

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

MINISTER OF NATIONAL REVENUE

Appellant

- and -

DUNCAN THOMPSON

Respondent

- and -

**FEDERATION OF LAW SOCIETIES OF CANADA, CANADIAN BAR ASSOCIATION
and CRIMINAL LAWYERS' ASSOCIATION**

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PART I - OVERVIEW

It is critical to emphasize here that all information protected by solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.¹

1. Since Justice Arbour made this observation in *Lavallee*, this Court has repeatedly reinforced solicitor-privilege as a principle of fundamental justice and noted that it is inextricably linked to the vitality and legitimacy of our legal system.² If the Minister of National Revenue is right in this case – that the state can acquire solicitor-client privileged information without the knowledge or consent of the privilege holder, simply because Parliament said so – then the words found in *Lavallee* are wrong. Parliament did not say so and *Lavallee* is not wrong.

2. Read alone or together, ss. 231.2, 231.7 and 232(1) of the Income Tax Act (“ITA”)³ do not require the release of solicitor-client privileged information. The appellant’s focus on *Blood Tribe* is misplaced. Even if the *obiter* comments of Justice Binnie in *Blood Tribe* mean that Parliament can overtake solicitor-client privilege, provided it does so clearly, a proposition that the Criminal Lawyers’ Association (“CLA”) refutes, there is no clear Parliamentary statement here. To the contrary, properly interpreted, the definition afforded “solicitor-client privilege” in s. 232(1) of the ITA does not allow for, or require, a breach of privilege. Indeed, read in accordance with the principles of statutory construction, the scheme for accessing lawyers’ records demands that solicitor-client privilege be respected through the imposition of a *Lavallee* type scheme.

¹ *Lavallee, Rackel & Heintz v Canada (Attorney General)*, [2002] 3 SCR 209 at para 24.

² *Maranda v Richer*, [2003] 2 SCR 193, at para 12; *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809, at para 14; *Goodis v Ontario (Ministry of Correctional Services)*, [2006] 2 SCR 32, at para 16; and *Canada v Blood Tribe Department of Health*, [2008] 2 SCR 574, at para 9.

³ RSC, 1985, c 1.

PART II - QUESTIONS IN ISSUE

3. The appellant places two questions in issue. The CLA has only intervened on the first:

Whether the Federal Court of Appeal erred by imposing a procedure to determine whether solicitor-client privilege applies to information or a document ordered released under s. 231.7 of the ITA?

4. The Federal Court of Appeal was right. Where a lawyer is required to provide solicitor-client privileged information to tax authorities, it is the client's privilege that is at risk. A procedure must be followed to ensure protection of that information. The statute supports this approach.

PART III - STATEMENT OF ARGUMENT

A. Solicitor-client privilege is fundamental to our legal system

5. This Court has held that that solicitor-client privilege is a “principle of fundamental justice and civil right of supreme importance in Canadian law”.⁴ It has been held to be “fundamentally important to our judicial system”.⁵ This reflects the importance of legal advice in helping citizens navigate their way through a complex legal system. It is also a recognition that without an assurance of confidentiality, “as close to absolute as possible”, clients will not seek counsel or be completely candid with their lawyers, thereby undermining their legal entitlements and affecting the quality of the advice they deserve.⁶ In *Lavallee*, this Court was “compelled” to adopt stringent norms to ensure its protection.⁷

6. The only exceptions to solicitor-client privilege that “will be tolerated” are limited, clearly defined and strictly controlled.⁸ Only in very rare circumstances will the privilege yield,

⁴ *Lavalle, Rackel & Heintz v Canada (Attorney General)*, *supra*, at para 36.

⁵ *Smith v Jones*, [1999] 1 SCR 455, at para 45. See also: *R v McClure*, [2001] 1 SCR 445 at para 32; *Solosky v The Queen*, [1980] 1 SCR 821.

⁶ *Canada v Blood Tribe Department of Health*, *supra*, at para 9. See also: *R v McClure*, [2001] 1 SCR 445 at para 35.

⁷ *Lavalle, Rackel & Heintz v Canada (Attorney General)*, *supra*, at para 36.

⁸ *Maranda v Richer*, *supra*, at para 12.

either to a greater good, like where the innocence of an accused is at stake⁹ or where the safety of an individual or clearly defined group is at risk,¹⁰ or where solicitor-client communications are being used to advance a criminal purpose.¹¹

B. The statutory scheme does not abrogate privilege in “clear” terms

7. At the centre of the debate in this case is the definition provided to “solicitor-client privilege” in s. 232(1) of the ITA. For ease of reference, it reads:

“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* [emphasis added].

8. The appellant says that Parliament has removed the cloak of privilege from “accounting records” and “supporting vouchers and cheques” in clear language. He relies upon *Blood Tribe* to say that when Parliament speaks clearly and decisively in a desire to eradicate solicitor-client privilege, then the court cannot interfere. What Justice Binnie said in *obiter* in *Blood Tribe* is that express language is necessary to reach a conclusion that there has been a statutory piercing of the privilege. What Justice Binnie did not say was that a clear and precise statutory piercing of privilege is constitutionally acceptable. Quite to the contrary, any such piercing of this near absolute privilege, upon which the very integrity of our legal system relies, would invite a strong and deserved constitutional attack.¹²

⁹ *R v McClure*, *supra* at paras 47-56.

¹⁰ *Smith v Jones*, [1999] 1 SCR 455, at paras 51-58.

¹¹ *Descôteaux v Mierzwinski*, [1982] 1 SCR 860, at page 881 (QL).

¹² No Constitutional Question has been stated in this appeal and, as such, the core constitutionality of the provision (and its related counterparts) are not addressed. Notably, leave to appeal has been sought in *Procureur général du Canada, et al v Chambre des notaires du Québec, et al*, 2014 QCCA 552, SCC Court file No 35892, where the court struck down the constitutionality of s. 231.2(1) to the extent that a requirement is sent to a taxpayer’s notary or lawyer.

9. The CLA takes issue with the proposition that Parliament can simply eradicate a near absolute privilege by saying it clearly. However, this Court need not come to terms with the scope of the *Blood Tribe* decision in this case, or whether it stands for the constitutionally unfriendly proposition suggested by the appellant. The definition of “solicitor-client privilege” in s. 232(1) of the ITA does not meet the “clear, precise and unequivocal” criteria upon which the appellant’s entire argument rests. Indeed, the term “accounting record of a lawyer” is far from clear in its meaning or reach.

10. There are all manner of documents contained within a law office, or held in a lawyer’s possession, that could constitute accounting records. From ledgers to journals to bank statements to invoices to contracts and much more, the term “accounting record” is a broad and malleable one.¹³ We learned in *Maranda* that even the gross amount of fees and disbursements billed to a client are privileged.¹⁴ Surely Parliament did not intend that all of these documents, and more, embedded with all manner of solicitor-client privileged information extending well beyond the realm of gross fees and disbursements, be provided to the tax authorities upon a simple request under s. 231.2 and without any notice to the client privilege holder.

11. The lack of agreement in the case law regarding what constitutes an “accounting record” demonstrates that the appellant’s “clear, precise and unequivocal” threshold is not met in this matter. Courts have spent a good deal of time grappling with the meaning of the term “accounting record” (as even the appellant acknowledges¹⁵), and yet there is still no clarity to the term.¹⁶ In *Organic*, the court found that there are “at least five possible meanings” of the term, several of which involve privileged documents.¹⁷ The jurisprudence reflects a lack of clarity

¹³ Canada Revenue Agency, Interpretation Bulletin RC4409(E) Rev 13, “Keeping Records” (10 December 2013), at page 4.

¹⁴ *Maranda v Richer, supra*, at paras 24, 32, 33.

¹⁵ Appellant’s factum, para 45.

¹⁶ *Organic Research Inc v MNR*, [1990] AJ no 1026, at p 11 (QB) (QL). See also: *Heath v The Queen* (1989), 90 DTC 6009 (BCSC); *Cox v AG Canada* [1988] 2 CTC 365 (BCSC); *Re Romeo's Place Victoria Ltd* (1982), 128 DLR (3d) 279 (FC); *Re Helman* (1970), 15 DLR (3d) 753 (Alta SC).

¹⁷ *Organic, supra*, at page 11.

even regarding whether the exception applies to the lawyer's personal records, or the records of his/her client that are in his/her possession.¹⁸

12. Courts have also reached varying conclusions regarding whether s. 232(1) requires the production of solicitor-client protected materials. As the appellant again acknowledges¹⁹, courts have excluded statements of account (which are, technically speaking, "accounting records") from the definition of accounting record in s. 232(1), based (at least partially) on a concern over privilege.²⁰ Further, at least one court has applied the *Lavallee* guidelines to ss. 231.2(3) and 232 of the ITA and held that documents protected by solicitor-client privilege were outside of the scope of this document production regime.²¹

13. The fact that the term "accounting record" requires judicial consideration to determine its reach, and the fact that the consideration requires a concern for privilege, belies any suggestion of clarity within this definition. This case offers an opportunity to clarify the meaning of the term by applying well known and time worn principles of statutory construction. When properly approached, the provision allows the tax authorities to achieve their laudable goals, while at the same time allowing lawyers to fulfill their duty to protect solicitor-client privilege.

C. Two key principles of statutory construction are applicable in this case

14. There are two key principles of statutory construction operative in this context: (1) a statutory provision must be presumed to be enacted in compliance with constitutional norms and values; and (2) the words of an Act must be interpreted in context with regard to their "grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".²²

¹⁸ *Organic, supra*, at page 11.

¹⁹ Appellant's factum, para 45 and footnote 47.

²⁰ *The Mutual Life Assurance Company of Canada v The Deputy Attorney General of Canada* (1984), 84 DTC 6177, at page 3 (Ont HC)(QL).

²¹ *Canada (Minster of National Revenue – M.N.R.) v Welton Parent Inc.*, [2006] F.C.J. No.117 (Fed. Ct), paras.144-148

²² EA Driedger, *Construction of Statutes* (2nd ed 1983), at page 87; *Imperial Oil v Jacques*, 2014 SCC 66 at para 47; R Sullivan, *Sullivan on the Construction of Statutes* (6th ed 2014), at pages 527-31.

15. As recently noted by this Court in *Mabior*, legislation must be interpreted in a manner that is harmonious with constitutional norms. In determining the meaning of fraud vitiating consent within s. 265(3)(c) of the *Criminal Code*, Chief Justice McLachlin found that *Charter* values were an important consideration:

Courts must interpret legislation harmoniously with the constitutional norms enshrined in the *Charter*: [citations omitted]. *Charter* values are always relevant to the interpretation of a disputed provision of the *Criminal Code*. ...

Although the *Charter* is not directly engaged, the values that animate it must be taken into account in interpreting s. 265(3)(c) of the *Criminal Code*.²³

16. These comments built on earlier comments of the Chief Justice in *Sharpe*, where she held that statutes that are open to more than one interpretation must be approached in a manner that accords with constitutional norms. There is a legal presumption that Parliament intends to “enact legislation in conformity with the *Charter*”. Where a statutory provision is open to both a constitutionally compliant and constitutionally subversive interpretation, the former should prevail.²⁴ The presumption of constitutionality is said to acknowledge the “centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada”.²⁵ The definition of “solicitor-client privilege” in s. 232(1), and the ambiguity surrounding what constitutes an “accounting record”, must be interpreted in light of the fact that solicitor-client privilege is a “constitutional imperative”²⁶ and a principle of fundamental justice central to the constitutional values that animate the legislation.²⁷

²³ *R v Mabior*, 2012 SCC 47 at paras 44, 48.

²⁴ *R v Sharpe*, 2001 SCC 2 at para 33.

²⁵ *Application under s 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at paras 34-35. See also: *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, at page 1078; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at p 660; *R v Lucas*, [1998] 1 SCR 439, at para 66; *R v Rodgers*, [2006] 1 SCR 554, at paras 18, 19.

²⁶ *Lavallee, Rackel & Heintz v Canada (Attorney General)*, *supra*, at paras 42 and 45.

²⁷ *R v McClure*, *supra*, at para 41; *R v Brown*, [2002] 2 SCR 185, at para 55; and *Maranda v Richer*, *supra*, at para 57.

17. The other principle of statutory construction that applies in this case, rests in what Driedger dubbed as the “modern principle of statutory interpretation”, which requires a grammatical and contextual approach to the words of a statute, demanding consideration be given to the scheme and object of the Act, including the intention of Parliament.²⁸ Approached contextually, particularly with a view to the surrounding provisions allowing for judicial determinations of privilege claims, s. 232(1) was never meant as an invitation to truncate privilege. Rather, read against the surrounding provisions, it was Parliament’s way of saying that, to the extent possible, efforts should be made to provide tax authorities with “accounting records”, but only those where a determination has been made that privilege does not attach.

D. Applying the principles of statutory construction leads to *Lavallee*

18. There is a statutory scheme in place under the ITA that allows for the assertion and determination of privilege when tax authorities demand “accounting records” under s. 231.2 of the ITA, or when tax authorities bring an application for an order for such records under s. 231.7. There is a “duty” upon the state to minimize any impairment of solicitor-client privilege that may arise out of a search.²⁹ As such, it is the CLA’s position that when seeking accounting records from lawyers, the tax authorities should always resort to the use of s. 231.7 to ensure that a judicial officer has an opportunity to consider whether the records sought are privileged. If there is a risk that they are privileged, apply appropriate conditions – *Lavallee* type conditions – to the order to care for that privilege.

19. The term “accounting record” must be considered in light of the constitutional values and norms that have evolved under our *Charter* jurisprudence. While it may be that the tax authorities can obtain some form of accounting records, they are not entitled to ones that reveal any privileged information. This is the only way to interpret the otherwise broad and nebulous terms within the statutory definition of “solicitor-client privilege” in a manner consistent with *Charter* values and norms. As in *Organic, supra*, if we don’t even know which of five possible

²⁸ EA Driedger, *Construction of Statutes, supra*, at page 87. See also: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para 26; *Imperial Oil, supra*, at para 47.

²⁹ *Ontario (Ministry of the Attorney General) v Law Society of Upper Canada*, [2010] OJ No 2975 (Sup Ct), at paras 20-21; *Maranda v Richer, supra*, at paras 10-12.

meanings that should be afforded the term “accounting record”, or whether the term is intended to cover lawyers’ personal or business records, we must be true to the long line of authority that has developed under this Court’s hand, offering a near absolute privilege. The integrity of our justice system relies upon it. This means that some ostensible accounting records will be excluded from production (as they have been in the past³⁰) and some records will be released, but only with appropriate redactions to care for the privileged information. The statutory scheme, considered as a whole, supports such an approach.

20. When this Court has assessed searches of law offices, it has made clear that state actors cannot obtain solicitor-client privileged materials. The Court has established a “minimal impairment standard” to ensure that the state’s chances of accessing such information are reduced to a minimum.³¹ For example, in *Descôteaux*, the Court held that justices of the peace should be “particularly demanding” in establishing such procedures.³² Further, in *Lavallee* the Court noted that such measures:

[M]ust strive to ensure that the chances of the state's accessing, through a search warrant, privileged information to which the state has no right of access, are reduced to their reasonable minimum.³³

21. It cannot be that a client’s privilege is better protected when he or she is the target of a criminal investigation, than a client who happens to be the unfortunate person who seeks counsel from a lawyer who becomes the subject of a tax audit or investigation. Both clients are constitutionally entitled to the same solicitor-client privilege. Surely both should be afforded a chance for equal protection.

³⁰ *Taves v Canada*, [1993] BCJ no 1713, at para 10 (Sup Ct); *Re Playfair Development Ltd and The Deputy Minister of National Revenue* (1985), 85 DTC 5155 (Ont Sup Ct); *The Mutual Life Assurance Company of Canada v The Deputy Attorney General of Canada*, *supra*, at p 3.

³¹ *Lavallee, Rackel & Heintz v Canada (Attorney General)*, *supra*, at para 37. See also: *R v Brown*, *supra*, at para 81; *Descôteaux v Mierzwinski*, *supra*, at p 891.

³² *Descôteaux v Mierzwinski*, *supra*, at p 891.

³³ *Lavalle, Rackel & Heintz v Canada (Attorney General)*, [2002] 3 SCR 209, at para 42.

22. Where there may be an incursion into privilege because the tax authorities have made a s. 231.2 demand for information or documents (rather than going by way of judicial order under s. 231.7), then there is an obligation on the lawyer to assert the privilege.³⁴ Section 232(3.1) sets out the manner in which this can occur. It invites lawyers who are faced with a s. 231.2 demand to claim privilege in respect of the document or information that is the subject of the request. The document is then sealed and produced to a judge for a determination of the privilege.³⁵ That determination must be made in accordance with common law principles that root solicitor-client privilege in s. 7 of the *Charter* as a principle of fundamental justice and give life to the meaning of “accounting record” within s. 232(1). It may be that the court makes an order releasing a redacted version of the document, edited in a way to protect the privilege, but provide the tax authorities with what they need. This type of redaction process, to protect privilege, is common in this and other contexts.³⁶

23. Where the tax authorities decide to obtain a judicial authorization under s. 231.7 in order to obtain the documents, this provision provides equal protection for privilege. When faced with such an application, the court will be in the same position as any other court faced with an application for a production order or search warrant for a law office.³⁷ The court must first determine whether the information or documents sought are privileged. If privileged, there is no jurisdiction to issue the order. If not, or there may be a means by which to redact privileged information, then the court can issue the order with “appropriate” terms and conditions pursuant

³⁴ Law Society of Upper Canada, “Guidelines for Law Office Searches” (29 March 2012); *Lavallee, Rackel & Heintz v Canada (Attorney General)*, *supra*, at para 40.

³⁵ Notably, there are aspects of this statutory scheme that bear similarities – if not repeat – s. 488.1 of the *Criminal Code* which was found unconstitutional in *Lavallee*. The significant constitutional deficiencies within s. 232(3-14) relate to the procedures put in place to deal with privilege claims. It is a scheme that appears, on its face, unconstitutional. Presumably, where a privilege claim is made, the court and parties will come together to craft a procedure that is in accordance with the spirit and intent of this Court’s judgment in *Lavallee*.

³⁶ See for example *R v Campbell*, [1999] 1 SCR 565, at para 74. See also *Slansky v Canada (Attorney General)*, 2011 FC 476; *Globe and Mail v Canada*, [2007] OJ no 1561, at para 2 (Sup Ct); *Canada (Attorney General) v O’Neill*, [2005] OJ no 2130, at para 60 (Sup Ct J); *R v Named Person B*, 2013 SCC 9; *R v Blake*, 2010 ONCA 1; *R v Garofoli*, [1990] 2 SCR 1421.

³⁷ *Lavallee, Rackel & Heintz v Canada (Attorney General)*, *supra*; *Descôteaux v Mierzwinski*, *supra*; *Criminal Code*, RSC, 1985, c C-46, ss. 487 and 487.012.

to s. 231.7(3) of the ITA, ones designed to provide maximum protection to the privilege. Again, *Lavallee* type conditions, such as automatic sealing with a later judicial determination as to privilege is in order. Such conditions ensure that the privilege is not lost pending resolution of the privilege issue.

E. Conclusion

24. The s. 232(1) definition of solicitor-client privilege is unclear. Read contextually and in accordance with constitutional norms and values, the provision is designed to protect privilege. The provision, and its surrounding counterparts, invite the application of *Lavallee* principles.


PART IV - SUBMISSIONS ON COSTS

25. The CLA does not seek costs and requests that no order as to costs be made against it.

PART V - ORDER SOUGHT

26. The CLA requests permission to make oral submissions of no more than 10 minutes. It asks that its submissions be taken into account in the disposition of the legal issues on this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2014



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PART VI - TABLE OF AUTHORITIES

	AUTHORITY	REFERRING PARA
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	<i>Canada v Blood Tribe Department of Health</i> , [2008] 2 SCR 574	1, 5
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	<i>Re Helman</i> (1970), 15 DLR (3d) 753 (Alta SC)	11
	<i>Re Playfair Development Ltd and The Deputy Minister of National Revenue</i> (1985), 85 DTC 5155 (Ont Sup Ct)	19
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	<i>The Mutual Life Assurance Company of Canada v The Deputy Attorney General of Canada</i> (1984), 84 DTC 6177 (Ont HC)(QL)	12, 19
Publications		
	EA Driedger, <i>Construction of Statutes</i> (2nd ed. 1983)	14, 17
	R Sullivan, <i>Sullivan on the Construction of Statutes</i> (6th ed. 2014)	14

PART VII - STATUTORY PROVISIONS

1. *Income Tax Act*, RSC, 1985, c 1

REQUIREMENT TO PROVIDE DOCUMENTS OR INFORMATION

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 listed international agreement 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 is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.

Unnamed Persons

(2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).

PRODUCTION DE DOCUMENTS OU FOURNITURE DE RENSEIGNEMENTS

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 international désigné 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) qu’elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu’elle produise des documents.

Personnes non désignées nommément

(2) Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au préalable autorisé par un juge en vertu du paragraphe (3).

Judicial authorization

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) if the judge is satisfied by information on oath that

(a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

(4) to (6) [Repealed, 2013, c. 33, s. 21]

COMPLIANCE ORDER

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or

Autorisation judiciaire

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu’il estime indiquées, autoriser le ministre à exiger d’un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d’une personne non désignée nommément — appelée « groupe » au présent article —, s’il est convaincu, sur dénonciation sous serment, de ce qui suit :

a) cette personne ou ce groupe est identifiable;

b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

c) et d) [Abrogés, 1996, ch. 21, art. 58(1)]

(4) à (6) [Abrogés, 2013, ch. 33, art. 21]

ORDONNANCE

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l’accès, l’aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s’il est convaincu de ce qui suit :

a) la personne n’a pas fourni l’accès, l’aide, les

231.2 to provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. 2001, c. 17, s.183.

renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification; voir les lois modificatives appropriées. 2001, ch. 17, art. 183.

Definitions

232. (1) In this section,

“*custodian*”

« gardien »

“*custodian*” means a person in whose custody a package is placed pursuant to subsection 232(3);

“*judge*”

« juge »

“*judge*” means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court;

“*lawyer*”

« avocat »

“*lawyer*” means, in the province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor;

“*officer*”

« fonctionnaire »

“*officer*” means a person acting under the authority conferred by or under sections 231.1 to 231.5;

“*solicitor-client privilege*”

« privilège des communications entre client et

Définitions

232. (1)

« avocat »

“*lawyer*”

« avocat » Dans la province de Québec, un avocat ou notaire et, dans toute autre province, un barrister ou un solicitor.

« fonctionnaire »

“*officer*”

« fonctionnaire » Personne qui exerce les pouvoirs conférés par les articles 231.1 à 231.5

« gardien »

“*custodian*”

« gardien » Personne à la garde de qui un colis est confié conformément au paragraphe (3).

« juge »

“*judge*”

« juge » Juge d’une cour supérieure compétente de la province où l’affaire prend naissance ou juge de la Cour fédérale.

« privilège des communications entre client et avocat »

“*solicitor-client privilege*”

avocat »

“*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.

Solicitor-client privilege defence

(2) Where a lawyer is prosecuted for failure to comply with a requirement under section 231.2 with respect to information or a document, the lawyer shall be acquitted if the lawyer establishes to the satisfaction of the court

(a) that the lawyer, on reasonable grounds, believed that a client of the lawyer had a solicitor-client privilege in respect of the information or document; and

(b) that the lawyer communicated to the Minister, or some person duly authorized to act for the Minister, the lawyer’s refusal to comply with the requirement together with a claim that a named client of the lawyer had a solicitor-client privilege in respect of the information or document.

« 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 confiance 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.

Secret professionnel invoqué en défense

(2) L’avocat poursuivi pour n’avoir pas obtempéré à une exigence de fourniture d’un renseignement ou de production d’un document prévue par l’article 231.2 doit être acquitté s’il démontre, à la satisfaction du tribunal, ce qui suit :

a) pour des motifs raisonnables, il croyait qu’un de ses clients bénéficiait du privilège des communications entre client et avocat en ce qui concerne le renseignement ou le document;

b) il a indiqué au ministre ou à une personne régulièrement autorisée à agir pour celui-ci son refus d’obtempérer à cette exigence et a invoqué devant l’un ou l’autre le privilège des communications entre client et avocat dont bénéficiait un des ses client nommément désigné en ce qui concerne le renseignement ou le

Seizure of certain documents where privilege claimed

(3) Where, pursuant to section 231.3, an officer is about to seize a document in the possession of a lawyer and the lawyer claims that a named client of the lawyer has a solicitor-client privilege in respect of that document, the officer shall, without inspecting, examining or making copies of the document,

(a) seize the document and place it, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package; and

(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if the officer and the lawyer agree in writing on a person to act as custodian, in the custody of that person.

Examination of certain documents where privilege claimed

(3.1) Where, pursuant to section 231.1, an officer is about to inspect or examine a document in the possession of a lawyer or where, pursuant to section 231.2, the Minister has required provision of a document by a lawyer, and the lawyer claims that a named client or former client of the lawyer

document.

Secret professionnel invoqué lors de la saisie de documents

(3) Le fonctionnaire qui, conformément à l'article 231.3, est sur le point de saisir un document en la possession d'un avocat qui invoque le privilège des communications entre client et avocat au nom d'un de ses clients nommément désigné en ce qui concerne ce document doit, sans inspecter ou examiner celui-ci ni en faire de copies :

a) d'une part, le saisir, ainsi que tout autre document pour lequel l'avocat invoque, en même temps, le même privilège au nom du même client, en faire un colis qu'il doit bien sceller et bien marquer;

b) d'autre part, confier le colis à la garde soit du shérif du district ou du comté où la saisie a été opérée, soit de la personne que le fonctionnaire et l'avocat conviennent par écrit de désigner comme gardien.

Secret professionnel invoqué lors de l'examen de documents

(3.1) Lorsque, conformément à l'article 231.1, un fonctionnaire est sur le point d'inspecter ou d'examiner un document en la possession d'un avocat ou que, conformément à l'article 231.2, le ministre exige la fourniture ou la production d'un document, et que l'avocat

has a solicitor-client privilege in respect of the document, no officer shall inspect or examine the document and the lawyer shall

(a) place the document, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the officer and the lawyer agree, allow the pages of the document to be initialed and numbered or otherwise suitably identified; and

(b) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

Application to judge

(4) Where a document has been seized and placed in custody under subsection 232(3) or is being retained under subsection 232(3.1), the client, or the lawyer on behalf of the client, may

(a) within 14 days after the day the document was so placed in custody or commenced to be so retained apply, on three clear days notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day, not later than 21 days after the

invoque le privilège des communications entre client et avocat en ce qui concerne le document au nom d'un de ses client ou anciens clients nommément désigné, aucun fonctionnaire ne peut inspecter ou examiner le document et l'avocat doit :

a) d'une part, faire un colis du document ainsi que de tout autre document pour lequel il invoque, en même temps, le même privilège au nom du même client, bien sceller ce colis et bien le marquer, ou, si le fonctionnaire et l'avocat en conviennent, faire en sorte que les pages du document soient paraphées et numérotées ou autrement bien marquées;

b) d'autre part, retenir le document et s'assurer de sa conservation jusqu'à ce que, conformément au présent article, le document soit produit devant un juge et une ordonnance rendue concernant le document.

Requête présentée par l'avocat ou son client

(4) En cas de saisie et mise sous garde d'un document en vertu du paragraphe (3) ou de rétention d'un document en vertu du paragraphe (3.1), le client ou l'avocat au nom de celui-ci peut :

a) dans les 14 jours suivant la date où le document a ainsi été mis sous garde ou a ainsi commencé à être retenu, après avis au sous-procureur général du Canada au moins trois jours francs avant qu'il soit procédé à cette

date of the order, and place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, and

(ii) requiring the production of the document to the judge at that time and place;

(b) serve a copy of the order on the Deputy Attorney General of Canada and, where applicable, on the custodian within 6 days of the day on which it was made and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and

(c) if the client or lawyer has proceeded as authorized by paragraph 232(4)(b), apply at the appointed time and place for an order determining the question.

Disposition of application

(5) An application under paragraph 232(4)(c) shall be heard in camera, and on the application

(a) the judge may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed; and

(b) the judge shall decide the matter summarily

requête, demander à un juge de rendre une ordonnance qui:

(i) d'une part, fixe la date — tombant au plus 21 jours après la date de l'ordonnance — et le lieu où il sera statué sur la question de savoir si le client bénéficie du privilège des communications entre client et avocat en ce qui concerne le document,

(ii) d'autre part, enjoint de produire le document devant le juge à la date et au lieu fixés;

b) signifier une copie de l'ordonnance au sous-procureur général du Canada et, le cas échéant, au gardien dans les 6 jours suivant la date où elle a été rendue et, dans ce même délai, payer au gardien le montant estimé des frais de transport aller-retour du document entre le lieu où il est gardé ou retenu et le lieu de l'audition et des frais de protection du document;

c) après signification et paiement, demander, à la date et au lieu fixés, une ordonnance où il soit statué sur la question.

Ordonnance sur requête de l'avocat ou de son client

(5) Une requête présentée en vertu de l'alinéa (4)c) doit être entendue à huis clos. Le juge qui en est saisi :

a) peut, s'il l'estime nécessaire pour statuer sur la question, examiner le document et, dans ce

and,

(i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, shall order the release of the document to the lawyer, and

(ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, shall order

(A) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3), or

(B) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1),

and the judge shall, at the same time, deliver concise reasons in which the judge shall identify the document without divulging the details thereof.

Order to deliver or make available

(6) Where a document has been seized and placed in custody under subsection 232(3) or where a document is being retained under subsection 232(3.1) and a judge, on the application of the

cas, s'assure ensuite qu'un colis du document soit refait et que ce colis soit rescellé;

b) statue sur la question de façon sommaire :

(i) s'il est d'avis que le client bénéficie du privilège des communications entre client et avocat en ce qui concerne le document, il ordonne la restitution du document à l'avocat ou libère l'avocat de son obligation de le retenir, selon le cas,

(ii) s'il est de l'avis contraire, il ordonne :

(A) au gardien de remettre le document au fonctionnaire ou à quelque autre personne désignée par le commissaire du revenu, en cas de saisie et mise sous garde du document en vertu du paragraphe (3),

(B) à l'avocat de permettre au fonctionnaire ou à l'autre personne désignée par le commissaire du revenu d'inspecter ou examiner le document, en cas de rétention de celui-ci en vertu du paragraphe (3.1).

Le juge motive brièvement sa décision en indiquant de quel document il s'agit sans en révéler les détails.

Ordonnance sur requête du procureur général du Canada

(6) En cas de saisie et mise sous garde d'un document en vertu du paragraphe (3) ou de rétention d'un document en vertu du paragraphe

Attorney General of Canada, is satisfied that neither the client nor the lawyer has made an application under paragraph 232(4)(a) or, having made that application, neither the client nor the lawyer has made an application under paragraph 232(4)(c), the judge shall order

(a) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3); or

(b) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1).

Delivery by custodian

(7) The custodian shall

(a) deliver the document to the lawyer

(i) in accordance with a consent executed by the officer or by or on behalf of the Deputy Attorney General of Canada or the Commissioner of Revenue, or

(ii) in accordance with an order of a judge under this section; or

(b) deliver the document to the officer or some other person designated by the Commissioner of

(3.1), et s'il est convaincu, sur requête du procureur général du Canada, que ni le client ni l'avocat n'a présenté de requête en vertu de l'alinéa (4)a) ou que, en ayant présenté une, ni l'un ni l'autre n'a présenté de requête en vertu de l'alinéa (4)c), le juge saisi ordonne :

a) au gardien de remettre le document au fonctionnaire ou à quelque autre personne désignée par le commissaire du revenu, en cas de saisie et mise sous garde du document en vertu du paragraphe (3);

b) à l'avocat de permettre au fonctionnaire ou à l'autre personne désignée par le commissaire du revenu d'inspecter ou examiner le document, en cas de rétention de celui-ci en vertu du paragraphe (3.1).

Remise par le gardien

(7) Le gardien doit :

a) soit remettre le document à l'avocat en conformité, selon le cas, avec :

(i) un consentement souscrit par le fonctionnaire, ou par le sous-procureur général du Canada ou au nom de celui-ci, ou par le commissaire du revenu ou au nom de ce dernier,

(ii) une ordonnance d'un juge sous le régime du présent article;

b) soit remettre le document au fonctionnaire ou à quelque autre personne désignée par le

Revenue

(i) in accordance with a consent executed by the lawyer or the client, or

(ii) in accordance with an order of a judge under this section.

Continuation by another judge

(8) Where the judge to whom an application has been made under paragraph 232(4)(a) cannot for any reason act or continue to act in the application under paragraph 232(4)(c), the application under paragraph 232(4)(c) may be made to another judge.

Costs

(9) No costs may be awarded on the disposition of any application under this section.

Directions

(10) Where any question arises as to the course to be followed in connection with anything done or being done under this section, other than subsection 232(2), 232(3) or 232(3.1), and there is no direction in this section with respect thereto, a judge may give such direction with regard thereto as, in the judge's opinion, is most likely to carry out the object of this section of allowing solicitor-client privilege for proper purposes.

commissaire du revenu en conformité, selon le cas, avec :

(i) un consentement souscrit par l'avocat ou le client,

(ii) une ordonnance d'un juge sous le régime du présent article.

Affaire continuée par un autre juge

(8) Lorsque, pour quelque motif, le juge saisi d'une demande visée à l'alinéa (4)a ne peut instruire ou continuer d'instruire la requête visée à l'alinéa (4)c, un autre juge peut être saisi de cette dernière.

Frais

(9) Il ne peut être adjugé de frais sur la décision rendue au sujet d'une requête prévue par le présent article.

Mesures non prévues

(10) Si aucune mesure n'est prévue au présent article sur une question à résoudre en rapport avec une chose accomplie ou en voie d'accomplissement selon le présent article — à l'exception des paragraphes (2), (3) et (3.1) —, un juge peut décider des mesures qu'il estime les plus aptes à atteindre le but du présent article, à savoir, accorder le privilège des communications entre client et avocat à des fins pertinentes.

Prohibition

(11) The custodian shall not deliver a document to any person except in accordance with an order of a judge or a consent under this section or except to any officer or servant of the custodian for the purposes of safeguarding the document.

Idem

(12) No officer shall inspect, examine or seize a document in the possession of a lawyer without giving the lawyer a reasonable opportunity of making a claim under this section.

Authority to make copies

(13) At any time while a document is in the custody of a custodian under this section, a judge may, on an ex parte application of the lawyer, authorize the lawyer to examine or make a copy of the document in the presence of the custodian or the judge by an order that shall contain such provisions as may be necessary to ensure that the document is repackaged and that the package is resealed without alteration or damage.

Waiver of claim of privilege

(14) Where a lawyer has, for the purpose of subsection 232(2), 232(3) or 232(3.1), made a

Interdiction

(11) Le gardien ne peut remettre aucun document à qui que ce soit, sauf en conformité avec une ordonnance d'un juge ou d'un consentement donné, en vertu du présent article, ou sauf à l'un de ses fonctionnaires ou préposés, pour protéger le document.

Idem

(12) Aucun fonctionnaire ne peut inspecter, examiner ou saisir un document en la possession d'un avocat sans donner à celui-ci une occasion raisonnable d'invoquer le privilège des communications entre client et avocat en vertu de présent article.

Autorisation de faire des copies

(13) À tout moment, lorsqu'un document est entre les mains d'un gardien selon le présent article, un juge peut, sur la demande ex parte de l'avocat, autoriser celui-ci à examiner le document ou à en faire une copie en présence du gardien ou du juge, au moyen d'une ordonnance qui doit contenir les dispositions nécessaires pour qu'un colis du document soit refait et que ce colis soit rescellé sans modification ni dommage.

Renonciation au privilège

(14) L'avocat qui, pour l'application du paragraphe (2), (3) ou (3.1), invoque, au nom

claim that a named client of the lawyer has a solicitor-client privilege in respect of information or a document, the lawyer shall at the same time communicate to the Minister or some person duly authorized to act for the Minister the address of the client last known to the lawyer so that the Minister may endeavour to advise the client of the claim of privilege that has been made on the client's behalf and may thereby afford the client an opportunity, if it is practicable within the time limited by this section, of waiving the claim of privilege before the matter is to be decided by a judge or other tribunal.

Compliance

(15) No person shall hinder, molest or interfere with any person doing anything that that person is authorized to do by or pursuant to this section or prevent or attempt to prevent any person doing any such thing and, notwithstanding any other Act or law, every person shall, unless the person is unable to do so, do everything the person is required to do by or pursuant to this section.

OFFENCES AND PUNISHMENT

238. (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with subsection 116(3), 127(3.1) or (3.2),

d'un de ses clients nommément désigné, le privilège des communications entre client et avocat en ce qui concerne un renseignement ou un document, doit en même temps indiquer la dernière adresse connue de ce client au ministre ou à quelque personne régulièrement autorisée à agir au nom de celui-ci, afin que le ministre puisse, d'une part, chercher à informer le client du privilège que est invoqué en son nom et, d'autre part, donner au client l'occasion, si la chose est matériellement possible dans le délai mentionné au présent article, de renoncer à invoquer le privilège avant que la question ne soit soumise à la décision d'un juge ou d'un autre tribunal.

Observation du présent article

(15) Nul ne peut entraver, rudoyer ou contrecarrer une personne qui fait une chose qu'elle est autorisée à faire en vertu du présent article, ni empêcher ou tenter d'empêcher une personne de faire une telle chose. Malgré toute autre loi ou règle de droit, quiconque est tenu par le présent article de faire quelque chose doit le faire, sauf impossibilité.

INFRACTIONS ET PEINES

238. (1) Toute personne qui omet de produire, de présenter ou de remplir une déclaration de la manière et dans le délai prévus par la présente loi ou par une disposition réglementaire, qui

147.1(7) or 153(1), any of sections 230 to 232, 244.7 and 267 or a regulation made under subsection 147.1(18) or with an order made under subsection (2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(a) a fine of not less than \$1,000 and not more than \$25,000; or

(b) both the fine described in paragraph 238(1)(a) and imprisonment for a term not exceeding 12 months.

Compliance orders

(2) Where a person has been convicted by a court of an offence under subsection 238(1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.

Saving

(3) Where a person has been convicted under this section of failing to comply with a provision of this Act or a regulation, the person is not liable to pay a penalty imposed under section 162 or 227 for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid

contrevient aux paragraphes 116(3), 127(3.1) ou (3.2), 147.1(7) ou 153(1), à l'un des articles 230 à 232, 244.7 et 267 ou à une disposition réglementaire prise en vertu du paragraphe 147.1(18) ou qui contrevient à une ordonnance rendue en application du paragraphe (2) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire et outre toute pénalité prévue par ailleurs :

a) soit une amende de 1 000 \$ à 25 000 \$;

b) soit une telle amende et un emprisonnement maximal de 12 mois.

Ordonnance d'exécution

(2) Le tribunal qui déclare une personne coupable d'une infraction prévue au paragraphe (1) peut rendre toute ordonnance qu'il estime indiquée pour qu'il soit remédié au défaut visé par l'infraction.

Réserve

(3) La personne déclarée coupable, par application du présent article, d'avoir contrevenu à une disposition de la présente loi ou de son règlement n'est passible d'une pénalité prévue à l'article 162 ou 227 pour la même contravention que si une cotisation pour cette pénalité a été établie à son égard ou que si le paiement en a été exigé d'elle avant que la dénonciation ou la plainte qui a donné lieu à la déclaration de

or made.

culpabilité ait été déposée ou faite.

2. Criminal Code (R.S.C., 1985, c. C-46)

Information for search warrant

487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a

Dénonciation pour mandat de perquisition

487. (1) Un juge de paix qui est convaincu, à la suite d'une dénonciation faite sous serment selon la formule 1, qu'il existe des motifs raisonnables de croire que, dans un bâtiment, contenant ou lieu, se trouve, selon le cas :

a) une chose à l'égard de laquelle une infraction à la présente loi, ou à toute autre loi fédérale, a été commise ou est présumée avoir été commise;

b) une chose dont on a des motifs raisonnables de croire qu'elle fournira une preuve touchant la commission d'une infraction ou révélera l'endroit où se trouve la personne qui est présumée avoir commis une infraction à la présente loi, ou à toute autre loi fédérale;

c) une chose dont on a des motifs raisonnables de croire qu'elle est destinée à servir aux fins de la perpétration d'une infraction contre la personne, pour laquelle un individu peut être arrêté sans mandat;

c.1) un bien infractionnel,

peut à tout moment décerner un mandat autorisant un agent de la paix ou, dans le cas

federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

Endorsement of search warrant

(2) If the building, receptacle or place is in another territorial division, the justice may issue the warrant with any modifications that the circumstances require, and it may be executed in the other territorial division after it has been endorsed, in Form 28, by a justice who has jurisdiction in that territorial division. The endorsement may be made on the original of the warrant or on a copy of the warrant transmitted by any means of telecommunication.

Operation of computer system and copying equipment

(2.1) A person authorized under this section to search a computer system in a building or place

d'un fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale, celui qui y est nommé :

d) d'une part, à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose et la saisir;

e) d'autre part, sous réserve de toute autre loi fédérale, dans les plus brefs délais possible, à transporter la chose devant le juge de paix ou un autre juge de paix de la même circonscription territoriale ou en faire rapport, en conformité avec l'article 489.1.

Le mandat de perquisition doit être visé

(2) Lorsque le bâtiment, contenant ou lieu est situé dans une autre circonscription territoriale, le juge de paix peut délivrer son mandat dans la même forme, modifiée selon les circonstances, et celui-ci peut être exécuté dans l'autre circonscription territoriale après avoir été visé, selon la formule 28, par un juge de paix ayant juridiction dans cette circonscription; le visa est apposé sur l'original du mandat ou sur une copie transmise à l'aide d'un moyen de télécommunication.

Usage d'un système informatique

(2.1) La personne autorisée à perquisitionner des données contenues dans un ordinateur se

for data may

(a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(c) seize the print-out or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the data.

Duty of person in possession or control

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;

(b) to obtain a hard copy of the data and to seize it; and

(c) to use or cause to be used any copying equipment at the place to make copies of the data.

trouvant dans un lieu ou un bâtiment peut :

a) utiliser ou faire utiliser tout ordinateur s'y trouvant pour vérifier les données que celui-ci contient ou auxquelles il donne accès;

b) reproduire ou faire reproduire des données sous forme d'imprimé ou toute autre forme intelligible;

c) saisir tout imprimé ou sortie de données pour examen ou reproduction;

d) utiliser ou faire utiliser le matériel s'y trouvant pour reproduire des données.

Obligation du responsable du lieu

(2.2) Sur présentation du mandat, le responsable du lieu qui fait l'objet de la perquisition doit faire en sorte que la personne qui procède à celle-ci puisse procéder aux opérations mentionnées au paragraphe (2.1).

Form

(3) A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

Effect of endorsement

(4) An endorsement that is made in accordance with subsection (2) is sufficient authority to the peace officers or public officers to whom the warrant was originally directed, and to all peace officers within the jurisdiction of the justice by whom it is endorsed, to execute the warrant and to deal with the things seized in accordance with section 489.1 or as otherwise provided by law.

Production order

487.012 (1) A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(a),

(a) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or

(b) to prepare a document based on documents or data already in existence and produce it.

Formule

(3) Un mandat de perquisition décerné en vertu du présent article peut être rédigé selon la formule 5 de la partie XXVIII, ajustée selon les circonstances.

Effet du visa

(4) Le visa apposé conformément au paragraphe (2) constitue une autorisation suffisante pour que les agents de la paix ou fonctionnaires publics à qui le mandat a été d'abord adressé, et tous les agents de la paix qui ressortissent au juge de paix qui l'a visé, puissent exécuter le mandat et s'occuper des choses saisies en conformité avec l'article 489.1 ou d'une autre façon prévue par la loi.

Ordonnance de communication

487.012 (1) Sauf si elle fait l'objet d'une enquête relative à l'infraction visée à l'alinéa (3)a), un juge de paix ou un juge peut ordonner à une personne :

a) de communiquer des documents — originaux ou copies certifiées conformes par affidavit — ou des données;

b) de préparer un document à partir de documents ou données existants et de le communiquer.

Production to peace officer

(2) The order shall require the documents or data to be produced within the time, at the place and in the form specified and given

(a) to a peace officer named in the order; or

(b) to a public officer named in the order, who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament.

Conditions for issuance of order

(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(a) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(b) the documents or data will afford evidence respecting the commission of the offence; and

(c) the person who is subject to the order has possession or control of the documents or data.

Terms and conditions

(4) The order may contain any terms and conditions that the justice or judge considers

Communication à un agent de la paix

(2) L'ordonnance précise le moment, le lieu et la forme de la communication ainsi que la personne à qui elle est faite — agent de la paix ou fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale.

Conditions à remplir

(3) Le juge de paix ou le juge ne rend l'ordonnance que s'il est convaincu, à la suite d'une dénonciation par écrit faite sous serment et présentée ex parte, qu'il existe des motifs raisonnables de croire que les conditions suivantes sont réunies :

a) une infraction à la présente loi ou à toute autre loi fédérale a été ou est présumée avoir été commise;

b) les documents ou données fourniront une preuve touchant la perpétration de l'infraction;

c) les documents ou données sont en la possession de la personne en cause ou à sa disposition.

Conditions

(4) L'ordonnance peut être assortie des conditions que le juge de paix ou le juge estime

advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client or, in the province of Quebec, between a lawyer or a notary and their client.

Power to revoke, renew or vary order

(5) The justice or judge who made the order, or a judge of the same territorial division, may revoke, renew or vary the order on an *ex parte* application made by the peace officer or public officer named in the order.

Application

(6) Sections 489.1 and 490 apply, with any modifications that the circumstances require, in respect of documents or data produced under this section.

Probative force of copies

(7) Every copy of a document produced under this section, on proof by affidavit that it is a true copy, is admissible in evidence in proceedings under this or any other Act of Parliament and has the same probative force as the original document would have if it had been proved in the ordinary way.

Return of copies

(8) Copies of documents produced under this section need not be returned.

indiquées, notamment pour protéger les communications privilégiées entre l'avocat — et, dans la province de Québec, le notaire — et son client.

Modification, renouvellement et révocation

(5) Le juge de paix ou le juge qui a rendu l'ordonnance — ou un juge de la même circonscription territoriale — peut, sur demande présentée *ex parte* par l'agent de la paix ou le fonctionnaire public nommé dans l'ordonnance, la modifier, la renouveler ou la révoquer.

Application

(6) Les articles 489.1 et 490 s'appliquent, avec les adaptations nécessaires, aux documents ou données communiqués sous le régime du présent article.

Valeur probante

(7) La copie d'un document communiquée sous le régime du présent article est, à la condition d'être certifiée conforme à l'original par affidavit, admissible en preuve dans toute procédure sous le régime de la présente loi ou de toute autre loi fédérale et a la même valeur probante que l'original aurait eue s'il avait été déposé en preuve de la façon normale.

Copies

(8) Il n'est pas nécessaire de retourner les copies de documents qui ont été communiquées sous le

régime du présent article.

Minister of National Revenue and
Appellant

Duncan Thompson
Respondent

Federation of Law Societies
of Canada et al
Interveners

SCC File No 35590

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM
THE FEDERAL COURT OF APPEAL)

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