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THE SUPERIOR COURT OF QUÉBEC RULES THAT REQUIREMENTS TO PROVIDE DOCUMENTS OR INFORMATION UNDER SECTION 231.2 OF THE *INCOME TAX ACT* ARE UNCONSTITUTIONAL AND OF NO FORCE AND EFFECT INSOFAR AS THEY RELATE TO LAWYERS AND NOTARIES

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ON APRIL 28, 2005, THE CHAMBRE DES NOTAIRES DU QUÉBEC FILED A PETITION TO DECLARE UNCONSTITUTIONAL AND OF NO FORCE AND EFFECT REQUIREMENTS ISSUED BY THE CANADA REVENUE AGENCY (CRA) UNDER SECTIONS 231.2 AND 231.7 AS WELL AS SUBSECTION 5 OF SECTION 232(1) OF THE *INCOME TAX ACT*, R.S.C. 1985, C. 1 (5TH SUPP.) (ITA) TO OBTAIN DOCUMENTS OR INFORMATION *PRIMA FACIE* PROTECTED BY PROFESSIONAL SECRECY.

Such requirements force notaries, often without their clients' consent, to communicate documents or information about them. Failure to comply to a requirement may result in fines ranging from $1,000 to $25,000 or prison sentences (imprisonment) of more than 12 months, or both. In addition, the minister can ask a judge to force a notary to provide any access, assistance, information or documents sought. Should a notary fail to comply with such an order, a judge may find the notary in contempt of court, in addition to the above-described penalties.

For the Chambre des notaires, a requirement to provide documents or information is unconstitutional and of no force and effect because it lacks the adequate protection measures required to ensure that professional secrecy is respected when the documents or information sought are *prima facie* protected. In its opinion, regular threats to prosecute notaries further place the latter in an unbearable position to provide the CRA with the documents or information sought in breach of their deontological obligations or be liable to prison sentences and fines.

The Chambre des notaires also asked the Court to declare several documents and information held by notaries as *prima facie* protected by professional secrecy.

The Québec Bar intervened in the proceedings and supported the Chambre des notaires' position.

THE SCOPE OF PROFESSIONAL SECRECY

Considering it unnecessary to expatiate upon this matter, Justice Marc-André Blanchard first confirmed that a notary, as a legal adviser, has the same duties and obligations to uphold professional secrecy as a lawyer.

Regarding the scope of professional secrecy, Justice Blanchard concluded, in light of the Supreme Court's key decisions regarding professional secrecy, that:

- the right to professional secrecy exists, *a priori*, in civil law as in criminal law;
- no distinction exists between communications and facts;
- the burden of proving whether or not documents or information sought are protected by professional secrecy belongs to the person challenging its application;
- it is solely in exceptional cases and as a last recourse that a breach of professional secrecy will be permitted;

- legislative frameworks must ensure that professional secrecy is respected; and
- any legislation likely to authorize a breach of professional secrecy must be interpreted restrictively.

Justice Blanchard added that professional secrecy applies *prima facie* to all the facts brought to the attention of the legal adviser and to all the documents and information held by him for his client.

Consequently, Justice Blanchard, regarding the second part of the Chambre des notaires' motion, declared that the following documents and information are *prima facie* protected by professional secrecy regardless of the form in which they are accessible:

- notarial acts, executed *en minute* or *en brevet*, unless they are registered, in which case only the information registered is not protected by professional secrecy;
- the repertory of the notarial acts executed *en minute* as well as the index to the repertory;
- unregistered acts executed under private signature, including contracts, agreements, settlements and resolutions;
- wills and codicils prepared or held by the notaries for their clients, including revoked or replaced wills and codicils;
- offers of purchase, for transactions involving movable property and real estate transactions;
- documents signed by a notary certifying the identity, quality and capacity of a party to an act;
- powers of attorney and mandates;
- correspondence and instructions transmitted to the notary for the purposes of preparing a contract, an agreement, a transaction or any other document as well as documents establishing from whom, when and how a client's instructions were communicated to the notary regarding a transaction;
- marriage contracts and other union contracts or separation agreements;
- documents annexed in compliance with section 48 of the *Notarial Act*, R.S.Q. c. N-2;
- patrimonial inventory, inventories of successions, declarations of heirs, trust agreements and all other documents of a confidential nature prepared by a notary or entrusted to him by his client;
- legal opinions prepared by the notary at the request of his client or parties to an act;
- motions and other procedures prepared by the notary at the request of his client, which were not filed with the court or made public;
- all trust accounting documents of the notary in which the funds, securities and other property are entered and recorded, including official receipts, passbooks or statements of the financial institution or the securities broker, cheques (front and back) and other payment orders, and registers and other vouchers, in addition to the cash book and the general ledger;
- disbursement accounts or statements as well as the statement of adjustments or disbursements (adjustment sheets) entrusted to a notary at the request of any of the parties to an act, including the date, the identity of the people to whom the sums were remitted, the method of payment and the receipt;
- notary's statements of account for fees and costs; and
- all projects and drafts of the documents previously identified.

VALIDITY OF SECTIONS 231.2, 232 AND 231.7 OF THE ITA

Relying mainly on the teachings of the Supreme Court in the *Lavallée* case, Justice Blanchard considered that the procedure under sections 231.2 and 231.7 of the ITA is equivalent to a search and seizure. Recognizing that a more flexible approach must be adopted when assessing the context in a regulatory or administrative matter, the judge nevertheless concluded that a breach of professional secrecy must be absolutely necessary and minimal: otherwise, it amounts to an unreasonable search and seizure.

What about the requirements to provide documents or information when they are addressed to notaries? Justice Blanchard first considered that the wording used in the requirements puts the notaries, at the very least, in a perilous position: they must choose to conform to the requirements, in breach of their deontological obligation to protect professional secrecy, or refuse to respond, risking severe penalties.

Moreover, the judge considered that the procedure implemented by the federal legislator does not allow the client, holder of the right to professional secrecy, to be informed that his right is being violated. For example, should the notary refuse or fail to respond to a requirement to provide documents or information, the minister's motion filed before the court under section 231.7 of the ITA is addressed only to the notary and not to the client.

Furthermore, the judge considered that the five-day delay between the date when the minister's motion is heard and the notice of application is served to the notary is too short.

Lastly, the judge considered that the procedure does not require the minister to prove to the judge that there is no other reasonable alternative.

Consequently, the judge concluded that he cannot constitutionally validate sections 231.2 and 231.7 of the ITA, their implementation reaching beyond what is absolutely necessary and because they do not guarantee that the holder of the right to professional secrecy will have a reasonable chance to object to preserve the confidentiality of the documents or information sought.

Regarding the exception under subsection 5 of section 232(1) of the ITA that provides 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* [between a client and a legal adviser]", the judge considered ill-founded the argument of the respondents that the documents and information requested are not protected by professional secrecy because they reveal facts and not communications between the legal adviser and his client. On the contrary, because all the facts brought to the attention of the legal adviser and all the documents and information held by him for his client are *prima facie* protected by professional secrecy, the exception set forth in subsection 5 of section 232(1) of the ITA, which excludes the data regarding the notary's account in trust, the supporting documents and cheques, must also be declared unconstitutional and of no force and effect.

Consequently, Justice Blanchard declared unconstitutional and of no force and effect sections 231.2 and 231.7 as well as subsection 5 of section 232(1) of the ITA, adding that his conclusions must extend to notaries and lawyers in the Province of Québec.

THE SUITABLE LEGISLATIVE FRAMEWORK

Justice Blanchard noted that the procedure already provides that should the notary refuse or fail to respond to a requirement to provide documents or information, it is up to a court to determine if an exception to professional secrecy applies. This confirms that it is not indeed up to employees of the CRA to determine what is or is not covered by professional secrecy, this responsibility belonging to courts of record.

However, because the judge considers that professional secrecy applies *prima facie* to all the facts brought to the attention of the legal adviser and to all the documents or information held by him for his client, any requirement to provide documents or information addressed to a notary would therefore be futile. In the judge's opinion, the legislator must put in place a judicial preauthorization procedure similar to the procedure described by the Supreme Court in the *Lavallée* case regarding searches, a procedure according to which the employees of the CRA will have to apply directly to the court when seeking to obtain documents and information held by a notary.

It is of interest to note that the respondents, during the hearing, had requested a one-year moratorium to allow the legislator to put in place an adequate alternative procedure in the event that the Court granted the request for unconstitutionality. However, emphasizing the federal government's inaction following the Supreme Court's invalidation of section 488.1 of *Criminal Code* in the *Lavallée* decision in 2004, Justice Blanchard refused to grant this request.

FORMAL DEMANDS TO PROVIDE DOCUMENTS OR INFORMATION UNDER THE PROVISIONS OF THE (PROVINCIAL) *ACT RESPECTING THE MINISTÈRE DU REVENU*

The Chambre des notaires filed a similar petition to declare unconstitutional and of no force and effect insofar as they related to notaries section 39 of the *Act respecting the ministère du revenu*, R.S.Q. c. M-31 (AMR), and section 57.1 of the *Act to facilitate the payment of support*, R.S.Q. c. P-2.2 (AFPS), which provide the framework put in place by the provincial legislator for formal demands to provide documents or information. This motion, however, was settled and an agreement between both parties was ratified by the Superior Court on May 19, 2010.

Under the terms of this agreement, the ministère du Revenu du Québec ("Revenu Québec") recognized that the documents and information identified by the Chambre des notaires are *prima facie* protected by professional secrecy and agreed to the following:

- Documents recognized as *prima facie* protected by professional secrecy cannot be subject to a formal demand unless, according to the Direction générale de la législation, des enquêtes et du registraire des entreprises (DGLERE, formerly the Direction générale de la législation et des enquêtes), the documents or information sought are not protected by professional secrecy according to a recognized exception, such as a waiver, the lack of one of the necessary conditions to the rule or the crime exception.

- When the DGLERE has been asked to verify if the documents or information sought are exempt, the formal demand must specifically describe them and the reasons why Revenu Québec considers that the documents or information are not protected by professional secrecy.
- The wording of the formal demand must also invite the notary to take the appropriate measures to verify if his client agrees to waive his right to professional secrecy and must explicitly indicate that, should the notary invoke or intend to invoke professional secrecy, he must inform Revenu Québec in writing by registered mail or bailiff.

Moreover, the formal demand will not mention that a notary who fails to comply is subject to prosecution or liable to fines or prison sentences. Likewise, Revenu Québec will not prosecute a notary who, in good faith, invokes professional secrecy by choosing not to hand over documents or information sought in a formal demand.

Furthermore, the amount of time granted to the notary to respond to a formal demand, either by handing over the documents or information sought by Revenu Québec because he has obtained a waiver or by invoking professional secrecy, cannot in any case be for a period of less than 15 days for a formal demand formulated under the AMR or of less than 10 days for a formal demand formulated under the AFPS.

Lastly, when a notary invokes professional secrecy in order to refuse to communicate documents or information to Revenu Québec in response to a formal demand that has been formulated under the above-described conditions, the DGLERE will re-evaluate the situation, namely in the light of the reasons invoked by the notary, and will decide whether to refer the question of professional secrecy to the court, either to a judge of the Court of Québec pursuant to section 39.2 LMR or to a judge of the Superior Court of Québec by submitting a motion for a declaratory judgment, if the formal demand is filed under section 57.1 AFPS.

RECENT UPDATE

On October 7, 2010, the Attorney General of Canada and the CRA filed a motion to appeal this decision before the Québec Court of Appeal.

The case is thus to be continued.

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