



SUPREME COURT OF CANADA

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

APPEAL HEARD: October 3, 2015
JUDGMENT RENDERED: June 3, 2016
DOCKET: 35892

BETWEEN:

Attorney General of Canada and Canada Revenue Agency
Appellants

and

Chambre des notaires du Québec and Barreau du Québec
Respondents

- and -

**Advocates' Society, Canadian Bar Association,
Federation of Law Societies of Canada and
Criminal Lawyers' Association**
Intervenors

OFFICIAL ENGLISH TRANSLATION

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner
and Gascon JJ.

JOINT REASONS FOR JUDGMENT: Wagner and Gascon JJ. (McLachlin C.J. and Abella,
(paras. 1 to 96) Cromwell, Moldaver and Karakatsanis JJ. concurring)

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CANADA (A.G.) v. CHAMBRE DES NOTAIRES

**Attorney General of Canada and
Canada Revenue Agency**

Appellants

v.

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Barreau du Québec**

Respondents

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Canadian Bar Association,
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2016 SCC 20

File No.: 35892.

2015: November 3; 2016: June 3.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of rights — Search and seizure — Professional secrecy of notaries and lawyers — Income tax — Tax audit and collection — Whether ss. 231.2(1) and 231.7 and definition of “solicitor-client privilege” set out in s. 232(1) of Income Tax Act infringe right guaranteed by s. 8 of Canadian Charter of Rights and Freedoms insofar as they apply to lawyer or notary — If so, whether that impairment can be justified under s. 1 of Charter — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.2(1), 231.7, 232(1) “solicitor-client privilege”.

Taxation — Income tax — Enforcement — Professional secrecy of notaries and lawyers — Statutory provision requiring provision of documents or information for audit or enforcement purposes — Constitutional validity of requirement scheme with respect to notaries and lawyers and of exception for accounting records of lawyer provided for in definition of “solicitor-client privilege” set out in Act — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.2(1), 231.7, 232(1) “solicitor-client privilege”.

Some notaries practising law in Quebec received requirements to provide documents or information from the Minister of National Revenue under s. 231.2 of the *ITA*. The purpose of these requirements was to obtain information or documents relating to clients of the notaries for tax collection or audit purposes. Some of the notaries who received such requirements contacted the *Chambre des notaires du*

Québec to raise concerns about their clients' right to professional secrecy. The Chambre instituted a declaratory action against the Attorney General of Canada and the Canada Revenue Agency ("CRA") for the purpose of having ss. 231.2 and 231.7 of the *ITA* and the exception for the accounting records of notaries and lawyers set out in the definition of "solicitor-client privilege" in s. 232(1) declared to be unconstitutional and of no force or effect with respect to notaries. The Barreau du Québec joined in the proceedings as an intervener for the purpose of having any declaration made by the courts concerning the legislative provisions in question apply equally to its members.

The Superior Court and the Court of Appeal ruled in favour of the Chambre and the Barreau. The Court of Appeal found that, pursuant to s. 52 of the *Constitution Act, 1982*, ss. 231.2(1) and 231.7 and the accounting records exception set out in s. 232(1) are unconstitutional and of no force or effect with respect to Quebec notaries and lawyers for all information and documents protected by professional secrecy.

Held: The appeal should be dismissed.

Section 8 of the *Charter* protects against unreasonable searches and seizures. There are two questions that must be answered to determine whether a government action was contrary to s. 8: whether the government action intruded upon an individual's reasonable expectation of privacy, in which case it constituted a

seizure within the meaning of s. 8, and whether the seizure was an unreasonable intrusion on that right to privacy.

The first of these questions is not problematic, as the Court has already established that a requirement constitutes a seizure within the meaning of s. 8. The seizure in this case involves information or documents that may be protected by the professional secrecy of notaries or lawyers. Professional secrecy must remain as close to absolute as possible, and it is generally seen as a fundamental and substantive rule of law. In this respect, professional secrecy has a deep significance regardless of the nature of the legal advice being sought or the context in which it is sought. For the purposes of the analysis under s. 8 of the *Charter*, the civil and administrative context of the requirement scheme does not diminish the taxpayer's expectation of privacy for information that is protected by professional secrecy. A client of a notary or a lawyer has a reasonable expectation of privacy for information and documents that are in the possession of the notary or lawyer and in respect of which a requirement is issued.

In answering the second question, the courts must balance the interests at stake, namely an individual's privacy interest on the one hand and the state's interest in carrying out a search or seizure on the other. Where the interest at stake is the professional secrecy of legal advisers, which is a principle of fundamental justice and a legal principle of supreme importance, the usual balancing exercise under s. 8 will not be particularly helpful. Stringent standards must be adopted to protect

professional secrecy. This means that any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable.

In this case there are several defects that cause a requirement sent to a notary or lawyer concerning information that is protected by professional secrecy to be unreasonable and contrary to s. 8, namely that the client is given no notice of the requirement, that an inappropriate burden is placed solely on the notary or lawyer concerned, that compelling disclosure of the information being sought is not absolutely necessary and that no measures have been taken to help mitigate the impairment of professional secrecy. The requirement scheme serves legitimate purposes, namely the collection of amounts owed to the CRA and tax audits, but the existence of an important purpose cannot justify sidestepping the protection afforded by s. 8 of the *Charter*. The constitutional defects in the requirement scheme are all the more unacceptable given that they could easily be mitigated and remedied by way of measures that are compatible with the state's obligations relating to the protection of professional secrecy. Currently, therefore, the impairment permitted by the requirement scheme set out in ss. 231.2(1) and 231.7 of the *ITA* is not consistent with the principle of minimization.

The exception whose effect is to exclude the accounting records of notaries and lawyers from the protection of professional secrecy and which is set out in s. 232(1) of the *ITA* also infringes the rights guaranteed by s. 8 of the *Charter*. To determine whether an abrogation of professional secrecy in the context of a seizure is

constitutional, a court must consider what characterizes professional secrecy as a substantive right. Thus, a legislative provision cannot, by abrogating professional secrecy, authorize the state to gain access to information that is normally protected, where the abrogation is not absolutely necessary to achieve the purposes of the legislation. Limits on professional secrecy must take into account the duty recognized by the Court to minimize impairments, and the exceptions must be precisely defined. In this case, the exception is broad and undefined, as it permits the seizure of any accounting record of a notary or a lawyer, and is therefore problematic from the standpoint of the absolute necessity test. Moreover, for all practical purposes, the exception removes from the court's jurisdiction the determination of whether accounting records in respect of which a requirement has been issued are privileged. In sum, in the absence of absolute necessity and given that there is no possibility of judicial review to ensure that professional secrecy is protected, the accounting records exception allows the unreasonable seizure of information found in the accounting records of notaries or lawyers.

Because the statutory provisions in question — ss. 231.2(1) and 231.7 and the accounting records exception set out in s. 232(1) of the *ITA* — do not minimally impair the right to professional secrecy, they cannot be saved under s. 1 of the *Charter*. As for the appropriate remedy in this case, since the Court has already found that the requirement scheme is generally constitutional insofar as requirements are sent to taxpayers, it is neither necessary nor appropriate to find that the entire scheme is invalid. The requirement scheme in the *ITA* infringes s. 8 of the *Charter*

and must be declared to be unconstitutional insofar as it applies to notaries and lawyers in Quebec. Section 231.2(1) of the *ITA*, which authorizes the Minister to send requirements, and s. 231.7 of the *ITA*, which authorizes the Minister to apply to a court to follow up on a requirement, are unconstitutional, and inapplicable to notaries and lawyers in their capacity as legal advisers. The exception for a lawyer's accounting records set out in the definition of "solicitor-client privilege" in s. 232(1) of the *ITA* is unconstitutional and invalid.

Cases Cited

Distinguished: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; **applied:** *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; **referred to:** *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Foster Wheeler Power Co. v. Société intermunicipale de*

gestion et d'élimination des déchets (SIGED) inc., 2004 SCC 18, [2004] 1 S.C.R. 456; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Canada (National Revenue) v. Thompson*, 2016 SCC 21; *Organic Research Inc. v. Minister of National Revenue* (1990), 111 A.R. 336; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

Statutes and Regulations Cited

Act respecting the ministère du Revenu, R.S.Q., c. M-31 [now *Tax Administration Act*, CQLR, c. A-6.002], s. 39.

Act to amend the Income Tax Act, S.C. 1956, c. 39, s. 28.

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

Act to facilitate the payment of support, CQLR, c. P-2.2, s. 57.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8.

Charter of human rights and freedoms, CQLR, c. C-12, s. 9.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46, s. 488.1.

Income Tax Act, R.S.C. 1952, c. 148.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 230 to 232, 231.1, 231.2, 231.7, 232(1) “solicitor-client privilege”, (2)(a), 238.

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Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 8., revised by John T. McNaughton. Boston: Little, Brown, 1961.

APPEAL from a judgment of the Quebec Court of Appeal (Bich, Léger and Fournier JJ.A.), 2014 QCCA 552, [2014] AZ-51056416, [2014] J.Q. n° 2296 (QL), 2014 CarswellQue 8337 (WL Can.), setting aside in part a decision of Blanchard J., 2010 QCCS 4215, [2010] R.J.Q. 2069, [2010] AZ-50670160, [2010] J.Q. n° 8868 (QL), 2010 CarswellQue 9351 (WL Can.). Appeal dismissed.

Marc Ribeiro, Christopher Rupar and Chantal Comtois, for the appellants.

Raymond Doray and Loïc Berdnikoff, for the respondent Chambre des notaires du Québec.

Giuseppe Battista, for the respondent Barreau du Québec.

Pierre Bienvenu and Andres Garin, for the intervener the Advocates’ Society.

Mahmud Jamal, Alexandre Fallon and W. David Rankin, for the intervener the Canadian Bar Association.

John B. Laskin and *Yael Bienenstock*, for the intervener the Federation of Law Societies of Canada.

Brian Gover, *Justin Safayeni* and *Carlo Di Carlo*, for the intervener the Criminal Lawyers' Association.

English version of the judgment of the Court delivered by

WAGNER AND GASCON JJ. —

I. Overview

[1] In this appeal, the Attorney General of Canada (“AGC”) and the Canada Revenue Agency (“CRA”), on the one hand, and the Chambre des notaires du Québec (“Chambre”) and the Barreau du Québec (“Barreau”), on the other, disagree about the requirement procedure set out in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”). This procedure enables the tax authorities to require any person to provide information or documents for any purpose related to the administration of the ITA.

[2] The Chambre and the Barreau submit that, when a “requirement to provide documents or information” is sent to a notary or a lawyer, there is a risk that the information or documents being sought will, unbeknownst to the legal adviser’s

client, reveal particulars that are protected by the professional secrecy of notaries and lawyers, otherwise known as solicitor-client privilege. To this extent, it is argued, the relevant provisions of the *ITA* infringe the rights guaranteed by ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), and the infringement cannot be justified under s. 1.

[3] The AGC and the CRA counter that the Canadian tax system is based on the principle of self-reporting and self-assessment, which means that the tax authorities must rely on broad powers of audit to ensure the system’s integrity. In this regard, they argue, the requirement procedure does not infringe any section of the *Charter*. Because the requirements in question are issued in an administrative context, not a criminal one, taxpayers have a lower expectation of privacy. In addition, according to the exception set out in the definition of “solicitor-client privilege” in s. 232(1) of the *ITA*, the accounting records of a notary or a lawyer, which contain information that is *prima facie* not privileged, are not protected by professional secrecy (“the accounting records exception”). The AGC and the CRA submit that this exception is valid and that the CRA should have access to information of this nature by means of requirements issued to such legal advisers.

[4] The Superior Court and the Court of Appeal ruled in favour of the Chambre and the Barreau. The Court of Appeal found that, pursuant to s. 52 of the *Constitution Act, 1982*, ss. 231.2(1) and 231.7 and the accounting records exception are unconstitutional and of no force or effect with respect to Quebec notaries and

lawyers for all information and documents protected by professional secrecy. We are in substantial agreement and would dismiss the appeal.

[5] The Court has held in the past that professional secrecy is a principle of fundamental justice within the meaning of s. 7 (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49). It is also a civil right of supreme importance in the Canadian justice system. Professional secrecy must thus remain as close to absolute as possible, and the courts must adopt stringent standards to protect it.

[6] A requirement under the *ITA* constitutes a seizure within the meaning of s. 8 of the *Charter*. The seizures made in this case are unreasonable and are contrary to that section, because the requirement scheme and the exception for accounting records do not provide adequate protection for the professional secrecy of notaries and lawyers. The procedure set out in the *ITA* does not require that the client, who is the holder of the privilege, be informed of the requirement or of any proceeding brought by the CRA to obtain an order to provide information or documents. The procedure also places the entire burden of protecting the privilege on the notary or lawyer. Finally, the AGC and the CRA have not established that it is absolutely necessary here to impair professional secrecy. Because the impugned provisions do not minimally impair the right to professional secrecy, they also cannot be saved under s. 1. In light of this conclusion, a separate analysis under s. 7 of the *Charter* will not be necessary.

II. Background

A. *Requirement Scheme of the ITA*

[7] Three provisions of the *ITA* relating to the requirement scheme are central to this appeal. They are set out in full in the appendix.

[8] The first of these provisions, s. 231.2(1), authorizes the Minister of National Revenue (“Minister”), by notice served personally or by registered or certified mail, to require a person to provide information or documents concerning a taxpayer within a reasonable time stipulated in the notice. This section therefore allows the CRA, for and on behalf of the Minister, to send a notary or lawyer a requirement concerning a client. But in most cases, the client in question has no knowledge of the requirement. The CRA generally sends the notice to the notary or lawyer without sending a copy to the client, that is, to the taxpayer about whom information is being sought. Moreover, the requirement is issued without judicial intervention.

[9] The second provision, s. 231.7, comes into play where a person to whom a requirement is issued refuses to provide the information or documents being sought. In such a case, this section provides that the Minister may have recourse to the courts by means of a proceeding of a summary nature. Section 231.7 authorizes a judge, on application by the Minister, to order a person to provide any access, assistance, information or document sought by the Minister if the judge is satisfied that the

person in question did not do so when required under s. 231.1 or 231.2 of the *ITA*. However, this section provides that the judge may make an order in respect of the information or document being sought only if the information or document is not protected from disclosure by solicitor-client privilege within the meaning of s. 232(1) of the *ITA*.

[10] The third provision is the definition of “solicitor-client privilege” set out in s. 232(1):

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.

[11] This definition was added to the *Income Tax Act*, R.S.C. 1952, c. 148, in 1956 (c. 39, s. 28). At the time, professional secrecy had not yet attained the status it is given today (c. 18, s. 26). As for the “accounting record of a lawyer” exception, it was added to the definition in 1965, although the term “accounting record” is not defined in the *ITA*. The definition and the exception have remained unchanged since they were first enacted. The third paragraph of s. 232(1) provides that, for the purposes of s. 232, the term “lawyer” includes both notaries and advocates in Quebec.

[12] It should be added that the *ITA*’s requirement scheme provides for sanctions up to and including imprisonment for persons who have failed to comply

with any of ss. 230 to 232 (s. 238(1) of the *ITA*, also reproduced in the appendix). However, a notary or lawyer who is prosecuted for failure to comply with a requirement can raise professional secrecy as a defence and must be acquitted if the judge is satisfied that the notary or lawyer had reasonable grounds to believe that solicitor-client privilege applied to the information or document being sought (s. 232(2)(a) of the *ITA*).

B. *Source of the Dispute*

[13] The factual background to the parties' dispute is essentially quite simple. In recent years, notaries practising law in Quebec have received requirements issued by the CRA under s. 231.2 of the *ITA*. The purpose of all these requirements has been to obtain information or documents relating to clients of the notaries for tax collection or audit purposes. According to the CRA, the information in question falls within the accounting records exception set out in the definition of "solicitor-client privilege" in s. 232(1) of the *ITA*. In almost every one of the requirements filed in evidence, the CRA official who sent the requirement advised the notary of the possible sanctions — namely a fine or imprisonment — for failing to comply with it.

[14] Some of the notaries who received such requirements contacted the Chambre to raise concerns about their clients' right to professional secrecy. The Chambre tried unsuccessfully to negotiate a compromise with the CRA on what should be done when requirements are issued to notaries. The failure of the negotiation led the Chambre to institute a declaratory action against the AGC and the

CRA in the Superior Court for the purpose of having ss. 231.2 and 231.7 of the *ITA* and the accounting records exception declared to be unconstitutional and of no force or effect with respect to notaries. The Chambre argued, *inter alia*, that those provisions authorized unreasonable seizures contrary to the *Charter* because they did not include adequate protection for professional secrecy. In its action, the Chambre also requested that a series of documents regularly held or prepared by its members in their practice be declared to be *prima facie* privileged.

[15] The Barreau, whose members are lawyers practising in Quebec to whom similar requirements could be issued for information and documents relating to their clients, joined in the proceedings as an intervener for the purpose of having any declaration made by the courts concerning the legislative provisions in question apply equally to its members.

III. Judicial History

A. *Quebec Superior Court, 2010 QCCS 4215, [2010] R.J.Q. 2069*

[16] Blanchard J. allowed the Chambre's action. He made an order declaring that ss. 231.2 and 231.7 of the *ITA* and the definition of "solicitor-client privilege" in s. 232(1) of the *ITA* are unconstitutional and of no force or effect with respect to notaries and lawyers in Quebec for documents protected by professional secrecy. He also granted the request to recognize a list of legal documents prepared by notaries or lawyers in the practice of their profession as being *prima facie* protected by

professional secrecy regardless of the medium on which the documents in question are found.

[17] In his reasons, Blanchard J. noted at the outset that there was no need for a lengthy discussion of the distinction between notaries and lawyers. Both are legal advisers. As such, they have the same duty and obligation to respect their clients' right to professional secrecy. After reviewing this Court's decisions on the professional secrecy of notaries and lawyers, Blanchard J. concluded that, in this case, there was no reason to draw a distinction based on whether the seizure in question occurred in a civil or a criminal context. He added that the distinction advanced by the CRA between "facts" and "communications" was not justified. In his view, the relationship between a legal professional and a client presupposes that all actions, documents and information resulting from that relationship are *prima facie* privileged. He also expressed the view that exceptions to professional secrecy should be made very rarely and only as a last resort.

[18] Concerning the impugned provisions of the *ITA*, Blanchard J. observed that the procedure established by Parliament does not provide a way for clients who hold the right to professional secrecy to know that their right is in jeopardy or to ensure that it is protected: only the person against whom an order is sought has to be given notice of a summary application made by the Minister to a judge. In the context of this case, that person is the notary. The fact that a judge can order a person to provide documents does not ensure that the holder of the right to professional secrecy

is given a reasonable opportunity to raise an objection in order to maintain the confidentiality of privileged information. Blanchard J. concluded that ss. 231.2 and 231.7 result in an unreasonable search and seizure contrary to s. 8 of the *Charter*.

[19] As to the accounting records exception, Blanchard J. found that it also had to be declared to be of no force or effect under the Constitution. In his view, the CRA should always have to apply directly to a superior court judge when seeking to obtain privileged information.

B. *Quebec Court of Appeal, 2014 QCCA 552*

[20] The Court of Appeal unanimously allowed the appeal, but solely to make a minor change to para. 125 of the trial judge's judgment and to strike out paras. 126-27 thereof. The primary purpose of the changes was to make it clear that where s. 231.2 of the *ITA* was concerned, only subsection (1) was to be declared to be of no force or effect with respect to a requirement sent to a taxpayer's notary or lawyer. In addition, the changes limited the scope of the declaration of unconstitutionality to the accounting records exception set out in s. 232(1) of the *ITA*. The paragraphs of the judgment that were struck out concerned the list of documents that Blanchard J. had recognized as being *prima facie* protected by professional secrecy. Bich J.A., who wrote the Court of Appeal's reasons, found that it was risky to establish in advance a presumption as to what documents or classes of documents were privileged.

[21] This being said, Bich J.A. accepted Blanchard J.'s conclusions about the scope of professional secrecy and noted that exceptions to professional secrecy must be rare and must be narrowly construed. In her opinion, the distinction between "facts" and "communications" is not relevant, and the expectation of privacy associated with professional secrecy is high regardless of whether the circumstances in which it might be jeopardized arise in a civil or criminal context. She agreed with Blanchard J. that there are strong similarities between the professional secrecy of legal advisers in Quebec and solicitor-client privilege in the law of the other provinces; the definition in s. 232(1) thus incorporates the law relating to professional secrecy in Quebec and all the rules on solicitor-client privilege developed by this Court.

[22] As to the requirement scheme provided for in ss. 231.2(1) and 231.7 of the *ITA*, Bich J.A. found that, insofar as it concerns notaries and lawyers, it infringes s. 8 of the *Charter* because of one principal, fatal feature: the potential breach of the professional secrecy of legal advisers without the knowledge or consent of the client in respect of whom a requirement is issued. For this reason, Bich J.A. was of the opinion that the provisions lead to an unreasonable seizure and that the impairment is not minimal, given that it does not meet the constitutional requirements for the seizure of documents that could be protected by professional secrecy. Nor, in her view, was the requirement scheme consistent with the principle of minimization enunciated in *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, according to which a seizure may be carried out at the office of a legal adviser only where there

are no reasonable alternative measures for obtaining the information being sought. She added that a seizure cannot be justified by mere convenience.

[23] Bich J.A. found that the accounting records exception is equally invalid. The exception does not meet the requirements of s. 8 of the *Charter*; Parliament cannot opt out of s. 8 by enacting a legislative exception to professional secrecy. In her view, judges may not be stripped of the possibility of deciding on a case-by-case basis whether documents are protected by professional secrecy. Finally, Bich J.A. noted that the scheme does not include measures that would satisfy the minimal impairment requirement that applies in respect of professional secrecy, and that as a result it cannot be saved under s. 1.

IV. Issues

[24] The Chief Justice stated the following constitutional questions for the purposes of the appeal:

1. Do ss. 231.2(1) and 231.7 and the definition of “solicitor-client privilege” set out in s. 232(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), infringe a right guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* insofar as they apply to a lawyer or a notary?
2. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Do ss. 231.2(1) and 231.7 and the definition of “solicitor-client privilege” set out in s. 232(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), infringe the right guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms* insofar as they apply to a lawyer or a notary?
4. If so, is the infringement a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[25] As can be seen from these questions, the constitutional validity of the relevant provisions of the *ITA* is at issue under both s. 7 and s. 8 of the *Charter*. In *Lavallee*, at para. 34, and in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401 (“*FLS*”), at para. 33, the Court stated that there is no need to undertake a s. 7 analysis where a s. 8 analysis leads to the conclusion that the impugned provisions are unconstitutional.

[26] Since that is in fact the conclusion we reach in the instant case, it will suffice for us to begin by outlining the framework for the s. 8 analysis and then to discuss the constitutional defects identified by the courts below in the requirement scheme as a whole and more particularly in the accounting records exception. Because the scope of the professional secrecy of legal advisers is central to this case, it will be necessary for us to discuss it in our analysis, as the Superior Court and the Court of Appeal did in their respective reasons.

V. Analysis

A. *Section 8 and Professional Secrecy*

[27] Section 8 of the *Charter* does not explicitly protect professional secrecy. Rather, it protects against unreasonable searches and seizures. There are two questions that must be answered to determine whether a government action was contrary to s. 8. The first is whether the government action intruded upon an individual's reasonable expectation of privacy. If it did, it constitutes a seizure within the meaning of s. 8. The second is whether the seizure was an unreasonable intrusion on that right to privacy (*R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 33; *Lavallee*, at para. 35). In the case at bar, the first step is not really problematic, as the Court held in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, that a requirement under s. 231(3) of the *ITA* (now s. 231.2(1)) constitutes a seizure within the meaning of s. 8 (pp. 641-42).

(1) Reasonable Expectation of Privacy

[28] On the first question, it should be remembered that professional secrecy, which started out as a mere rule of evidence, became a substantive rule over time (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, at pp. 875-76; *Smith v. Jones*, [1999] 1 S.C.R. 455, at paras. 48-49; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, at para. 10). The Court now recognizes that this rule has deep significance and a unique status in our legal system (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 28 and 31-33; *Smith*, at paras. 46-47). In

Lavallee, the Court reaffirmed that the right to professional secrecy has become an important civil and legal right and that the professional secrecy of lawyers or notaries is a principle of fundamental justice within the meaning of s. 7 of the *Charter* (para. 49). Moreover, professional secrecy is generally seen as a “fundamental and substantive” rule of law (*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 39). Because of its importance, the Court has often stated that professional secrecy should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible (*Lavallee*, at paras. 36-37; *McClure*, at para. 35; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, at para. 27; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, at para. 15).

[29] From this perspective, Blanchard J. was right to note that [TRANSLATION] “[t]he fundamental importance of the right to professional secrecy of lawyers is a cornerstone not only of our judicial system but, more broadly, of our legal system” (para. 86).

[30] In this respect, professional secrecy has a deep significance regardless of the nature of the legal advice being sought or the context in which it is sought (*Smith*, at para. 46). We therefore conclude, contrary to the argument of the AGC and the CRA, that for the purposes of the analysis under s. 8 of the *Charter*, the civil and administrative context of the requirement scheme does not diminish the taxpayer’s expectation of privacy for information that is protected by professional secrecy.

[31] It is true that this Court stated in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, that it might be appropriate to find that there is a lower expectation of privacy in an administrative context and therefore to apply a “less strenuous and more flexible” standard of reasonableness in determining whether a seizure is constitutional (pp. 506-7). To justify its reasoning in that case, the Court stated that “there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course” (p. 507). In such cases, the routine performance of the activities in question often involves the inspection by agents of the state of premises or documents that would otherwise be considered private. Since the state is therefore expected to have access to information for regulatory purposes, it would make no sense to find that, on the one hand, the disclosure of such information is normal but that, on the other, the expectation of privacy associated with the information is extremely high.

[32] The situation is very different when information protected by professional secrecy is involved. The nature of such information means that it cannot be disclosed by a notary or a lawyer in any regulatory context. Even if the information may be obtained from a third party or may be a type of information that taxpayers must regularly provide to the tax authorities, it is presumed to be protected by professional secrecy while in the hands of a notary or a lawyer and is therefore exempt from seizure (*Maranda*, at paras. 33-34). The key difference between the situation in the

case at bar and the one in *Thomson Newspapers* lies in the fact that here, the party in possession of the information is the notary or the lawyer, not the person who is subject to the regulatory framework. We are therefore of the opinion that, with certain rare exceptions, the general rule is that information protected by professional secrecy that is in the possession of a legal adviser is immune from disclosure (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 37; *Smith*, at para. 51; *McClure*, at paras. 34-35).

[33] Moreover, the Court confirmed in *FLS* that the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is always high, regardless of whether the question arises in a civil, administrative or criminal context. Cromwell J. wrote the following on this point:

I also accept that, as Arbour J. noted in *Lavallee*, “the need for the full protection of the privilege is activated” in the context of a criminal investigation: para. 23. However, the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context. The main driver of that elevated expectation of privacy is the specially protected nature of the solicitor-client relationship, not the context in which the state seeks to intrude into that specially protected zone. I do not accept the proposition that there is a reduced expectation of privacy in relation to solicitor-client privileged communication when a [Financial Transactions and Reports Analysis Centre of Canada] official searches a law office rather than when a police officer does so in the course of investigating a possible criminal offence. While Arbour J. placed her analysis in the context of criminal investigations (see, e.g., paras. 25 and 49), her reasons, as have many others before and since, strongly affirmed the fundamental importance of solicitor-client privilege. [para. 38]

[34] We recognize that, in that case, Cromwell J. rejected the AGC's contention that the impugned scheme had to be characterized as merely an administrative law regulatory compliance scheme. Cromwell J. stated that the purposes of the scheme were instead to deter criminal offences and to facilitate the investigation and prosecution of serious offences. He noted that the scheme had "a predominantly criminal law character and [that] its regulatory aspects serve[d] criminal law purposes" (*FLS*, at para. 37). However, this takes nothing away from the clear and unequivocal remarks quoted above, which, in our view, apply to this appeal. The protection afforded to professional secrecy in the context of a s. 8 analysis is invariably high regardless of whether the seizure has occurred in a criminal or an administrative context.

[35] In our view, therefore, it is well established that a client of a notary or a lawyer has a reasonable expectation of privacy for information and documents that are in the possession of the notary or lawyer and in respect of which a requirement is issued. Indeed, the Court wrote in *Lavallee* that "[a] client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential" (para. 35).

(2) Unreasonable Intrusion on the Right to Privacy

[36] In answering the second question from *Edwards* in respect of an unreasonable seizure that is contrary to s. 8, the courts must balance the interests at

stake, namely an individual's privacy interest on the one hand and the state's interest in carrying out a search or seizure on the other. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Court stated in this regard "that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" (pp. 159-60).

[37] Here again, however, where the interest at stake is the professional secrecy of legal advisers, which is a principle of fundamental justice and a legal principle of supreme importance, the usual balancing exercise under s. 8 will not be particularly helpful (*Lavallee*, at para. 36). As the Court observed in *Goodis*, "[w]hile a fact-specific balancing may have been appropriate in *Fuda v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.), it cannot, having regard to this Court's categorical jurisprudence, apply where the records involve communications between solicitor and client" (para. 18).

[38] In *Lavallee*, the Court stated that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance" (para. 36). In *Smith*, the Court noted that "[t]he disclosure of the privileged communication should generally be limited as much as possible" (para. 86). This means that any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable (*Lavallee*, at para. 36). Absolute necessity is as restrictive a test

as may be formulated short of an absolute prohibition in every case (*Goodis*, at para. 20). In short, “[t]he appropriate test for any document claimed to be subject to solicitor-client privilege is ‘absolute necessity’” (*Goodis*, at para. 24). Stringent standards must therefore be adopted to protect it. A procedure will withstand *Charter* scrutiny only if its impact on the professional secrecy of legal advisers is minimal, as minimal impairment “has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege” (*Lavallee*, at para. 37).

[39] Thus, where professional secrecy is in issue, what matters is not the context in which a privileged document or privileged information could be disclosed to the state, but rather the fact that the document or information in question is privileged. It is important that a client consulting a legal adviser feel confident that there is little danger that information or documents shared by the client will be disclosed in the future regardless of whether the consultation takes place in the context of an administrative, penal or criminal investigation: “The lawyer’s obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients” (*Foster Wheeler*, at para. 34).

[40] From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected (*Maranda*, at paras. 30-33; *Foster Wheeler*, at para. 38). The line between facts and communications may be difficult to draw (S. N.

Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 941). For example, there are circumstances in which non-payment of a lawyer's fees may be protected by professional secrecy (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30). The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication" (*Maranda*, at para. 48). This is why there must be a rebuttable presumption to the effect that "all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42).

[41] It follows that we must reject the argument of the AGC and the CRA that some information, particularly information found in accounting records, constitutes facts rather than communications and is therefore always excluded from the protection of solicitor-client privilege as defined in s. 232(1) of the *ITA*.

[42] This being said on the applicable principles, the Chambre argued in particular, at every stage of the litigation, that Quebec notaries have a distinct role and face an even greater risk that information or documents they disclose in response to a requirement will be protected by professional secrecy. With respect, we are of the view that there are strong similarities between the common law's solicitor-client privilege and professional secrecy in the civil law. Nationwide, the Court's decisions with respect to the professional secrecy of legal advisers have been consistent. It would not be appropriate to change that approach in the case at bar.

[43] Of course, we are not denying the special status of notaries in Quebec. Notaries play a role distinct from that of lawyers in that province. However, it must be recognized that their role as legal advisers is very similar to the role played by solicitors in the common law provinces. It is therefore unnecessary to undertake a specific analysis respecting s. 9 of the *Charter of human rights and freedoms*, CQLR, c. C-12, or other legislation relating solely to the notarial profession. Clients who retain notaries in Quebec and those who retain solicitors in the common law provinces have the same expectation that their right to professional secrecy or solicitor-client privilege will be respected and that any information or documents they provide to their notaries or solicitors will be kept confidential. In any event, when it comes to solicitor-client privilege, the definition of “lawyer” in s. 232(1) of the *ITA* puts notaries and lawyers on the same footing.

B. *Constitutional Defects in the Requirement Scheme*

[44] The Superior Court and the Court of Appeal identified several defects that cause a requirement sent to a notary or lawyer concerning information that is protected by professional secrecy to be unreasonable and contrary to s. 8. We agree with that conclusion. The defects in question are that the client is given no notice of the requirement, that an inappropriate burden is placed solely on the notary or lawyer concerned, that compelling disclosure of the information being sought is not absolutely necessary and that no measures have been taken to help mitigate the impairment of professional secrecy. In the end, the AGC and the CRA have not made

any persuasive arguments that can overcome these defects identified by the courts below.

(1) Absence of Notice to the Client

[45] Professional secrecy belongs to the client, not to the notary or lawyer; only the client may waive it (*Blood Tribe*, at para. 9; *McClure*, at para. 37; *FLS*, at para. 48). Where it is in jeopardy, the client must therefore have an opportunity to ensure that it is protected. In *Lavallee*, Arbour J. identified the possibility of solicitor-client privilege being breached “without the client’s knowledge, let alone consent” as a “principal, fatal feature” of s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 (para. 39). In our view, the same risk exists in the instant case.

[46] Nothing in the *ITA* obliges CRA officials to send a requirement to anyone other than the person from whom they are seeking information or documents. There is therefore no obligation to give notice to the client of a notary or lawyer to whom a requirement is issued, not even where the information or documents being sought will help facilitate collection from or an audit of that client. In fact, according to the evidence in the record of the Superior Court, the vast majority of the requirements sent to Quebec notaries were not served on their clients, thus indiscriminately putting the clients at risk of losing the protection of professional secrecy to which they are entitled in respect of privileged information that might be found in “accounting records” prepared by their legal advisers.

[47] At the hearing, the AGC and the CRA argued that it is the government's usual practice to always contact a notary or lawyer rather than his or her client. The government's expectation is that the notary or lawyer will act in a manner consistent with his or her ethical obligations and will therefore notify the client and ensure that the client's right to professional secrecy is protected. We find this argument unpersuasive for two reasons.

[48] First, as Arbour J. noted in *Lavallee* (at para. 40), a notary or a lawyer is not the alter ego of his or her client. Legal advisers and their clients may sometimes have conflicting interests. The professional relationship between the notary or lawyer and the client may even have been terminated before the requirement is sent. In any event, the right to claim professional secrecy does not belong to the legal adviser. The constitutionality of a seizure cannot rest on the unverifiable expectation that a legal adviser will always act diligently and solely in the client's interests when faced with a seizure by the state (*Lavallee*, at para. 40; *FLS*, at para. 49).

[49] Second, although it is true that for practical reasons it can sometimes be necessary for third parties to contact an individual's legal adviser rather than contacting the individual directly, that is not the case here. Notaries to whom requirements are sent must instead be considered third parties who are in possession of information and documents relevant to collection from or an audit of the taxpayer, that is, the client. The notaries in question are placed in a situation similar to that of banks holding financial information or companies doing business with the taxpayer

that have kept information relevant to a particular transaction. A requirement sent to a taxpayer's legal adviser cannot be regarded as a communication similar to the communication that takes place in the course of litigation, for example. The argument of the AGC and the CRA that it is normal not to contact the clients of notaries or lawyers where requirements are issued is unfounded.

[50] Apart from this argument, which we reject, the AGC and the CRA have made no submission to explain why it would not be possible to notify a client that a requirement has been sent to his or her legal adviser. In cases in which a requirement is sent by email, it is certainly possible and, more importantly, easy for the letter sent to the notary or lawyer to be copied to the client. Indeed, the evidence in this case shows that there were some rare occasions on which CRA officials did notify the clients of notaries to whom they had sent requirements. If it was possible to do this in some cases, we find it difficult to understand why the CRA was not required to do so in all cases.

[51] In any event, as Bich J.A. correctly pointed out, the occasional service of requirements on clients in addition to notaries and lawyers does not amount to a true notification system. Because the *ITA* does not make it mandatory to notify the clients of legal advisers that a requirement has been sent, such service remains optional even where it is effected voluntarily. The constitutionality of the requirement scheme cannot be based on a presumption that the state will always behave honourably. The absence of any formal obligation to notify the clients in respect of whom

requirements are sent to notaries and lawyers is therefore a critical constitutional defect, as the Court indicated in both *Lavallee* and *FLS*.

[52] We wish to be clear, however, that in our opinion, the fact that the CRA need not seek judicial authorization before sending a requirement does not constitute a constitutional defect in the current scheme. Although the Court asserted in *FLS* that “the judicial pre-authorization requirement is, in itself, an important protection against improper search and seizure of privileged material”, it did not rule out “the possibility that Parliament could devise a constitutionally compliant inspection regime without a judicial pre-authorization requirement” (para. 56). In the instant case, if the client is given notice of the requirement, the risk of privileged information being disclosed without his or her consent when the requirement is sent would be greatly reduced.

(2) Burden Imposed on Legal Advisers

[53] The absence of notice to clients whose information and documents are sought by means of a requirement brings to light another significant defect in the scheme having regard to information protected by professional secrecy that is in the possession of a notary or a lawyer. This defect has to do with the role that notaries and lawyers are expected to play in safeguarding their clients’ right to professional secrecy and the fact that they ultimately bear alone the burden of safeguarding that right when a requirement is issued.

[54] Judicial consideration of a requirement under s. 231.7 of the *ITA* is not automatic. It can occur only if the notary or lawyer concerned refuses to comply with the requirement, in which case the Minister must apply to a Federal Court judge for a compliance order. The notary or lawyer therefore bears the burden of raising an objection to the requirement on the basis of professional secrecy. Unless the notary or lawyer does so, there is a possibility that the state will obtain information or documents to which it is not entitled (*Lavallee*, at paras. 39-40). In other words, basing the protection solely on the duty of legal advisers to claim their clients' right to professional secrecy increases the risk that the state will gain access to protected information.

[55] However, as we mentioned above, there may be many reasons why lawyers or, in the case at bar, notaries might fail to claim protection for their clients' right to professional secrecy in court. Since the legal adviser is not the alter ego of the client, he or she will not necessarily always make the same choices the client would (*Lavallee*, at paras. 39-40). There may be situations in which a notary or a lawyer is simply negligent and forgets to verify whether any of the information requested by the Minister is protected by professional secrecy. There may be other situations in which a notary or a lawyer forgets to notify a client that a requirement has been received before complying with it. Aside from a case of simple negligence that takes the form of a failure to notify a client, it is also possible for a notary or a lawyer to honestly but wrongly believe that the information sought by the Minister is not protected by professional secrecy and can therefore be disclosed. In addition, a

requirement could be issued to a notary or a lawyer who, although no longer the client's legal adviser, still has documents concerning the client.

[56] Finally, the possibility of being prosecuted (under s. 238 of the *ITA*) for failing to provide the CRA with the information it seeks could influence the choice made by a notary or a lawyer to comply or not to comply with a requirement. The threat of prosecution in fact creates a conflict of interests between legal advisers and their clients, pitting the duty of confidentiality owed by legal advisers to their clients against their statutory duty of disclosure to the tax authorities (*Lavallee*, at para. 40). In this regard, it is, contrary to the AGC's argument, irrelevant that none of the notaries who received requirements have so far been prosecuted for refusing to provide the information or documents being sought. The mere possibility of being so prosecuted under the *ITA* places those legal advisers in an intolerable situation. For the purposes of determining whether the seizure is unreasonable within the meaning of s. 8 and analyzing the scheme's constitutional defects in relation to notaries and lawyers and the protected information they have in their possession, this is sufficient.

[57] Because the client is not given notice of the requirement, the notary or lawyer can take any of the possible courses of action discussed above without the client's knowledge and without a court being asked to determine whether professional secrecy applies to the particular situation. This is all the more problematic given that, regardless of the reason why a notary or a lawyer fails to notify his or her client that a requirement has been received, there is no way for a court to remedy that failure after

the fact. If a legal adviser provides the CRA with the information or documents it seeks, the *ITA* gives the client no opportunity to remedy the improper disclosure. The client cannot go to court following the disclosure in order to withdraw certain privileged information or documents from the CRA. Once professional secrecy is lost, there is no way to recover it. This confirms that the requirement scheme is unreasonable, since it increases the risk of improper disclosure of confidential information protected by professional secrecy.

(3) Disclosure Is Not Absolutely Necessary

[58] There is more. In addition to the problems posed by the facts that notice is not given to the client and that an inappropriate burden is placed on the legal adviser alone, the courts have held that it is not appropriate to interfere with professional secrecy unless it is absolutely necessary to do so (*Goodis*, at para. 24; *Lavallee*, at para. 36). In *Lavallee* and *FLS*, the Court faulted the authorities for the fact that the impugned searches had not been carried out as a last resort (*Lavallee*, at para. 49; *FLS*, at para. 54). In addition to the fact that, as we will explain below, the exception set out in the definition of “solicitor-client privilege” in s. 232(1) is in itself problematic, we find that the entire requirement scheme is flawed in that it authorizes a seizure that cannot be characterized as a measure of last resort. In the context of a seizure involving information or documents that may be protected by the professional secrecy of notaries or lawyers, this presents a problem.

[59] We agree that the problem in this case is not as acute as in *Lavallee* or *FLS*, which involved physical searches of law offices. The mere service of a requirement to disclose certain information or documents is not on the same scale. Nevertheless, we find that it is not absolutely necessary here to rely on notaries or lawyers rather than on alternative sources in order to obtain the information or documents being sought. For example, where the Minister seeks information about specific transactions in which the client took part, the information would be available from alternative sources, such as financial institutions, that do not have as onerous an obligation to safeguard its confidentiality. In this regard, there is no evidence that the Minister even tried, albeit unsuccessfully, to obtain the information in question by alternative means before issuing a requirement to a legal adviser.

[60] No one disputes the fact that the requirement scheme serves legitimate purposes, namely the collection of amounts owed to the CRA and tax audits. Nor does anyone dispute the fact that it is important to prevent firms of notaries or lawyers from becoming tax havens. However, such firms must not be turned into archives for the tax authorities either (*FLS*, at para. 75). The fact that the requirement scheme has an important purpose does not mean that it can be used to sidestep the protection afforded by s. 8 of the *Charter*. The authorities' failure to even attempt to obtain the information or documents they seek from alternative sources indicates that the manner in which the seizure is conducted is unreasonable, as it does not minimally impair the right to professional secrecy.

[61] If the client were given notice of the requirement and afforded an opportunity to independently safeguard his or her right to professional secrecy before the information was disclosed, the fact that the requirement is not sent as a last resort would not be fatal to the scheme. The risk of information protected by professional secrecy being revealed would then be minimized by the fact that the client would have an opportunity to challenge its disclosure. That is not the case here, however, and this further problem adds to the ones already identified.

(4) Possibility of Mitigating the Scheme's Defects

[62] Finally, these constitutional defects in the *ITA*'s requirement scheme are all the more unacceptable given that they could easily be mitigated and remedied by way of measures that are compatible with the state's obligations relating to the protection of professional secrecy.

[63] For example, as the *Chambre* noted at the hearing in this Court and as Blanchard J. mentioned in his judgment, the declaratory action in this case had also been brought against the Attorney General of Quebec and the Deputy Minister of Revenue of Quebec in relation to the corresponding provisions of the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31 ("*AMR*") (now the *Tax Administration Act*, CQLR, c. A-6.002), and the *Act to facilitate the payment of support*, CQLR, c. P-2.2 ("*AFPS*"). However, a settlement agreement was reached for that part of the action and was approved by the judge; a declaration of an out-of-court settlement, which included the transaction, was filed in the record. The transaction establishes the limits

to be observed by Revenu Québec in issuing “formal demands” for information or documents to notaries. It sets out criteria to ensure that the client’s professional secrecy is protected and to prevent the disclosure of documents that may contain information to which notary-client privilege applies.

[64] Revenu Québec thus agreed, *inter alia*, as regards formal demands for information sent to notaries under s. 39 of the *AMR* or s. 57.1 of the *AFPS*, to comply with a directive issued on May 3, 2005 by the Direction générale de la législation et des enquêtes (now the Direction générale de la législation, des enquêtes et du registraire des entreprises) (“directive”). Revenu Québec also agreed to take into account the other limits imposed by the transaction, recognizing for example that, *prima facie*, certain documents are protected by professional secrecy and cannot be the subject of a formal demand.

[65] The directive concerns the minimization of state impairments of the professional secrecy of lawyers and notaries. It states that, before issuing a formal demand, Revenu Québec must try to obtain the documents or information from various public records or by requesting them from the taxpayer, another party to a contract, a financial institution, an accountant or other third parties that have prepared the documents. If Revenu Québec determines that only a lawyer or a notary has the documents or information it is seeking, the Minister of Revenue may then ask the taxpayer for permission to obtain the documents or information from the taxpayer’s legal adviser by way of a consent in writing to release the adviser from professional

secrecy. The directive further provides that Revenu Québec can consider sending a formal demand to a lawyer or a notary only if the other steps are unsuccessful and there is no other way to obtain the information or documents.

[66] The directive also states that, where Revenu Québec is of the opinion that professional secrecy does not apply to the information or documents being sought, a judgment may be obtained from the Court of Québec or the Superior Court, as provided for in the particular statute. Where the Minister of Revenue indicates that it is absolutely necessary to obtain the information for the purposes of administering the *AMR* or the *AFPS*, the judge must determine whether the Minister is entitled to have access to the information or documents in question.

[67] The transaction further provides that any formal demand issued to a notary by Revenu Québec must specify the information or documents covered by the demand. It must explain why Revenu Québec is of the opinion that the information or documents in question are not protected by professional secrecy, and it must ask the notary to find out whether the client agrees to waive professional secrecy. Finally, Revenu Québec agrees not to include any statement to the effect that a notary who fails to comply with a formal demand could face prosecution that could result in a fine or a term of imprisonment. Revenu Québec also agrees not to prosecute a notary who invokes professional secrecy in good faith.

[68] The agreement between the Chambre and the Quebec authorities is helpful to our analysis, since it shows that there are ways to minimize the risk that a

requirement scheme will impair professional secrecy. In its current form, the *ITA*'s requirement scheme is problematic insofar as it is applied to a notary or a lawyer. It will be for Parliament, if it so chooses, to adopt measures specifying how the CRA can obtain information or documents from a taxpayer's legal adviser without jeopardizing professional secrecy. Currently, in our view, the impairment permitted by the requirement scheme set out in ss. 231.2(1) and 231.7 of the *ITA* is not consistent with the principle of minimization (*Maranda*, at paras. 14-20).

C. *Constitutional Defects in the Exception in Section 232(1) of the ITA*

[69] The Court of Appeal held that the accounting records exception also infringes the rights guaranteed by s. 8 of the *Charter*. We agree with this conclusion, too.

[70] Even though we have concluded that the requirement scheme is contrary to s. 8 for the reasons and to the extent mentioned above, whether this exception is constitutional remains an important issue. In the companion case, *Canada (National Revenue) v. Thompson*, 2016 SCC 21, we find that the definition in s. 232(1) creates a valid exception to solicitor-client privilege on the basis of the rules of interpretation enunciated in *Blood Tribe*. Therefore, even if Parliament remedies the defects we have identified in the general requirement scheme, the application of that exception in the context of a requirement could nonetheless result in the disclosure of information that is normally "privileged" as defined by the courts. A separate analysis regarding the exception is therefore necessary in this case.

[71] No matter how it is viewed, the exception set out in the definition of “solicitor-client privilege” does not withstand constitutional scrutiny. The abrogation of professional secrecy in respect of the accounting records of lawyers in a scheme that allows such documents to be seized gives the state access to a whole range of information that would otherwise be exempt from the duty to disclose and therefore exempt from seizure. The Minister has not satisfied us that giving the state access to a range of information that is normally protected by professional secrecy is absolutely necessary to meet the *ITA*’s objectives. In the absence of absolute necessity and given that there is no possibility of judicial review to ensure that professional secrecy is protected, the accounting records exception infringes s. 8 of the *Charter* by allowing the unreasonable seizure of information found in the accounting records of notaries or lawyers.

(1) Accounting Records and Protected Information

[72] It is well established that the accounting records of notaries and lawyers are inherently capable of containing information that is protected by professional secrecy. In *Descôteaux*, the Court quoted the following passage from John Henry Wigmore (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, § 2292): “Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure” (pp. 872-73). In *Foster Wheeler*, the Court observed that “[i]t would be inaccurate to

reduce the content of the obligation of confidentiality to opinions, advice or counsel given by lawyers to their clients” (para. 38). In *Maranda*, noting the importance of the information that can be extracted from particulars as seemingly neutral as the amount of the fees paid by a client, the Court concluded that “the fact consisting of the amount of the fees must be regarded, in itself, as information that is . . . protected” (para. 33). The Court thus acknowledged that, even where accounting information includes no description of work, it may in itself, if disclosed, reveal confidential and privileged information.

[73] Whether a document or the information it contains is privileged depends not on the type of document it is but, rather, on its content and on what it might reveal about the relationship and communications between a client and his or her notary or lawyer. If lawyers’ fees can reveal privileged information, it is difficult to see why this could not also be the case for accounting records. Such records will not always contain privileged information, of course, but the fact remains that they may contain some, so their disclosure could involve a breach of professional secrecy. This is sufficient for the purposes of our analysis.

[74] From this perspective, it is important to note that clients’ names may appear in accounting records that contain information about amounts received by and owed to a notary or a lawyer. In some cases, those names may be privileged, since the fact that a person has consulted a notary or a lawyer may reveal other confidential information about the person’s personal life or legal problems (*Lavallee*, at para. 28;

G. Geddes, “The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege” (1999), 47 *Can. Tax. J.* 799, at pp. 805-6; Lederman, Bryant and Fuerst, at p. 939). Accounting records may also include a description of the mandate the notary or lawyer was given and for which a statement of account was submitted to the client. In other cases, the notary or lawyer may include numerous particulars about the work he or she performed, including the topic of the consultation with the client. Finally, a legal adviser might keep his or her books of account and other accounting records related to the statements of account sent to clients and the amounts owed by clients in such a way as to reveal certain aspects of the litigation strategy that was adopted in a given case.

[75] This being the case, the outright exclusion of the accounting records of notaries and lawyers from the protection of professional secrecy as set out in the definition of “solicitor-client privilege” in s. 232(1) of the *ITA* causes a problem. Although the definition expressly provides that an accounting record includes “any supporting voucher or cheque”, the expression “accounting record of a lawyer” is not defined in the *ITA*. Section 230(2.1) of the *ITA* does require lawyers to keep records and books of account, but it does not specify what information those records must contain. This lack of precision creates a real risk that a wide variety of documents, some of which may contain information protected by professional secrecy, will be disclosed in response to a requirement. The expression “accounting record of a lawyer” is open to multiple interpretations. Some of these interpretations could lead a court to conclude that such records cannot be considered to contain any privileged

information, while others could lead to the opposite conclusion (*Organic Research Inc. v. Minister of National Revenue* (1990), 111 A.R. 336 (Q.B.)).

[76] Moreover, this lack of precision of the expression “accounting record of a lawyer” in terms of the documents practitioners must keep, the format they must be kept in and the level of detail they must contain creates a risk that different legal advisers will include different information in their accounting records. The risk that a client’s privileged information might be exposed as a result of the exception may therefore vary greatly.

(2) Constitutional Analysis

[77] In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, the Court noted that “whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter” (para. 34). In this appeal, we are not being asked to answer this question for all cases in which a legislature expresses a clear and unequivocal intention to abrogate professional secrecy in respect of a class of documents or information. The question in the case at bar is limited to whether an abrogation of that privilege that has the effect of permitting the seizure of documents that would otherwise be protected by professional secrecy constitutes an infringement of the right to be secure against unreasonable seizure guaranteed by s. 8.

[78] In our view, for the exception at issue in this case, the answer must be yes. The exception is broad and undefined, as it permits the seizure of any accounting record of a notary or a lawyer. As a result of s. 231.7 of the *ITA*, the effect of the exception is stark. Once a court finds that a document is an accounting record, it must order that the document be disclosed regardless of whether it would be considered privileged in the absence of the exception. In other words, for all practical purposes, the exception removes from the court's jurisdiction the determination of whether accounting records in respect of which a requirement has been issued are privileged.

[79] At the hearing in this Court, the AGC and the CRA, no doubt aware of this problem, argued for the first time that judges nonetheless have some "residual discretion" in such cases. They argued that a judge considering a ministerial application for disclosure can exercise this "discretion" to exclude privileged documents from the seizure of accounting records of a notary or a lawyer. We reject this argument. It conflicts with the actual wording of the accounting records exception and with the meaning of s. 231.7. Neither of those provisions mentions such a "residual discretion". The definition of "solicitor-client privilege" in s. 232(1) results, rather, in a complete abrogation of professional secrecy in respect of one class of documents, namely the accounting records of notaries and lawyers.

[80] To determine whether an abrogation of professional secrecy in the context of a seizure is constitutional, a court must consider what characterizes professional secrecy as a substantive right. More specifically, the third factor of the

substantive rule from *Descôteaux* is of decisive importance in such a case. According to Lamer J., when a law authorizes someone to do something that might interfere with the right to confidentiality that results from professional secrecy, “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” (p. 875 (emphasis added)).

[81] Thus, a legislative provision cannot, by abrogating professional secrecy, authorize the state to gain access to information that is normally protected, where the abrogation is not absolutely necessary to achieve the purposes of the legislation. If the provision does so, the seizure will be unreasonable and contrary to s. 8 of the *Charter*. This rule prevents the state from giving itself, with a clear intention to create a statutory exception to professional secrecy, the authority to gain untrammelled access to documents that are normally privileged even though the state’s operations are facilitated only minimally by access to the information.

[82] This is consistent with the emphasis frequently placed by the Court on ensuring that professional secrecy always remains as close to absolute as possible (*McClure*, at para. 35). Limits on professional secrecy must take into account the duty recognized by the Court to minimize impairments (*Maranda*, at para. 14; *Goodis*, at para. 24). This Court’s decisions have narrowly circumscribed the situations in which and the reasons for which professional secrecy may be set aside without the client’s consent. In every case, professional secrecy will be set aside only if the court is of the

view that it is absolutely necessary to do so, and only for a very specific purpose. Even then, the exceptions must be precisely defined.

[83] For example, in legal proceedings, where professional secrecy prevents an accused from making full answer and defence, it can be set aside only if the innocence of the accused is at stake (*R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at pp. 43-45; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 69; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 607; *Brown*). Likewise, where concerns about the health and well-being of individuals make it necessary to infringe professional secrecy, “the interference must be no greater than is essential to the maintenance of security” (*Solosky*, at p. 840). In *Smith*, the Court upheld the requirement that privileged documents be disclosed only on the basis of a clear, serious and imminent danger (para. 84). Major J., dissenting on another point, agreed that a more permissive standard that authorizes “completely lifting the privilege and allowing [the client’s] confidential communications to his legal advisor to be used against him in the most detrimental ways will not promote public safety, only silence” (para. 23). Any other conclusion would undermine the main rationale for professional secrecy: the need to maintain a legal system that ensures that individuals have access to specialists who will represent their interests and with whom they can be completely honest about their legal problems and needs.

[84] The potential scope of the expression “accounting record of a lawyer” is therefore problematic from the standpoint of the absolute necessity test. The

exception set out in the definition of “solicitor-client privilege” in s. 232(1) of the *ITA* does not distinguish the many forms that information in an accounting record can take. For now, all information in an accounting record is to be disclosed in response to a requirement regardless of the form or the content of the record. The information may therefore have nothing to do with the Minister’s power of audit and collection, and the Minister may not need it in order to achieve his or her objective under the *ITA*. In fact, nothing in the arguments of the AGC and the CRA suggests why, to achieve the purposes of the *ITA*, it would be absolutely necessary to set aside professional secrecy for such a wide range of documents rather than, for example, doing so only in respect of the amounts paid and owed by clients.

[85] It is true that in the companion case, *Thompson*, the Minister argues that, when a requirement is sent to a lawyer whose own tax liability is the subject of an assessment, access to clients’ names may be necessary in order for the amounts owed by the lawyer to be collected and for the Minister to fulfil the Minister’s duties under the *ITA*. Nevertheless, we note that, in the absence of a definition of “accounting record of a lawyer” in the *ITA*, it is impossible to distinguish an accounting record that contains only a client’s name and the amount the client owes the lawyer from one that contains much more information about the nature of the activities a lawyer has engaged in for a client under a mandate for professional services. When the Minister requests access to a lawyer’s accounting records by means of a requirement, all such records must be disclosed, even if they contain information that will not help the CRA collect the amounts it is owed.

[86] In closing, we would add that a conclusion that the exception is valid could have unfortunate consequences that transcend this appeal. The *ITA* sets only a vague limit on what the CRA can do in requesting access to information by means of a requirement: the information must be necessary “for any purpose related to the administration or enforcement of this Act” (s. 231.2(1)). There appear to be no restrictions on sharing the information with government agencies and other public players as long as the CRA does so for a purpose related to the administration or enforcement of the *ITA*.

[87] As a result, there is a real risk that, even if an audit or a collection action under the *ITA* does not directly target clients, information that the CRA obtains about them could be used against them in other circumstances. Within the CRA, for example, information disclosed in response to a requirement could be used to start investigations concerning clients’ income tax returns. In our view, it would be unacceptable to allow the state to make use of an administrative procedure in order to obtain information that would otherwise be protected by professional secrecy, and then allow it to use that information for other purposes simply because Parliament excluded a lawyer’s accounting records from the definition of “solicitor-client privilege”.

D. *Section 1 Analysis*

[88] Section 1 of the *Charter* “guarantees the rights and freedoms set out in [the *Charter*]”. It provides that this guarantee is “subject only to such reasonable

limits prescribed by law as can be demonstrably justified in a free and democratic society”.

[89] In order to justify the infringement of rights guaranteed by s. 8 of the *Charter*, the appellants must show that the impugned provisions of the *ITA* have a pressing and substantial objective and that the means chosen are proportional to that objective. A law is proportionate if (1) the means adopted are rationally connected to the objective; (2) it is minimally impairing of the rights in question; and (3) there is proportionality between the deleterious and salutary effects of the law (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 94). In *Lavallee*, the Court wrote that “if, as here, the violation of s. 8 is found to consist of an unjustifiable impairment of the privacy interest protected by that section, everything else aside, it is difficult to conceive that the infringement could survive the minimal impairment part of the *Oakes* test” (para. 46).

[90] In the instant case, it is clear that the *ITA* has a pressing and substantial objective, namely the collection of taxes. Moreover, there is a logical and direct connection between the collection of taxes and the requirement scheme. Requirements enable the CRA to obtain information about taxpayers so that it can ensure that the information they have provided it is accurate.

[91] However, the requirement scheme in relation to notaries and lawyers fails at the minimal impairment stage of the justification analysis. For the reasons given above, the statutory provisions in question — ss. 231.2(1) and 231.7 and the

accounting records exception set out in s. 232(1) of the *ITA* — do not minimally impair the right to professional secrecy. As a result, they cannot be saved under s. 1.

VI. Remedy and Conclusion

[92] We conclude that the requirement scheme in the *ITA* infringes s. 8 of the *Charter* and must be declared to be unconstitutional insofar as it applies to notaries and lawyers in Quebec. The appropriate remedy in this case will be to “read down” the statutory provisions at issue, as the Court did in *FLS*, so as to exclude notaries and lawyers from the scope of their operation (para. 63). Since the Court has already found that the requirement scheme is generally constitutional insofar as requirements are sent to taxpayers (*McKinlay Transport*), it is neither necessary nor appropriate to find that the entire scheme is invalid. We consider it more appropriate simply to prohibit its being applied to notaries and lawyers in their capacity as legal advisers.

[93] We would therefore declare s. 231.2(1) of the *ITA*, which authorizes the Minister to send requirements, and s. 231.7 of the *ITA*, which authorizes the Minister to apply to a court to follow up on a requirement, to be unconstitutional, and inapplicable to notaries and lawyers in their capacity as legal advisers.

[94] On the other hand, the exception for a lawyer’s accounting records set out in the definition of “solicitor-client privilege” in s. 232(1) of the *ITA* is unconstitutional and invalid. The manner in which it limits the scope of professional

secrecy is not absolutely necessary to achieve the purposes of the *ITA*, which means that the exception is contrary to s. 8 of the *Charter*.

[95] Finally, in our view, it is not appropriate to establish a list of documents that are *prima facie* protected by professional secrecy. Whether a document is protected by professional secrecy depends not on the type of document it is but, rather, on its content and on what it might reveal about the relationship of and communications between a client and his or her legal adviser.

[96] The appeal is therefore dismissed with costs. The constitutional questions set out in para. 24 of our reasons are answered as follows:

1. No answer is required.
2. No answer is required.
3. Yes, but in the case of the definition of “solicitor-client privilege” in s. 232(1) of the *ITA*, solely as regards the exception for a lawyer’s accounting records.
4. No.

APPENDIX

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

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).

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 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)).

Notice required

(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.

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

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

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

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.

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), 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.

Appeal dismissed with costs.

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