

Pritchard v. Ontario (Human Rights Commission) [2004] SCC 31

In *Pritchard v. Ontario (Human Rights Commission)* [2004] SCC 31 the Supreme Court of Canada confirmed the application of solicitor-client privilege to legal opinions prepared by an administrative agency's in-house counsel. Colleen Pritchard filed a human rights complaint in 1997, alleging, in part, reprisal, due to her previous human rights complaints against Sears Canada Inc. The Commission decided not to address most of the complaint as it found that it had been brought in bad faith, the complainant having released her employer from *Human Rights Code* and employment-related claims.

Later, on judicial review, Ms Pritchard successfully brought a motion for all information that had been before the Commission, including a legal opinion. The Commission's appeal of this order to the Ontario Court of Appeal was allowed. The Court of Appeal asserted that solicitor-client privilege is not simply a rule of evidence, but a civil and legal right. The Court observed that statutory decision-makers are required to weigh different interpretations of how to fulfill their statutory mandate. The need for statutory decision-makers, who are often not lawyers, to receive confidential legal advice was also noted.

The Court of Appeal was not persuaded by the principle of "*common interest*", an exception to solicitor-client privilege applied in executor/beneficiary, insurer/insured and trade union/union member contexts. In addition, in its view, the issuance of the legal opinion itself was irrelevant. The ultimate question was not the correctness of the opinion, but whether the decision of the Commission can be upheld. In addition, the Commission's earlier production of a legal opinion did not create an exception to solicitor client privilege.

An appeal to the Supreme Court was dismissed. It too found that the Commission did not share a "*common interest*" with the parties before it. Rather, it was a "*disinterested gatekeeper for human rights complaints*". Nor was it persuaded by the reasoning in *Melanson v New Brunswick (Workers Compensation Board)*, [1994], 146 N.B.R. (2d) 294, where the New Brunswick Court of Appeal stated that legal opinions pertaining to a claim before the board's tribunal were not privileged. Comments made about legal opinions in *Melanson* were considered *obiter*.

The judicial principles for solicitor-client privilege have been jealously guarded and are nearly absolute, Major, J stated for the court. That the opinion was provided by in-house counsel of an administrative agency did not change this. The work done by in-house counsel involves legal and non legal responsibilities. The application of privilege depends on the circumstances in which advice is sought and given, the subject matter of the advice and the nature of the relationship. When solicitor-client privilege is found, it applies *"with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law."*

Furthermore, the appellant knew the case to be met without production of the legal opinion. Both procedural fairness and solicitor-client privilege may coexist without one being at the expense of the other. Major, J concluded that solicitor-client privilege cannot be *"abrogated by inference"* and that legislation purporting to limit it will be narrowly interpreted. He also stated that privilege will not arise where legislation mandates provision of the record and specifies inclusion of opinions to an administrative board, but he acknowledged that *"whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal."*

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