



SUPREME COURT OF CANADA

CITATION: Canada (Privacy Commissioner) v. Blood Tribe
Department of Health, 2008 SCC 44

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BETWEEN:

Privacy Commissioner of Canada
Appellant

and

Blood Tribe Department of Health
Respondent

- and -

**Attorney General of Canada, Federation of Law Societies
of Canada, Information Commissioner of Canada,
New Brunswick Office of the Ombudsman,
Information and Privacy Commissioner of British Columbia,
Information and Privacy Commissioner of Ontario,
Advocates' Society, Canadian Bar Association and
Information and Privacy Commissioner of Alberta**
Interveners

CORAM: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and
Rothstein JJ.

REASONS FOR JUDGMENT: Binnie J. (McLachlin C.J. and Deschamps, Fish, Abella,
(paras. 1 to 35) Charron and Rothstein JJ. concurring)

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canada v. blood tribe department of health

Privacy Commissioner of Canada

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Neutral citation: 2008 SCC 44.

File No.: 31755.

2008: February 21; 2008: July 17.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the federal court of appeal

Privacy — Investigations of complaints — Powers of Privacy Commissioner — Production of documents — Solicitor-client privilege — Dismissed employee filing complaint with Commissioner and seeking access to her personal employment information — Employer claiming solicitor-client privilege over some documents — Whether Commissioner can compel production of privileged documents — Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 12.

Following her dismissal, an employee asked to have access to her personal employment information because she suspected that the employer had improperly collected inaccurate information and used it to discredit her before its board. The employer denied the request, and the employee filed a complaint with the Privacy Commissioner seeking access to her personal file. The Commissioner requested the records from the employer in broad terms. All records were provided except for those over which the employer claimed solicitor-client privilege. The Commissioner then ordered production of the privileged documents pursuant to s. 12 of the *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”), which confers the powers to compel the production of any records “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”. The employer applied for judicial review of the Commissioner’s decision. The reviewing judge determined the Commissioner was empowered to compel production of documents over which solicitor-client privilege was claimed in order to effectively complete her statutory investigative role. The Federal Court of

Appeal set aside the decision of the reviewing judge and vacated the Commissioner's order for production of records.

Held: The appeal should be dismissed.

Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. However, experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible". Without that assurance, access to justice and the quality of justice in this country would be severely compromised. It is in the public interest that the free flow of legal advice be encouraged. [9]

When the appropriate principles of statutory interpretation are applied to the general language of *PIPEDA*, the right of the individual or organization that is the target of the complaint to keep solicitor-client confidences confidential must prevail. The Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder, including words as broad as those contained in s. 12 of *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved to the courts. Express words are necessary to permit a statutory official to

“pierce” the privilege. Such clear and explicit language does not appear in *PIPEDA*. [1-2]

An adjudication of a claim of privilege by the Commissioner, who is an administrative investigator not an adjudicator, would be an infringement of the privilege. Client confidence is the underlying basis for the solicitor-client privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where, as here, there is a possibility of the privileged information being made public or used against the person entitled to the privilege. Furthermore, in pursuit of its mandate, the administrative officer may become adverse in interest to the party whose documents it wants to access. Not only may it take the resisting party to court but it may decide to share compelled information with prosecutorial authorities without court order or the consent of the party from whom the information was compelled. [20-21] [23]

Here, the only reason the Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. In the Commissioner’s view, piercing the privilege would become the norm rather than the exception in the course of her everyday work. Even courts will decline to review solicitor-client documents to

adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue. [17]

The Commissioner has not made out a case that routine access to solicitor client confidences is necessary to achieve the ends sought by *PIPEDA*. There are other less intrusive remedies. Firstly, she may, at any point in her investigation, refer a question of solicitor-client privilege to the Federal Court under s. 18.3(1) of the *Federal Courts Act*. Secondly, within the framework of *PIPEDA* itself, the Commissioner has the right to report an impasse over privilege in her s. 13 report and, with the agreement of the complainant, bring an application to the Federal Court for relief under s. 15. The court is empowered, if it thinks it necessary, to review the contested material and determine whether the solicitor-client privilege has been properly claimed. This procedure permits verification while preserving the privilege as much as possible. [31] [33-34]

Cases Cited

Referred to: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39; *Goodis v. Ontario*

(Ministry of Correctional Services), [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Englander v. TELUS Communications Inc.*, [2005] 2 F.C.R. 572, 2004 FCA 387; *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60; *H.J. Heinz Co. of Canada v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13; *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, [1993] 5 W.W.R. 710; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673, 2005 FCA 199.

Statutes and Regulations Cited

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 50.

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, s. 50.

Employment Equity Act, S.C. 1995, c. 44, s. 29.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.3(1).

Interpretation Act, R.S.C. 1985, c. I-21, s. 31(2).

Lobbyists Registration Act, R.S.C. 1985, c. 44 (4th Supp.), s. 10.4.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, ss. 4(1)(b), 9(3), 11-15, 17(1), 20(5), Sch. 1, clause 4.9.

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

Privacy Act, S.C. 1980-81-82-83, c. 111, Sch. II, s. 34(2).

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APPEAL from a judgment of the Federal Court of Appeal (Sharlow, Pelletier and Malone JJ.A.), [2007] 2 F.C.R. 561, 274 D.L.R. (4th) 665, 354 N.R. 302, 61 Admin. L.R. (4th) 1, 53 C.P.R. (4th) 273, [2006] F.C.J. No. 1544 (QL), 2006 CarswellNat 3294, 2006 FCA 334, reversing a judgment of Mosley J., [2005] 4 F.C.R. 34, 265 F.T.R. 276, 40 C.P.R. (4th) 7, 133 C.R.R. (2d) 124, [2005] F.C.J. No. 406 (QL), 2005 CarswellNat 612, 2005 FC 328. Appeal dismissed.

Steven Welchner and Patricia Kosseim, for the appellant.

Eugene Creighton, Q.C., Gary Befus and Ken McLeod, for the respondent.

Christopher Rupar, for the intervener the Attorney General of Canada.

Bruce T. MacIntosh, Q.C., Angus Gibbon and Garner A. Groome, for the intervener the Federation of Law Societies of Canada.

Marlys Edwardh, Daniel Brunet and Diane Therrien, for the intervener the Information Commissioner of Canada.

Christian Whalen, for the intervener the New Brunswick Office of the Ombudsman.

Susan E. Ross, for the intervener the Information and Privacy Commissioner of British Columbia.

William S. Challis and *Stephen McCammon*, for intervener the Information and Privacy Commissioner of Ontario.

Benjamin Zarnett and *Julie Rosenthal*, for the intervener the Advocates' Society.

Mahmud Jamal and *Craig Lockwood*, for the intervener the Canadian Bar Association.

Ritu Khullar and *Vanessa Cosco*, for the intervener the Information and Privacy Commissioner of Alberta.

The judgment of the Court was delivered by

BINNIE J. —

[1] This appeal requires the Court to resolve a conflict between, on the one hand, the Privacy Commissioner's statutory power to have access to personal information about a complainant for the purpose of ensuring compliance with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

(“*PIPEDA*”), and, on the other hand, the right of the target of the complaint (in this case a former employer of the complainant) to keep solicitor-client confidences confidential. In my view, when the appropriate principles of statutory interpretation are applied to the general language of *PIPEDA*, the right of the individual or organization that is the target of the complaint to keep solicitor-client confidences confidential must prevail.

[2] Section 12 of *PIPEDA* gives the Privacy Commissioner express statutory authority 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”. She therefore argues that, as is the case with a court, she may review documents for which solicitor-client privilege is claimed to determine whether the claim is justified. I do not agree. The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 of *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved to the courts. Express words are necessary to permit a regulator or other statutory official to “pierce” the privilege. Such clear and explicit language does not appear in *PIPEDA*. This was the view of the Federal Court of Appeal and I agree with it. I would dismiss the appeal.

I. Facts

[3] Annette Soup was dismissed from her employment with the Blood Tribe Department of Health, in the spring of 2002. At the time of dismissal, the employer sought legal advice from its solicitors. Ms. Soup's employment file thus included the correspondence between the employer and its solicitors. There is no suggestion that this consultation was in any way improper in purpose or in content.

[4] Following her dismissal, Ms. Soup asked to have access to her personnel file because she suspected that the employer had improperly collected inaccurate information and used that information to discredit her before its board. The employer denied Ms. Soup's request for access without giving reasons. Ms. Soup then filed a complaint with the Privacy Commissioner seeking access to her personal employment information. The Privacy Commissioner requested Ms. Soup's employment records. The employer provided some documents but withheld what it described as a "bundle of letters" from its solicitors over which a claim of solicitor-client privilege was advanced, relying on s. 9(3)(a) of *PIPEDA*, which provides:

9. . . .

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege. . . .

[5] The Privacy Commissioner, through her General Counsel, responded on July 16, 2003, as follows:

In your letter you have framed the legal issue as “Is the Blood Tribe required by law to provide access to the solicitor-client privileged documents to the Office of the Privacy Commissioner?”

Our answer to that question is an unqualified yes. . . . [The Privacy Commissioner takes the position that] in order to fulfil his mandate according to his standards he must be absolutely certain that the [s.] 9(3)(a) exemption has been properly invoked. In order to be certain either the Commissioner or his delegate must be provided with access to the documents in question. [Emphasis in original.]

The Privacy Commissioner then ordered production of the privileged documents pursuant to s. 12(1)(a) and (c) of *PIPEDA*. The employer brought an application for judicial review to challenge the legality of the Privacy Commissioner’s order. The application for judicial review was dismissed by the motions judge, but the Federal Court of Appeal allowed the appeal, set aside the decision of the Federal Court and vacated the Privacy Commissioner’s order for production of solicitor-client records.

II. Relevant Statutory Information

[6] See Appendix.

III. Judicial History

A. *Federal Court*, [2005] 4 F.C.R. 34, 2005 FC 328

[7] Mosley J. noted that, pursuant to s. 12(1)(c) of *PIPEDA*, the Privacy Commissioner may receive and accept any evidence and other information “whether or not it is or would be admissible in a court of law”. He found that this language suggested that Parliament did not intend the Privacy Commissioner’s investigations to be fettered by questions of privilege. The judge drew an analogy with the *Privacy*

Act, S.C. 1980-81-82-83, c. 111, Sch. II (now R.S.C. 1985, c. P-21), in which courts have determined that the Privacy Commissioner is given the authority to review information to decide whether an exemption for reasons of national security has been properly claimed. Mosley J. observed that “this is an indication of Parliament’s confidence in the [Privacy] Commissioner’s ability to protect sensitive information” (para. 55). The Privacy Commissioner is given extraordinary powers to allow her to conduct investigations effectively and these powers can be exercised “in the same manner and to the same extent as a superior court of record” (s. 12(1)(a)). Mosley J. noted that a superior court has the power to compel production of documents to assess claims of solicitor-client privilege. Further, “[h]ad Parliament intended to prevent the Commissioner from verifying claims of privilege, it could have specifically excluded this power, as it has done under several other Acts” (para. 57).

B. *Federal Court of Appeal (Sharlow, Pelletier and Malone J.J.A.)*, [2007] 2 F.C.R. 561, 2006 FCA 334

[8] Malone J.A., writing for the court, noted the Privacy Commissioner’s request of the employer’s records was framed “in very broad terms” (para. 7). In his view, a statutory abrogation of solicitor-client privilege requires clear and express language: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31. Moreover, “[o]n the present record, there have been no facts alleged that demonstrate why the privileged documents are in any way necessary to the Commissioner’s investigation” (para. 18). Malone J.A. further noted that s. 20(5) of *PIPEDA* states that the Privacy Commissioner may disclose information relating to the commission of an offence to an attorney general. Although s. 12(1)(a) of *PIPEDA* gives the Privacy Commissioner similar powers to a superior court, it did not constitute a grant of the jurisdiction of a superior court, but merely allowed the Privacy

Commissioner to issue subpoenas and orders that have the force of law for matters otherwise within her investigative jurisdiction. In his view, “[l]anguage that allows a tribunal to compel evidence in the same manner and to the same extent as a superior court . . . does not extend the jurisdiction of a tribunal or commission” (para. 29) into matters of solicitor-client privilege.

IV. Analysis

[9] Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer’s expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer’s advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality “as close to absolute as possible”:

[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

(*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36)

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 173, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client’s confidence.

[10] At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31, at paras. 5 and 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8. A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained “[a]s close to absolute as possible to ensure public confidence and retain relevance” (*McClure*, at para. 35).

[11] To give effect to this fundamental policy of the law, our Court has held 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: *Lavallee*, at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle.

A. *The PIPEDA Complaints Procedure*

[12] *PIPEDA* makes specific reference to “personal information that . . . is about an employee of [an] organization . . . that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business” (*PIPEDA*, s. 4(1)(b)). If an individual believes that such a business or organization has breached *PIPEDA* by denying a proper request for access to his or her own personal information, that individual has the right to file a written complaint under s. 11(1). Once a complaint is filed, s. 12 of *PIPEDA* requires the Privacy Commissioner to investigate its merits. Following her investigation, the Privacy Commissioner prepares a report containing findings and recommendations (s. 13). The report must be prepared within one year after the day on which the complaint was filed. Even where the Privacy Commissioner finds that an organization has improperly refused access to personal information, she has no authority to order an organization such as the respondent to provide it. She makes findings and recommendations. The complainant then has the option of seeking a remedy in the courts (s. 14), which alone can order an organization such as the respondent to provide the complainant with access to his or her personal information: *Englander v. TELUS Communications Inc.*, [2005] 2 F.C.R. 572, 2004 FCA 387. Section 15 permits the Privacy Commissioner to apply to the Federal Court in relation to any matter described in s. 14, with the consent of the complainant and within the time limit set out in that section. At that point, if not before, the Privacy Commissioner is in an adversarial relationship with the business or organization being complained about.

B. *The Need for Independent Verification*

[13] Individuals are often unaware of the nature and extent of information about themselves being collected and stored by numerous private organizations, including employers. Some of this information may be quite inaccurate.

Not only is information circulated from unknown or out-of-date sources, but it is mixed and matched with other information purportedly relating to the same individuals. Digitalized attributes of one consumer may be mixed and matched with those of others who subjectively appear to belong to the same category of socioeconomic behaviour. Few data “subjects” ever see the information being held and exchanged under their names; fewer still are able to correct this information or have it withdrawn from circulation.

(I. Lawson, *Privacy and Free Enterprise* (2nd ed. 1997), at p. 32)

Accordingly, Parliament recognized that a corollary to the protection of privacy is the right of individuals to access information about themselves held by others in order to verify its accuracy.

[14] *PIPEDA* itself provides in Sch. I, at clause 4.9, of its statement of principles that

[u]pon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

[15] The Privacy Commissioner argues that

this case is about calling the private sector to account for its claims of privilege over documents containing personal information of others. Whether their claims turn out to be completely right, honestly equivocal, overly broad, inadvertently wrong, or intentionally misleading, they must be independently verified in order to give proper meaning to the fundamental right of access to one's personal information. [Transcript, at p. 2]

I agree. However, the question raised by the appeal is whether the proper forum for this independent verification in the first instance is the court or the Privacy Commissioner herself.

C. The Sweeping Nature of the Privacy Commissioner's Argument

[16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer *did*, not about the legal advice (if any) upon which the employer did it.

[17] The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where

solicitor-client privilege is invoked. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue: see e.g. *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen. Div.)), at para. 20. In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work.

D. The Privacy Commissioner's Argument Rests on a False Analogy Between it and the Court

[18] It is common ground that *PIPEDA* does not *expressly* grant to the Privacy Commissioner the power to review documents in respect of which solicitor-client privilege is claimed — either to verify the privilege claim, or for any other purpose. The question is thus whether the legislation *implicitly* grants that power.

[19] In support of her position, the Privacy Commissioner stresses the independence of her office from the parties and refers to the grant of some court-like powers under s. 12 of *PIPEDA*. She argues that acknowledging a power to review claims to privilege would be consistent with Parliament's objective of creating an inexpensive and expeditious process: "Just as courts must verify claims of privilege to ensure the integrity and proper functioning of the justice system", she argues, "the [Privacy] Commissioner must verify claims of solicitor-client privilege to ensure the integrity and proper functioning of the legislative scheme protecting fundamental privacy rights" (A.F., at para. 38).

[20] The Privacy Commissioner is an officer of Parliament who carries out "impartial, independent and non-partisan investigations": *H.J. Heinz Co. of Canada*

v. Canada (Attorney General), [2006] 1 S.C.R. 441, 2006 SCC 13, at para. 33. She is an administrative investigator not an adjudicator. Yet she argues that “[a] common sense approach would recognize that the requisite *express* legislative authority need not exist in language as *specific* and *explicit* as the Court of Appeal would require, nor be assessed in total isolation from the overall legislative scheme and context” (A.F., at para. 64 (emphasis in original)). In her view, s. 12(1)(a) could hardly be broader, as it grants the Privacy Commissioner the same powers as a superior court of record. A superior court of record has the power to compel the production of, and to inspect, documents over which privilege is claimed. Accordingly, she argues, the Privacy Commissioner is vested with a similar authority in relation to documents over which solicitor-client privilege is claimed. The Information Commissioner, intervening in support of the [Privacy] Commissioner, points out that “verification of the privilege is the very object of the Privacy Commissioner’s statutory ombudsperson function and not merely a preliminary step to determine the record’s use for another purpose” (I.F., at para. 21).

[21] I do not accept the validity of the analogy between the Privacy Commissioner and a court in this respect. The Privacy Commissioner is a stranger to the privilege. She argues that because of her independence from the parties her adjudication of a claim of privilege would not be an infringement of the privilege. I do not agree. Client confidence is the underlying basis for the privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where (as here) there is a possibility of the privileged information being made public or used against the person entitled to the privilege: *Lavallee*, at para. 44; *Goodis*, at para. 21;

Pocklington Foods Inc. v. Alberta (Provincial Treasurer), [1993] 5 W.W.R. 710 (Alta. C.A.). While s. 12 gives the Privacy Commissioner some court-like procedural powers, she is not a court of law. The words of s. 12(1)(a) confer a power to compel 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. . . .

This amounts to a general production provision. In *Pritchard*, the Court dismissed a similar argument concerning s. 10 of the Ontario *Judicial Review Procedure Act*. We held that a general production provision that does not specifically indicate that the production must include records for which solicitor-client privilege is claimed is insufficient to compel the production of such records (*Pritchard*, at para. 35). On the other branch of her argument, the Privacy Commissioner points out that s. 12(1)(c) permits her in the course of exercising her powers of investigation to

12. (1)

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law. . . .

The authority to *receive* a broad range of evidence cannot be read to empower the Privacy Commissioner to *compel production* of solicitor-client records from an unwilling respondent. The language of s. 12 is simply incapable of carrying the Privacy Commissioner to her desired conclusion.

[22] In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel

production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.

E. The Privacy Commissioner May Be Adversarial in Interest

[23] A major distinction between the Privacy Commissioner and a court, for present purposes, is that in pursuit of her mandate the Privacy Commissioner may become adverse in interest to the party whose documents she wants to access. This is not true of a court. Not only may she take the resisting employer to court but she may decide to share compelled information with prosecutorial authorities without court order or the consent of the party from whom the information was compelled. Although the general rule is non-disclosure, s. 20(5) of *PIPEDA* provides for such an exception:

20. . . .

(5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

It is true, as mentioned earlier, that at common law privilege does not attach to communications criminal in themselves or intended to further a criminal purpose, but the wording of s. 20(5) ("information *relating to* the commission of an offence") is much broader than the narrow common law exception, and would authorize disclosure to a prosecutor of much that the common law would regard as solicitor-client confidences.

[24] To meet the s. 20(5) objection, the Privacy Commissioner is obliged to resort to an argument that in my opinion contradicts the position she takes on s. 12 which (she says) should be read *broadly* to *include* documents over which solicitor-client privilege is claimed. On the other hand, she says, s. 20(5) should be read *narrowly* to *exclude* solicitor-client confidence because its wording “is not clearly and unambiguously intended to authorize the Commissioner to disclose privileged documents to the Attorney General” (A.F., at para. 48). However, such a distinction between ss. 12 and 20(5) cannot be made because both sections use words of the same level of generality and there is no persuasive reason to apply a contradictory approach to their interpretations.

[25] Interestingly, the argument made by the Privacy Commissioner in support of reading down s. 20(5) is essentially the same as the argument the respondent makes in respect of a narrow reading of s. 12, namely, that clear and unambiguous statutory language is required to overcome solicitor-client privilege. Of course, if, as the employer contends, s. 12 does not grant the Privacy Commissioner access to solicitor-client documents in the first place, there is no need to read down s. 20(5) to forestall the onward transmission of such confidence to the Crown prosecutors.

[26] It is the very generality of the language of s. 12, which does *not* advert to issues raised by solicitor-client privilege, that shows the importance of *Pritchard's* prohibition against abrogation by inference. A search of Parliament's use of the expression “in the same manner and to the same extent” as a court reveals that there are about 14 other federal statutes with substantially identical wording to s. 12(1) of *PIPEDA*, including the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 99; *Lobbyists Registration Act*, R.S.C. 1985, c. 44,(4th Supp.), s. 10.4; *Employment*

Equity Act, S.C. 1995, c. 44, s. 29; *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 50; and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 50. Looking at these provisions in their different statutory contexts shows that it certainly cannot be said that in all these instances Parliament intended to abrogate solicitor-client privilege. As the intervener Attorney General of Canada concedes in his factum:

. . . Parliament must be mindful of the importance of that privilege in the administration of justice. Consequently, if Parliament seeks to abrogate solicitor-client privilege it must do so in clear, precise and unequivocal language. Any ambiguity in the language of the legislation at issue must be resolved in favour of protecting the privilege and against any abrogation of the privilege. [para. 1]

Therefore, the Attorney General of Canada submits, “[t]he ordinary and grammatical meaning of the words used in s. 12(1) of *PIPEDA* taken in their full and proper context, do not support the conclusion of the Commissioner” (para. 2). I agree.

F. *The Privacy Commissioner Argues by Analogy with her Powers Under the Privacy Act*

[27] The Privacy Commissioner criticizes the Court of Appeal’s decision in this case for introducing “unfounded discrepancies between the Commissioner’s powers of investigation under the *Privacy Act* and *PIPEDA*, contrary to . . . the plain language of these *Acts*” (A.F., at para. 120). She invokes the “principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter”: *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 327-28; P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 288-89. She argues that Parliament could not have intended that the

Commissioner's virtually identical powers of investigation be contradictory as between these constituent pieces of legislation.

[28] However, the powers of the Privacy Commissioner under *PIPEDA* and the *Privacy Act* are not the same. For present purposes, as observed by the Federal Court of Appeal, it is sufficient to note that *PIPEDA* does not contain explicit language granting access to confidences such as is found in s. 34(2) of the *Privacy Act*, R.S.C. 1985, c. P-21:

34. . . .

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

[29] The scope of the Privacy Commissioner's powers under s. 34(2) in relation to solicitor-client confidences has been the subject of divergent interpretations by the Federal Court of Appeal: see *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127, at para. 11; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673, 2005 FCA 199, at paras. 25 and 26. Its scope is not in issue here. There is no equivalent of s. 34(2) in *PIPEDA*. The Privacy Commissioner seeks to explain its absence on the basis that s. 34(2) "was enacted solely to address issues of crown privilege, which do not arise in the private sector". The fact is, however, that solicitor-client privilege regularly arises in *both* the public and private sectors, and there is no language in *PIPEDA* comparable to s. 34(2) even to provide the Privacy Commissioner with an argument

that “notwithstanding . . . any privilege” she may examine privileged information in the hands of a private business or organization. The proper interpretation of s. 34(2) must await a case in which it is squarely raised. Its only relevance to the present appeal is its absence from *PIPEDA*, an absence from which we may draw an adverse inference. It is not there because Parliament either did not put its collective mind to the solicitor-client issue or because Parliament had no intention of giving the Privacy Commissioner the power she now claims.

G. Reliance Is Placed on a “Contextual Reading” of Section 9(3) of PIPEDA

[30] The Information Commissioner, intervening in support of the Privacy Commissioner, contends that by “including solicitor-client privilege (in s. 9(3)) as one of the six enumerated grounds for refusing access to requested personal information, Parliament clearly indicated its intention that the Privacy Commissioner would administer and verify claims of exemption based on solicitor-client privilege *in the same manner as she administers and verifies claims based on the other five exemption grounds*” (I.F., at para. 24 (emphasis in original)). This presupposes that there is a parity of legal status and importance among the s. 9(3) grounds, which include not only solicitor-client privilege but “confidential commercial information” and information “collect[ed] with[out] the knowledge or consent” of an individual for enumerated purposes. There is no such parity of legal status and importance. Solicitor-client privilege “commands a unique status within the legal system. . . . [It] is integral to the workings of the legal system itself” (*McClure*, at para. 31; *Gruenke*, at p. 289). An argument that equates the status of solicitor-client privilege with “confidential commercial information” is simply a denial of its fundamental

importance and illustrates the slippery slope on which the appellant's position would place its future health and vitality in the regulatory context.

H. *Reliance on Section 31 of the Interpretation Act*

[31] Reference was made to s. 31(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that:

31. . . .

(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

The *Interpretation Act* is a statute of general application. It does not address solicitor-client confidences. The reality is that all of the appellant's arguments for "implied powers" or a "purposive interpretation" of *PIPEDA* are arguments for an abrogation by inference. The Privacy Commissioner's position is that her review of solicitor-client documents is "routinely necessary" in all cases where solicitor-client privilege is claimed. However, such routine access would contradict the principles explained in *Descôteaux* over 25 years ago:

When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that [solicitor-client] confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation. [Emphasis added; p. 875.]

The Privacy Commissioner has not made out a case that routine access to solicitor client confidences is “absolutely necessary” to achieve the ends sought by *PIPEDA*. There are other less intrusive remedies, as will now be referred to.

I. *The Privacy Commissioner Has Alternate Effective Remedies to Have Solicitor-Client Privilege Verified*

[32] Parliament has provided the Privacy Commissioner with at least two alternative effective and expeditious means “of exercising [her] authority” to ensure that *PIPEDA* requirements are met.

[33] Firstly, as the Privacy Commissioner conceded in the hearing of the appeal, she may, at any point in her investigation, refer a question of solicitor-client privilege to the Federal Court under s. 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides that:

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

[34] Secondly, within the framework of *PIPEDA* itself, the Privacy Commissioner has the right to report an impasse over privilege in her s. 13 report and, with the agreement of the complainant, bring an application to the Federal Court for relief under s. 15. The court is empowered, if it thinks it necessary, to review the contested material and determine whether the solicitor-client privilege has been properly claimed. This procedure permits verification while preserving the privilege as much as possible. The requirement that the court application “be heard and determined without delay and in a summary way unless the Court considers it

inappropriate to do so” (s. 17(1)) is designed to expedite access to justice for the complainant. The legislative scheme, thus interpreted, permits the objectives of *PIPEDA* to be met while preserving solicitor-client privilege “as close to absolute as possible to ensure public confidence and retain relevance” (*McClure*, at para. 35).

V. Disposition

[35] I would dismiss the appeal with costs in this Court.

Appendix

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

4. (1) This Part applies to every organization in respect of personal information that

(a) the organization collects, uses or discloses in the course of commercial activities; or

(b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

...

9. . . .

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege;

(b) to do so would reveal confidential commercial information;

(c) to do so could reasonably be expected to threaten the life or security of another individual;

(c.1) the information was collected under paragraph 7(1)(b); or

(d) the information was generated in the course of a formal dispute resolution process.

However, in the circumstances described in paragraph (b) or (c), if giving access to the information would reveal confidential commercial information or could reasonably be expected to threaten the life or security of another individual, as the case may be, and that information is severable from the record containing any other information for which access is requested, the organization shall give the individual access after severing.

...

12. (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may

(a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce 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;

(b) administer oaths;

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

...

13. (1) The Commissioner shall, within one year after the day on which a complaint is filed or is initiated by the Commissioner, prepare a report that contains

(a) the Commissioner's findings and recommendations;

(b) any settlement that was reached by the parties;

...

...

14. (1) A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause . . . of Schedule 1 . . .

. . .

15. The Commissioner may, in respect of a complaint that the Commissioner did not initiate,

(a) apply to the Court, within the time limited by section 14, for a hearing in respect of any matter described in that section, if the Commissioner has the consent of the complainant;

(b) appear before the Court on behalf of any complainant who has applied for a hearing under section 14; or

(c) with leave of the Court, appear as a party to any hearing applied for under section 14.

16. The Court may, in addition to any other remedies it may give,

(a) order an organization to correct its practices in order to comply with sections 5 to 10;

(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and

(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

17. (1) An application made under section 14 or 15 shall be heard and determined without delay and in a summary way unless the Court considers it inappropriate to do so.

2) In any proceedings arising from an application made under section 14 or 15, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of any information or other material that the organization would be authorized to refuse to disclose if it were requested under clause 4.9 of Schedule 1.

. . .

20. (1) Subject to subsections (2) to (5), 13(3) and 19(1), the Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part.

...

(3) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information that in the Commissioner's opinion is necessary to

(a) conduct an investigation or audit under this Part; or

(b) establish the grounds for findings and recommendations contained in any report under this Part.

(4) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information in the course of

(a) a prosecution for an offence under section 28;

(b) a prosecution for an offence under section 132 of the *Criminal Code* (perjury) in respect of a statement made under this Part;

(c) a hearing before the Court under this Part; or

(d) an appeal from a decision of the Court.

(5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

Appeal dismissed with costs.

Solicitor for the appellant: Welchner Law Office, Ottawa.

Solicitors for the respondent: Walsh Wilkins Creighton, Calgary.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: MacIntosh, MacDonnell & MacDonald, New Glasgow, N.S.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Solicitor for the intervener the New Brunswick Office of the Ombudsman: New Brunswick Office of the Ombudsman, Fredericton.

Solicitor for the intervener the Information and Privacy Commissioner of British Columbia: Susan E. Ross, Victoria.

Solicitor for the intervener the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner/Ontario, Toronto.

Solicitors for the intervener the Advocates' Society: Goodmans, Toronto.

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Information and Privacy Commissioner of Alberta: Chivers Carpenter, Edmonton.