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## **“Presumptively inviolate”: Federal Court of Appeal rules federal Privacy Commissioner cannot force disclosure of privileged documents**

The importance of the confidentiality of communications between a lawyer and client has been highlighted by a recent decision of the Federal Court of Appeal in the context of an investigation under federal private sector privacy legislation – the *Personal Information Protection and Electronic Documents Act* (PIPEDA, the Act). The decision, *Blood Tribe (Department of Health) v. Canada (Privacy Commissioner)* (October 18, 2006), concerned a complaint to the federal Privacy Commissioner by a terminated employee seeking access to her personnel file, part of which contained correspondence between her former employer and its legal counsel.

In investigating the complaint, the Assistant Privacy Commissioner requested that the file, including the above mentioned correspondence, be forwarded to her attention. The employer refused to produce that part of the file, claiming it was subject to solicitor-client privilege and presented an unchallenged affidavit to that effect. The Commissioner ordered production and the employer appealed to the Federal Court.

### **LEGISLATION**

Under s. 12(1)(a) of PIPEDA, the Commissioner has the power to compel the production of “any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record.” Section 12(1)(c) gives the Commissioner the power to receive and accept any evidence that the Commissioner sees fit, “whether or not it is or would be admissible in a court of law.” Under s. 9(3)(a), organizations subject to the Act are not required to give access to an individual’s personal information where that information “is protected by solicitor-client privilege.”

### **FEDERAL COURT: EXPRESS LANGUAGE REQUIRED TO RESTRICT COMMISSIONER’S POWER**

The trial judge held in favour of the Commissioner. He ruled that these provisions should be read in a broad and purposive manner, and that they gave the Commissioner extraordinary powers similar to that of a superior court of record such that the Commissioner was entitled to review privileged documents. In his view, if Parliament had intended to prevent the Commissioner from verifying claims of privilege, it could have specifically excluded this power as it had done under several other statutes.

### **COURT OF APPEAL: EXPRESS LANGUAGE REQUIRED TO FORCE DISCLOSURE**

The Federal Court of Appeal allowed the employer’s appeal, holding that solicitor-client privileged documents were “presumptively inviolate.” In overruling the trial judge, the Court specifically rejected the trial judge’s view that Parliament would have used express language had it wanted to restrict the Commissioner’s access to privileged documents. In fact, the Court of Appeal stated the opposite is the case. The recent approach used by the Supreme Court of Canada suggests that if Parliament wished to create a power to compel privileged documents then express language must be used. Citing the 2004 decision of the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, the Court stated that any legislation limiting or denying solicitor-client privilege must be interpreted restrictively, and that broad language and inclusive phrases relating to the production of records should not be read to include privileged communications. In this case, PIPEDA had no express language to restrict the privilege.

The Court rejected the Commissioner's claim that she must be in a position to test claims of solicitor-client privilege, as opposed to accepting such claims at face value or bringing an application to court to have a judge decide the issue. The Court expressed the view that the Commissioner had presented only a general rationale that her investigation would be fettered, while the employer's affidavit in support of its claim of privilege had not been challenged on cross-examination. In short, the Court stated that no facts were alleged that demonstrate why the privileged documents were in any way necessary to the Commissioner's investigation.

The Court also pointed to s. 20(5) of PIPEDA, the provision which permits the Commissioner to disclose to the Attorney General of Canada or of a province, any information relating to the commission of an offence by officers or employees of organizations subject to the Act. In the Court's view, this provision could only have a chilling effect on those fearful that solicitor-client privileged documents could end up in the hands of law enforcement officers, by way of a privacy complaint made under the Act.

In the result, the employer's appeal against the order to disclose privileged information to the Commissioner was allowed.

### **In Our View**

The Court also noted that private sector privacy legislation, such as PIPEDA, should not be read as expansively as public sector access and privacy information. The Court stated that the latter, including the federal *Access to Information Act* and Ontario's *Freedom of Information and Protection of Privacy Act*, have as their purpose "the codification of a right of access to information held by the Canadian government." These statutes have a key role in a modern democracy and have accordingly been given quasi-constitutional status by courts. This is not the case with legislation governing access to information in private hands. The provisions compelling disclosure of information in privacy investigations under PIPEDA should accordingly be given a more restrictive interpretation.

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