Vern Krishna: Supreme Court protects professional secrecy

VERN KRISHNA | July 5, 2016 | Last Updated: Jul 5 12:57 PM ET
More from Vern Krishna

A security camera outside the CRA headquarters. The Supreme Court of Canada has curtailed the CRA's ability to peek at communications between solicitors and clients. Drew Hasselback/National Post

The Supreme Court of Canada has clipped the wings of the Canada Revenue Agency in its efforts to curtail solicitor-client privilege for financial records.

In two companion cases released last month — Thompson v. Federation of Law Societies of Canada and Canada (Attorney General) v. Chambre des notaires du Québec — the Supreme Court reiterated that legal privilege is a near constitutional right that can be abrogated only in the most limited circumstances.

In tax law, the text of the statute is primordial. The statute confers virtually unlimited audit powers on the CRA, which it uses aggressively to extract confidential information from taxpayers under threat of criminal prosecution. The CRA can demand that individuals, and third parties, provide information and documents for any purpose connected with the administration of the Act.

Since the Act is an administrative statute, the CRA has considerable latitude in the wider public interest of tax collection. There are constitutional limits to their powers, which the Supreme Court articulated clearly in its judgments.

Related

Vern Krishna: Tax law's attempt to chip away at solicitor-client privilege

Vern Krishna: Confidential doesn't mean privileged when it comes to accountants

Section 231.2 of the Act requires taxpayers who are being audited, or against whom enforcement action is being taken, and third parties to reveal to the CRA any information or document, other than privileged information. But the Act curtails the scope of legal privilege, which it defines as a person's right to refuse to disclose in court any communication with a lawyer, except "an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication."

The exception for accounting records includes not only accounts, but also agreements, books, charts, tables, diagrams, invoices, letters, memoranda, statements and any other thing containing information. There are severe sanctions (including imprisonment) for persons who do not comply with the disclosure requirements of the Act.

Ultimately, it is a question of fact whether a document is "an accounting record" for the purposes of tax law. Solicitors' charge sheets and statements of accounts are not accounting records and, therefore, may be the subject of a claim of privilege. But accounting records such as ledgers, books of accounts and supporting documents may not be privileged, depending upon who owns the records.

The protection of professional secrecy has a long history in the common law. Originally considered an evidentiary rule, the protection of legal advice evolved into a substantive rule of law. Since the advent of the Canadian Charter of Rights and Freedoms, the rule is one of fundamental justice that governments should not interfere with unless absolutely necessary.

In Thompson, the CRA demanded various documents from the taxpayer, a lawyer, pertaining to his personal finances, as well as his accounts receivable listing. Claiming solicitor-client privilege, the lawyer refused to provide details about his accounts receivable, except for a general indication of the balance owing. Similarly, in Canada (Attorney General) v. Chambre des notaires du Québec, the CRA demanded information from lawyers and notaries in Quebec.

The Supreme Court acknowledged parliament's clear and unambiguous intent to constrain privilege in tax law. However, parliament's intent and its ability to define solicitor-client privilege in a particular way for the purposes of the administration of the Act must be evaluated in the context of the protection against unreasonable searches and seizures.

The CRA's demand on legal advisers to produce information and documents constitutes a "seizure,"which can be justified only if it is reasonable in the context of a free and democratic society. The test in a particular situation is whether the public's interest in privacy should give way to the government's interest in order to advance its goals. The starting point is a rebuttable presumption that all professional communications between client and lawyer are prima facie confidential. The burden is on the CRA to dislodge the presumption.

Further, the structure for judicial evaluation of privilege in the Act is not sufficient to validate the statutory scheme for disclosure of confidential information. The CRA does not even have to advise the client of the demand for disclosure. The burden is on the legal adviser to raise the defence of legal privilege. The structure places an unwarranted risk that the CRA would gain access to protected information.

Based on the constitutional deficiencies of the entire demand structure, the Supreme Court held subsection 232(1) invalid in the context of solicitor-client privilege. The protection afforded to professional secrecy is high.

The two decisions constrain the CRA's powers to intrude into solicitor-client privilege. Having failed to get in through the front door, we must now wait to see if the CRA will try to get in through the window to breach legal privilege. For now, it must operate within the constitution.