

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (National Revenue) *v.* Thompson, 2016 SCC 21, [2016] 1 S.C.R. 381 | **Appeal heard:** December 4, 2014  **Judgment rendered:** June 3, 2016  **Docket:** 35590 |

Between:

Minister of National Revenue

Appellant

and

Duncan Thompson

Respondent

- and -

Federation of Law Societies of Canada,

Canadian Bar Association and Criminal Lawyers’ Association

Interveners

**Coram:** McLachlin C.J. and Abella, Rothstein,[[1]](#footnote-1) Cromwell, Karakatsanis, Wagner and Gascon JJ.

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| **Joint Reasons for Judgment:**  (paras. 1 to 42) | Wagner and Gascon JJ. (McLachlin C.J. and Abella, Cromwell and Karakatsanis JJ. concurring) |

Canada (National Revenue) *v.* Thompson, 2016 SCC 21, [2016] 1 S.C.R. 381

Minister of National Revenue Appellant

v.

Duncan Thompson Respondent

and

Federation of Law Societies of Canada,

Canadian Bar Association and

Criminal Lawyers’ Association Interveners

**Indexed as: Canada (**National Revenue) ***v.*** Thompson

2016 SCC 21

File No.: 35590.

2014: December 4; 2016: June 3.

Present: McLachlin C.J. and Abella, Rothstein,[[2]](#footnote-2) Cromwell, Karakatsanis, Wagner and Gascon JJ.

on appeal from the federal court of appeal

*Taxation — Income tax — Enforcement — Solicitor‑client privilege — Statutory requirement to provide documents or information for purposes of audit and enforcement — Lawyer refusing to comply with request for details about his accounts receivable claiming solicitor‑client privilege — Whether definition of “solicitor‑client privilege” in Income Tax Act was intended to exclude lawyer’s accounting records — Whether Federal Court of Appeal acted appropriately in sending taxpayer’s case back to Federal Court — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.2(1), 231.7(1), 232(1) “solicitor‑client privilege”.*

The Canada Revenue Agency (“CRA”) sent T a requirement pursuant to s. 231.2(1) of the *Income Tax Act* (“*ITA*”), requesting various documents pertaining to his personal finances as well as his current accounts receivable listing. T provided the CRA with certain material but claimed solicitor‑client privilege in further details of his accounts receivable, such as the names of his clients. The Minister of National Revenue applied to the Federal Court for a compliance order pursuant to s. 231.7 *ITA*. T objected and asked the Federal Court to rule on whether s. 231.2(1) *ITA* may be interpreted and applied in a manner that abrogates solicitor‑client privilege. In addition, T claimed that the requirement issued by the CRA constituted an unreasonable search or seizure contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*.

The Federal Court judge disagreed that client names can be shielded from disclosure to the Minister on the basis of solicitor‑client privilege. Nor did he find a breach of s. 8 of the *Charter*. The Federal Court of Appeal held that, in some rare circumstances, the records sought may contain privileged information. The clients whose names were in fact privileged would be owed the opportunity to assert and defend this privilege, and T should be given the opportunity to assert the privilege on their behalf. The Federal Court of Appeal therefore sent the matter back to the Federal Court. Moreover, it dismissed T’s *Charter* challenge. The sole issue raised by the Minister’s appeal before this Court is the statutory interpretation of the purported exclusion of lawyers’ accounting records from the protection of “solicitor‑client privilege”, as that term is defined in s. 232(1) *ITA*.

Held:The appeal should be allowed solely to set aside the Federal Court of Appeal’s disposition. The Minister’s application for a compliance order is dismissed.

Solicitor‑client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice. An intrusion on solicitor‑client privilege must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation. This Court has rejected a category‑based approach to solicitor‑client privilege that distinguishes between a fact and a communication. In this case, absent proof to the contrary, all of the information sought is *prima facie* privileged.

According to *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, it is only where legislative language evinces a clear intent to abrogate solicitor‑client privilege that a court may find that the statutory provision in question actually does so. The definition of “solicitor‑client privilege” in s. 232(1) *ITA* is unequivocal, based on the express language of the provision, its legislative history and the purpose of the broader scheme into which it is incorporated. Parliament’s intent to define this privilege so as to exclude a lawyer’s accounting records from its protection could hardly be clearer.

However, Parliament’s intent and its ability, in constitutional terms, to define solicitor‑client privilege in a particular way are not necessarily equivalent. In light of the Court’s conclusion in *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, that the purported exception in s. 232(1) and the *ITA*’s requirement scheme, insofar as it applies to lawyers and notaries, are constitutionally invalid, the request made to T under that scheme is now foreclosed. It is therefore unnecessary to return the matter to the Federal Court.

It should be added that while the Federal Court of Appeal acted appropriately in sending T’s case back to the Federal Court, the order would have been insufficient to safeguard the rights of T’s clients. Solicitor‑client privilege is a right that belongs to, and can only be waived by, a client. It is the client and not the lawyer who must be given an opportunity to assert the privilege, and a court must act to facilitate the client’s ability to do so.

**Cases Cited**

**Distinguished:** *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; **applied:** *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336; **referred to:** *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *In re Income Tax Act*, [1963] C.T.C. 1, leave to appeal refused, [1965] S.C.R. 84; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643; *Attorney General of Quebec v. Carrières Ste‑Thérèse Ltée*, [1985] 1 S.C.R. 831; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536.

**Statutes and Regulations Cited**

*Act to amend the Income Tax Act*, S.C. 1956, c. 39, s. 28.

*Act to amend the Income Tax Act and the Federal‑Provincial Fiscal Arrangements Act*, S.C. 1965, c. 18, s. 26.

*Canadian Charter of Rights and Freedoms*, ss. 1, 8.

*Income Tax Act*, R.S.C. 1952, c. 148, s. 126A(1), (*e*) “solicitor‑client privilege”, (5)(*b*).

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.2, 231.7, 232(1) “solicitor‑client privilege”.

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ss. 12 [am. 2010, c. 23, s. 83], 12.1 [ad. *idem*].

**Authors Cited**

Canada. House of Commons. *House of Commons Debates*, vol. III, 3rd Sess., 26th Parl., June 25, 1965, p. 2875.

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Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Federal Court of Appeal (Pelletier, Trudel and Mainville JJ.A.), 2013 FCA 197, 448 N.R. 339, 366 D.L.R. (4th) 169, 2013 DTC 5146, [2013] F.C.J. No. 939 (QL), 2013 CarswellNat 3092 (WL Can.), setting aside in part an order of the Federal Court, No. T‑1180‑12, October 31, 2012, and ordering a new hearing. Appeal allowed.

Christopher Rupar and Daniel Bourgeois, for the appellant.

Michael A. Feder and Emily MacKinnon, for the respondent.

John B. Laskin and Yael S. Bienenstock, for the intervener the Federation of Law Societies of Canada.

Mahmud Jamal, Pooja Mihailovich (née Samtani) and W. David Rankin, for the intervener the Canadian Bar Association.

Michal Fairburn and Carlo Di Carlo, for the intervener the Criminal Lawyers’ Association.

The judgment of the Court was delivered by

Wagner and Gascon JJ. —

1. Overview
2. In the course of an audit and an enforcement action pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), the Canada Revenue Agency (“CRA”) has broad powers to require individuals to provide the appellant, the Minister of National Revenue (“Minister”), with information and documents relating to a particular taxpayer. Information that is protected by solicitor-client privilege is normally exempt from disclosure. For the purposes of the *ITA*,however, the definition of “solicitor-client privilege” in s. 232(1) expressly excludes “an accounting record of a lawyer”. The Minister argues that this specific exclusion exempts a lawyer’s accounting records from the protection of solicitor-client privilege and means that the lawyer can be compelled to disclose them. The Minister has taken action against the respondent, Duncan Thompson, to obtain accounting records relating to his law practice. Mr. Thompson argues that the records in question are privileged.
3. The Federal Court concluded that the definition of “solicitor-client privilege” in s. 232(1) *ITA* validly abrogates the privilege in respect of Mr. Thompson’s accounting records, and ordered him to comply with the Minister’s request. The Federal Court of Appeal disagreed, finding that, s. 232(1) notwithstanding, solicitor-client privilege can attach to individual documents and to client names contained in those documents. It therefore sent the matter back to the Federal Court to have it determine whether that was actually so in this case.
4. In our view, Parliament’s intention to exclude “an accounting record of a lawyer” from the scope of solicitor-client privilege in s. 232(1) is clear and unequivocal. The language used in the exception, the legislative history of the definition and the context of the scheme in which this exception appears lead us to conclude that Parliament’s goal in defining “solicitor-client privilege” as it did in the *ITA* was to permit the disclosure of otherwise confidential information to the Minister. At first glance, therefore, Mr. Thompson cannot refuse to disclose his accounting records on the basis that the information contained in them might be privileged.
5. However, in the companion appeal to this case, *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 S.C.R. 336, we conclude that this exception is constitutionally invalid because it violates s. 8 of the *Canadian Charter of Rights and Freedoms*. The Minister’s request for Mr. Thompson’s documents is consequently now foreclosed. In the end, we would allow this appeal solely to set aside the Federal Court of Appeal’s disposition. Given the circumstances, we would dismiss the Minister’s application.
6. Facts
7. Mr. Thompson is a lawyer from a small Alberta town against whom the Minister took enforcement action under the *ITA*.
8. The *ITA*’s scheme for tax collection depends primarily on taxpayers accurately assessing and reporting their own tax liabilities. To permit the Minister to verify the accuracy of tax returns and take collection action, the *ITA* grants the CRA fairly broad powers to require a person ― whether someone who is being audited or against whom enforcement action is being taken, or a third party to an audit of or an enforcement action against another taxpayer ― to provide the Minister with “any information or additional information, including a return of income or a supplementary return”, or “any document” that the Minister deems necessary to achieve the purposes of the *ITA* (s. 231.2(1)). The range of documents and information that the CRA can demand is very broad.
9. The details of the scheme under which the CRA may request such information from taxpayers and third parties are laid out in ss. 231.2 and 231.7 *ITA*. We provide a more thorough description of the procedure by which the CRA can demand disclosure by sending a person a “requirement to provide documents or information” in our reasons in *Chambre des notaires*. In the instant case, we will focus on the requirement scheme as a whole and how it accounts for documents and information that are protected by solicitor-client privilege.
10. When the CRA sends a requirement to a taxpayer or a third party in order to obtain the disclosure of documents and the recipient of the requirement does not comply with it, the Minister may, by way of a summary procedure established in s. 231.7(1) *ITA*, apply to a judge of the Federal Court for an order that the recipient provide the documents in question. Section 231.7(1)(b) specifies that the judge may make such an order only if he or she is satisfied that “the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1))”.
11. Section 232(1) *ITA* is a general definition provision that states:

**232 (1)** In this section,

. . .

***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.

Thus, where the Minister applies for a compliance order under s. 231.7(1), the party against whom the order is sought must prove to the judge hearing the application that the requested documents fall within this definition of “solicitor-client privilege” in order to have them exempted from disclosure.

1. In the course of its enforcement action against Mr. Thompson, the CRA sent him a requirement pursuant to s. 231.2(1) *ITA*, requesting various documents pertaining to his personal finances as well as his current accounts receivable listing. Mr. Thompson provided the CRA with certain material, but the CRA determined that he had complied with the requirement only in part, particularly given that he had provided no details about his accounts receivable aside from a general indication of the balance owing. Mr. Thompson claimed that further details with respect to his accounts receivable, such as the names of his clients, were protected by solicitor-client privilege and were therefore exempt from disclosure.
2. The Minister applied to the Federal Court for a compliance order pursuant to s. 231.7 *ITA*. Mr. Thompson objected to the issuance of this order in regard to his accounts receivable, reiterating that the information being sought was protected by solicitor-client privilege. Mr. Thompson filed a notice of constitutional question, asking the Federal Court to rule on whether the *ITA*, and in particular s. 231.2(1), may be interpreted and applied such that a lawyer on whom the CRA has served a requirement must divulge privileged information about his or her clients. It was Mr. Thompson’s position that the definition of “solicitor-client privilege” in s. 232(1) could not be interpreted as abrogating this privilege in relation to a particular class of documents, in this case that of a lawyer’s accounting records. In addition, Mr. Thompson claimed that the requirement issued by the CRA constituted an unreasonable search or seizure contrary to s. 8 of the *Charter*.
3. Judicial History
   1. Federal Court (Russell J.)
4. Russell J. found that the law does not support a view that client names and financial information can be shielded from disclosure to the Minister on the basis of solicitor-client privilege (No. T-1180-12, October 31, 2012). He explained that the CRA was seeking not information as to the content of solicitor-client communications but, rather, financial records that set out Mr. Thompson’s payables and receivables. Such records are included in the “accounting record[s]” that s. 232(1) *ITA* excludes from the application of solicitor-client privilege. Although client names contained within them might be privileged in certain situations, Mr. Thompson had failed to establish that this was actually the case for any of the documents being sought such that the client names in question had to be excluded from disclosure. Nor had he established a breach of s. 8 of the *Charter*.
   1. Federal Court of Appeal (Pelletier, Trudel and Mainville JJ.A.)
5. The Federal Court of Appeal allowed Mr. Thompson’s appeal in part (2013 FCA 197, 448 N.R. 339). It held that although accounting records generally constitute evidence of a transaction or an act rather than a privileged communication and are therefore not normally capable of revealing the history of a file, there may be rare circumstances in which such records do contain privileged information, possibly with respect to clients’ names. Where that is the case, it will be incumbent on the court asked to grant the Minister a compliance order under s. 231.7 *ITA* to verify the records in question before ordering an individual to disclose any information.
6. The Federal Court of Appeal held that although the Federal Court judge had been right to conclude that there is no blanket privilege applicable to all accounting records, he had failed to consider whether solicitor-client privilege might apply to any individual client names in the accounts receivable listing. If that were the case, the clients whose names were in fact privileged would be owed the opportunity to assert and defend this privilege, and Mr. Thompson should be given the opportunity to assert the privilege on their behalf at the hearing for a compliance order. The Federal Court of Appeal consequently sent the matter back to the Federal Court for a new hearing to establish whether any client names in Mr. Thompson’s accounts receivable listing were protected by solicitor-client privilege. Moreover, it dismissed Mr. Thompson’s *Charter* arguments on the basis that there was no breach of s. 8, given that a class privilege does not attach to accounting records and client names.
7. Issues
8. The Minister sought leave to appeal the Federal Court of Appeal’s decision to this Court. The Minister did not raise the s. 8 *Charter* issue as a ground of appeal, but focused solely on the proper interpretation of s. 232(1) *ITA*. Mr. Thompson filed a motion to state a constitutional question, but the motion was dismissed. Accordingly, the constitutional argument that had been raised by Mr. Thompson did not constitute a ground of appeal in this Court, and the constitutional validity of ss. 231.2, 231.7 and 232(1) *ITA* is addressed only in the companion appeal, *Chambre des notaires*. The sole issue raised in this appeal is the statutory interpretation of the purported exclusion of lawyers’ accounting records from the protection of “solicitor-client privilege”, as that term is defined in s. 232(1).
9. Analysis
   1. Solicitor-Client Privilege
10. Given that this appeal turns on the interpretation of a statutory provision purporting to define solicitor-client privilege in a particular manner for the purposes of the *ITA*, it will be important to make some preliminary remarks about the nature of this privilege as developed by the courts.
11. Solicitor-client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED)* *inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 34; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, at para. 11; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 8 and 84). The obligation of confidentiality that springs from the right to solicitor-client privilege is necessary for the preservation of a lawyer-client relationship that is based on trust, which in turn is

indispensable to the continued existence and effective operation of Canada’s legal system. It ensures that clients are represented effectively and that the legal information required for that purpose can be communicated in a full and frank manner (*R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289 . . .).

(*Foster Wheeler*, at para. 34)

1. In *Descôteaux*, one of the earliest cases in which this Court acknowledged that solicitor-client privilege involves a substantive right, Lamer J., as he then was, elaborated on the various aspects of the privilege as follows:

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.

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.

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.

Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [p. 875]

The third and fourth elements of this substantive rule have together been interpreted to support the proposition that an intrusion on solicitor-client privilege must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation (*Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, at para. 24).

1. Although *Descôteaux* appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege (*Maranda*, at para. 30). While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary (*Maranda*, at paras. 33-34; see also *Foster Wheeler*, at para. 42). This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para. 34; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289).
2. In the case at bar, therefore, we cannot conclude at the outset that Mr. Thompson’s communications with his clients are distinct from financial records that disclose various facts about their relationships in order to determine whether solicitor-client privilege covers those facts. Absent proof to the contrary, all of this information is *prima facie* privileged, and therefore confidential.
3. With these general principles in mind, we will now turn to the interpretation of the purported exception to “solicitor-client privilege” contained in the definition of that term in s. 232(1) *ITA*.
   1. Blood Tribe Criteria for Statutory Interpretation
4. The Minister contends that s. 232(1) *ITA*, particularly when read in conjunction with ss. 231.2 and 231.7, evinces a clear and unambiguous parliamentary intent to abrogate solicitor-client privilege over information found in “accounting record[s] of a lawyer”. Mr. Thompson disputes this position. The parties’ disagreement turns primarily on whether, as is required by this Court’s decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, an appropriately restrictive interpretation of the impugned definition can lead to the conclusion that the legislature intended to define solicitor-client privilege so as to exclude a class of documents from its protection.
5. *Blood Tribe* was a case that involved statutory interpretation. The issue was whether s. 12 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“*PIPEDA*”), could be read so as to permit the Privacy Commissioner to have access, for the purpose of ensuring compliance with the *PIPEDA*, to information that would otherwise be protected by solicitor-client privilege. Section 12 (now s. 12.1) gave the Privacy Commissioner the authority to compel a person to produce any records the Commissioner considered necessary for the investigation of a complaint “in the same manner and to the same extent as a superior court of record”, and “whether or not [they are] or would be admissible in a court of law”. The Commissioner argued that this language should be read as permitting her to have access to documents which would otherwise be confidential by virtue of being privileged.
6. Binnie J., writing for the Court, held that such an interpretation of s. 12 was untenable in light of the shift of solicitor-client privilege from being merely a rule of evidence to becoming one of substance (*Blood Tribe*, at para. 2). He explained that

legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively.  The privilege cannot be abrogated by inference.  Open-textured language governing production of documents will be read not to include solicitor-client documents: *Lavallee*, at para. 18; *Pritchard*, at para. 33.  This case falls squarely within that principle. [Emphasis deleted; para. 11.]

This conclusion aligned perfectly with the Court’s earlier pronouncement in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, that “[l]egislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively” and that this privilege may not be abrogated by inference (para. 33).

1. The parties therefore agree that it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect.
2. In contrast to s. 12 of the *PIPEDA*, which did not explicitly grant the Privacy Commissioner the power to obtain and review documents in respect of which solicitor-client privilege was claimed, the definition of “solicitor-client privilege” in s. 232(1) *ITA* is unequivocal. It lays out what is protected when the privilege is invoked to oppose a compliance order under s. 231.7. The definition includes the words “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 . . . a communication” covered by solicitor-client privilege, which means that accounting records are explicitly excluded from the scope of the privilege for the purpose of the *ITA*.
3. Consequently, once a court has determined that a document over which solicitor-client privilege is being asserted is an accounting record of a lawyer, s. 232(1) is clearly intended to bypass the traditional protection associated with solicitor-client privilege, which means that the document can then be seized and inspected by the Minister. We will disregard for now the issue of whether this definition of the privilege corresponds to the broader scope of the right that has been established in the jurisprudence since s. 232(1) (then s. 126A(1) of the *Income Tax Act*, R.S.C. 1952, c. 148) was amended in 1965 (*An Act to amend the Income Tax Act and the Federal-Provincial Fiscal Arrangements Act*, S.C. 1965, c. 18, s. 26). Whether Parliament may define what is privileged generally, in light of the evolving and expanded understanding of this right, is a different question, to which we will return below.
4. The legislative history of s. 232(1) lends further support to an interpretation to the effect that Parliament intended to exempt a lawyer’s accounting records from the protection of solicitor-client privilege. Parliament introduced a general definition of “solicitor-client privilege” into the *ITA* by enacting s. 126A(1) (now s. 232(1)) in 1956 (*An Act to amend the Income Tax Act*, S.C. 1956, c. 39, s. 28). At that time, the definition was functionally the same as the one now found in s. 232(1), but without the accounting records exception:

(*e*) “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 him and his lawyer in professional confidence.

1. However, in the 1962 case *In re Income Tax Act*, [1963] C.T.C. 1 (“*Brown*”), leave to appeal to this Court refused, [1965] S.C.R. 84, the British Columbia Supreme Court concluded that to the extent that trust account records and other accounting or bookkeeping records maintained by lawyers might contain privileged information, the Minister could not obtain them by means of an order made by a court under what was then s. 126A(5)(*b*) (pp. 5-7). Sullivan J. pointed out that “[i]f it were the intention of Parliament to make all records of a solicitor available to inspection by taxation people then it would be a simple matter to so provide by appropriate legislation” (p. 5).
2. Not too long after that, in 1965, Parliament amended the definition of “solicitor-client privilege” to introduce the current exemption for accounting records. When asked to explain why the exemption was being added, the Minister of Finance stated: “. . . it became evident as a result of a court decision that the definition of solicitor-client privilege was deficient” (*House of Commons Debates*, vol. III, 3rd Sess., 26th Parl., June 25, 1965, at p. 2875). It is thus difficult to consider the intention behind this amendment to be anything other than to address the refusal in *Brown* to require the disclosure of privileged information by enacting an express legislative provision permitting such a disclosure.
3. We would add that to find that s. 232(1) *ITA* is not indicative of a clear legislative intent to exempt certain documents from the protection of solicitor-client privilege would be to deprive the *ITA*’s definition of this privilege of any functional meaning. The *ITA* creates a self-assessment system which “depends for its success upon the taxpayers’ honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability” (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 648). A system that enables the Minister to have access to books and records in relation to a taxpayer’s personal and business affairs is thus crucial to the Minister’s ability to verify the veracity of a taxpayer’s return (*Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643, at para. 20). Yet as the Minister points out, excluding some of these records from the Minister’s scrutiny could enable lawyers and their clients to hide misreporting and tax evasion behind the veil of solicitor-client privilege. According to the Minister, access to the records, such as client names, is necessary to effectively determine their financial liability to the taxpayer for collection purposes.
4. It is thus clear to us that if Parliament’s intent in defining “solicitor-client privilege” in s. 232(1) *ITA* as it has were not to exempt accounting records from the protection of this privilege, that definition and the apparent exemption would essentially serve no purpose. This would violate the presumption against tautology, according to which “[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain” (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 211, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). Instead, every word has “a specific role to play in advancing the legislative purpose” (Sullivan, at p. 211). Given that legislation must be read in its entire context and having regard to the legislative purpose and scheme (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578), it is at the very least important to ensure that our characterization of the legislative intent underlying the definition of solicitor-client privilege in s. 232(1) is not incompatible with the purpose of the Minister’s audit and enforcement powers as they are structured in the *ITA*.
5. If we consider the express language of the definition of “solicitor-client privilege” in s. 232(1) together with the provision’s legislative history, Parliament’s intent to define this privilege so as to exclude a lawyer’s accounting records from its protection could hardly be clearer. Even the most restrictive interpretation of the provision leads to this conclusion, as the definition in s. 232(1) must be read in tandem with the *ITA*’s other provisions relating to the production of documents. In this regard, we note that, contrary to what the intervener the Canadian Bar Association suggests, it would be inappropriate to read the definition so restrictively as to conclude that it can apply only to documents that are already not protected by solicitor-client privilege. As we explained above, such an interpretation would disregard the legislative intent behind the definition and render it functionally meaningless.
6. In short, in contrast to how the statutory provision at issue in *Blood Tribe* could be interpreted, the only interpretation of the definition of “solicitor-client privilege” in s. 232(1) that takes account of the history of the provision and the purpose of the broader scheme into which it is incorporated is that the provision is intended to permit the Minister to have access to lawyers’ accounting records even if they contain otherwise privileged information.
   1. Nature of the Remedy
7. That said, this case arises in unusual circumstances. Whereas Mr. Thompson’s challenge to the Minister’s power to require disclosure is based solely on the argument that the definition of “solicitor-client privilege” in s. 232(1) does not satisfy the *Blood Tribe* criteria, in the companion appeal, *Chambre des notaires*, the validity of this definition is being challenged on constitutional grounds. As we mentioned above, Parliament’s intent and its ability, in constitutional terms, to define solicitor-client privilege in a particular way for the purposes of the administration of the *ITA* are not necessarily equivalent. The question whether a legislature can, simply by using clear and unambiguous language, abrogate this privilege over a class of documents in a scheme in which the seizure of such documents is permitted cannot be answered on the basis of *Blood Tribe* alone. When a seizure is involved, s. 8 of the *Charter* comes into play. Thus, in *Chambre des notaires*, we conclude that the purported abrogation in s. 232(1) is constitutionally invalid because it permits the state to obtain information that would otherwise be privileged to a far greater extent than is absolutely necessary for the administration of the *ITA*.
8. It is equally important to note that in *Chambre des notaires* we hold that the *ITA*’s requirement scheme, insofar as it applies to lawyers and notaries, infringes s. 8 of the *Charter* and that the infringement cannot be justified under s. 1. Given that the scheme is invalid to that extent, the request made to Mr. Thompson under that scheme is now foreclosed.
9. It is possible that Parliament will amend ss. 231.2 and 231.7 to remedy the constitutional defects of the requirement scheme. Even if it does not do so, however, there are other situations in which courts could be asked to determine whether certain information is covered by solicitor-client privilege and, if they find that the privilege does not apply, to order that the information be disclosed. As a result, we find that it will be helpful in the instant case to address the appropriateness of the remedy granted to Mr. Thompson by the Federal Court of Appeal.
10. In light of our conclusions in *Chambre des notaires* that the purported exception in the definition of “solicitor-client privilege” in s. 232(1) *ITA* is constitutionally invalid and that any court order for the disclosure of documents cannot be taken to include privileged information, we are of the view that the Federal Court of Appeal acted appropriately in sending Mr. Thompson’s case back to the Federal Court to have it determine whether any information in the accounting records sought by the CRA was privileged and therefore exempt from disclosure.
11. Still, solicitor-client privilege is a right that belongs to, and can only be waived by, a client of a legal professional (*Lavallee*, at para. 39; *Chambre des notaires*, at para. 45). In both *Lavallee*, at para. 40, and *Federation of Law Societies of Canada*, at paras. 48-49, this Court noted that a lawyer is not the alter ego of his or her client, so it is the client and not the lawyer who must be given an opportunity to assert the privilege over the information sought by the state. A court must act to facilitate the client’s ability to do so.
12. The Federal Court of Appeal’s order would therefore have been insufficient to safeguard the rights of Mr. Thompson’s clients. In order to properly afford clients the opportunity to raise their right to solicitor-client privilege, they must be notified when a court considers making any order requiring the disclosure of what might be privileged information. They must also be afforded the opportunity to decide whether they wish to contest the disclosure of the information requested by the state, and if they do wish to do so, they must be permitted to make submissions in that regard on their own behalf. Thus, should Parliament choose to modify the existing *ITA* disclosure scheme in order to remedy its constitutional defects, a court assessing a request for access to presumptively privileged information will need to ensure that the clients whose information is being sought can participate in the process of asserting the protections that apply to them.
13. Conclusion
14. Given our holding in *Chambre des notaires* that the exception contained in the definition of “solicitor-client privilege” in s. 232(1) *ITA* is constitutionally invalid, the Minister’s request that Mr. Thompson be compelled to disclose the documents he has been withholding must be rejected. The information contained in those documents is presumptively privileged, and its disclosure cannot be required unless a court first determines whether solicitor-client privilege actually applies. Because we conclude in *Chambre des notaires* that the *ITA*’s requirement scheme is unconstitutional insofar as it applies to lawyers like Mr. Thompson, it is unnecessary to return the matter to the Federal Court.
15. In light of the above, we would allow the appeal solely to set aside the Federal Court of Appeal’s order, and we would dismiss the Minister’s application. On the basis of this outcome, we would award costs to Mr. Thompson throughout.

*Appeal allowed.*

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Federation of Law Societies of Canada: Torys, Toronto.

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Criminal Lawyers’ Association: Stockwoods, Toronto.

1. Rothstein J. took no part in the judgment. [↑](#footnote-ref-1)
2. Rothstein J. took no part in the judgment. [↑](#footnote-ref-2)