



The
DOMINION OF CANADA
General Insurance Company

REMARKS BY
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY
TO THE
HOUSE OF COMMONS STANDING COMMITTEE ON ACCESS

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INTRODUCTION

Members of the Committee, ladies and gentlemen, good morning.

I am Ann MacKenzie, Privacy Officer of The Dominion Of Canada General Insurance Company. Presenting with me today is Vivian Bercovici. Until recently, she was General Counsel at The Dominion. Vivian continues to advise us in private practice.

We appreciate the opportunity to present our views and concerns directly to the Committee.

We have provided a booklet of materials which includes our submission made in September, 2006, to the Office of the Privacy Commissioner (“OPCC”) regarding this statutory review.

The OPCC has provided this Committee with a resume of submissions (which can be found at Tab 5 of our material). I note that certain positions put forward by The Dominion in September do not appear to be reflected in the OPCC resume.

Today, we intend to focus our comments on two issues:

- 1) The matter of solicitor-client privilege, *PIPEDA*, and the recent Federal Court of Appeal decision in the *Blood Tribe* case; and
- 2) The right of the respondent to a complaint made to the Privacy Commissioner under *PIPEDA* to appeal.

Vivian will now present our position regarding solicitor client privilege and related issues.

FIRST ISSUE: SOLICITOR CLIENT PRIVILEGE AND THE *BLOOD TRIBE* CASES

Good morning.

The discussion of solicitor client privilege in this context was focused by the Federal Court of Appeal decision in the *Blood Tribe* case in October, 2006 (at Tab 8 of our material). This case is really about the scope of power of the OPCC and the manner in which that power is exercised. This is about considering what the statute allows explicitly, and the limits of discretionary interpretation.

In order to analyze these fundamental principles, we must consider the intent of Parliament in enacting *PIPEDA*.

I draw your attention to page 3 of our written submission, where we discuss the legislative purpose of *PIPEDA*.

Where Parliament intends to legislate an ombudsman-type adjudicative structure, as in *PIPEDA*, then that's what Parliament does.

When Parliament intends to grant more expansive powers – such as those we might find in an administrative tribunal with rule-making powers – then that's what Parliament does.

When Parliament intends to require that material protected by solicitor client privilege be disclosed, then that's what Parliament does.

Parliament did not do this in *PIPEDA*, and we must presume that this was not a matter of inadvertence or oversight. Parliament did not intend that the OPCC should have the power to compel production of solicitor client privileged documents.

Writing for the bench in the Federal Court of Appeal decision in *Blood Tribe*, Malone J.A. states:

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.

Solicitor client privilege goes to the heart of the order and integrity of our system of justice.

An individual or party in any proceeding must know, with confidence, that any communication with their solicitor will not be disclosed. This allows free and unthreatened communication between solicitor and client, which facilitates the preparation and execution of a full and vigorous defence. The impact of qualifying solicitor client privilege, which has anchored the common law for centuries, would be seismic.

Imagine, if you will, the sudden and retroactive abrogation of executive privilege, and the profound effect that would have on government. I suggest to you that the impact of the OPCC position regarding solicitor client privilege would be no less dramatic.

It is of the utmost importance that power be clear and interpreted clearly. It is of the utmost importance that the commissioner's discretion in interpreting powers be consistent with our legal practices.

The insurance industry receives many requests from plaintiffs counsel, often when litigation is being contemplated, sometimes after a claim has been filed. Often, counsel seek production under *PIPEDA* of documents to which they are not entitled at common law or pursuant to the Rules of Civil Procedure. These documents are protected by either solicitor client privilege, litigation privilege, or both.

With respect, we submit that it is highly unlikely that Parliament intended an interpretation of *PIPEDA* that would permit the circumvention of privilege in this manner.

And, we have to ask, what happens if the Commissioner finds that the documents which are the subject of a complaint are not privileged, or that they must be disclosed, anyway? Then what?

Ann MacKenzie will address this issue with you.

SECOND ISSUE: RESPONDENT'S RIGHT OF APPEAL

Our interpretation of *PIPEDA* is that there is no clear right of appeal for the respondent of a *PIPEDA* complaint.

In our September submission, at Tab 2, Page 3, and in our current written submission at Page 5.

This issue was not raised in the OPCC oral testimony before this Committee, or in its written submission or the resume of submissions received from third parties. We think it is very important and wish to bring it to your attention.

Section 14 of *PIPEDA* allows the applicant to appeal a finding of the Privacy Commission to the Federal Court. There is no such explicit right of the respondent. We submit, respectfully, that this is a matter that should be corrected in this statutory review.

The powers of the Privacy Commissioner are significant powers that may profoundly affect a commercial interest. To allow one party a right of appeal and to deny the other party this same fundamental opportunity is inconsistent with the common law standards of fairness.

We ask the Committee to consider recommending to Parliament that the statute be amended to explicitly provide for a right of appeal for the respondent.

In addition, we ask the Committee to consider addressing the current practice of the OPCC regarding disclosure of complaints. It seems, based on our experience, that the identity of a complainant is not disclosed to the respondent, nor is the original complaint. Rather, the respondent receives a paraphrase.

PIPEDA was intended to be a general guideline for a principled approach to the collection, use and disclosure of personal information, not to create a parallel system of justice.

All Canadians would benefit from a clarification of the OPCC's powers so that we understand, with certainty and confidence, the standards which are being applied.

In closing, on behalf of The Dominion, I wish to thank the Committee for hearing us today. We commend the OPCC and the Committee for such careful consideration of the matters before us.