File Number: 31755

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE PRIVACY COMMISSIONER OF CANADA

Appellant
(Respondent)

and

BLOOD TRIBE DEPARTMENT OF HEALTH

Respondent
(Appellant)

and

ATTORNEY GENERAL OF CANADA, INFORMATION COMMISSIONER OF CANADA, INFORMATION AND PRIVACY COMMISSIONER FOR THE PROVINCE OF BRITISH COLUMBIA AND INFORMATION AND PRIVACY COMMISSIONER FOR THE PROVINCE OF ONTARIO, NEW BRUNSWICK OFFICE OF THE OMBUDSMAN, INFORMATION AND PRIVACY COMMISSIONER OF ALBERTA, CANADIAN BAR ASSOCIATION, FEDERATION OF LAW SOCIETIES OF CANADA, ADVOCATES SOCIETY

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PART I - OVERVIEW & FACTS

1. The Federation of Law Societies of Canada ("the Federation") submits that the investigative jurisdiction of the Appellant, the Privacy Commissioner of Canada ("the Commissioner") under the *Personal Information Protection and Electronic Documents Act,*[1] does not include the authority to directly compel production of records claimed to be protected by solicitor-client privilege. The facts relevant to the Federation's submissions are as described by the Appellant, Respondent and other Interveners on file herein.

PART II - POSITION OF THE FEDERATION OF LAW SOCIETIES OF CANADA

2. The Federation's position on the points in issue is as follows:

   a. any compulsory production of communications subject to a claim of privilege, including for purposes of adjudicating the claim, constitutes an infringement on privilege;

   b. such infringement is permissible only where it can be justified as absolutely necessary; and

   c. examination by a constitutionally independent court is a more minimal infringement of privilege than compulsory production to an administrative entity. Only if an enabling statute unequivocally authorizes it, should an administrative body have jurisdiction to compel production of communications subject to a claim of privilege.

3. The Federation opposes specifically and in principle the incidental erosion of the substantive right of privilege, in this instance by the Commissioner. The effectiveness of solicitor-client privilege stands as one of the truest tests of the legal system's commitment to a client's access to professional legal counsel, as a fundamental condition for the fair administration of justice. As the underlying rationale for privilege has been elevated to a principle of fundamental justice, it is appropriate and necessary to discourage incidental, case-by-case infringement on the basis of competing policy considerations.[2] Only in the clearest and most necessary of circumstances should our

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[1] S.C. 2000, c. 5 [*PIPEDA*].

[2] *R. v. McClure*, [2001] 1 S.C.R. 445 [*McClure*], [Appellant's Book, Tab 31], Major J. at para. 35: "…[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and

courts sanction such infringement.[3]

4. The Federation challenges the assertion of the Appellant that adjudication of a claim of privilege is not an infringement upon the privilege. Client confidence is the underlying basis for the privilege, and infringement must be measured through the eyes of the client. To a client, compelled disclosure to an adjudicator, even if not disclosed further, still constitutes an infringement on privacy. To the extent that any administrative proceeding requires an adjudication of such a claim, and examination of the communications themselves becomes necessary, then the enabling statute must be interpreted to require application to a constitutionally independent court. Only if the enabling statute clearly authorizes the administrative agency to order compulsory production to itself, and no other interpretation is possible, can the resulting infringement satisfy the restrictive interpretation and absolutely necessary principles in *Descôteaux c. Mierzwinski*.[4]

PART III - ARGUMENT

A Introduction

5. The fundamental right of privilege is a judicial creation, subject to the overarching protective mantle of the courts. It is subject to infringement only in certain narrowly-defined and court-sanctioned circumstances. The list of competing interests giving rise to those exceptions presently includes the serious and immediate threat of grievous public harm[5], and the real possibility of a wrongful conviction.[6] Privilege may be specifically abrogated by statute, but only in very limited circumstances and subject to constitutional scrutiny for reasonableness.[7]

6. To this restrictive list, the Commissioner wishes to add the informal and expeditious

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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."

[3] *Smith v. Jones*, [1999] 1 S.C.R. 455 [Appellant's Book, Tab 37], Cory J. at para. 74.

[4] *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 [*Descôteaux*] [Appellant's Book, Tab 15] at para 27.

[5] *Smith v Jones*, *supra*, note 3.

[6] *McClure, supra*, note 2; *R. v. Brown*, [2002] 2 S.C.R. 185 [Federation's Book, Tab 21].

[7] *Descôteaux, supra*, note 4; *R. v Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209 [*Lavallee*] [Federation's Book, Tab 20].

resolution of private-sector privacy complaints under *PIPEDA*.

7. The Federation submits that the current list of court-sanctioned exceptions ought not to be extended by this appeal. Any interpretation of section 12(1)(a) of *PIPEDA* must be guided by the principle that infringement upon privilege - including for purposes of adjudicating a claim of privilege - is to be construed as restrictively and protectively as possible. The Privacy Commissioner claims a power that is duplicative of the pre-existing jurisdiction of the superior courts, and to that extent is an unnecessary infringement of the privilege.

B Infringement upon privilege

8. Compulsory production of communications over which there is an unproven claim of privilege represents an infringement of privilege. This has been clear since *Descôteaux, supra*. Lamer J., as he then was, explained the substantive rule as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in *any circumstances where such communications are likely to be disclosed without the client's consent*.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives *someone* the authority to do *something* which, in the circumstances of the case, *might* interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it *except to the extent absolutely necessary* in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.[8]

[8] *Descôteaux, supra*, note 4, at para. 27 [emphasis added]. See also *Shell Canada Ltd. v. Canada (Director of Investigation & Research)* (1975), 22 C.C.C. (2d) 70 (Fed. C.A.) (*sub nom. Re Director of Investigation and Research and Shell Canada Ltd.*) [Federation's Book, Tab 22], Thurlow J.A. at para. 27: "As the right to protection for the confidence, commonly referred to as legal professional privilege, is not dependent on there being litigation in progress or even in contemplation at the time the communications

9. The legal principle that insists that infringement upon privilege be kept to an absolute minimum applies wherever solicitor-client communications may be revealed to any person under authority of law. For the sake of the client's confidence, the principle must apply even when the purpose is the adjudication of a subsequently validated claim of privilege, where the communications will remain confidential as against all others.

10. Pre-disclosure adjudication of a privilege claim should not attract a lower standard of protective vigilance. The cases have consistently adopted a broad approach that recognizes virtually any incursion upon the solicitor-client relationship as an infringement which must be justified according to the test in *Descôteaux*. When called upon to adjudicate a privilege claim, even the courts do not examine the communications themselves unless it is necessary to do so, and even then, only in a manner that minimally impairs the client's continuing interest in privacy.[9]

11. In the specific context of access to information legislation, the Federal Court of Appeal has already held that compulsory production of privileged communications to the federal Information Commissioner, even for the limited purpose of the Commissioner's own internal review, is nevertheless an infringement which must be justified as absolutely necessary.[10] Although under the federal *Access to Information Act* the authority to compel such production is provided for, "notwithstanding ... any privilege under the law of evidence,"[11] the Court nevertheless determined that the exercise of that authority in

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take place, it seems to me that the right to have the communications protected must also arise at that time and be capable of being asserted on *any later occasion* when the confidence may be in jeopardy at the hands of *anyone* purporting to exercise the authority of the law." [emphasis added]; cited with approval in *Lavallee, supra,* note 7, at para. 13.

[9] See, *e.g.*, *Municipal Insurance Assn. (British Columbia) v. British Columbia (Information & Privacy Commissioner),* (1996) 143 D.L.R. (4th) 134 (B.C.S.C.) [Federation's Book, Tab 13] at para. 10: " ... I am of the view that where privilege is claimed over a document it ought not to be viewed by the Commissioner or the Court unless evidence and argument establishes a *necessity* to do so to fairly decide the issue. *I am not in favour of automatically viewing the document as that in itself weakens the sanctity of privilege."* [emphasis added] See also *Ansell Canada Inc. v. Ions World Corp*., [1998] O.J. No. 5034, 1998 CarswellOnt 4673 (Gen. Div.) [*Ansell*] [Federation's Book, Tab 3], Cullity J. at para. 20. See generally, *Société d'énergie Foster Wheeler Ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.,* [2004] 1 S.C.R. 456 [*Foster Wheeler*] [Appellant's Book, Tab 18], at para. 47; *Solosky v. Canada*, [1980] 1 S.C.R. 821 [Federation's Book, Tab 24], at para. 28.

[10] *Canada (Attorney General) v. Canada (Information Commissioner),* (2005) 253 D.L.R. (4th) 590 (F.C.A.), [*Canada (Attorney General) (2005)*] [Appellant's Book, Tab 5].

[11] *Access to Information Act*, R.S., 1985, c. A-1, [Appellant's Book, Tab 44], section 36(2): "Notwithstanding any other Act of Parliament *or any privilege under the law of evidence,* the Information

any given case would interfere with the privilege and would therefore have to be justified as absolutely necessary to accomplish the investigation.[12]

12. There is one recognized exception to the general rule that mere access to privileged communications, without a client's consent, constitutes an infringement upon privilege.[13] That is the case of the regulatory self-governing bar. A client who retains a licensed and regulated lawyer expects both that the lawyer will be required to act in accordance with the terms of license and will be held accountable by the authority of the independent licensor. Distinguishable from all other recognized exceptions, the self-governing bar, as protector of both the client and the administration of justice, has access to privileged materials as a matter of right and as an implied term of any solicitor-client retainer. Such access is a necessary extension of the solicitor's relationship with the client and remains under the protective umbrella of privilege, as contrasted to an infringement upon it. The protective envelope of privilege extended by each lawyer to every client is figuratively an envelope administered and overseen by the law society as independent regulator of the self-governing bar. Whether the protective envelope is the responsibility of the individual lawyer or the law society, the security such responsibility provides to the client, as against all the rest of the world, remains equally as effective by one as the other. In this unique context only, such access to privileged communications is granted without the necessity of adjudicating the privilege claim.

13. Certain lower court decisions have regarded law society access as a necessary infringement,[14] which is reasonable under section 8 of the *Charter*.[15] Others have held it

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Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds." [emphasis added] See also *Privacy Act*, R.S.C. 1985, c. P-21, [Appellant's Book, Tab 52], s.34(2).

[12] *Canada (Attorney General) (2005)*, *supra*, note 10, esp. at paras. 20, 24-25.

[13] *Skogstad v. Law Society (British Columbia)*, (2007) 69 B.C.L.R. (4th) 322 (C.A.) [*Skogstad*] [Federation's Book, Tab 23].

[14] *Greene v. Law Society (British Columbia),* (2005) 40 B.C.L.R. (4th) 125 (S.C.) [*Greene*] at paras. 28-53; *Stewart McKelvey Stirling Scales v. Barristers' Society (Nova Scotia)*, (2005) 236 N.S.R. (2d) 327 (S.C.) [Federation's Book, Tab 26], at para. 29; *Parry-Jones v. Law Society* (1967), [1969] 1 Ch. D. 1 (Eng. C.A.), Denning L.J. [Federation's Book, Tab 18]. But see *Law Society (Saskatchewan) v. EM & M Law Firm*, (2006) 287 Sask. R. 140 (Q.B.) [Federation's Book, Tab 10]; *B and others v. Auckland District Law Society and another*, [2004] 4 All E.R. 269 (Privy Council) [Federation's Book, Tab 4].

not to be an infringement at all, but rather an extension of the privilege umbrella to encompass not just the lawyer, but the law society as the regulator of the independent profession - the essential pre-requisite to the privilege itself.[16] It must suffice for present purposes to simply note the inherent connection between the rationale for privilege and the unique entitlement of law societies to gain access to such privileged communications. Law societies do not typically require access to privileged communications for the purpose of adjudicating a claim of privilege, the issue of privilege being irrelevant to the assessment of professional conduct. In safeguarding the professionalism on which privilege depends, the law society - alone amongst statutory entities - must have access to and substantively rely upon all evidence of the solicitor's conduct, whether privileged or not. By contrast, all other administrative entities seek the adjudication of privilege claims simply for the purpose of determining admissibility.

14. This related issue of compelled disclosure to the law society is not presently before the Court on this appeal. However, the Federation has considered it appropriate to flag the distinction, in view of its broader submission, below, that administrative tribunals in general ought not to have jurisdiction to compel production of communications claimed to be privileged.

C Minimal Impairment

15. Examination of privileged communications by a constitutionally independent court is, by dint of the rationale for privilege, almost always the most minimally intrusive option.

16. For the purpose of receiving legal advice, clients must be encouraged to have the highest expectation of privacy with regard to their confidential communications with counsel. Second guessing future intrusions because of competing societal interests does not foster either client candour or client confidence in the reliability of privilege.

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[15] *Greene, supra*, note 14.

[16] *Skogstad, supra*, note 13, at paras. 18-20. See generally, *Morgan Grenfell & Co. v. Income Tax Special Commissioner*, [2002] 3 All E.R. 1 (U.K. H.L.), [Federation's Book, Tab 12], Hoffman LJ, at para. 32.

17. Pursuant to *Descôteaux, supra,* any statute which purports to abrogate the privilege in any way is subject to the strictest rules of interpretation. If such power to abrogate privilege is found to exist, it must be exercised only when absolutely necessary.[17]

18. In *Lavallee*, this Court confirmed that inherent in the 'absolutely necessary' test is a further requirement of minimal impairment. Arbour J. summarized the application of *Descôteaux* in previous decisions, as follows:

> Minimal impairment has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege ... .[18]

19. The *Descôteaux/Lavallee* minimal impairment analysis should be no less stringently applied when the purpose for the infringement is the adjudication of a claim of privilege. In *Ontario (Ministry of Correctional Services) v. Goodis*,[19] this Court confirmed that, even when the disclosure is only to counsel for the opposing party, for the purpose of arguing the privilege claim on an undertaking of confidentiality, the absolute necessity test must still be employed. Rothstein J. concluded that, even in circumstances where confidentiality is otherwise preserved by the adjudication process, the test remains as strict as that applied in *Lavallee*: "Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case ... ."[20] Applying the absolute necessity test to the limited, adjudicative disclosure order in *Goodis*, Rothstein J. observed:

> While I cannot rule out the possibility, it is difficult to envisage circumstances where the absolute necessity test could be met if the sole purpose of disclosure is to facilitate argument by the requester's counsel on the question of whether privilege is properly claimed. Hearing from both sides of an issue is a principle to be departed from only in exceptional circumstances. However, privilege is a subject with which judges are acquainted. They are well equipped in the ordinary case to determine whether a record is subject to privilege. There is no evidence in this case that disclosure of records to counsel for the purpose of arguing whether or

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[17] *Descôteaux, supra,* note 4, at para. 27.
[18] *Lavallee, supra*, note 7, at para. 37.
[19] *Ontario (Ministry of Correctional Services) v. Goodis*, [2006] 2 S.C.R. 32 [*Goodis*] [Appellant's Book, Tab 19].
[20] *Ibid.,* at para. 20.

not they are privileged is absolutely necessary.[21]

20. How then should these evolving protective principles apply to cases in which an administrative entity seeks to compel confidential production of communications subject to a claim of privilege, in order to adjudicate the claim? There is to date a paucity of reported legal authority, and no definitive direction from this Court, on this jurisdictional issue of who adjudicates privilege. The Federation submits that such analysis must be undertaken in the same context as all other issues related to the fundamental right of privilege: minimal intrusiveness. This analysis requires strict scrutiny of the process to be followed by the administrative entity to determine whether there is in fact any need to examine privileged communications. It also requires scrutiny of the procedures and practices to be adopted by the administrative entity following adjudicative disclosure, to ensure the continuing confidentiality of communications found to be privileged. More fundamentally still, the issue raises the question of which, if any, administrative entities are demonstrably qualified to examine privileged communications in such a minimally intrusive manner. This question of relative institutional capacity - that is, which administrative entity ought to be authorized to examine communications subject to a claim of privilege for purposes of adjudicating the claim - has been central to two of this Court's most recent decisions regarding privilege.[22]

21. The Federation respectfully submits that the most minimally intrusive institutional option for any examination of privileged communications will almost always be the constitutionally independent judiciary. Only if a statute unequivocally requires an administrative entity to undertake such examination itself would *Descôteaux* permit the resulting infringement. Conversely and more simply, if a statute is capable of an interpretation that directly or implicitly provides for conventional judicial examination of the communications to adjudicate the claim, that interpretation must be favoured as less intrusive.

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[21] *Ibid.,* at para. 21.
[22] *Lavallee, supra*, note 7; *Goodis, supra*, note 19.

D Solicitor-client privilege and the independent judiciary

22. The courts' traditional jurisdiction to examine communications subject to a claim of privilege, whenever necessary to adjudicate the claim, is not in dispute. Despite the Commissioner's bold assertion that the Federal Court of Appeal has subverted the proper functioning of *PIPEDA* by "transferring to the courts" the Commissioner's authority over privilege, our superior courts are the progenitors and protectors of privilege, originally as a rule of evidence and latterly as a constitutionally protected fundamental right. Jurisdiction of the courts over privilege is original, as contrasted with administrative entities that, for sake of administrative convenience, seek to claim jurisdiction over privilege by statutory mandate.

23. The relevant distinguishing characteristics between courts and administrative entities are multitudinous, but the focus in these submissions will be on two key elements: independence and the substantive mandate to ensure the fair and effective administration of justice.

24. Privilege is not simply a client centered concept. Unlike other fundamental legal rights, privilege is not solely concerned with the protection of an individual claimant's autonomy or dignity. Rather, privilege is a systemic incentive to effective participation within the administration of justice, which enables all persons who access the legal system to seek confidential legal counsel, for the purpose of ensuring the fair and effective administration of justice. This underlying rationale for privilege has been identified since the earliest articulations of the doctrine, in *Bolton v. Corporation of Liverpool*[23] and *Greenough v. Gaskell*.[24]

25. More recently, Major J. of this Court observed in *McClure*:

> Solicitor-client privilege describes the privilege that exists between a client

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[23] *Bolton v. Corporation of Liverpool*, (1833) 1 My. & K. 88; 110 E.R. 614 [Federation's Book, Tab 5].

[24] *Greenough v. Gaskell*, (1833) 1 My. & K. 98, 110 E.R. 618 [Federation's Book, Tab 9]. See also: *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 [Federation's Book, Tab 1] at 649. Courts have also more recently recognized that the substantive right of privilege to some extent serves the client's privacy interests as well: *General Accident Assurance Co. v. Chrusz,* (1999) 180 D.L.R. (4th) 241 (Ont C.A.), [Federation's Book, Tab 7], Doherty J.A. at paras. 92-94; See also *Foster Wheeler, supra,* note 9, at para. 34.

> 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.[25]

26. Privilege is a means to ensure that, wherever possible, clients who come into contact with the law have resort to an independent and professional class of legal advisors. So understood, privilege derives from the judiciary's fundamental responsibility for and commitment to the rule of law, including the fair and effective administration of justice upon which the separation of powers and the rule of law depends. It is in this context that jurisdiction over the application of privilege becomes essential to ensuring the fair and effective administration of justice.

27. As observed by Lamer C.J. in *R v. Campbell*,[26] one of the purposes of the constitutional independence of the judiciary is to secure the rule of law.[27] The rule of law encompasses the familiar principle that state action must be authorized by and undertaken pursuant to express legal rules. More importantly for present purposes, those rules must be administered by an independent institution subject to strict separation from the influence of the political branches of government. Or, as Sir A. Denning, as he then was, observed:

> The keystone of the rule of law in England has been the independence of the judges. *It is the only respect in which we make any real separation of powers*. There is here no rigid separation between the legislative and the executive powers: because the ministers, who exercise the executive power, also direct a great deal of the legislative power of Parliament. But the judicial power is truly separate.[28]

28. In *Campbell*, Lamer C.J. explained that the principle of institutional independence, one component of the larger principle of judicial independence, was necessary to ensure that the courts can fulfill their constitutional responsibilities:

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[25] *McClure, supra*, note 2, at para. 2. [emphasis added].
[26] *R. v. Campbell*, [1997] 3 S.C.R. 3 [*Campbell*] [Appellant's Book, Tab 33].
[27] *Ibid*. at para. 10.
[28] Sir A. Denning, "The Spirit of the British Constitution", (1951) 29 *Can. Bar Rev.* 1180 [Federation's Book, Tab 6] at 1182.

> ... the institutional independence of the courts is inextricably bound up with the separation of powers, because in order to guarantee that the courts can protect the Constitution, they must be protected by a set of objective guarantees against intrusions by the executive and legislative branches of government.[29]

29. Such institutional independence engenders and preserves the necessary public confidence in the protection of the privilege. In contrast, the risk of declining client confidence, as a result of further encroachment by non-independent administrative entities, lies at the core of the Federation's intervention in this appeal.

30. Continuing client confidence in the integrity of privilege is both ethereal and fragile. Individual clients vary in their level of appreciation of the inviolability of solicitor-client privilege. While the client may lack the nuanced understanding of the constitutional separation of powers and the rule of law, he or she will nevertheless appreciate intuitively that both counsel and the court stand ready against the state in any attempted intrusion upon solicitor and client privilege. The client will be attuned to the danger of state intrusion, in particular by any administrative entity of the state that exercises compulsory authority to demand production of the most sensitive and private communications with counsel, in breach of a right that has historically been protected by an independent bar and assured by an independent judiciary.

31. Like trust, public confidence is hard earned and easily lost. Once tarnished, its luster is not readily restored. By jealously safeguarding privilege and protecting clients against the intrusive competing interests of the state, both bench and bar have, over generations, institutionally earned public confidence in the protected integrity of privilege. Despite such success, public confidence remains fragile and vulnerable to controversial intrusions, such as the administrative inspection proposed by the Commissioner. Once lost, whether by careless or careful balancing of other competing societal interests, the potential adverse repercussions to the effective administration of justice will reach far beyond the administrative entity and societal policies that gave rise to the initial encroachment. Even fair-handed and vigilant adjudication of privilege by an administrative entity that lacks the institutional credibility of the bench may erode such

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[29] *Campbell, supra*, note 26, at para. 138.

public confidence, and thereby undermine the privilege itself. In summary, the efficacy of the administration of justice itself risks corrosion, if clients lose confidence in the integrity of the private communications between lawyer and client.

32. Privilege is the product of the commitment of our courts to the effective administration of justice. It is that responsibility for the administration of justice that has imbued our courts with the institutional expertise to apply principles of privilege in their full and proper context. In *Descôteaux,* Lamer J. commented on the obligation of the court to assert privilege even where the client does not.[30] In *Andrews v. Law Society (British Columbia)*, McIntyre J. similarly observed that the Court will not permit a solicitor to disclose a client's confidence.[31] This is the sort of institutional mindset, reflecting a profound commitment to the substantive right of privilege, that instills in the client the confidence that privilege will be respected, even when it must be minimally infringed by adjudicative disclosure to the court.

33. By contrast, administrative decision-makers are statutorily responsible for the administration of particular policy ends favoured by the legislature and or executive. Their administrative discretion is exercised in the furtherance of the governmental policy purposes entrusted to them. While they are considered as part of the justice system,[32] they are not independent of the state, nor do they share the courts' fundamental responsibility for the fair and effective administration of justice, including protection of the substantive right of privilege.

34. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control &*

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[30] *Descôteaux, supra,* note 4, at para. 57.

[31] *Andrews v. Law Society (British Columbia),* [1989] 1 S.C.R. 143 [Federation's Book, Tab 2], McIntyre J. at para. 37. See also *Stevens v. Canada (Prime Minister),* (1998) 161 D.L.R. (4th) 85 (F.C.A.) [Federation's Book, Tab 25], Linden J.A. at para 28: "... [A] court, of its own motion, may raise the matter of the privilege in order to protect the sanctity of the solicitor-client relationship. ... [T]he protection of the privilege is not merely in the interest of the individual client in the particular circumstances, but it is also important to all present and future clients. The public should have the security of knowing that all communications with lawyers will be regarded as inviolate. Therefore, *it is not only in the individual client's interest to assert the privilege, it is also in the court's interest*, as long as no waiver has been given. Only in this way will the privilege facilitate the giving of advice in general." [emphasis added].

[32] *Paul v. British Columbia (Forest Appeals Commission),* [2003] 2 S.C.R. 585 [Federation's Book, Tab 19], at para. 22.

Licensing Branch)[33] McLachlin C.J. put it this way:

> Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts. Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges - both in fact and perception - by insulating them from external influence, most notably the influence of the executive ... .
>
> Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not.[34]

35. Administrative entities do not have as their central obligation the maintenance of a fair, independent and effective justice system. Such entities are not required to be separate from the executive branch to ensure the integrity of that system. They cannot claim the mantle of the independent judiciary and self-governing bar as the traditional guardians of privilege. The intrusive conduct of the Commissioner in this case under appeal highlights that lack of institutional perspective. The Commissioner's claim, that viewing privileged communications to verify privilege is not an infringement, reflects an insensitivity to the client's perspective that highlights the hazards of delegating the authority to infringe upon privilege to non-traditional protectors of the client's substantive right. The Commissioner's specific insensitivity to the importance of preserving the near absolute protection of privilege is anecdotally informative of the hazards of institutional myopia by regulators and tribunals with more narrow or zealous mandates.

36. Our courts have consistently held that administrative entities, and Information and

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[33] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch),* [2001] 2 S.C.R. 781 [*Ocean Port*] [Federation's Book, Tab 14].
[34] *Ibid*., at paras. 23-24.

Privacy Commissioners in particular, have no special expertise with regard to the fundamental right of privilege. They are entitled to no deference in their determination of privilege claims:

> ... [W]here decisions of specialized administrative bodies relate to questions of law as to fundamental rights which do not fall within the specialized expertise of the tribunal and with which the Courts deal on a regular basis, the appropriate degree of curial deference may be attenuated. ... In my view, solicitor-client privilege is such an area and the deference to be accorded to the Commissioner's decisions is attenuated. Solicitor-client privilege has been identified by the Supreme Court of Canada as a fundamental right. ... It cannot be said that defining the scope of solicitor-client privilege is a matter within the specialized expertise of the Commissioner.[35]

37. In arguing for the constraint of the statutory authority of administrative entities to compel production of privileged communications, the Federation acknowledges that such entities are not monolithic in terms of policy function and mandate, security of office, financial security, administrative independence and other elements of institutional design. Some are more qualified than others to act as guardians of privilege. However, none can claim to have as their overriding responsibility the preservation of the rule of law, and the independent, fair and effective administration of justice. None have been granted the constitutional independence necessary to secure the fairness, and perception of fairness, of the justice system. Indeed, in *Ocean Port, supra,* this Court specifically refused to extend any recognition of constitutional independence to administrative entities, preferring to preserve the bright line between the constitutional independence of the judiciary and the functional policy mandates of administrative agencies and tribunals. McLachlin C.J.C. rejected the appellant's attempt to extend to administrative tribunals the constitutional principle of judicial independence recognized in, among others, *Campbell*, *supra*:

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[35] *Ontario (Freedom of Information & Protection of Privacy Co-Ordinator, Ministry of Finance) v. Ontario (Assistant Information & Privacy Commission),* (1997) 46 Admin. L.R. (2d) 115 (Ont. Div. Ct.) [Federation's Book, Tab 16], Sharpe J. at para. 11. [references omitted]. See also: *Legal Services Society (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C. S.C.) [Federation's Book, Tab 11], Lowry J. at para. 23; *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, (2002) 220 D.L.R. (4th) 467 (Ont.C.A.) [Federation's Book, Tab 15], Carthy J.A., at para. 6.

> The preservation of this tripartite constitutional structure ... requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. *While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*[36]

38. The issue is one of qualifications and institutional ethos. Even if an enabling statute, as it may stand at any given moment, preserves the tribunal members' institutional independence from both competing policy initiatives and direct influence of the executive branch, the tribunal may yet lack the administrative independence necessary to secure privileged communications from external disclosure.

39. While clients may lack a nuanced understanding of the complex jurisprudence of administrative independence, they do understand intuitively the difference between a judge sitting as an independent judge and either a judge or other person sitting in some investigative or quasi-judicial capacity. Clients understand that tribunal members do not enjoy the tenure or independence of office granted to judges. It is not the robe or the honorific or the individual reputation that bestows societal and individual client confidence: it is the accumulation of institutional checks and balances that constitute the constitutionally independent judiciary, functioning within an independent court and charged with the near absolute duty of protecting privilege from unwarranted intrusion. Simply put, the client will not have the same assurance of protected privacy with an administrative entity, no matter how favourably its current officeholder may compare to the judicial model at any given point in time.

40. As privilege goes, so will go the effective administration of justice. To preserve client confidence on which the right to independent counsel depends, incursions upon privilege by emanations of the state must be kept to an absolute minimum. From the client's perspective, compelled disclosure to an administrative entity will be qualitatively more intrusive than the necessary exception to the substantive right of privilege which

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[36] *Ocean Port, supra*, note 33, at para. 32 [emphasis added].

permits a constitutionally independent court to adjudicate a claim of privilege.

41. In *Lavallee*, this Court broadly proclaimed that "all information protected by the solicitor-client privilege is out of reach for the state."[37] Administrative entities simply cannot provide that assurance.

E Jurisprudence on tribunal examination of privileged communications

42. The caselaw on this issue is surprisingly underdeveloped, other than in the distinctive context of regulatory bar investigations discussed earlier. Certain lower courts have found that an adjudicative tribunal may be able to compel production of communications subject to a claim of privilege for purposes of adjudicating the claim. In *Ontario (Human Rights Commission) v. Dofasco Inc.*,[38] the Ontario Court of Appeal determined that, while a Human Rights Board of Inquiry could not make a blanket order for production of all relevant documents to the respondent employer, it could order a process involving an affidavit of documents, which would allow the complainant to claim privilege over certain documents. The employer would then be entitled to challenge the basis for the privilege claim and the Board could, if necessary, examine the documents to adjudicate the claim.[39] There appeared to be no argument advanced against such authority and Morden J.A. did not consider whether there was a more minimally intrusive option.

43. In *Lyons v Toronto Computer Leasing Inquiry Commissioner*,[40] a solicitor had worked as a lobbyist for certain clients in regard to specific municipal purchases which later became the subject of the inquiry. The Commissioner obtained sealed boxes of documents relating to the solicitor's lobbying activities. The solicitor objected to disclosure, claiming privilege. The Commissioner issued an Order requiring the unsealing of the boxes and an initial confidential review of the documents by Commission counsel. The Order further provided that determinations of privilege were to be made by agreement between Commission counsel and the solicitor, and failing

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[37] *Lavallee, supra*, note 7, at para. 24.
[38] *Ontario (Human Rights Commission) v. Dofasco Inc.*, (2001), 57 O.R. (3d) 693 (C.A.) [*Dofasco*] [Federation's Book, Tab 17].
[39] *Ibid.*, at para. 57.
[40] *Lyons v Toronto Computer Leasing Inquiry Commissioner*, (2004) 70 O.R. (3d) 39 (Div. Ct.) [*Lyons*] [Appellant's Book, Tab 23].

agreement by reference to a sitting judge of the Ontario Superior Court. Swinton J. remarked that by law, the Commissioner must be a judge of the Superior Court,[41] and went on to observe:

> Both in criminal and civil proceedings, a judge has the authority to determine whether a document is privileged and, therefore, inadmissible. For example, the statutory provision struck down in *Lavallee, supra*, would have permitted judicial scrutiny of the documents to determine privilege, and the common law procedure for law office searches set out by Arbour J. also envisaged a role for the judge in determining privilege. This would, of necessity, require the judge to look at the documents. Similarly, R. 30.10(3) of the Rules of Civil Procedure permits a judge or master to determine questions of privilege and, in doing so, to examine the documents if he or she finds it appropriate to do so (*Ansell, supra*, at para. 20). *In my view, if a judge may inspect potentially privileged documents in the civil litigation context, a judge sitting as a Commissioner in the context of an inquiry under the Municipal Act, 2001 is also able to do so*.[42]

44. The Federation respectfully takes issue with this conclusion, which does not appear to have been fully argued before the Court. There is a superficial appeal to the reasoning, in that it recognizes the inherent expertise and general capacity of a judge to review privileged communications with minimal infringement. However, while a judge by title carries both the substantive expertise and normative commitment to the rule of law necessary to uphold the client's confidence, a judge sitting as commissioner of inquiry lacks the independence from the state that is unique to the courts. A commissioner of inquiry is subject to the inquisitorial or investigative (i.e., non-judicial) mandate assigned by the appointing authority, and has no greater legal claim to administrative independence than any other statutory tribunal. The mandate, terms of reference, rules of procedure and other characteristics of the Inquiry are subject to change at the instance of the appointing authority. *Ocean Port, supra,* confirms that there is no constitutional principle of independence governing the appointment and conduct of a Commission of Inquiry, or any other administrative tribunal or agency, other than to some extent in quasi-criminal matters where section 7 of the *Charter* may be engaged. Thus, a key element of the courts' distinctive capacity to minimize the infringement of privilege - that being the court's immutable independence from the state, as a matter of

[41] *Ibid*., at para. 36.
[42] *Ibid.,* at para. 37.

constitutional law - is necessarily missing when judges are drafted to serve on administrative entities.

F Conclusions

45. The Federation seeks to preserve and bolster the law's current commitment to the sanctity of the solicitor-client relationship. Consistent with recent pronouncements from this Court, the Federation advocates a restrictive approach to the infringement of privilege at the instance of any statutory administrative entity. As the parameters of privilege continue to evolve through advocacy, the final argument may well be the assertion that, pursuant to section 8 of the *Charter*, administrative entities other than the regulatory arm of the independent bar must, in all cases, be required to refer compulsory production of privileged communications to a constitutionally independent court, if that option is available. That constitutional argument is not raised by this appeal and accordingly, the Federation takes no position at this time.

46. The administrative jurisdiction to compel production of communications subject to a claim of privilege must be considered as distinct from the power to decide such claims. This appeal deals with the former, not the latter. Any statute purporting to authorize the compulsory production of communications claimed to be privileged must be subject to the common law and constitutional rules protecting privilege, and especially that of minimal impairment. Production to a court, subject to a constitutional guarantee of independence and guided in all respects by a fundamental commitment to the preservation of privilege as an essential component of the effective administration of justice, will be appreciated and understood by a client as a lesser infringement than production to an investigative or adjudicative arm of the executive branch. Consequently, a court's examination of the communications, if necessary at all for the adjudication of the claim, will almost always be the least intrusive alternative.

47. The Commissioner's response is to assert that, despite her overlapping investigatory and advocacy roles, and the various statutory exceptions to confidentiality under *PIPEDA*, her office is an impartial and expert adjudicator on issues of privilege, and to

that extent equivalent to a court.[43] That submission, as well as the Commissioner's position that compulsory production is not an infringement of privilege at all, highlights the hazards of entrusting the adjudication of privilege to those who are not institutionally sensitized to its critical role in the administration of justice. The Commissioner's propensity to consider the effective preservation of privilege as an obstacle to her statutory mandate is troublesome, as are her assurances of confidentiality, notwithstanding statutory exceptions to the contrary.

48. Within the administration of justice system in Canada, it is unchallenged that the client remains reasonably assured that confidences will remain private within the independent legal profession, to be disclosed only if necessary on a confidential basis to the independent judiciary. In the eyes of the client, any statutory authority that compels production *outside* these independent institutions, to an administrative entity which is effectively an emanation of the executive branch, must represent an erosion of confidence and therefore a tangible threat to the effective administration of justice. No client can retain the traditional confidence in her communications with counsel, knowing that they may be subject to production to an administrative decision-maker who lacks the permanence of office, financial security, and constitutionally-guaranteed freedom from political influence and legislative interference as does a court.

49. This submission of the Federation is not an absolute argument that administrative tribunals lack all such judicial safeguards, nor that independent judges are independent in some perfect, impermeable sense. The point is more limited: that the courts are, and are perceived to be, independent in a qualitative manner and to an extent that administrative entities are not. Clients understand and appreciate the difference.

50. It may be argued that quasi-judicial tribunals, as distinct from an investigative agency like the Commissioner, ought to be assessed more charitably. It may be argued that to require a quasi-judicial body to apply to the court would unreasonably interfere with the efficiency of the tribunal process. The jurisprudence is clear, however, that only the most critical of competing interests can serve as appropriate justifications for intrusion

[43] Factum of the Appellant, paragraphs 28, 29, 33-37, 61.

upon the fundamental right of privilege.[44] Administrative convenience cannot be counted among such compelling interests.

51. Moreover, any test that would permit adjudicative tribunals with a certain standard of legal expertise, statutory independence and legislatively binding confidentiality procedures to compel production of privileged communications would nevertheless remain problematic. Such a mid-ground compromise would require the sort of case-by-case balancing or exceptionalism that this Court has held should be avoided with regard to issues of privilege.[45] The predictable result would be indistinct and uncertain jurisprudence beyond the substantive understanding of clients in general, a consequence which would beget further loss of public confidence in the near absolute protection of privilege which the law currently affords. Where privilege is at stake, bright lines are distinctly preferable.

PART IV & PART V

52. The Federation does not seek costs, and asks that it not be liable for costs of any other party.

53. The Federation requests permission to present oral argument, not to exceed fifteen minutes, at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 10th day of January, 2008.

_____	_____
Bruce T. MacIntosh	**Angus Gibbon**

Counsel for the Intervener,
The Federation of Law Societies of Canada

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[44] *Smith v Jones, supra*, note 3; *McClure, supra*, note 2.

[45] *Smith v. Jones, supra*, note 3, Cory J., at para 51: "However, 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."

PART VI - TABLE OF AUTHORITIES

Cases & Commentary

1. *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 [cited at para. 24]

2. *Andrews v. Law Society (British Columbia),* [1989] 1 S.C.R. 143 [cited at para. 32]

3. *Ansell Canada Inc. v. Ions World Corp*., [1998] O.J. No. 5034, 1998 CarswellOnt 4673 (Gen. Div.) [cited at paras. 10, 43]

4. *B and others v. Auckland District Law Society and another*, [2004] 4 All E.R. 269 (Privy Council) [cited at para. 13]

5. *Bolton v. Corporation of Liverpool*, (1833) 1 My. & K. 88; 110 E.R. 614 [cited at para. 24]

6. *Canada (Attorney General) v. Canada (Information Commissioner)*, (2005) 253 D.L.R. (4th) 590 (F.C.A.) [cited at para. 11]

7. Denning, Sir A., “The Spirit of the British Constitution”, (1951) 29 *Can. Bar Rev*. 1180 [cited at para. 27]

8. *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 [cited at paras. 4, 5, 8, 10, 17, 18, 19, 21, 32]

9. *General Accident Assurance Co. v. Chrusz*, (1999) 180 D.L.R. (4th) 241 (Ont C.A.) [cited at para. 24]

10. *Greene v. Law Society (British Columbia),* (2005) 40 B.C.L.R. (4th) 125 (S.C.) [cited at para. 13]

11. *Greenough v. Gaskell*, (1833) 1 My. & K. 98, 110 E.R. 618 [cited at para. 24]

12. *Law Society (Saskatchewan) v. EM & M Law Firm*, (2006) 287 Sask. R. 140 (Q.B.) [cited at para. 13]

13. *Legal Services Society (British Columbia) v. British Columbia (Information & Privacy Commissioner)*, (1996) 140 D.L.R. (4th) 372 (B.C. S.C.) [cited at para. 36]

14. *Lyons v Toronto Computer Leasing Inquiry Commissioner*, (2004) 70 O.R. (3d) 39 (Div. Ct.) [cited at paras. 43, 44]

15. *Morgan Grenfell & Co. v. Income Tax Special Commissioner*, [2002] 3 All

E.R. 1 (U.K. H.L.) [cited at para. 13]

16. *Municipal Insurance Assn. (British Columbia) v. British Columbia (Information & Privacy Commissioner)*, (1996) 143 D.L.R. (4th) 134 (B.C.S.C.) [cited at para. 10]

17. *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781 [cited at paras. 34, 37, 44]

18. *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, (2002) 220 D.L.R. (4th) 467 (Ont.C.A.) [cited at para. 36]

19. *Ontario (Freedom of Information & Protection of Privacy Co-Ordinator, Ministry of Finance) v. Ontario (Assistant Information & Privacy Commission)*, (1997) 46 Admin. L.R. (2d) 115 (Ont. Div. Ct.) [cited at para. 36]

20. *Ontario (Human Rights Commission) v. Dofasco Inc*., (2001) 57 O.R. (3d) 693 (C.A.) [cited at para. 42]

21. *Ontario (Ministry of Correctional Services) v. Goodis*, [2006] 2 S.C.R. 32 [cited at paras. 19, 20]

22. *Parry-Jones v. Law Society* (1967), [1969] 1 Ch. D. 1 (Eng. C.A.) [cited at para. 13]

23. *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 [cited at para. 33]

24. *R. v Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209 [cited at paras. 5, 8, 18, 19, 20, 41, 43]

25. *R. v. Brown*, [2002] 2 S.C.R. 185 [cited at para. 5]

26. *R. v. Campbell*, [1997] 3 S.C.R. 3 [cited at paras. 27, 28, 37]

27. *R. v. McClure*, [2001] 1 S.C.R. 445 [cited at paras. 3, 5, 25, 50]

28. *Shell Canada Ltd. v. Canada (Director of Investigation & Research)* (1975), 22 C.C.C. (2d) 70 (Fed. C.A.) [cited at para. 8]

29. *Skogstad v. Law Society (British Columbia),* (2007) 69 B.C.L.R. (4th) 322 (C.A.) [cited at paras. 12, 13]

30. *Smith v. Jones*, [1999] 1 S.C.R. 455 [cited at paras. 3, 5, 50, 51]

31. *Société d'énergie Foster Wheeler Ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.,* [2004] 1 S.C.R. 456 [cited at paras. 10, 24]

32. *Solosky v. Canada*, [1980] 1 S.C.R. 821 [cited at para. 10]

33. *Stevens v. Canada (Prime Minister*), (1998) 161 D.L.R. (4th) 85 (F.C.A.) [cited at para. 32]

34. *Stewart McKelvey Stirling Scales v. Barristers' Society (Nova Scotia)*, (2005) 236 N.S.R. (2d) 327 (S.C.) [cited at para. 13]

Statutes

35. *Access to Information Act*, R.S.C., 1985, c. A-1 [cited at para. 11]

36. *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 [cited at paras. 1, 6, 7, 22, 47]

37. *Privacy Act*, R.S.C. 1985, c. P-21 [cited at para. 11]

PART VI - PROVISIONS DIRECTLY AT ISSUE

***Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5, as amended**

...

Powers of Commissioner

12(1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may

(a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and 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;

...

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

...

***Protection des renseignements personnels et les documents électroniques, Loi sur la*, L.C. 2000, ch. 5, telle que modifiée**

...

12 (1) Le commissaire procède à l'examen de toute plainte et, à cette fin, a le pouvoir :

a) d'assigner et de contraindre des témoins à comparaître devant lui, à déposer verbalement ou par écrit sous la foi du serment et à produire les documents ou pièces qu'il juge nécessaires pour examiner la plainte dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives;

...

c) de recevoir les éléments de preuve ou les renseignements -- fournis notamment par déclaration verbale ou écrite sous serment -- qu'il estime indiqués, indépendamment de leur admissibilité devant les tribunaux;

...