

## THE SUPREME COURT BROADENS THE SCOPE OF SOLICITOR-CLIENT PRIVILEGE UNDER THE *INCOME TAX ACT*

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### A. INTRODUCTION

On June 3, 2016, the Supreme Court of Canada (“SCC”) rendered its judgments in the companion appeals [\*Canada \(Attorney General\) v Chambre des notaires du Québec\*](#)<sup>1</sup> (“*Chambre des notaires*”) and [\*Canada \(National Revenue\) v Thompson\*](#)<sup>2</sup> (“*Thompson*”). The appeal in *Chambre des notaires* was heard on October 3, 2015 and the appeal in *Thompson* was heard on December 4, 2014. Both appeals focused on the *Income Tax Act*’s (“ITA”) <sup>3</sup> “requirement scheme” and the ITA’s definition of “solicitor-client privilege.” Together these judgments will likely have an impact on how all taxpayers, including registered charities, other qualified donees, and non-profit organizations (“NPOs”), deal with Canada Revenue Agency’s (“CRA”) officials during audits and throughout the more formal tax dispute process.

### B. THE ITA’S REQUIREMENT SCHEME BEFORE *CHAMBRE DES NOTAIRES* AND *THOMPSON*

The ITA’s requirement scheme is rooted in subsection 231.2(1), which gives the Minister of Revenue (“Minister”) broad authority to “require that any person provide...any information...or...any document” to the Minister “for any purpose related to the administration or enforcement of” the ITA, or certain international agreements and tax treaties. Requirements are typically issued by the Minister when a

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<sup>1</sup> *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20.

<sup>2</sup> *Canada (National Revenue) v Thompson*, 2016 SCC 21.

<sup>3</sup> *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

taxpayer or third party refuses or is unable to provide information that the Minister needs in order to administer or enforce the ITA. Additional sections of the ITA set out what the Minister can do if a taxpayer or third party fails to comply with a section 231.2 requirement, but carves out an exception where the information sought by the Minister is protected by solicitor-client privilege.

In particular, section 231.7 precludes a judge from issuing a compliance order where the information sought under a requirement is protected by solicitor-client privilege. Section 232 further compels the courts to acquit a lawyer who fails to comply with a requirement if the lawyer satisfies the court that the lawyer had reasonable grounds to believe “that a client of the lawyer had a solicitor-client privilege in respect of the information” and communicated this to the Minister. For the purposes of analysis under the ITA, the ITA limits the protection of solicitor-client privilege, insofar as lawyers’ accounting records are exempted from this privilege. The ITA’s restrictive definition of solicitor-client privilege in this context is contained in subsection 232(1) of the ITA and refers to:

the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person’s lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication. [emphasis added]

### C. THE SCC’S REVIEW OF THE ITA’S REQUIREMENT SCHEME

Although each appeal arose from different fact scenarios, at issue in both was the exclusionary aspect of the ITA’s solicitor-client privilege definition (underlined above), i.e. that a lawyer’s accounting records are deemed not to be privileged communications for the purposes of the ITA. The appeal in *Chambre des notaires* focused on whether, among other things, this definition of, and the exclusionary ‘carve out’ of lawyers’ accounting records in particular, infringes section 8 of the [Canadian Charter of Rights and Freedoms](#) (“Charter”), which guarantees that “[e]veryone has the right to be secure against unreasonable

search or seizure.”<sup>4</sup> *Thompson*, on the other hand, focused primarily on the statutory interpretation “of the purported exclusion of lawyers’ accounting records from the protection of ‘solicitor-client privilege.’”<sup>5</sup>

## 1. *Chambre des notaires*

The main conflict in this case was between the Attorney General of Canada and CRA (“Appellants”) and the *Chambre des notaires du Québec* and *Barreau du Québec* (“Respondents”) over whether CRA was entitled to rely on section 231.2 to issue requirements to notaries in order “to obtain information or documents relating to clients of the notaries for tax collection or audit purposes.”<sup>6</sup> The Respondents, who represent the interests of notaries and lawyers in Québec, initiated a court action against CRA, in part, because they were concerned that the ITA’s requirement scheme was unconstitutional and “did not include adequate protection for professional secrecy.”<sup>7</sup> By the time the case made its way to the SCC the Advocates’ Society, Canadian Bar Association, Federation of Law Societies of Canada, and the Criminal Lawyers’ Association had joined the proceeding as interveners to represent the interests of legal professionals across the country.

After reviewing the arguments of the appellants, respondents, and interveners, the SCC ultimately held subsection 231.2(1) and section 231.7 of the ITA “to be unconstitutional, and inapplicable to notaries and lawyers in their capacity as legal advisers.”<sup>8</sup> The SCC further held that the exclusionary aspect of the solicitor-client privilege definition was “unconstitutional and invalid.”<sup>9</sup> Therefore, until an amendment is made to the ITA that can withstand the scrutiny of a *Charter* challenge, taxpayers can now assert privilege over a potentially broader range of documents and information than they previously could, so long as a court can be convinced that solicitor-client privilege has been properly asserted over that information.

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<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 8.

<sup>5</sup> *Thompson* at para 15.

<sup>6</sup> *Chambre des notaires* at para 13.

<sup>7</sup> *Chambre des notaires* at para 14.

<sup>8</sup> *Chambre des notaires* at para 93.

<sup>9</sup> *Chambre des notaires* at para 94.

## 2. *Thompson*

In this case, the taxpayer, Thompson was a lawyer whose own accounting records had been the subject of a section 231.2 requirement in the context of enforcement action taken by CRA. Thompson provided some information to CRA, but “claimed that further details with respect to his accounts receivable, such as the names of his clients, were protected by solicitor-client privilege and were therefore exempt from disclosure.”<sup>10</sup> The Minister sought a compliance order for the information in accordance with section 231.7 of the ITA and Thompson again asserted solicitor-client privilege over the information. The parties had mixed success at the Federal Court and Federal Court of Appeal, and the SCC granted the Minister’s request for leave to appeal on March 13, 2014.<sup>11</sup> The Federation of Law Societies of Canada, Canadian Bar Association, and Criminal Lawyers’ Association also intervened in this case.

After reviewing the parties’ arguments regarding the statutory interpretation of solicitor-client privilege in subsection 232(1), the SCC found that “the only interpretation of the definition...that takes account of the history of the provision and the purpose of the broader scheme into which it is incorporated is that the provision is intended to permit the Minister to have access to lawyers’ accounting records even if they contain otherwise privileged information.”<sup>12</sup> The judgment in *Thompson* builds on *Chambre des notaires* and clarifies that a lawyer’s accounting records cannot be the subject of a section 231.2 requirement “unless a court first determines whether solicitor-client privilege actually applies” to the records.<sup>13</sup>

## D. CONCLUDING COMMENTS

Given the results of the judgements in *Chambre des notaires* and *Thompson*, registered charities and NPOs should familiarize themselves with what communications, information, and other documents could be subject to solicitor-client privilege and ensure that proper procedures are in place so that this critical privilege is not inadvertently given up (e.g. by inadvertently providing that information to third parties, in some situations). How solicitor-client privilege is created in each scenario, asserted, and preserved has a

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<sup>10</sup> *Thompson* at para 10.

<sup>11</sup> *Minister of National Revenue v Duncan Thompson*, 2013 FCA 197, leave to appeal to SCC granted, 35590 (March 13, 2014).

<sup>12</sup> *Thompson* at para 34.

<sup>13</sup> *Thompson* at para 41.

myriad of complexities and nuances that require education and consistency in practice within each NPO and particularly for registered charities.

For now, the exemption for the Minister to access information otherwise protected by solicitor-client privilege under the ITA because the information may be interpreted as belonging to lawyers' accounting records has been struck down, so for the time being organizations can rely on the traditional (yet subtle and complex in maintaining) protections of solicitor-client privilege. That being said, as contemplated in the judgments discussed, amendments to the ITA may be introduced that again attempt to place limits on solicitor-client privilege in the context of CRA's authority to enforce and administer the ITA. As such, careful watch needs to be kept out for this and proactive legal advice sought.



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