

For Immediate Release

July 24, 2008

Supreme Court of Canada dismissal upholds solicitor-client privilege

The Privacy Commissioner's order for records between a lawyer and a client was dismissed Thursday, July 18 when the Supreme Court of Canada upheld a decision made earlier by the Federal Court of Appeal.

The FCA decision in the case, *Blood Tribe Department of Health v. Privacy Commissioner of Canada and Annette J. Soup*, to vacate the Commissioner's order for production of records, stands.

In this decision, the SCC upheld the right of clients and lawyers to solicitor-client privilege which means that clients are assured that information shared to their lawyers is, and will always remain, confidential.

The SCC noted in its decision that: "solicitor-client privilege is fundamental to the proper functioning of the legal system. 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."

"Client confidence is the underlying basis for the solicitor-client privilege, and infringement must be assessed through the eyes of the client," the SCC report stated.

The SCC noted that: "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."

Chronology of Events:

The case began in spring 2002 when Ms. Soup's employment was terminated by the Blood Tribe (a southern Alberta First Nations). At the time of her dismissal, the Blood Tribe sought and obtained written legal advice regarding Ms. Soup's employment.

Following her dismissal, Ms. Soup made a request under the federal *Personal Information Protection and Electronic Documents Act* for copies of all of her personal information held by the Blood Tribe. The Blood Tribe complied with this request except for the legal advice it received from its solicitors.

The Privacy Commissioner demanded copies of the material to verify the claim to solicitor-client privilege but the Blood Tribe refused to waive the privilege. Subsequently the Privacy Commissioner issued an order under PIPEDA to produce the documents.

In November 2003, the Blood Tribe brought an application in Federal Court for a judicial review of the production order. The application was denied in March 2005.

The Blood Tribe's solicitors requested that the Law Society of Alberta intervene in its appeal. The Blood Tribe appealed to the Federal Court of Appeal where the LSA was granted intervener status.

In October 2006, the appeal was granted and the production order quashed. In quashing the Commissioner's order, the Federal Court of Appeal recognized the presumptively inviolate nature of the solicitor-client privilege and held that PIPEDA did not contain any language allowing the Commissioner to violate that privilege.

The Court agreed with the LSA's arguments that the provisions of PIPEDA may allow information obtained by the Commissioner, including solicitor-client privileged information, to make its way into the hands of public law enforcement officers which would undermine the confidence and candour of Canadians when dealing with their lawyers.

The Court also agreed with the LSA that only an actual superior court could inspect the actual documents to rule on whether solicitor-client privilege has been properly claimed.

The Privacy Commissioner sought leave to appeal to the Supreme Court of Canada.

The LSA engaged the Federation of Law Societies of Canada (FLSC) which became one of four interveners at the SCC level. Other interveners were the: Canadian Bar Association, Attorney General of Canada, and the Advocates Society.

A copy of the decision is posted on www.lawsociety.ab.ca

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