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In this article, Bruce Russell from McInnes Cooper discusses two recent Supreme Court of Canada decisions that strengthened the legal protection of solicitor-client privilege in relation to Canada Revenue Agency's audit and tax collection powers when it decided the federal Income Tax Act's "requirement" scheme is unconstitutional.

## McInnes Cooper

### Supreme Court of Canada Decides Income Tax Act Sections are Unconstitutional – and Strengthens Solicitor-Client Privilege in Canada (Attorney General) v. Chambre des notaires du Québec & Canada (National Revenue) v. Thompson

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By [Bruce Russell](#), at McInnes Cooper

On June 3, 2016, the Supreme Court of Canada, in two related decisions, strengthened the legal protection of solicitor-client privilege in relation to Canada Revenue Agency's (CRA) audit and tax collection powers when it decided the federal *Income Tax Act's* "requirement" scheme is unconstitutional insofar as it applies to lawyers and notaries, and the lawyers' accounting records exception in the Act's definition of "solicitor-client privilege" is completely unconstitutional.

Broadly, solicitor-client privilege is the fundamental right of every person that his, her or its confidential communications with counsel for the purpose of obtaining legal advice be exempt from disclosure. The Supreme Court of Canada's decisions in these two cases strengthens the legal protection of solicitor-client privilege in relation to Canada Revenue Agency's (CRA) audit and tax collection powers by:

- Continuing to support and uphold the primacy of solicitor-client privilege, including in the context of protecting privileged information and documentation from release to CRA.
- Expanding the scope of protected documentation to include lawyers' so-called "accounting records" pertaining to their clients, including client names.
- Confirming the privilege is for the client to waive, should she (or it) so choose – but noting that the privilege only applies to documentation and information generated or communicated in the confidential seeking or obtaining of legal advice.

Based on these decisions, Quebec notaries and lawyers across Canada ought no longer respond to CRA-issued requirements seeking information respecting their clients. And, no one – notary, lawyer or client taxpayer – will be required to produce any notaries and lawyers' "accounting record[s]".

**Requirements Sections Unconstitutional.** In *Canada (Attorney General) v. Chambre des notaires du Québec*, the CRA issued to various Quebec notaries (who give legal advice) "requirements" under section 231.2 of the federal *Income Tax Act* for the purpose of obtaining information and or documents pertaining to their clients for CRA's tax collection or audit purposes. The Chambre des notaires brought a legal action against CRA asserting the provisions of the Act allowing CRA to issue requirements are unconstitutional and invalid on the basis they breach solicitor-client privilege, and thus an unreasonable seizure in breach of section 8 of the *Canadian Charter of Rights and Freedoms*. These include: section 231.2(1) authorizing CRA to send a notice to any person requiring her to provide information or documentation concerning a taxpayer within a set time period, but without notifying that taxpayer; section 231.7 permitting CRA to go before a judge for enforcement of an issued requirement to which the recipient had not responded; and the portion of the section 232(1) exempting from the definition of "solicitor-client privilege", for purposes of issued requirements, "an accounting record of a lawyer [which term includes Quebec notaries], including any voucher or cheque". The SCC agreed the Act's "requirement" scheme is unconstitutional insofar as it applies to lawyers and notaries because it's an unreasonable seizure in breach of

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section 8 of the *Charter*, and the lawyers' accounting records exception in the Act's "solicitor-client privilege" definition is wholly unconstitutional.

**Presumptive Privilege.** In *Canada (National Revenue) v. Thompson*, CRA issued the taxpayer (a lawyer) a requirement under section 231.2(1) of the Act requesting documents pertaining to his personal finances and his current accounts receivable listing. The taxpayer responded by claiming solicitor-client privilege over details of his accounts receivable, such as client names. The Supreme Court of Canada applied its decision in *Chambre des notaires*, deciding because the lawyers' accounting records exception to the s. 232(1) definition of "solicitor-client privilege" is unconstitutional, the taxpayer had no obligation to disclose the withheld client documentation. The Court further stated that information in those documents is "presumptively privileged" and could only be disclosed if a court first determined solicitor-client privilege did not apply. And because, pursuant to *Chambre des notaires*, the Act's entire "requirement" scheme was unconstitutional against taxpayers acting in their capacity as lawyers, as in this case, there was no need to refer this case back to the Federal Court to determine the actual nature of the client-related documentation the taxpayer had withheld.

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