Federal Court of Appeal  Cour d'appel fédérale

Date: 20130829

Docket: A-515-12

Citation: 2013 FCA 197

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

DUNCAN THOMPSON

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Calgary, Alberta, on June 12, 2013.

Judgment delivered at Ottawa, Ontario, on August 29, 2013.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This appeal calls upon this Court to consider the solicitor-client privilege (or privilege) asserted by a lawyer who is the subject of enforcement proceedings pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] Mr. Thompson (or the appellant) has raised the shield of solicitor-client privilege to protect basic information regarding his accounts receivable, arguing that his clients' names and amounts owing are protected and out of the Minister of National Revenue's reach (Minister or respondent).

Background and Context

[3] More specifically, this appeal is from an Order of the Federal Court (T-1180-12) wherein Russell J. (the Judge) allowed the application of the Minister for a compliance order under subsection 231.7(1) of the Act.

[4] The Judge found that the appellant did not comply with the Requirement for Information (Requirement) provided to him by the respondent pursuant to subsection 231.2(1) of the Act, which states:

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,	231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord général d'échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s'applique ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

(*a*) any information or additional information, including a return of income or a supplementary return; or	*a*) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
(*b*) any document.	*b*) qu'elle produise des documents.

[5] As a result, the Judge ordered that "the respondent shall comply with the Requirement issued by the Minister and shall forthwith, and in any event not later than 30 days after being served with this Order, provide the information and documents [sought]" (Speaking Order, appeal book, volume 1, page 30 at paragraph 1). Hence the within appeal by Mr. Thompson, which I propose to allow in part, but for completely different reasons than those advanced by the appellant.

[6] Although I generally agree with the legal statements made by the Judge in his Speaking Order, I am of the view that the appellant's objections called for an intervention by the Federal Court to ensure that the question of privilege over individual client names was addressed before the release of the clients' accounts receivable information was ordered.

[7] The information and documents sought by the Canada Revenue Agency (CRA) consist of:

1. A completed statement of your income and expenses, and assets and liabilities as of January 30, 2012 (form enclosed). The income and expense, and asset and liability statement includes any sole or joint income, expense, asset, or liability.

2. A current accounts receivable listing as of January 30, 2012.

3. Copies of all your bank statements, credit card statements, utility bill statements, gas and electric bill statements, loans statements and mortgage statements for sole and joint accounts for the period January 1, 2011 to December 31, 2011.

> (affidavit of Maria Van Dyk, collection officer with the Canada Revenue Agency, Exhibit A, Requirement date February 6, 2012, appeal book, volume 1, page 41).

[8] Mr. Thompson responded to the Requirement giving his explanation under six headings: Income; Expenses (personal and business); Assets as of January 30, 2012; Liabilities (excluding Canada Revenue Agency); Accounts Receivable Listing; and Statements (*ibidem*, Exhibit C, page 47).

[9] Following a review of the appellant's information, the CRA found that he had provided sufficient information only with regard to his income and business expenses. The CRA noted that no details were provided regarding his accounts receivable other than a total balance owing.

[10] Despite his failure to follow through with the Requirement under most headings, Mr. Thompson, both in this Court and below, has made solicitor-client privilege the focus of his objection to the Requirement. Amongst other arguments, he has raised section 8 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter) alleging that the Requirement is akin to an unreasonable search or seizure. He has also filed a Notice of Constitutional Question pursuant to section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7:

> Can Section 231.2(1) of the *Income Tax Act* be interpreted, applied or enforced so as to require a Barrister and Solicitor who, himself, is the subject of the proceedings or inquiry by the Applicant (and not his clients), to divulge information about unnamed clients, which information is protected by the principles of solicitor-client privilege, found in the *Legal Professions Act*, R.S.A. 2000 c. L-8, the *Rules of the Law Society*

> *of Alberta* and the *Law Society of Alberta Code of Conduct*, and in the common law applicable to the Province of Alberta thereby causing that Barrister and Solicitor to violate his *Code of Conduct*, breach those Rules and contravene the Act, rendering him liable for serious penal and civil consequences? (appeal book, volume 2, page 521).

Standard of Review

[11] Even before discussing the Judge's Speaking Order and the parties' position, it is useful to state the applicable standard of review.

[12] The standard of correctness applies to questions of law, while the standard of palpable and overriding error applies to questions of fact and mixed fact and law: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paragraph 11. The interpretation of the Act and the legal approach to solicitor-client privilege are questions of law. They attract no deference. Most issues in this appeal are questions of law.

[13] With this said, I can immediately dispose of one of the ten grounds of appeal raised by the appellant in his memorandum of fact and law at paragraph 66 and following (ground of appeal E) :

> The Learned Justice erred in law by concluding under Section 231.7(1)*(a)* of the *Income Tax Act* that the Appellant had failed to provide all the information and documents sought by the Minister in the specific Requirement issued February 6, 2012, and improperly allowed the Minister to amend, change, amplify or expand the Requirement by ordering the Appellant to "provide additional information and documents sought by the Minister as set forth in the Affidavit of Maria Van Dyk" filed with this Application.

[14] I find that the Judge did not expand the Requirement. In his Speaking Order, the Judge states:

> My review of the evidence suggests to me that the [appellant] has not fully complied with the Minister's request and I do not think his arguments that it is not clear what the Minister wants, or that the Minister already has the information and documentation, stand up to scrutiny or are supported by the evidence. (Judge's Speaking Order, appeal book, volume 1, page 21 at paragraph 2).

[15] This is a finding of fact. The appellant has not convinced me that the Judge committed a reviewable error in concluding as he did.

[16] Neither did he convince me that it was not open to the Judge to order the appellant to provide "additional information and documents … as set out in the affidavit of Maria Van Dyk" where such information was not listed in the Requirement (*ibidem*, page 29 at paragraph 2).

[17] As I read this affidavit, it appears to me that the Minister is simply seeking full disclosure of the information and documents sought in the Requirement. The "additional" information and documents are, in reality, the documents related to the three categories of information and documents described in the Requirement (see paragraph [7] of these reasons), which the appellant has failed to provide in his response to the Requirement.

[18] The failure of the appellant to make full disclosure as requested by the Minister is what brought the parties to court. As soon as the Judge was satisfied under subsection 231.7(1) that (a) Mr. Thompson was required under section 231.2 to provide information or documents and did

not do so; and (b) the information or document was not protected from disclosure by solicitor-client privilege within the meaning of subsection 232(1), he was entitled make the order that he did.

[19] The remaining nine grounds of appeal raised by the appellant all concern, in one way or another, the question of solicitor-client privilege. For the sake of convenience, I have regrouped them under the following three issues:

(1) Which party bore the evidentiary burden to establish that the information at issue was subject to privilege?

(2) Did the Court err in finding that the information requested by the respondent – information relating to the appellant's business accounts receivable, including the names and amounts owed by the appellant's client – consists of accounting records and is not subject to solicitor-client privilege?

(3) Did the Court err in finding that the decision does not infringe any privacy rights under section 8 of the Charter?

[20] I will return to these issues after reviewing the relevant portion of the Speaking Order under appeal, the general scope of the solicitor-client privilege and subsection 232(1) of the Act, which states:

"solicitor-client privilege" means 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.	« privilège des communications entre client et avocat » Droit qu'une personne peut posséder, devant une cour supérieure de la province où la question a pris naissance, de refuser de divulguer une communication orale ou documentaire pour le motif que celle-ci est une communication entre elle et son avocat en confidence professionnelle sauf que, pour l'application du présent article, un relevé comptable d'un avocat, y compris toute pièces justificative out tout chèque, ne peut être considéré comme une communication de cette nature.

[21] Finally, I shall dispose of the constitutional question.

The Judge's Speaking Order

[22] The Judge expressed his conclusion in these words:

> … I have considerable sympathy for the situation [Mr. Thompson] now finds himself in whereby his clients could face garnishee proceedings if their names are disclosed, which might come as a surprise to them and will certainly not assist the [appellant] who practices law in a small town … [H]owever I do not think the law supports [his] position. The information and documents that the Minister is seeking are simply financial records of the [appellant] and, in my view, are not privileged… (*ibidem*, appeal book, volume 1, pages 21-22 at paragraphs 3 and 4).

[23] Referring to *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209 [*Lavallee*], the Judge noted that clients' names are not always privileged. He found, as a matter of fact, that Mr. Thompson had provided no evidence to show that any particular client name should be protected and that Mr. Thompson had failed to establish that the financial records sought by the Minister constituted or contained information or documents properly protected by solicitor-client privilege.

[24] The Judge also considered the appellant's argument on section 8 of the Charter and dismissed it. Noting that Mr. Thompson conceded that section 8 protects against unjustified state intrusions on a person's reasonable expectation of privacy, the Judge observed that taxpayers have a

very low expectation of privacy in their business records relevant to the determination of their tax liability, and that an expectation of privacy should not be confused with a duty of confidentiality.

[25] Furthermore, the Judge pointed out that duties of confidentiality pursuant to the regulatory directives of bodies such as the Law Society of Alberta cannot be relied on to invalidate a provision of the Act: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113. In any case, the Law Society of Alberta's *Code of Conduct* contains an explicit exception to the duty of confidentiality where "required by law or a court to do so": Rule 2.03(1)(*b*) Confidential Information (Judge's Speaking Order, appeal book, volume 1, page 27 at paragraph 22).

[26] Finally, relying on *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, the Judge stated that subsection 231.2(1) of the Act provides the least intrusive means to effectively monitor compliance with the Act. For the aforementioned reasons, and in light of the circumstances, the Judge concluded that both the provision of the Act and the Requirement met the requirements of section 8 of the Charter (*ibidem* at paragraphs 25-28).

The Position of the Parties

[27] Mr. Thompson's position is straightforward. He asserts that the names, addresses, phone numbers of clients and the amount that they owe their lawyers for legal services rendered are always privileged. They cannot form part of a lawyer's accounting records within the meaning of subsection 232(1) of the Act.

[28] Bills or statements of accounts are at the very core of the relationship between solicitors and clients. They are privileged. The Minister would be interfering in that unique relationship if she was allowed to enforce her Requirement. Amongst other consequences, the appellant would no longer be in a position to diminish the amount owed by a given client or write it off completely after service of garnishment proceedings by the Minister to this client.

[29] As a result, the appellant argues that the Judge took an incorrect and restrictive approach to the meaning of solicitor-client privilege and failed to give full effect to the common law principles of solicitor-client privilege set out in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574.

[30] Furthermore, the appellant argues that the Judge erred in applying the definition of "solicitor-client privilege" found at subsection 232(1) of the Act, reproduced above at paragraph [20], to the facts of this case. In his view, this definition applies only to matters arising under section 232 of the Act (entitled solicitor-client privilege) and not to a consideration of whether a compliance order should issue under section 231.7 of the Act.

[31] In any event, the appellant also states that the Judge erroneously prioritized the Act over the *Legal Profession Act*, R.S.A. 2000 c. L-8, the Rules and the *Code of Conduct* of the Law Society of Alberta, which he submits take precedence over the Act as matters of property and civil rights in the province.

[32] Finally, as mentioned above, the appellant invokes section 8 of the Charter. Relying upon the case of *Baron v. Canada*, [1993] 1 S.C.R. 416, a case in which the Supreme Court of Canada found section 231.3 of the Act of no force and effect and in violation of section 8, the appellant opines that the same reasoning applies to subsection 231.2(1) of the Act. He submits that sections 231 through 232 of the Act interfere with the administration of justice in a manner comparable with subsection 231(3). He states:

> … the Minister's attempted interference with the clients' guaranteed right and freedom regarding "solicitor-client privilege" can not [*sic*] be "demonstrably justified in a free and democratic society" as is required by Section 1 of the [Charter] and as provided in Section 8 thereof (appellant's memorandum of fact and law, page 26, Ground of Appeal "J").

[33] The respondent fully supports the Order of the Federal Court. She asserts that the Judge made no reviewable error, whether in law or in fact.

Solicitor-Client Privilege

[34] Solicitor-client privilege is one of the most revered doctrines under the common law, described by the Supreme Court of Canada as "one of the most ancient and powerful privileges known to our jurisprudence". It is generally seen as a "fundamental and substantive rule of law": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 at paragraph 39, quoting *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 [*McClure*] discussed by Professor Adam Dodek in "Solicitor-Client Privilege in Canada, Challenges for the 21st Century" (Discussion Paper for the Canadian Bar Association, February 2011).

[35] In *McClure* at paragraph 35, Major J. wrote:

> … 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.

[36] Court reiterated this position in *Lavallee,* adding:

> Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection (at paragraph 36).

[37] More recently, the Supreme Court stated as follows in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331 at paragraph 26, [*Cunningham*]:

> It need hardly be said that solicitor-client privilege is a fundamental tenet of our legal system. The solicitor-client relationship is integral to the administration of justice; privilege encourages the free and full disclosure by the client required to ensure effective legal representation.

[38] While the Supreme Court of Canada has adopted a firm stance on the importance of privilege, it has also consistently recognized that the claim of privilege is not absolute. As stated above, solicitor-client privilege will yield in clearly defined circumstances. Of relevance to the within appeal are the following limitations to the protection against disclosure afforded by privilege.

[39] Firstly, the privilege belongs to the client, not the lawyer: *Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 46. It can only be asserted or waived by the client or through his or her informed consent (*Lavallee* at paragraph 39). It "serves to both protect the essential interests of

clients and ensure the smooth operation of Canada's legal system…": *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456 at paragraph 34 [*Foster Wheeler*] [Emphasis added.]

[40] Secondly, solicitor-client privilege applies only to a communication between a lawyer and client, which is of a confidential character, and which is directly related to the seeking, formulating or giving of legal advice. Put differently, privilege will not attach to communications in which legal advice is neither sought nor offered or where the communication is not intended to be confidential. The purpose of privilege is to ensure that clients will not fear that information given in confidence to their lawyers may later be disclosed and used against them: *Canada (Combines Investigation Act*) (*Re*), [1975] F.C. 184, 55 D.L.R. (3d) 713 at paragraph 12 approved and adopted in *Solosky* v. *The Queen* [1980] 1 S.C.R. 821, page 834).

[41] Thirdly, courts have determined that solicitor-client privilege protects client names, but only in certain circumstances. In *R. v. Budd*, 2002, [2002] O.T.C. 893, the Ontario Superior Court canvassed Canadian case law and authorities on the question of privilege over client names, and concluded that privilege protects client names where the identity of the client "constitutes the foundation of the retainer" or "the essence of the consultation" (at paragraphs 14-15). The Court determined that the general rule is that client names are not *per se* privileged in Canadian law.

[42] In the same year that *Budd* was decided, the Supreme Court concluded to the same effect in *Lavallee*. It stated: "The name of the client may very well be protected by solicitor-client privilege, although this is not always the case": See also *Thorson v. John Jones* (1973), 38 D.L.R.

(3d) 312 (B.C.S.C.) and R. D. Manes and M. P. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham, Ont: Butterworths, 1993) at page 141, quoted in *Lavallee*.

[43] Lastly, privilege is distinct from, and narrower than, the duty of confidentiality. The appellant relies on the duty of confidentiality he owes his clients pursuant to the Law Society of Alberta's *Rules* and its *Code of Conduct*. However, courts and law societies recognize the distinction between the duty of confidentiality and solicitor-client privilege. The Law Society of Alberta's *Code of Conduct* includes this commentary under Rule 2.03 concerning confidentiality:

> This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[44] The Supreme Court has similarly distinguished between the two concepts. In *Cunningham*, the Court stated that its reasons, which "address the application, or non-application, of solicitor-client privilege" should not be taken as affecting "counsel's ethical duty of confidentiality" (at paragraph 31). Similarly, in *Foster Wheeler*, the Court distinguished between "the scope of the lawyer's obligation of confidentiality" (i.e., the duty of confidentiality) on the one hand, and "the application of the immunity from disclosure designed to protect that confidentiality" (*i.e.*, solicitor-client privilege) on the other (at paragraph 29).

Subsection 232(1) of the Act

[45] As mentioned above, subsection 232(1) defines solicitor-client privilege for the purposes of the Act. For ease of reference, I reproduce it again:

> "solicitor-client privilege" means 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.
>
> « privilège des communications entre client et avocat » Droit qu'une personne peut posséder, devant une cour supérieure de la province où la question a pris naissance, de refuser de divulguer une communication orale ou documentaire pour le motif que celle-ci est une communication entre elle et son avocat en confidence professionnelle sauf que, pour l'application du présent article, un relevé comptable d'un avocat, y compris toute pièces justificative out tout chèque, ne peut être considéré comme une communication de cette nature.

[46] This definition is in line with the teachings of the Supreme Court of Canada on the law of solicitor-client privilege. It protects from disclosure those communications passing between solicitor and client in professional confidence, *i.e.* communications that involve seeking and providing legal advice. I fail to see how it applies to accounting records and supporting vouchers and cheques, which constitute, as a general rule, evidence of an act or transaction rather than a privileged communication: See also *Canada (Minister of National Revenue – M.N.R.) v. Jakabfy*, 2013 FC 706 at paragraph 11 [*Jakabfy*]; *Canada (Minister of National Revenue – M.N.R.) v. Singh Lyn Ragonetti Bindal LLP*, 2005 FC 1538 at paragraph 18; *Canada (Minister of National Revenue – M.N.R.) v. Reddy*, 2006 FC 277; *Canada (Minister of National Revenue – M.N.R.) v. Cornfield*, 2007 FC 436; *Canada (Minister of National Revenue – M.N.R.) v. Currie*, 2008 FC 237. Of course,

if for some unusual circumstances a lawyer's accounting records contain privileged communications, these communications would remain subject to judicial scrutiny under the Act since legislative language governing the production of documents must be read so that it does not include communications subject to solicitor-client privilege: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, above at paragraph 11.

[47] I also fail to understand the appellant's argument as to the non-applicability of the definition of solicitor-client privilege found in the Act to his case. The Minister has instituted her proceedings under subsection 231.7(1) because the appellant had failed to comply with a Requirement served pursuant to subsection 231.2(1) of the Act. Paragraph 231.7(1)(*b*) refers specifically to that definition when stating the Judge's task when presented with a summary application for a compliance order.

[48] I now turn to the three specific issues identified earlier at paragraph [19] of these reasons.

The Burden of Proof

[49] Mr. Thompson raised the shield of solicitor-client privilege. It is the party asserting privilege that bears the evidentiary burden to establish the claim on a balance of probabilities.

[50] Mr. Thompson did not. To the contrary, the Judge found that "on the record before [him], there is nothing to suggest that any client's name requires the protection of privilege"

(Judge's Speaking Order, appeal book, volume 1, page 22 at paragraph 5). This factual finding is fully supported by the evidence, especially Mr. Thompson's affidavit, which contains only generalities about his legal practice (appellant's affidavit, appeal book, volume 2, page 335 and ff.).

[51] One of the difficulties with the appellant's position that names of clients are always privileged is that it runs contrary to the foundation of the taxation system in Canada, which is a self-assessing and self-reporting system. On his theory, the CRA could never seek and obtain information from a solicitor or barrister about the revenue generated by his practice or otherwise that would enable the CRA to ensure compliance or determine non-compliance by a lawyer. Indeed, the appellant goes as far as arguing that privilege covers the financial institutions who hold registered mortgages on his own personal interests because he provides legal services to these financial institutions where he also has bank accounts.

[52] In my view, the appellant could not succeed on his argument by simply raising the shield of privilege on behalf of his clients whose names the Minister was seeking and by hiding behind it. The appellant is a taxpayer whose compliance with the Act the Minister is fully entitled to verify. Had Mr. Thompson raised solicitor-client privilege until he had further opportunity to consult with his clients and assess their rights, and then provided specifics in his affidavit explaining why some of the names might attract privilege, he would have been in a better position to persuade the Judge that his position might be justified.

[53] It is also noteworthy that the Court observed that there was no indication, on record, that the appellant had even informed his clients that he was asserting privilege on their behalf.

Rather, it appears that he is attempting to protect his clients from knowledge of the whole matter. Once again, the Judge found that the appellant "has provided no evidence to show that any particular client name should be protected in this case" (Judge's Speaking Order, appeal book, volume 1, page 25 at paragraph 14). I have not been persuaded that the Judge committed reviewable errors when he made these findings.

The Information Requested is not Subject to Solicitor-Client Privilege

[54] Interestingly, case law provides a very recent example of a barrister and solicitor whose clients were facing a compliance order under section 231.7 of the Act. In *Jakabfy*, Mr. Jakabfy was found to have acted appropriately in his dealings with his former clients (the Lavallees) and with the Minister. Upon receipt of the Requirement addressed to him, seeking information as to how Mr. Lavallee had distributed the proceeds from the sale of a property, Mr. Jakabfy wrote to his clients and sought their specific instructions. He then, by sworn affidavit, informed the CRA of his clients' refusal to disclose the relevant information. In the end, the Federal Court Judge ordered Mr. Jakabfy to provide the information in the form of, *inter alia*, trust account ledger, cheque journal, statement of adjustments or disbursements, copies of invoices or receipts for payments. All these documents were found not to be privileged.

[55] In Mr. Thompson's case, the Minister seeks similar documents, more particularly a "current accounts receivable listing". In his memorandum of fact and law, the appellant argues that names of clients are as privileged as statements of account. He asserts that, contrary to what the

Judge found, client names do not form part of an accounting record of a lawyer (at paragraphs 35-37). I disagree with the appellant.

[56] Section 230 of the Act generally defines the terms "Records and Books of Account". They are documents containing "such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined". The particular situation of lawyers is addressed in subsection 230(2.1) in these terms:

(2.1) For greater certainty, the records and books of account required by subsection 230(1) to be kept by a person carrying on business as a lawyer (within the meaning assigned by subsection 232(1)) whether by means of a partnership or otherwise, include all accounting records of the lawyer, including supporting vouchers and cheques.	(2.1) Il est entendu que les registres et les livres de comptes qui doivent, en vertu du paragraphe (1), être tenus par une personne exploitant une entreprise consistant dans l'exercice de la profession d'avocat (au sens du paragraphe 232(1)) en société de personnes ou autrement comprennent tous les registres comptables de l'avocat, y compris les pièces justificatives et les chèques.

[57] Statements of account are not the same as a lawyer's accounting records. The latter consist essentially of statements of fact such as the name of the client, the amount billed for the professional services, the payments received and the amounts still owed. Statements of account, by contrast, may reveal a history of the file. They may contain information including the nature of the consultation, a summary of communications between solicitor and client, and so on, which may be covered by solicitor-client privilege.

[58] In this case, the Minister is not seeking the information contained in statements of account. She seeks purely factual information consisting of the names of the clients and the amounts of money owed by these clients individually.

[59] At the hearing of this appeal, Mr. Thompson admitted that he could institute legal proceedings to recover his fees from an uncooperative client. In light of the public nature of court proceedings, he would be obliged to reveal an uncooperative client's identity and amounts owing in order to recover these fees. On that answer alone, it is difficult to accept his position that this information is subject to solicitor-client privilege. I note that the Law Society of Alberta's *Code of Conduct* provides for circumstances where this type of information may be disclosed. Rule 2.03(5) states:

> 2.03(5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.

[60] Consistent with this example, what Mr. Thompson is asked to provide is no more than the information he would need to include in a Statement of Claim to disclose a cause of action.

[61] In light of the foregoing, I conclude that the Judge did not err in finding that the information requested in the Requirement was not subject to solicitor-client privilege.

Privacy Rights not Infringed under Section 8 of the Charter

[62] The appellant asserts that the Minister's attempted interference with clients' guaranteed rights in relation to solicitor-client privilege violates section 8 and is not saved by section 1 of the Charter. As the appellant has failed to establish that the Court erred in finding that a class privilege does not attach to the accounting records and client names requested by the Minister, there is no interference with any rights in relation to privilege, and this argument cannot succeed.

[63] The appellant also refers to the case of *Baron v. Canada*, [1993] 1 S.C.R. 416 in which the Supreme Court of Canada struck down section 231.3 of the Act, because the provision interfered with judicial discretion as to whether or not a search warrant should be issued to enter, search any building, receptacle or place and seize any document or thing that may afford evidence as to the commission of an offence under this Act. However, in the circumstances at bar, the appellant points to no evidence that the Court's decision-making ability is fettered by the wording of the provisions at issue.

[64] Further, the appellant's analogy with the physical seizure of documents in the course of executing a warrant does not apply on the facts. There is no entry of tax officials onto the appellant's premises. The Requirement consists solely of a demand for production of documents. Finally, I note a recent decision from the Superior Court of Quebec wherein a Judge of that Court declared unconstitutional and inoperable sections 231.2, 231.7 and subsection 232(1)(5) of the Act as far as Quebec lawyers and notaries were concerned: *Chambre des notaires du Québec c. Canada (Procureur general*), 2010 J.Q. no. 8868; [2010] QCCS 4215.

[65] I am unmoved by this decision. Firstly, a Quebec Superior Court decision is not binding on this Court. That decision is under appeal and no decision on the appeal has been rendered to date (appeal filed on October 7, 2010, 500-09-021073-101). Secondly, the facts of that case are distinguishable as they involve information requirements issued by the CRA to a number of Quebec notaries in order to obtain information and documents concerning their clients. The Quebec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 and Quebec's *Code of Ethics of Notaries,* R.R.Q., c. N-3, r. 2 and *Code of Ethics of Advocates*, R.R.Q., c. B-1, r. 3 are also relied upon. They are not applicable to the appellant.

[66] As a result, I conclude that the appellant points to no palpable error in the Judge's reasons on the Charter questions that would justify our intervention.

The Notice of Constitutional Question

[67] The need for a notice of constitutional question is linked to the remedy sought by a party: *Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation*, 2004 FCA 66, [2004] 3 F.C.R. 436. Section 57 of the *Federal Courts Act* states that the constitutional validity, applicability, or operability of an Act of Parliament shall not be judged unless notice has been served. Neither in his Notice of Appeal nor in the Order Sought section of his memorandum of fact and law does the appellant seek a finding that the provisions of the Act under which the Minister acted in this case are invalid, inapplicable or inoperable as required by section 57. As a result, it is not necessary to address the question raised in the notice of constitutional question.

Conclusion

[68] As announced at the outset of these reasons, I propose to partially allow the appeal although, as did the Judge, I dismiss all of Mr. Thompson's arguments. In my respectful view, however, the Judge's order was premature with respect to the accounts receivable listing. Once he had decided that Mr. Thompson's position on that issue could not stand, the Judge had to take the appropriate steps to verify whether solicitor-client privilege protected any of Mr. Thompson's clients individually. The appellant had built his case on an erroneous understanding of the law of solicitor-client privilege. As a result, he had made the blanket statement that clients' names are always privileged. On a proper understanding of privilege and the construction of the statutory provisions and rules at play, it is possible that some of the appellant's clients' names are protected by solicitor-client privilege. If that is the case, these clients ought to have the opportunity to assert this privilege, and Mr. Thompson should be given the chance to lay the proper evidentiary foundation on their behalf.

[69] There is no specific obligation on a lawyer to advise a client when asserting a right on his or her behalf, when this right is in jeopardy. That being said, provincial law societies impose general obligations on lawyers, or make recommendations to lawyers, which suggest that the appellant should be asserting and pursuing the claims of solicitor-client privilege after having informed his clients and having obtained their instructions in this regard.

[70] With respect, I find that the Judge, as guardian of the law, should have fashioned a remedy addressing the critical issue of privilege before making his Order. The Act provides for the

compliance order to be made by a Judge ensuring enough flexibility and discretion for him or her to remain the protector of the rights attached to solicitor-client privilege.

[71] As he did not fashion such a remedy, I propose to return the file to the Federal Court for a new hearing, on the question of the accounts receivable listing. Mr. Thompson may then have the opportunity to get his clients' instructions and, on the basis of these reasons, may file new sworn affidavits explaining why individual clients' names are privileged, if in fact this continues to be the case. I will not impose a time limit to do so and leave it up to the Federal Court to set the timelines for the parties to exchange further affidavits or materials. However, I should add that the clients on whose behalf the appellant is claiming privilege should produce their own affidavits explaining the history of their accounts. Copies of such affidavits should be served on the respondent, with clients' names redacted.

[72] As for the rest of the missing information and documents, as listed in Ms. Maria Van Dyk's affidavit (appeal book, volume 1, page 35 and ff.), the Judge's Speaking Order stands. The missing information and documents shall be produced as ordered and in an unredacted version within thirty (30) days of the judgment to issue. For the sake of clarity, the relevant paragraphs of Ms. Van Dyk's affidavit describing the missing information and documents are reproduced in an Annex to these reasons.

Costs

[73] Considering the result of this appeal, I would order that each party bear its own costs.

"Johanne Trudel"

J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
Robert M. Mainville J.A.”

ANNEX

(Ms. Maria Van Dyk's sworn affidavit
of June 21, 2012)

8. […]

(a) N/A

(b) N/A

(c) Personal Expenses: the [appellant] provided insufficient information. The [appellant] provided a listing of various discretionary expenses that include food/groceries, life insurance, household repair, vacation, charitable donations, clothing, memberships, recreation/entertainment, gifts to family, miscellaneous spending and medical & prescription. He indicated that his expenditures for the utilities, satellite and internet were detailed on the statements he provided to the CRA. However, the information provided is in the form of numerous redacted utility and banking documents, making it impossible to ascertain the various expenses. No information was provided for the following:

(i) mortgage payments;
(ii) property tax payments;
(iii) phone payment (home phone & personal cell);
(iv) cable payment;
(v) internet payment;
(vi) utility payment (water / sewage);
(vii) gas & electric payment;
(viii) home and auto insurance payments;
(ix) vehicle payments;
(x) gas and oil payments (for vehicle);
(xi) vehicle maintenance payments;
(xii) credit card payments;
(xiii) bank loan payments;
(xiv) other loan payments; and
(xv) any other expenses he may have but has not reported with his response to the Requirement;

(d) Assets: the [appellant] provided insufficient information in regards to his assets, as follows:

(i) the [appellant] stated he has a joint interest in 80 acres but failed to provide the location of the 80 acres. Furthermore, no information was provided as to whether his personal residence is located on the 80 acres or where otherwise the personal residence might be located;

(ii) the [appellant] stated that he owns six motor vehicles, but has failed to list the motor vehicles, with their respective VIN and value for each vehicle;

(iii) the [appellant] stated that he has three recreational vehicles but failed to list them or provide any identifying features; and

(iv) the [appellant] stated that he has $1,100 on deposit at the bank, but failed to disclose which bank the deposit is with. The bank statements provided were redacted. The information the [appellant] redacted from the bank statements include: bank information, transit number, bank number, bank account number and transaction details;

(e) Liabilities: the [appellant] failed to provide sufficient information regarding his liabilities as follows:

(i) the [appellant] stated he had credit card debt of $33,000 but did not provide details as to which credit card companies with which he carries debt. The [appellant] redacted the relevant information in the credit card statements including the credit card issuer, account number and transaction details;

(ii) the [appellant] claimed to have $80,000 in payables but has not broken this balance down or associated this balance with business or personal payables; and

(iii) the [appellant] provided total balances in regard to mortgages and a statement concerning a "judgment debt" but failed to provide any supporting details or any supporting documents that show what payments he is making on the judgment debt or mortgage.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-515-12
STYLE OF CAUSE:	DUNCAN THOMPSON v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	June 12, 2013
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	PELLETIER J.A. MAINVILLE J.A
DATED:	August 29, 2013

APPEARANCES:

Duncan Thompson	ON HIS OWN BEHALF
Margaret McCabe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT