SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-17-0025479-059

DATE: September 8, 2010

PRESIDING: THE HONOURABLE JUSTICE MARC-ANDRÉ BLANCHARD, J.S.C.

CHAMBRE DES NOTAIRES DU QUÉBEC
Petitioner

v.
ATTORNEY GENERAL OF CANADA
-and-
CANADA CUSTOMS AND REVENUE AGENCY
Respondents
-and-
QUÉBEC BAR
Intervenor

JUDGMENT

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[1] Seeing its members confronted with requirements to provide documents or information under the Income Tax Act[1] (**"the ITA"**), the Chambre des notaries du Québec (**"the Chambre"**) petitions that the Court declare unconstitutional, under Sections 7, 8, 24(1) and 52 of the Canadian Charter of Rights and Freedoms[2] (**"the Charter"**), the statutory provisions allowing such requirements, and render a declaratory judgment to the effect that certain documents held by notaries are, *prima facie*, protected by professional secrecy.

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[1] R.S.C. (1985), c. 1 (5th Supp.).
[2] Schedule B of the Constitution Act, 1982.

[2] The Québec Bar (**"the Bar"**) supports this petition, while the Attorney General of Canada (**"the AGC"**) and the Canada Customs and Revenue Agency (**"the Agency"**) oppose it.

[3] By way of introduction, it must be noted that the AGC and the Agency do not challenge the Chambre's legal interest in filing the petition for a declaratory judgment or the procedural vehicle chosen. The Court reached the same conclusion.

[4] We should add that the Attorney General of Québec and the Québec Deputy Minister of Revenue were also involved in the same action, regarding the relevant provisions of the Act respecting the Ministère du Revenu[3] and the Act to facilitate the payment of support[4], but that this part of the action was the object of an agreement ratified by the Court at the end of the hearing.

THE FACTS

[5] The factual background is simple: many notaries receive requirements to provide documents or information formulated under the authority of Section 231.2 ITA from employees of the Agency requiring information or documents regarding their clients.

[6] Here is the framework put in place by the legislator for requirements to provide documents or information:

- An agent of the Agency, for and in the name of the Minister, may require any person to provide information or produce documents within a reasonable time[5];
- Failure to comply may result in penal charges by summary procedure which, in case of conviction, results in a fine of $1,000 to $25,000 or both the fine and imprisonment for a term not exceeding 12 months[6];
- Also, the Minister, on summary application, may apply to a judge, despite a plea of guilty or conviction, to order a person to provide any access, assistance, information or document he seeks[7];

[3] R.S.Q. c. M-31.
[4] R.S.Q., c. P-2.2.
[5] Section 231.2(1) ITA.
[6] Section 238(1) ITA.
[7] Section 231.7 ITA.

- The order may be issued if the judge is satisfied that the right to do so exists according to Section 231.2 ITA and that, in particular, solicitor-client privilege, as defined in Section 232(1) ITA, does not apply[8];

- The delay to present the application is five clear days after the notice of application is served on the person against whom the Order is sought[9];

- The judge may impose conditions to the Order[10];

- Failure to comply with the Order may result in a judgment for contempt of court with the punishments that this entails[11].

[7] In almost all of the requirements produced in evidence, the employees of the Agency notify the notary of the possible penal charges, namely the fine and the possibility of imprisonment, if he does not respond to the requirement. Some grant a reasonable time to respond, while others require a response within just a few days, which is clearly unreasonable.

[8] Some notaries, after obtaining their client's consent, respond positively to the requirement. Others, after consulting the Chambre, claim the right to professional secrecy and refuse to respond to the requirement.

[9] Believing that it had negotiated a *modus vivendi* with the Agency regarding its method insofar as it relates to notaries, the Chambre instituted its proceedings noting that its members were receiving new requirements.

[10] The Chambre requests the Court to:

- **DECLARE** unconstitutional, inoperative and of no force and effect Sections 231.2 and 231.7 as well as subsection 5 of Section 232(1) of the Income Tax Act insofar as they relate to Québec notaries and the documents and information protected by their professional secrecy and their obligation of discretion and loyalty;

- **DECLARE** that the following documents are *prima facie* protected by professional secrecy and therefore cannot be subject to requirements to provide documents or information:

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[8] Section 231.7(a) and (b) ITA.

[9] Section 231.7(2) ITA.

[10] Section 231.7(3) ITA.

[11] Section 231.7(4) ITA.

- 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.

- **DECLARE** that these same documents are *prima facie* protected by professional secrecy regardless of the form in which they are accessible, including media that utilize information technology, such as USB keys, removable hard drives, floppy disks and CD-ROMs;

POSITION OF THE PARTIES

- The Chambre

[11] Basing itself primarily on the decision in *Lavallée, Rackel and Heintz* v. *Canada (Attorney General)*[12], the Chambre argues that requirements to provide documents or information constitute seizures authorized by statutory provisions which must be declared unconstitutional because the protective measures they include are inadequate to ensure that professional secrecy is respected.

[12] For the Chambre, there is a potential breach of professional secrecy without the client's knowledge, let alone consent[13], the burden of proving its application resting with the client, whereas this right must be raised automatically by the courts on their own motions since it cannot simply be assumed that the legal advisor is the alter ego of the client[14].

[13] The Chambre adds that the notary must disclose the client's name and last address to be able to benefit from the sealing procedure, even before a court can rule on the confidentiality of this information, thus breaching Section 37 of the Code of ethics of notaries[15].

[14] We should note that certain documents produced by the notary[16] do not disclose a client's identity, in and of themselves, but necessitate cross-referencing with information found in other documents held by the notary to arrive at this result. It is precisely in this context, as the Chambre points out, that these documents acquire all their significance, because if the information they contain cannot be cross-referenced with other information to establish a client's identity, it thus becomes of no interest to the Agency.

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[12] [2002] 3 S.C.R. 209.
[13] Idem, para. 39.
[14] Idem, para. 40.
[15] R.R.Q., 1981, c. N-3, r. 0.2.
[16] Exhibits P-17 and R-18.

[15] According to the Chambre, the systematic threat of penal prosecution in the requirement to provide documents or information letters, including the imposition of a fine or term of imprisonment, prevents clients from making an informed decision and exerts undue pressure on the notaries to whom the requirements to provide documents or information are addressed.

[16] Also, the Chambre maintains that even though, according to the Agency and the AGC, no penalties have ever been imposed, this does not make the requirement to provide documents or information procedure reasonable, since the constitutionality of a statutory provision cannot rest on an expectation that the Crown will refrain from doing what it is permitted to do[17].

[17] As for the statutory frameworks in place, the Chambre considers that the delays for application of the protective measures are unreasonable since the mere passage of time could forfeit the right to professional secrecy without the client's consent. It adds that the costs engendered by the defence of professional secrecy could cause clients or notaries to waive their claims. All this can give rise to a conflict of interest between the legal advisor and the client.

[18] The Chambre argues that professional secrecy of notaries is a fundamental right that receives constitutional and quasi-constitutional protection under the preamble to the Canadian Constitution and under the terms of Sections 7 and 8 of the Charter and Section 9 of the Charter of Human Rights and Freedoms[18] (**"the Québec Charter"**).

[19] On this subject-matter, it is instructive to recall what the Supreme Court teaches in the case of *R. v. National Post*[19]:

> [39] The courts have leaned against conferring constitutional status on testimonial immunities. Even professional secrecy, one of the most ancient and powerful privileges known to our jurisprudence, is generally seen as a "fundamental and substantive rule of law" (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 17), rather than as "constitutional" even though professional secrecy is supported by and impressed with the values underlying s. 7 of the *Charter*.

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[17] Lavallée, supra, Note 12, para. 45.
[18] R.S.Q., c. C-12.
[19] 2010 SCC 16.

[20] The Chambre adds, on the basis of the decision *Vaillancourt v. Deputy Attorney General of Canada*[20], that the State may have access to information protected by professional secrecy without there even being an allegation of offences.

[21] This argument is *prima facie* unfounded since it is based on a decision that discusses statutory provisions other than those attacked in the case at bar. Moreover, the existing tax system does not require that a requirement to provide documents or information can only exist in the contingency of a potential offence.

- **The Agency and the AGC**

[22] For the Agency and the AGC, given that it is the Minister who must apply to a judge for authorization to have access to information or documents in case of the notary's inaction or negative response, no impairment to professional secrecy can exist due to the mere existence of the requirement to provide documents or information.

[23] For them, the purpose of the State's approach is relevant in determining the rights at stake, in particular, the reasonableness of the expectation of a legal advisor, thus of a notary, that his client's right to professional secrecy will be respected, the latter having the right to privacy.

[24] In their opinion, the Chambre is confusing the expansion of the forum of application of the privilege, which originally only applied to the judicial debate, which is no longer the case because it is now broader, with the basis of the privilege, which has not been expanded. Also, they argue that the ethical obligation, which is a statutory creation, has not been given constitutional recognition, contrary to the privilege, although they acknowledge that a certain symbiosis exists between the privilege and the ethical obligation.

[25] For the Court, however, it is neither useful nor necessary to draw a distinction between a notary's ethical obligations and the obligations arising from the right to respect for professional secrecy. Indeed, to the extent that the right to professional secrecy is at issue, which is the case in this instance, this distinction is in fact a difference that is of no use in deciding the dispute.

[26] Regarding the framework set out in the ITA, they maintain that it involves no constitutional problem since analyzed in its context, that is, in a framework that does not fall under criminal law, there is no loss of confidentiality for the client unless the notary commits such an act. Thus, it is a well designed regime in respect to the purpose of the ITA and the social objectives it seeks, which is not rendered unconstitutional by an inadequate application by the employees of the Agency since recourses exist against abusive or illegal requests.

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[20] AZ-85021193 (S.C.), pages 2, 3, 5, 7 to 13.

[27] In their opinion, Section 231.7 and subsection 5 of Section 232(1) ITA provide a framework that ensures sufficient protection for professional secrecy to the minimum extent deemed necessary to achieve the objectives of the Act[21].

[28] Also, they argue that there is no proof as to the existence of penal prosecution of notaries and consequently, that their fears are unjustified in this regard. Moreover, since the defence of good faith set out in Section 232(2) ITA is an obstacle to a conviction and professional secrecy would be an embodiment of this defence, there is no situation that would justify the remedy sought. They add that the threat of penal prosecution does not threaten the right to professional secrecy, because a requirement to provide documents or information formulated to a notary is addressed to a person who knows his rights.

[29] In any case, they conclude that because a court would ultimately allow the documents to be obtained, the statutory framework respects the constitutional rights at stake and there is no need for any declaration of unconstitutionality.

[30] According to the AGC and the Agency, a ruling in favour of the Chambre would create a tax haven in the lawyers' and notaries' offices of Québec.

[31] In their opinion, the employees of the Agency only contact notaries as a last resort and they must be trusted to act appropriately. However, for the Court, the evidence does not establish this position to the effect that the Agency takes all the necessary measures before contacting the notaries or that it acts appropriately.

[32] Indeed, the "Politique et procédure relative à l'envoi de demandes péremptoires de renseignements aux avocats – secret professionnel[22]" (Policy and procedure for sending requirements to provide documents or information to solicitors – professional secrecy), issued by the Agency on June 11, 2004, contains a contradiction regarding its position, since it is recognized that it is only in the event that contacting a legal advisor as a last resort "does not compromise and does not unduly delay tax recovery that persons other than [the legal advisor] should be contacted"[23].

[33] Moreover, the requirement letters[24] addressed to the notaries show that the Agency is incapable of complying with its policy regarding its obligation to grant a reasonable delay to any person to whom it addresses a requirement to provide documents or information.

[21] Written arguments of the Agency and the AGC, page 45.

[22] Exhibit AT-2.

[23] Idem page 4, Step 1 (translation).

[24] See, inter alia, in R-1A, the letter dated September 19, 2005 to M^{tre} Richard Drapeau, in R1-B, the letter dated October 28, 2008 to M^{tre} Denis Gariépy and the letter dated February 18, 2009 to M^{tre} Luigi Albanese.

[34] Also, the policy contains the following passage, which leaves the Court perplexed, to say the least:

> [TRANSLATION]
>
> (...)
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> (As long as the courts have not clearly ruled as to whether the accounting information pertaining to the solicitor's in trust bank accounts benefits from the protection of professional secrecy within the context of tax recovery, it is appropriate not to err by excess of caution, and to give the eventual privilege holder the possibility of expressing himself).

[35] We should note that the AGC and the Agency acknowledge[25] that Section 8 of the Charter is clearly applicable to the situation under discussion and, in so doing, argue the pointlessness of debating Section 7 of the Charter.

[36] The statutory provisions relevant to the analysis are appended to the judgment.

ANALYSIS

- **<u>The scope of professional secrecy</u>**

1) <u>The notary</u>

[37] There is no need for lengthy discussion to determine that a notary is a legal advisor on the same basis as a lawyer[26] and that he is bound to respect professional secrecy[27]. It is not because the notary does not act in contentious matters before the courts that a lesser value should be attached to the notary's professional secrecy. As a legal advisor, a notary has the same duties and obligations to respect the right to professional secrecy as a lawyer.

[38] Regarding the scope of a notary's professional secrecy, it applies, *a priori*, to all the facts brought to his attention and to all the documents of which he holds a copy. In this regard, the Court cannot state its position any better than Jean-Louis Baudouin[28]:

> [TRANSLATION]
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> Secondly, however, the notary has always been considered, and rightly so, as the keeper of the family peace. Because of his profession and the reasons of its practice, he is led

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[25] Arguments of May 18, 2010.

[26] See the <u>Notaries Act</u>, R.S.Q., c. N-3, Section 10 and <u>ITA</u>, supra, Note 1, Section 232(1).

[27] See the <u>Professional Code</u>, R.S.Q., c. c-26, Section 60.4, the <u>Notaries Act</u>, R.S.Q., c. N-3, Section 14; the <u>Code of ethics of notaries</u>, supra, Note 15, Sections 35 to 40.

[28] Le secret professionnel du conseiller juridique (1963) 65 R. du N., numéro 10, pages 504 to 508.

to penetrate into the privacy of families, much more so than the lawyer. The secrets entrusted to him generally interest more people than the confidant alone: they interest the entire family unit. It is therefore normal and just that the notary be bound to the strictest secrecy, the acts he receives (wills, donations, marriage contracts, etc.) being intended to maintain absolute secrecy regarding the family's affairs on the part of their authors. The professional secrecy of the notary, like that of the lawyer, is manifested in court by an exemption from testifying and from producing confidential documents. However, his obligation of silence is much more difficult to define than that of his confrere, because it is more delicate and more nuanced. This obligation extends not only to the acts themselves, namely to their content as such, but to all the circumstances regarding their drafting and their establishment, the discussions that preceded them, the confidences received and the advice given. The notary is bound not only not to disclose the acts of which he has knowledge, but not to allow anyone to suspect or even suppose their existence in the course of testimony in court. The only restriction imposed by the legislator on the notary, as on the lawyer, is that the facts on which he is bound to secrecy were brought to his attention in the performance or on the occasion of the performance of his duties.

(...)

By public acts, we mean not only authentic acts as opposed to acts under private signature, but any act made before a notary and intended to be brought to the attention of the general public, in particular, for example, by means of registration. On the contrary, by private acts we mean all the acts for which public disclosure is not required and the existence of which is known only to the notary, the parties and the witnesses. This is true, for example, of an act of hypothec, as opposed to a last will and testament. It is easy to perceive the fundamental difference between the two categories of notarized acts. The former, which the parties might originally have meant to keep secret, are disclosed to the public by their registration, either by becoming opposable to third parties, or because the law requires it. Thenceforth, the notary can no longer be bound to secrecy regarding the nature or the content of the juridical act, because anyone can obtain whatever details he wishes through the registries. However, the notary remains bound to observe the strictest secrecy regarding the negotiations that preceded the drafting of the act and all the circumstances surrounding it. While he is not bound to secrecy regarding the content and the apparent nature of the act in question, it may happen that the apparent act does not correspond to the reality; this may be a disguised, simulated or fictitious act. It would be a breach of notarial secrecy (except perhaps in the case of fraud because *"fraus omnia corrumpit"*) to disclose the true relationship existing between the parties or the true nature of the act to which they subscribed. Thus, it is common to see in Québec, in a notarized act of sale of an immovable, that the sale was made for a nominal amount ($1.00) and "other valuable considerations". The executing notary would be guilty of a serious professional fault if he disclosed the true consideration of the contract, even to the tax authorities.

In the case of public acts, the notary is bound by law to disclose them, send them or deliver an excerpt of them to any person who so requires, even to a perfect stranger, when these acts are among those which are required to be recorded. However, his obligation stops there. He is not bound to go farther. His role is a negative and passive role to some extent: he has a duty to disclose rather than a duty to inform...

(...)

If, on the contrary, the act passed before a notary is a private act, namely an act not intended to be known to the public, and which is even made specifically not to be known to the public, the notary must observe the most complete and total discretion not only regarding its nature and its content, but also, of course, regarding its very existence. Such is the case, for example, for a counter-letter, which must not be disclosed by the notary at any price, unless the parties to the act so require.

B- UNILATERAL ACTS AND SYNALLAGMATIC CONTRACTS

Regarding acts to which more than one person is a party (sale, transaction, etc.), the notary's obligation is twofold and absolute. It is twofold, because each party to the act is a creditor of the obligation of secrecy of which the notary is the debtor. Since the obligation is twofold, it seems that the double consent of the parties to the act is required to relieve the notary of his obligation. However, a distinction must be made. If the notary is required to produce such an act in proceedings brought between one of the parties and a third party, we think he must require in advance to be formally exempted from observing secrecy by the parties; on the contrary, if the action is brought between the parties to the act, the authorization of only one of the parties is sufficient. The notion of ownership is involved here; the notary is not the owner of the documents and is merely a depositary. For the acts passed before a notary to which only one person is a party, the obligation of secrecy is even stricter. The notary is bound to the most complete discretion and to the most absolute silence for everything concerning the will for example. He cannot be bound during the testator's lifetime to declare whether or not a will made by his client exists, nor to produce such will in court, except if the testator himself requires it...

2) The case law of the Supreme Court of Canada

[39] This having been established, a chronological review of the Supreme Court decisions regarding the question of professional secrecy over the past thirty years shows a definite evolution in the scope of what must now be understood as protected by this legal notion.

[40] For that matter, by way of introduction, like the Supreme Court judgment in the case of *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*[29], the Court recognizes, from the position defended by the Agency and the AGC, that the semantic problems caused by the use of the terms "solicitor-client privilege" in common law and

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[29] [2004] 1 S.C.R. 456

"privilège avocat-client" in Québec as an equivalent to the right to professional secrecy[30] persist.

[41] We should note immediately that in this decision, the Supreme Court affirms that professional secrecy must be understood as follows[31]:

> 29. (...) In the context of Quebec's statutory framework, the term "professional secrecy" refers to this institution in its entirety. Professional secrecy includes an obligation of confidentiality, which, in areas where it applies, imposes an obligation of discretion on lawyers and creates a correlative right to their silence on the part of their clients. In relation to third parties, professional secrecy includes an immunity from disclosure that protects the content of information against compelled disclosure, even in judicial proceedings, subject to any other applicable legal rules or principles.

[42] In 1980, the decision *Solosky v. The Queen*[32] marked an important step in the development of the definition of the content of professional secrecy and its impact in the legal environment, in particular regarding the sound administration of justice. The Supreme Court reminded us that the privilege does not apply where the lawyer is not consulted in his professional capacity or where the communication is not intended to be confidential or if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, and it is immaterial whether the lawyer is an unwitting dupe or knowing participant[33]. However, the Court refused to recognize it as a "fundamental principle"[34].

[43] In 1982, in *Descôteaux v. Mierzwinski*[35], the Supreme Court recognized that professional secrecy, namely the right to confidentiality of the solicitor-client relationship, had been transformed from a rule of evidence into a substantive rule[36]. It states that:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
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> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

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[30] Idem, para. 23 and 28.
[31] Idem., para. 29.
[32] [1980] 1 S.C.R. 821.
[33] Idem, page 835.
[34] Idem, page 836.
[35] [1982] 1 S.C.R. 860.
[36] Idem, page 875.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, 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.[37]

[44] The Court clearly establishes that professional secrecy exists from the time the client first has dealings with the lawyer's office and that this covers all financial information[38].

[45] In 1999, *Smith v. Jones*[39] taught that only a compelling public interest may justify setting aside professional secrecy.

[46] In 2001, in *R. v. McClure*[40], Canada's highest court took a new step in defining professional secrecy. Describing it as the most notable example of a class privilege, because of its unique position in our legal system[41], it affirms that professional secrecy must be as close to absolute as possible. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis[42]. It reminds us that professional secrecy stems from communications made for the purpose of obtaining lawful professional advice and that the privilege may only be waived by the client[43].

[47] In 2002, the *R. v. Brown*[44] decision reiterated the lessons of the *McClure* case, specifying that piercing professional secrecy should be treated as an extraordinary measure, as a last resort when innocence is at stake[45].

[48] In 2002, the *Lavallée*[46] decision certainly marked another important step in the evolution of the case law and represents a fundamental element in determining the rights of the parties in the case at bar. Indeed, the appeal concerned the constitutional validity of Section 488.1 of the Criminal Code[47] regarding the procedure for deciding whether professional secrecy applied to documents seized in a lawyer's office during the execution of a search warrant, with regard to Section 8 of the Charter.

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[37] Idem.
[38] Idem, pages 876-877.
[39] [1999] 1 S.C.R. 455, para. 74.
[40] [2001] 1 S.C.R. 445.
[41] Idem, para. 28.
[42] Idem, para. 35.
[43] Idem, para. 37.
[44] [2002] 2 S.C.R. 185.
[45] Idem, para. 27.
[46] Supra, Note 12.
[47] R.S.C. 1985, c. C-46.

[49] By way of introduction to its analysis, the highest court in the land emphasized that all information protected by professional secrecy out of reach for the State and that it cannot be forcibly discovered or disclosed and it is inadmissible in court[48]. The legislative regime put in place must take all steps to ensure that there is no access to this information[49].

[50] Recalling the *Solosky*[50] decision and *Geffen v. Goodman*[51], *Smith v. Jones*[52] and *McClure*[53], the Supreme Court reaffirms that, having become a fundamental civil right, professional secrecy is a principle of fundamental justice within the meaning of Section 7 of the Charter[54].

[51] Affirming that the privilege attached to professional secrecy is a positive feature of law enforcement, not an impediment to it, the Supreme Court teaches that since this privilege must remain as close to absolute as possible if it is to retain relevance, the procedure in the specific context of law office searches for documents that are potentially protected will pass Charter scrutiny if it results in a minimal impairment of professional secrecy[55].

[52] The Court concludes that a procedural scheme cannot be raised to a standard of constitutional reasonableness when it fails to address directly the entitlement that the privilege holder, the client, should have to ensure the adequate protection of his or her rights[56]. Thus, since the violation of Section 8 of the Charter consists of an unjustifiable impairment of the privacy interest protected by that section, it is difficult to conceive that this violation could be justified by section 1 of the Charter, even though effective police investigations are indisputably a pressing and substantive concern[57].

[53] It appears useful to emphasize what the Supreme Court teaches in *Lavallée*[58], regarding the general principles that must exist to ensure the constitutional legality of a search warrant, when it is known that this will involve professional secrecy:

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.

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[48] Supra, Note 12, para. 24.
[49] Idem, para. 25.
[50] Supra, Note 32.
[51] [1991] 2 S.C.R. 353, p. 383.
[52] Supra, Note 39.
[53] Supra, Note 40.
[54] Supra, Note 12, para. 16.
[55] Idem, para. 36.
[56] Idem, para. 40.
[57] Idem, para. 46.
[58] Supra, Note 12.

2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.

3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so as to afford maximum protection of solicitor-client confidentiality.

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court[59].

[54] In 2003, another landmark decision, *Maranda v. Richer*[60], was rendered. The Court retains the following lessons:

[59] Idem, para. 49.
[60] [2003] 3 S.C.R., 193.

- Professional secrecy is one of the rare class privileges recognized by the common law[61];
- The clear and strict rule establishes the prohibition against issuing any search warrant concerning privileged information, in accordance to what had been stated in *Lavallée*[62];
- The question of whether the amount of fees and costs is neutral information that falls outside the scope of the communication between a solicitor and his client, since it can be compared to a pure fact, as maintained by the AGC, seems to have divided Canadian courts[63]. This is the distinction Justice Proulx had adopted in his judgment in this case for the Québec Court of Appeal[64];
- Justice Lebel evokes the decision in *Kruger Inc. v. Kruco Inc.*[65], in which he had written the grounds of the Québec Court of Appeal, which concluded that in Québec law, the professional secrecy does not protect the information contained in statements of accounts for fees and costs that do not include any details concerning the nature of the services rendered. In this regard, as he points out, two groups of shareholders of a corporation opposed each other in this case and were seeking to obtain complete financial information on the corporation, in particular regarding the professional legal fees paid by the corporation at the request of some of the shareholders[66];

  Without fear of error, it can be said that the outcome of this case depended on the fact that every shareholder has the right to know the details of the activities of the corporation in which he holds an interest and not a case in which third parties were attempting to obtain information on a matter that possibly was covered by professional secrecy;
- In this case, a criminal prosecution, the solution had to respect the fundamental principles of criminal procedure, both regarding the definition of professional secrecy and the necessity of its protection[67];
- This solution could not depend on the distinction between "fact" and "communication", because this would lead to the erosion of the privilege[68]. Indeed, this distinction is not an accurate reflection of all the aspects of the professional relationship between solicitor and client and the fact that issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties[69];

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[61] Idem, para. 11.
[62] Supra, Note 12.
[63] Supra, Note 60, para. 23 to 25.
[64] [2001] R.J.Q. 2490, para. 9.
[65] [1988] R.J.Q. 2323 (C.A.).
[66] Supra, Note 60, para. 27.
[67] Idem, para. 28.
[68] Idem, para. 31.
[69] Idem, para. 32.

- In general, there exists a presumption that the very amount of the fees must be regarded as falling *prima facie* under professional secrecy, which will help reduce potential impairments of the privilege to a minimum[70];

- Information will remain available from other sources, such as cheques from a bank, since a lawyer cannot be compelled to provide that information[71];

- Lawyers must not have their offices turned into archives for the use of the prosecution[72].

[55] In 2004, the *Foster Wheeler*[73] decision was rendered. The Court retains from this decision that:

- Professional secrecy has two components, one that recognizes the confidentiality of information generated by the lawyer-client relationship, the other arising from the client's right to expect their legal advisers to remain silent, which gives rise to an immunity that protects the client against the disclosure of that information, particularly in judicial proceedings[74].

- The analysis of the implementation of professional secrecy is based on the social importance it has been given in maintaining a properly functioning justice system and preserving the rule of law in Canada[75].

- Professional secrecy does have its limits since concern for competing interests may sometimes necessitate the disclosure of confidential information[76] after an analysis of the nature and the context of the professional services rendered[77].

- Professional secrecy must be afforded strong and generous protection[78].

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[70] Idem, para. 33.
[71] Idem, para. 34.
[72] Idem, para. 37.
[73] Supra, Note 29.
[74] Idem, para. 27.
[75] Idem., para. 33.
[76] Idem, para. 37.
[77] Idem, para. 38.
[78] Idem, para. 41.

- There exists a rebuttable presumption of fact that arises from the existence of a mandate entrusted by a client to a lawyer, to the effect that all communications between them are *prima facie* considered confidential. It will be up to the opposing party to justify that the information sought is subject neither to the obligation of confidentiality nor to immunity from disclosure[79].

[56] That same year, in *Pritchard v. Ontario (Human Rights Commission)*[80], it was decided that a general provision regarding the production of records that does not clearly specify that it applies to records regarding which professional secrecy is invoked, is not sufficient to compel the holder of these records to produce them[81]. The Supreme Court pointed out that the privilege is jealously guarded and should only be set aside in the most unusual circumstances[82], because the privilege must be nearly absolute[83].

[57] In 2006, in *Goodis v. Ontario (Ministry of Correctional Services)*[84], the Supreme Court specifically ruled that it is incumbent on a judge to apply the "absolutely necessary" test when deciding on an application for disclosure of records covered, *a priori*, by professional secrecy. In so doing, it renewed its teachings from the *Smith v. Jones*[85], *McClure*[86], *Brown*[87], and *Lavallée*[88] decisions.

[58] In 2008, *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*[89] recalled that professional secrecy must be maintained as close to absolute as possible, because it is a rule of substance and not a rule of evidence[90]. Thus, any legislative provision that may allow incursions on professional secrecy must be interpreted restrictively since it cannot be abrogated by inference, and open-textured language governing the production of documents will be read not to include solicitor-client documents[91]. This is essentially what is stated in the *Lavallée*[92] and *Pritchard*[93] decisions.

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[79] Idem, para. 42.
[80] [2004] 1 S.C.R. 809.
[81] Idem, para. 35.
[82] Idem, para. 17.
[83] Idem, para. 18.
[84] [2006] 2 S.C.R. 32, para. 15.
[85] Supra, Note 39.
[86] Supra, Note 40, para. 52.
[87] Supra, Note 44, para. 3.
[88] Supra, Note 12, para. 46.
[89] [2008] 2 S.C.R. 574.
[90] Idem, para. 10.
[91] Idem, para. 11.
[92] Supra, Note 12, para. 18.
[93] Supra, Note 80, para. 33.

[59] In 2010, in *R. v. Cunningham*[94], the Supreme Court held that, in the context of a law office search, information regarding fees and costs is considered *prima facie* privileged if the Crown seeks disclosure, the ultimate decision of whether the fee information is in fact privileged is made by the court[95].

[60] Then, in *R. v. National Post*[96], it recalled, as in the *McClure*[97] decision, that professional secrecy, one of the most ancient and powerful privileges known to our jurisprudence, is generally seen as a fundamental and substantive rule of law, rather than as a constitutional rule[98].

[61] Underlining that in a class privilege, such as professional secrecy, what is important is not so much the content of the particular communication as the protection of the type of relationship, meaning that once the relationship is established, privilege presumptively cloaks the confided information in confidentiality, without regard to the particulars of the situation. Consequently, this privilege departs from the truth-finding principal of our justice system[99] and it cannot be tailored to fit the circumstances[100].

[62] Reiterating its previous case law, the highest court in the land, in *Ontario (Public Security and Safety) v. Criminal Lawyers' Association*[101], recently affirmed that professional secrecy has been held to be all but absolute and that the only exceptions recognized are public safety and the right for an accused to present a full and complete defence[102].

[63] This concludes this overview of Supreme Court case law. Nonetheless, some questions still persist in the case at bar that deserve an answer.

3) Incidental case law

[64] More specifically, as this Court has already ruled[103], it is inappropriate to distinguish between the duties of lawyers and notaries regarding their obligation to maintain the secrecy of the transactions performed in the trust account. The Court can do no better than to repeat:

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[94] 2010 SCC 10.
[95] Idem, para. 28.
[96] Supra, Note 19.
[97] Supra, Note 40.
[98] Supra, Note 19, para. 39.
[99] Idem, para. 42.
[100] Idem, para. 46.
[101] 2010 SCC 23.
[102] Idem, para. 53.
[103] Yves R. Léonard v. The Deputy Minister of Revenue of Québec and Guy Mercier, AZ-81021180, March 2, 1981 (S.C.); 164461 Canada Inc. (Syndic de) v. Kyte, AZ-97021085, November 12, 1996 (S.C.).

According to the Court, even though no specific text in the Code of ethics of advocates provides for professional secrecy for a lawyer's trust account, it is not appropriate to make any distinction between a notary's account and a lawyer's account. The two professionals very often deal with the same type of transactions, are called upon to receive money in trust of which they must dispose according to the instructions received. Can it be conceived for even an instant that the same transaction, depending on whether it was performed by a notary rather than by a lawyer, would be better protected and that the notion of professional secrecy should be interpreted differently? Disclosing how one has disposed of funds in trust implies that, frequently and unequivocally, there will be disclosure of the instructions received from the client and the legal advice that he will have been given. The Court can easily conceive, as Mtre Kyte alleges, that the mere fact of revealing how the money was disbursed will indicate and confirm the legal structure that was established on his client's account.

There is no doubt that this concerns information, advice and instructions received from the client that pertain directly to professional secrecy. The preparation of cheques and the remittance of the cheques received in the lawyer's trust account very often cannot be separated from a transaction as a whole. They are directly related to the instructions received from the client and to the advice the lawyer may have given to his client, and it is impossible to separate the instructions given from the fact as such, constituted by the issuance of a cheque in the name of a very specific person or institution. Thus, the Court has no doubt that cheque issuance falls directly within the mandate entrusted to the lawyer within the context of a transaction concerning the sale of an immovable. (...)[104]

[65] Since the Agency and the AGC argue that a distinction must exist between criminal law and civil law regarding the determination of the rights in question, the Court, after the hearing, drew the attention of the parties to the existence of the *R.L. v. M.S.*[105] decision on this subject, having recently learned of its existence, and requested their comments.

[66] In this case, the Court had to rule on a motion to obtain disclosure of the mandate for professional fees paid by the father within the context of a child custody dispute. It was then specified that the motion did not concern the disclosure of the lawyer's statements of fees and costs to the opposing party, but only the amounts paid by the opposing party in 2009 and 2010, the amounts owed and the lawyer's hourly rate[106].

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[104] Kyte supra, pages 6 and 7.
[105] 2010 QCCS 1186
[106] Idem, para. 8.

[67] In its analysis, the Court referred to the fact that the Supreme Court, on two occasions, dealt with the question of the privileged nature of lawyer's fees[107] in litigation cases under criminal law[108], namely the *Maranda*[109] and *Cunningham*[110] decisions.

[68] Regarding the impact of the *Maranda*[111] decision, the Court decided that since the right to silence and, accordingly, the constitutional protection against self-incrimination, does not exist in civil matters, and that in criminal matters, the disclosure of the amount of the lawyer's fee could indirectly impair this protection, the principle stated in this decision thus does not necessarily apply in civil law[112].

[69] Regarding the *Cunningham*[113] decision, in which the Supreme Court had to decide whether, in a penal matter, a court can refuse to authorize a defence lawyer to withdraw due to the accused's non-compliance with the financial conditions of the mandate, the Court decided that, since the Supreme Court based its decision solely on the fact that non-payment of the lawyer's professional fees cannot serve to incriminate a person, it issued an *obiter* when it discussed the effect that an allegation of impecuniousness can have in civil law, more specifically in the context of a claim for support. Therefore, it was appropriate not to retain these decisions to rule[114] on the motion referred to it.

[70] Declaring that he was bound by the *Kruger*[115] and *Ruffo (Re)*[116] decisions of the Court of Appeal, the judge in *R.L.*[117] concluded that the highest jurisdiction in Québec has recognized the principle that the amount of fees paid by a party to his lawyer is not privileged information[118]. He also pointed out that a party who claims reimbursement of his extrajudicial fees waves his privilege, as the Québec Court of Appeal decided in *APEIQ v. Nortel Networks Corporation*[119], among other cases.

[71] With all due respect, the Court cannot conclude identically in the case at bar. Here is why.

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[107] Idem, para. 7.
[108] Idem, para. 8.
[109] Supra, Note 60.
[110] Supra, Note 94.
[111] Supra, Note 60.
[112] Supra, Note 105, para. 12 and 13.
[113] Supra, Note 94.
[114] Supra, Note 105, para. 14 to 19.
[115] Supra, Note 65.
[116] [2005] R.J.Q. 1637.
[117] Supra, Note 105.
[118] Idem, para. 24.
[119] (2007) QCCA 1208.

[72] In *R. v. Henry*[120], the Supreme Court expressed an opinion regarding the scope of an *obiter dictum*, which it analyzed under the wording *obiter dicta* versus the *ratio decidendi*, pointing out that the supposed dichotomy between these concepts is an oversimplification.[121]

[73] It teaches that all *obiter* do not have, and are not intended to have, the same weight. It notes that the weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance.[122]

[74] On the one hand, for the Court, the *obiter dictum* in *Cunningham*[123] serves as an illustration to explain the *ratio decidendi* regarding the consequences of an allegation of impecuniousness in civil matters. Although the following formulation seems to be contradictory in itself, for the Court this *obiter* in the *Cunningham*[124] decision is at the very heart of the Supreme Court's reasoning when it rules on the question referred to it, even though this is not specifically <u>the</u> question on which it had to decide. Consequently, its persuasive weight remains substantial.

[75] On the other hand, when in *Maranda*[125] we read that the distinction between "fact" and "communication" does not respect the right to professional secrecy and would lead to the erosion of the privilege if it were maintained, we cannot reasonably be convinced that a difference must exist between civil law and criminal law in this regard. Indeed, if the statement of fees and costs and its payment result from the relationship between the lawyer and the client, they thus are covered *prima facie* by professional secrecy, as the Supreme Court affirms in *Foster Wheeler*[126].

[76] By way of illustration, how can one consider logically a statement of fees and costs and the payment of a client who consults a single legal advisor regarding facts that pertain both to criminal law and to civil law? As a more specific example among several situations that may exist, what about the right to professional secrecy of the person who may be charged with crimes for his conduct regarding a spouse or a child and who is party to child custody proceedings based on the same facts, who consults <u>one</u> legal advisor for both cases?

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[120] [2005] 3 S.C.R., 609.
[121] Idem., para. 53.
[122] Idem, para. 57.
[123] Supra, Note 94.
[124] Idem.
[125] Supra, Note 60.
[126] Supra, Note 29.

[77] Moreover, the authorities of the Québec Court of Appeal decisions, which impose the decision on the Court in the *R.L.*[127] case, all pertain to a context of waiver, if not express, then at least implicit, of the privilege of confidentiality. In this regard, all the decisions show that the situation is no different than that of a person who sues any professional regarding their professional relationship, which implicitly relieves that professional of his duty of confidentiality.

[78] It follows that, conceptually and generically, there must be no dichotomy between civil law and criminal law regarding the existence, *prima facie*, of the right to professional secrecy.

[79] Thus, for the Court, since it considers itself bound by the clear and precise statements of the Supreme Court, it cannot share the opinion expressed in the *R.L.*[128] case.

4) Recapitulation

[80] From all this, the Court draws the following conclusions regarding professional secrecy:

- That there is no reason, *a priori*, to distinguish between the law in civil matters and the law in criminal matters.
- That there should be no distinction between what constitutes a "fact" and a "communication".
- That once a legitimate professional relationship is established between a legal professional and a client, all actions, documents and information are, *prima facie*, covered by professional secrecy.
- That the burden of proving whether or not documents or information sought are protected by professional secrecy belongs to the person challenging its application.
- That the exceptions allowing professional secrecy to be bypassed are rare and can only be used as a last resort.
- That the legislative frameworks put in place must ensure that professional secrecy is scrupulously respected in order to avoid untimely disclosures.
- That any legislation likely to authorize a breach of professional secrecy must be interpreted restrictively and cannot allow the production of documents that it protects.

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[127] Supra, Note 105.
[128] Idem.

B - The validity of the legislative texts of the ITA

1) Sections 231.2 and 231.7 ITA

[81] The Agency and the AGC base their positions mainly on the *R. v. McKinlay Transport Ltd.*[129], which validated the constitutionality of Section 231(3) ITA regarding Section 8 of the Charter. In this case, having refused to comply with a requirement to provide documents or information for the production of a wide variety of information and documents, the companies were accused of having violated Section 238(2) ITA. They then petitioned for nullification of the denunciation on the grounds that Section 231(3) ITA attached to Section 238(2) ITA violates the Charter.

[82] The Supreme Court concluded that even if it is a seizure[130], it is not abusive under the terms of Section 8 of the Charter[131]. Indeed, since a distinction must be made between seizures in criminal or quasi-criminal matters, which must strictly comply with the criteria set out in *Hunter v. Southam Inc.*[132], from seizures in administrative matters to which less strict standards can apply[133], then Section 231(3) prescribes the least invasive method to control ITA compliance effectively[134], and since the taxpayers have a relatively low expectation of respect for their privacy by the tax authorities, in view of the statutory regime of self-reporting and self-assessment put in place, the seizure is therefore reasonable and does not violate Section 8 of the Charter[135].

[83] In a book of "extrinsic" evidence, the Agency and the GC produce publications explaining the income tax audit and recovery methods and those regarding the special execution program to ensure observance of the ITA. In this regard, the Court cannot state its position any better than the Supreme Court has already done in *McKinlay*[136] and *R. v. Jarvis*[137] regarding the legitimacy of the existing vast powers that the Agency must have at its disposal in overseeing the enforcement of the ITA.

[84] In this regard, it is useful, in an approach of contextual analysis of the rights in question, to note that the public's expectations regarding respect for their right to privacy is not as high in tax matters as in a criminal investigation[138].

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[129] [1990] 1 S.C.R., 627.
[130] Idem, page 642, line f).
[131] Idem, page 650, line d).
[132] [1984] 2 S.C.R. 145.
[133] Supra, Note 129, page 647, line h).
[134] Idem, page 649, line j).
[135] Idem, page 650, lines a) to d).
[136] Supra, Note 129.
[137] [2002] 3 S.C.R. 757.
[138] McKinlay, supra, note 129, p. 649; Thompson Newspapers Ltd. v. Canada (Director of Investigations and Research) [1990] 1 S.C.R. 425, p. 507; R. v. Jarvis, Note 137.

[85] However, the requirement to discover the truth in criminal, civil or fiscal matters is not an end in itself, or else the constitutional guarantees would be meaningless and the right to professional secrecy would be nothing more than a shrinking protection.

[86] The issue instead is to see whether the class privilege arising from the right to professional secrecy is contextually more important than the search for truth. The fundamental importance of professional secrecy is a cornerstone not only of our judicial system, but more broadly of our legal system. To paraphrase the *Lavallée*[139] decision, the issue is whether the legislator has put all the necessary measures in place to ensure the greatest possible respect for this privilege.

[87] Although it is true that the Supreme Court teaches that a more flexible approach must be adopted when assessing the context in a regulatory or administrative matter[140], the Court nonetheless reiterated that the impairment of professional secrecy must be absolutely necessary and minimal[141]. It could even be affirmed, without too much risk, that it is adopting an increasingly scrupulous attitude in this regard.

[88] Undeniably, the degree of invasion of privacy is less important in a requirement to provide documents or information than in the execution of a search, since, in particular, the government employees do not have direct access to the documents or information by the mere fact of the request. However, the possibility of an impairment of the right to professional secrecy in this context must not be minimized.

[89] In light of the *Lavallée*[142] decision, it must be recognized that the procedure put in place by the legislator, by combining the effects of Sections 231.2 and 231.7 ITA, does not allow the client, the holder of the right to professional secrecy, to know directly that his right is threatened and thus see to its protection.

[90] Indeed, according to Section 231.72(2) ITA, the Minister's application to the judge must be addressed only to the person against whom the order is requested, in this instance the notary, and not to the client as well. This is the first fault of the statutory framework according to the Supreme Court.

[91] Moreover, the five-day delay to obtain the order appears too short. This is a second fault of the system. Thirdly, the Act does not impose a condition that it be proved to the judge that no other reasonable alternative exists before contacting the professional. This is another deficiency.

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[139] Supra, Note 12.
[140] McKinlay Transport, supra, Note 129.
[141] Descôteaux, supra, Note 35, pages 875 and 891.
[142] Supra, Note 12, para. 49.

[92] Since the Court is bound to adapt rigorous standards to ensure the protection of professional secrecy and thus to qualify as abusive under Section 8 of the Charter any statutory provisions that impair it more than is absolutely necessary[143], it must be determined whether such is the case in this instance.

[93] Like Section 488(1)(8) of the Criminal Code[144], Section 231.7(2) ITA does not guarantee the holder of professional secrecy a reasonable chance to file an objection based on the notary's professional secrecy to preserve the confidentiality of privileged information[145]. This deficiency is fatal, according to the Supreme Court, because the State has the obligation to ensure that the rights of the holder of professional secrecy remain sufficiently protected[146].

[94] By the very wording of some of the requirements addressed to the notaries, it is difficult, in all logic, to do otherwise than conclude that they are placed in a perilous position, to say the least: they must choose to conform to the requirement to provide documents or information and thus, at the very least, be in breach of their ethical duty or, in order to respect their obligations to their client, they refuse to respond, exposing themselves to penal prosecution.

[95] Therefore, this is not a minimal impairment. All this is equivalent to an abusive search and seizure, contrary to Section 8 of the Charter. In this regard, the Agency and the AGC did not attempt to justify this violation based on Section 1 of the Charter. As in the *Lavallée*[147] decision, the Court does not see how this could be done[148].

[96] As a result, the Court concludes, based on the teachings of the Supreme Court, that it cannot constitutionally validate these statutory provisions. Consequently, the Court thus will declare that these provisions are unconstitutional and inoperative under the terms of Section 52 of the Charter[149].

2) Subsection 5 of Section 232(1) ITA

[97] Regarding the exception under subsection 5 of Section 232(1) 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 Agency and the AGC justify its constitutional validity by referring to a broad series of decisions that affirm, in substance, that in the matter of a real estate transaction, the cheques of a lawyer's account and the adjustment statement are not subject to professional secrecy, in particular because this concerns a fact and not a privileged communication[150].

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[143] Idem, para. 36.
[144] Supra, Note 47.
[145] Supra, Note 12, para. 40.
[146] Idem, para. 39.
[147] Supra, Note 12.
[148] Idem, para. 46.
[149] Idem, para. 48.
[150] Law Society v. Cornfield, 2008 CAF 156; In the Matter of the Legal Professional Act and Martin K. Wirick, 2005 BCSC 1821, 51 B.C.L.R. (4th) 193, (2005) B.C.J. No. 2878 (Sup. C. B.C.) (QL): Minister of National Revenue v. Vlug, 2006 FC 866, 2006 DTC 6285, [2006] F.C.R. no. 142 (F.C.) (QL): Canada (Minister of National Revenue) v. Reddy, 2006 F.C. 277, 146 A.C.W.S. (3d 568, [2006] F.C.R. no. 348 (F.C.) (QL): Canada (Minister of National Revenue) v. Singh Lyn Ragonetti Bindal LLP, 2005 F.C. 1538, [2006] 1 TCC 113, [2005] F.C.R. no. 1097 (F.C.) (QL): Burnett v.

[98] Specifically on this subject, it is necessary to draw some guidelines regarding the impact of the decision *Re Ontario Securities Commission and Greymac Credit Corp.*[151] used in many of the decisions cited in the preceding paragraph, to make a distinction between "fact" and "communication". For the Court, this decision determines only in the event that a lawyer's trust account is used solely as a financial conduit and that the presence of the funds does not appear to be related to the solicitation of any legal advice, that no right to professional secrecy exists[152]. This decision does not establish that a distinction exists between "fact" and "communication".

[99] The legislative history of Section 232 ITA, originally Section 126(2), regarding the definition of what the federal legislator declares to be "solicitor-client privilege" shows that the 1965 amendment added the current restrictions regarding a lawyer's accounting record. Allegedly supposed to set aside a British Columbia judgment[153], this amendment, according to *Hebman v. M.N.R.*[154], did not have this effect, however.

[100] In any event, one can legitimately question the logic of the legal reasoning of the Agency and the AGC regarding the 1965 legislative amendment, which adds the exception regarding the accounting record, the vouchers and the cheque. Indeed, if as they allege, these documents do not fall under professional secrecy, then the legislator spoke for nothing, which is not presumed and which the Court cannot resolve to conclude. If, however, these documents are in fact covered by professional secrecy, the issue is to determine whether this legislative definition meets the constitutional criteria defined by the Supreme Court's recent case law.

Canada (Minister of National Revenue – M.N.R.) [1998] F.C.R. no. 1678; In the Matter of the Legal Professional Act and Martin K. Wirick, 2005 BCSC 1821; Minister of National Revenue v. Singh Lyn Ragonetti Bindal LLP, previously known as Singh Walters Bindal, 2005 F.C. 1538; Minister of National Revenue v. Gary Vlug, 2006 F.C. 86; Minister of National Revenue v. Reddy, 2006 F.C. 277.

[151] (1983) 41 O.R. (2d) 328.

[152] Maranda, supra, note 60, para. 30; Stevens v. Canada (Prime Minister), [1998] F.C.R. no. 794, para. 43 and 44; Patrick and Littleton (Re), 2006 Q.C.C.S. 2276, para. 12 to 14; Cinar Corporation v. Weinberg, 2007 Q.C.C.S. 4380, para. 9 to 11; Nova Scotia Real Estate Commission v. Larhway, 2009 N.S.S.C. 266, para. 25.

[153] In Re The Income Tax Act and In Re a Solicitor, [1962] 16 DTC 1331.

[154] [1970] 24 DTC 67355, p. 6359.

[101] It is important to mention that the Agency and the AGC acknowledge that in Québec the rights of notaries and lawyers could be different, due to the existence of Section 9 of the Québec Charter, given the definition in subsection 5 of Section 232(1) ITA regarding solicitor-client privilege, which clearly states that a person's right to refuse to disclose a professional confidence must be assessed according to the law and should be applied by the Superior Court of the province where the question arose.

[102] Professional secrecy for legal advisors receives statutory consideration in Section 9 of the Québec Charter, thus conferring a quasi-constitutional status for Québec. Without fear of error, it can be affirmed *ipso facto* that it could benefit from a greater protection than under federal law, which recognizes it only as a principle of fundamental justice, that is a substantive rule as a class privilege, but not as a constitutional or quasi-constitutional right.

[103] However, the Court can only note that in *McClure*[155], the Supreme Court affirmed that the right to professional secrecy for lawyers is a principle of fundamental justice[156]. Thus, it can be affirmed that this is a principle arising from Section 7 of the Charter but, at the risk of repeating oneself, in the *National Post*[157] decision, the Supreme Court affirmed that this is a rule of fundamental law, but not a constitutional rule[158].

[104] With all due respect, it is difficult to grasp the exact scope of these two jurisprudential statements. Indeed, a principle arising from Section 7 of the Charter should be a principle that becomes constitutional because of this recognition. Yet this does not seem to be the case.

[105] This is why the Court concludes as it does regarding the qualification of this right in federal law.

[106] In this regard, it is fundamental to note that the Agency and the AGC declare that they are not invoking the theory of supremacy of federal law over provincial law. They acknowledged at the hearing that the legal situation in Québec could well be unique in Canada, and if Section 9 of the Québec Charter served as the basis of the Court's decision, they did not argue that the definition of solicitor-client privilege mentioned in Section 232(1) ITA took precedence.

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[155] Supra, Note 40.
[156] Idem, para. 41.
[157] Supra, Note 19.
[158] Idem, para. 39.

[107] By studying the principles stated previously, which can be found, in particular, in the *Descôteaux*[159], *Pritchard*[160] and *Blood Tribe*[161] decisions, the Court concludes that an express statutory provision is needed to restrict the right protected by Section 9 of the Québec Charter[162], and that it must receive a restrictive interpretation[163].

[108] As the Supreme Court affirms and as the Québec Charter requires, the Court must actively ensure the protection of professional secrecy by qualifying as abusive any statutory provision that impairs professional secrecy more than absolutely necessary[164].

[109] At the risk of repeating itself, since the *Descôteaux*[165], *Lavallée*[166], *Maranda*[167], *Foster Wheeler*[168] and *Cunningham*[169] decisions, the Court concludes that no dichotomy must exist between "fact" and "communication" and that, *prima facie*, all the actions, documents and information are covered by professional secrecy, it follows that the exception of subsection 5 of Section 232(1) which reads: "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]" must be declared constitutionally inoperative.

[110] Section 9 of the Québec charter is only one additional element that convinces the Court of the exorbitant nature of this statutory provision.

[111] In this regard, the AGC does not provide any justification under the terms of Section 1 of the Charter. It follows that the Court cannot validate this legislative provision.

3) The suitable legislative framework

[112] In this regard, in claiming the application of the *Blood Tribe*[170] decision, the Chambre argues that only a court of records has the power to examine a document with a view to ruling on the contested claim of the privileged since the employees who use the requirement to provide documents or information procedure do not have the independence required to do so.

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159 Supra, Note 35, page 875.
160 Supra, Note 80, para. 33.
161 Supra, Note 89, para. 10 and 11.
162 Archambault v. Comité de discipline du Barreau du Québec et als., AZ-92011356 (C.A., page 14)
163 Central Mortgage and Housing Corporation v. Pagé, 1977, C.A. 560 (C.A.), page 561.
164 Lavallée, supra, Note 12, para. 36; Goodis, supra, Note 84, para. 15 and 20.
165 Supra, Note 35.
166 Supra, Note 12.
167 Supra, Note 60.
168 Supra, Note 29.
169 Supra, Note 94.
170 Supra, Note 89, para. 2 and 22.

[113] The Court readily agrees with this. For the Court, it is not up to the notary or a public servant to decide ultimately what is covered by professional secrecy, since this is the role of a superior court. However, this is not a problem in the case at bar. Indeed, once the requirement to provide documents or information is sent and the notary's refusal to claim the right to professional secrecy is served on the Agency, or in the absence of a response from the notary, the Act already provides that a court will adjudicate on the legitimacy of the claim to the right to respect of professional secrecy.

[114] It must be noted that the requirements to provide documents or information sent to the notaries do not state that the judicial authorization framework will be set in motion should the notary fail to respond positively, but rather that penal proceedings under the terms of Section 238 ITA will be instituted immediately.

[115] In fact, because the Court decides that the documents subject to the Chambre's motion are *prima facie* covered by professional secrecy, it follows that any requirement to provide documents or information addressed to a notary becomes *de facto* useless. Consequently, the Agency's employees should apply directly to a judge of a Superior Court when seeking to obtain such information.

[116] Once again, as the *Foster Wheeler*[171] decision teaches, since all of the communications between the client and the notary must be considered *prima facie* confidential , it will be up to the Agency to prove to a judge of a superior court, following the application of a legislative framework that respects the client's constitutional rights, that what it is seeking is not subject to the obligation of confidentiality and immunity from disclosure[172].

[117] Indeed, when the State is confronted with professional secrecy, it must conform to the teachings of the *Lavallée*[173] decision. In this regard, it is not useless to recall that in the matter of a search, there is a prior judicial authorization procedure by a judicial instance, in this case a justice of the peace, whereby the documents seized at the legal advisor's office are sealed and a judicial adjudication then occurs. The legislator therefore must envision an analogous procedure under the ITA.

[118] In this regard, the fears of the Agency and the AGC of seeing a tax haven created in the offices of lawyers and notaries appear to be exaggerated. On the one hand, certain documents remain available from third parties. On the other hand, to the extent that illegal acts will be committed, it will have to prove that the exception recognized in the *Solosky*[174] and *McClure*[175] decisions regarding the lawfulness of the acts committed must be recognized.

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[171] Supra, Note 29.
[172] Idem, para. 42.
[173] Supra, Note 12, para. 24.
[174] Supra, Note 32.
[175] Supra, Note 40.

C- The conclusions sought

[119] Subsidiarily, in the event that the Court grants the motion to declare certain statutory provisions unconstitutional, the Agency and the AGC argued that this conclusion should be stayed for one year, to which the Chambre does not object on condition that there is a moratorium on requirements during the same period, in response to which they made no comment.

[120] The Court will not grant this request for two reasons. First of all, the Supreme Court did not act in this way when it invalidated Section 488.1 Cr. C. in *Lavallée*[176]. Secondly, the federal legislator has done nothing since this decision, i.e. since 2004, to rewrite this statutory provision. It is therefore reasonable to conclude that granting such a delay will not contribute to serving a public interest imperative.

[121] The Court wishes to be clear. It is not its intention to punish the federal legislator for its inaction, but rather to recognize, on the one hand, that it has not proved why it should obtain this stay, which is not automatic, and, on the other hand, that the right to respect of professional secrecy prevails over other administrative considerations.

[122] Finally, we should note that the conclusions sought by the Chambre cannot be granted as written. Indeed, on the one hand, the first conclusion must be extended to the notaries <u>and</u> lawyers of the Province of Québec regarding the documents and information protected by their professional secrecy. On the other hand, regarding the second conclusions, it is not necessary to declare that there cannot be a requirement to provide documents or information regarding documents protected by professional secrecy since the Court has concluded that the enabling provisions as currently written are unconstitutional. It will be up to the legislator to put an adequate framework in place.

[123] In this context, one may question the necessity of declaring, as the Chambre requests, that certain documents be covered *prima facie* by professional secrecy. For the Court, the Chambre has proved the validity of its legal position in this regard and it would not be a wise use of its judicial discretion to refuse to grant the remedy sought.

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[176] Supra, Note 12.

THEREFORE, THE COURT:

[124] **GRANTS** the petition of the Chambre des notaries du Québec and the intervention of the Québec Bar;

[125] **DECLARES** unconstitutional, inoperative and of no force and effect, under Section 52 of the Charter, Sections 231.2 and 231.7 and subsection 5 of Section 232(1) of the Income Tax Act insofar as they relate to notaries and lawyers of the Province of Québec with respect to the documents and information protected by their professional secrecy;

[126] **DECLARES** that the following documents are protected *prima facie* by professional secrecy for legal advisors:

- 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.

[127] **DECLARES** that these same documents are *prima facie* protected by professional secrecy regardless of the form in which they are accessible, including media that utilize information technology, such as USB keys, removable hard drives, floppy disks and CD-ROMs;

[128] **WITH COSTS.**

MARC-ANDRÉ BLANCHARD, J.S.C.

M[tre] Raymond Doray
M[tre] Loïc Berdnikoff
LAVERY DE BILLY
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SHADLEY BATTISTA
Counsel for the Intervenor

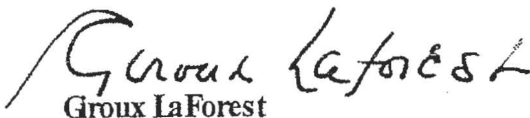
Hearing dates:	May 13, 17, 18 and 19, 2010
Date of deliberation after receipt of the notes and authorities:	June 23, 2010

CERTIFICATE

To whom it may concern :

As a duly Certified Translator and Member of OTTIAQ in good standing, the undersigned has translated and reviewed the subject Judgment delivered by Mr. Justice Marc-André Blanchard, J.S.C on September 8, 2010 to this Page 34, and reviewed the material contained in the Appendix to the judgment from Page 35 to the end. The latter contents are basically taken and quoted verbatim from the Canadian Charter of Rights and Freedoms and Sections of various Acts, and were not translated as such by the undersigned, but merely gone over.

The undersigned is of the opinion that the English translation of the French judgment fairly reflects the latter's contents in all material respects.



Groux LaForest

Certified Translator #5608 – OTTIAQ

Issued this 15th day of December 2010.

APPENDIX

CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SCHEDULE B OF THE CONSTITUTION ACT, 1982

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the Canada Act 1982, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

INCOME TAX ACT, R.S.C. 1985 (5th Supp.), ch. 1

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 comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect 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 stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or
(b) any document.

(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).

(3) On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") where 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) [Provision repealed.]

(4) Where an authorization is granted under subsection 231.2(3), it shall be served together with the notice referred to in subsection 231.2(1).

(5) Where an authorization is granted under subsection 231.2(3), a third party on whom a notice is served under subsection 231.2(1) may, within 15 days after the service of the notice, apply to the judge who granted the authorization or, where the judge is unable to act, to another judge of the same court for a review of the authorization.

(6) On hearing an application under subsection 231.2(5), a judge may cancel the authorization previously granted if the judge is not then satisfied that the conditions in paragraphs 231.2(3)(a) and 231.2(3)(b) have been met and the judge may confirm or vary the authorization if the judge is satisfied that those conditions have been met.

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)).

(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.

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

(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.

(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.

232. (1) In this section,

"custodian"
«gardien»

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

"judge"
«juge»

"judge" means a judge of a superior court having jurisdiction in the province where the matter arises or a judge of the Federal Court;

"lawyer"
«avocat»

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

"officer"
«fonctionnaire»

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

"solicitor-client privilege"
«privilège des communications entre client et avocat»

"solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

(2) Where a lawyer is prosecuted for failure to comply with a requirement under section 231.2 with respect to information or a document, the lawyer shall be acquitted if the lawyer establishes to the satisfaction of the court

(a) that the lawyer, on reasonable grounds, believed that a client of the lawyer had a solicitor-client privilege in respect of the information or document; and
(b) that the lawyer communicated to the Minister, or some person duly authorized to act for the Minister, the lawyer's refusal to comply with the requirement together with a claim that a named client of the lawyer had a solicitor-client privilege in respect of the information or document.

(3) Where, pursuant to section 231.3, an officer is about to seize a document in the possession of a lawyer and the lawyer claims that a named client of the lawyer has a solicitor-client privilege in respect of that document, the officer shall, without inspecting, examining or making copies of the document,

(a) seize the document and place it, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package; and
(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if the officer and the lawyer agree in writing on a person to act as custodian, in the custody of that person.

(3.1) Where, pursuant to section 231.1, an officer is about to inspect or examine a document in the possession of a lawyer or where, pursuant to section 231.2, the Minister has required provision of a document by a lawyer, and the lawyer claims that a named client or former client of the lawyer has a solicitor-client privilege in respect of the document, no officer shall inspect or examine the document and the lawyer shall

(a) place the document, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the officer and the lawyer agree, allow the pages of the document to be initialed and numbered or otherwise suitably identified; and
(b) retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

(4) Where a document has been seized and placed in custody under subsection 232(3) or is being retained under subsection 232(3.1), the client, or the lawyer on behalf of the client, may

(a) within 14 days after the day the document was so placed in custody or commenced to be so retained apply, on three clear days notice of motion to the Deputy Attorney General of Canada, to a judge for an order
(i) fixing a day, not later than 21 days after the date of the order, and place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, and
(ii) requiring the production of the document to the judge at that time and place;
(b) serve a copy of the order on the Deputy Attorney General of Canada and, where applicable, on the custodian within 6 days of the day on which it was made and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and
(c) if the client or lawyer has proceeded as authorized by paragraph 232(4)(b), apply at the appointed time and place for an order determining the question.

(5) An application under paragraph 232(4)(c) shall be heard in camera, and on the application

(a) the judge may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and resealed; and
(b) the judge shall decide the matter summarily and,

(i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, shall order the release of the document to the lawyer, and
(ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, shall order

(A) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3), or
(B) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1),

and the judge shall, at the same time, deliver concise reasons in which the judge shall identify the document without divulging the details thereof.

(6) Where a document has been seized and placed in custody under subsection 232(3) or where a document is being retained under subsection 232(3.1) and a judge, on the application of the Attorney General of Canada, is satisfied that neither the client nor the lawyer has made an application under paragraph 232(4)(a) or, having made that application, neither the client nor the lawyer has made an application under paragraph 232(4)(c), the judge shall order

(a) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3); or
(b) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1).

(7) The custodian shall

(a) deliver the document to the lawyer

(i) in accordance with a consent executed by the officer or by or on behalf of the Deputy Attorney General of Canada or the Commissioner of Revenue, or
(ii) in accordance with an order of a judge under this section; or

(b) deliver the document to the officer or some other person designated by the Commissioner of Revenue

(i) in accordance with a consent executed by the lawyer or the client, or
(ii) in accordance with an order of a judge under this section.

(8) Where the judge to whom an application has been made under paragraph 232(4)(a) cannot for any reason act or continue to act in the application under paragraph 232(4)(c), the application under paragraph 232(4)(c) may be made to another judge.

(9) No costs may be awarded on the disposition of any application under this section.

(10) Where any question arises as to the course to be followed in connection with anything done or being done under this section, other than subsection 232(2), 232(3) or 232(3.1), and there is no direction in this section with respect thereto, a judge may give such direction with regard thereto as, in the judge's opinion, is most likely to carry out the object of this section of allowing solicitor-client privilege for proper purposes.

(11) The custodian shall not deliver a document to any person except in accordance with an order of a judge or a consent under this section or except to any officer or servant of the custodian for the purposes of safeguarding the document.

(12) No officer shall inspect, examine or seize a document in the possession of a lawyer without giving the lawyer a reasonable opportunity of making a claim under this section.

(13) At any time while a document is in the custody of a custodian under this section, a judge may, on an ex parte application of the lawyer, authorize the lawyer to examine or make a copy of the document in the presence of the custodian or the judge by an order that shall contain such provisions as may be necessary to ensure that the document is repackaged and that the package is resealed without alteration or damage.

(14) Where a lawyer has, for the purpose of subsection 232(2), 232(3) or 232(3.1), made a claim that a named client of the lawyer has a solicitor-client privilege in respect of information or a document, the lawyer shall at the same time communicate to the Minister or some person duly authorized to act for the Minister the address of the client last known to the lawyer so that the Minister may endeavour to advise the client of the claim of privilege that has been made on the client's behalf and may thereby afford the client an opportunity, if it is practicable within the time limited by this section, of waiving the claim of privilege before the matter is to be decided by a judge or other tribunal.

(15) No person shall hinder, molest or interfere with any person doing anything that that person is authorized to do by or pursuant to this section or prevent or attempt to prevent any person doing any such thing and, notwithstanding any other Act or law, every person shall, unless the person is unable to do so, do everything the person is required to do by or pursuant to this section.

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 127(3.2), 147.1(7) or 153(1), any of sections 230 to 232 or a regulation made under subsection 147.1(18) or with an order made under subsection 238(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.

(2) Where a person has been convicted by a court of an offence under subsection 238(1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.

(3) Where a person has been convicted under this section of failing to comply with a provision of this Act or a regulation, the person is not liable to pay a penalty imposed under section 162 or 227 for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid or made.

CHARTER OF HUMAN RIGHTS AND FREEDOMS, R.S.Q., c. C-12

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, ex officio, ensure that professional secrecy is respected.

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

24. No one may be deprived of his liberty or of his rights except on grounds provided by law and in accordance with prescribed procedure.

24.1. No one may be subjected to unreasonable search or seizure.

PROFESSIONAL CODE, R.S.Q., c. C-26

23. The principal function of each order shall be to ensure the protection of the public.

For this purpose it must in particular supervise the practice of the profession by its members.

60.4. Every professional must preserve the secrecy of all confidential information that becomes known to him in the practice of his profession.

He may be released from his obligation of professional secrecy only with the authorization of his client or where so ordered or expressly authorized by law.

The professional may, in addition, communicate information that is protected by professional secrecy, in order to prevent an act of violence, including a suicide, where he has reasonable cause to believe that there is an imminent danger of death or serious bodily injury to a person or an identifiable group of persons. However, the professional may only communicate the information to a person exposed to the danger or that person's representative, and to the persons who can come to that person's aid. The professional may only communicate such information as is necessary to achieve the purposes for which the information is communicated.

CIVIL CODE OF QUÉBEC, S.Q., 1991, c. 64

2138. A mandatary is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it.

He shall also act honestly and faithfully in the best interests of the mandator, and avoid placing himself in a position that puts his own interest in conflict with that of his mandator.

2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.

The latter criterion is not taken into account in the case of violation of the right of professional privilege.

NOTARIAL ACT, R.S.Q., c. N-2

48. (1) Notarial deeds en minute under the authority of which a deed is executed shall be sufficiently described in such deed by the nature and date thereof, the name of the notary who executed the same and the number under which they are registered in the appropriate register for the publication of rights, if any; they shall not be annexed to the deed.
Other deeds and documents annexed.

(2) All deeds and documents other than notarial deeds en minute, under the authority of which a deed is executed, shall be annexed and also be sufficiently described, acknowledged as true and signed by the party or parties who produce them, with and in the presence of the notary.
Other documents annexed.

(3) All other documents which the parties wish to annex to a deed may be so annexed upon compliance with the formalities prescribed in subsection 2.

NOTARIES ACT, R.S.Q., c. N-3

10. A notary is a public officer and takes part in the administration of justice. A notary is also a legal adviser.

The mission of a notary, in his or her capacity as a public officer, is to execute acts which the parties wish or are required to endow with the authenticity attaching to acts of public authority, to provide such acts with a fixed date, and to keep all acts executed en minute in his or her notarial records and issue copies of or extracts from them.

11. In his or her role as a public officer, a notary is duty-bound to act impartially and to advise all parties to an act which the parties wish or are required to endow with authenticity.

14.1. A notary must keep absolutely secret the confidences made to him or her by reason of his or her profession.

Such obligation, however, shall not apply when the notary is expressly or implicitly relieved therefrom by the person who made such confidences or where so ordered or expressly provided by law.

A notary may, in addition, communicate information that is protected by professional secrecy, in order to prevent an act of violence, including a suicide, where the notary has reasonable cause to believe that there is an imminent danger of death or serious bodily injury to a person or an identifiable group of persons. However, the notary may only communicate the information to a person exposed to the danger or that person's representative, and to persons who can come to that person's aid. The notary may only communicate such information as is necessary to achieve the purposes for which the information is communicated.

CODE OF ETHICS OF NOTARIES, R.R.Q., c. N-3, r. 2

7. The advice given by a notary to clients or to parties to an act must be disinterested, frank, and honest.

30. A notary shall avoid all situations where he could have a conflict of interest.

A notary has a conflict of interest where the interests are such that he may be inclined to give preference to some of them and his judgment or loyalty may be unfavourably affected.

The notary shall notify his client and cease to perform his duties as soon as he is aware that he has a conflict of interest, unless the client, after being informed of the nature of the conflict of interest and the facts relating thereto, authorizes the notary in writing to continue.

However, a notary who receives an application under article 863.4 of the Code of Civil Procedure (R.S.Q., c. C-25) or who acts pursuant to an application for dissolution of a civil union under article 521.13 of the Civil Code shall cease to perform his duties as soon as he is aware that he has a conflict of interest.

30.1. A notary shall take prompt measures to ensure that information and documents relevant to professional secrecy are not disclosed to a partner, shareholder, director, manager, officer, or employee of a partnership or company within which the notary carries on professional activities or in which he has an interest, where he becomes aware that the partner, shareholder, director, manager, officer, or employee has a conflict of interest.

The following factors must be considered in assessing the efficacy of such measures:

(1) size of the partnership or company;
(2) precautions taken to prevent access to the notary's file by the person having a conflict of interest;
(3) instructions given to protect confidential information or documents relating to the conflict of interest;
(4) isolation, from the notary, of the person having a conflict of interest.

31. A notary shall ignore any intervention by a third party that might influence the performance of his professional duties to the detriment of his client.

35. Every notary is bound by professional secrecy.

36. A notary may be released from professional secrecy only with the written authorization of the person concerned, or if required by law.

A notary who, under section 14.1 of the Notaries Act, communicates information protected by professional secrecy in order to prevent an act of violence shall provide the following in a statement under professional oath:

(1) the circumstances under which the information was communicated to him;
(2) the content of the information;
(3) the mode, date, and time of communication, the name and address of the person to whom the information was communicated, and if applicable, in what capacity that person received the information.

The statement must be kept in the client's file.

37. No notary shall, except for purposes of the internal administration of the partnership or company within which he carries on professional activities, disclose that a person has retained his services, unless required to do so by the nature of the case.

40. Every notary must ensure that no person for whom he is responsible in his practice discloses any confidential information to a third party.

REGULATION RESPECTING TRUST ACCOUNTING BY NOTARIES, R.R.Q., c. N-3, r. 5

15. The accounting records in which the funds, securities, and other property are entered and recorded must be in single-entry or double-entry form and consist of official receipts, passbooks or statements of the financial institution or the securities broker, cheques and other payment orders, and registers and other vouchers conforming to generally accepted accounting principles, in addition to the cash book and the general ledger.

35. A notary is subject to professional secrecy with respect to the account books and documents contemplated in this regulation.

However, an inspector, the syndic, or an assistant or corresponding syndic of the Order may obtain from the accountant appointed pursuant to this regulation any information that is relevant to the trust accounts subject to the audit.