

COMMITTEE: Ethics Committee

DATE: February 26, 2009

4. CHAPTER 5: CANADA REVENUE AGENCY NOTICES OF REQUIREMENT AND COMPLIANCE ORDERS

The Committee was asked whether, in situations where lawyers receive a demand from the Canada Revenue Agency (“CRA”) to produce documents under the *Income Tax Act* and are unable to obtain client instructions regarding whether to make a claim of privilege, there are any circumstances where lawyers would be justified in producing the documents without advancing a claim of privilege.

The Committee noted that Chapter 5, Rule 14, provides that lawyers who are required to produce documents which are or may be privileged pursuant to any Federal or Provincial legislation must claim privilege in respect of the documents.

If a lawyer is unable to obtain instructions from the client regarding a possible claim of privilege, it was the Committee’s view that Rule 14 requires the lawyer to make a claim of privilege in all circumstances. While certain situations may make it unlikely that a claim of privilege would succeed, unique facts in some situations can cause documents to be privileged. Since privilege always belongs to the client the Committee was of the opinion that the decision whether to claim that privilege must always be that of the client, and not of the lawyer, regardless of the lawyer’s view about the validity of a potential claim of privilege by the client. If the client cannot claim privilege because the client does not know of CRA’s application to obtain the client’s document it is the role of the court to decide the issue of privilege, not the role of the lawyer who has custody of the document.

The Committee noted that this view may place some lawyers in the position of having to attend court or file an affidavit to claim the privilege in cases where they are unable to obtain client instructions, and may expose them to a claim of costs. While it is not the Ethics Committee’s decision about what assistance the Law Society should grant to lawyers placed in this position, the Committee was of the view that the Law Society should intervene in any situations where costs are claimed against a lawyer who is obliged to claim privilege in these circumstances. The Committee asked that this view be communicated to the Law Society Executive.

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