Case In Point

Supreme Court Affirms Supremacy of Solicitor-Client Privilege

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In Alberta (Information and Privacy Commissioner) v. University of Calgary, a majority of the Supreme Court of Canada (with two justices partially concurring) affirmed that the University of Calgary was justified in its refusal to produce certain documents over which it had claimed solicitor-client privilege to the Information and Privacy Commissioner of Alberta (Commissioner).

The issue arose within the context of a freedom of information request under Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPP) in which a dismissed employee sought records related to her personal employment information. The University provided some records but refused to provide others on the grounds of solicitor-client privilege. It did, however, provide a list of documents identified only by page number and in this respect complied with Alberta's law and practice in civil litigation regarding identification of solicitor-client privileged documents.

A delegate of the Commissioner then issued a Notice to Produce Records under s. 56(3) of FOIPP. That section requires a public body to produce required records to the Commissioner "despite…any privilege of the law of evidence"[1], thus allowing the Commissioner and her delegates to review the documents in question "to verify that privilege was properly asserted." The University sought judicial review of the delegate's decision to issue the Notice. The decision was upheld on judicial review but on further appeal the Court of Appeal found that "any privilege of the law of evidence" as used in this section did not refer to solicitor-client privilege.

The majority of the Supreme Court of Canada dismissed the appeal, stating:

[57] Solicitor-client privilege is clearly a "legal privilege" under s. 27(1), but not clearly a "privilege of the law of evidence" under s. 56(3). As discussed, the expression "privilege of the law of evidence" is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

Citing its 2008 decision in Canada (Privacy Commissioner) v. Blood Tribe Department of Health, the majority noted that solicitor-client privilege "cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal," which s. 53 of FOIPP failed to do. It

found that solicitor-client privilege is no longer merely a privilege of the law of evidence but a substantive right that is fundamental to the proper functioning of the legal system as a whole with potentially wide implications on other statutes. The question of what statutory interpretation language is sufficient to authorize administrative tribunals to infringe solicitor-client privilege was outside the Commissioner's specialized area of expertise.

Notwithstanding that the majority rooted its analysis in statutory interpretation principles, it affirmed that solicitor client privilege is "a highly protected privilege" which is a substantive right, and as such transcends privilege as a law of evidence.

[1] The phrase appears in a number of other public sector access and privacy statutes as does the similar phrase "any privilege under the law of evidence." Ten privacy and access authorities therefore intervened in this case to argue in support of their mandates.