
CANADA / JUDGMENT

Pritchard v. Ontario (Human Rights Commission)

2004 SCC 31

COURT

Supreme Court of Canada

DECIDED

14 May 2004

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Pritchard v. Ontario (Human Rights Commission)

Collection

Supreme Court Judgments

Date

2004-05-14

Neutral citation

2004 SCC 31

Report

[2004] 1 SCR 809

Case number

29677

Judges

Iacobucci, Frank; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.

On appeal from

Ontario

Subjects

Administrative law

Professional law

Notes

SCC Case Information: 29677

Decision Content

Pritchard v. Ontario (Human Rights Commission), [2004] 1 S.C.R. 809, 2004 SCC 31

Colleen Pritchard Appellant

v.

Ontario Human Rights Commission Respondent

and

Attorney General of Canada,

Attorney General of Ontario,

Canadian Human Rights Commission and

Manitoba Human Rights Commission Interveners

Indexed as: Pritchard v. Ontario (Human Rights Commission)

Neutral citation: 2004 SCC 31.

File No.: 29677.

Hearing and judgment: March 23, 2004.

Reasons delivered: May 14, 2004.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

Barristers and solicitors — Solicitor-client privilege — In-house counsel — Legal opinions — Whether legal opinion prepared by in-house counsel for administrative board protected by solicitor-client privilege.

Administrative law — Judicial review — Solicitor-client privilege — In-house counsel — Legal opinions — Complainant seeking production of legal opinion prepared by Human Rights Commission's in-house counsel — Whether legal opinions prepared by in-house counsel protected by solicitor-client privilege.

Administrative law — Judicial review — Procedure — Record of proceedings — Solicitor-client privilege — Decision-maker served with notice of application for judicial review of its decision must file in court for use in application record of proceedings in which decision was made — Whether expression “record of the proceedings” in s. 10 of Ontario Judicial Review Procedure Act abrogates solicitor-client privilege — Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 10.

The appellant filed a complaint with the Ontario Human Rights Commission against her former employer. She later sought judicial review of the Commission's decision not to deal with most of her complaint. When the Commission refused her request for the production of various documents, including a legal opinion provided to the Commission by in-house counsel, the appellant brought a motion before a judge of the Divisional Court for the production of all documents that were before the Commission when it made its decision, including the legal opinion. The motion was granted. On appeal on the sole issue of the production of the legal opinion, a three-judge panel of the Divisional Court upheld the motions judge's decision. The Court of Appeal set aside the orders pertaining to the legal opinion, holding that the opinion was privileged.

Held: The appeal should be dismissed.

Solicitor-client privilege applies to a broad range of communications between lawyer and client and 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. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that that lawyer is "in-house" does not remove the privilege and does not change its nature. Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if privilege arose in the circumstances. Here, the communication between the Commission and its in-house counsel was a legal opinion and protected by solicitor-client privilege.

Procedural fairness does not require the disclosure of a privileged legal opinion and does not affect solicitor-client privilege. Both may co-exist without being at the expense of each other. In this case, the appellant was aware of the case to be met without production of the legal opinion. Further, legislation purporting to limit or deny solicitor-client privilege must be interpreted restrictively; this privilege cannot be abrogated by inference. "[R]ecord of the proceedings" in s. 10 of the Ontario Judicial Review Procedure Act does not include privileged communications from in-house counsel. Section 10 does not clearly or unequivocally express an intention to abrogate solicitor-client privilege and does not stipulate that the "record" includes legal opinions. Finally, the common interest exception to solicitor-client privilege does not apply to an administrative board with respect to the parties before it.

Cases Cited

Considered: *R. v. Campbell*, [1999] 1 S.C.R. 565; not followed: *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294; referred to: *Smith v. Jones*, [1999] 1 S.C.R. 455; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61; *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221; *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7 , 15 .

Employment Standards Act, R.S.O. 1990, c. E.14.

Human Rights Code, R.S.O. 1990, c. H.19, ss. 34, 37, 39(6) [ad. 1994, c. 27, s. 65(18); am. 2002, c. 18 , Sch. C, s. 1(12)].

Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 10.

APPEAL from a judgment of the Ontario Court of Appeal (2003), 63 O.R. (3d) 97, 167 O.A.C. 356, 223 D.L.R. (4th) 85, 22 C.C.E.L. (3d) 201, 27 C.P.C. (5th) 223, [2003] O.J. No. 215 (QL), setting aside a judgment of the Divisional Court, [2002] O.J. No. 1169 (QL), ordering the production of a legal opinion prepared by an in-house counsel of the Ontario Human Rights Commission. Appeal dismissed.

Geri Sanson and Mark Hart, for the appellant.

Anthony D. Griffin and Hart Schwartz, for the respondent.

Christopher M. Rupar, for the intervener Attorney General of Canada.

Leslie M. McIntosh, for the intervener Attorney General of Ontario.

Andrea Wright and Monette Maillet, for the intervener Canadian Human Rights Commission.

Aaron L. Berg, for the intervener Manitoba Human Rights Commission.

The judgment of the Court was delivered by

Major J. —

I. Introduction

1 The appellant, Ms. Colleen Pritchard, filed a human rights complaint with the respondent Ontario Human Rights Commission, against her former employer Sears Canada Inc., alleging gender discrimination, sexual harassment and reprisal. The Commission decided, pursuant to s. 34(1)(b) of the Ontario Human Rights Code, R.S.O. 1990, c. H.19 (“Code”), not to deal with her complaint. The appellant sought judicial review and brought a motion for production of all documents that were before the Commission when it made its decision, including a legal opinion provided to the Commission by in-house counsel.

2 The motions judge, MacFarland J. of the Divisional Court, ordered production and a three-judge panel of that court later upheld that decision. The Ontario Court of Appeal overturned the decision, holding instead that the opinion was privileged. The appeal was dismissed with reasons to follow.

II. Factual Background

3 The appellant's employment with Sears was terminated on July 19, 1996. In January 1997 she filed a human rights complaint alleging that she had been subjected to gender discrimination, sexual harassment and reprisal. With regard to reprisal, the complaint alleged that the appellant was denied re-employment for an advertised position in December 1996 because of earlier complaints she made to the Commission (in 1994) regarding sexual harassment and discrimination, and Sears' failure to deal with the issues she raised appropriately.

4 On January 20, 1998, the Commission decided, pursuant to s. 34(1)(b) of the Code, not to deal with most of the appellant's complaint. The Commission was of the view that the appellant had acted in bad faith in bringing the complaint because she had previously signed a release which expressly released Sears from any claims under the Code.

5 In particular, it stated that she released Sears from any claims relating to her employment including "any claims for severance or termination pay under the Employment Standards Act or claims under the Human Rights Code". In exchange for the release, the appellant was paid her statutory entitlement under the Employment Standards Act, R.S.O. 1990, c. E.14, plus two weeks salary.

6 On June 23, 1998, the Commission decided, pursuant to an application by the appellant for reconsideration under s. 37 of the Code, not to deal with the termination issues; in essence, they upheld the January 20 decision not to address most of the complaint.

7 On October 28, 1998, the appellant commenced an application for judicial review of the Commission's decisions. The Commission did not defend the application. Instead, it provided the court and the appellant with a letter from its legal counsel setting out the reasons why it would not defend the application and why the entire complaint should be remitted for investigation. The Commission also offered to settle the matter, over the objections of Sears. The Superior Court of Justice, Divisional Court, quashed the Commission's decisions, finding that the Commission had misinterpreted the meaning of "bad faith", and had applied the wrong criteria in its reconsideration ((1999), 45 O.R. (3d) 97). The matter was remitted back to the Commission for a redetermination under s. 34 of the Code. An appeal by Sears was dismissed.

8 In its consideration of the complaint anew, the Commission again exercised its discretion under s. 34(1)(b) of the Code not to deal with most of the appellant's complaint. On December 20, 2000, the Commission issued its decision not to deal with it based on a set of reasons that were strikingly similar to the first, again claiming that the appellant acted in bad faith. On January 11, 2001, the appellant brought a second application for judicial review. The notice sought to quash the Commission's second decision on the basis of jurisdictional error, including excess of jurisdiction, denial of procedural fairness, and violations of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms .

9 In the context of this second judicial review application, the appellant requested production of various documents including a legal opinion provided to the Commissioners. The Commission refused the request for documents, and the appellant brought a motion before MacFarland J. of the Superior Court of Justice requesting “all information — both oral and written — which was placed before the Commission for its consideration of her complaint which resulted in the Commission’s decision under s. 34(1)(b) of the Code”.

III. Judicial History

10 On July 6, 2001, MacFarland J., of the Superior Court of Justice, Divisional Court, granted the appellant’s motion and ordered production of all the documents, including the legal opinion which had been prepared by in-house counsel for the Commission ((2001), 148 O.A.C. 260). Six months later, on January 10, 2002, a three-judge panel of the Divisional Court ([2002] O.J. No. 1169 (QL)) heard the expedited appeal on the sole issue of the production of the legal opinion, and confirmed MacFarland J.’s order. Neither of the lower courts was provided with a copy of the legal opinion at issue.

11 On January 29, 2003, the Ontario Court of Appeal allowed the appeal, set aside the lower court orders pertaining to the legal opinion, and ordered that the copies of the legal opinion which had been filed with the appellate court be sealed ((2003), 63 O.R. (3d) 97).

IV. Relevant Statutory Provisions

12 While this appeal can be decided on the basis of case law alone, ss. 34, 37 and 39(6) of the Code provide the context in which the Commission made its decisions. For convenience, these sections are reproduced below.

34.—(1) Where it appears to the Commission that,

- (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
- (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
- (c) the complaint is not within the jurisdiction of the Commission; or
- (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,

the Commission may, in its discretion, decide to not deal with the complaint.

- (2) Where the Commission decides to not deal with a complaint, it shall advise the complainant in writing of the decision and the reasons therefor and of the procedure under section 37 for having the decision reconsidered.

- 37.—(1) Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34(2) or subsection 36(2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based.
- (2) Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies.
- (3) Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final.
39. . . .
- (6) A member of the Tribunal hearing a complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the inquiry with any person or with any party or any party's representative except upon notice to and opportunity for all parties to participate, but the Tribunal may seek legal advice from an advisor independent of the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

V. Issues

13 The sole issue in this appeal is whether the Court of Appeal erred in overturning the decision of the motions judge ordering production of the legal opinion. The question is whether a legal opinion, prepared for the Ontario Human Rights Commission by its in-house counsel, is protected by solicitor-client privilege in the same way as it is privileged if prepared by outside counsel retained for that purpose.

VI. Analysis

A. Solicitor-Client Privilege Defined

14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.

15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: “(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties”. Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, at p. 834.

16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching “to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established”. The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, supra, at p. 835.

17 As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

18 In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*:

... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original.]

(Arbour J. in *Lavallee*, supra, at para. 36, citing Major J. in *McClure*, at para. 35.)

19 Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49. In *Campbell*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a “client department”

that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.

20 Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Campbell*, *supra*, at para. 50.

21 Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply 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. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is “in-house” does not remove the privilege, or change its nature.

B. The Common Interest Exception

22 The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a “joint interest” with the client in the subject-matter of the communication. This “common interest”, or “joint interest” exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.

23 The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), per Martin J.A., at p. 245:

The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . .

24 The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a “selfsame interest” as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer* (No. 3), [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

25 The Commission neither has a trust relationship with, nor owes a fiduciary duty to, the parties appearing before it. The Commission is a statutory decision-maker. The cases relied on by the appellant related to trusts, fiduciary duty, and contractual obligations. These cases are readily distinguishable and do not support the position advanced by the appellant. The common interest exception does not apply to an administrative board with respect to the parties before it.

26 The appellant relied heavily on the decision of the New Brunswick Court of Appeal in *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294. In that case, the court ordered a new hearing based on a failure by the Workers' Compensation Board to observe procedural fairness in the processing of the appellant's claim. The court held that several significant errors were made at the review committee level, negating the review committee's duty to act fairly. Among these errors were the failure to provide the appellant with its first decision, the decision to turn the appellant's claim into a test case without her knowledge and partly at her expense, and the introduction of new evidence not disclosed to the appellant. For these reasons the court, in its ratio, concluded that "the taint at the intermediate level of the Review Committee has irrevocably blemished the proceedings" (para. 31). Other comments made by the Court of Appeal, pertaining to the production of legal opinions, were obiter dicta. The proper approach to legal opinions is to determine if they are of such a kind as would fall into the privileged class. If so, they are privileged. To the extent that *Melanson* is otherwise relied on is error.

C. Application to the Case at Bar

27 As stated, the communication between the Commission and its in-house counsel was protected by solicitor-client privilege.

28 The opinion provided to the Commission by staff counsel was a legal opinion. It was provided to the Commission by in-house or "staff" counsel to be considered or not considered at their discretion. It is a communication that falls within the class of communications protected by solicitor-client privilege. The fact that it was provided by in-house counsel does not alter the nature of the communication or the privilege.

29 There is no applicable exception that can remove the communication from the privileged class. There is no common interest between this Commission and the parties before it that could justify disclosure; nor is this Court prepared to create a new common law exception on these facts.

30 With respect, the motions judge erred in following the comments made by the New Brunswick Court of Appeal in obiter dicta in *Melanson* and in ordering production of the legal opinion.

31 Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may co-exist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

32 Section 10 of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1, provides:

10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

33 Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively: see *Lavallee*, supra, at para. 18. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.

34 Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the “whole of the record” includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond 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.

35 Section 10 of the Judicial Review Procedure Act, in any event, does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the “record” includes legal opinions. As such, “record of the proceedings” should not be read to include privileged communications from Commission counsel to the Commission.

VII. Disposition

36 The communication between the Ontario Human Rights Commission and its in-house counsel is protected by solicitor-client privilege. It was a communication from a professional legal advisor, the Commission’s in-house counsel, in her capacity as such, made in confidence to her client, the Commission. Accordingly, this appeal is dismissed and the decision of the Ontario Court of Appeal is confirmed. There is no order for costs as against the parties before this Court. Any order of costs pertaining to the judicial review should properly be considered by the Divisional Court undertaking the review.

Appeal dismissed.

Solicitors for the appellant: Sanson & Hart, Toronto.

Solicitor for the respondent: Ontario Human Rights Commission, Toronto.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General of Ontario, Toronto.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Manitoba Human Rights Commission: Manitoba Human Rights Commission, Winnipeg.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2144/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/pritchard-v-ontario-human-rights-commission-2004>

Prepared on 26 October 2026 · Esheria