

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

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant

- and -

DUNCAN THOMPSON

Respondent

- and -

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

Interveners

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**FACTUM OF THE INTERVENER FEDERATION OF LAW SOCIETIES OF CANADA**  
(*Rule 42 of the Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW OF POSITION AND FACTS

### Overview of position

1. At the heart of this appeal lies the question whether the narrow definition of solicitor-client privilege in the *Income Tax Act* – a definition that was enacted well before this Court clarified the scope of the privilege, and determined it to be a *Charter*-guaranteed right – limits Parliament’s express grant of judicial discretion to determine whether information about a lawyer-taxpayer’s clients must be provided to the Minister. According to the Minister, the narrow definition of solicitor-client privilege in the *Act* is a complete code. She therefore argues that if the Minister seeks production of information that falls outside that definition, a court must abrogate its role as the protector of solicitor-client privilege and give up its right to control its own process. Instead, it must simply act as a “rubber stamp” and grant the Minister’s application. However, that is not what the *Act* contemplates.

2. Rather, the *Act* protects solicitor-client privilege by providing that, for information that falls within the statutory definition, a judge has no discretion to grant the Minister’s application and allow the information to be disclosed. However, as long as the requested information falls outside the statutory definition of solicitor-client privilege, the *Act* expressly provides the judge with broad discretionary power to determine the Minister’s application. The judge may therefore refuse to grant the Minister’s application or, as occurred in this case, provide for notice to the clients who may be affected by the disclosure and an opportunity to be heard to assist the judge in determining whether the application should ultimately be granted.

3. In arguing that the *Act*’s definition of solicitor-client privilege overrides Parliament’s express grant of judicial discretion, the Minister’s position is contrary to the principle that any statutory intrusion of the privilege must be clear and explicit – that the privilege cannot be abrogated by inference. In this case, the *Act* places express limits on judicial discretion in order to protect solicitor-client privilege, by providing that a judge cannot grant the Minister’s application unless the judge is satisfied that it is not protected by the statutory definition. However, it does not in any way limit judicial discretion to protect the privilege above and beyond the minimum level guaranteed in the *Act*.

4. The Minister’s interpretation is also inconsistent with *Charter* values. Although the constitutionality of the statute is not at issue in this appeal, any ambiguity must be interpreted so

that it is consistent with *Charter* values. This Court has held that judicial discretion (expressly provided for in the *Act*) is a crucial aspect of the protection of solicitor-client privilege. Indeed, similar provisions that precluded the exercise of discretion have been held unconstitutional because they failed to adequately protect rights guaranteed under the *Charter*, including solicitor-client privilege.

5. Even if this Court agrees with the Minister that the statutory definition of solicitor-client privilege limits judicial discretion, it is uncontroverted that a court always has the discretion to control its own process. The Court of Appeal exercised that discretion in directing a process that provides for the holders of any potentially privileged information – the respondent’s clients – to be notified and to have the opportunity to participate in the decision whether the information should be disclosed. In doing so, the Court made no error.

### **The Federation**

6. The Federation is the coordinating body of Canada’s 14 law societies. Its members, the law societies of Canada’s provinces and territories, have statutory mandates in their respective jurisdictions to regulate the lawyers in Canada and the notaries in Quebec in the public interest. That mandate includes defending core values related to the governance of the legal profession, including protecting solicitor-client privilege.

### **The Federation’s view of the statutory scheme at issue**

7. The Federation adopts the summary of the background facts and the decisions of the courts below set out in the factum of the respondent. The Federation’s view of the relevant provisions of the *Act* is summarized below.

8. Subsection 231.7(1) of the *Act* provides that on a summary application by the Minister, a judge “may” order a person to provide any access, assistance, information or document sought by the Minister, but only if the judge is satisfied that certain statutory criteria are met. In particular, the judge must be satisfied that the information is not protected from disclosure by solicitor-client privilege within the meaning of subsection 232(1) of the *Act*. Otherwise, the decision whether to grant the Minister’s application is a discretionary one.<sup>1</sup>

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<sup>1</sup> *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), s. 231.7(1)

9. The *Act* also allows for significant discretion in how compliance is ordered. If a judge decides to exercise his discretion to order compliance under subsection 231.7(1), then subsection 231.7(3) provides that the judge “may impose any conditions in respect of the order that the judge considers appropriate.”

10. Section 232 of the *Act* sets out a scheme for the protection of information that may be subject to solicitor-client privilege. Subsection 232(1) defines solicitor-client privilege as

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.

11. This definition was enacted in its current form in 1965, well before a series of important decisions by this Court that established the modern definition of solicitor-client privilege. These decisions confirmed that solicitor-client privilege is a substantive, not merely an evidentiary right, and that it is constitutionally guaranteed under the *Charter*.<sup>2</sup>

12. The balance of section 232, while not at issue in this case, provides helpful context for the definition of solicitor-client privilege. Among other things, it sets out a procedure that must be followed where a document that is in the possession of a lawyer is going to be seized, and the lawyer claims that a named client has solicitor-client privilege in respect of that document. In that case, a client (or his or her lawyer) may apply to a judge for a determination of whether the client has solicitor-client privilege in respect of the document.<sup>3</sup>

13. While the *Act* sets out a procedure that must be followed in that determination, it also provides the judge with significant discretion over the process. In particular, it specifies that where a question arises as to the course to be followed in connection with any aspect of section

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<sup>2</sup> *Act to amend the Income Tax Act and the Federal-Provincial Fiscal Arrangements Act*, S.C. 1965, c. 18, s. 26; *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 836 [*Solosky*] (Appellant’s Book of Authorities (ABA), Tab 36); *Smith v. Jones* [1999] 1 S.C.R. 455 at paras. 45-50 [*Smith*] (ABA, Tab 35); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R v. Fink*, 2006 SCC 61 at para. 21 [*Lavallee*] (Federation’s Book of Authorities (FBA), Tab 4)

<sup>3</sup> *Income Tax Act*, ss. 232(3), 232(3.1), 232(4)

232 (subject to certain exceptions) and the *Act* does not provide any direction, a judge may give any direction which is “most likely to carry out the object of this section of allowing solicitor-client privilege for proper purposes.”<sup>4</sup>

## PART II – POSITION ON QUESTIONS RAISED

14. The Federation’s position is that the *Act* provides a court with judicial discretion to protect solicitor-client privilege by refusing the Minister’s application for a compliance order, or by imposing an evidentiary procedure for that determination, even where the statutory criteria are met. Therefore, the Federation’s position is that the answer to each of the questions posed by the appellant is “no” – the Court of Appeal committed no error.

## PART III – ARGUMENT

### The common law of solicitor-client privilege

15. As the parties to this appeal recognize, protection of solicitor-client privilege has long been recognized as fundamental to the administration of justice. The privilege exists because of the unique relationship between a client and his or her lawyer and is essential to clients receiving sound legal advice. The privilege belongs to the client, not the lawyer, although the lawyer acts as a gatekeeper, and is ethically and professionally bound to protect the privilege.<sup>5</sup>

16. *The common law approach to the privilege has evolved.* Since 1965, when the definition of solicitor-client privilege set out in the *Act* was enacted, the common law definition of the privilege has significantly evolved. It is no longer a simple rule of evidence; it is a substantive rule of law and a fundamental right. Most recently, this Court has held that solicitor-client privilege is “a principle of fundamental justice within the meaning of s. 7 of the *Charter* and the constitutional protection against unreasonable searches and seizures as guaranteed by s. 8 of the *Charter*.” Given its status as a constitutionally protected right, the judiciary is the guardian of solicitor-client privilege.<sup>6</sup>

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<sup>4</sup> *Income Tax Act*, s. 232(10)

<sup>5</sup> *Solosky* at 833 (ABA, Tab 36); *Smith* at paras. 45-46 (ABA, Tab 35); *Lavallee* at para. 24 (FBA, Tab 4)

<sup>6</sup> *Solosky* at 836 (ABA, Tab 36); *Smith* at paras. 48-50 (ABA, Tab 35); *R. v. McLure*, 2001 SCC 14 at paras. 22-24 (Respondent’s Book of Authorities (RBA), Tab 41); *Lavallee* at paras. 21, 48 (FBA, Tab 4); *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at 70, 72 (FBA, Tab 6)

17. ***The scope of solicitor-client privilege is broad.*** All communication that is made with a view to obtaining legal advice falls within the privilege, whether it is of a substantive or merely administrative nature. As this Court has recognized, even the name of the client, in and of itself, may be protected by the privilege. Similarly, issues relating to the calculation and payment of fees are an important element of the solicitor-client relationship. This Court has therefore held that the “existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it.” Therefore, in order to keep impairments of solicitor-client privilege to a minimum, lawyers’ bills are presumptively considered to be protected by the privilege.<sup>7</sup>

18. ***Legislation that interferes with the privilege must be interpreted restrictively.*** Because of the fundamental role that solicitor-client privilege plays in administration of justice, it must be “jealously guarded and should only be set aside in the most unusual circumstances.” This Court has stated that the question of when solicitor-client privilege can be violated by the express intention of the legislature is “a controversial matter.” Although a statute can provide the authority to interfere with the privilege, “the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.” Therefore legislation that may encroach on solicitor-client privilege must be interpreted restrictively. Solicitor-client privilege “cannot be abrogated by inference.”<sup>8</sup>

### **The definition of solicitor-client privilege in the *Act***

19. In contrast to this Court’s expansive approach to solicitor-client privilege, the *Act* narrowly defines the privilege as a mere evidentiary right to refuse to disclose documents in court. Indeed, the information at issue in this case technically falls outside the narrow definition of the privilege (without even considering the exception for accounting records) simply because it is to be disclosed to the Minister, not in a court. Moreover, to the extent that the definition of solicitor-client privilege in the *Act* is construed to provide a blanket exception for all “accounting records,” it is inconsistent with the common law’s nuanced approach to the privilege, which

<sup>7</sup> *Lavallee* at para. 28 (FBA, Tab 4); *Maranda v. Richer*, 2003 SCC 67 at paras. 32-33 (RBA, Tab 32)

<sup>8</sup> *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at paras. 17-18, 34 [*Pritchard*] (RBA, Tab 36); *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875 [*Descôteaux*] (ABA, Tab 4); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 11 [*Blood Tribe*] (ABA, Tab 3)

recognizes that in some circumstances information contained within “accounting records” (such as the names of the clients and amounts owing) may be privileged.<sup>9</sup>

**The *Act* provides for judicial discretion to protect solicitor-client privilege**

20. The Minister’s attempt to limit judicial discretion under the *Act* is contrary to the plain language of the *Act*, the purpose of the provisions at issue and the principle that statutes that interfere with solicitor-client privilege “must be interpreted restrictively.” Moreover, it is inconsistent with *Charter* values, under which courts must have sufficient “flexibility and discretion to remain the protectors of constitutional rights and guardians of the law.” Properly construed, as the Court of Appeal correctly noted, “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.”<sup>10</sup>

21. ***Section 231.7 expressly confers judicial discretion.*** On a plain reading of section 231.7, the *Act* provides broad discretionary powers to a court to grant or refuse the Minister’s application for a compliance order. Subsection 231.7(1) provides that a judge “may” order a person to provide any information or document sought by the Minister, but only if the judge is satisfied that the information is not protected from disclosure by solicitor-client privilege within the meaning of subsection 232(1). However subsection 231.7(1) does not mandate that a judge “must” or “shall” grant the Minister’s application where the statutory criteria are met. Rather, even in those cases, the judge “may” (or may not) choose to grant the Minister’s application.<sup>11</sup>

22. ***Purpose of the relevant provisions is to protect solicitor-client privilege.*** In arguing that the statutory definition of solicitor-client privilege limits judicial discretion under the *Act*, the Minister focuses on her broad powers to ensure compliance with Canada’s self-reporting tax system. However, the purpose of these provisions is not only to enhance the Minister’s power under the *Act* – it is also to limit it. Subsection 237.1(1) *allows* a judge to grant the Minister’s application for a compliance order, but only on the condition that the information is not protected by solicitor-client privilege within the meaning of subsection 232(1). It does not *require* a judge

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<sup>9</sup> *Income Tax Act*, s. 232(1); *Maranda* at paras. 32-33 (RBA, Tab 32); *Lavallee* at para. 28 (FBA, Tab 4)

<sup>10</sup> *Descôteaux* at 875 (ABA, Tab 4); *Lavallee* at para. 48 (FBA, Tab 4); Judgment and Reasons of the Federal Court of Appeal [*FCA Reasons*] at para. 70, Appellant’s Record, Vol. 1, Tab 2, p. 12

<sup>11</sup> *Income Tax Act*, s. 231.7(1); *Interpretation Act* (R.S.C., 1985, c. I-21), s. 11

to grant the Minister's application under any circumstances. Moreover, the purpose of section 232, where solicitor-client privilege is defined, is to protect solicitor-client privilege by preventing the disclosure of privileged information to the Minister.<sup>12</sup>

23. ***The Act guarantees a certain level of protection of solicitor-client privilege.*** The combination of section 231.7 and subsection 232(1) achieves this purpose. By section 231.7, if the information that the Minister requires falls within the definition of solicitor-client privilege in subsection 232(1), the judge *may not* grant the Minister's application for a compliance order. However, where information falls outside the definition, a judge nevertheless retains discretion to refuse the Minister's application on any basis consistent with the statutory purposes, including that it is protected by the common law of solicitor-client privilege. Contrary to the argument in the Minister's factum, the Court of Appeal's exercise of discretion does not render Parliament's definition "meaningless." Rather, it furthers the statutory scheme. Read together, section 231.7 and subsection 232(1) ensure a minimum level of protection for solicitor-client privilege under the *Act* – but they do not set a limit on that protection.<sup>13</sup>

24. ***The Minister is seeking to abrogate solicitor-client privilege by inference.*** Indeed, the only limitation that the *Act* places on the judge's discretion is that the judge must be satisfied that certain criteria are met (in particular, that the information is not protected by privilege within the meaning of subsection 232(1)). Even if the Minister is correct that Parliament has used "clear and explicit language" to narrow the definition of solicitor-client privilege in subsection 232(1), there is no such clear and explicit language limiting the judge's discretion under section 237.1. In the absence of any express limit on judicial discretion in the *Act*, the Minister is impermissibly seeking to abrogate solicitor-client privilege "by inference."<sup>14</sup>

25. ***Privilege must be interfered with only to the extent absolutely necessary.*** The Minister's attempt to limit judicial discretion is also contrary to the principle that, even where a statute does provide the express authority to interfere with solicitor-client privilege, it must be interfered with only "to the extent absolutely necessary in order to achieve the ends sought by the enabling

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<sup>12</sup> Appellant's factum, paras. 31-36, 46; *Income Tax Act*, s. 232(10)

<sup>13</sup> Appellant's factum, para. 65

<sup>14</sup> Appellant's factum, para. 61; *Blood Tribe* at paras. 2, 11 (ABA, Tab 3)

legislation.” That determination inherently requires courts to balance the importance of privilege with the object of the legislation, an exercise that requires judicial discretion.<sup>15</sup>

26. ***Charter values support allowing judicial discretion.*** The Federation recognizes that the constitutionality of the provisions of the *Act* is not at issue in this case. However, as a matter of statutory interpretation, to the extent there is any ambiguity about whether the definition of solicitor-client privilege limits judicial discretion under section 231.7, the *Act* must be interpreted in a manner that is consistent with *Charter* values. Since solicitor-client privilege is a *Charter*-protected right, the *Act* should be interpreted in a manner that provides courts with sufficient “flexibility and discretion to remain the protectors of constitutional rights,” including the ability to fashion means to protect clients’ interests.<sup>16</sup>

27. This Court has previously held that the absence of judicial discretion violates the *Charter*. In *Baron v. Canada* this Court considered subsection 231.3(3) of the *Act*, which provided that a judge “shall” issue a search warrant if certain statutory criteria were met. This Court held that it “violates s. 8 of the *Charter*, insofar as it removes the residual discretion for the issuing judge to refuse to issue a search warrant in the proper circumstances, notwithstanding that the statutory criteria for its issuance have been met.” As the Court explained, “[i]t is implicit in the provision that the judge is not to act as a rubber stamp.” Similarly, in *Lavallee* this Court held that the absence of discretion was a “fatal flaw” in the statutory scheme at issue. Justice Arbour explained that “reasonableness dictates that courts must retain a discretion to decide whether material seized in a lawyer’s office should remain inaccessible to the state as privileged information if and when, in the circumstances, it is in the interest of justice to do so.”<sup>17</sup>

28. In contrast, subsection 231.7(1) expressly provides for judicial discretion. Especially since this Court has held its absence to be a “fatal flaw” in other cases, the *Act* should not be interpreted to limit the judicial discretion for which it provides. Rather, interpreting the provision to be consistent with *Charter* values, it must allow for the meaningful exercise of judicial discretion to protect solicitor-client privilege.

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<sup>15</sup> *Descôteaux* at 875 (ABA, Tab 4)

<sup>16</sup> *R v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 29 (FBA, Tab 5); *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 61-62 (FBA, Tab 2); *Lavallee* at para. 48 (FBA, Tab 4)

<sup>17</sup> *Baron v. Canada*, [1993] 1 S.C.R. 416 at 422-423, 439 (FBA, Tab 1); *Lavallee* at para. 43 (FBA, Tab 4)

**The Act provides for judicial discretion to direct an evidentiary process**

29. In any event, even if the Minister is correct that the definition of solicitor-client privilege overrides courts' discretion to protect information on the basis of the privilege, the Minister's argument is premature. The Court of Appeal did not actually exercise its discretion to protect solicitor-client privilege beyond the statutory definition. It simply directed an evidentiary process by which the respondent's clients, the holders of any privilege that might exist in the documents sought by the Minister, would be notified that potentially privileged information was at risk of being disclosed, and would be provided with an opportunity to respond. As explained below, the Court of Appeal's discretion to impose this process is consistent with both the *Act* and the common law.

30. ***Court's right to control its own evidentiary process.*** At common law "courts have always had a right to oversee and control the evidentiary process" and therefore "have all the powers necessary for the exercise of such control." As this Court very recently confirmed, this broad jurisdiction provides a judge with the power to weigh the various interests at stake and ensure that proceedings remain fair and efficient. That is exactly what the Court of Appeal did in this case. Taking into account the importance of solicitor-client privilege and fairness to the clients (whose privileged information was at risk of being provided to the Minister without their knowledge) the Court imposed a procedure whereby the clients would be provided with notice and an opportunity to be heard.<sup>18</sup>

31. ***The Act does not limit courts' ability to control their own process.*** The Minister does not point to any limitation in the *Act* that could possibly limit the Court's ability to control its own process. Instead, she focuses on the potential result of that process (that the Court may refuse to order the requested accounting records to be produced to the Minister). However, the process that the Court of Appeal directed under section 231.7 is not unique under the *Act*. The *Act* expressly provides a named client whose privileged information has been seized or retained (including under the Minister's requirement provision in section 231.2) with an opportunity to apply to a judge for a determination of the question of whether the client has solicitor-client privilege in the document at issue. It further provides a judge with discretion to give directions as

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<sup>18</sup> *Imperial Oil v. Jacques*, 2014 SCC 66 at paras. 82-87 (FBA, Tab 3)

to the course to be followed for that determination. It is inconceivable that Parliament intended to deprive an unnamed client of similar procedural fairness.<sup>19</sup>

32. ***Process is particularly important here given the conflict of interest.*** The evidentiary process that the Court of Appeal imposed is especially important in this case, where it is the clients, not the lawyer, whose privilege may be at stake, there has been no notice to the clients that their information may be disclosed, and their lawyer is in a position of conflict (since he is being investigated by the Minister). The conflict of interest is particularly acute since, as the respondent explains in his factum, the respondent may benefit from providing the potentially privileged information to the Minister, while at the same time his clients would be prejudiced (by potentially losing their right to solicitor-client privilege). The Court of Appeal was therefore correct in holding that “the Judge, as guardian of the law, should have fashioned a remedy addressing the critical issue of privilege before making his Order.”<sup>20</sup>

33. ***Discretion to impose a process to determine whether information falls within 232(1).*** At a minimum, a judge must determine whether the information falls within the definition of solicitor-client privilege in subsection 232(1). As part of that determination, the Court must be allowed to impose an appropriate process that can provide clients with notice and the opportunity to be heard. Moreover, precluding courts from directing such a process will preclude clients in future cases (as well as the clients in this case) from arguing that the *Act*'s treatment of solicitor-client privilege infringes their constitutional rights under the *Charter*. This Court should not prevent clients from raising a *Charter* challenge based on their particular circumstances simply because they have no notice that their privileged information may be disclosed.

#### **PART IV – COSTS**

34. The Federation does not seek costs and asks that no costs be awarded against it.

#### **PART V – REQUEST FOR PERMISSION TO MAKE ORAL ARGUMENT**

35. The Federation requests permission to make oral submissions not exceeding 10 minutes.

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<sup>19</sup> *Income Tax Act*, ss. 232(4) and 232(10)

<sup>20</sup> Respondent's factum, paras. 71-73; FCA Reasons at para. 70, Appellant's Record, Vol. 1, Tab 1. p.12

November 19, 2014

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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## PART VI – TABLE OF AUTHORITIES

| <i>Authority</i>   | <i>Paragraph(s) in<br/>Parts I &amp; III</i> |
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| <i>R. v. McLure</i> , 2001 SCC 14, [2001] 1 S.C.R. 445   | 16   |
| <i>Smith v. Jones</i> , [1999] 1 S.C.R. 455  | 11, 15, 16                                   |
| <i>Solosky v. The Queen</i> , [1980] 1 S.C.R. 821  | 11, 15, 16                                   |

## PART VII – STATUTORY PROVISIONS

*Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), s. 231.7, ss. 232(1), (4), (10)

*Act to amend the Income Tax Act and the Federal-Provincial Fiscal Arrangements Act*, S.C. 1965, c. 18, s. 26

*Interpretation Act* (R.S.C., 1985, c. I-21), s. 11

***Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.)***

***Loi de l'impôt sur le revenu, L.R.C. (1985), ch. 1 (5e suppl.)***

### **Compliance order**

### **Ordonnance**

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

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) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

(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)).

(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.

### **Notice required**

### **Avis**

(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.

(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.

**Judge may impose conditions**

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

**Contempt of court**

(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.

**Appeal**

(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

**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

**Conditions**

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

**Outrage**

(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.

**Appel**

(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.

**Définitions**

**232.** (1) Les définitions qui suivent s’appliquent au présent article.

« *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

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”

« *privilege des communications entre client et 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.

### **Seizure of certain documents where privilege claimed**

**232. (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

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.

« *privilege des communications entre client et avocat* »

“*solicitor-client privilege*”

« *privilege 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 lors de la saisie de documents**

**232.(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

same client, in package and suitably seal and identify the package; and

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

- o (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
- o (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**

**232.(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

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 document**

(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 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**

**232.(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

(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 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.

### **Directions**

**232.(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.

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 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.

### **Mesures non prévues**

**232.(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.



ACTS OF THE  
**PARLIAMENT OF CANADA**

PASSED IN THE SESSION HELD IN THE

FOURTEENTH YEAR OF THE REIGN OF HER MAJESTY

**QUEEN ELIZABETH II**

BEING THE

**THIRD SESSION OF THE TWENTY-SIXTH PARLIAMENT**

Began and holden at Ottawa, on the Fifth day of April, 1965,  
and ended by dissolution on the Eighth day of September, 1965.

HIS EXCELLENCY GENERAL

**GEORGES PHILIAS VANIER**

GOVERNOR GENERAL

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PART I

**PUBLIC GENERAL ACTS**

**DEC 22 1965**

73730

ROGER DUHAMEL, P.R.S.C.  
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY  
OTTAWA, 1965

## 14 ELIZABETH II.

## CHAP. 18

An Act to amend the Income Tax Act and the  
Federal-Provincial Fiscal Arrangements Act.

[Assented to 30th June, 1965.]

HER Majesty, by and with the advice and consent of the  
Senate and House of Commons of Canada, enacts as  
follows:

## INCOME TAX ACT.

1. (1) Subparagraph (iii) of paragraph (b) of  
subsection (1) of section 5 of the *Income Tax Act* is repealed  
and the following substituted therefor:

“(iii) representation or other special allowances  
received in respect of a period of absence  
from Canada as a person described in  
paragraph (b), (c) or (ca) of subsection (3)  
of section 139,”

(2) This section is applicable to the 1966 and  
subsequent taxation years.

2. (1) All that portion of paragraph (u) of sub-  
section (1) of section 11 of the said Act preceding sub-  
paragraph (i) thereof is repealed and the following substituted  
therefor:

“(u) such part of any amount included in computing  
the income of the taxpayer for the year by  
virtue of subparagraph (iv) or (v) of paragraph  
(a) of subsection (1) of section 6 or sub-  
section (9) of section 79c as does not exceed  
the amount by which”

Transfer of  
super-  
annuation  
benefits and  
retiring  
allowances

R.S., c. 148;  
1952-53, c. 40;  
1953-54, c. 57;  
1955, cc. 54  
55;  
1959, c. 39;  
1957, c. 29;  
1957-58, c. 17;  
1958, c. 32;  
1959, c. 45;  
1960, c. 43;  
1960-61,  
cc. 17, 49;  
1962-63, c. 8;  
1963, cc. 21,  
41;  
1964-65, c. 13;  
1965, c. 12.

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*Income Tax Act.*

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or by way of cross-appeal are true; but, notwithstanding anything in this section, a reply may be filed at any time until an application to dispose of the appeal is made under this subsection and thereafter only upon such terms as the court may by order permit."

**25.** Section 117 of the said Act is amended by adding thereto the following subsection:

"(3) Notwithstanding subsection (1) of section 9 of the *Old Age Security Act*, the Minister of National Health and Welfare may communicate or allow to be communicated to the Minister or any officer or servant employed in connection with the administration or enforcement of this Act, if designated by the Minister for the purpose, upon request of the Minister, information as to the amount of any pension under the *Old Age Security Act* authorized to be paid to a taxpayer for a year." Pension communication authorized.

**26.** Paragraph (e) of subsection (1) of section 126A of the said Act is repealed and the following substituted therefor:

"(e) "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 him and his 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."

**27.** Section 136 of the said Act is amended by adding thereto the following subsection:

"(16) In any prosecution for an offence under this Act an affidavit of an officer of the Department of National Revenue, sworn before a commissioner or other person authorized to take affidavits, setting out that he has charge of the appropriate records and that an examination of the records shows that an amount required under this Act to be remitted to the Receiver General of Canada on account of tax for a year has not been received by the Receiver General of Canada, shall be received as *prima facie* evidence of the statements contained therein." Idem.

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28.

**Interpretation Act, R.S.C., 1985, c. I-21**

## IMPERATIVE AND PERMISSIVE CONSTRUCTION

**11.** The expression “shall” is to be construed as imperative and the expression “may” as permissive.

**Loi d'interprétation, L.R.C. (1985), ch. I-21**

## OBLIGATION ET POUVOIRS

**11.** L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.