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Solicitor-Client Issues and the Information and Privacy Commissioner

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Case Commented On: *University of Calgary v JR*, 2015 ABCA 118 (CanLII)

The Alberta Court of Appeal (per Justice Russell Brown, with Justices Myra Bielby and Patricia Rowbotham concurring) recently ruled that a delegate of the Alberta Information and Privacy Commissioner did not have the statutory authority to issue a notice to the University of Calgary to produce documents so that the Commissioner could determine whether the University had properly claimed that the records were subject to solicitor-client-privilege. Further, the Commissioner did not have the statutory authority to compel the production of the records.

JR sued the University, alleging wrongful dismissal and other legal issues. During the litigation, when the parties exchanged affidavits of records, JR did not object to the University asserting solicitor-client-privilege for some of the documents. The litigation was resolved (see 2012 ABQB 342) and JR has had no involvement in the litigation since then (at para 3).

At the same time that the civil action was commenced, JR applied for access to information under section 7 of the *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 (*FOIPPA*). She sought emails, file information, letters, records of discussion, third party correspondence, personal notes and meeting notes regarding her that were in the possession of the University. The University provided some disclosure, but JR asked the Commissioner to review the University's assertion of solicitor-client-privilege over some of the records. After mediation failed, the Commissioner commenced a formal inquiry, appointing a delegate under section 61 of *FOIPPA* to hear the matter (at para 4).

When the University was asked to provide unredacted copies of the records JR had requested, the University's access and privacy coordinator responded that she had been advised that the University was asserting solicitor-client-privilege over the communications that had been given and received by the University's lawyers in respect of the matter (at para 5).

The Commissioner's delegate responded by referring to a document created by the Commissioner's office: The Solicitor-Client Adjudication Protocol, which, the Court was quick to point out, had no statutory or regulatory force (at para 6). The preamble to the Protocol states that it was the result of a careful analysis of the Supreme Court of Canada's decision in *Canada (Privacy Commissioner) v Blood Tribe Department of Health,* 2008 SCC 44, which held that the Privacy Commissioner of Canada did not have the authority to compel production of records subject to solicitor-client-privilege. The Protocol proceeds to distinguish the *Blood Tribe* case on

various grounds (e.g. the difference in powers and procedures between the federal Privacy Commission and the Alberta Information and Privacy Commission) and concludes that the Alberta Commissioner can require production of records in order to assess whether an assertion of solicitor-client-privilege is proper (at para 7).

After the University stated that it was asserting solicitor-client-privilege, the delegate invoked *FOIPPA* section 56(2) and issued a "notice to produce records". Further, the delegate relied on section 56(3) of FOIPPA, which provides:

> 56(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection …(2)

It is interesting to compare the language of the impugned provision in the provincial legislation to that in the federal legislation. The *Personal Information Protection and Electronic Documents Act,* SC 2000 c 5 (*PIPEDA*) section 12(1), at issue in *Blood Tribe,* provided as follows in 2008:

> 12(1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may
>
> (a) … compel [persons] … 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.

This section was amended in 2010, but the current provision (section 12.1) has essentially the same wording as section 12 did in 2008 (see here).

The University sought judicial review of the delegate's decision to issue the notice to produce. The Law Society of Alberta intervened at both the Court of Queen's Bench and the Alberta Court of Appeal hearings (at para 10).

Court of Queen's Bench Justice C.M. Jones used a correctness standard to review whether the Commissioner's delegate had authority to issue a notice to produce the records when solicitor-client-privilege had been asserted. The correctness standard was also applied to the issue of whether the delegate had to resort to a notice to produce in order to ascertain whether solicitor-client-privilege had been properly asserted (see 2013 ABQB 652 (CanLII) at paras 112 and 121). Was the delegate correct when it stated it was asking for production of the documents in order to determine whether solicitor-client-privilege had been properly asserted?

Justice Jones held that the ordinary meaning of section 56(3) was that the Commissioner (or his/her delegate) had the power to compel the production of records subject to solicitor-client-privilege. This conclusion was supported because only that interpretation would meet the legislative objective of section 2(e) of *FOIPPA* (providing for independent reviews of decisions of public bodies under *FOIPPA*) and by the fact that *FOIPPA* does not limit the Commissioner's authority to questions of fact and law, except solicitor-client-privilege (ABQB at paras 213-215).

While the University advanced three grounds of appeal, the Alberta Court of Appeal chose to really only deal with one issue: Did Justice Jones err in interpreting section 56(3) of *FOIPPA* as empowering the Commissioner to order production and inspection of records over which

solicitor-client-privilege is asserted, such that he should have followed *Blood Tribe*? The University was supported by the Law Society's submission that a contextual analysis of section 56(3) would take into account the importance of solicitor-client-privilege (at para 23).

The ABCA reinforced the holding in *Blood Tribe* with respect to the correct rule of statutory interpretation to be applied in the context of an assertion of solicitor-client-privilege (at para 40):

> *Blood Tribe*'s direction is categorical: because of the central importance of solicitor-client privilege to our legal system and to the preservation of a relationship which is integral to the administration of justice, where statutory language might be interpreted as authorizing an infringement of solicitor-client privilege, the rule of strict construction – and only the rule of strict construction – is to be applied *ab initio*. It follows that the chambers judge erred in applying the modern approach to statutory interpretation in considering the meaning of section 56(3). Inasmuch as section 56(3) might authorize the infringement of solicitor-client privilege, he ought to have interpreted that provision strictly. The cases he relied upon in doing otherwise either have no application to solicitor-client privilege (*Canada 3000*) or are in my respectful view irreconcilable with *Blood Tribe* and as such in error (*Newfoundland and Labrador Information and Privacy Commissioner*; *Central Coast*) [references omitted].

The ABCA next summarized *Blood Tribe*'s principles about the issue of whether a legislative provision displaces the presumption that the Legislature did not intend to authorize the infringement of solicitor-client-privilege (at paras 42 to 43):

> 1. To abrogate solicitor-client privilege, statutory language must be clear, unequivocal and unambiguous: *Blood Tribe* at paras 2, 18, 25-26;
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> 2. Statutory language cannot be taken as authorizing the infringement of solicitor-client privilege by inference or implication: *Blood Tribe* at paras 18 and 31; and
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> 3. General (or "open-textured") language granting power to compel production of records is insufficiently specific to authorize a demand for production of records over which solicitor-client privilege is asserted: *Blood Tribe* at paras 2, 11 and 26.
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> In brief, statutory language, to be taken as authorizing acts which may infringe solicitor-client privilege, must be clear, explicit and specific. …

The ABCA then applied these principles to the question of whether section 56(3) authorizes the Commissioner to infringe solicitor-client privilege and concluded that section 56(3) "does not clearly, explicitly and specifically authorize infringement of solicitor-client-privilege" (at para 49).

Commentary

It is possible that the question of whether or not provincial privacy commissioners may compel production of documents that are the subject of a claim of solicitor-client privilege—whether for any purpose or for the purpose of determining the veracity of the claim of privilege—will end up being decided by the Supreme Court of Canada. Some provincial commissioners have quasi-judicial (adjudicative) authority that does not exist in the federal sphere. In some jurisdictions, this has been interpreted to mean that in order to fulfill their quasi-judicial mandate,

commissioners should at least have the authority to assess whether a claim of solicitor-client-privilege has been properly made.

For example, like Alberta's Commission, some Ontario boards and commissions consider that their quasi-judicial function allows them to request disclosure of the documents subject to a claim of solicitor-client-privilege, at least for the purpose of determining whether the claim was properly made (see: Simon Ruel, "What Privileges Arise in the Administrative Context and When?" (2013) Can J Admin L & Prac 141 at 153-4). Some provinces have taken a different stance. After similar legislation in Newfoundland and Labrador was interpreted to allow the Commissioner to compel document production in *Newfoundland & Labrador (Attorney General) v Newfoundland & Labrador (Information and Privacy Commissioner),* 2011 NLCA 69, the Newfoundland and Labrador Legislature amended its legislation in Bill 29 (*An Act to Amend the Access to Information and Protection of Privacy Act,* SNL 2012, c 25) to exempt the Commissioner from having these powers. (It should be noted that the agency claiming solicitor-client-privilege in this case was governmental.)

The distinction between adjudicative and investigative powers in Commissions is sometimes used by courts to find that commissioners have authority to determine matters of solicitor-client-privilege see: *School District No 49 (Central Coast v British Columbia (Information and Privacy Commissioner*), 2012 BCSC 427.

The debate centres around the appropriate function of commissions (as administrative tribunals) versus courts. Administrative agencies are not modeled exactly like courts. This is deliberate, to ensure that they are not constrained by overly rigid rules. They are required to act in the public interest, are not bound by *stare decisis*, and may build relationships with industry members in order to fulfill their statutory regimes (Peter Ruby, Lauren Macleod "Solicitor-Client Privilege and Administrative Agencies" (2009) 22 Can J Admin L & Prac 91 at 93. The lack of stringent rules and greater flexibility allows administrative bodies to be faster and less expensive and may reduce the need for legal representation.

Some commissions argue that, in the interest of supporting administrative expediency, commissions that already have decision-making (and not merely advisory) powers should be able to address the issue of solicitor-client-privilege in order to avoid the expense of a court application. Also, Ruby and MacLeod (at 102) point out that commissioners may frequently use their interpretation of their powers to request that solicitor-client-privilege be waived. On the other hand, solicitor-client-privilege is very highly protected as a substantive rule of law in Canada (Ruby and MacLeod at 94). It is considered to have a critical role in the proper functioning of Canada's legal system. Lawyers must be able to properly advise their clients, and this requires full disclosure between lawyers and their clients; clients must be candid with their lawyers yet be assured that what they say will not be used against them (Ruby and MacLeod at 94). The argument is that because solicitor-client-privilege is so important, it must be carefully safeguarded, and if a tribunal is going to be given the power to abrogate solicitor-client-privilege by statute, it must be explicitly stated.

It seems in the Alberta case, the easiest solution would be for the Legislature to amend our legislation to explicitly state the Commissioner's powers to compel disclosure of documents that are subject to the claim of solicitor-client-privilege. Otherwise, government departments and businesses will be able to involve lawyers in cases at the early stages, allowing the assertion of solicitor-client-privilege (whether appropriate or not), thereby requiring the Commission to go to court, and thus possibly discouraging expedient and fair resolution of access to information and privacy cases.

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