News

Supreme Court of Canada Says Privacy Commissioner Can't Decide Privilege Claims

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The Supreme Court of Canada issued its much-anticipated decision in *Blood Tribe* earlier this month. In a judgement written by Mr. Justice Binnie, it unanimously held that the Privacy Commissioner of Canada does not have the power to compel production of records over which an organization claims solicitor-client privilege. In doing so, the Court affirmed the well-established principle that solicitor-client privilege cannot be abrogated by inference and made its first comments yet on the mandate granted to the PCC by the *Personal Information and Protection of Documents Act*.

The dispute arose when the respondent to an access to personal information complaint refused to produce records of communications that it claimed to be subject to solicitor-client privilege. In demanding the records be produced, the Commissioner relied on the investigatory powers granted by section 12. Section 12 reads as follows:

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

The Supreme Court held that this provision does not give the PCC the power to compel production of records over which solicitor-client is claimed by mere inference or by necessary implication in light of the PCC's mandate.

While the principle that solicitor-client privilege can only be abrogated by express statutory language is not new, the Court's application of the principle in this case demonstrates its strength because (as pointed out by the Information Commissioner in support of the PCC's appeal), "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."

The Court was not convinced by this argument, especially given the PCC's mandate, which it characterized as adversarial rather than independent. Though the Court acknowledged that the validity of a solicitor-client privilege claim which is raised in response to a PIPEDA right of access request is of concern to the PCC given her mandate, it said her only valid means of seeking a determination of such a claim is to engage the Federal Court as she is empowered to do under the *Act*.

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