Federal Court of Appeal

Cour d'appel fédérale

Date: 20061018

Docket: A-147-05

Ottawa, Ontario, October 18, 2006

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
MALONE J.A.

BETWEEN:

Blood Tribe Department of Health

Appellant

and

The Privacy Commissioner of Canada and Annette J. Soup

Respondents

and

The Law Society of Alberta

Intervener

JUDGMENT

The appeal is allowed, the order of Mosley J. dated March 8, 2005 is set aside and the Commissioner's order for production of records dated October 22, 2003 is vacated.

Costs to the appellant in this appeal. No costs were sought by the intervener, the Law Society of Alberta.

"K. Sharlow"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

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Heard at Calgary, Alberta, on October 4, 2006.

Judgment delivered at Ottawa, Ontario, on October 18, 2006.

REASONS FOR JUDGMENT BY: MALONE J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

MALONE J.A.

I. Introduction

[1] This appeal deals with the power of the Privacy Commissioner of Canada (Commissioner) to compel the production of documents over which a claim of solicitor-client privilege is asserted in the context of an investigation under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 (*PIPEDA*).

[2] A Judge of the Federal Court (Judge) determined that paragraphs 12(1)(a) and (c) of *PIPEDA* did empower the Commissioner to compel production of documents over which solicitor-client privilege was claimed in order to effectively complete her statutory investigative role (order dated March 8, 2005 and reported at 2005 FC 328).

[3] Those paragraphs read as follows:

12. (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may,	**12. (1)** Le commissaire procède à l'examen de toute plainte et, à cette fin, a le pouvoir :
(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;	**(a)** d'assigner et de contraindre des témoins à comparaître devant lui, à déposer verbalement ou par écrit sous la foi du serment et à produire les documents ou pièces qu'il juge nécessaires pour examiner la plainte dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives;
(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.	**(c)** de recevoir les éléments de preuve ou les renseignements — fournis notamment par déclaration verbale ou écrite sous serment — qu'il estime indiqués, indépendamment de leur admissibilité devant les tribunaux.

[4] A private organization's right to refuse the production of documents protected by solicitor-client privilege is found in subsection 9(3) of *PIPEDA*:

9.(3) ... an organization is not required to give access to personal information only if,	**9.(3)** ... l'organisation n'est pas tenue de communiquer à l'intéressé des renseignements personnels dans les cas suivants seulement:
(a) the information is protected by solicitor-client privilege;	**(a)** les renseignements sont protégés par le secret professionnel liant l'avocat à son client;

[5] The Judge analyzed these paragraphs based on a broad and purposive interpretation (see paragraph 38 of his reasons). The basis of his order was that the Commissioner had extraordinary procedural and substantive powers similar to that of a superior court of record and was entitled to review privileged documents. In his view, also compelling, was the fact that if Parliament had intended to prevent the Commissioner from verifying such claims, it could have specifically excluded this power as it had done under several other Acts (see paragraphs 56-58 of his reasons).

II. Factual Background

[6] Annette J. Soup was dismissed from her employment with the Blood Tribe Department of Health (Blood Tribe). Part of her employment file included correspondence between the Blood Tribe and its solicitors (the Privileged Documents). Following her dismissal, Ms. Soup filed a complaint with the Commissioner seeking access to her personal employment information. The Blood Tribe had denied her request without giving reasons. Ms. Soup also alleged that information had been collected by a Blood Tribe representative without her consent and had been presented to a Blood Tribe board meeting.

[7] An Assistant Privacy Commissioner requested the records of the Blood Tribe in very broad terms:

> As a first step in the investigation, please forward to my attention a copy of Ms. Soup's personnel file, including the performance evaluation and the document alleging a breach of confidentiality referenced above. As well, please forward a copy of any notes or correspondence regarding Ms. Soup's employment, including the minutes of any Board Meetings where her contract of employment was discussed.

All records were provided save for the Privileged Documents over which a claim of solicitor-client privilege was advanced in the form of an unchallenged affidavit by an officer of the Blood Tribe. This claim of privilege has never been waived.

[8] The Commissioner ordered production of the Privileged Documents pursuant to her purported powers under paragraphs 12(1)(a) and (c) of *PIPEDA*.

III. Standard of Review

[9] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the Supreme Court of Canada reviewed the considerations to be taken into account in a pragmatic and functional application. The factors to be considered in applying the pragmatic and functional approach are well known: (1) presence or absence of a privative clause or statutory right of appeal; (2) expertise of the tribunal; (3) purpose of the legislation and the provision; and (4) nature of the question.

[10] Upon a balancing of these factors, the Judge concluded that the appropriate standard of review of the Commissioner's decision respecting her authority to order the production of documents which are subject to a claim of solicitor-client privilege is correctness.

[11] In my analysis, applying the factors listed above suggests that little deference should be shown to the Commissioner's interpretation of the scope of her powers under paragraphs 12(1)(a) and (c). First, there is no privative clause purporting to exclude judicial review of the

Commissioner's interpretation of *PIPEDA*. Second, the Commissioner has no greater expertise than a reviewing court when determining the nature and scope of her powers. Third, while the legislative scheme provides the Commissioner with broad investigatory powers, these powers are circumscribed by section 9(3). Finally, the nature of the question in this appeal is one of law.

[12] Therefore, I conclude that the Judge properly found that the standard of review is correctness.

IV. Analysis

(a) Solicitor-Client Privilege – The General Rule

[13] In 1982, the Supreme Court of Canada in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, established a substantive rule for solicitor-client privilege, which provides some guidance on the proper interpretation of a statutory power to compel the production of records. First, solicitor-client privilege will protect a record regardless of the legal setting where the competing right arises; there need not be a pending legal proceeding. Second, where a law or statute creates a right purporting to permit access to a privileged communication, the right of privilege should be given precedence. Thirdly, a law which expressly authorises interference with the privilege is to be circumscribed by a procedure that avoids unnecessary violation of the privilege, and ensures any violation is minimized. Finally, any such statutory power must be interpreted restrictively (at page 875).

(b) The Need for Express Language

[14] At paragraph 57 of his decision, the learned Judge stated that had Parliament intended to prevent the Commissioner from verifying claims of privilege, it could have specifically excluded that power. In sharp contrast, the recent approach used by the Supreme Court of Canada suggests that if Parliament wished to create a power to compel privileged documents then express language must be used.

[15] In *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at paragraph 33, Major J. 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. Further, at paragraph 35, he stated that broad language and inclusive phrases relating to the production of records should not be read to include privileged communications.

[16] At paragraphs 28 to 31 of his decision, the Judge relies on the trial judge's decision in *Canada (Attorney General) v. Canada (Information Commissioner)*, [2004] 4 F.C.R. 181 [*Information Commissioner*]. There the judge applied a purposive and liberal interpretation to investigative powers found in the *Access to Information Act* (*AIA*), R.S.C. 1985, c.A-1. However, that decision was later overturned by this Court. The reasons for decision of this Court were released on May 27, 2005, after the Judge had issued his reasons in this case.

[17] At issue in the *Information Commissioner* appeal was the interpretation of subsection 36(2) of the *AIA*. That subsection empowers the Commissioner to examine any record notwithstanding

any privilege under the law. On appeal, this Court found that the judge below had erred by adopting a purposive and liberal interpretation of this section in light of the pronouncements on privilege from the Supreme Court of Canada. Despite the express language in subsection 36(2) to abrogate privilege, this Court stated at paragraph 22:

> ... subsection 36(2) must be interpreted restrictively in order to allow access to privileged information only where absolutely necessary to the statutory power being exercised.

[18] In the present case, *PIPEDA* has no express language to abrogate privilege similar to subsection 36(2) of the *AIA*. The Commissioner submits that she must be in a position to test claims of solicitor-client privilege, as opposed to accepting such claims at face value or bringing an application to court to have a judge decide the issue. However, she has presented only a general rationale that her investigation would be fettered. The affidavit presented by the Blood Tribe has not been challenged on cross-examination. On 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.

[19] Equally troubling is subsection 20(5) of *PIPEDA* which reads:

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.	**20.(5)** Dans les cas où, à son avis, il existe des éléments de preuve touchant la perpétration d'infractions au droit fédéral ou provincial par un cadre ou employé d'une organisation, le commissaire peut faire part au procureur général du Canada ou d'une province, selon le cas, des renseignements qu'il détient à cet égard.

[20] While the Commissioner is bound by subsection 20(1) not to disclose information received during her investigation, this power under subsection 20(5) ultimately requires Canadians to trust that the Commissioner will always exercise her discretion prudently on matters involving solicitor-client privilege. The prospect that solicitor-client documents might make their way into the hands of public law enforcement officers can only have the chilling effect referred to by Binnie J. in *R. v. Campbell*, [1999] 1 S.C.R. 565 at paragraph 49 and will undermine the confidence and candor of Canadians when dealing with their lawyers.

[21] Although not argued by the parties, it also should be noted that documents subject to solicitor-client privilege would be exempt from disclosure whether or not *PIPEDA* purported to make them so. The British Columbia Court of Appeal so stated in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 8 W.W.R. 399 at paragraph 29, in the context of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165:

> What then of the purpose of s. 14 of the British Columbia legislation? Headed "Legal Advice", it states: "The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." One suspects the provision was intended to protect communications between public bodies qua clients and their lawyers; but again, even if s. 14 had not been enacted, the law would protect information that is subject to solicitor-client privilege, no matter who the lawyer or client.

[22] In short, the reason express language is required to abrogate solicitor-client privilege is because it is presumptively inviolate. The exception for solicitor-client privilege in *PIPEDA* is not what shelters privileged documents from disclosure. The law of privilege does that. The exception simply recognizes that privilege.

(c) PIPEDA governs Information held by Private and not Public Organizations

[23] *PIPEDA* governs the use, collection and disclosure of personal information by private organizations and represents Canada's somewhat grudging move away from industry self-regulation (see McIsaac, Shields, and Klein in *The Law of Privacy in Canada*, looseleaf (Toronto, Ont: Carswell, 2000)). This move was brought about by a need for the Government of Canada to bring our laws into line with the trade requirements of the European Union. The history of the legislation was carefully reviewed by this Court in *Englander v. Telus Communications Inc.*, [2005] 2 F.C.R. 572 (C.A.) [*Englander*]. That history reveals that the legislation arose as a compromise among stakeholders who wanted a flexible legislative framework. *PIPEDA* expressly states it will be subordinate to any substantively similar provincial law.

[24] In contrast, the purpose of the *AIA* (*supra* at paragraphs 14 and 15) is much more fundamental to Canada's system of government. The Supreme Court in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 [*Lavigne*] noted at paragraph 31 that the *AIA*, like other access to information statutes, has as its main purpose the codification of a right of access to information held by the Canadian government. In *Lavigne*, the Supreme Court of Canada recognized the need for this feature in Canada's political structure. In a modern bureaucratic state, access to information helps preserve national values and provides a humane system of government. Consequently, access to information legislation has been afforded a quasi-constitutional status, and the Commissioner so empowered, has been given an ombudsman's role (see *Lavigne* at paragraphs 38 and 39).

[25] This Court in *Englander* also stated that one should not be hasty in applying principles and rules of interpretation developed in the context of *AIA* to *PIPEDA* (see paragraph 36). Décary J.A. writing for the panel stated the purpose of *PIPEDA* was altogether different from the *AIA* and he recognized that *PIPEDA* was the result of legislative compromise. In our case, the Judge stated, in effect, that because Parliament had the confidence to entrust the Commissioner with sensitive information under the *AIA*, it should be inferred that Parliament intended the Commissioner to have access to privileged records (see paragraph 55 of his reasons). In my analysis, the Judge's adoption of legal principles developed under the *AIA* to an analysis under *PIPEDA* was in error.

(d) Role of the Commissioner when Faced with a Claim of Solicitor-Client Privilege

[26] The Judge concluded that the exercise of the power by the Commissioner to compel and examine solicitor-client privileged records was not an abrogation of that privilege. In his view, the sanctity of the privilege was not violated by having an investigator from the Commissioner's office examine privileged communication (see his reasons at paragraph 58). Respectfully, I cannot agree.

[27] First of all, the reference in paragraph 12(1)(a) to the Commissioner's power being exercisable in the same manner and to the same extent as a superior court was not intended to empower the Commissioner with the jurisdiction of a superior court. That paragraph does not apply generally to all of the extraordinary powers of the Commissioner, but only to the procedural powers in that paragraph, to compel evidence, records and things in the course of investigating a complaint.

[28] Put another way, the paragraph allows the Commissioner, for this limited purpose, to issue subpoenas and orders that have the force of law for matters otherwise within her investigative jurisdiction.

[29] Language that allows a tribunal to compel evidence in the same manner and to the same extent as a superior court or the Federal Court does not extend the jurisdiction of a tribunal or commission. For example, in *Public Service Alliance of Canada v. Northwest Territories*, (2000) 191 F.T.R. 266 (T.D.), aff'd 2001 FCA 259, MacKay J. considered the effect of paragraph 50(3)(a) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6. The paragraph read:

50.(3) In relation to a hearing of the inquiry, the member or panel may,	**50.(3)** Pour la tenue de ses audiences, le membre instructeur a le pouvoir :
(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to ... produce any documents ...	**(a)** d'assigner et de contraindre les témoins à comparaître, à déposer (...) et à produire les pièces (...) au même titre qu'une cour supérieure d'archives;

[30] In that case, the applicants argued this language meant the tribunal could hear a privilege claim under section 37 of the *Canada Evidence Act*, R.S., 1985, c. C-5. MacKay J. ruled that only an actual superior court could rule on the issue of privilege.

(e) <u>How to Deal with a Claim of Solicitor-Client Privilege under *PIPEDA*</u>

[31] Section 15 of *PIPEDA* permits the Commissioner to apply to the Federal Court in relation to any matter referred to in section 14 which in turn encompasses solicitor-client privilege pursuant to subsection 9(3) of that Act (*supra*, at paragraph 4).

[32] The Intervener, the Law Society of Alberta, directed the panel to the Supreme Court of Canada of *R. v. McClure*, 2001 SCC 14 [*McClure*]. That case outlined useful principles to be applied regarding a review of solicitor-client privilege by civil and criminal courts. McClure faced sexual charges from twelve former students, including one 'J.C.' who had also commenced a civil action. In the criminal action, McClure sought production of J.C.'s civil litigation file in order to determine the nature of his allegations and to test his motivation in fabricating or exaggerating incidents of abuse. Major J. outlined a three stage procedural test to protect the solicitor-client privilege. In the first two stages, the party seeking privileged material must establish that there is no other compellable source for the privileged information as well as an evidentiary basis upon which to conclude that the information would be legally useful. In the third stage, the judge must then examine the documents and will not release them unless satisfied that they would likely give rise to an issue of relevance pertinent to the ultimate disposition of the case.

[33] In my analysis, the Commissioner's ability to conduct her investigation is not fettered by a rule that protects privileged communication. In circumstances where a broad claim of solicitor-client privilege is used as a shield to thwart an investigation, judges of the Federal Court are equal to the task of developing procedures that adequately minimize the potential invasion of the privilege (see also *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paragraph 21).

V. Conclusion

[34] In summary, the Judge erred in adopting a purposive and liberal interpretation of paragraphs 12(1)(a) and (c) of *PIPEDA* and in adopting *AIA* principles in a *PIPEDA* review. The appeal should

be allowed, the order of the Judge dated March 8, 2005 should be set aside and the Commissioner's order for production of records dated October 22, 2003 should be vacated. Costs to the appellant in this appeal. No costs were sought by the intervener, the Law Society of Alberta.

"B. Malone"
J.A.

"I agree.
K. Sharlow"

"I agree
J.D. Denis Pelletier"