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**Dockets: T-1075-07
T-1076-07**

Citation: 2008 FC 594

Docket: T-1075-07

[ENGLISH TRANSLATION]

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

NATIONAL BANK OF CANADA

Respondent

and

LUC OUELLETTE

Intervener

Docket: T-1076-07

AND BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

CAISSE POPULAIRE DE THETFORD MINES

Respondent

and

LUC OUELLETTE

Intervener

REASONS FOR ORDER

HARRINGTON J.

[1] Mr. Luc Ouellette is a lawyer at a general partnership named Ouellette, Larouche, Gagné, s.e.n.c., in Thetford Mines. The Canada Customs and Revenue Agency proceeded with a random tax audit of this individual. The Agency states that the selection of this individual for an audit was absolutely by a random choice and that it had no preconceived ideas as to the validity of the income and expenses claimed by him.

[2] At the beginning, Mr. Ouellette was cooperative with the audit process. He provided the documents that the Agency was seeking. However, when he was asked to provide the documents on which his tax transactions were based, **deposit slips** and cheques drawn from his accounts, he balked. He was of the view that those documents would or could reveal the names of a few clients and cases before him. For him, that information had to be protected by solicitor-client privilege and he therefore refused to disclose it.

[3] In reply, the Agency ordered the two financial institutions with whom Mr. Ouellette does business, the National Bank of Canada and the Caisse Populaire de Thetford Mines, to reply to a requirement to provide information and produce documents. The Agency cited section 231.2(1)(a) and (b) of the *Income Tax Act*:

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 ... 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.

Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi ... exiger d'une personne, dans le délai raisonnable que précise l'avis :

- a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
- b) qu'elle produise des documents.

[4] In reply, Mr. Ouellette referred the matter to the Syndic of the Barreau du Québec and consulted a solicitor who offered independent legal advice. In turn, the Agency referred the matter to the Minister of Justice of Canada. An excerpt from a letter written on behalf of the Agency to counsel for Mr. Ouellette clearly indicates the Agency's position:

[TRANSLATION]

You must know that Mr. Luc Ouellette is currently subject to a tax audit by the CRA. In that matter, like any Canadian taxpayer, Mr. Ouellette has the obligation to keep books and records that allow the Minister of National Revenue ("the Minister") to establish his income, expenses, and taxes payable. The Minister must also be able to consult them during a tax audit and that is what Ms. Cantin of the CRA is attempting to do in the file for your client

[5] In addition, the Agency claims that the affected documents do not receive the protection afforded by solicitor-client privilege in light of the principle stated in subsection 232(1) of the Act:

[.....] 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.

[Emphasis added.]

Droit qu'une personne peut posséder, devant une cour supérieure de la province où la question a pris naissance, de refuser de divulguer une communication orale ou documentaire pour le motif que celle-ci est une communication entre elle et son avocat en confiance professionnelle sauf que, pour l'application du présent article, un relevé comptable d'un avocat, y compris toute pièces justificative out tout chèque, ne peut être considéré comme une communication de cette nature.

[je souligne.]

[6] Whatever the case may be, the Agency claims that even if those documents were protected while in Mr. Ouellette's hands, there is no privilege that extends to documents once financial institutions are in possession of them.

[7] The issue was resolved in two steps. First, the National Bank and the Caisse Populaire made copies of the documents in question and delivered them to the Court, and they were sealed. The Court authorized Mr. Ouellette to intervene in the cases in order to present his arguments for solicitor-client privilege and against allowing the Agency to review that information.

[8] Mr. Ouellette also claims that the Agency has no need of those documents in particular to complete a tax audit. The Minster submits that this claim exceeds the basis on which Mr. Ouellette was authorized to intervene in the cases in this matter. On that point, the auditors are entitled to

consult the supporting documents. It is not the role of the Court to dictate to the Agency how to manage its affairs.

[9] During debates, it became clear that even though in letters addressed to the Minister the financial institutions had described the contents of the sealed envelopes in general terms, such as, for example, “deposit slips and drawn cheques”, Mr. Ouellette never received copies of those letters or copies of documents filed with the Court. When Mr. Ouellette took a look at said envelopes, he was of the view that some of the documents could be submitted to the Agency. Nevertheless, he maintained his objection to other documents. At that stage of the matter, Mr. Ouellette conceded that he no longer objects to the productions of the following documents:

- a. Documents provided by the National Bank of Canada:
 - i. Mr. Luc Ouellette’s credit file
 - ii. Mr. Luc Ouellette’s financial profile
- b. Documents provided by the Caisse Populaire de Thetford Mines
 - i. Mr. Luc Ouellette’s credit file
 - ii. The statements of all of Mr. Luc Ouellette’s personal bank accounts
 - iii. Mr. Luc Ouellette’s financial profile

[10] The Court preferred to hear the parties’ submissions at the hearing before opening the sealed envelopes. After the hearing, I indeed opened the envelopes. Among the documents, some of them

do not identify the clients of Mr. Ouellette when they were examined independently. However, when those documents are paired with other information or documents, there may be a risk of such an identification. By examining the drawn cheques, there may be the possibility of figuring out the identity of clients. Some cheques do not in any way indicate the reason for their existence, while others refer to a matter, possibly identifying Mr. Ouellette's cases or even his invoicing. A more detailed description of the disputed documents is in Appendix 1 of these reasons.

MR. OUELLETTE'S SUBMISSIONS

[11] No one can dispute Mr. Ouellette's argument that communication through solicitor-client privilege has a fundamental role in Canadian society. As highlighted by Deschamps J. at paragraph 40 of *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193:

[...] The ultimate purpose of this privilege is to enable every individual to exercise his or her rights in an informed manner. The protection extends to advice given in both criminal and civil cases, without distinction. The privilege performs the social function of preserving the quality, freedom and confidentiality of information exchanged between a client and his or her lawyer in the context of a legal consultation. It enables all individuals to participate in society with the benefit of the information and advice needed in order to exercise their rights. It is closely associated with access to justice. Accordingly, regardless of the historical origin of the privilege, contemporary imperatives dictate that the same generous approach be taken which led to the recognition of this privilege as a principle of fundamental justice.

[12] Mr. Ouellette cited case law, establishing that a client's expectation of confidentiality is determined according to the very nature of the consultation with a solicitor and not only according to the contents (*Thorson v. Jones*, [1973] B.C.J. No. 489, 38 D.L.R. (3d) 312), and even if the warrant is well-known, the invoicing may be protected (*Maranda*, above).

[13] Although the concept of solicitor-client privilege developed from the law of evidence in common law, Mr. Ouellette claims that the definition found in the *Income Tax Act* itself incorporates provincial law, and more specifically in this case, Quebec law. In Quebec, article 9 of the *Charter of Human Rights and Freedoms* specifies that:

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

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.

Duties of the tribunal

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

I must highlight that this article is compatible with the concept put forward by Mr. Ouellette, but the article does not allow us to stray from the connotation that is well developed and recognized across the country. Undergoing a tax audit by the Agency is without a doubt an unpleasant experience, but such audits are necessary.

ANALYSIS

[14] Although I can understand the position of Mr. Ouellette, and that possibly a certain portion of the information may be confidential, that information is not protected by solicitor-client privilege.

[15] As affirmed in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, [1990] S.C.J. no. 25, everyone has the right to be secure against unreasonable search or seizure as guaranteed by section 8 of the *Canadian Charter of Rights and Freedoms*. In those reasons, Wilson J. states that the Act is based on the principle of self-reporting and self-assessment. To ensure compliance with the Act, the Minister of National Revenue must be given broad powers to audit taxpayers' returns and inspect all relevant records whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. The integrity of the tax system can be maintained only by a system of random monitoring. Another important decision on which Mr. Ouellette relied, like *Maranda*, above, is *Lavallee Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, but both of those are cited out of context. Those cases involve criminal investigations of solicitors' clients and searches of law offices were authorized by search warrants. In this case, it is Mr. Ouellette himself who is subject to a random tax audit. Whether there are circumstances according to which the identity of a client or the information linked to the invoicing of legal services may be protected by solicitor-client privilege, there is nothing in the record before the Court affirming such a claim.

[16] Among the decisions that are recognized in this filed, we find *Ontario (Securities Commission) v. Greymac Credit Corp.*, 41 O.R. (2d) 328, [1983] O.J. No. 2986. This Court recently had the opportunity to examine *Greymac*, although in a context in which the Agency was asking a lawyer to provide his client's tax information (*Canada (Minister of National Revenue – MNR) v.*

Singh Lyn Ragonetti Bindal LLP, 2005 FC 1538, [2005] F.C.J. no. 1907 and *Canada (Minister of National Revenue – MNR) v. Reddy*, 2006 FC 277, [2006] F.C.J. no. 348).

[17] As noted by Shore J. in *Reddy*, above, at paragraph 14:

Solicitor-client privilege attaches only to communications between a solicitor and a client and not to actions by the solicitor. For that reason, courts have consistently held that solicitor-client privilege does not apply to documents relating to monies flowing through a solicitor's accounts to or from a client or to documents relating to real estate transactions. In *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983) 41 O.R. (2d) 328 (Ont. Div. Ct.), the Court stated:

Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material.

[18] Mr. Ouellette's argument only deals with general platitudes. He did not provide the Court with any specific considerations that would allow for the drawn cheques or other documents in this case to be protected by solicitor-client privilege. In addition, I am of the view that in any case, such a privilege, even if applicable to the documents in question, was lost when the information was disclosed to a third party, in this case, to the National Bank or the Caisse Populaire. That concept was selected by the Quebec Court of Appeal in *Chevrier et al. v. Guimond et al.*, (1984) R.D.J. no. 240 (JE 84-188).

[19] For those reasons, the Minister's applications will be allowed and Mr. Ouellette's interventions will be dismissed with costs (a fee based on Tariff B, item 6) against him.

Judge

Ottawa, Ontario
May 5, 2008

APPENDIX 1
DISPUTED DOCUMENTS

THE DOCUMENT WAS PROVIDED BY:	COURT FILE NUMBER	ENVELOPE CONTENTS:
Counsel for the respondent, the National Bank	T-1075-07	<p>Photocopies of electronic hard copies of [TRANSLATION] “statements of all of Mr. Luc Ouellette’s personal bank accounts” at the National Bank.</p> <p>Dated January 2005 to October 2005, inclusively, and with a handwritten note that indicates [TRANSLATION] “no transactions Nov. Dec. 2005” and for March 2006.</p> <p>The documents indicate the amounts deposited and withdrawn and the final balance, but have no apparent reference to a cheque number, file, invoice or name.</p>
Counsel for the respondent, the National Bank	T-1075-07	<p>Photocopies of electronic hard copies of [TRANSLATION] “statements of Mr. Luc Ouellette’s trust account” at the National Bank.</p> <p>Dated from November 2002 with a handwritten note indicating [TRANSLATION] “no transactions until June 2003” and from June until January 2004 inclusively.</p> <p>The documents indicate the amounts deposited and withdrawn and the final balance, but have no apparent reference to a cheque number, file, invoice or name.</p>
Counsel for the respondent, the National Bank	T-1075-07	<p>Photocopies of [TRANSLATION] “deposit slips and cheques drawn from Luc Ouellette’s personal accounts” at the National Bank, and also records of transactions showing deposit and withdrawal amounts, but with no apparent reference to any cheque numbers.</p> <p>The drawn cheques and money orders clearly identify either the person who issued the cheque or to whom the cheque was endorsed. Sometimes there is a reference on the cheque in the section <for>: a</p>

THE DOCUMENT WAS PROVIDED BY:	COURT FILE NUMBER	ENVELOPE CONTENTS:
		name, number or other information.
Caisse Populaire de Thetford Mines	T-1076-07	<p>Photocopies of the electronic hard copies of [TRANSLATION] “statements for the trust account of Ouellet Larouche Gagné” at the Caisse Populaire for 2003, 2004, and 2005.</p> <p>The documents are titled [TRANSLATION] “Journal of operations by folio – annual” representing a simple list of digital information, but without any text, such as names of persons or of files, indicating deposited or withdrawn amounts. Examined independently, the documents do not appear to reveal a cheque number, file number or invoice number.</p>
Caisse Populaire de Thetford Mines	T-1076-07	<p>Photocopies of [TRANSLATION] “deposit slips and cheques drawn from Luc Ouellette’s personal accounts” at the Caisse Populaire, and also records of transactions indicating the amounts deposited and withdrawn, but with no apparent cheque number reference.</p> <p>The drawn cheques clearly identify either the person who issued the cheque or to whom the cheque was endorsed. Sometimes there is a reference on the cheque in the “For” section – a name, number or other information.</p>

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1075-07

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v.
CAISSE POPULAIRE DE THETFORD MINES AND
LUC OUELLETTE

AND DOCKET: T-1076-07

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v.
NATIONAL BANK OF CANADA AND
LUC OUELLETTE

PLACE OF HEARING: Québec City, Quebec

DATE OF HEARING: April 18, 2008

**REASONS FOR ORDER
AND ORDERS:** HARRINGTON J.

DATED: May 12, 2008

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