LITIGATION - CANADA

Supreme Court narrows scope of CRA's power to force disclosure

October 04 2016 | Contributed by Dentons

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Introduction

The Canada Revenue Agency (CRA) has broad powers to require taxpayers and other persons – including a taxpayer's accountants or lawyers – to provide any documents or information required for the enforcement of the Income Tax Act.

Section 231.2(1) of the act authorises the CRA to issue requirements that oblige recipients to provide information or documents concerning a taxpayer. When a recipient refuses to comply, Section 231.7 of the act provides the minister recourse to the courts for a compliance order, if the information or document is not protected by "solicitor-client privilege" within the meaning of Section 232(1) of the act.

Generally in Canada there is no privilege in respect of a taxpayer's accounting documents. Conversely, a taxpayer's communications and documents in a lawyer's file could be privileged.

Section 232 of the act states that a lawyer will not be prosecuted for failure to comply with the CRA's requirements to provide information or documents. However, the definition of 'solicitor-client privilege' in the act purports to exclude the accounting records of a lawyer.

In 2016 two cases made their way to the Supreme Court which considered the enforceability of this provision to force production of documents that otherwise appeared to be privileged. The court unanimously upheld the primacy of professional secrecy in the Canadian justice system.

In a body of case law that usually upholds the broad scope of the CRA's powers, the Supreme Court's recent decisions in *Chambre des notaires du Québec*(1) and *Thompson*(2) are welcome news for counsel acting for taxpayers, as well as international companies and companies involved in cross-border transactions.

Canada v Chambre des notaires du Québec

Background

In *Chambre des notaires du Québec* the CRA issued requirements to Quebec notaries for information and documents concerning their clients, including accounting records. This raised concerns about their clients' right to professional secrecy.

The notaries initiated an action in the Quebec Superior Court to have Sections 231.2, 231.7 and 232 (1) of the act declared unconstitutional for violations of the Canadian Charter of Rights and Freedoms, which protects against unreasonable seizures. The notaries also sought to have a series of documents declared to be *prima facie* privileged. The *Barreau du Québec*, whose members include lawyers practising in Quebec, joined the proceedings and requested that the court's declaration

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apply equally to its members.

At first instance, Justice Blanchard made an order declaring that Sections 231.2 and 231.7 and the definition of solicitor-client privilege in Section 232(1) of the act were unconstitutional and of no force or effect with respect to notaries and lawyers in Quebec. Blanchard also recognised a list of legal documents as being *prima facie* protected by professional secrecy.

On appeal, Blanchard's judgment was modified to clarify that only Subsection (1) of Section 231.2 of the act was of no force and effect with respect to a requirement sent to a taxpayer's notary or lawyer. The court also limited the scope of the declaration of unconstitutionality to the accounting records exception in Section 232(1) of the act and overturned the *prima facie* privilege finding on certain documents.

Decision

In keeping with its previous decisions on the matter, the Supreme Court found that solicitor-client privilege must remain as close to absolute as possible, in order to maintain relevance. Legislative provisions that interfere with professional secrecy more than is absolutely necessary must be found to be unreasonable. The court also confirmed that there is a rebuttable presumption that all communications between client and legal adviser be considered *prima facie* confidential in nature. Further, as a general rule, information protected by professional secrecy in the possession of a legal adviser is immune from disclosure. A client's reasonable expectation of privacy, in relation to communications subject to solicitor-client privilege, is high.

The court acknowledged that the requirement scheme under Section 231.2 of the act serves the legitimate purposes of aiding in the collection of amounts owed to the CRA and conducting tax audits. Nevertheless, regarding legal advisers, the court determined that the requirement scheme, its enforcement provision and the accounting records exception under Section 232(1) contain numerous constitutional defects, including the following:

- Client is not given notice of the requirement – the right to professional secrecy belongs to the client, not the notary or lawyer; only the client may waive it. The act does not oblige CRA officials to send a requirement to anyone other than the person from whom they are seeking information or documents. As a result, the majority of requirements sent to Quebec notaries have not been served to their clients, thereby risking the loss of the protection of professional secrecy without their knowledge.
- Inappropriate burden placed on legal advisers – when a requirement is issued, lawyers and notaries ultimately bear the burden of safeguarding their clients' right to professional secrecy, as well as the associated burden of raising an objection to the requirement on the basis of professional secrecy. Since the legal adviser is not the alter ego of the client, he or she will not necessarily make the same choices the client would, thereby increasing the risk that the state will gain access to the protected information. The court found that the threat of prosecution for non-compliance creates an intolerable conflict of interests between legal advisers and their clients, pitting the duty of confidentiality owed by legal advisers to their clients against their statutory duty of disclosure to the tax authorities.
- Compelling disclosure is not absolutely necessary – in the narrow set of circumstances under which professional secrecy may be set aside, the court will do so only if absolutely necessary. The requirement scheme authorises a seizure that cannot be characterised as a measure of last resort. It is not absolutely necessary to rely on legal advisers in order to obtain the information or documents being sought. The failure to even attempt to obtain the information elsewhere, before issuing a requirement, indicates that the seizures are conducted in an unreasonable manner and do not minimally impair the right to professional secrecy.
- "Accounting record of a lawyer" is not defined in the act – the accounting records exception is broad and undefined, therefore permitting the seizure of any accounting record of a legal adviser. This lack of precision risks different legal advisers including different information in their accounting records, thereby increasing the risk that professional secrecy may be breached.

Canada v Thompson

Background

In *Thompson*, the minister applied to the Federal Court for a compliance order pursuant to Section 231.7 of the act, after Duncan Thompson, a lawyer practising in Alberta, refused to comply with a requirement obliging him to disclose his accounts receivable to the CRA. Thompson filed a notice of constitutional question, asking the Federal Court to rule on whether Section 231.2(1) may be interpreted and applied in a manner that abrogates solicitor-client privilege.

At first, Justice Russell found that client names and financial information pertaining to Thompson's receivables were "accounting records" within the meaning of Section 232(1) and therefore could not be shielded from disclosure to the minister on the basis of solicitor-client privilege.

The Federal Court of Appeal held that, in certain rare circumstances, the records sought may contain privileged information and Thompson should be given the opportunity to assert and defend the privilege on behalf of those clients. The matter was referred back to the Federal Court.

Decision

The SCC determined that even the most restrictive interpretation of Section 231.2(1) concludes that Parliament's intent was to define solicitor-client privilege to exclude a lawyer's accounting records. When read within the context of the requirement scheme, it is clear that the provision is intended to permit the minister to have access to lawyers' accounting records even if they contain otherwise privileged information.

Mirroring its decision in *Chambre des notaires du Québec*, the court concluded that disclosure of presumptively privileged documents cannot be required, unless a court first determines whether solicitor-client privilege actually applies. The abrogation of solicitor-client privilege over lawyers' accounting records, within the context of a requirement scheme, is constitutionally invalid because it permits the state to obtain information that would otherwise be privileged to a greater extent.

Comment

The SCC has established a bright-line rule that solicitor-client privilege is of paramount importance in the Canadian justice system. The *Chambre* and *Thompson* cases are particularly instructive for counsel to determine whether and how to comply with CRA demands for information or documents. Clients should also expect greater transparency from the CRA in light of the SCC's finding that any legislative remedy must include notice to the client, thereby assuring the client an opportunity to assert privilege over their documents and information.

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Endnotes

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

(2) *Canada (National Revenue) v Thompson*, 2016 SCC 21.