

financial services litigation bulletin

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Court Rejects Charter Challenge to Financial Institution's Fraud Investigation Under PIPEDA

Summary: The Ontario Superior Court recently dismissed an application which claimed that a bank had violated the applicant's rights under section 8 of the Canadian Charter of Rights and Freedoms ("Charter")¹. The bank had conducted a mortgage fraud investigation pursuant to provisions in the Personal Information Protection and Electronic Documents Act ("PIPEDA")².

Facts: In its fraud investigation, the financial institution relied on certain sections of PIPEDA to obtain information on the alleged mortgage fraudsters. The fraudsters included a lawyer and several other individuals, some of whom were clients of the lawyer. Once the mortgage fraud scheme was suspected, and it was determined that the lawyer was involved, the financial institution relied on PIPEDA to obtain access to the lawyer's trust account which was held at another financial institution. Once the fraud was confirmed, the financial institution successfully brought a motion for an injunction to protect its private interests, and brought a civil action to recover its loss as a result of the fraud.

Subsequently, the fraudsters brought an application arguing that the financial institution violated their Charter rights by over-stepping its investigative authority. The fraudsters argued that the PIPEDA provisions that the bank relied on to gain access to the lawyer's trust account violated s.8 of the Charter which protects individuals against unreasonable search and seizure by a public or governmental authority. The fraudsters argued that the bank should be prohibited from using any of the information it obtained as a result of the unreasonable search and seizure of records from the trust account. The fraudsters also argued that the financial institution had no right to the information in the lawyer's trust account as it was protected by solicitor and client privilege.

Privilege Issue: The court held that there was no privilege over the information in the trust account because the trust account information included deposits and withdrawals, not communications between counsel and client, therefore no

¹ See *Royal Bank of Canada v. Welton et al* (2008), 89 O.R. (3d) 532 (S.C.J.).

² S.C. 2000, c.5, s.7(3).

privilege existed, and the information was not protected. Furthermore, the court held that solicitor and client privilege will not apply to communications where a lawyer knowingly participates in a fraudulent scheme.

PIPEDA and Charter Issue: PIPEDA permits disclosure of personal information, by an organization to an “investigative body”, where there are *“reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed.”*

PIPEDA also permits the investigative body to disclose such information, provided that *“the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.”*

The financial institution argued that it had legal authority to conduct its investigation into the mortgage scheme and obtain documents from the lawyer’s trust account because The Bank Crime Prevention and Investigation Office of the Canadian Bankers Association is an authorized “investigative body” under PIPEDA. The financial institution also argued that the Charter was not applicable to this situation as a bank is not a public or governmental authority.

The fraudsters disagreed and argued that their Charter rights were applicable because the Charter applies to legislation enacted by Parliament, including PIPEDA, and that the Charter applies to the bank as it was engaging in an “inherently governmental ‘law enforcement’ function of searching and seizing records.” The fraudsters argued that their s. 8 rights were violated because they enjoyed an expectation of privacy with respect to the information in the trust account.

The court found that the simple fact that PIPEDA applies to a financial institution in restricting and regulating its freedom does not mean that a bank, in complying with the dictates of PIPEDA, is transformed into performing an inherently governmental function. The bank was performing a private investigation, followed by pursuing an injunction to protect its private interests, and brought a civil action to recover its loss as a result of the fraud. The mere fact that the fraudsters were engaged in conduct that may constitute a criminal offence did not transform the bank into an arm of the state. The court therefore held that section 8 of the Charter did not apply in this situation and dismissed the application.

Written by Erin Cowling

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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