

Solicitor Client Privilege and Administrative Agencies[†]

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This article discusses solicitor-client privilege in the administrative law context, in light of the recent Supreme Court of Canada decision in Canada (Privacy Commissioner) v. Blood Tribe Department of Health. The Court ruled that solicitor-client privilege must be interfered with by regulatory bodies as minimally as possible and that they may review solicitor-client privilege documents only in situations where they have the explicit statutory authority to do so. The Court reaffirmed solicitor-client privilege as a substantive right, but in doing so, the Court may have reduced some of the benefits of administrative agencies. Given the Court's strong language in favour of this privilege, the article queries the growing practice of administrative agencies seeking that the parties before them waive solicitor-client privilege.

Dans le présent article, l'auteur traite du privilège du secret professionnel de l'avocat dans le contexte du droit administratif, à la lumière de la décision récente de la Cour suprême du Canada dans l'arrêt Canada (Commissaire à la protection de la vie privée) c. Blood Tribe Department of Health. La Cour a statué que les autorités de réglementation doivent, dans le plus grand nombre possible de cas, éviter de passer outre au privilège du secret professionnel de l'avocat. En fait, ils ne peuvent consulter les documents protégés par ce privilège que si des termes exprès prévus dans la loi leur en accordent le pouvoir. La Cour a réaffirmé la nature fondamentale du droit au privilège du secret professionnel de l'avocat. Toutefois, ce faisant, elle risque d'avoir réduit les avantages reliés aux organismes administratifs. Compte tenu de la position tranchée de la Cour pour la préservation du privilège du secret professionnel de l'avocat, l'auteur s'interroge sur la pratique croissante des organismes administratifs qui consiste à demander aux parties se présentant devant eux de renoncer à ce privilège.

The Supreme Court of Canada's recent decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*¹ yielded a re-statement about the significance of solicitor-client privilege

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¹ *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, [2008] S.C.J. No. 45, 2008 CarswellNat 2244, 2008 CarswellNat 2245, (*sub nom. Privacy Commissioner of Canada v. Blood Tribe Department of Health*) 294 D.L.R. (4th) 385, (*sub nom. Canada (Privacy Commissioner) v. Blood Tribe Department of Health*) [2008] 2 S.C.R. 574 (S.C.C.), affirming 2006 CarswellNat 4539, 2006 CarswellNat 3294, [2007] 2 F.C.R. 561, (F.C.A.), reversing 2005 CarswellNat 2285, 2005 CarswellNat 612, (*sub nom. Blood Tribe Department of Health v. Privacy Commissioner (Can.)*) [2005] 4 F.C.R. 34 (F.C.) [hereinafter *Blood Tribe* cited to QL].

in the administrative law context. It reaffirmed the fact that solicitor-client privilege is a substantive right and confirmed that the powers of regulatory bodies must be exercised, and the content of statutes must be interpreted, in a manner that recognizes the importance of this right and that interferes with the privilege as minimally as possible.

In reaffirming the importance of privilege, the Supreme Court has affected the role and power of administrative agencies. The decision has arguably reduced the power of administrative agencies to carry out their mandates by impeding their ability to access and assess documents allegedly protected by privilege. This may have the unintended result of diminishing many of the benefits of proceeding before administrative agencies, such as efficiency and flexibility, and may create frustration amongst administrative actors. The decision also emphasized that administrative bodies, no matter how robust, are not courts.

Despite the possible negative consequences from *Blood Tribe* that may arise in the context of proceedings before administrative agencies, it was important that the court reaffirm the significance of solicitor-client privilege: there are certain substantive rights in our legal system that must be protected, even at the expense of procedural expediency. Thus, in order to protect the right to solicitor-client privilege, in this case it was necessary for the Court to rule that unless a statute expressly sets out that an administrative body can review documents that are subject to privilege they do not have such a power. This was especially important in light of the rising expectation that parties before certain tribunals will waive privilege in the name of cooperation.

In this article, the role and powers of administrative agencies and of solicitor-client privilege generally will be discussed, and the pre-*Blood Tribe* legal landscape and unanswered questions regarding privacy law statutes and privilege will be examined. Then, the *Blood Tribe* decisions from the Federal Trial Court, Court of Appeal, and Supreme Court of Canada levels will be analyzed. Finally, the broader implications of the decision — regarding the current trend towards waiving privilege under credit-for-cooperation schemes, the problems posed for administrative agencies, and the application of the decision to litigation privilege — will be explored.

THE INTERSECTION BETWEEN ADMINISTRATIVE AGENCIES AND PRIVILEGE

Despite the fact that the governing statutes of many administrative agencies bestow judicial qualities on them, no matter how many characteristics of a court a tribunal may have, a tribunal is still

administrative in nature. As stated by MacCaulay & Sprague in *Hearings Before Administrative Tribunals*,²

The uncritical adoption of judicial mores leads to unsuitable, and...unsuccessful agency operations.... Even when the agency's function appears very close to a court function, disciplinary hearings for example, I suggest that it is incorrect to blindly pattern the agency essentially upon judicial process. After all there must be a reason the function has been mandated to an administrative agency and not to a court.³

That is, it is necessary that administrative agencies do not become too closely modeled after courts so that they can properly fulfill their functions as administrative agencies and not become constrained by overly rigid rules. For example, they are able to act in the public interest,⁴ are not bound by *stare decisis*, and can build relationships with industry members to better facilitate the administration of their statutory regime.⁵ This lack of stringent rules and greater flexibility can permit the proceedings of administrative bodies to be faster and less expensive, and can reduce the need for parties to be represented by lawyers.

The differentiation of tribunals from courts creates corresponding limitations on other types of power that they may exercise. One such power that must be kept in check and cannot be bestowed lightly on administrative actors is the ability to compel the production of documents that are subject to privilege.

The concept of privilege is one that involves a balancing of competing policy considerations. On one hand, our legal system is built upon principles of openness and transparency that make it important that relevant material is disclosed. On the other hand, situations often arise where it is argued that the protection and non-disclosure of information is in the public interest, and so privilege is claimed. The weight that is given to each policy consideration varies over time and is a function of the evolution of "legal and social realities"⁶ that in turn impact on our conceptions of what is

² Third edition (Toronto: Carswell, 2007).

³ *Ibid.* at 9-1 to 9-2.

⁴ Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure before Administrative Tribunals* (Toronto: Carswell, 1988+) at 1-9.

⁵ *Ibid.* at 1-7.

⁶ *M. (A.) v. Ryan*, [1997] S.C.J. No. 13, [1997] 1 S.C.R. 157 (S.C.C.) at para. 21 [hereinafter *Ryan* cited to QL].

considered to be in the public interest and, thus, affect our opinion about how far privilege should be extended.⁷

Solicitor-client privilege is arguably the type of privilege that is the most stringently protected in Canadian law. Although it began as an evidentiary rule, it has now evolved into a substantive rule of law.⁸ The importance of solicitor-client privilege has been recognized on the basis that it plays a central role in ensuring the proper functioning of our legal system. While it is necessary to ensure that all relevant evidence is disclosed in a dispute to ensure that justice is obtained and a proper outcome is reached,⁹ for justice to be done it is also necessary so that lawyers are able to properly advise their clients, which requires full disclosure of information between lawyer and client. That is, it is imperative that clients are not concerned that what they tell their lawyer may be used against them, so that they may be as candid as possible.

Another related policy-based reason to safeguard privilege was suggested by Doherty J.A. in *General Accident Assurance Co. v. Chrusz*.¹⁰ As described in *The Law of Privilege in Canada*, he held that “privilege is an expression of our commitment to the important societal values of fairness, personal autonomy and access to justice. Personal autonomy depends in part on an individual’s ability to control the dissemination of personal information and to maintain confidences. Access to justice depends in part on the ability to obtain effective legal advice.”¹¹

Thus, because of the broad-reaching importance of solicitor-client-privilege, it is important to safeguard this privilege as much as possible. Although it is not absolute, it must only be abrogated in certain limited circumstances that are clearly defined,¹² such as when a tribunal is explicitly given the power to breach privilege by a statute.¹³ Also, even when a body has the power to override privilege, privilege must still not be breached lightly—the disclosure of information subject to privilege must only be ordered when absolutely necessary.¹⁴

This principle has been implemented in Canadian jurisprudence.

⁷ Robert W. Hubbard, Susan Magotiaux, & Suzanne M. Duncan, *The Law of Privilege in Canada* (Aurora: Canada Law Book, 2006+) at 1-1 to 1-2, and 1-18.

⁸ *Descôteaux c. Mierzwinski*, 1982 CarswellQue 13, 1982 CarswellQue 291, [1982] 1 S.C.R. 860 (S.C.C.) at para. 26, affirming *Solosky* [hereinafter *Descôteaux* cited to WeC].

⁹ *Carey v. Ontario*, [1986] S.C.J. No. 74, [1986] 2 S.C.R. 637 (S.C.C.) at para. 22 [hereinafter *Carey* cited to QL].

¹⁰ (1999), 180 D.L.R. (4th) 241 (Ont. C.A.).

¹¹ *Supra* note 7 at 11-11.

¹² *Ibid* at 11-3.

¹³ *Supra* note 1.

¹⁴ *Ontario (Ministry of Correctional Services) v. Goodis*, [2006] S.C.J. No. 31, (*sub nom. Goodis c. Ontario (Correctional Services)*) [2006] 2 S.C.R. 32 (S.C.C.) at para. 4 [hereinafter *Goodis* cited to QL].

The issue of protecting solicitor-client privilege in the context of investigations by administrative actors was considered in *Pritchard v. Ontario (Human Rights Commission)*,¹⁵ which is one of the seminal cases concerning the abrogation of solicitor-client privilege by statute. In this case, the Court considered whether an administrative agency could claim solicitor-client privilege to preclude the disclosure of legal opinions provided to them by in-house counsel. The Court affirmed the importance of privilege and set out the proper approach to dealing with legislation that limits solicitor-client privilege, stating that legislation that purports to deny privilege must be analyzed restrictively.

Then, in *Blank v. Canada (Minister of Justice)*,¹⁶ the issue of whether a distinction should be drawn between solicitor-client privilege and litigation privilege was addressed in the context of the *Access to Information Act*.¹⁷ Section 23 of the AIA permits the disclosure of information covered by solicitor-client privilege, but does not contain a similar provision for litigation privilege. The Court held that the two types of privilege were not the same and that they were the result of different policy considerations. However, despite the differences between solicitor-client and litigation privilege, in light of the fact that there is narrower protection of litigation privilege than solicitor-client privilege, the Court held that the disclosure exception for solicitor-client privilege should also extend to litigation privilege. The Court also upheld the discretion given to tribunals under the AIA to determine whether or not privileged information should be disclosed.

In *Canada (Attorney General) v. Canada (Information Commissioner)*,¹⁸ the Federal Court of Appeal also considered the proper interpretation of a section of the AIA (section 36(2)), which bestowed investigative powers on the Information Commissioner and the ability to override privilege in the course of an investigation. The Court held that this power must be “interpreted restrictively to allow access to privileged information only where absolutely necessary to the statutory power being exercised”.¹⁹ The Court found that because of a strong expectation of confidentiality that exists in solicitor-client communications, a legal memorandum providing advice concerning access to information requests could not be disclosed, notwithstanding the existence of section 36(2), which stated that:

¹⁵ [2004] S.C.J. No. 16, [2004] 1 S.C.R. 809 (S.C.C.) [hereinafter *Pritchard* cited to QL].

¹⁶ [2006] 2 S.C.R. 319 (S.C.C.).

¹⁷ S.C. 1980-81-82-83, c. 111 (“AIA”).

¹⁸ [2005] 4 F.C.R. 673 (F.C.A.).

¹⁹ *Ibid.* at 684-685.

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.

The Court arrived at its decision because of the principle set out in *Descôteaux* that any legislation that appears to abrogate from upholding solicitor-client privilege must be interpreted restrictively and any powers given by the legislation must be exercised so as to interfere with the privilege as minimally as possible.²⁰ Because in that case abrogating privilege was not absolutely necessary in order for the Commissioner to complete its investigation, other options were to be exhausted instead.²¹ However, the Court also stated *in obiter* that under section 36(2), the Information Commissioner did have the power to review a record sought under the AIA claimed to be subject to solicitor-client privilege in order to verify that the exemption was properly claimed.²² As a result, the Court concluded that the Information Commissioner could review solicitor-client privilege documents that were the subject of an access to information request, but not other more tangential, solicitor-client privilege documents.

THE BLOOD TRIBE DECISIONS

Thus, there were a number of decisions pre-*Blood Tribe* that had considered the issue of privilege and specifically solicitor-client privilege in the context of administrative proceedings under privacy access statutes. However, *Blood Tribe* was the first time that the Supreme Court of Canada ruled specifically on the status of the *Personal Information Protection and Electronic Documents Act*²³ and on the powers of the Privacy Commissioner under section 12 of the Act to breach solicitor-client privilege between a party to a proceeding and counsel in the course of an investigation.²⁴

²⁰ *Ibid.* at 683-684.

²¹ *Ibid.* at 684-685.

²² *Ibid.* at 681.

²³ S.C. 2000, c. 5 (“PIPEDA”).

²⁴ Office of the Privacy Commissioner of Canada, *Recent Court Activity (2008)*, online: Legal Corner <http://www.privcom.gc.ca>.

It was not yet clear whether PIPEDA enjoyed the elevated status of other privacy legislation. In *Lavigne v. Canada (Commissioner of Official Languages)*,²⁵ the Supreme Court held that the *Privacy Act*²⁶ enjoys quasi-constitutional status as it “preserves and enhances the autonomy of the individual”.²⁷ Then in *Eastmond v. Canadian Pacific Railway*,²⁸ the Federal Court made the assumption that both PIPEDA and the *Privacy Act* enjoy similar standing (an assertion with which the court of first instance in *Blood Tribe* agreed²⁹). However, the Supreme Court had not yet given its view, and given the fact that the purposes behind the Acts were quite different—while they both concern the right of individuals to access personal information about themselves, PIPEDA concerns information held by private actors, whereas the *Privacy Act* is concerned with that held by public bodies—it was unclear before the Supreme Court’s decision in *Blood Tribe* whether administrative actors under PIPEDA would be given the power to breach privilege in order to carry out their investigative duties.

Blood Tribe concerned an application by an employee, Annette J. Soup, to obtain her employment records and the personal information contained about her in her file from her employer, the Blood Tribe Department of Health (“Department”). She had been terminated and believed that the file contained inaccurate information about her. The Department initially refused. However, it later largely complied with her request after Ms. Soup filed a complaint with the Privacy Commissioner, who then sent a letter to the Department once again requesting this information. But it still refused to provide her with correspondence between the Department and its legal counsel (who the Department had approached after learning about Ms. Soup’s complaint) on the grounds that it was protected by solicitor-client privilege. The Privacy Commissioner issued an order for the production of the correspondence under section 12(1)(a)(c) of PIPEDA on the grounds that it was necessary for the Privacy Commissioner to review the letters between the Department and its solicitor to ensure that privilege was being properly claimed. The Privacy Commissioner relied on the power vested in her under section 20 of PIPEDA, which gives her the power of a superior court to receive evidence and to order production of the records. The Department sought judicial review of the order.

²⁵ [2002] 2 S.C.R. 773 (S.C.C.).

²⁶ R.S.C., 1985, c. P-21.

²⁷ *Blood Tribe Department of Health v. Privacy Commissioner (Can.)*, [2005] 4 F.C.R. 34 (F.C.) at 46.

²⁸ (2004), 16 Admin. L.R. (4th) 275 (F.C.) at para. 100.

²⁹ *Supra* note 27 at 46.

At first instance, Mosley J. held that the Privacy Commissioner did in fact have the power to compel production of the documents, even though solicitor-client privilege had been claimed, for the purpose of verifying that claim. He canvassed the state of the law on the issue of solicitor-client privilege. He acknowledged the principle of law set out in *R. v. McClure*,³⁰ that “solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance”,³¹ and referred to the decisions of *Lavallee, Rackel & Heintz v. Canada (Attorney General)*,³² *Pritchard v. Ontario (Human Rights Commission)*, *Descôteaux c. Mierzewski*, and others, all of which emphasize the fact that solicitor-client privilege must be infringed upon as little as possible. He also referred to *Canada (Attorney General) v. Canada (Information Commissioner)* and found that section 36(1) of the *Privacy Act* was substantially similar to section 12 of PIPEDA, and therefore section 12 gave the Privacy Commissioner the power to override privilege to determine whether it had been properly claimed. He cited *Lyons v. Toronto (Computer Leasing Inquiry - Bellamy Commission)*³³ where it was also held that a Commissioner under the *Municipal Act, 2001*,³⁴ has the power to compel production of documents over which solicitor-client privilege is claimed and to examine them to determine whether privilege was properly claimed.

The judge at first instance then considered the investigative powers of the Privacy Commissioner under PIPEDA. He held that the power set out in section 12(1)(a) of PIPEDA, which stated that the Privacy Commissioner could “produce any records and things that the Privacy Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record”, should be given a broad and purposive interpretation in light of the “central role of the Privacy Commissioner in achieving the important objects of the legislative scheme.”³⁵ He stated that the Privacy Commissioner could not perform her role if she was barred from accessing information necessary to ascertain relevant facts in a case on the basis of privilege.³⁶ He noted that he arrived at his decision in part because if it had been the legislature’s intent to preclude the Privacy Commissioner from accessing privileged documents, this could have been done

³⁰ [2001] 1 S.C.R. 445 (S.C.C.).

³¹ *Ibid.* at 459.

³² [2002] 3 S.C.R. 209 (S.C.C.).

³³ (2004), 70 O.R. (3d) 39 (Ont. Div. Ct.).

³⁴ S.O. 2001, c. 25.

³⁵ *Supra* note 27 at 53.

³⁶ *Ibid.* at 59.

explicitly.³⁷ He emphasized that care must be taken to protect the privileged information from disclosure, but concluded that there were sufficient statutory safeguards in place to ensure that inappropriate disclosure of privileged documents would not be made and so the power to access privileged documents did not have to be further constrained.³⁸ He examined the decision of the Privacy Commissioner from the standard of correctness and determined that her decision to compel production of the documents was indeed correct.

The Department appealed the decision to the Federal Court of Appeal,³⁹ which overturned the decision of Mosley J. The Court of Appeal held that Mosley J. applied incorrect rules of statutory interpretation, and that a broad, purposive approach should not have been used. Instead, Malone J.A., writing for the Court, held that because of the fact that solicitor-client privilege was at issue, which is a foundation of our legal system, a restrictive approach should have been implemented. Also, Malone J.A. found that Mosley J. was incorrect in his assumption that if the legislature had wanted to prevent the Privacy Commissioner from verifying claims of privilege it would have stated this explicitly. Rather, Malone J.A. made reference to the recent Supreme Court of Canada decision in *Pritchard*, which stated that “any legislation which would limit or deny solicitor-client privilege must be interpreted restrictively and that the privilege cannot be abrogated by inference”,⁴⁰ and reminded the parties that the law of solicitor-client privilege is “presumptively inviolate”.⁴¹ Malone J.A. also did not agree with Mosley J. that there were sufficient safeguards in the legislation to ensure that the Privacy Commissioner would not disclose privileged information, and was concerned that, if this information was or could be disclosed, this may lead to a chilling effect on disclosure by clients to their lawyers.⁴²

Finally, Malone J.A. held that privacy statutes governing information held by public bodies such as the *Privacy Act* and the AIA could not be compared to PIPEDA as the purposes of the statutes were different. The *Privacy Act* and the AIA governed access to information held by the Canadian government and had been afforded a quasi-constitutional status on this basis.⁴³ PIPEDA, on the other hand, was intended to be a flexible statute and subordinate to provincial law. Also, Malone J. held that paragraph 12(1)(a) was not intended to extend the jurisdiction of the Tribunal by giving the

³⁷ As he explained had been done in other Acts. *Ibid.* at 58-59.

³⁸ *Ibid.* at 56.

³⁹ Indexed as *Blood Tribe (Department of Health) v. Canada (Privacy Commissioner)*, [2007] 2 F.C.R. 561 (F.C.A.).

⁴⁰ *Ibid.* at 571.

⁴¹ *Ibid.* at 573.

⁴² *Ibid.* at 572-573.

⁴³ *Ibid.* at 574.

Privacy Commissioner new substantive powers—rather it was intended only to bestow the Privacy Commissioner with procedural powers relating to matters already within her jurisdiction.⁴⁴ Malone J.A. did agree with Mosley J. that the correct standard of review was correctness;⁴⁵ however, he held that the Privacy Commissioner had been incorrect in her assessment. This was because there was no evidence to suggest that the Privacy Commissioner required the privileged documents in order to carry out her investigation, and thus she had not proven that her task would have been fettered by the lack of the documents.

Following the Court of Appeal decision, the Privacy Commissioner became concerned that the ruling would negatively impact her ability to fully exercise her investigative powers under PIPEDA⁴⁶ and therefore appealed the decision to the Supreme Court of Canada. The unanimous judgment of the Supreme Court was delivered by Binnie J. who upheld the Court of Appeal’s decision and affirmed the fact that solicitor-client privilege must take precedence over the unfettered right of the Privacy Commissioner to conduct an investigation to ensure compliance with PIPEDA.⁴⁷ He stated that because of the paramount importance of solicitor-client privilege in our legal system, any legislation that purports to erode this privilege must explicitly set out this intention, which PIPEDA does not do. Also, any infringement on this privilege set out in a statute must be interpreted restrictively so as to interfere with the privilege only to the extent that is absolutely necessary.⁴⁸ That is, it is not enough to infer this power and in the context of PIPEDA, “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.”⁴⁹

Binnie J. emphasized the fact that the Privacy Commissioner is an administrative actor whose position cannot be equated with that of a court to give it the ability to access documents protected by solicitor-client privilege to determine whether this privilege is properly claimed.⁵⁰ It must be ensured that solicitor-client privilege can only be overridden by a neutral, adjudicative body, not by an administrative body such as the Privacy Commissioner which has the potential to be an adversary of

⁴⁴ *Ibid.* at 575.

⁴⁵ *Ibid.* at 570.

⁴⁶ Submission of Jennifer Stoddart, Privacy Commissioner of Canada “Statutory Review of the Personal Information Protection and Electronic Documents Act” (27 November 2006), online at: Office of the Privacy Commissioner of Canada <http://www.privcom.gc.ca>.

⁴⁷ *Supra* note 1 at para 1.

⁴⁸ *Ibid.* at para 31.

⁴⁹ *Ibid.* at para. 21.

⁵⁰ *Ibid.* at para 2.

the party that is claiming privilege. To allow this to occur would infringe upon the existence of the expectation of confidentiality in our legal system.⁵¹ Also, he further pointed out that in this situation, even if the Privacy Commissioner had been given an express power in the statute to override privilege for the sake of investigation, in this case the Privacy Commissioner had not even met the test that the court uses when deciding whether it should override privilege — that is, she had not established that it was necessary to override privilege to fairly decide the issue.⁵²

Finally, Binnie J. held that his ruling would not overly inhibit the powers of the Privacy Commissioner to conduct investigations as under PIPEDA the Privacy Commissioner has other avenues to resolve issues that arise where privilege is claimed. The Privacy Commissioner could either refer a question of solicitor-client privilege to the Federal Court under section 18.3(1) of the *Federal Courts Act*,⁵³ or report an impasse over privilege and bring an application for relief to the Federal Court.⁵⁴ Therefore, it would never be absolutely necessary for the privilege to be abrogated by the Privacy Commissioner. Furthermore, he agreed with the Court of Appeal's assessment that the *Privacy Act* and PIPEDA are very different statutes. Unlike the *Privacy Act*, PIPEDA does not contain express language stating that the Privacy Commissioner may examine information notwithstanding any privilege, and the lack of such a provision can be used to draw an adverse inference that Parliament did not intend for the Commissioner under PIPEDA to have such a power.⁵⁵

LOOKING FORWARD: THE POSSIBLE CONSEQUENCES AND SIGNIFICANCE OF *BLOOD TRIBE*

As discussed above, the decision in *Blood Tribe* is significant in that it reaffirmed the importance of solicitor-client privilege, reiterated the fact that administrative agencies are administrators, not courts, but also reminded tribunals that there are mechanisms in place that ensure that their power to carry out their mandates is not stifled by the limitations imposed on them by virtue of the fact that they are administrative agencies.

The decision may also have a broader significance. First, it may decrease the problem of parties being pressured by regulators into giving up privilege rights under credit-for-cooperation

⁵¹ *Ibid.* at para. 21.

⁵² *Ibid.* at para. 17.

⁵³ R.S.C. 1985, c. F-7.

⁵⁴ *Supra* note 1 at paras. 33-34.

⁵⁵ *Supra* note 1 at para. 29.

schemes or simple pressure. Over the past five or so years, in the United States especially, there has been the development of practice, policy and regulations that has encouraged regulators and prosecutors to pressure parties into waiving privilege.⁵⁶ In 2006, the American Bar Association, in conjunction with the Association of Corporate Counsel and the National Association of Criminal Defence Lawyers, commissioned a survey that showed that 75 per cent of corporate counsel felt that a “culture of waiver” had developed whereby “government agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections.”⁵⁷ The Supreme Court of Canada’s confirmation of the sanctity of privilege will hopefully remind parties and regulators that it is not appropriate or reasonable to expect privilege to be waived, which may strengthen and validate the argument of parties who refuse to waive privilege solely. Although the trend of companies being pressured by regulators has not become as prevalent in Canada as in the U.S. as of yet, in Canada it no doubt exists.⁵⁸

Second, in creating more administrative hurdles, the decision will likely increase feelings of disenfranchisement with tribunals, both on the part of administrative actors and on the part of the public. Despite the fact that the Supreme Court of Canada pointed out the avenues of recourse to the Federal Court that were open to administrative bodies when dealing with privilege claims, it still may be felt that in reaffirming the importance and strength of solicitor-client privilege, the power of administrative tribunals was arguably weakened. In creating more steps for administrative tribunals to go through to achieve their mandate, some of the benefits and purposes behind administrative tribunals — efficiency, not having to adhere to the same level of formal rules and procedures — may have been eroded because tribunals will no longer be able to make informal decisions about evidence and whether it is protected from disclosure.⁵⁹

That is, as surmised in the August 8, 2000, edition of *Lawyer’s Weekly*, “from now on, operationally, what will happen is the commission will ask organizations to produce a lot of supporting evidence, background evidence, to support their claim...and if she needs to, she will now

⁵⁶ Joel B. Harris & Andrew I. Stemmer, “Risks and Rewards of Waiving the Attorney-Client Privilege” (July 7, 2006) 21:23 *Legal Background*, cited to reprint in (September, 2006) 14:9 *Metropolitan Corporate Counsel*, Northeast Edition 34 (QL).

⁵⁷ *Ibid.* at 35. There has recently been a recognition of this issue in the United States, as evidenced by the remarks of Deputy Attorney General Mark R. Filip at a Press Conference Announcing Revisions to Corporate Charging Guidelines on August 28, 2008, where he stated that there would be changes to the credit-for-cooperation policy whereby attaining credit would no longer depend on whether privilege was waived, just on whether facts were disclosed.

⁵⁸ For example, see Ontario Securities Commission Staff Notice 15-702, “Credit-For-Cooperation”.

⁵⁹ Colin H.H. McNair & Alexander K. Scott. *A Guide to the Personal Information Protection and Electronic Documents Act, 2008 Edition*. (Markham: LexisNexis Canada Inc., 2007) at 68.

cross-examine on those affidavits.”⁶⁰ Then, if after this level of investigation the Privacy Commissioner believes that the privilege claims are not legitimate recourse can be had to the Federal Court.⁶¹ This may have the effect of greatly increasing the burden of the administrative process, and may increase the necessity of being represented by counsel.

It remains to be seen whether legislative steps will be taken to mitigate the administrative burden of the decision. In response to criticisms surrounding the impact that it was argued the Federal Court of Appeal decision would have on the efficiency of tribunals if privilege claims had to be constantly referred to the Federal Court, amendments were proposed to expedite this procedure.⁶² In 2007, Parliament’s Standing Committee on Access to Information, Privacy and Ethics undertook a statutory review of PIPEDA and issued recommendations for amendments to the Act. One such recommendation was the implementation of a process for an expedited review of a claim of solicitor-client privilege.⁶³ However, once leave to appeal to the Supreme Court was granted, this suggestion was put on hold. It is unclear whether there will be a revival of discussions regarding amendments to minimize the procedural barriers created by the decision now that the Federal Court of Appeal’s ruling has been affirmed.

It is also unclear to what extent the ruling on the inability of an administrative actor to abrogate solicitor-client privilege without explicit statutory direction will be applied to litigation privilege. Under section 9(3)(d) of PIPEDA, an organization is not required to give access to personal information if the information was generated in the course of a formal dispute resolution process. Given the similarities between this section and section 9(3)(a) (the corresponding section regarding solicitor-client privilege) and the fact that section 12 seems to apply to privilege generally, not just solicitor-client privilege, it seems that litigation privilege may also be protected from disclosure. This interpretation can also be supported by the recent Federal Court of Appeal decision of *Rousseau v.*

⁶⁰ Cristin Schmitz. “SCC upholds solicitor-client privilege” (August 8, 2008) 28: 13 *The Lawyer’s Weekly* (QL).

⁶¹ *Ibid.*

⁶² For example, in her appearance before the Standing Committee on Access to Information, Privacy and Ethics, Jennifer Stoddard, the Privacy Commissioner of Canada, stated that the decision “left a gaping hole in our ability to conduct meaningful investigations” (“Statutory Review of the Personal Information Protection and Electronic Documents Act” [27 November 2006], online at: Office of the Privacy Commissioner of Canada http://www.privcom.gc.ca/parl/2006/parl_061127_e.asp). “It effectively allows organizations to shield information from our investigators with no independent verification that the documents in question do in fact contain information subject to solicitor-client privilege.”

⁶³ Priva Works, “Monitoring for Changes in Privacy Law: Privacy Risks” online at: Priva Works <http://www.privaworks.com>.

Wyndowe,⁶⁴ where it was held that the solicitor-privilege exemption under PIPEDA concerning access for information requests includes those made under litigation privilege. This interpretation would have the benefit of alleviating concerns that PIPEDA is being used to circumvent procedural rules of evidence and to gain access to information gathered in contemplation of litigation.⁶⁵

However, because solicitor-client privilege is protected more stringently than litigation privilege, the *Blood Tribe* decision exempting privilege may not be more broadly applied to litigation privilege in non-PIPEDA contexts. In the recent Canadian Human Rights Tribunal decision of *Ruth Walden et al. v. Canadian Human Rights Commission and Social Development Canada, Treasury Board Canada and Public Service Human Resources Management Agency Canada*,⁶⁶ the decision-maker was referred to the decision in *Blood Tribe* and asked to apply the law relating to solicitor-client privilege, to litigation privilege. The decision-maker refused to do so based on the principles set out in *Blank v. Canada* that litigation privilege and solicitor client privilege are very different legal constructs with very different policy considerations that yield very different results and so ruled that the decision re: solicitor-client privilege could not be applied to litigation privilege.⁶⁷ Therefore, this points to the fact that the issue may not have been decided definitively and there may be reluctance on the part of administrative actors to apply *Blood Tribe* to litigation privilege, as doing so could further erode administrative agencies' investigative powers.

Thus, although *Blood Tribe* provided a definitive, affirmative answer to the question of whether it is outside the jurisdiction of a tribunal to override solicitor-client privilege absent explicit statutory authority, how far the decision will be extended to apply to other types of privilege, and how much of an impediment the decision will create for administrative actors remains to be seen.

⁶⁴ [2006] F.C.J. No. 1631, 302 F.T.R. 134 (Eng.) (F.C.) at para 34 [hereinafter *Rousseau* cited to QL] (overturned by the FCA, on other grounds, 2008 CarswellNat 246, 2008 CarswellNat 1530, 2008 FCA 39 (F.C.A.)).

⁶⁵ Priva Works, "Ongoing Statutory Review of PIPEDA" (02 January 2007) online at: Priva Works http://cmte.parl.gc.ca/cmte/CommitteeHome.aspx?Lang=1&PARLSES=391&JNT=0&SELID=e17_COM=10473.

⁶⁶ (8 August 2008), 2008 CHRT 35, online: CHRT <http://www.chrt-tcdp.gc.ca/search/files>.

⁶⁷ *Ibid.* at 5.