intelligence Review Committee, SIRC. The RCMP has the Civilian Review and Complaints Commission, CRCC. Those are a couple of examples. However, there is no unified review body that can look beyond one agency at a time and actually follow the evidence as it moves across government from agency to agency.
>
> For the first time, Bill C-59 would fix this problem by creating the national security and intelligence review agency, or NSIRA. NSIRA is largely modelled on the often discussed idea of a "super-SIRC", which would have the authority to review all matters of national security, whether they are with CSIS, or CBSA, or IRCC, or the RCMP, or Global Affairs, or DND, or anywhere else in the Government of Canada.
>
> (House of Commons Debates, May 28, 2018, Vol 148, No 302, at 19770)

[128] The "judicial inquiries" to which Minister Goodale referred in his earlier speech are, of course, the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 conducted by the Honourable Jack Major, the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar conducted by the Honourable Dennis O'Connor, and the Internal Inquiry into the Actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin conducted by the Honourable Frank Iacobucci. Among other things, the O'Connor and Iacobucci inquiries examined whether information sharing by Canadian officials (including national security agencies and the RCMP) had

contributed to the detention and torture of Messrs. Arar, Almalki, Abou-Elmaati and Nureddin overseas.

[129] Minister Goodale's reference to the Arar Inquiry is particularly salient for understanding the objectives of Bill C-59. Commissioner O'Connor's mandate had been divided into two parts: one was a factual inquiry directing him to investigate and report on the actions of Canadian officials in relation to what happened to Mr. Arar; the other was a policy review, which required him to make recommendations for an independent, arm's-length review mechanism with respect to the RCMP's national security activities. Commissioner O'Connor's report stemming from the second part of his mandate is the one mentioned above, *A New Review Mechanism for the RCMP's National Security Activities*.

[130] As described in detail in that report, among the features of Canada's national security landscape that Commissioner O'Connor had found problematic were the accountability gaps inherent in the existing review and complaint investigation regimes. To a large extent, those gaps were a consequence of the limited jurisdiction of SIRC (the Security Intelligence Review Committee). Under its enabling legislation (namely, sections 34 to 52 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*] [now repealed]), SIRC's review and complaints investigations mandates were limited to the activities of CSIS yet CSIS was not the only agency whose activities touched on matters of national security. Indeed, its activities were often undertaken in coordination with other Canadian agencies and information was often shared amongst all these agencies. The limited scope of SIRC's review and complaint investigation mandates resulted in the "siloing" effect Minister Goodale referred to in his speeches to the

House of Commons. As well, Commissioner O'Connor found that no one had effective review or complaint investigation powers concerning RCMP activities relating to national security.

[131] The solution Commissioner O'Connor recommended was an enhanced Commission for Public Complaints Against the RCMP with jurisdiction to review all of the RCMP's activities, including those related to national security. Commissioner O'Connor also recommended that Parliament create statutory "gateways" between this new agency and two other independent review bodies, SIRC and the Office of the Communications Security Establishment Commissioner (see section 273.63 of the *National Defence Act*, RSC 1985, c N-5 [now repealed]). These gateways would allow for effective sharing of information between all the review bodies and, where appropriate, coordinated reviews and investigations. As Commissioner O'Connor explained (at 582):

> It is essential that there be institutional co-operation among review bodies where there is institutional co-operation among the bodies being reviewed, for four specific reasons: to avoid gaps in accountability, to attempt to avoid reaching inconsistent or differing conclusions about the co-operative activities, to provide a unified intake system for national security complaints, and to avoid the burden on agencies of duplicative review.

[132] Although Commissioner O'Connor's recommended solution was not adopted by Parliament, there can be no doubt that his insights into the deficiencies of the previous regime and his recommendations for a better one influenced the design of the Review Agency, including giving a single agency jurisdiction to conduct reviews and investigate complaints relating to CSIS, the CSE and the RCMP (when its activities related to national security or intelligence). As Minister Goodale put it in his speech to the House of Commons, this new agency was meant to

be able to “follow the trail wherever it leads” and to provide “comprehensive analysis and integrated findings and recommendations.”

[133] One additional part of the background to Bill C-51 should be mentioned here. Like the Review Agency, SIRC had both review and complaint investigation mandates. Its right of access to information relevant to a review or to a complaint investigation was governed by the same provision, subsection 39(2) of the *CSIS Act.* At the time of its repeal upon the enactment of the *NSIRA Act*, subsection 39(2) of the *CSIS Act* provided as follows:

Access to Information	**Accès aux informations**
(2) Despite subsection 18.1(2) [the general prohibition on disclosure of information that could identify a CSIS human source], any other Act of Parliament or any privilege under the law of evidence, but subject to subsection (3) [the exclusion of Cabinet confidences] the Review Committee is entitled	**(2)** Malgré le paragraphe 18.1(2), toute autre loi fédérale ou toute immunité reconnue par le droit de la preuve, mais sous réserve du paragraphe (3), le comité de surveillance :
(a) to have access to any information under the control of the Service that relates to the performance of the duties and functions of the Committee and to receive from the Director and employees such information, reports and explanations as the Committee deems necessary for the performance of its duties and functions; and	**a)** est autorisé à avoir accès aux informations qui se rattachent à l’exercice de ses fonctions et qui relèvent du Service et à recevoir du directeur et des employés les informations, rapports et explications dont il juge avoir besoin dans cet exercice;
(b) during any investigation referred to in paragraph	**b)** au cours des enquêtes visées à l’alinéa 38c), est

38(c) [the complaint investigation mandate], to have access to any information under the control of the deputy head concerned that is relevant to the investigation.	autorisé à avoir accès aux informations qui se rapportent à ces enquêtes et qui relèvent de l'administrateur général concerné.

[134] In his 2006 report, Commissioner O'Connor confirmed that SIRC had access to solicitor-client privileged information. Although, generally speaking, it did not access documents subject to solicitor-client privilege, there was no question in anyone's mind that SIRC was entitled to such information. Accordingly, "it has been provided with summaries and excerpts of legal opinions, as well as oral briefings by CSIS counsel providing explanations of legal advice" (O'Connor, at 278). As Commissioner O'Connor observed, "The legal advice has become material in the conduct of reviews where SIRC is seeking to determine whether CSIS has acted in accordance with legal advice from the Department of Justice Canada and, as such, has acted lawfully in carrying out its operations" (*ibid.*).

[135] It bears repeating that, whether it was conducting a review or investigating a complaint, SIRC's right of access to information was defined by the same provision (*CSIS Act*, subsection 39(2)). In both cases, that provision granted SIRC access to relevant information (apart from Cabinet confidences) despite "any privilege under the law of evidence."

[136] As Member Forcese also noted in his February 14, 2024, procedural ruling, SIRC had access to relevant solicitor-client information in the possession or control of CSIS not only in connection with reviews but also in connection with complaints investigations (apart from legal advice relating to the complaint investigation itself). This was confirmed in a letter dated

June 30, 2006, to SIRC from Normand Vaillancourt, Senior Counsel with CSIS Legal Services, which is included in the record on this application. Mr. Vaillancourt wrote (emphasis added):

> My client and I fully recognize that, with the exception of Cabinet confidences, the Committee has a full and unfettered right of access to all information under the control of the Service, including to legal opinions. However, as raised at the meeting last week, we believe that a distinction ought to be made between two classes of legal advice, that is, between operation-related advice and litigation-related advice.
>
> In the first instance, legal advice may itself be part of the operational activities of the Service when, for example, officials may have acted or refrained from acting on the strength of advice from counsel. Such advice should properly be disclosed to the Committee. The second class of CSIS-DOJ communications concerns advice given on the conduct of litigation matters pending or contemplated before the Review Committee, the Court or any administrative tribunal. Typically, such advice deals bluntly with strengths and weaknesses of the cases, the tactics of how best to present a case, areas of testimony that may prove awkward for the prospective witness, legal issues that may be difficult to overcome, and so on. We believe that it is perfectly proper that litigation-related communications between the Service and counsel, from the day a complaint is made to the Director (s. 41) or to the SIRC, should be excluded from disclosure to the Committee.

[137] Returning to Commissioner O'Connor's report, in making his recommendations for a new form of review and complaint investigation for RCMP activities relating to national security, Commissioner O'Connor highlighted the importance of access to as much relevant information as possible for effective reviews and investigations: see O'Connor, at 504 and 531-33. As he stated, "The need for thoroughness applies both to self-initiated review and the investigation of and reporting on complaints" (O'Connor, at 533). Accordingly, he recommended that the new agency "should have access to all information it considers necessary to conduct a thorough review, subject only to two minor qualifications" (*ibid.*). One qualification related to Cabinet confidences; the other related to information subject to solicitor-client privilege.

[138] Regarding information subject to solicitor-client privilege, Commissioner O'Connor wrote as follows (at 538, emphasis added):

> The question of solicitor-client privilege is also somewhat complex. In my view ICRA [the Independent Complaints and National Security Review Agency, the new agency Commissioner O'Connor was recommending] should have access to information covered by solicitor-client privilege if the communication in question took place as part of the decision-making process or series of events being investigated or reviewed. Accessing solicitor-client advice provided in this context will help ICRA make a thorough and accurate assessment of the RCMP's activities. This is of particular importance in the national security context, as the prior consent of an attorney general is required to lay charges for terrorism offences or offences under the *Security of Information Act*, as well as to exercise the new preventive arrest and investigative hearing powers [under the *Criminal Code*]. <u>It is therefore important that ICRA have access to the legal advice given the RCMP about the exercise of such powers, not to second-guess or evaluate that advice, but to determine the propriety of the RCMP's actions in seeking and complying with the advice received. Legal advice plays such an important role in national security investigations that a review body unable to examine the legal advice received by the RCMP would have only a partial and, at times, distorted view of the Force's national security activities.</u>

[139] Commissioner O'Connor added only one qualification to these comments. This was that the new agency "should not have access to information subject to solicitor-client privilege that relates to any disputes concerning the exercise of the review body's powers or other proceedings intended to assess the RCMP's activities or the activities or individual officers or employees" (*ibid.*). In his view, it was "essential that the solicitor-client privilege apply in such circumstances" (*ibid.*). As set out above, in so many words, this is exactly what the understanding between SIRC and CSIS had been.

[140] Drawing all of these elements together, it is incontrovertible that, in creating the Review Agency, Parliament intended to improve national security oversight compared to what SIRC had been able to do under its enabling legislation. It did this by consolidating review and complaint investigation functions relating to national security in a single expert body with a broader mandate than SIRC had had. This broader mandate included the authority to investigate complaints concerning RCMP activities relating to national security. It also included the ability, when investigating such complaints, to obtain relevant information not only from the RCMP but also from CSIS and the CSE.

[141] Significantly for our purposes, the Review Agency's right of access to information in a complaint investigation under section 10 of the *NSIRA Act* is the same whether the agency whose activities gave rise to the complaint is CSIS, the CSE or the RCMP. The AGC's interpretation of this provision entails that the Review Agency actually has *less* access to relevant information in a complaint investigation than SIRC did: whereas SIRC could obtain relevant solicitor-client privileged information from CSIS, the new Review Agency cannot.

[142] With respect, I find this completely untenable.

[143] Given the objectives discussed above, including improving the effectiveness of the agency responsible for adjudicating complaints in relation to national security, and in the absence of express language stating otherwise, Parliament must have intended the Review Agency to have access to at least as much information as SIRC had had – including solicitor-client privileged information – when investigating complaints against CSIS. And since, under

section 10, the Review Agency has exactly the same right of access to relevant information whether it is investigating a complaint against CSIS or against the RCMP, it must also be the case that Parliament intended the Review Agency to have access to relevant solicitor-client privileged information when investigating complaints involving the RCMP.

[144] This conclusion finds additional support in the fact that, if the present complaint had remained with the CRCC, there would have been at least the possibility that that body could obtain solicitor-client privileged information from the RCMP.

[145] In 2013, the *RCMP Act* was amended to create the CRCC and to provide it with enhanced powers compared to its predecessor, the RCMP Public Complaints Commission (see the *Enhancing Royal Canadian Mounted Police Accountability Act* (Bill C-42), SC 2013, c 18 – Royal Assent June 19, 2013). Under the newly enacted subsection 45.39 of the *RCMP Act*, the CRCC "is entitled to have access to any information under the control, or in the possession, of the Force that the Commission considers is relevant" to the exercise of its powers or the performance of its duties and functions in conducting reviews or investigating complaints. This includes access to privileged information, which is defined to include "the privilege that exists between legal counsel and their client" (see *RCMP Act*, subsections 45.4(1) and (2)). The RCMP may object to producing privileged information (including solicitor-client information) and, if this happens, the issue is referred for a non-binding opinion from a former judge or other individual (see *RCMP Act*, section 45.41).

[146] With the enactment of the *National Security Act, 2017* in 2019, the *RCMP Act* was amended by adding subsection 45.53(4.1), which provides: “The Commission shall refuse to deal with a complaint concerning an activity that is closely related to national security and shall refer such a complaint to the National Security and Intelligence Review Agency.” The important point for our purposes is that, until the creation of the Review Agency in 2019, the CRCC would have had jurisdiction to deal with the present complaint. Had it done so, it would have had at least a qualified right of access to solicitor-client privileged information in conducting its investigation. (Purely as a point of interest, the requirement to refer complaints closely related to national security to the Review Agency came into force in July 2019, the month before the present complaint was submitted to the CRCC.)

[147] On the AGC’s view, the Review Agency has not been granted even a qualified right of access to solicitor-client privileged information when investigating a complaint against the RCMP. In other words, it is entitled to *less* information than the CRCC was entitled to when the Review Agency was created. In my view, this cannot be reconciled with why Parliament gave the Review Agency the responsibilities it did with respect to the RCMP. Parliament decided that complaints against the RCMP relating to matters of national security should be investigated by a body with expertise in that area and with the authority to obtain relevant information not only from the RCMP (as would be the case with the CRCC) but also from CSIS and the CSE so that it can “follow the trail.” It is completely counterintuitive to think that, in creating a body with this mandate, Parliament intended to give it less access to relevant information than the CRCC had had before the Review Agency was created. The AGC was unable to suggest any reason why this would be the case. In my view, it is highly unlikely that this was Parliament’s intent.

[148] In conclusion on this point, to accept the AGC's interpretation of section 10 of the *NSIRA Act*, one would have to accept that Parliament intended to give the Review Agency access to less relevant information than its predecessor agencies once had. In particular, one would have to accept that Parliament intended to give the Review Agency access to all relevant information in the possession or under the control of the agency whose actions are being examined in a complaint investigation (apart from Cabinet confidences) despite any privilege under the law of evidence *except solicitor-client privilege*, even though SIRC had had access to such information when investigating complaints against CSIS. In my view, given all of the foregoing (especially the overarching goals of the new legislation, including improving the effectiveness of complaints investigations in the area of national security), this is not a plausible view of Parliament's intentions when it created the Review Agency.

[149] The legislative history of the *NSIRA Act* also sheds some light on Parliament's intentions. Since that history is somewhat complicated, it is helpful to consider it under a separate heading.

(6) Legislative History

[150] As just discussed, the *NSIRA Act* was enacted as part of Bill C-59, an omnibus bill respecting national security matters. Some of the historical context of the bill – in particular, the need for a more effective national security review and complaint adjudication body – has already been discussed. Before examining the legislative history of the *NSIRA Act* further, it may be helpful to sketch out one additional part of the broader historical context. This relates to the powers of the Information Commissioner of Canada.

[151] In 2016, when the Supreme Court of Canada decided *University of Calgary*, the Information Commissioner's right of access to records when investigating a complaint was substantially the same as that of the Alberta Information and Privacy Commissioner. Specifically, subsection 36(2) of the *Access to Information Act*, RSC 1985, c A-1, provided as follows:

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.	**(2)** Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, le Commissaire à l'information a, pour les enquêtes qu'il mène en vertu de la présente loi, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

[152] Prior to the decision in *University of Calgary*, it had been understood that the Information Commissioner had access to information over which solicitor-client privilege exemptions to disclosure were claimed in order to determine whether those claims were well founded (see the special report from the Information Commissioner cited below).

[153] On June 19, 2017, Bill C-58 (An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts) received First Reading in the House of Commons. Among the proposed amendments to the *Access to Information Act* was to replace subsection 36(2) with the following:

(1.1) [. . .]	**(1.1)** [. . .]

Access to Records

(2) Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, and subject to subsection (2.1), the Information Commissioner may, during the investigation of any complaint under this Part, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Protected information – solicitors, advocates and notaries

(2.1) The Information Commissioner may examine a record that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege only if the head of a government institution refuses to disclose the record under section 23.

For greater certainty

(2.2) For greater certainty, the disclosure by the head of a government institution to the Information Commissioner of a record that contains information that is subject to solicitor-client privilege or the professional secrecy of

Accès aux documents

(2) Malgré toute autre loi fédérale, toute immunité reconnue par le droit de la preuve, le secret professionnel de l'avocat ou du notaire et le privilège relatif au litige, mais sous réserve du paragraphe (2.1), le Commissaire à l'information a, pour les enquêtes qu'il mène en vertu de la présente partie, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente partie s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

Renseignements protégés : avocats et notaires

(2.1) Le Commissaire à l'information n'a accès qu'aux documents contenant des renseignements protégés par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige dont le responsable d'une institution fédérale refuse la communication au titre de l'article 23.

Précision

(2.2) Il est entendu que la communication, au Commissaire à l'information, par le responsable d'une institution fédérale, de documents contenant des renseignements protégés par le secret professionnel de

advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that professional secrecy.	l'avocat ou du notaire ou par le privilège relatif au litige ne constitue pas une renonciation au secret professionnel ou au privilège.

[154] These amendments were a direct response to the Supreme Court of Canada's decision in *University of Calgary*. Following the release of that decision, the Information Commissioner had requested that the *Access to Information Act* be amended "to include language that provides for a clear and unambiguous legislative intent that the Information Commissioner's investigative powers, including her power to compel institutions to produce records, apply to records over which the exemption for solicitor-client privilege has been claimed" (Information Commissioner of Canada, "Failing to Strike the Right Balance for Transparency: Recommendations to improve Bill C-58: An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts", section 5 [online: https://www.oic-ci.gc.ca/en/resources/reports-publications/failing-strike-right-balance-transparency]. Among the express purposes of Bill C-58 was to "clarify the powers of the Information Commissioner and the Privacy Commissioner to examine documents containing information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege in the course of their investigations and clarify that the disclosure by the head of a government institution to either of those Commissioners of such documents does not constitute a waiver of those privileges or that professional secrecy." Following the introduction of the bill, the Information Commissioner welcomed this aspect of Bill C-58 as having codified "the clear and unambiguous powers of the Commissioner to examine a record that contains information that is subject to solicitor-client privilege if an institution refuses to disclose the record because it

claims it is subject to the exemption for solicitor-client privilege" ("Failing to Strike the Right Balance", section 5).

[155] It should be noted that Bill C-58 received First Reading in the House of Commons on June 19, 2017, the day before First Reading of Bill C-59. The House of Commons and the Senate (and their respective committees) considered the two bills more or less simultaneously. Both bills received Royal Assent on June 21, 2019.

[156] Returning to the *NSIRA Act*, on First Reading of Bill C-59, section 9 and paragraph 10(d) read as follows:

Right of access — reviews	**Droit d'accès-examens**
9 (1) Despite any other Act of Parliament and subject to section 12, the Review Agency is entitled, in relation to its reviews, to have access in a timely manner to any information that is in the possession or under the control of any department.	**9 (1)** Malgré toute autre loi fédérale et sous réserve de l'article 12, l'Office de surveillance a le droit d'avoir accès, relativement aux examens qu'il effectue et en temps opportun, aux informations qui relèvent de tout ministère ou qui sont en la possession de tout ministère.
Protected information	**Informations protégées**
(2) Under subsection (1), the Review Agency is entitled to have access to information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.	**(2)** Le paragraphe (1) confère notamment à l'Office de surveillance le droit d'accès aux informations protégées par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.
For greater certainty	**Précision**

(3) For greater certainty, the disclosure to the Review Agency under this section of any information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that secrecy.	**(3)** Il est entendu que la communication a l'Office de surveillance, au titre du présent article, d'informations protégées par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige ne constitue pas une renonciation au secret professionnel ou au privilège.
Right of access — complaints	**Droit d'accès — plaintes**
10 Despite any other Act of Parliament and subject to section 12, the Review Agency is entitled to have access in a timely manner to the following information:	**10** Malgré toute autre loi fédérale et sous réserve de l'article 12, l'Office de surveillance a le droit d'avoir accès en temps opportun aux informations suivantes :
[. . .]	[. . .]
(d) in relation to a complaint referred to it under subsection 45.53(4.1) or 45.67(2.1) of the *Royal Canadian Mounted Police Act*, any information that relates to the complaint and that is in the possession or under the control of the review body, the Royal Canadian Mounted Police, the Canadian Security Intelligence Service or the Communications Security Establishment.	**d)** relativement à une plainte qui lui est renvoyée au titre des paragraphes 45.53(4.1) ou 45.67(2.1) de la *Loi sur la Gendarmerie royale du Canada*, les informations liées à la plainte qui relèvent de l'organisme de surveillance, de la Gendarmerie royale du Canada, du Service canadien du renseignement de sécurité ou du Centre de la sécurité des télécommunications ou qui sont en la possession de l'un d'eux.

[157] Notably, neither section 9 nor section 10 contained the expression "any privilege under the law of evidence." (The original version of the provision of the *Intelligence Commissioner Act* dealing with the Commissioner's right of access to information was drafted in substantially the

same terms as this version of section 9. It also omitted any reference to "any privilege under the law of evidence.")

[158] The omission of this expression from the original versions of sections 9 and 10 of the *NSIRA Act* was addressed at two key points when Bill C-59 was considered by the Standing Committee on Public Safety and National Security.

[159] The first time was on February 6, 2018, when the Honourable Pierre Blais, the Chair of SIRC, appeared before the Committee together with Chantelle Bowers, the Acting Executive Director of SIRC. As part of their presentation on behalf of SIRC, Mr. Blais and Ms. Bowers submitted a brief suggesting certain amendments to Bill C-59, including the following:

> 7. **Proposal:** s. 9(1) and 10 of the *NSIRA Act* mirror that language of s. 39(1) and (2) of the *CSIS Act* regarding the access to information by adding to section 9(1) "Despite any other Act of Parliament or <u>any privilege under the law of evidence</u>."
>
> **Rationale:** Bill C-59 seems to provide for a more narrow entitlement in the context of the Review Agency's functions. We recommend that the Review Agency's entitlement to access information be the same as what was written in the *CSIS Act*. Under the current wording of the *CSIS Act*, SIRC's access to information in the context of reviews is extended to any information under the control of any department, save for cabinet confidences.

[160] When asked about this specific proposal and whether the Review Agency having access to solicitor-client privileged information could have a chilling effect on those providing legal advice (as had been suggested in an earlier hearing before the committee by the Canadian Bar Association), Mr. Blais stated: "As for the access to information aspect, which is the objective

here, we usually have access to everything but cabinet documents. This is where we are, and it should be this way." He later added: "I think it's accepted that this is the law of the land." Ms. Bowers then added the following:

> With respect to complaints before the organization, the access to information in that regard is more narrow. Up until now, we've had access to everything, including solicitor-client privilege documentation. Now we notice that in Bill C-59, that access to information is more limited. It specifically removes solicitor-client privileged information, for instance. That's the problem we were highlighting.
>
> (Proceedings of the Standing Committee on Public Safety and National Security, February 6, 2018 (SECU-95), at 7)

[161] SIRC's proposed amendments to sections 9 and 10 of the *NSIRA Act* may not be as clear as they might have been given that its brief suggested adding the expression "or any privilege under the law of evidence" only to subsection 9(1) and not to section 10 as well (see paragraph 159, above). Considering SIRC's submissions to the Committee as a whole, however, this must have been a typographical error. After all, the SIRC officials were urging that both subsection 9(1) and section 10 should "mirror" SIRC's right of access to information under subsection 39(2) of the *CSIS Act*. I would therefore understand Mr. Blais and Ms. Bowers to have been making, *inter alia*, the following points in their submission to the committee: (1) in both reviews and complaints investigations, SIRC has had access to all relevant information except Cabinet confidences, including solicitor-client privileged information; (2) this should continue to be the case for the new Review Agency; (3) as it is currently drafted, section 10 of the *NSIRA Act* does not give the Review Agency access to solicitor-client information; and (4) to put the new Review Agency in the same position as SIRC, subsection 9(1) and section 10 should

both be amended to mirror the language of subsection 39(2) of the *CSIS Act* by including the expression "or any privilege under the law of evidence."

[162] For our purposes, the second important time the committee addressed this issue was on April 17, 2018, when it approved the following amendments to subsection 9(2) and to section 10 of the *NSIRA Act* (even though no changes were made to subsection 9(1), I have set it out again as helpful context):

Right of access — reviews	**Droit d'accès — examens**
9 (1) Despite any other Act of Parliament and subject to section 12, the Review Agency is entitled, in relation to its reviews, to have access in a timely manner to any information that is in the possession or under the control of any department.	**9 (1)** Malgré toute autre loi fédérale et sous réserve de l'article 12, l'Office de surveillance a le droit d'avoir accès, relativement aux examens qu'il effectue et en temps opportun, aux informations qui relèvent de tout ministère ou qui sont en la possession de tout ministère.
Protected information	**Informations protégées**
(2) Under subsection (1), the Review Agency is entitled to have access to information that is subject to <u>any privilege under the law of evidence,</u> solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.	**(2)** Le paragraphe (1) confère notamment à l'Office de surveillance le droit d'accès aux informations protégées <u>par toute immunité reconnue par le droit de la preuve</u>, par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.
Right of access — complaints	**Droit d'accès — plaintes**
10 Despite any other Act of Parliament <u>and any privilege under the law of evidence</u> and subject to section 12, the	**10** Malgré toute autre loi fédérale et <u>toute immunité reconnue par le droit de la preuve et</u> sous réserve de

Review Agency is entitled to have access in a timely manner to the following information [. . .].	l'article 12, l'Office de surveillance a le droit d'avoir accès en temps opportun aux informations suivantes : [. . .]

[163] These are, of course, the versions of sections 9 and 10 that ultimately were enacted.

[164] In his February 14, 2024, procedural ruling, Member Forcese highlighted SIRC's presentation to the committee and the amendments to sections 9 and 10 subsequently proposed by the committee and ultimately enacted by Parliament. He found that the amendments were directly responsive to SIRC's presentation, writing as follows: "I conclude that Parliament incorporated this language in response to the SIRC officials' testimony precisely so that the Review Agency would have unfettered access to all information, including solicitor-client information, with the sole exception of cabinet confidences."

[165] While I agree with Member Forcese that this was the rationale for the amendments to subsection 9(2) and section 10, the discussion of the amendments in committee is not quite as clear cut as this. When the committee was considering the amendments, government officials offered somewhat more mundane and technical rationales for adding the expression "or any privilege under the law of evidence" to the two provisions.

[166] With respect to subsection 9(2), John Davies, Director General with the Department of Public Safety and Emergency Preparedness, explained that the drafters had meant to replicate the language of subsection 39(2) of the *CSIS Act* but had simply made a drafting error. He stated:

> The idea with this amendment is to replicate exactly what was already in the CSIS Act in terms of access to information

> covered under common law privilege. When Bill C-59 was drafted, this was just an oversight of the CSIS Act. We didn't want any confusion that there would be any lack of or any differential access for review that SIRC, the Security Intelligence Review Committee enjoyed. All we're doing is fixing an error in drafting when Bill C-59 was created.
>
> I think this issue was raised in other amendments coming up, and it was raised during committee hearings a number of times. It looked like there was less access and that was not the intent.
>
> (Proceedings of the Standing Committee on Public Safety and National Security, April 17, 2018 (SECU-104), page 8)

[167] In other words, as it was originally drafted, subsection 9(2) failed to make it clear that the Review Agency was meant to have access to information protected by *other* privileges under the law of evidence such as police informer privilege, and not only to information protected by solicitor-client privilege (which had been expressly provided for). As Mr. Davies also observed, the same issue was raised in other amendments the committee was about to consider – in particular, to section 10.

[168] It is interesting to note that, earlier in the same committee proceeding, Member of Parliament Peter Fragiskatos (one of the Liberal sponsors of this amendment) specifically mentioned the amendments to the *Access to Information Act* that were being considered at the same time (see paragraph 153, above). The concern he articulated was that inclusion of the phrase "Despite [. . .] any privilege under the law of evidence" there and its omission here could be taken to imply that the Review Agency was not intended to have access to information protected by other common law privileges besides solicitor-client privilege, which was not the case (see Proceedings of the Standing Committee on Public Safety and National Security, April 17, 2018 (SECU-104), page 7).

[169] In short, the expression "or any privilege under the law of evidence" was added to fill a gap inadvertently created by the drafting of the original version of section 9. The amendment confirmed that, in addition to information protected by solicitor-client privilege, the professional secrecy of advocates and notaries or litigation privilege, the Review Agency was also meant to have access to information protected by any other form of common law privilege.

[170] Turning to the amendment to section 10, Mr. Fragiskatos explained its rationale as follows:

> The amendment clarifies that, when investigating complaints, the review agency has access to information that is subject to common law privileges under the law of evidence not otherwise named, such as police informer privilege. The intent was always for the review agency, again, to access this class of information, but making this explicit removes any ambiguity.
>
> Finally, Bill C-58 [amending the *Access to Information Act*] makes explicit reference to privileges under the law of evidence. This raised the possibility that the absence of such language from Bill C-59 could be interpreted as suggesting a lack of access. This avoids that risk by making the review agency's access clear in legislation.
>
> (Proceedings of the Standing Committee on Public Safety and National Security, April 17, 2018 (SECU-104), at 9)

[171] This explanation is not very illuminating for our purposes because there is no mention of solicitor-client privilege, one way or the other. Mr. Fragiskatos suggests that the expression being added ("any privilege under the law of evidence") refers to "common law privileges under the law of evidence not otherwise named" but section 10 (unlike section 9) does not name any other common law privileges under the law of evidence. Still, since no other privileges have been named, it must be the case that the expression covers *all* common law privileges under the

law of evidence, including solicitor-client privilege. While the point could have been made more directly, it is clear that the Review Agency was meant to have access to information even if it is subject to common law privileges under the law of evidence. No exceptions are mentioned.

[172] To add one more piece of the puzzle, as noted above, in its original version, section 23 of the *Intelligence Commissioner Act*, which dealt with the provision of information to the Commissioner, also omitted the expression "or any privilege under the law of evidence." It read as follows:

Provision of information to Commissioner	**Fourniture de renseignements au commissaire**
23 (1) Despite any other Act of Parliament and subject to section 26, the person whose conclusions are being reviewed by the Commissioner under any of sections 14 to 20 must, for the purposes of the Commissioner's review, provide the Commissioner with all information that was before the person in issuing or amending the authorization or making the determination at issue, including information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.	**23 (1)** Malgré toute autre loi fédérale et sous réserve de l'article 26, la personne ayant formulé les conclusions examinées par le commissaire au titre des articles 14 a 20 lui fournit, aux fins de son examen, les renseignements dont elle disposait pour accorder ou modifier l'autorisation ou effectuer la détermination en cause, y compris les renseignements protégés par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.
No waiver	**Non-renonciation**
(2) For greater certainty, the disclosure to the Commissioner under this	**(2)** Il est entendu que la communication au commissaire, au titre du

section of any information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that secrecy.	présent article, de renseignements protégés par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige ne constitue pas une renonciation au secret professionnel ou au privilège.

[173] Following its study of the bill, the Standing Committee on Public Safety and National Security recommended amending subsection 23(1) of the *Intelligence Commissioner Act* as follows:

23 (1) Despite any other Act of Parliament and subject to section 26, the person whose conclusions are being reviewed by the Commissioner under any of sections 14 to 20 must, for the purposes of the Commissioner's review, provide the Commissioner with all information that was before the person in issuing or amending the authorization or making the determination at issue, including information that is subject to <u>any privilege under the law of evidence</u>, solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege.	**23 (1)** Malgré toute autre loi fédérale et sous réserve de l'article 26, la personne ayant formulé les conclusions examinées par le commissaire au titre des articles 14 à 20 lui fournit, aux fins de son examen, les renseignements dont elle disposait pour accorder ou modifier l'autorisation ou effectuer la détermination en cause, y compris les renseignements protégés <u>par toute immunité reconnue par le droit de la preuve</u>, par le secret professionnel de l'avocat ou du notaire ou par le privilège relatif au litige.

[174] Member of Parliament Fragiskatos explained the rationale for the amendment as follows: "This amendment would clarify that the intelligence commissioner can receive information when evaluating ministerial decisions, subject to a privilege under the law of evidence. It seeks to

address in particular any ambiguity relating to privileges under the law of evidence that would be posed by Bill C-58." Mr. Davies (Director General from Public Safety) added: "Again, as we went through with NSIRA, this is just a draft, and we do not quote the exact phrasing used in the CSIS Act in particular, which made it clear that the review bodies would have access to common law privileged information. It was left out. It was inadvertent. We don't want any confusion with that." See Proceedings of the Standing Committee on Public Safety and National Security, April 23, 2018 (SECU-106), at 5.

[175] I draw three conclusions from this legislative history.

[176] First, in relation to both reviews and complaints investigations, the Review Agency was always meant to have the same degree of access to information as SIRC had enjoyed. In my view, it is telling that Mr. Davies stated with respect to both subsection 9(2) and section 10 as they were originally drafted: "It looked like there was less access [compared to SIRC] and that was not the intent." The original versions had fallen short in this regard (something that had been pointed out in committee hearings, including by officials from SIRC) as a result of drafting errors but they fell short in different ways. Section 9 failed to mention common law privileges besides solicitor-client privilege and related legal privileges; section 10 failed to mention common law privileges at all. The amendments introduced at the committee stage (which were ultimately enacted) were meant to correct these errors in order to bring the scope of the new provisions into line with what had been covered by subsection 39(2) of the *CSIS Act*. As we have seen, this included SIRC having access to solicitor-client privileged information in connection with both reviews and complaints investigations. Even though the same expression was added to

both provisions, doing so corrected different shortcomings in each provision so that both aligned with what SIRC had been entitled to obtain. Considered together, the amendments confirm the breadth of information the Review Agency was meant to be entitled to, whether it was engaged in a review or in a complaint investigation. There is nothing in the parliamentary proceedings to suggest that anything other than Cabinet confidences was meant to be withheld from the Review Agency in the discharge of either of its mandates.

[177] Second, the expression "or any privilege under the law of evidence" was added to section 10 to confirm that, when investigating a complaint, the Review Agency had access to information even if it is otherwise protected from disclosure by a common law privilege. Standing on its own, the explanation at the Committee stage for why this expression was added is somewhat question-begging when it comes to the central question raised in this application – namely, whether solicitor-client privilege is included among those common law privileges. Nevertheless, it is clear that the drafters, the standing committee and, ultimately, Parliament, intended the Review Committee to have access to exactly the same information as SIRC enjoyed, including access to solicitor-client privileged information. In my view, even though this specific rationale is not mentioned expressly when the amendment was discussed, it is significant that section 10 was amended in exactly the way suggested by SIRC officials to address the fact that, in its original form, section 10 did not appear to grant the new Review Agency access to solicitor-client privileged information in complaints investigations. Given that background, had the drafters intended the expression to have a more narrow meaning, surely they would have said so.

[178] Third, a straight line can be drawn from the decision of the Supreme Court of Canada in *University of Calgary* through the amendments to the *Access to Information Act* in response to that decision to the version of section 9 of the *NSIRA Act* that was ultimately enacted. The drafters modelled section 9 of the *NSIRA Act* (as well as section 23 of the *Intelligence Commissioner Act*) on subsections 36(2), (2.1) and (2.2) of the *Access to Information Act*, which were being considered by Parliament as part of Bill C-58 at the same time as Bill C-59 was being considered. This is further confirmation that section 9 was intended to overcome the substantive protections of solicitor-client privilege in the review context in a way that would satisfy the requirements of *University of Calgary*. It also explains why section 9 is worded as it is and why section 10, which did not need to meet those same requirements, is worded differently.

[179] In sum, I am satisfied that the legislative history of the *NSIRA Act* provides additional support for the conclusion that section 10 of that Act was meant to give the Review Agency access to solicitor-client privileged information in complaints investigations.

(7) Prosecutorial Independence

[180] As set out above, when the RCMP first objected to providing information protected by solicitor-client privilege, two arguments were advanced. One was that, unlike subsection 9(2) of the *NSIRA Act*, section 10 of that Act does not provide an express and unequivocal right of access to solicitor-client information in the context of complaints investigations. The other was that any legal advice responsive to the Review Agency's request would have been provided to the RCMP by counsel with the PPSC and this advice "was tightly interwoven with an exercise of prosecutorial discretion." As a result, providing information responsive to the Review Agency's

request would trench impermissibly on the independence of the PPSC and the office of the DPP. Accordingly, the RCMP contended that, in addition to the other considerations on which it relied in support of its interpretation of section 10, this was another reason for concluding that the provision does not grant the Review Agency access to solicitor-client privileged information. Put another way, if the text and context of section 10 do not resolve the issue, an interpretation of the provision that does not grant the Review Agency access to solicitor-client privileged information should be preferred because this would better protect prosecutorial independence. While Member Forcese addressed the first argument, he did not address the second.

[181] On this application for judicial review, this second argument is advanced again by the DPP, who was granted leave to intervene. As I will explain, while the fundamental importance of prosecutorial independence is beyond dispute, I am not persuaded that granting the Review Agency access to advice the PPSC provided to the RCMP in relation to its investigation of Abdulrahman would trench in any way upon that independence. Consequently, in my view, the principle of prosecutorial independence has no bearing on the interpretation of section 10 of the *NSIRA Act.*

[182] Prosecutorial independence is a bedrock principle of Canadian law with constitutional status: see *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 23-32; *Miazga v Kvello Estate*, 2009 SCC 51 at paras 45-47; *R v Nixon*, 2011 SCC 34 at paras 18-21; *R v Cawthorne*, 2016 SCC 32 at paras 21-30; and *R v Anderson*, 2014 SCC 41 at paras 46-51. There is no question that the DPP and the PPSC enjoy all the protections this principle entails.

[183] The exercise of prosecutorial discretion is not immune from review but I agree with the DPP that the Review Agency does not have the authority to review the actions or decisions of the Crown in criminal matters (no one has suggested otherwise). Nevertheless, even if production of solicitor-client information to the Review Agency would reveal Crown decision-making and the advice the PPSC gave to the RCMP in relation to a criminal investigation, I am unable to agree that this would encroach in any way on prosecutorial independence.

[184] As described above, in the December 22, 2023, direction and again in the February 14, 2024, ruling, Member Forcese identified three specific areas in which legal advice sought or provided to the RCMP was relevant to his investigation of the complaint. To repeat for ease of reference, they are:

(a) whether the RCMP sought and received legal advice on the prospect of bringing legal proceedings against Abdulrahman El-Bahnasawy in Canada, and whether the RCMP acted in accordance with any legal advice obtained;

(b) whether the RCMP sought and received any legal advice in relation to its activities against Abdulrahman El-Bahnasawy, including with respect to any obligations that were owed to him as a Canadian national, as a minor, or as a person suffering a severe psychiatric illness (whether under the *Charter*, under other Canadian law, or under international human rights treaties) and whether the RCMP acted in accordance with that advice; and

(c) whether the RCMP sought and received any legal advice regarding compliance with the *Privacy Act* before sharing reports concerning Abdulrahman El-Bahnasawy and members of his family with the FBI and whether the RCMP acted in accordance with that advice.

[185] I pause here to observe that, on the record before me, there does not appear to be any issue that any legal advice the RCMP obtained in relation to its investigation of Abdulrahman was provided by the PPSC. In his letter of April 11, 2022, Mr. Rasmussen stated: ". . . any legal advice responsive to this request was provided to the RCMP by counsel with the Public Prosecution Service of Canada (PPSC)." No one has suggested otherwise since then. While some of the issues Member Forcese wished to investigate (e.g. any legal advice provided in relation to the *Privacy Act* or in relation to legal duties owed to Abdulrahman under domestic or international law given his particular circumstances) might appear to fall more within the purview of RCMP legal counsel than that of the PPSC, the parties and the intervener have proceeded on the basis that the legal advice in issue here was provided by the PPSC. As well, while the focus of the discussion has been on the potential impact of revealing that advice on prosecutorial independence, no one has questioned that it qualifies as solicitor-client advice. In this regard, see *R v Campbell*, [1999] 1 SCR 565 at paras 49-54. Although *Campbell* pre-dates the creation of the PPSC and the office of the DPP, the principles articulated there concerning the characterization of legal advice provided to the RCMP by a lawyer with the Department of Justice readily apply to the present situation.

[186] Returning to the issue at hand, in my view, the information Member Forcese was seeking is highly germane to any findings or recommendations he might ultimately report to the Minister

of Public Safety and to the Commissioner of the RCMP concerning the activities under investigation. As Department of Justice counsel expressed the point in 2006 in relation to SIRC investigations of complaints against CSIS, "legal advice itself may be part of the operational activities of the Service when, for example, officials may have acted or refrained from acting on the strength of advice from counsel" (see paragraph 136, above). This is equally true when it is the national security activities of the RCMP, as opposed to CSIS, that are the subject of the complaint investigation.

[187] In the report of the second part of his inquiry discussed earlier, Commissioner O'Connor concluded that an agency responsible for investigating complaints against the RCMP in the national security context must have access to legal advice given in connection with the decision making process or the series of events being investigated if it is to be able to "make a thorough and accurate assessment of the RCMP's activities" (O'Connor, at 538). I agree. As Commissioner O'Connor also found, access to such advice is essential, "not to second-guess or evaluate that advice, but to determine the propriety of the RCMP's actions in seeking and complying with the advice received" (*ibid.*). As he observed, "Legal advice plays such an important role in national security investigations that a review body unable to examine the legal advice received by the RCMP would have only a partial and, at times, distorted view of the Force's national security activities" (*ibid.*). Significantly, Commissioner O'Connor did not express any concerns that giving a review body access to such information would encroach upon prosecutorial independence.

[188] It is clear from how Member Forcese identified the issues he still needed to investigate that he was not seeking solicitor-client information in order to review *the Crown's* decision making or exercises of discretion. Acting pursuant to his statutory mandate to investigate a complaint against the RCMP, his focus was entirely on the actions of the RCMP. His only interest in the information he was seeking was to determine whether the RCMP had sought legal advice and whether it had acted in accordance with any legal advice it received. His role was to investigate the actions of the RCMP, not to second-guess any legal advice they may have received. The relevance of any legal advice sought or received by the RCMP to the Review Agency's mandate related solely to the actions of the RCMP. In these circumstances, I am unable to see how the Review Agency having access to this information would threaten prosecutorial independence.

[189] As well, to repeat points made above, subsection 25(1) of the *NSIRA Act* requires that the investigation be conducted in private; subsection 25(2) provides that no party is entitled as of right to be present during, to have access to or to comment on representations made to the Review Agency by any other person; and subsection 52(1) requires that any solicitor-client privileged information be removed from any report of the investigation provided to the complainant. These provisions all help to ensure that prosecutorial independence continues to be safeguarded by strong confidentiality protections even if legal advice the PPSC gave to the RCMP is disclosed to the Review Agency.

[190] In sum, Member Forcese understood that his mandate was to make findings and recommendations in relation to a complaint against the RCMP. Whether the RCMP sought legal

advice in relation to the activities in question and, if such advice was provided, whether the RCMP acted in accordance with that advice was relevant to the propriety of the activities the Review Agency was investigating. In the words of Commissioner O'Connor, without access to that advice, Member Forcese would be left with only a partial and distorted view of the activities he was investigating. There is no reason to think that Member Forcese considered it his role to assess the actions and decision making of the PPSC or to second-guess any advice given; to the contrary, I have no doubt that he understood that this was *not* his role in investigating and reporting on this complaint. His only concern was whether the RCMP had sought legal advice regarding its activities in relation to Abdulrahman and his family and how it had acted in light of any advice it may have obtained. In my view, allowing Member Forcese to have access to that advice would not encroach in any way on prosecutorial independence. As a result, the principle of prosecutorial independence is of no assistance in determining the meaning of section 10 of the *NSIRA Act*.

(8) Conclusion

[191] Having regard to all of the considerations set out above, I agree with Member Forcese's interpretation of section 10 of the *NSIRA Act.* His conclusion that the Review Agency is entitled to obtain relevant solicitor-client privileged information from the RCMP is consistent with the legislative text, it promotes the intent of the legislation, and it complies with accepted legal norms (see *Piekut*, at para 49). In short, it is correct.

[192] The AGC submits, in the alternative, that if this Court were to find that the Review Agency is generally entitled to obtain solicitor-client privileged information from the RCMP

under paragraph 10(d) of the *NSIRA Act*, it should nevertheless declare that the Review Agency is not entitled to the information it seeks in the present case because that information is not relevant to the complaint. Little was said about the standard of review I should apply to this issue. As I have already observed, Member Forcese provided a compelling explanation for why he concluded that the information he was seeking is necessary for the exercise of the Review Agency's powers and the performance of its duties and functions – in short, for why that information was relevant to the complaint and required for a complete adjudication. I am satisfied that that determination is both reasonable and correct. As a result, even on this alternative ground, there is no basis to interfere with the decision to issue the summons.

VI. CONCLUSION

[193] For all of these reasons, I have concluded that there is no basis to interfere with the decision under review. Member Forcese's determination that the doctrine of *functus officio* did not prevent him from continuing with his investigation of the complaint and issuing a summons to the RCMP for information it had refused to provide is reasonable. As well, his determination that, in connection with this investigation, the Review Agency is entitled under section 10 of the *NSIRA Act* to obtain relevant solicitor-client privileged information in the possession or under the control of the RCMP is correct. Accordingly, this application for judicial review will be dismissed.

[194] Neither party sought costs and none will be awarded.

[195] Finally, when this judicial review application was commenced, the Attorney General of Canada was named as the applicant. Despite a subsequent amendment to the style of cause naming the applicant as His Majesty the King in Right of Canada, the parties now agree that the applicant was named correctly at the outset. Accordingly, the style of cause will be amended to name the Attorney General of Canada as the correct applicant. The style of cause will also be amended to reflect the Director of Public Prosecution's status as intervener.

JUDGMENT IN T-381-24

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the Attorney General of Canada as the correct applicant and to reflect the Director of Public Prosecution's status as intervener.

2. The application for judicial review is dismissed without costs.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-381-24
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v OSAMA EL-BAHNASAWY ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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