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## Publication

### TITLE

Solicitor-Client Privilege Trumps Privacy Commissioner's Investigatory Powers

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### EXPERTISE

[Privacy and Access to Information](#)

In a unanimous ruling issued on July 17, 2008, the Supreme Court of Canada confirmed that the Privacy Commissioner of Canada cannot order the production of documents over which a claim of solicitor-client privilege is asserted.<sup>[1]</sup> The Court ruled that the right of the individual or organization "to keep solicitor-client confidences confidential must prevail."

This decision clarifies the scope of the Commissioner's investigatory power. In short, the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") does not grant the Commissioner authority to compel production of privileged documents, even for the limited purpose of determining whether privilege is properly claimed.

### BACKGROUND

Following her dismissal, an employee of the Blood Tribe Department of Health asked to review her personal employment information. The employer denied the request and the employee filed a complaint with the Commissioner. The Commissioner, in turn, requested a copy of the employee's file. The employer provided all records save for a "bundle of letters" over which a claim of solicitor-client privilege was advanced. The Commissioner ordered the production of the withheld documents on the basis that such production was necessary to verify the claim of privilege. The employer challenged the legality of the order and the case was heard by the Federal Court.

The Federal Court considered the relevant paragraphs of PIPEDA and, adopting a broad and purposive interpretation of the legislation, concluded that the Commissioner did have the extraordinary power to review documents for privilege. However, the Federal Court of Appeal unanimously overturned this decision. Writing for the Court of Appeal, Justice Malone concluded that solicitor-client privilege was presumptively inviolate and that no exception to it was disclosed in PIPEDA.

### THE SUPREME COURT OF CANADA'S DECISION

In a unanimous decision, the Supreme Court of Canada agreed with the Federal Court of Appeal and affirmed that PIPEDA does not grant the Commissioner the power to compel production of privileged documents.

### IMPLICATIONS OF THE RULING

It is now clear that the Commissioner does not have the authority to order the production of privileged documents even for the purpose of verifying a privilege claim. Although the ruling does preclude the Commissioner from ordering production of privileged documents, the Court has recognized that there are, nonetheless, less intrusive remedies available to the Commissioner for purposes of ensuring the propriety of privilege claims. The Commissioner may, for example, at any point in the investigation, refer a question of solicitor-client privilege to the Federal Court. At such time, the Court is empowered, if it thinks it necessary, to review the contested material and determine whether solicitor-client privilege has been properly claimed.

The Commissioner has taken the position that such remedies are insufficient and argues that the decision leaves a "gap" in the ability of the Commissioner to discharge the Commissioner's legislative mandate and potentially allows broad claims of solicitor-client privilege to inhibit investigations.<sup>[2]</sup> This position was clearly rejected by the Supreme Court of Canada. It remains to be seen whether Parliament will consider amending PIPEDA in an effort to grant the Commissioner the sought-after power to compel production of privileged documents, or whether it will take to heart the Supreme Court of Canada's view that granting the Commissioner the power to review documents for privilege is unnecessary for purposes of achieving the ends sought by PIPEDA.

At a practical level, corporations which have previously forwarded privileged documents to the Commissioner should consider requesting that any improperly compelled documents be returned.

[1] *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, 2008 SCC 44.

[2] Office of the Privacy Commissioner of Canada, News Release, "Supreme Court of Canada to consider Privacy Commissioner's powers of investigation and enforcement" (21 February 2008).

*The purpose of this document is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Ogilvy Renault LLP or any member of the firm on the points of law discussed.*

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