

**Date: 20080424**

**Docket: A-257-07**

**Citation: 2008 FCA 156**

**CORAM: NOËL J.A.  
NADON J.A.  
RYER J.A.**

**BETWEEN:**

**LAW SOCIETY OF BRITISH COLUMBIA**

**Appellant  
(Intervener)**

**and**

**S. BRUCE CORNFIELD**

**Appellant  
(Respondent)**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent  
(Applicant)**

Heard at Vancouver, British Columbia, on April 24, 2008.

Judgment delivered from the Bench at Vancouver, British Columbia, on April 24, 2008.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**NOËL J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on April 24, 2008)**

**NOËL J.A.**

[1] This is an appeal by the Law Society of British Columbia (the “Law Society”) from a decision of Snider J. (the “applications judge”) of the Federal Court, whereby a Compliance Order was issued under section 289.1 of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the “ETA”), requiring

that Mr. Cornfield, a lawyer, produce certain documents relating to a client, to the Minister of National Revenue (the “MNR”). The decision to order compliance is based on the applications judge’s finding that none of the documents sought to be produced are protected by the solicitor-client privilege. The applications judge also indicated in the course of her reasons that the procedure in place for requiring the production of documents when privilege is validly claimed adequately safeguards the sanctity of solicitor-client privilege.

[2] The Law Society does not challenge the conclusion that the documents in issue are not covered by the privilege or that the Compliance Order should issue but submits that the applications judge erred in finding that the procedure in place for obtaining a Compliance Order (see *Minister of National Revenue v. Norris*, [2002] 3 C.T.C. 346), when lawyers are the holders of the documents sought to be produced, provides adequate safeguards for the protection of the solicitor-client privilege.

[3] The Law Society’s standing to bring this appeal is based on its intervener status granted by Gauthier J. on December 20, 2006, in the application for a Compliance Order before the Federal Court. Gauthier J’s order provided that that the Law Society had the right to make representations in respect of all issues concerning solicitor-client privilege raised in the application, including the procedures which a court should follow in considering an order for production of documents in possession of a lawyer and the protection of solicitor-client privilege in the face of a demand for production of documents. She further granted the Law Society the right to appeal in respect of any of these issues.

[4] Counsel for the respondent raises a preliminary objection to the hearing and disposition of the question raised by the Law Society in this appeal. Counsel submits that the only matter that can be appealed is the order given by the applications judge. As the Law Society does not take issue with the issuance of that order, or the reasoning of the applications judge for issuing it, there is nothing to appeal.

[5] The only issue in the proceedings below was whether a Compliance Order should be issued. This turned on whether the documents sought – documents relating to a conveyance of property such as cheques from a solicitor’s account and statements of adjustments – were covered by a solicitor-client privilege. Relying on a consistent body of case law (*In the Matter of the Legal Profession Act and Martin K. Wirick*, 2005 BCSC 1821, 51 B.C.L.R. (4<sup>TH</sup>) 193, [2005] B.C.J. No. 2878 (B.C. Sup. Ct.) (QL); *Minister of National Revenue v. Vlug*, 2006 FC 86, 2006 D.T.C. 6285, [2006] F.C.J. No. 142 (F.C.) (QL); *Canada (Minister of National Revenue) v. Reddy*, 2006 FC 277, 146 A.C.W.S. (3d) 568, [2006] F.C.J. No. 348 (F.C.) (QL); *Canada (Minister of National Revenue) v. Singh Lyn Ragonetti Bindal LLP*, 2005 FC 1538, [2006] 1 C.T.C. 113, [2005] F.C.J. No. 1907 (F.C.) (QL)), the applications judge held that they were not. Given this conclusion, the applications judge went on to issue the Compliance Order.

[6] Despite this finding, the applications judge addressed the concern raised by the Law Society (Reasons, para. 28):

The Law Society raises the problem that sometimes these types of documents may contain notations or other information that may be privileged. This is not the case with the Information and Documents that are the subject of this application; the Law Society does not assert that the documents at issue in this application are annotated. . . . However, I

acknowledge that this situation could arise in a future case. The simple response to this concern is that a financial or accounting record that contains privileged information in the form of a notation is not a document that satisfies the definition of non-privileged information or documents. A Compliance Order may only be issued if the information or document is not protected from disclosure by solicitor-client privilege, either pursuant to s. 289.1 of the *Excise Tax Act* or under principles of common law. If such circumstances were to arise, the statute and the Federal Court procedures for obtaining a Compliance Order would, in my view, suffice to provide the important protection for privileged documents and information.

[My emphasis]

[7] As can be seen, the opinion expressed in this last passage, with which the Law Society takes issue, was not necessary for the disposition of the application and, as noted earlier, the Law Society does not take issue with the order itself or the reasons given for issuing it.

[8] The Law Society nonetheless argues that the order of Gauthier J. authorized the applications judge to rule on the adequacy of the procedure, and that the right of appeal which she granted must be read as extending to this question.

[9] With respect, we do not read the order of Gauthier J. as having this effect. Gauthier J. did not have the authority to refer the procedural question raised by the Law Society for determination, and did not purport to do so. She authorized the Law Society's intervention on the basis that it could be of assistance to the applications judge in disposing of the issue whether the documents in issue were privileged and whether a Compliance Order should be issued (See Rule 109 of the *Federal Courts Rules*).

[10] We therefore conclude that the appeal by the Law Society should not have been brought.

The appeal will be accordingly dismissed. Costs will be awarded to the respondent.

"Marc Noël"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-257-07

**STYLE OF CAUSE:** LAW SOCIETY OF BRITISH COLUMBIA ET AL. v. MNR

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** April 24, 2008

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NADON J.A.  
RYER J.A.

**DELIVERED FROM THE BENCH BY:** NOËL J.A.

**APPEARANCES:**

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(INTERVENER)

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(RESPONDENT)

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(APPLICANT)

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