FEDERATION OF LAW SOCIETIES OF CANADA
INTERVENTIONS AT THE SUPREME COURT OF CANADA

Summary of judgments in

Canada (National Revenue) v. Thompson
and
Canada (A.G.) v. Chambre des notaires

The first case, *Canada (National Revenue) v. Thompson*, involved a lawyer from a small Alberta town who was asked to provide certain information to the Minister regarding his own tax obligation, including his accounts receivable listing. The lawyer refused to provide the names of his clients to the Minister, on the basis that they were protected by solicitor-client privilege. Based on the statutory exclusion of "accounting records" from the definition of solicitor-client privilege, the Federal Court ordered Mr. Thompson to provide the information. The Federal Court of Appeal allowed the appeal in part, sending the matter back to the Federal Court to consider whether solicitor-client privilege may actually attach to any of the client names (even though they were contained within "accounting records"). The Minister appealed.

The Supreme Court set aside the Court of Appeal's decision – but not because, as the Minister argued, the Court had no discretion to determine whether information within accounting records was actually privileged. Rather, the Supreme Court held that the Court of Appeal's remedy did not go far enough to protect the clients' right to solicitor-client privilege. In doing so, the Court emphasized key arguments made by the Federation: that since the definition of solicitor-client privilege had been enacted in 1965, the privilege had evolved from a mere evidentiary rule to a principle of fundamental justice; and that solicitor-client privilege is a right that belongs to, and can only be waived by, the client. Although the Court held that the language in the definition was sufficiently "clear and unambiguous" to abrogate solicitor-client privilege, the case did not actually turn on this point, because the Court held, in the companion case of *Canada (A.G.) v. Chambre des notaires*, that the definition was contrary to s. 8 of the *Charter*. The Minister's request to Mr. Thompson was therefore ultimately foreclosed on constitutional grounds.

In contrast to *Thompson*, which primarily turned on statutory interpretation, the *Chambre* case was a constitutional challenge by the Chambre des notaires du Québec and the Barreau du Québec to the statutory scheme. The Court held that the scheme was contrary to s. 8 of the *Charter*, the unreasonable search and seizure provision, insofar as it applies to lawyers and notaries in Québec. Consistent with its previous decisions, the Court confirmed that professional secrecy/solicitor-client privilege is a principle of fundamental justice that must remain as close to absolute as possible. It accepted the Federation's argument that the expectation of privacy in information that falls within the privilege is of the highest order, regardless of whether the context is administrative/regulatory or criminal. The Court also accepted the Federation's arguments that the statutory scheme fell short of protecting the privilege as much as possible. It failed to ensure that clients would receive notice that their privileged information was at risk of being disclosed and have an opportunity to respond. Instead, the burden of protecting the privilege fell primarily on the lawyers and notaries. This was especially problematic given that the lawyers were threatened with penalties if they did not disclose the information at issue, placing them in a position of conflict vis-à-vis their clients. In addition, the blanket exception of "accounting records"

ignored the fact that, as the Federation argued, whether information is privileged depends on the nature of the information at issue – not the form of document in which it is contained. Finally, the information being sought was not absolutely necessary – there was no indication that the Minister had tried to get the information through other means that did not compromise professional secrecy. In sum, the provisions were found to contravene s. 8 of the *Charter* because they failed minimally impair professional secrecy/solicitor client privilege and could not be saved under s. 1.