Solicitor-Client Privilege (Minister of National Revenue v. Thompson)

BACKGROUND

- See separate note on Solicitor-Client Privilege Interventions.

- In *Minister of National Revenue v. Thompson,* the Supreme Court considered whether lawyers' accounting records are excluded from the definition of "solicitor-client privilege" in the *Income Tax Act*, even if those records would otherwise be privileged at common law.

- Duncan Thompson, an Alberta lawyer, refused to provide the Canada Revenue Agency with accounts receivable records requested under s. 232(1) of the *Income Tax Act,* because the records contained clients' names and were privileged. S. 232(1) states that "an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be [a privileged] communication".

- The Federal Court concluded that s. 232(1) deems the accounting records of a lawyer not to be privileged communications, even if privileged at common law. The Court also found that client names are only privileged where the client's identity is critical to the essence of the solicitor-client communication.

- The Federal Court of Appeal reversed the lower court ruling in part and held that, to the extent lawyers' accounting records contain privileged information, they are protected from disclosure under the *Income Tax Act*. However, as a general rule, accounting records constitute evidence of a transaction, not a privileged communication. The records were not "statements of account" which might reveal the history of the file, but just statements of fact. Further the Federal Court failed to verify whether any of the client names were privileged.

- Both the Federal Court and Federal Court of Appeal dismissed arguments challenging the constitutionality of s. 232(1) in statutorily limiting the scope of solicitor-client privilege.

- The Minister of National Revenue argued that Parliament intended for the *Income Tax Act* to override solicitor-client privilege in connection with lawyer accounting records.

CURRENT STATUS

- CBA was granted leave to intervene in September 2014. CBA *pro bono* counsel were Mahmud Jamal, Pooja Samtani and David Rankin of Osler.

- CBA argued that:
  - s. 232(1) of the *Income Tax* Act maintains the common law definition of "solicitor-client privilege" and does not restrict its scope;
  - clients' names and financial means indicated in administrative records can be privileged if that is information the client had to provide to obtain legal advice, and the amount of fees charged is presumptively privileged information;
  - the clause in s. 232(1) of the *Income Tax Act* that states "an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be [a privileged] communication" is merely a codification of the common law principle that solicitor-client privilege does not extend to communications where legal advice is not sought or offered -

accounting records may or may not contain privileged information, but if they do, that information is protected from disclosure;

- statutory encroachment onto solicitor-client privilege must be clear and explicit and interpreted restrictively;
- the exception in s. 232 (1) does not address the scenario in which accounting records contain privileged information; and
- any ambiguity must be resolved in favour of protecting the near absolute character of solicitor-client privilege as recognized under s. 7 of the *Charter.*

NEXT STEPS

- The appeal was heard on December 4, 2014 and judgment was reserved. Ethics Committee and L&LR staff will assess the implications for the profession and consider communications and education to inform CBA members.

- CBA is applying for leave to intervene at the Supreme Court in *Attorney General of Canada v. Chambre des notaires du Québec.* The appeal is from a Quebec CA decision that s. 232 (1) of the *Income Tax Act* (and related compliance provisions) contravenes s. 8 of the *Charter* in that it fails to adequately safeguard the professional secrecy of legal advisers (akin to solicitor-client privilege in Quebec). The issues in the appeal are parallel to those in *MNR v. Thompson*, with the added s. 8 argument which was not part of the *Thompson* appeal.