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September 18, 2015

File No.: 551860-1

DELIVERED

The Honourable Mr. Justice D.R.G. Thomas
Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

Dear Sir:

RE: 1985 Sawridge Trust - Action No. 1103 14112
Public Trustee July 30, 2015 Account

We are writing in response to the September 2, 2015 letter from Supreme Advocacy LLP relating to the Public Trustee's account dated July 30, 2015.

Introduction

At the June 30, 2015 hearing in respect of this matter, Your Lordship directed that the Sawridge Trustees ("Trustees") raise any concerns that they may have with the Public Trustee's accounts on a regular basis. We have followed the procedure set out by the Court and have requested further information from the Public Trustee so that we can properly consider the reasonableness of the July 30, 2015 Account. This request has been refused by the Public Trustee. In accordance with the procedure set out by Your Lordship, we are seeking the further direction of the Court. Specifically, we are seeking adequate detail to allow us to assess the appropriateness of the July 30, 2015 Account.

Process regarding the Public Trustee Accounts

At the June 30, 2015 hearing, Your Lordship directed that the Trustees raise any issues that they may have with the Public Trustee's accounts on a regular basis (June 30, 2015 Transcript, pages 35-40) [**Tab A**]. Your Lordship noted that if there was a spike in legal charges, such as a $25,000 fee for research, the Trustees could ask for an explanation and if one was not forthcoming, the matter could be raised with the Court. Further, the Trustees and the Public Trustee have agreed to a form of Order arising out of the June 30, 2015 hearing confirming the process to be followed, including the request for unredacted accounts should issues arise (June 30, 2015 form of Order) [**Tab B**, paragraphs 10-11]. The Trustees have followed the procedure set out by the Court, and not having received an adequate explanation from the Public Trustee, we now seek the further direction of the Court.

Previous Public Trustee Accounts

Prior to the July 30, 2015 Account, counsel for the Public Trustee rendered the following accounts: February 4, 2015 ($7,729.80), April 15, 2015 ($16,532.43) and May 21, 2015 ($19,369.69). Each of these accounts was viewed as reasonable by the Trustees, no further information was requested and the accounts were paid by the Trustees.

On July 30, 2015, the Trustees received the July 30, 2015 Account **[Tab C]** in the amount of $210,138.56. The July 30, 2015 Account covers work carried out over a period of approximately 6 weeks (May 21 – July 6), and is a significant ($190,000) "spike" in the level of billing. The Trustees were very concerned with respect to this spike and sought further details from the Public Trustees (see Tabs C, D, E and F of September 2, 2015 Supreme Advocacy letter; also attached hereto is our September 1, 2015 letter dealing with this issue) **[Tab D]**. Some explanation was provided which advised that there had been two contested applications. However, the previous accounts also included one contested application. Essentially, it appears that the Public Trustee is suggesting that contested applications that did not involve any questioning and very few documents would cost over $100,000 per application. On the surface, that appears unreasonable. The previous contested application only cost approximately $20,000.

July 30, 2015 Account - Details Requested

The Trustees seek adequate detail to assess whether the July 30, 2015 Account is reasonable. It is respectfully submitted that the redacted July 30, 2015 Account does not provide sufficient information to permit the Trustees to determine whether the account is reasonable. We note the following:

1. Individual time entries – the July 30, 2015 Account does not include individual time entries. Rather, only the total number of hours for the billing period are included. This makes it virtually impossible to assess the reasonableness of the work carried out when dealing with an account of this magnitude. For example, the first entry on the July 30, 2015 Account is "legal research". There is no indication of whether .5 hours or 5.0 hours was spent, making it impossible to consider whether the time was well spent. Even the date of the entry is not revealed.

2. Inadequate disclosure of nature of work – the July 30, 2015 Account contains generic descriptions of the type of work conducted. These descriptions include "legal research", "receipt and review of correspondence", "draft correspondence", "review documents", "teleconference", "meeting", "prepare for court appearance", "attendance in Chambers", "consultation", and the like. The concern is that in most instances, it is impossible to assess the reasonableness of the work carried out. For example:

    (i) "Legal research", without more, does not provide the Trustees with adequate disclosure as to the nature of the work and the time spent. If the research was in respect of a straightforward matter (eg. the interpretation of Rule 6.3), but a significant amount of time was spent in researching the issue, then the reasonableness of this entry may be questionable. It is possible that there are issues that were researched which should still remain privileged but after the many briefs that have been filed, many of the issues that were researched are no longer secret. We submit that there is simply too much that has been redacted. Further information can be provided without releasing privilege.

    (ii) "Review documents" – again, it is impossible to assess whether the review of documents was reasonable without knowing which documents were being reviewed and how much time was being spent. The documents in this case are known (and in fact, the Public Trustee has certainly made submissions that too few documents have been produced). If there are documents that the Trustees do not know about that the Public Trustee has reviewed, the nature of those documents can be redacted. However, the rest can be disclosed in order to allow the Trustees to assess the reasonableness of these entries.

(iii) "Extended day, day before court hearing" – this entry appears on the Supreme Advocacy LLP invoice dated July 7, 2015 (Invoice #2345), at page 6 of 7. Alone, it is not clear what this work entailed and how much time was billed, making it impossible to assess the reasonableness of this time entry.

3. Inadequate information on disbursements – the July 30, 2015 Account from Supreme Advocacy LLP contains no detail with respect to the amount of disbursements, whether in the body of the invoice or at the end of the invoice. See, for example, page 6 of 7 of Supreme Advocacy LLP invoice dated July 7, 2015 (Invoice #2345), where the type of disbursement is identified but no amount is provided.

The Trustees seek unredacted accounts, or in the alternative, further details with respect to the individual time entries and the nature of the work carried out. While we acknowledge that legal accounts may contain information that is subject to solicitor/client privilege, we note the following:

(i) The Trustees are responsible for the payment of the accounts and have an obligation to the beneficiaries to ensure that they are reasonable. It is impossible to make this assessment with respect to the redacted July 30, 2015 Account.

(ii) With respect to any concerns that unredacted accounts would disclose "litigation issues" being considered by the Public Trustee and the strengths and weaknesses relating to those issues, the applications dealt with in the time frame of these accounts are well known to everyone. In respect of the ultimate application for the advice and direction, if the Public Trustee has any "litigation issues", we would expect that it would raise these with the Trustees without delay so that the issues can be properly put before the Court but if they must remain privileged then those limited issues could be redacted.

Responses to the Brief filed

Without Prejudice Agreement

The agreement did not contemplate the hiring of agents and certainly did not contemplate that there would be no review of accounts that appear unreasonable on their face.

Public Trustee Proposal

The proposal by the Public Trustee that only the Court sees the unredacted accounts does not allow the Trustees to make fulsome representations on the reasonableness of the accounts. The Trustees have information about the work being done outside the courtroom that they can provide to the Court in order to give a more complete picture about the work done.

Lawyer Hired

The submissions of the Public Trustee involve making representations about the Trustees retaining three law firms. First, the legal team of Doris Bonora and Marco Poretti have been in place since the inception of the application. The addition of Bryan & Company is necessary because the Public Trustee contrives to bring the action of 1403 04885 into the arguments at this application. Moreover, the retention of three firms by the Trustees is irrelevant unless comparison is made of the fees charged, and we submit that based on the fees charged to the Trustees the Public Trustee's fees are unreasonable.

Law

Donovan WM Waters, Mark R Gillen and Lionel D Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) (WLNext Can) at 1209 indicates that the Trustees must exercise diligence and prudence in the review and expenditure of trust expenses:

> In effect, therefore, it is the beneficiaries who are paying for the expenses incurred by the trustees and it is of critical importance to them that some brake or check shall be imposed upon trustees in the expenses which can be "passed on" to the trust. The brake supplied is that the trustees can only recover or be allowed those expenses which are "properly incurred" which is equivalent to saying "not improperly incurred. **[Tab E]**

The cases cited by the Public Trustee are not applicable to this case, as they do not involve payment by a third party of a solicitor's accounts. The cases produced by the Public Trustee are reproduced at **Tabs F, G and H**. It is clear from a review that the cases say that there is a privilege attached to a solicitor's accounts and some of that is borne out of the criminal context in the protection against self-incrimination.

In *Maranda v Richer*, 2003 SCC 67 **[Tab F]**, the Court concluded that lawyer's bills are presumptively subject to solicitor-client privilege (at para. 33). However, the presumption is rebuttable if "there is no reasonable possibility that disclosure of the requested information will lead, directly or indirectly, to the revelation of confidential solicitor-client communications: *Kaiser (Re)*, 2012 ONCA 838 at para 30 **[Tab G]** citing *Maranda* and *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 2005 CanLII 6045 (ON CA), 251 D.L.R. (4th) 65, 197 O.A.C. 278. Given the applications and briefs filed we believe the presumption has been rebuffed. Release of further information will not lead to revelation of confidential solicitor-client communications.

Conclusion

The information sought by the Trustees is not privileged information. We seek time spent on each task and information on disbursements. We seek information of the type of research where it is now known what research was conducted given the briefs filed. We seek information about the meetings held, unless they are with people whose identity must be protected. We admit that if there are entries that are clearly not known to anyone at this stage and which the Public Trustee believes it must protect for the purpose of its solicitor-client privilege, then such entries should be redacted. However, we anticipate those entries will be minimal. After we have this information we seek to make substantive submission on the reasonableness of the July 30, 2015 Account.

The September 2, 2015 letter from Supreme Advocacy LLP raises other issues that the Trustees previously addressed in its September 1, 2015 letter, and we do not intend to address them further herein. These issues include the reasonableness of hourly rates, the increased fees being a result of two contested motions and the number of legal counsel currently retained by the Trustees. We refer Your Lordship to our September 1, 2015 letter [Tab D].

The Court has directed that we raise any concerns with the Public Trustee's accounts on a regular basis. At this time, we are not in a position to assess the reasonableness of the July 30, 2015 Account without the further information that we are requesting herein. The Court has been provided with an unredacted copy of the July 30, 2015 Account, which document is currently sealed.

At this time, we do not make any submissions with respect to whether the July 30, 2015 Account is reasonable or not, an issue that we will address in the future once receiving the Court's direction with respect to our request for further details.

Thank you for your assistance in this matter.

All of which is respectfully submitted.

Yours truly,
Dentons Canada LLP

Doris Bonora
DCEB/pdk

Yours truly,
REYNOLDS, MIRTH, RICHARDS & FARMER LLP

Marco S. Poretti

Enclosures
c.c. Hutchison Law
Attn: Janet Hutchison (*w/enclosures*)
Eugene Meehan (*w/enclosures*)

Action No.: 1103 14112
E-File No.: EVQ15SAWRIDGEBAND1
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")

ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
June 30, 2015

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

June 30, 2015	Afternoon Session
The Honourable Justice Thomas	Court of Queen's Bench of Alberta
M.S. Poretti	For the Sawridge Trustees
D.C.E. Bonora	For the Sawridge Trustees
J.L. Hutchison	For the Office of the Public Trustee
E. Meehan, Q.C.	For the Office of the Public Trustee
N.E. Cumming, Q.C.	For Roland Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo
P.E.S. Kennedy	For June Kolosky and Aline Huzar
K.A. Platten	For Catherine Twinn
L. Credgeur	Court Clerk

Discussion

THE COURT: Afternoon.

MS. BONORA: Afternoon, Sir.

THE COURT: I see that we have one of the youngest beneficiaries in the back row.

Submissions by Ms. Bonora (Adjournment)

MS. BONORA: Potential.

Sir, this is my application for -- initially obviously you made some directions on June 24th that the application with respect to the settlement would go ahead, and followed by three other applications in the event that the settlement was not approved and deemed to be a complete settlement of this matter.

Since that application we had understood that a Practice Note was to -- Practice Note 2 was to be followed and since that application we have received about 100 pages of affidavits which have been filed by the Public Trustee's Office. Ms. Hutchison has said these came unsolicited and we don't have any concerns about the fact that she felt the need to put these forward. And if it had only just been these affidavits, potentially we

my friend was surprised by.

THE COURT: No, I -- thank you. I prefer --obviously I am someone who only takes information in by reading it so further Briefs does not bother me. It is quite helpful rather than raising it in a -- in a courtroom setting.

All right, we are done on that issue then. Let us deal with this agency costs issue.

MS. HUTCHISON: And My Lord, just a proposal and perhaps a question for my friend.

I heard certain submissions last week that suggested in fact the -- the extent of my concerns about agency resources may have narrowed. We both have applications. I'm quite happy to begin but it may actually be more efficient if Ms. Bonora speaks to some of those. I get the sense she's narrowed her focus. Would that be acceptable, My Lord?

THE COURT: Certainly.

MS. BONORA: Sir, our -- really we don't have any con -- well, we have concerns about the costs and I can tell you the trustees are very concerned about the costs in this litigation which they saw as feeling like they were doing the right thing to bring the prejudice forward and try and correct it, and it has gotten in their minds certainly out of control.

But in terms of the hiring of agents, we believe that the Public Trustee has the right to do that and you know, obviously it's a concern and we raised it in our Brief that bringing someone in from Ontario obviously adds to the costs. We're suggesting that you can't judge that today and that we just simply want the opportunity to address issues like this at the end of the day when all the costs are in and it's been determined what will ultimately happen in this. And it just follows on what the Public Trustee said, that the order is not a blank cheque and if there can be reviews and checks and balances. So we're simply suggesting that at the end of the day there would be the ability to review the accounts and to review issues such as the selection of agents. Obviously the Public Trustee will make good choices along the way and the Court will have the ability to review those at the end of the day. That's all we're seeking at this point.

THE COURT: Well, I guess that is -- that is your -- you have got a right to do that in any event, you know, once the litigation is wrapped up. So do you want some more certainty than that?

MS. HUTCHISON: Well, I think we need at least some, My Lord,

simply because we can't obviously go into with the Court the terms of the agreement we reached without prejudice about how to deal with accounts. But I think I can tell the Court, and I think it's apparent from the materials, that the one account the Public Trustee has submitted from Supreme Advocacy has not been paid. So they're -- the Sawridge trustees have -- when they were first advised that the Public Trustee intended to access these agency resources, they responded with no reasons for their objection but to say they opposed use of agency resources. And while our fees were paid in that May account, My Lord, Supreme Advocacy's fees were not.

And so I do have some concern about going forward and ensuring that if -- if accounts are submitted that are in accordance with the terms of the agreement reached that they will be paid. Clearly, the Sawridge --

MS. BONORA: There's no problem with that, Sir.

THE COURT: There you go.

MS. HUTCHISON: Thank you, My Lord.

THE COURT: All right, just so it is clear. If that agreement is -- is that agreement beyond just the existing Supreme Advocacy account or is that going down the road in terms of getting the accounts paid?

MS. HUTCHISON: Our -- our application to the Court, My Lord, was for clarification about use of agency resources generally because we had one previous occasion where we sought to use them and that was refused. I'm hearing my friend say she has no objection to use of agency resources.

MS. BONORA: Well, I mean, the agency that's been put before us now we don't have any objections. The other agency request that was put before us we thought was completely inappropriate and perhaps that was something we have to address in the future.

THE COURT: Okay, well let us not speak in tongues here. We have got Supreme Advocacy, they are okay, right?

MS. BONORA: Yes, Sir. I didn't understand that my friend was going to go back to the previous one that we -- I didn't understand we were speaking to that today.

THE COURT: Okay, well it is a mystery to me. Which one is

that?

MS. BONORA: Sir --

THE COURT: There is some there -- I know there was a name of some person who was --

MS. BONORA: With respect, Mr. Glancy.

THE COURT: -- an investigator or something but -- what are we talking about here.

MS. HUTCHISON: My Lord, the Public Trustee isn't seeking a specific order to retain Mr. Glancy today, but when my friend opposed the retainer of Supreme Advocacy after also opposing the retainer of a previous agent, the Public Trustee brought this application to seek general clarification about the terms of the Court's indemnification order which was upheld by the Court of Appeal.

We are simply -- simply seeking confirmation from the Court that when necessary, when reasonable, when one lawyer acting for the Public Trustee can't quite keep up with three firms that it's reasonable and appropriate to retain additional resources. At the moment that is Supreme Advocacy. It may be that in the future we need to access other resources. I don't want to be back before the Court again in six months on the same issue because frankly we've -- we've filed a great deal of materials already on it and I don't want to waste the Court's time.

THE COURT: Okay, well --

MS. HUTCHISON: What we're asking, My Lord, is just a general clarification that subject to any litigant's ability to review accounts at the conclusion of litigation, the Public Trustee's indemnification costs order allows us to retain reasonable resources, My Lord.

THE COURT: Well, can I suggest this? I am just -- just a suggestion. I mean, so Supreme Advocacy is okay. Glancy -- what about that one? Was that some investigator or what was --

MS. HUTCHISON: No. Mr. Terrence Glancy is a barrister and solicitor in Alberta. He represents Elizabeth Poitras in the Federal Court action that we've referred to in the materials, My Lord.

At the time that the Sawridge trustees produced material from that Federal Court action during the questioning, it was quite a surprise to us, we adjourned to deal with that issue, adjourned the questioning. And at that time I had requested agency resources for Mr. Glancy so that he could review the document production in that action and assist me in terms of dealing with how that affected Liz Poitras' questioning. That's a massive production, My Lord. I thought it would be more efficient for the lawyer that had dealt with it for over 20 years to review it and brief me than for me to have to review the entire production.

The Sawridge trustees did not agree to that request. Ultimately, other solutions were found and I didn't have to review that.

THE COURT: Okay, so it is -- it is dealt with.

MS. HUTCHISON: Well, it's not entirely, My Lord. Mr. -- we've got a number of answers to undertakings to deal with for Liz Poitras and quite likely the only place that those undertakings could be answered is by accessing Mr. Glancy as a resource. And so I expect that it's possible he may still -- he may still need to be of assistance to the Public Trustee.

But our biggest concern, My Lord, is that when we make proposals to access additional resources that they not be denied outright without reasons and without accounts having even been submitted on the basis that the costs order doesn't go to that extent.

THE COURT: Okay, well let us leave it on this basis. I mean, maybe the Glancy issue will come up again, but I mean that is the sort of thing that a case manager can deal with on a written basis. I mean, you -- if this debate breaks out again around a particular resource, then fire me a letter and ask me to decide it. I mean -- but I do not think we need to mount the whole -- you know, re -- restage, you know, Gone With the Wind to deal with that sort of issue.

MS. BONORA: And Sir, just by way of clarification. I understand that every litigant has the opportunity to have accounts reviewed that they have to pay, but the review officer can't of course deal with issues about the appropriateness of hiring someone or the appropriateness of those expenses. So what I'm looking for is that that -- it's not -- we aren't limited just to going to the review officer. That this would be a matter where there would be a review of the appropriateness of those expenses at the end of this matter.

THE COURT: Well, I mean maybe the quantum but I am not sure whether the -- there is going to -- can be a debate at the end of it about the

appropriateness of retaining somebody.

MS. BONORA: Well --

THE COURT: And that is why I think you should get that cleared as you go. You can debate whether the -- actually I thought Mr. Meehan's hourly rates are pretty reasonable when I look at what my son charges at Osler's in Toronto. You know, I -- it is a little by the way but those -- the issue of hourly rates and the amount of time that has been thrown at a particular item, that is typically what is sorted out at the end and I do not think anybody is going to have an argument about that.

MS. BONORA: Sir, it's not necessarily about hourly rates because if it was just about hourly rates and the amount of time spent, that would just be a review officer's issue. I think when we go back to the issue of what the Court of Appeal said is while this can happen, it can't be a blank cheque. There have to be controls and we're just asking that along the way -- I mean, now we have some direction from you that things can be approved along the way but that at the end there would also be the ability to address issues if they in fact weren't approved along the way.

THE COURT: Well, I suppose you are getting bare bones accounts --

MS. BONORA: Yes.

THE COURT: -- from time to time. If you have got an issue, raise it and then --

MS. BONORA: Well, Sir, it's pretty hard to raise --

THE COURT: -- but just do not let it build up until the end.

MS. BONORA: Well, the problem is it's pretty hard for us to raise issues that say telephone attendance, redacted, redacted. Meeting, redacted, redacted. There's no ability for us to address the issues in the accounts at this point with the redacted accounts.

THE COURT: Yes, but you -- you can get an idea. Suddenly if a huge amount of research is done in a particular month and a $25,000 bill arrives you can take -- you can take issue with and say what is this all about? There should be enough information in the account to at least reveal what -- what the nature of the work was.

MS. BONORA: Sir, I'm happy to do that on a regular basis if we need to. My preference would be not to use the Court's resources on a regular basis for those issues without -- because we would have to ask for accounts and I don't want to add the issues now. I would prefer to do it at the end. If your direction is to do it periodically I'm happy to do that, I just don't want to add to the issues at this point. I would prefer at the end to look at the totality of all the accounts we've rendered and they've rendered and determine whether it's reasonable and deal with it at that point. I just want the opportunity to deal with it at that point.

THE COURT: Well, I assume as in most litigation these days, the bills are flowing in on a monthly basis. I mean, I would hope that they are and if there is an issue -- if you take issue with some -- suddenly there is a great big spike in legal co -- legal charges from the Public Trustee that is not explained, you can ask for an explanation and then if you do not get an explanation you can come and ask the case manager, we have got to -- costs are getting out of control. I mean, I am -- I do not have a problem with that. That can all be dealt with in writing.

MS. BONORA: Okay. So we'll -- we'll deal with those I guess periodically. I guess we'll deal with issues in terms of seeking unredacted accounts periodically --

THE COURT: Yes.

MS. BONORA: -- if -- if we think it's appropriate then. Thank you, Sir.

THE COURT: Okay, anything else?

MS. HUTCHISON: No, My Lord.

THE COURT: All right.

MS. HUTCHISON: I think that resolves all the issues we asked you to deal with today.

THE COURT: Okay, good. We are adjourned. Thanks counsel, go ahead. I am going to have to organize all this stuff.

MS. HUTCHISON: Thank you, My Lord.

Form 11
[Rule 3.31]

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Hutchison Law** #155, 10403 122 Street Edmonton, AB T5N 4C1 Attention: Janet L. Hutchison Telephone: (780) 423-3661 Facsimile: (780) 426-1293 File No.: 51433 JLH

Clerk's Stamp

DATE ON WHICH ORDER WAS PRONOUNCED: June 30, 2015

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honorable Justice D.R.G. Thomas

UPON NOTING the presence of the following Counsel:

i. Doris Bonora – Counsel for the Sawridge Trustees;
ii. Nancy Cumming, Q.C. – Counsel for the Sawridge Trustees, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward in Court of Queen's Bench Action No. 1403 04885;
iii. Janet Hutchison – Counsel for the Office of the Public Trustee;
iv. Eugene Meehan, Q.C. – Agent Counsel to Hutchison Law (Counsel for the Office of the Public Trustee);
v. Karen Platten, Q.C. – Counsel for Catherine Twinn.

AND UPON REVIEWING the Notice of Application filed by the Office of the Public Trustee on June 12, 2015, returnable June 30, 2015 (the "Public Trustee's Notice");

AND UPON REVIEWING the Notice of Application filed by the Sawridge Trustees on June 12, 2015, returnable June 30, 2015 (the "Trustee's Notice");

AND UPON REVIEWING the written submissions filed by Counsel for the Sawridge Trustees, on June 12, 2015 and June 19, 2015;

AND UPON REVIEWING the written submissions filed by Counsel for the Office of the Public Trustee, on June 12, 2015 and June 19, 2015;

AND UPON REVIEWING the written submissions filed by Counsel for the Sawridge Trustees, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward (Bryan & Co.) on June 23, 2015;

AND UPON REVIEWING the written submissions filed by Counsel for Catherine Twinn (McLennan Ross LLP) on June 26, 2015, and served upon the parties on June 29, 2015;

AND UPON REVIEWING the correspondence forwarded to the Court by Counsel for the Sawridge Trustees and Counsel for the Public Trustee, dated June 29, 2015;

AND UPON hearing oral submissions from all Counsel present.

IT IS HEREBY ORDERED THAT:

1. The Sawridge Trustees' application to adjourn the Settlement Application is granted;

2. The Public Trustee's Production Application will be heard in Chambers on September 2, 2015, going over to September 3, 2015, if necessary;

3. The Sawridge Trustee's Settlement Application will be heard after the Production Application is heard, on either September 2 or 3, 2015;

4. By July 15, 2015, the Public Trustee will file an amended Application to provide the Sawridge First Nation with further and better particulars of the relief sought in the Production Application;

5. The Sawridge First Nation will file its Brief, responding to the Public Trustee's Amended Production Application and brief, by August 14, 2015;

6. The Public Trustee may file a written reply to the Sawridge First Nation brief, if necessary, by August 21, 2015;

7. The Sawridge Trustees will file their Brief, responding to the Public Trustee's Amended Production Application and brief, by August 21, 2015;

8. The Public Trustee may file a written reply to the Sawridge Trustees' August 21, 2015 brief, if necessary, prior to the September 2, 2015 chambers appearance;

9. The Costs Indemnity Order, issued June 12, 2012, permits the Public Trustee to retain agent counsel when additional resources are required;

10. The Sawridge Trustees should raise any issues they may have regarding accounts the Public Trustee submits to them for reimbursement under the Cost Indemnity Order, including requests for unredacted accounts, on a regular basis;

11. Any future issues about specifics of retainer of agency or additional resources by the Public Trustee, or requests for unredacted accounts by the Sawridge Trustees, may be addressed by the Case Management Justice on a written basis.

Hon. Justice D.R.G. Thomas

APPROVED AS BEING THE ORDER GRANTED:

Dentons Canada LLP

Per: _____
Doris Bonora, Counsel for the Sawridge Trustees

APPROVED AS BEING THE ORDER GRANTED:

Hutchison Law

Per: _____
Janet Hutchison, Counsel for the Office of the Public Trustee

APPROVED AS BEING THE ORDER GRANTED:

Bryan & Company LLP

Per: _____
Nancy Cumming Q.C., Counsel for the Sawridge Trustees in Court of Queen's Bench Action No. 1403 04885

APPROVED AS BEING THE ORDER GRANTED:

McLennan Ross LLP

Per: _____
Karen Platten, Q.C., Counsel for Catherine Twinn in Court of Queen's Bench Action No. 1403 04885

11. Any future issues about specifics of retainer of agency or additional resources by the Public Trustee, or requests for unredacted accounts by the Sawridge Trustees, may be addressed by the Case Management Justice on a written basis.

Hon. Justice D.R.G. Thomas

APPROVED AS BEING THE ORDER GRANTED:

Dentons Canada LLP

Per:_____
Doris Bonora, Counsel for the Sawridge Trustees

APPROVED AS BEING THE ORDER GRANTED:

Hutchison Law

Per:_____
Janet Hutchison, Counsel for the Office of the Public Trustee

APPROVED AS BEING THE ORDER GRANTED:

Bryan & Company LLP

Per:_____
Nancy Cumming Q.C., Counsel for the Sawridge Trustees in Court of Queen's Bench Action No. 1403 04885

APPROVED AS BEING THE ORDER GRANTED:

McLennan Ross LLP

Per:_____
Karen Platten, Q.C., Counsel for Catherine Twinn in Court of Queen's Bench Action No. 1403 04885

HUTCHISON LAW

#155, Glenora Gates
10403 122 Street
Edmonton, AB T5N 4C1

Telephone: (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

STATEMENT OF ACCOUNT

Public Trustee of Alberta
400 South, 10365 97 Street
Edmonton, Alberta T5J 3Z8

File #: 51433
Inv #: 4023
July 30, 2015

RE: In the Matter of the Sawridge Band Inter Vivos Settlement - Court of Q.B. Action No. 1103 14112

To all legal services rendered in connection with the above-noted matter, including the following:

DATE	DESCRIPTION
May-[redacted]-15	Legal Research [redacted]. (*Articling Student Rate)
May-[redacted]-15	Legal research; Receipt and review of correspondence from [redacted]; Draft and revise correspondence [redacted]; Correspondence to [redacted].
May-[redacted]-15	Receipt and review of correspondence from D. Bonora (Dentons LLP); Draft and revise correspondence to D. Bonora (Dentons LLP).
May-[redacted]-15	Receipt and review of correspondence from D. Bonora (Denton's); Draft correspondence to all counsel, Dentons and Trial Coordinator.
	Transcript Summary: [redacted] (*Articling Student Rate)
May-[redacted]-15	Review documents for application [redacted]; Legal research [redacted].

Jun-[redacted]-15	Recepit and review of correspondence from D. Bonora (Dentons).
Jun-[redacted]-15	Legal research; Draft and revise [redacted] for application [redacted].
Jun-[redacted]-15	Legal research; Draft and revise [redacted] for application.
Jun-[redacted]-15	Review documents for application [redacted]; Draft and revise [redacted] for application [redacted]
Jun-[redacted]-15	Review documents for application [redacted]; Draft and revise [redacted] for application [redacted]; Legal research [redacted]; Correspondence to [redacted]; Correspondence to [redacted].
	Memo [redacted] (*Articling Student Rate)
Jun-[redacted]-15	Draft and revise correspondence to [redacted]; Review documents for application [redacted]; Draft and revise brief, affidavit and application [redacted]; Legal research [redacted]; Correspondence to [redacted].
Jun-[redacted]-15	Legal research [redacted]; Draft and revise [redacted]; Receipt and review of correspondence [redacted]; Correspondence to [redacted]; Receipt and review of correspondence [redacted].
Jun-[redacted]-15	Review documents for application [redacted]; Draft and revise [redacted] for application [redacted]; Legal research [redacted]; Correspondence to [redacted]; Teleconference with [redacted]; Teleconference with [redacted].
Jun-[redacted]-15	Review documents for application [redacted]; Draft and revise [redacted] for application [redacted]; Legal research [redacted]; Meeting [redacted].

Jun-[redacted]-15 Receipt and review of correspondence from N. Cumming; Correspondence to N. Cumming; Review Sawridge Trustee's application materials.

Jun-[redacted]-15 Review file; Teleconference with E. Molstad (Parlee McLaws LLP); Correspondence to all counsel; Review [redacted]; Teleconference with all counsel;

Teleconference with [redacted]; Draft response to all counsel; Draft [redacted].

Jun-[redacted]-15 Receipt and review of correspondence from E. Molstad (Parlee LLP); Receipt and review of correspondence from D. Bonora (Dentons LLP); Correspondence to [redacted]; Teleconference with [redacted]; Review and revise correspondence to the Court; Review and revise correspondence to all counsel; Preparation [redacted]; Teleconference [redacted]; Legal research; Drafting [redacted];

Jun-[redacted]-15 Legal research; Draft and revise [redacted].

Jun-[redacted]-15 Review and revise [redacted]; Receipt and review of correspondence from Dentons; Receipt and review of correspondence from Parlee McLaws LLP.

Jun-[redacted]-15 Receipt and review of correspondence [redacted]; Review file and submissions received; Receipt and review of correspondence [redacted]; Correspondence to [redacted]; Receipt and review of correspondence [redacted]; Correspondence to [redacted].

Jun-[redacted]-15 Receipt and review of correspondence [redacted]; Draft correspondence to Court and all parties; Review materials; Teleconference with [redacted].

Jun-[redacted]-15 Prepare for court appearance; Attendance in Chambers; Consultation [redacted]; Correspondence to [redacted].

Review and summarize [redacted] (*Articling Student Rate)

Jun-[redacted]-15 Review materials; Review [redacted]; Preparation for chambers appearance; Receipt and review of correspondence [redacted]

	[redacted]; Correspondence to [redacted]; Receipt and review of correspondence from [redacted]; Correspondence [redacted]; Receipt and review of correspondence [redacted]; Telephone calls [redacted]		
Jun-[redacted]-15	Receipt and review of correspondence from M. Poretti (RMRF LLP); Review materials for June 30 appearance; Preparation for chambers; Receipt and review of correspondence [redacted]; Draft [redacted]; Correspondence to [redacted]; Correspondence to [redacted]; Telephone consultation with [redacted]; Draft correspondence to all counsel; Receipt and review of correspondence from Denton's.		
Jun-[redacted]-15	Review [redacted]; Preparation for Court appearance.		
Jun-[redacted]-15	Review materials; Draft notes [redacted]; Prepare for chambers appearance.		
Jun-[redacted]-15	Review materials; Draft [redacted]; Prepare for chambers appearance; Consultations with [redacted]; Receipt and review of correspondence from Dentons; Correspondence to Justice Thomas; Correspondence to Dentons.		
Jun-[redacted]-15	Preparation for chambers appearance; Receipt and review of correspondence from Dentons; Receipt and review of correspondence from McLennan Ross; Correspondence to Dentons; Attendance in chambers; Consultation [redacted].		
Jul-[redacted]-15	Receipt and review of correspondence from Justice Thomas; Receipt and review of correspondence from E.Molstad; Correspondence to [redacted].		
Jul-[redacted]-15	Receipt and review of correspondence from [redacted]; Review transcripts; Correspondence to [redacted]; Receipt and review of correspondence [redacted].		
FEES FOR PROFESSIONAL SERVICES Total Hours: 142.7 @ $425.00/hour (J. L. Hutchison) Total Hours: 11.8 @ $100.00/hour (Articling Student)		154.50	$61,827.50
OTHER CHARGES			
Facsimiles		$8.25	
Photocopies		$3,566.25	

Total Other Charges		$3,574.50
DISBURSEMENTS		
Courier	$568.00	
Postage	$0.77	
Quicklaw (Online Legal Research)	$169.16	
Supreme Advocacy Invoice # 2318	$15,736.10	
Supreme Advocacy Invoice #2318 HST*	$1,258.88	
Filing Fee (June 12, 2015 application)	$50.00	
Parking	$14.29	
Transcript Management Invoice #55671 & #55672	$32.40	
Supreme Advocacy Invoice #2345	$111,503.06	
Supreme Advocacy Invoice #2345 HST*	$8,806.48	
Parking	$14.29	
Total Disbursements		$138,153.43
GST		$6,583.13
Total Fees, Disbursements & GST		$210,138.56
Balance Due		**$210,138.56**

Hutchison Law

E. & O.E.

* tax-exempt

GST # 87325 1573

Per: _____

Janet L. Hutchison

Payable upon receipt. Interest charged at 18% per annum on accounts over 30 days.

SUPREME ADVOCACY LLP SRL

340 Gilmour Street Suite 100
Ottawa, Ontario
K2P 0R3
Phone: 613-695-8855
613-695-8580

Invoice # 2318
Date: 06/04/2015
Due On: 07/04/2015

Janet L. Hutchison
Hutchison Law
#155, Glenora Gates
10403 - 122 Street
Edmonton, Alberta
T5N 4C1

0274-006

1985 Sawridge Trust v. Alberta (Public Trustee)

Attorney	Description	Date
MFM	Discussion; review; changes	May 2015
EM	Email , draft letters, ; meeting	May /2015
MFM	Review of email sent by client	May 2015
MFM	Review of Response; discussion	May 2015
EM	Email , notes on same; meeting	May /2015
MFM	Email to client	May 2015
MFM	Client sent email; review of letter; discussion ; email to client; review of email	May /2015
MFM	Client sent email, sent email to client	May /2015
MFM	Client sent email, sent email to client	May /2015
EM	Email ; email forwarding documents to review draft letter; email ; email discussion on teleconference following day; three meetings and notes thereafter.	May /2015
MFM	Review; changes; call; draft	May /2015

MFM	Client sent email; review of letter; email to client	May /2015
EM	Email ; email back with comments on same; meeting teleconference , notes on same; draft letter	May /2015
EM	Email attaching draft letter for review and approval; email and response to same; email ; two meetings	May /2015
MFM	Review of emails and draft letters; suggestions for changes	May /2015
MFM	Discussion ; email to client	May /2015
MFM	Discussion series of emails sent	May /2015
MFM	Client sent email, sent email to client	May /2015
MFM	Review of emails	May /2015
EM	Teleconference regarding file; review of letter, changes to same.Email , email ; email ; email ; additional email email , and email back ; email .	May /2015
EM	Meeting ; teleconference notes after; review and changes sent by email.	May /2015
MFM	Exchange of emails; discussion	May /2015
MFM	Conference call	May /2015
EM	Meeting , notes after.	May /2015
EM	Two meetings ; email ; email	May /2015
MFM	Review of email sent; discussion ; review of draft email	May /2015
MFM	Review of emails and draft letters sent; email to client	May /2015
MFM	Exchange of emails	May /2015
EM	Email , review of same; email and proposed response; review of same; email ; email back	May /2015
MFM	Review of letters; discussion email to client	May /2015

EM	Email ; email ; email back ; email ; email		May /2015
SF	Photocopies		May /2015
EM	Email		May /2015

Time Keeper	Position	Quantity	Rate	Total
Marie-France Major	Attorney	9.4	$500.00	$4,700.00
Eugene Meehan	Attorney	14.7	$750.00	$11,025.00
			Subtotal	$15,736.10
			HST (13.0%)	$2,045.69
			Total	$17,781.79

All invoice totals are in CDN funds.
HST #839003308
Please make all amounts payable to: Supreme Advocacy LLP

Please pay within 30 days.

E & OE

Supreme Advocacy LLP

Per: Eugene Meehan, Q.C.

SUPREME ADVOCACY LLP SRL

340 Gilmour Street Suite 100
Ottawa, Ontario
K2P 0R3
Phone: 613-695-8855
613-695-8580

Invoice # 2345
Date: 07/07/2015
Due On: 06/08/2015

Janet L. Hutchison
Hutchison Law
#155, Glenora Gates
10403 - 122 Street
Edmonton, Alberta
T5N 4C1

0274-006

1985 Sawridge Trust v. Alberta (Public Trustee)

Attorney	Description	Date
EM	Email ; detailed review of same; notes after.	June 2015
MFM	Review of email draft response	June 2015
MFM	Discussion ; email	June 2015
MFM	Client sent email, sent email to client	June 2015
EM	Email ; detailed review of same; notes after.	June 2015
EM	Meeting and notes after; email email June 2015 email ; email detailed review , and changes and suggestions to same;	June 2015
MFM	Client sent email, sent email to client	June 2015
MFM	Review of documents; changes to documents;	June 2015
MFM	Meeting and discussion ; email to client	June 2015
MFM	Client sent email, sent email to client	June 2015
MFM	Review of email sent -	June 2015

MFM	Client sent email, sent email to client	June 2015
NK	Research and summary	June 2015
NK	Research for client	June 2015
MFM	Review of emails; review of documents; discussion	June 2015
MFM	Call with client; notes after call; discussion	June 2015
MFM	Review; research; discussion; email with outline	June 2015
MFM	Started review of document	June 2015
MFM	Discussion - re memo	June 2015
MFM	Review of emails; review of document - changes; discussion; email to client	June 2015
MFM	Review of document; exchange of emails	June 2015
EM	Six meetings throughout the day; extended teleconference , and notes after; emails back and forth emails back and forth as to materials, review of various drafts and suggestions/changes to same; email ; email ; telephone from	June 2015
NK	research for client	June 2015
MFM	Review of emails; review of documents; email to clients	June 2015
MFM	Review of documents; exchange of emails; discussion	June 2015
EM	Numerous email correspondence , review, changes and suggestions email to ; emails ; extended telephone call	June 2015
MFM	Client sent email, sent email to client	June 2015
EM	Emails review of same; email ; email back from J. Hutchison as to same.	June 2015
MFM	Review of email sent by client; email to client	June 2015
EM	Email ; meeting teleconference notes after.	June 2015
TS	Meeting research issue; review ; review other documents	June 2015

TS	Research issue ; draft memorandum.	June 2015
NK	Research issue . ; analyze case law on same.	June 2015
MFM	Review of documents; discussion; conference call; review - discussion as to parts of research	June 2015
MFM	Review of materials sent by email; correspondence;	June 2015
MFM	Received email; email sent; review; suggestions for changing; discussion ; email sent	June 2015
EM	Three meetings ; email comments and drafts email from , and review of same; email with comments regarding call; email email ; telephone call	June 2015
TS	Continue drafting memo	June 2015
TS	Meeting ; research issue ; draft memorandum	June 2015
TS	Review final version of memo and finalize same; draft email to client.	June 2015
NK	Continue researching analyze case law Draft memo of findings.	June 2015
MFM	Review of email and document sent by client	June 2015
MFM	Discussion; review; additions and deletions; memo (research)	June 2015
MFM	Review and discussion - memo; changes; additions and deletions; review of email sent by client; email to client with document	June 2015
EM	Email draft revisions, email back email from	June 2015
MFM	Review of emails; update	June 2015
MFM	Review of document; suggestions for changes; discussion with E. Meehan	June 2015
EM	Meeting ; email review of same; email email response to same;	June 2015
MFM	Review of emails; letters; outline	June 2015
EM	Email email ; email ; two emails	June 2015

	; email from conference call, and email back	
MFM	Discussion ; outline; position; email to client	June 2015
MFM	Review of email; letters; update	June 2015
MFM	Conference call :	June 2015
EM	Email ; 6 meetings teleconference notes after; de-briefing meeting	June 2015
MFM	Review of email sent; outline	June 2015
MFM	Email to client	June 2015
MFM	Review of email sent; outline of questions and issues; email	June 2015
MFM	Exchange of emails; outline	June 2015
EM	Email ; emails from follow-up/discussion, update teleconference.	June 2015
SF	Photocopies	June 2015
MFM	Email ; discussion	June 2015
MFM	Review of emails; documents; memos; discussion	June 2015
MFM	Conference call; documents	June 2015
TS	Review emails and notes in preparation for call; teleconference ; debrief	June 2015
TS	Receive documents and briefly review same.	June 2015
NK	Conference call / discussion	June 2015
TS	Research materials ; prepare brief memo	June 2015
TS	Research issue and begin drafting memo regarding same	June 2015
NK	Preliminary research	June 2015
EM	Email call; teleconference ; notes on same; email to . , and email back as to same;	June 2015
SM	Transportation Charge	June 2015
TS	Continue drafting memo	June 2015

TS	Email ; phone call regarding same.	June 2015
TS	Review issue of ; review memo on same; draft brief note	June 2015
TS	Review issue ; amended memo and draft note regarding same.	June 2015
TS	Review issue ; review memo and draft brief note on same.	June 2015
TS	Email ; review reply to same ;	June 2015
TS	Draft detailed cover email for memos addressing legal issues	June 2015
NK	Continued research Drafting of said memos.	June 2015
EM	Telephone conference notes after; full day of work on file.	June 2015
MFM	Review; discussion ; issues to be addressed; emails	June 2015
EM	Emails (15) from J. Hutchison , and continued work on file.	June 2015
SM	Flight to Edmonton & return - Eugene Meehan	June 2015
TS	Email from client review same.	June 2015
NK	Research and memo drafting	June 2015
EM	Continued full day of work on file (Sat.) and meeting at office.	June 2015
MFM	Review of memorandums; research points to prepare ; review of outline; approach; review of emails; issues to be addressed	June 2015
EM	Emails (4) from J. Hutchison . Review of agenda for teleconference. Teleconference and de-briefing meeting , and continued work on file.	June 2015
TS	Meeting ; locate relevant documents and conduct research as requested ; email to client	June 2015
EM	Continued work on file for Court appearance, including work on plane.	June 2015
EM	Emails (2) Travel to Edmonton and working on court materials and preparation en route.	June 2015
NK	Drafted list of questions	June 2015

MFM	Review of emails; review of research; discussion	June 2015
EM	Extended day, day before court hearing.	June 2015
SM	Meal at hotel	June 2015
SM	Taxi	June 2015
SM	Taxi	June 2015
SM	Meal	June 2015
TS	Phone call ; research issue analyze case law on same and draft brief email.	June 2015
TS	Email from client research same and analyze case law; prepare memo	June 2015
SM	Meal	June 2015
TS	Discussions review same prepare list of ssues/questions, draft email, send to client.	June 2015
SF	Photocopies	June 2015
MFM	Exchange of emails	June 2015
EM	Working on file in morning, Attendance at court in afternoon, meeting De-brief meeting Travel home (no time posted).	June 2015
SM	Hotel in Edmonton - Eugene Meehan	June 2015
SM	Meal at hotel	June 2015
SM	Meal at hotel	June 2015
SM	Taxi	June 2015
SM	Taxi	June 2015
SM	Taxi	June 2015
SM	Meal/Drink	June 2015
SM	Meal in airport	June 2015
SM	Meal	June 2015
TS	Phone call ; prepare one page document ; email to client.	June 2015

Time Keeper	Position	Quantity	Rate	Total

Marie-France Major	Attorney	41.4	$500.00	$20,700.00
Eugene Meehan	Attorney	118.8	$750.00	$89,100.00
Thomas Slade	Attorney	32.25	$300.00	$9,675.00
Neil Kennedy	Non-Attorney	32.67	$150.00	$4,900.00
			Subtotal	**$126,503.06**
			Invoice Discount	**$15,000.00**
			Discount on fees (see cover letter dated July 7,15)	
			HST (13.0%)	**$14,381.63**
			Total	**$125,884.69**

All invoice totals are in CDN funds.
HST #839003308
Please make all amounts payable to: Supreme Advocacy LLP

Please pay within 30 days.

E & OE

Supreme Advocacy LLP

Per: Eugene Meehan, Q.C.

DENTONS

Doris C.E. Bonora

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D +1 780 423 7188

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2900 Manulife Place
10180 - 101 Street
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T +1 780 423 7100
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Salans FMC SNR Denton
dentons.com

September 1, 2015

File No.: 551860-1

VIA EMAIL

Hutchison Law
#155 Glenora Gates
10403 - 122 Street
Edmonton AB T5N 4C1

Attention: Janet Hutchison

Dear Madam:

RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112

Thank you for your letter dated August 29, 2015 regarding the account of Hutchison Law dated July 30, 2015, a copy of which we attach hereto ("July 30 Account").

Your letter states that we "object" to the July 30 Account. This is not correct. We have not objected, we have simply raised a concern about the significant spike in fees, and have requested information from you in accordance with the directions of Justice Thomas on June 30, 2015. You have refused to provide us this information. The July 30 Account in its redacted form does not allow us to assess whether the account is reasonable. Not only are most time entries redacted, the amount of time spent on each task is also deleted, making it impossible to assess the work that was done. Simply showing the total number of hours for an account of this size is not helpful. Further the accounts from Supreme Advocacy do not even show the amounts for disbursements.

Your letter of August 29, 2015, a copy of which was provided to the Court, contains a number of representations that we take issue with. We note the following:

1. You state that the Public Trustee will not consent to providing unredacted accounts as this would represent a "breach" of the agreement on costs negotiated between the Sawridge Trustees and the Public Trustee in 2014. Our agreement allows us to raise any concerns or issues regarding the reasonableness of fees or disbursements, and there is nothing precluding the Public Trustee from providing us with information, including unredacted accounts, to allow us to address these concerns.

2. You cite as a factor a courtesy discount by Supreme Advocacy which includes travel time to and from Edmonton having been written off. We have asked you to confirm that Mr. Meehan had other business in Edmonton and was not travelling to Edmonton solely for the purpose of the Sawridge application. You have not provided us with a response.

3. You state that the intense levels of activity on the file between May and July 2015 were driven to a significant degree by applications the Trustees have since withdrawn and by our opposition to

the Public Trustee's production application that you state has also since been withdrawn. We have the following comments:

a) Regarding the document production application, we have indeed offered to provide an Affidavit of Records on the assumption that this would end the matter, but this has not been accepted by the Public Trustee.

b) You state that our settlement application was particularly complex and involved, and required the insight of counsel with particular expertise in Trusts. In our opinion, our settlement proposal was not complex but relatively straight forward. Further, other than the grandfathering of the minors that would have lost their beneficial status under the new definition of "beneficiary", there was nothing new in our proposal. The Public Trustee has been aware of our position from the beginning of this matter and presumably has already considered the issue.

c) The withdrawal of the litigation plan application was necessary in the circumstances, and in any event, is relatively minor.

d) You state that when matters became more involved in 2015, the Trustees expanded their legal team to a third, and perhaps a fourth, large national law firm. This is misleading for a number of reasons. Firstly, we continue to be the lawyers representing the trustees in respect of our application for advice and directions. The only reason there are two firms instead of one is that Ms. Bonora is now practicing at Dentons. When this move occurred, it made sense for both of us to continue representing the Trustees given our significant knowledge on the file. Further, the other firms that have been retained by the Trustees were not retained because matters have become more involved, rather, conflict issues have made it necessary that these different firms be retained.

e) You raise as a factor the time and resources expended arguing over provisions of the June 30 form of Order. We note that you continue to argue for the inclusion of paragraph 9 despite your co-counsel, Mr. Meehan, stating that the Court's comments were obiter, and not in the Court Order, and despite all counsel not having made representations on the issue after Justice Thomas indicated that he did not see the benefit of getting mixed up in the middle of the dispute.

f) You state that the Trustees' recent positions show indications of a "strategy" designed to limit or control the scope of the Public Trustee's participation in this matter, citing, among other things, our refusal to pay the July 30 Account. We confirm that we are concerned about the escalating costs in this matter. The Trustees have a fiduciary obligation to ensure that all legal accounts rendered are reasonable. Seeking information with respect to the July 30 Account is not designed to exert control over the Public Trustee's participation in this matter.

g) You state that providing unredacted accounts would disclose to the Trustees the litigation issues being considered by the Public Trustee and the strength and weakness relating to these issues. We remind you that this is an application for advice and directions with respect to the definition of "beneficiary" in the 1985 Sawridge Trust. If you have any "litigation issues" we would be interested in knowing what these are. We do not view this as an adversarial process in which the Public Trustee or the Sawridge Trustees should be seeking a victory. We need direction on the change of a beneficiary designation that would be in the best interest of all involved.

Our position is as follows:

1) On the face of it, the July 30 Account is unreasonable. The sum of approximately $210,000.00 in respect of services rendered in a 6 week period gives us great cause for concern. The last account rendered by your office was for approximately $20,000.00. This is a 1000% increase, a significant spike that remains unexplained.

2) By copy of this letter to the Court, we are requesting that Justice Thomas review the matter in accordance with his directions to the parties on June 30, 2015, and direct that the Public Trustee provide us an unredacted July 30, 2015 account along with individual time entries for each individual recording their time.

Yours truly,

DENTONS CANADA LLP

DORIS BONORA

REYNOLDS, MIRTH, RICHARDS & FARMER LLP

MARCO S. PORETTI

Encl.

cc: Bryan & Company – Attention: Nancy Cumming, Q.C.
cc: McLennan Ross LLP – Attention: Karen Platten, Q.C.
cc: Parlee McLaws – Attention: Edward Molstad, Q.C.
cc: DLP Piper – Attention: Priscilla Kennedy
cc: The Honourable Justice D.R.G. Thomas

WatersTrusts 22.I

Waters' Law of Trusts in Canada, 4th Ed.

22 — Indemnification and Renumeration of Trustees

Contributing Editor: Mark R. Gillen, Editor: Donovan W.M. Waters

22 — Indemnification and Remuneration of Trustees

22 — Indemnification and Remuneration of Trustees

22.I — Indemnification [1]

A. — Principle of Indemnification

1. — Generally

It would be an extraordinary system of law which did not permit trustees to recover their out-of-pocket expenses incurred in the discharge of their duties and powers under the trust, and in fact courts of Chancery were never in any doubt that the trustee was entitled to such indemnification. Lord Eldon's remarks on this subject in *Worrall v. Harford*[2] summarized the position, and this case has been a leading authority in both England and Canada.[3] "It is in the nature of the office of trustee", said Lord Eldon, "whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust. This is implied in every such deed." Early in the nineteenth century the right of the trustee to be indemnified in this way was made statutory, and the same statutory right was conferred upon trustees in Ontario in 1865.[4] Since then it has become a standard provision in every provincial and territorial jurisdiction in Canada.[5] But, as Master Hodgins pointed out in *Hughes v. Rees*,[6] the statute did not add anything; it merely does what a court of equity would do without any such directions.

The idea is essentially one of reimbursement. The trustees discharge costs, expenses and liabilities, and then seek to recover them from the trust property. They are not required to make payments initially out of their own pockets, though the notion of indemnification would suggest this and trustees do find occasions when the best interests of the trust lead them to make payments before funds are readily available from the trust. Before the statutory provisions were enacted, trustees often made such payments. The statutory enactments have now made it clear that the trustee is entitled to be reimbursed when the payments have been made on behalf of the trust out of the trustee's own funds, or to "pay or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trust or powers."[7] In practice, trustees do make payments for expenses from the trust property, and this has always been regarded as perfectly proper; it will be only in the exceptional situations where they will employ their own funds, and subsequently seek reimbursement.[8]

The trustee's expenses are normally drawn from the capital of the trust property, since this is a neutral source of repayment which will affect all the beneficiaries' interests, but both income and capital are subject to the liability to meet expenses,[9] and it will be seen that the statutory provision is careful to refer to "trust property" as the source of the indemnification.

In effect, therefore, it is the beneficiaries who are paying for the expenses incurred by the trustees, and it is of crucial importance to them that some brake or check shall be imposed upon trustees in the expenses which can be "passed on" to the trust. The brake supplied is that the trustees can only recover or be allowed those expenses which are "properly incurred" which is equivalent to saying "not improperly incurred".[10] This restriction was part of the equitable principle of indemnification, and it is implicit in the application of the statutory provisions. The check upon trustees is that their claim for indemnification is made at the time

Maranda v. Richer, [2003] 3 SCR 193, 2003 SCC 67 (CanLII)

Date: 2003-11-14
Docket: 28964
Other citations: 232 DLR (4th) 14; 15 CR (6th) 1; 178 CCC (3d) 321; 311 NR 357; [2003] CarswellQue 2477; JE 2003-2138; [2003] SCJ No 69 (QL); 113 CRR (2d) 76; [2003] ACS no 69; 59 WCB (2d) 553
Citation: Maranda v. Richer, [2003] 3 SCR 193, 2003 SCC 67 (CanLII), <http://canlii.ca/t/1rz> retrieved on 2015-09-18

Maranda *v.* Richer, [2003] 3 S.C.R. 193, 2003 SCC 67

Léo-René Maranda *Appellant*

v.

Corporal Normand Leblanc, in his capacity as informant *Respondent*

and

The Attorney General of Quebec, theCanadian Bar Association, the Barreau du Québec and the Federation of Law Societies of Canada *Interveners*

and

The Honourable Carol Richer, J.C.Q., in his capacity as Justice of the Peace, the Clerk of the Peace and the Crown of the District of Terrebonne, the Sheriff of the District of Terrebonne, Association québécoise des avocats et avocates de la défense and Association des avocats de la défense de Montréal *Mis en cause*

Indexed as: Maranda *v.* Richer

Neutral citation: 2003 SCC 67.

File No.: 28964.

2003: May 12; 2003: November 14.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for quebec

Criminal law — Search warrant — Lawyers' office — Solicitor-client privilege — Procedure for authorizing and executing searches in lawyers' offices — Scope of protection afforded by solicitor-client privilege — Documents seized by police in lawyers' office pursuant to warrant — Information sought by police limited to gross amount of fees and disbursements billed by lawyer to client — Whether amount of fees and disbursements paid by client to lawyer is protected by solicitor-client privilege — Whether search and seizure were unreasonable.

Suspecting that C was involved in money laundering and drug trafficking, the RCMP obtained authorization to search the appellant's law office for any documents relating to fees and disbursements billed to C or relating to the ownership of an automobile that C had allegedly transferred to his lawyer in payment for professional services. No notice was given to the appellant but a representative of the Syndic of the Barreau du Québec went with the police when they conducted the search, which lasted thirteen and a half hours. The appellant brought an application for *certiorari* in the Superior Court to have the warrant quashed and the search declared to be unlawful and unreasonable. An application was also filed under s. 488.1 of the *Criminal Code*. Although the Crown conceded that the search was void, the trial judge decided to continue hearing the case given the importance of the issues. He allowed the application for *certiorari* and quashed the search warrant and the procedures that had been carried out under it, declaring them to have been unlawful and unreasonable. The Court of Appeal reversed that decision. In the time since the Court of Appeal's judgment, this Court has declared s. 488.1 to be unconstitutional.

Held: The appeal should be allowed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.: The search and seizure were unreasonable and abusive within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* because of the breach of the duty to minimize and the failure to contact the lawyer. The duty to minimize requires, first, that a search not be authorized unless there is no other reasonable solution and, second, that the authorization be given in terms that, to the extent possible, limit the impairment of solicitor-client privilege. The search must be executed in the same way. In this case the application for authorization did not comply with the duty to minimize. It was neither alleged nor established that there was no other reasonable alternative and that the information sought could not be obtained using other sources. The trial judge found that the evidence showed that the Crown could have obtained at least half of the information sought from different sources. A search and seizure procedure for the purpose of acquiring information half of which could have been obtained in another manner would not be tolerable. Nor does executing the search during business hours and making off with a large quantity of documents comply with the principle of minimization, given the nature of the information sought. Finally, no notice was given to

the appellant. There is nothing in the application for authorization to indicate why such contact should not or could not have taken place.

An application for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values of criminal law and procedure, such as the accused's right to silence and the protection against self-incrimination. The preservation of those values leads to the conclusion that no distinction should be drawn between a fact and a communication in determining whether the solicitor-client privilege applies to lawyers' billings for fees and disbursements. The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship and must be regarded, as a general rule, as one of its elements. The fact consisting of the amount of the fees must therefore be regarded, in itself, as information that is generally protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of the solicitor-client privilege are achieved and helps keep impairments of solicitor-client privilege to a minimum. In this case, the Crown neither alleged nor proved that disclosure of the amount of the appellant's billings would not violate the privilege that protected his professional relationship with his client and that information therefore had to remain confidential.

The Court of Appeal should not have applied the crime exception since it was not alleged by the informant and was not argued by the Crown at trial. It is not possible to find information that would justify applying that exception in the affidavit submitted in support of the application for warrant authorization.

Per Deschamps J.: There was agreement with the conclusions of the majority regarding the deficiency of the information and regarding the crime exception. However, it is preferable not to characterize the amount of the fees paid by a client as a matter protected by solicitor-client privilege. 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. Not all communications with a lawyer will be protected by privilege. It is the context in which the communication takes place that justifies characterizing it as privileged. In order to ensure that solicitor-client privilege continues to serve its purpose, the amount of the fees billed should not be protected unless, due to context, it is found to fall within the ambit of the privilege. Here, the amount of the fees and disbursements is relevant for the purpose of proving the charge of possession of the proceeds of crime or money laundering, but it does not provide any indication as to the nature of the legal advice given, and is not likely to draw a court into an examination of the advice given or the professional services performed by the lawyer. In a context in which the information discloses nothing, there is no reason to justify finding that the information is of as much importance as the legal

advice itself. When a lawyer submits a bill of account, he or she does so as a supplier of a service. The lawyer's relationship with the client is one of creditor to debtor. The amount owing takes on an identity distinct from the service itself. Therefore, it is not appropriate to grant it the same sort of protection given to the legal advice. It is in the interests of the administration of justice and of society in general for there to be greater transparency in respect of the amount of the fees that lawyers charge their clients.

The appeal is therefore allowed for the sole reason that the issuing judge should not have issued the search warrant without imposing conditions to ensure that the intrusion inherent in the search was minimized.

Cases Cited

By LeBel J.

Applied: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII); *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860; **distinguished:** *Kruger Inc. v. Kruco Inc.*, 1988 CanLII 962 (QC CA), [1988] R.J.Q. 2323; **referred to:** *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (CanLII); *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 (CanLII); *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 (CanLII); *Rieger v. Burgess*, [1989] S.J. No. 240 (QL); *R. v. Joubert* (1992), 1992 CanLII 1073 (BC CA), 69 C.C.C. (3d) 553; *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA), [1998] 4 F.C. 89; *Hodgkinson v. Simms* (1988), 1988 CanLII 181 (BC CA), 55 D.L.R. (4th) 577; *Madge v. Thunder Bay (City)* (1990), 1990 CanLII 6838 (ON SC), 72 O.R. (2d) 41; *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 1996 CanLII 521 (BC SC), 143 D.L.R. (4th) 134; *Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 1983 CanLII 1894 (ON SC), 41 O.R. (2d) 328; *Amadzadegan-Shamirzadi v. Polak*, 1991 CanLII 3002 (QC CA), [1991] R.J.Q. 1839.

By Deschamps J.

Applied: *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII); **referred to:** *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565; *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (CanLII); *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 (CanLII); *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263; *Québec (Procureur général) v. R.C.*, 2003 CanLII 33470 (QC CA), [2003] R.J.Q. 2027.

Statutes and Regulations Cited

Act respecting the Barreau du Québec, R.S.Q., c. B-1, s. 75.

By-law respecting accounting and trust accounts of advocates, R.R.Q. 1981, c. B-1, r. 3.

Canadian Charter of Rights and Freedoms, s. 8.

Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, ss. 3.03.03, 3.08.01, 3.08.02, 3.08.05.

Criminal Code, R.S.C. 1985, c. C-46, ss. 462.31, 488.1, 488.1(2), (8).

Narcotic Control Act, R.S.C. 1985, c. N-1, ss. 19.1, 19.2.

Regulation respecting the conciliation and arbitration procedure for the accounts of advocates, (1994) 126 O.G. II, 4691.

Authors Cited

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

APPEAL from a judgment of the Quebec Court of Appeal, 2001 CanLII 15883 (QC CA), [2001] R.J.Q. 2490 (*sub nom. Leblanc v. Maranda*), 47 C.R. (5th) 162 (*sub nom. Maranda v. Québec (Juge de la Cour du Québec)*), 161 C.C.C. (3d) 64 (*sub nom. R. v. Charron*), [2001] Q.J. No. 4826 (QL) (*sub nom. Maranda v. Canada (Gendarmerie royale)*), reversing a decision of the Superior Court, [1998] R.J.Q. 481, [1997] Q.J. No. 3730 (QL). Appeal allowed.

Giuseppe Battista, for the appellant.

Bernard Laprade and *Bernard Mandeville*, for the respondent.

Gilles Laporte and *Benoît Lauzon*, for the intervener the Attorney General of Quebec.

Denis Jacques, for the intervener the Canadian Bar Association.

Louis Belleau, for the intervener Barreau du Québec.

Jean-Claude Hébert, for the intervener the Federation of Law Societies of Canada.

English version of the judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ. delivered by

LEBEL J. —

I. Introduction

1 This appeal arises out of an improperly authorized and improperly executed search conducted in the office of a Montreal criminal lawyer, the appellant, Léo-René Maranda ("Mr. Maranda"), on September 11, 1996. Although the Crown conceded, after an application for *certiorari* was filed, that the search was void by reason of a serious defect in the affidavit filed in support of the application for authorization, the matter proceeded, largely at the instance of the trial judge. Following the judgments of the Superior Court ([1998] R.J.Q. 481) and the Quebec Court of Appeal (2001 CanLII 15883 (QC CA), [2001] R.J.Q. 2490), there are three issues now remaining in the appeal to this Court. The first concerns the requirements governing the issuance and execution of warrants to search lawyers' offices, particularly as they relate to the duty to minimize any violation of solicitor-client privilege, to establish that there are no other sources of information and to give the lawyer in question notice of the procedure to be carried out. The second issue is whether the information in lawyers' billings is privileged. The third involves the application of what is called the "crime exception", which was raised by the Quebec Court of Appeal on its own motion.

2 To dispose of these issues, we must examine how the common law rules as they were set out by this Court in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII), after it declared s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), to be unconstitutional, have been applied and developed. For the reasons that follow, I would allow the appeal and set aside the appeal decision. Like the trial judge, I find that the common law rules that must govern authorizations to seize materials from lawyers' offices, and the execution of those authorizations, were violated. As well, in my opinion, the lawyers' billings must be deemed, in the context in which this case arose, to fall within the category of information protected by solicitor-client privilege. It also seems to me that the crime exception was not properly relied on by the Court of Appeal and does not apply in this case.

II. Origin and Judicial History of the Case

3 In September 1996, the Royal Canadian Mounted Police ("RCMP") was conducting an investigation of Alain Charron, a client of Maranda. The police suspected that Mr. Charron was involved in money laundering and drug trafficking. In the course of the criminal investigation, the respondent, Cpl. Normand Leblanc, a member of the RCMP, filed an application for authorization to search Mr. Maranda's office. The application covered all documents relating to fees and disbursements billed to or paid by Mr. Charron. It also covered all documents relating to the ownership of a Bentley automobile that Mr. Charron had transferred to his lawyer, in payment for certain accounts for professional services, according to the police.

4 The affidavit sworn by Cpl. Leblanc in support of the application for authorization stated that the search would lead to the discovery of information relating to the commission by Mr. Charron of the offence of possession of the proceeds of crime, contrary to ss. 19.1 and 19.2 of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, then in force. The affidavit contained no allegation that Mr. Maranda had participated in the offences with which his client was charged.

5 Once the authorization was granted, the search took place. The police gave Mr. Maranda no notice. However, they alerted the Syndic of the Barreau du Québec, and a representative of the Syndic went with the police when they attended at Mr. Maranda's office to conduct the search. The search took place during normal office hours. It lasted thirteen and a half hours. Mr. Maranda, who had been detained in court, returned to his office right in the middle of this, to find his files and accounting records being carted off. In accordance with the representations made by Mr. Maranda and the practice in such cases that had been agreed to with the Syndic of the Barreau, the police did not read any of the documents. Nonetheless, filing cabinets and bookshelves were emptied. A number of boxes of documents were left behind, under guard. The appellant and others affected by the search warrant then brought an application for *certiorari* in the Quebec Superior Court to have the warrant quashed and the search declared to be unlawful and unreasonable. An application was also filed under s. 488.1 *Cr. C.* The parties agreed to proceed first with the hearing of the application for *certiorari*, in which a number of parties, including the Barreau du Québec, intervened.

6 After several days of testimony and argument before Béliveau J. of the Superior Court, there was a dramatic turn of events. Counsel for the federal Crown informed the trial judge and counsel for the other parties that after reviewing the entire case, the Crown had decided not to lay any charges against Mr. Charron, Mr. Maranda's client, in connection with money laundering and possession of the proceeds of crime, the matters that the search had related to. Counsel also admitted that a statement concerning the sources referred to in the affidavit filed in support of the application for authorization to search might have misled the authorizing judge. In the circumstances, since the search had been improper and was of no future use, the Crown stated that it wished to return the property that had been seized, which it ultimately did. The question then arose of whether a case should continue when it had become moot, given that the files and documents seized were being returned to Mr. Maranda.

7 Notwithstanding the admission by counsel for the Crown that the search was invalid and void, and despite the Crown's objections, Béliveau J. decided to continue hearing the case, noting the importance of the issues it raised in relation to the procedure for authorizing and executing searches in lawyers' offices, and the scope of

the protection afforded by solicitor-client privilege, for future cases. The trial judge then allowed the application for *certiorari*. He accordingly quashed the search warrant and the procedures that had been carried out under the authority of that warrant, declaring them to have been unlawful and unreasonable. In his opinion, even after s. 488.1 *Cr. C.* came into force, certain common law principles concerning searches in lawyers' offices identified by the courts were still valid and had been violated in this case. First, Cpl. Leblanc's affidavit failed to meet the duty to establish that the things or information sought could not reasonably have been obtained by other means. Second, Béliveau J. stated that solicitor-client privilege, as defined by the common law rules that apply in criminal law, covers the amount of fees and disbursements billed by a lawyer to his or her client, even in the absence of any other details concerning the nature of the professional services rendered. Third, the trial judge concluded that the authorizing judge must, at this stage, try to minimize any violations of privilege and of the confidentiality of the information covered by it. The fact that there was no minimization clause could make the search unreasonable. The judge pointed out that in this case, merely inspecting the lawyer's accounting records would have been sufficient to achieve the objectives of this search.

8 The Court of Appeal decided to hear the respondent's appeal despite the fact it was moot. However, it expressed strong reservations regarding the wisdom of the decision to give judgment despite the fact that the proceedings in connection with the search had been abandoned and the property seized returned to Mr. Maranda. Given the serious consequences of the Superior Court's judgment, however, the court thought it necessary to hear the appeal and examine the legal issues that had been raised at trial. On the merits, the unanimous opinion of the Court of Appeal, written by Proulx J.A., was in almost complete disagreement with the decision of Béliveau J. First, Proulx J.A. expressed the view that the authorizing judge had not lost jurisdiction as a result of a breach of the duty to satisfy himself that there was no alternative. Although he agreed with the finding of fact made by Béliveau J. that the prosecution could have obtained at least half of the information it wanted from other sources, he noted that, on the other hand, the other half could not have been obtained by other means. Accordingly, the authorizing judge had exercised his jurisdiction properly and retained jurisdiction. Proulx J.A. then added that the fact that the issuing judge had not required either that notice be given to the lawyer in question or that the lawyer be present during the search did not invalidate the warrant. Such conditions went beyond what is required by s. 488.1(2) and (8) *Cr. C.* The presence of the Syndic, which had been required by the judge, provided protection that went beyond what was required by the law itself.

9 Proulx J.A. also examined the question of solicitor-client privilege. In that regard, he distinguished between facts and communications in the relationship between a client and his or her lawyer. In his opinion, the gross amount of fees and disbursements, without any further information or details, is a mere fact. It exists independently of the communication that is the real subject matter of the solicitor–client relationship. Accordingly, the fact must be examined in the context of

that communication, in order to determine whether the circumstances indicate that the information relating to that fact will involve a breach of the privilege. Proulx J.A. also, on his own motion, raised the question of the crime exception to solicitor-client privilege. In his view, the allegations made by the informant in his affidavit provided a basis for applying that exception. Accordingly, the Court of Appeal concluded that the authorizing judge had retained jurisdiction, even though he had not imposed a minimization clause or required that notice be given to the lawyer or that the lawyer be present. In addition, the information about the amount of the fees and disbursements was not privileged. The judgment also criticized Béliveau J. for not applying the crime exception. This Court then granted leave to bring an appeal raising these issues, but within a legal framework that has been altered by recent developments in the Court's constitutional decisions.

III. The Legal Context of the Appeal

10 The legal context in which this appeal must be examined has changed substantially. When the case began, the principles and rules that applied to searches and seizures in lawyers' offices were set out in s. 488.1 *Cr. C.* and in the common law, the relevant substance of which this Court had defined in *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, in particular. In the time since the Court of Appeal's judgment, this Court has declared s. 488.1 to be constitutionally invalid, in *Lavallee, Rackel & Heintz*, *supra*. It was of the opinion that the section violated s. 8 of the *Canadian Charter of Rights and Freedoms* by authorizing abusive and unreasonable searches and seizures in lawyers' offices. In this Court's opinion, the procedures prescribed by s. 488.1 *Cr. C.* were likely to jeopardize the privileged nature of solicitor-client communications. This Court's decision then clarified and strengthened the common law rules described in *Mierzwinski*. As defined in the reasons for judgment of Arbour J., those common law rules are meant to consolidate solicitor-client privilege, by placing the Crown under a clear duty to minimize any impairments of that privilege that might arise out of the search and seizure procedure. The rules are also intended to facilitate intervention by the lawyer concerned, by requiring that he or she be notified in time to be able to invoke the solicitor-client privilege in the information covered by the search warrant effectively:

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

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 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.

(*Lavallee, Rackel & Heintz*, *supra*, at para. 49)

11 Obviously, neither the trial judge nor the Court of Appeal was able to examine the issues in this case in the specific context of those modified common law rules. However, the changes made to the common law by the decision in *Lavallee, Rackel & Heintz* did not totally rewrite the legal rules that apply to searches and seizures of lawyers' offices. They clarify and consolidate the previous rules, which recognized the need for solid protection of solicitor-client privilege. Those changes were consistent with the line of decisions rendered by this Court since *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, which stressed the social importance of that privilege, whose purpose is to protect the confidentiality of communications between solicitor and client (*R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, at p. 289). In fact, solicitor-client privilege is one of the rare class privileges recognized by the common law. The decisions of this Court have clearly distinguished that privilege from privileges that are recognized on an individual, case-by-case basis for legal policy reasons, under the Wigmore test (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 713-15; *Gruenke*, at pp. 286-87).

12 The decisions of this Court have consistently strengthened solicitor-client privilege, which it now refuses to regard as merely an evidentiary or procedural rule, and considers rather to be a general principle of substantive law (see *Lavallee, Rackel & Heintz*, at para. 49). The only exceptions to the principle of confidentiality established by that privilege that will be tolerated, in the criminal law context, are limited, clearly defined and strictly controlled (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (CanLII); *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 (CanLII)). The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients. In determining the propriety of the authorization and execution of the search in Mr. Maranda's office and examining the problem of the confidentiality of the information about the fees and disbursements billed to his clients, care must be taken to follow the general approach that can be seen in this Court's decisions in this area.

IV. Analysis

13 In this appeal, the Court must answer questions that are now moot, since in any event the Crown concedes that the search and seizure were void and unreasonable. The Court of Appeal's negative responses to the arguments made by the appellant in respect of those questions could not revive that procedure. However, because of the nature of the proceedings that have taken place and their possible consequences, the questions have been asked and this Court has agreed to examine and answer them, as I shall now do.

1. *The Duty to Minimize*

14 The first problem that arises is the question of the existence and effect, in Canadian criminal law, of a duty to minimize impairments of solicitor-client privilege when a search in a lawyer's office is authorized and executed. Under the current law, as set out in the decisions of this Court, there is no doubt that such a duty exists. It rests on the informant who applies for a search warrant, the authorizing judge and those responsible for executing it.

15 There are two aspects to this duty. First, it requires that a search not be authorized unless there is no other reasonable solution. Second, the authorization must be given in terms that, to the extent possible, limit the impairment of solicitor-client privilege. The search must be executed in the same way. Those principles had been laid down by Lamer J. (as he then was) in *Mierzwinski*, at p. 893:

> Before authorizing a search of a lawyer's office for evidence of a crime, the justice of the peace should refuse to issue the warrant unless he is satisfied that there is no reasonable alternative to the search, or he will be exceeding his jurisdiction (the substantive rule). When issuing the warrant, to search for evidence or other things, he must in any event attach terms of execution to the warrant designed to protect the right to confidentiality of the lawyer's clients as much as possible.

16 In the recent decision in *Lavallee, Rackel & Heintz*, Arbour J. reiterated the need for stringent application of these rules. The requirement that there be no reasonable alternative must be met. The procedure to be followed must then be designed to ensure that the search will be executed so as to minimally impair solicitor–client privilege (para. 20). Later in her reasons, Arbour J. again stressed the importance of adopting a procedure that will rigorously protect the privilege, and of the more general principle of minimization (at para. 36):

> Indeed, solicitor–client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection. Such protection is ensured by labeling as unreasonable any legislative provision that interferes with solicitor–client privilege more than is absolutely necessary.

17 The existence of the principle of minimization must be reflected in the way that the application for authorization is worded, and in particular in the wording of the affidavits presented in support. The affidavit must contain allegations that are sufficiently precise and complete that the authorizing judge is able to exercise his or her jurisdiction with full knowledge of the facts. On that point, the principles laid down by this Court in *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 (CanLII), concerning wiretapping cases, in which a principle requiring that violations of privacy be minimized applies, appear to be relevant here. As noted in that decision, while those affidavits should not be pointlessly prolix, they must provide the authorizing judge with full and frank information, which the judge can use to perform his or her function completely (see *Araujo*, at paras. 46-47). It is then up to the judge to exercise his or her jurisdiction carefully, to ensure that the application for authorization properly establishes that there are no reasonable alternatives, and to define a procedure to be followed in executing the search that will preserve solicitor-client privilege to the greatest possible extent. This is not a matter of fulfilling formalities or laying out boilerplate allegations. Where privilege could be breached, it must be shown to the judge's satisfaction that the duty to minimize can be met in carrying out the proposed procedure.

18 In these respects, the application for authorization did not comply with the duty to minimize. It was neither alleged nor established, at that stage, that there was no other reasonable alternative, that the information sought could not be obtained using other sources. In this regard, Béliveau J. found that the evidence showed that the Crown could have obtained at least half of the information sought from different sources. Neither the Court of Appeal nor the Crown has disputed that finding of fact.

19 A procedure in which a relatively minimal amount of information that could have been gathered by other means was obtained from the lawyer would undoubtedly be tolerable. A search and seizure procedure for the purpose of acquiring information half of which could have been obtained in another manner violates the duty to minimize. Nor does executing the search during business hours and making off with a large quantity of documents comply with the principle of minimization, when it was claimed that only information about fees and disbursements paid to Mr. Maranda, and certain information about the transfer of an automobile, was being sought. The failure to make any attempt to contact the lawyer in question ahead of time exacerbated the violation.

20 In *Lavallee, Rackel & Heintz*, as noted earlier, the Court cited the need for a lawyer who is to be the subject of a search and seizure to be contacted. As useful as it may seem to contact the law society and to have its representative present, there is still a duty to inform the lawyer and the persons concerned, for the purpose of ensuring that solicitor-client privilege is effectively protected. Because that rule exists, the application for authorization and the authorization itself must provide for a method of informing the lawyer to alert him or her to the operation it is proposed to conduct in his or her office. However, circumstances may arise where that information would jeopardize the criminal investigation that is underway and the proposed seizure. In such a case, it will be up to the authorizing judge to exercise his or her power to assess the situation and to require that appropriate measures be taken to limit breaches of privilege. The law society to which the lawyer belongs will then have to be informed in a timely manner, so that its representative can be present at the search and take the necessary steps to avoid any breach of solicitor-client privilege. In this case, no notice was given to Mr. Maranda. There is nothing in the application for authorization to indicate why such contact should not or could not have taken place. As Béliveau J. concluded, that defect affected the validity of the procedure by which the search was authorized and the execution of the search. It contributed to making the operation abusive and unreasonable within the meaning of s. 8 of the *Charter*.

2. *The Privileged Nature of Information About Lawyers' Fees and Disbursements*

21 This case generated a debate about the privileged nature of lawyers' billings for fees and disbursements. In the eyes of the parties, and of the Superior Court and the Court of Appeal, that question seems to have become the main subject of the legal proceedings that arose out of this case. It must be discussed in the context of the very first of the common law rules set out by Arbour J. in *Lavallee, Rackel & Heintz*, *supra*, at para. 49. That rule prohibits the issuance of any search warrant relating to privileged information:

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

22 At first glance, that rule is clear and stringent. The authorizing judge may not issue a search warrant for privileged documents unless the material submitted to the judge by the informant establishes that an exception to that privilege applies. In that case, the warrant applied for may be granted, on terms that seek to keep breaches of privilege to a minimum. In this appeal, we must determine how that rule applies to information concerning lawyers' fees, in the context of a criminal investigation being conducted by the police. However, the parties are not questioning the principles set out in *Mierzwinski*, holding that lawyers' billings are protected by privilege when they contain information regarding the content of communications between the lawyer and his or her client, both about the legal advice given and about the terms for payment of

the lawyer's fees or the financial situation of the person who consults the lawyer (p. 877, *per* Lamer J.). In the Court's opinion, the scope of the privilege is broad. The reasons written by Lamer J. suggest that courts should exercise great caution before trying to circumscribe or create exceptions to that privilege (at pp. 892-93):

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

23 In this appeal, however, the Attorney General of Canada, whose arguments on this point were adopted by the Quebec Court of Appeal, submits that the application related only to neutral information, the amount of the fees and disbursements paid, and to no other details. That information, it is submitted, falls outside the scope of the solicitor-client communication that is protected by common law privilege. The Attorney General compares it to a pure fact which is not such as would inform third parties about the content of the solicitor-client communication. That information would not facilitate the enlisting of the lawyer against his or her client, thus violating the client's constitutional protection against self-incrimination. The ultimate thrust of that argument is that this information could be the subject of a search warrant and could be disclosed to the prosecution, unless the context established that disclosing it might violate the confidentiality of the content of the professional communication. The appellant replies that this information is deemed to be covered by privilege. It cannot be the subject of a search warrant, and the lawyer could not disclose it to the Crown.

24 The question has never before been submitted to this Court in these terms. To answer it, I will have to assume that the Crown is seeking only the raw data, the amount of the fees and disbursements. I have some doubts on that point, however, after reading the list of documents sought. The documents and information sought, in particular concerning Mr. Maranda's disbursement accounts, might enable an intelligent investigator to reconstruct some of the client's comings and goings, and to assemble evidence concerning his presence at various locations based on the documentation relating to his meetings with his lawyer. In any event, I shall examine the issue in the terms defined by the parties, who assume that the information that the RCMP wanted was limited to the gross amount of the fees and disbursements billed by Mr. Maranda to his client, Mr. Charron.

25 The Canadian courts seem to have been divided on the question. The Court of Appeal has adopted an approach under which access to the information would be permitted as a general rule, unless the context showed that disclosing it would violate privilege. In the court's view, the privilege attaches to the communication, and not to a fact that might arise out of that communication. Proulx J.A. explained his understanding of the nature and scope of the privilege as follows (at para. 54):

> [TRANSLATION] . . . solicitor-client "privilege" confers protection against any disclosure by the client or the lawyer of (1) *communications by the client*, (2) *for the purpose of obtaining legal advice*, (3) *in the course of the solicitor-client relationship*, and (4) *intended by the client to be confidential*. Where those four elements are all present, a communication may be described as "privileged". [Emphasis in original.]

26 The Court of Appeal's reasons place great weight on the distinction between a fact and a communication in determining whether the common law privilege applies. If that privilege is to attach, there must have been not only confidentiality, but also a communication. Although the payment of fees, as a fact, is incidental to the solicitor-client relationship, it is separate from all of the privileged elements of the communication. In any event, in Proulx J.A.'s opinion, even if the payment of fees is regarded as an element of an act of communication, the content of that communication would not found a claim to privilege, because that content would not jeopardize the essential purpose of the privilege, which is to protect the trust and freedom that must be the hallmark of communications between solicitor and client (at para. 95):

> [TRANSLATION] . . . disclosure of the fees paid cannot jeopardize the purpose of the privilege. In other words, I believe that a client who knows that the amount of the fees he or she will pay could be disclosed is still not prevented from freely confiding in his or her lawyer for the purpose of the client's defence, or denied the assurance of confidentiality.

27 There is a line of cases that supports the position taken by the Quebec Court of Appeal. While those cases sometimes cite the distinction between fact and communication, they would, as a general rule, refuse to recognize solicitor-client privilege as attaching to information about the gross amount of fees paid to a lawyer (see, for example: *Rieger v. Burgess*, [1989] S.J. No. 240 (QL) (Q.B.); *R. v. Joubert* (1992), 1992 CanLII 1073 (BC CA), 69 C.C.C. (3d) 553 (B.C.C.A.)). The Court of Appeal also relied on a decision, in which I wrote the reasons, where it had concluded that solicitor-client privilege, in Quebec law, did not protect the information contained in billings that did not contain any details concerning the nature of the services rendered (*Kruger Inc. v. Kruco Inc.*, 1988 CanLII 962 (QC CA), [1988] R.J.Q. 2323 (C.A.)). Other judgments have taken a position in favour of applying privilege in

those circumstances. The most important of those judgments is undoubtedly the decision of the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA), [1998] 4 F.C. 89. In that case, although it dealt with the problem of applying federal access to information legislation, Linden J.A. had concluded that the amount of fees fell within the framework of the solicitor-client relationship and had to be protected (paras. 29-30). His reasons stressed the importance of the information that able counsel could sometimes extract from apparently neutral information such as the mere amount of the fees paid by opposing counsel's client (para. 46) (see also, for example: *Hodgkinson v. Simms* (1988), 1988 CanLII 181 (BC CA), 55 D.L.R. (4th) 577 (B.C.C.A.); *Madge v. Thunder Bay (City)* (1990), 1990 CanLII 6838 (ON SC), 72 O.R. (2d) 41 (S.C.); *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)* (1996), 1996 CanLII 521 (BC SC), 143 D.L.R. (4th) 134 (B.C.S.C.), at paras. 47-49).

28 The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. In the context of criminal investigations and prosecutions, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination.

29 Because this Court is dealing here with a criminal case, we must not overestimate the authority of *Kruco* or of other judgments that may have been rendered in civil or commercial cases. *Kruco*, for example, dealt with a completely different, commercial law matter, one that was governed by the law of evidence and the civil procedure of Quebec. It involved a dispute between two groups of shareholders who claimed to be entitled to complete financial information concerning the company's affairs, including information about the lawyers' fees that some of them had allegedly arranged to be paid by the company in which they all held an interest. An application by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.

30 That rule cannot be based on the distinction between facts and communication. The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence (*Stevens*, *supra*, at para. 25). It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for

transfers of funds (*Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 1983 CanLII 1894 (ON SC), 41 O.R. (2d) 328 (Div. Ct.); *Joubert*, *supra*).

31 However, the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege. Sopinka, Lederman and Bryant, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, §14.53):

> The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

32 While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitates a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the members of law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect. The applicable legislation and regulations include strict rules regarding accounting and record-keeping, an obligation to submit detailed accounts to the client, and mechanisms for resolving disputes that arise in that respect (*Act respecting the Barreau du Québec*, R.S.Q., c. B-1, s. 75; *By-law respecting accounting and trust accounts of advocates*, R.R.Q. 1981, c. B-1, r. 3; *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, ss. 3.03.03 and 3.08.05; *Regulation respecting the conciliation and arbitration procedure for the accounts of advocates*, (1994) 126 O.G. II, 4691). The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.

33 In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it

would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, *supra*, at paras. 4-5.

34 Accordingly, when the Crown believes that disclosure of the information would not violate the confidentiality of the relationship, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. The judge will have to satisfy himself or herself of this, by a careful examination of the application, subject to any review of his or her decision. In addition, certain information will be available from other sources, such as the client's bank where it retains the cheques or documents showing payment of the bills of account. As a general rule, however, a lawyer cannot be compelled to provide that information, in an investigation or in evidence against his or her client. In this case, the Crown neither alleged nor proved that disclosure of the amount of Mr. Maranda's billings would not violate the privilege that protected his professional relationship with Mr. Charron. That information therefore had to remain confidential, as the trial judge held.

3. *The Crime Exception*

35 The final ground relied on by the Court of Appeal to justify disclosure of the amount of the lawyer's fees and disbursements in this case was the crime exception. That ground comes as a surprise, and should not have been argued on appeal. The informant had not alleged that exception. The Crown had not argued it in the Superior Court. Contrary to the opinion of the Court of Appeal, it is difficult to find information that would justify applying that exception in the affidavit submitted by the informant in support of the application for authorization. In order to rely on this ground, it would have to be concluded that this exception applies whenever a lawyer is consulted by a client concerning an offence of the same type as the offence contemplated by the provisions of s. 462.31 *Cr. C.*, relating to what are called proceeds of crime. In this case, the affidavit plainly did not claim that Mr. Maranda was connected in any way with the acts it was sought to charge his client with.

36 The courts have recognized the existence of this exception (see *Amadzadegan-Shamirzadi v. Polak*, 1991 CanLII 3002 (QC CA), [1991] R.J.Q. 1839 (C.A.)). The legal rules governing the exception, both at the stage of an investigative procedure such as a search and at trial, merit careful examination. Such an examination would not be warranted in this case, where all that is needed is to observe that none of the allegations and facts required if it were to be applied were present. Accordingly, on this point as well, the appeal must succeed.

37 Despite the circumstances in which the trial judge decided to retain jurisdiction in this case, his conclusions seem to be in accordance with the general trend in the decisions of this Court. This Court has shown itself to be mindful of the protection that must be afforded to solicitor-client privilege, which plays a fundamental role in the functioning of the criminal justice system. The confidentiality of the solicitor-client relationship is essential to the functioning of the criminal justice system and to the protection of the constitutional rights of accused persons. It is important that lawyers, who are bound by stringent ethical rules, not have their offices turned into archives for the use of the prosecution.

V. Conclusion

38 For these reasons, I would allow the appeal. I would find that the search and seizure were unreasonable and abusive, because of the breach of the duty to minimize and the failure to contact the lawyer. I would also conclude that the information relating to the lawyer's fees and disbursements was privileged and that the Court of Appeal should not have applied the crime exception.

English version of the reasons delivered by

39 DESCHAMPS J. — No one is questioning the importance of the privilege that attaches to the solicitor-client relationship. The only issue here is the scope of that privilege. Rather than abstractly considering the whole relationship that may exist between a lawyer and his or her client to be hallowed, I favour a contextual approach. In my view, this approach promotes the due administration of justice, since it protects all communications made by the client to his or her lawyer for the purpose of obtaining legal advice, while not unduly impairing the search for truth. I am therefore of the view that it is preferable not to characterize the amount of the fees paid by a client as a matter protected by solicitor-client privilege. On the question of the rules that apply to the issuance of a warrant, I am of the opinion, like LeBel J., that the information was deficient. I also concur with his conclusions regarding the crime exception.

I. Solicitor-Client Privilege

40 As LeBel J. observes, the issue in this case has never been submitted to the Court, and I think it is important not to lose sight of the objective of solicitor-client privilege. 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.

41 However, this principle of fundamental justice does not function in the abstract. For one thing, it involves its own limitations; for another, it must be reconciled with numerous other social imperatives, such as public safety and truth-seeking. To date, there have been several cases in which the courts have had an opportunity to examine this privilege. The boundaries of the privilege have not been drawn and, in my opinion, it should not be assigned a watertight definition. While the context in which this case arose is unique in that the appeal is moot, it offers an example of a situation in which no purpose is served by the protection afforded by the privilege. I therefore think that it will be useful to review the internal limitations on the privilege, after which I will discuss the exceptions to it. I will conclude by explaining why, in my opinion, the justice system is better served when neutral information is disclosed instead of concealed.

(a) *Scope of the Privilege*

42 Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. It is the context in which the communication takes place that justifies characterizing it as privileged. Accordingly, a commercial lawyer who works in an advertising agency and whose time is spent exclusively on developing products for his or her client will not be able to claim privilege for promotional work done. Similarly, the mere fact that a client considers certain information to be confidential will not suffice for it to be protected by solicitor-client privilege. I mention these examples as a reminder that the three prerequisites for privilege to attach, as laid down by Dickson J. (as he then was) in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 837, still apply:

> . . . (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

43 What then was the information sought in this case? It is common ground that the sole purpose of the search was to obtain information about the amount of the fees and disbursements paid by Alain Charron to his lawyer, Léo-René Maranda, for representing him at trials held in Nova Scotia and Newfoundland on narcotics charges.

44 In order to afford the broadest possible protection, I will assume that the first and last criteria set out in *Solosky* are met. The second criterion is more problematic, and a complete answer can only be found by examining the whole context.

45 The information was sought not in connection with the narcotics charges that gave rise to the lawyer's fees and disbursements, but because an investigation was being conducted into an allegation of money-laundering and possession of the proceeds of crime. The declaration made by Cpl. Normand Leblanc contains the following allegations:

> [TRANSLATION]
> 20. The foregoing details lead me to believe and establish that Alain CHARRON (DOB: 48-06-08) has for several years been active in the drug world. The lifestyle he has led for several years, and the large sums he has invested in buying the BOURBON, doing renovations and buying expensive vehicles, and his investments on the stock market, cannot be justified by legitimate sources of income. It is obvious that Alain CHARRON (DOB: 48-06-08) has taken considerable precautions to conceal his assets, by using pseudonyms. At present, the only asset in his possession that is registered in his name is a vehicle leased by him, to wit: a white Cadillac Seville 94, licence number WPS630/QC. I believe that the moneys spent by Alain CHARRON (DOB: 48-06-08) and referred to above are profits derived directly from his activities in connection with narcotics trafficking.
>
> 21. My preliminary analysis of the monthly expenses incurred by Alain CHARRON (DOB: 48-06-08) and his common-law wife, Diane BUNDOCK, in recent years establishes an average amount of about $5,000.00. That amount does not take into account the expenses referred to in paragraph 17 above. In addition, that amount does not take into account the legal fees incurred by Alain CHARRON (DOB: 48-06-08) since his arrest on 90-07-31 including expenses for travelling to court in Sydney, Halifax and St-John's and the cost of hotels, telephone calls, meals and vehicle rentals for himself and Léo René MARANDA. I believe that the information concerning the amount of those expenses is needed in order to determine the total amount that Alain CHARRON (DOB: 48-06-08) has spent since 1990. From those details, I will be able to prepare a balance sheet and net assets for Alain CHARRON (DOB: 48-06-08). I believe that the result of that work will serve as evidence in court against Alain CHARRON (DOB: 48-06-08) by establishing CHARRON's inability to have been in lawful possession of the sums of money spent as described in paragraph 17 above.

> 22. The information cited above constitutes my reasonable and probable grounds for believing that the documents (see Appendix "A") exist and are located at the places of business of the hotels and lawyers' offices referred to above (ref.: paras. 13, 14 & 15). Those documents will serve as evidence to establish the total of the amounts paid by Alain CHARRON (DOB: 48-06-08) to the lawyers referred to above and the amount of his personal expenses, including the expenses of Léo René MARANDA, who would have billed them to CHARRON. That information is needed in order to prepare a balance sheet and net assets for Alain CHARRON (DOB: 48-06-08) in order to establish that his lifestyle and the assets he has acquired exceed his lawful means and are entirely dependent on the profits from his unlawful activities. For these same reasons, I request that a search warrant be granted for the business office of *Léo René MARANDA, advocate*, located at *31 rue St-Jacques, 1st floor, Montréal QC, H2Y 1K9, and its appurtenances*, for the purpose of seizing all documents pertaining to the amounts of the legal fees and other disbursements billed to Alain CHARRON (DOB: 48-06-08) and paid by him. In addition, we are searching for documents such as the contract of sale, transfer of ownership, registration or other documents from which we can confirm the real owner of the Bentley, who, according to our information, is Alain CHARRON. That evidence is required to justify charges under sections 19.1 and 19.2 of the Narcotic Control Act against Alain CHARRON (DOB: 48-06-08) and to justify an application to the court for seizure of the assets acquired by him with the profits from his criminal activities. [Emphasis in original.]

(Sworn statement of Cpl. Normand Leblanc, September 4, 1996 (Appellant's Record, at pp. 258-59))

46 As can be seen in these allegations, the sole reason for the prosecution's interest in the fees and disbursements billed by the lawyer is that they show the lifestyle led by Alain Charron, on the same basis as does the information collected in relation to the purchase of the Bourbon Street Club, the renovations to the residences, the purchases of luxury vehicles or the investments on the stock market. Nor are they any more sought after than would be information from another professional or supplier of consumer goods. The amount of the fees and disbursements, in the context of this case, is relevant for the purpose of proving the charge of possession of the proceeds of crime or money laundering, but it discloses nothing having to do with any advice the lawyer may have given his client.

47 The fact that Mr. Maranda represented Mr. Charron is public knowledge. As well, it can be inferred that Mr. Maranda was not acting as a volunteer, but that he was receiving fees for his services and that he was reimbursed for expenses he incurred in carrying out his instructions. Therefore, the only remaining issue is the amount of the fees and disbursements. I do not see how any litigant, even the ablest, could use such facially neutral information as the amount of fees and disbursements to

deduce some information concerning the legal advice that a lawyer gave his client. The amount of the fees and disbursements does not provide any indication as to the nature of the legal advice given, and is not likely to draw a court into an examination of the advice given or the professional services performed by the lawyer.

48 When I describe the amount of the fees and disbursements in this case as neutral, I am not relying on a distinction between fact and communication, because, as pointed out by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 734, that line can be difficult to draw. Certain facts, if disclosed, can sometimes speak volumes about a communication. In this case, however, the appellant did not argue that the information sought might jeopardize the confidentiality of the legal advice given. He relied solely on a general presumption that the information is privileged because it is part of the solicitor-client relationship.

49 In order to bring the amount of the fees and disbursements within the ambit of professional privilege, it seems to me that some rational connection with the objective of the privilege would have to be identified. As Binnie J. stated in *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 50: "It is, of course, not everything done by a ... lawyer that attracts solicitor–client privilege. ... Whether or not solicitor–client privilege attaches in [a particular situation] depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered." In a context such as the one in this case, in which the information discloses nothing, I see no reason to justify finding that the information is of as much importance as the legal advice itself. When a lawyer submits a bill of account, he or she does so as a supplier of a service. The lawyer's relationship with the client is one of creditor to debtor. The amount owing takes on an identity distinct from the service itself. Therefore, it is not appropriate to grant it the same sort of protection given to the legal advice.

50 LeBel J. proposes (at para. 28) that in the criminal law context, the protection conferred by the privilege might have a different scope, in particular because of the fundamental principles of the criminal law such as the right to silence and the protection against self-incrimination. I cannot accept this distinction. First, while there may be a specific justification for the privilege in criminal law, because of the principles unique to that context, privilege is not to be confused with those principles. It has its own autonomous existence, which transcends the particular field of law in which lawyers may be called upon to give advice.

51 LeBel J. also suggests (at para. 34) that if the Crown believes that the disclosure of the amount of fees does not violate the confidentiality of the relationship, then it must make that allegation in its application for authorization. It seems to me

that this simplified mechanism is inconsistent with the protective approach adopted by the Court to date, which allows very little room for exceptions once the privilege is recognized. To date, recognition of the privilege has been seen as giving rise to a presumption *juris et de jure* and not a presumption *juris tantum*. This brings me to the question of what are the exceptions to professional privilege.

(b) *Exceptions to Privilege*

52 When information is recognized as privileged, there are a number of exceptions that allow for the protection to be circumvented. One well known exception is the crime exception: *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860. As noted earlier, I will not discuss this at length because I am of the opinion that the context does not lend itself to a complete analysis of that exception in this case. It was also recognized in *Solosky* that pressing social needs such as safety and the public interest may justify exceptions to the privilege. As well, *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (CanLII), offers another example of an exception: when an accused's innocence depends on privileged information being admitted in evidence, the court will be justified in authorizing disclosure. In any case, finding these exceptions is not a task to be undertaken lightly: *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 (CanLII).

53 Therefore, it seems to me that, in order to be true to the importance of solicitor-client privilege, a court should be very wary of diluting the protection of privilege by lowering the threshold for creating exceptions or developing new mechanisms to justify disclosure. The disclosure of the amount of fees and disbursements in this case certainly does not merit such an exceptional departure; indeed, it does not merit the protection of privilege at all.

(c) *Judicial Policy Considerations*

54 I can imagine that a client might regard the amount of his or her legal fees as private information. However, that possibility does not seem to me to justify the exceptional protection associated with privilege. For instance, the examples given by the trial judge are all situations in which there was a fear of being charged with possession of the proceeds of crime. I disagree with his assertion that disclosure of the fees would interfere with the proper functioning of the judicial system. The examples given overemphasize the confidentiality intended by the parties, the third criterion in the test proposed by Dickson J. in *Solosky*. Making that criterion the determining factor would amount to protecting all information that a client wishes to be confidential, without regard to any connection between the information and the substance of legal advice, the second criterion, which is the only outstanding issue here. The fees billed by a physician, notary or accountant may strike just as sensitive a

chord as the fees billed by a lawyer. Lawyers, themselves, do not exist in a separate category. In *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, the Court held that a communication made to a member of the clergy is not necessarily confidential. Similarly, the amount of fees paid to a lawyer is not necessarily privileged. When severed from the details of the services rendered, it is not inextricably bound up with the legal system.

55 In this respect, lawyers cannot expect to be exempt from the trend toward greater transparency in relation to the accounts of professionals and corporate managers. The legal profession has everything to gain from greater transparency, not the least of which would be to enhance public confidence in the justice system and its leading actors. Therefore, it is in the interests of the administration of justice and of society in general for there to be greater transparency in respect of the amount of the fees that lawyers charge their clients. It is worth noting that in Quebec, the *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, contains provisions regarding how fees are to be established:

> **3.08.01.** The advocate must charge and accept fair and reasonable fees.
>
> **3.08.02.** The fees are fair and reasonable if they are warranted by the circumstances and correspond to the services rendered. In determining his fees, the advocate must in particular take the following factors into account:
>
> *(a)* his experience;
>
> *(b)* the time devoted to the matter;
>
> *(c)* the difficulty of the question involved;
>
> *(d)* the importance of the matter;
>
> *(e)* the responsibility assumed;
>
> *(f)* the performance of unusual services or services requiring exceptional competence or celerity;
>
> *(g)* the result obtained;
>
> *(h)* the judicial and extrajudicial fees fixed in the tariffs.

56 In a society that is mindful of transparency, a lawyer's fees should not necessarily be treated as secret information. The manner in which fees are established is regulated and they may be challenged. The gross amount billed on account of fees is not information that is likely, in normal circumstances, to disclose anything about the legal advice given to a client by a lawyer. In some cases, the amount that a lawyer

must reasonably receive is considered a matter of public interest: *Québec (Procureur général) v. R.C.*, 2003 CanLII 33470 (QC CA), [2003] R.J.Q. 2027 (C.A.). I therefore believe that in order to ensure that solicitor-client privilege continues to serve its purpose, the amount of the fees billed should not be protected unless, due to context, it is found to fall within the ambit of professional privilege as defined in *Solosky*.

57 I must also, again, emphasize my disagreement with the distinction based on the fact that this case involves the criminal law. Making that kind of distinction is dangerous because its effect could be to create a double standard. That double standard is not likely to promote public respect for the criminal justice system. Solicitor-client privilege has been recognized by this Court as a principle of fundamental justice, which applies equally to both civil law and criminal law.

58 Each time the Court has had to decide whether information was protected by privilege, it has looked to the context to see it in relation to the purpose of the privilege. Even in *Mierzwinski*, in which the Court recognized that financial information supplied for the purpose of obtaining legal advice is privileged, the reasons stated show that protection was granted because of the connection with the legal advice sought. The approach adopted by LeBel J. seems to me to be based on a theoretical presumption that is detached from any contextual foundation.

II. Unreasonableness of the Search

59 In light of recent decisions of the Court, primarily *Lavallee, Rackel& Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII), I would conclude, like LeBel J., that the issuing judge should have attached conditions to the warrant to ensure that the intrusion inherent in the search was minimized. The facts do not indicate that there was any particular urgency, and there was no allegation made from which it might be believed that the lawyer had participated in the crime. It would have been easy to notify him. His participation would have made it possible to conduct the search with due regard for the premises concerned. The information sought was narrowly focussed and the lawyer was in the best position to direct the search efforts of the officers responsible for executing the warrant.

60 Since an issuing judge has no control over how the search is conducted, the Court cannot reproach the judge here for failing to anticipate that the search would take more than 13 hours. Nor would I rely, as the sole ground for issuing a writ of *certiorari*, on the argument that 50 percent of the documents could have been obtained by other means. On that point, it must be noted that the documents that could have been located elsewhere are vouchers such as hotel or restaurant bills, while the most important information was undoubtedly the amount of the fees and the total amount of

the disbursements, information that could not have been located elsewhere than in the lawyer's office. Lastly, like Proulx J.A., I would find that the issuing judge had sufficient discretion to be able to authorize the search.

61 To summarize, while I conclude that the appeal must be allowed, the reason is that I am also of the opinion that the issuing judge should not have issued the search warrant without imposing conditions to ensure that the intrusion inherent in the search was minimized.

Appeal allowed.

Solicitors for the appellant: Shadley Battista, Montréal.

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

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitors for the intervener the Canadian Bar Association: Grondin Poudrier Bernier, Québec.

Solicitors for the intervener Barreau du Québec: Filteau& Belleau, Montréal.

Solicitors for the intervener the Federation of Law Societies of Canada: Hébert, Bourque & Downs, Montréal.

Kaiser (Re), 2012 ONCA 838 (CanLII)

Date: 2012-11-29
Docket: C54857
Other citation: 113 OR (3d) 308
Citation: Kaiser (Re), 2012 ONCA 838 (CanLII), <http://canlii.ca/t/ftz2s> retrieved on 2015-09-18

In the Matter of the Bankruptcy of Kaiser, of the City of Toronto, in the Province of Ontario
[Indexed as: Kaiser (Re)]

113 O.R. (3d) 308
2012 ONCA 838

Court of Appeal for Ontario,
Goudge, Feldman and Blair JJ.A.
November 29, 2012

Professions -- Barristers and solicitors -- Solicitor-client privilege -- Motion judge granting motion by trustee in bankruptcy for order for disclosure of identity of person paying bankrupt's legal fees in bankruptcy proceedings -- Bankrupt's appeal allowed -- Identity of person paying party's legal fees presumptively privileged -- Presumption being rebuttable by evidence showing that there is no reasonable possibility that disclosure will lead to revelation of confidential solicitor-client communications or that requested information is not linked to merits of case and its disclosure would not prejudice client -- Motion judge erring in finding that presumption had been rebutted.

K was a bankrupt. His trustee in bankruptcy suspected that he was hiding assets and using B as a straw man to do so. Accordingly, the trustee applied for the appointment of a receiver over the property of B and his company on the basis that the property belonged to K and therefore to the trustee. A member of the law firm that represented the trustee had in the past represented numerous litigants in proceedings against or involving K. When the trustee sought to examine K pursuant to s. 163(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, K brought a motion to have the law firm removed as solicitor for the trustee (the "removal motion"). The removal motion was dismissed, and K was ordered to pay costs to the trustee. Those costs were not paid. The trustee moved for an order compelling K and his lawyer to disclose the identity of the person paying K's lawyer's legal fees for the removal

motion. K opposed that motion on the basis that the information sought was permanently protected by solicitor-client privilege. The motion judge granted the motion. K appealed.

Held, the appeal should be allowed.

Administrative information relating to the solicitor-client relationship -- including the identity of the person paying the lawyer's bills -- is presumptively privileged. The presumption may be rebutted by evidence showing (a) that there is no reasonable possibility that disclosure of the requested information [page309] will lead, directly or indirectly, to the revelation of confidential solicitor-client communications; or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client. The motion judge took too narrow a view both of the potential prejudice and the impact of disclosure on K's right to confidentiality. K's lawyer was not simply retained for the removal motion; rather, he was retained to represent K in the bankruptcy proceedings generally, and in those proceedings, the real dispute was about whether K was hiding assets from the trustee through the use of a straw man. The identity of the person paying K's legal fees on the removal motion was not merely tangential information. It impacted directly on the merits of the overall dispute and its revelation might well be prejudicial to K in that overall context. Moreover, disclosure of the source of K's lawyer's fees would reveal confidential communications between the lawyer and his client. The information was provided in the context of the lawyer's need to know how his fees would be paid in order to decide whether to act. It was therefore information which K had to provide in order to obtain legal advice and which was given in confidence for that purpose.

APPEAL from the order of Newbould J., [2011] O.J. No. 6036, 2011 ONSC 7617 (S.C.J.) (CanLII) for disclosure of the identity of the person paying the bankrupt's legal fees. [page310]

Cases referred toMaranda v. Richer, [2003] 3 S.C.R. 193, [2003] S.C.J. No. 69, 2003 SCC 67 (CanLII), 232 D.L.R. (4th) 14, 311 N.R. 357, J.E. 2003-2138, 178 C.C.C. (3d) 321, 15 C.R. (6th) 1, 113 C.R.R. (2d) 76, 59 W.C.B. (2d) 553; Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), 2005 CanLII 6045 (ON CA), [2005] O.J. No. 941, 251 D.L.R. (4th) 65, 197 O.A.C. 278, 10 C.P.C. (6th) 144, 137 A.C.W.S. (3d) 877 (C.A.); R. v. Cunningham, [2010] 1 S.C.R. 331, [2010] S.C.J. No. 10, 2010 SCC 10 (CanLII), 399 N.R. 326, 2010EXP-1163, J.E. 2010-626, EYB 2010-171414, 317 D.L.R. (4th) 1, 73 C.R. (6th) 1, 254 C.C.C. (3d) 1, 87 W.C.B. (2d) 70, 283 B.C.A.C. 280, 87 W.C.B. (2d) 70, apld Descôteaux v. Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43, 141 D.L.R. (3d) 590, 44 N.R. 462, J.E. 82-659, 70 C.C.C. (2d) 385, 28 C.R. (3d) 289, 1 C.R.R. 318, 8 W.C.B. 383, consd Other cases referred to Bankruptcy of Morris Kaiser (Re), [2011] O.J. No. 3716, 2011 ONSC 4877 (CanLII), 84 C.B.R. (5th) 29 (S.C.J.) [Leave to appeal refused [2011] O.J. No. 6223, 2011 ONCA 713, 84 C.B.R. (5th) 269, 209 A.C.W.S. (3d) 223]; R. v. 1504413 Ontario Ltd. (2008), 90 O.R. (3d) 122, [2008] O.J. No. 1302, 2008 ONCA 253 (CanLII), 235 O.A.C. 48, 77 W.C.B. (2d) 194, 230 C.C.C. (3d) 193, 70 C.L.R. (3d) 1; R. v. Colbourne, 2001 CanLII 4711 (ON CA), [2001] O.J. No. 3620, 149 O.A.C. 132, 157 C.C.C. (3d) 273, 19 M.V.R. (4th) 29, 51 W.C.B. (2d) 65 (C.A.) Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 163(1) [as am.], 193, (a)-(e) Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 [as am.] Authorities referred to Wigmore, John Henry, Wigmore on Evidence, vol. 8 (McNaughton rev. 1961)

Melvyn L. Solmon and Cameron J. Wetmore, for appellant Morris Kaiser.

Milton A. Davis and Neil S. Rabinovitch, for respondent Soberman Inc. as trustee of the estate of Morris Kaiser, a bankrupt.

BLAIR J.A.: -- Issue

[1] May a court require that a bankrupt and/or the bankrupt's solicitor disclose the identity of the person paying the bankrupt's legal fees in proceedings arising out of the bankruptcy? That is the issue raised on this appeal. Background

[2] Morris Kaiser has been bankrupt for more than three years, and claims to have been impecunious at the time of his bankruptcy. In spite of this, however, he appears to have continued to live a life of some means in Toronto. He has made a number of trips to various casinos in the United States, gambling many hundreds of thousands of dollars in pursuit of this hobby, and made numerous cash withdrawals on credit cards allegedly paid for by a third party, Mr. Cecil Bergman, and by various companies under Mr. Bergman's control.

[3] This has led Soberman Inc., Mr. Kaiser's trustee in bankruptcy, to suspect that Mr. Kaiser was not impecunious at the time of his bankruptcy but, rather, that he is hiding assets from the trustee and using Mr. Bergman as a "straw man" to do so. Both Mr. Kaiser and Mr. Bergman deny that Mr. Bergman has provided Mr. Kaiser with any funds since the date of his bankruptcy, but this controversy underpins the issue arising on this appeal.

[4] The trustee applied to the court for the appointment of a receiver over the property of Mr. Bergman and his company, Bergman Capital, on the basis that the property belongs to Mr. Kaiser and therefore to the trustee as a result of the bankruptcy (the "receivership motion"). Shortly thereafter, it also moved for an order requiring Mr. Kaiser, or any person so requested by the trustee, to disclose the source of "any and all funds" received by Mr. Kaiser since the bankruptcy (the "first disclosure motion"). The law firm, Davis Moldaver LLP, represented the trustee in those proceedings.

[5] The record indicates that Milton Davis of that firm has had considerable experience dealing with Mr. Kaiser because he has represented numerous disgruntled litigants in proceedings [page311] against or involving Mr. Kaiser for over a decade. When the trustee (with Mr. Davis acting for it) sought to examine Mr. Kaiser pursuant to s. 163(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), Mr. Kaiser, in turn, brought a motion to have Davis Moldaver LLP removed as solicitor for the trustee (the "removal motion"). Newbould J. dismissed that motion on August 16, 2011: Bankruptcy of Morris Kaiser (Re), [2011] O.J. No. 3716, 2011 ONSC 4877 (S.C.J.) (CanLII). He observed, at para. 4:

> In my view the motion is completely miscast and it is evident that it has been brought for tactical purposes to try to delay actions by the trustee in seeking to obtain a declaration that a third party, Cecil Bergman, is holding millions of dollars of assets in trust for Mr. Kaiser. It is quite evident that Mr. Kaiser, who has an obligation to the trustee to assist in locating assets belonging to the bankrupt estate, is taking every opportunity to refuse to provide information that could assist the trustee.

[6] Cronk J.A. dismissed an application for leave to appeal from the removal motion order, noting that the motion judge's conclusions were "firmly grounded in the evidentiary record": Bankruptcy of Morris Kaiser (Re), [2011] O.J. No. 6223, 2011 ONCA 713. A motion to set aside her decision was dismissed and the appeal from the removal motion order quashed.

[7] In the meantime, the trustee's first disclosure motion had been adjourned indefinitely. However, after Newbould J. dismissed the removal motion he ordered Mr. Kaiser to pay costs to the trustee in the amount of $50,000, and, not surprisingly, those costs were not paid. As a result, the trustee moved separately before Newbould J. for an order compelling Mr. Kaiser and his lawyer Mr. Solmon to disclose the identity of the person paying Mr. Solmon's legal fees respecting the removal motion (the "second disclosure motion"). The trustee's request that the amount of the legal fees also be disclosed was not pursued at the hearing. No one doubts that, if successful, the trustee will follow with a motion for an order requiring that person to pay the outstanding costs.

[8] Mr. Kaiser opposed the second disclosure motion on the basis that the information sought was permanently protected by solicitor-client privilege. The trustee argued that the identity of the person paying Mr. Kaiser's legal bills is simply a matter of fact that does not attract solicitor-client privilege in the first place.

[9] The motion judge considered the relevant case law and determined that the information sought was presumptively -- not permanently -- privileged. However, he went on to hold that the presumption could be rebutted if it could be shown that the information did not reveal confidential solicitor-client communications [page312] and was not relevant to the merits of the case, and that its revelation would not be prejudicial to Mr. Kaiser.

[10] Ultimately, the motion judge concluded that this burden had been met. He explained, at paras. 11 and 15:

> In this case, I fail to see how the amount of fees paid by the third person to Mr. Solmon could reveal any communication between Mr. Kaiser and Mr. Solmon protected by solicitor- client privilege. The same applies to the release of only the identity of the person who paid. . . . . .
>
> The identity of the person who paid Mr. Solmon's fees is not relevant to the merits of what was before the court, namely, whether Mr. Davis's firm should be removed as solicitor for the trustee. Nor could it be prejudicial to that issue or cause any other legal prejudice to Mr. Kaiser.

[11] Accordingly, the motion judge ordered Mr. Kaiser and Mr. Solmon to disclose to the trustee the identity of the person who paid Mr. Solmon for his work on the removal motion, as well as for the unsuccessful appeals arising from that motion. This order is the subject of the appeal. Leave to Appeal

[12] As a threshold matter, the trustee moved to quash Mr. Kaiser's appeal because he had not sought leave as required by s. 193 of the BIA. Just prior to the hearing of the appeal, Mr. Solmon served a notice of motion seeking leave in the event that it was needed. While there was no apparent justification for the late notice, I am satisfied that leave to appeal is required and that, in the circumstances, leave should be granted.

> [13] In bankruptcy proceedings, an appeal only lies to this court as of right in the specific circumstances enumerated in paras. (a)-(d) of s. 193 of the BIA, namely,
> (a) if the point at issue involves future rights;
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
> (c) if the property involved in the appeal exceeds in value ten thousand dollars; or
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars.

[14] Paragraph (e) of s. 193 provides that an appeal lies to this court "in any other case by leave of a judge of the Court of Appeal".

[15] An appeal from an order requiring a bankrupt and his solicitor to reveal the identity of the person paying the bankrupt's legal fees does not fit nicely into any of paras. (a)-(d). [page313] However, the issue raised is an important one for the practice -- not dealt with in this context before -- and has implications beyond the four corners of this dispute. I would therefore grant leave to appeal pursuant to s. 193(e). Analysis

[16] Whether a court may order disclosure of the identity of a person paying the legal fees of a bankrupt in proceedings arising out of the bankruptcy depends upon whether that information is protected by solicitor-client privilege. For the reasons that follow, I am satisfied that, on this record, the identity of the person paying Mr. Kaiser's legal fees on the motion to remove Mr. Davis's firm as solicitors of record is protected by that privilege and ought not to have been ordered disclosed.

[17] As he did in the court below, Mr. Solmon relies heavily on the decision of the Supreme Court of Canada in Descôteaux v. Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43, for his argument that the information sought to be disclosed is protected by solicitor-client privilege. In that case, Mr. Descôteaux was suspected of lying about his finances in a legal aid application so the police obtained a warrant and seized the allegedly fraudulent application from a legal aid bureau. Both the bureau and Mr. Descôteaux claimed that the document was protected by privilege.

[18] Speaking for the court, Lamer J. held that, in the context of legal advice, "administrative" information required to obtain that advice -- including information about the payment of the lawyer's bill -- was completely privileged, subject only to very narrow common law exceptions. In coming to this conclusion, he adopted the "permanently protected from disclosure" condition precedent found in Wigmore's test for the existence of solicitor-client privilege: Wigmore on Evidence (McNaughton rev. 1961), vol. 8, at 2292. Lamer J. summed up the principle, at pp. 892-93 S.C.R.:

> [A] lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial

> means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. (Emphasis added)

[19] Mr. Solmon argues that the motion judge erred in failing to apply the Descôteaux test. Mr. Kaiser's ability or inability to pay his fees was a precondition to the creation of the solicitor-client relationship, he says, and, relying on Descôteaux, at pp. 876-77 S.C.R., [page314] he argues that the source of those fees was "as much [a communication] made in order to obtain legal advice as any information communicated" to the lawyer subsequently, and was "[an item] of information that a lawyer requires from a person in order to decide if he [or she] will agree to advise or represent" the client:
Descôteaux, at pp. 876-77 S.C.R. The information, he submits, is therefore permanently protected from disclosure.

[20] I agree that the foregoing principles would preclude disclosure of the information sought by the trustee here. However, I do not agree that the "permanent protection from disclosure" test governs any longer.

[21] Descôteaux must be read in light of more recent jurisprudence. In Maranda v. Richer, [2003] 3 S.C.R. 193, [2003] S.C.J. No. 69, 2003 SCC 67 (CanLII) and in R. v. Cunningham, [2010] 1 S.C.R. 331, [2010] S.C.J. No. 10, 2010 SCC 10 (CanLII), the Supreme Court moved away from the categorical approach articulated in Descôteaux and towards a more flexible and contextual approach to the determination of when peripheral information is protected by solicitor-client privilege. The prevailing law now appears to be that administrative information related to the establishment of a solicitor-client relationship -- including a lawyer's bill and a client's ability to pay, and by extension, the source of the lawyer's fees -- is presumptively privileged. The presumption may be rebutted by the party seeking disclosure, however.

[22] Maranda involved the seizure under warrant of documents from a lawyer's office relating to fees and disbursements billed to, or paid by, a client who was suspected of money laundering and drug trafficking. The warrant was quashed and the search declared illegal because the information contained in the seized documents was privileged. Writing for eight of nine judges, [See Note 1 below] LeBel J. reaffirmed the importance and the broad scope of solicitor-client privilege and the principles to that effect enunciated in Descôteaux. He did not adopt the "permanently protected" test, however. Instead, at paras. 33 and 34, he introduced the concept of a "presumption" of privilege:

> In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor- client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral [page315] information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls prima facie within the privileged category will better ensure that the objectives of this time- honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum[.]

> Accordingly, when the Crown believes that disclosure of the information would not violate the confidentiality of the relationship, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. The judge will have to satisfy himself or herself of this[.] (Emphasis added)

[23] In developing the "presumption of privilege" approach, LeBel J. considered, and rejected, the argument that the raw data of lawyers' dockets are not "communications" protected by solicitor-client privilege, but are rather "facts" to which privilege does not attach at all. He explained, at para. 32:

> While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in [Descôteaux], there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties . . . . The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements. (Emphasis added)

[24] LeBel J. acknowledged in the course of his analysis that at least some information in lawyers' dockets might well be "neutral" information that does not attract solicitor-client privilege. He therefore directed that in future cases where search warrants are sought for lawyers' dockets, the information sought should be treated as presumptively privileged. The onus would be on the Crown to demonstrate that disclosure would not violate the confidentiality of the solicitor-client relationship.

[25] Although the court in Maranda did not discuss the identity of the person paying the lawyers' fees, I see no practical distinction between the source of payment and the details of payment for purposes of this analysis. As will become apparent, the identity of the person paying the legal fees may well not be "neutral information" in the context of a particular case and its disclosure may, indeed, violate the confidentiality perimeters of that relationship. It follows that the "fact/communication" distinction the trustee attempts to draw in this case must be rejected for the same reason as LeBel J. rejected it in Maranda.

[26] This court applied the "presumptive privilege" approach introduced in Maranda outside the criminal/search warrant [page316] context in Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner), 2005 CanLII 6045 (ON CA), [2005] O.J. No. 941, 251 D.L.R. (4th) 65 (C.A.). There, the issue was whether the total amount of fees paid by the Attorney General to outside counsel in two high-profile criminal matters was privileged, and therefore exempt from disclosure under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31. The Information and Privacy Commissioner concluded that this information was not privileged, and ordered the Attorney General to disclose it. The Attorney General disagreed and challenged the production order in court. The commissioner's order to disclose the information was upheld in the Divisional Court and in this court on the basis of the Maranda analysis. At para. 9 of its reasons, this court said:

> Assuming that [Maranda] . . . holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, Maranda also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the

> client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege. (Emphasis added)

[27] More recently, in Cunningham the Supreme Court emphasized that the question of whether or not fee information is protected by solicitor-client privilege should be answered contextually.

[28] The narrow issue in Cunningham was whether a court could refuse a request by defence counsel to withdraw from a case on the basis of the client's failure to pay his legal bills. For purposes of this discussion, the important question was whether it would breach solicitor-client privilege for the lawyer to disclose to the court that the client had not paid.

[29] Writing for a unanimous court, Rothstein J. held, at para. 30, that this information may be privileged "[w]here payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client". However, where these conditions are not met, the "sliver" of information that the client is in arrears does not attract privilege in the first place.

[30] From these developments in the jurisprudence, I take the law to be that administrative information relating to the solicitor-client relationship -- including the identity of the person paying the lawyer's bills -- is presumptively privileged. The presumption may be rebutted by evidence showing (a) that there is no reasonable possibility that disclosure of the requested information will [page317] lead, directly or indirectly, to the revelation of confidential solicitor-client communications (Maranda, at para. 34; and Ontario (Assistant Information and Privacy Commissioner), at para. 9); or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client (Cunningham, at paras. 30-31).

[31] I note that the "confidential communication" and the "merits/prejudice" lines of reasoning from Maranda and Cunningham, respectively, do not necessarily define the same body of information. The reason is that not all information a client tells his lawyer in confidence will be relevant to the merits of the case for which the lawyer is retained: see Descôteaux, at p. 877 S.C.R.

[32] That said, even if there are differences between the Maranda and the Cunningham approaches, those differences do not matter in the present case. From either viewpoint, the record does not support the disclosure of the identity of the person paying Mr. Kaiser's legal bills. I respectfully disagree with the motion judge on this point.

[33] The motion judge properly concluded that the Maranda/ Cunningham line of jurisprudence governed. However, he erred in its application, in my opinion, primarily because he took too narrow a view both of the potential prejudice and the impact of disclosure on Mr. Kaiser's right to confidentiality.

[34] As I explained above, the thrust of the motion judge's reasoning to order disclosure was two-fold. First, he concluded [at para. 15] that "[t]he identity of the person who paid Mr. Solmon's fees is not relevant to the merits of what was before the court, namely, whether Mr. Davis's firm should be removed as solicitor for the trustee". Secondly, he decided that disclosure of that information could not prejudice Mr. Kaiser on the removal motion or in the sense that it might have a chilling effect on any future attempts by Mr. Kaiser to obtain

funding to pay legal fees. The motion judge was sceptical about why Mr. Kaiser, a bankrupt, would have a need for future legal services in any event.

[35] In my view, this line of reasoning fails to take into account the overall context of the dispute between the trustee and Mr. Kaiser. Mr. Solmon is not simply retained for the removal motion. He is retained to represent Mr. Kaiser in the bankruptcy proceedings generally. In those proceedings, the real dispute is about whether Mr. Kaiser, a bankrupt, is hiding assets from the trustee through the use of a "straw man". The removal motion is but a tangential skirmish in that theatre of battle.

[36] Respectfully, however, the identity of the person paying Mr. Kaiser's legal fees on the removal motion is not merely tangential information. It has relevance beyond that motion. [page318] Mr. Bergman is the trustee's primary suspect as the "straw man", if there is one. Should it turn out that Mr. Bergman is the person paying Mr. Solmon's fees on the removal motion, the trustee will have a significant piece of circumstantial evidence for use in the receivership and related proceedings that there is a "straw man", and, indeed, that Mr. Bergman is he.

[37] In that sense, the information sought to be disclosed impacts directly on the merits of the overall dispute and its revelation might well be prejudicial to Mr. Kaiser in that overall context. Thus, the presumption of privilege cannot be rebutted using the Cunningham criteria.

[38] Similarly, the presumption cannot be rebutted based on the Maranda criteria because disclosure of the source of Mr. Solmon's fees would reveal confidential communications between him and his client. The information is provided in the context of Mr. Solmon's need to know how his fees will be paid in order to decide whether to act. In the words of Supreme Court, it is therefore "information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose", and accordingly "enjoys the privileges attached to confidentiality": Maranda, at para. 22, citing Descôteaux, at p. 893 S.C.R. Of course, this privilege is lost if the party seeking disclosure can demonstrate that the communication was itself criminal or fraudulent or made in furtherance of a crime or fraud: Descôteaux, at p. 873 S.C.R. Here, the trustee did not seek to invoke the crime/fraud exception to force disclosure of the identity of the person who funded the removal motion.

[39] The foregoing conclusions are in themselves sufficient to dispose of the appeal.

[40] In addition, however, the motion judge rejected Mr. Kaiser's argument that disclosure of the identity of the person paying his legal fees would have a chilling effect on any further attempts to obtain funding for legal fees. Mr. Kaiser said in his affidavit that he was concerned that if the trustee learned of the details of his fee arrangement, the trustee would take steps to prevent him from obtaining legal advice and representation.

[41] The motion judge was of the view that there were few, if any, legitimate reasons that Mr. Kaiser, a bankrupt, would need legal advice in the future. On the contrary, the motion judge obviously thought that whatever legal proceedings Mr. Kaiser might initiate were more likely to be in furtherance of Mr. Kaiser's obstructive strategy of attempting to prevent the trustee from succeeding on the receivership motion.

[42] There was some discussion during oral argument of Mr. Kaiser's potential need for counsel in connection with the [page319] first disclosure motion referred to earlier in these

reasons. On that motion -- brought in May 2010 -- the trustee sought an order requiring Mr. Kaiser and Mr. Solmon to disclose the source of "any and all funds" received by Mr. Kaiser since the date of his bankruptcy, as well as ancillary information relating to those funds and their use by Mr. Kaiser and/or members of his family. This motion, although long dormant, is still outstanding and encompasses a request for relief that is much wider than merely the source of funding for the removal motion.

[43] As I have said, however, the chilling-effect point is not dispositive in any event. The appeal turns on the analysis, conducted above, that the trustee has failed to tender evidence sufficient to rebut the presumption of privilege based on the principles outlined in Maranda, Ontario (Assistant Information and Privacy Commissioner) and Cunningham. On that basis, the appeal must be allowed.

[44] Finally, given my conclusion that the appeal must be allowed for the reasons articulated above, there is no basis to order that Mr. Kaiser's lawyer be required to disclose the information as well. I observe, however, that the courts have been very reluctant to put lawyers in the position where they are required to give evidence against their clients except in very rare cases where the proper administration of justice demands it: see R. v. 1504413 Ontario Ltd. (2008), 90 O.R. (3d) 122, [2008] O.J. No. 1302, 2008 ONCA 253 (CanLII), at para. 13; and R. v. Colbourne, 2001 CanLII 4711 (ON CA), [2001] O.J. No. 3620, 157 C.C.C. (3d) 273 (C.A.), at para. 51. Here, there was another source of the information -- Mr. Kaiser -- had disclosure been ordered. Disposition

[45] For the foregoing reasons, I would allow the appeal, set aside the order below and in its place substitute an order dismissing the trustee's motion for an order directing Mr. Kaiser and Mr. Solmon to disclose the identity of the person who paid Mr. Kaiser's legal fees in connection with the removal motion and any appeals there from, with costs.

[46] Counsel may submit brief submissions, not to exceed three pages in length, as to costs within 15 days of the release of this decision.

Appeal allowed.

Notes

Note 1: Deschamps J. wrote separate but concurring reasons.

CanLII

Donell v. GJB Enterprises Inc., 2012 BCCA 135 (CanLII)

Date: 2012-03-27
Docket: CA038848
Other citation: [2012] 7 WWR 660
Citation: Donell v. GJB Enterprises Inc., 2012 BCCA 135 (CanLII), <http://canlii.ca/t/fqrb4> retrieved on 2015-09-18

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135

Date: 20120327
Docket: CA038848

Between:

Stephen J. Donell, Receiver Appointed By The California Superior Court, County of Los Angeles, Over GJB Enterprises., Gerald Berke and Judith Berke

Appellant
(Petitioner)

And

GJB Enterprises Inc., Gerald Berke and Judith Berke

Respondents
(Respondents)

Before: The Honourable Mr. Justice K. Smith
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, February 1, 2011
(*Donell v. GJB Enterprises, Inc.*, Vancouver No. S106088)

Counsel for the Appellant: W.E. Skelly & B. La Borie

Counsel for the Respondent, Gerald Berke: R.S. Anderson, Q.C.

Place and Date of Hearing:	Vancouver, British Columbia October 17, 2011
Place and Date of Judgment:	Vancouver, British Columbia March 27, 2012

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Neilson

Dissenting Reasons by:
The Honourable Mr. Justice K. Smith (p. 25, para. 92)

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal involves issues of solicitor-client privilege, including the effect of *Maranda v. Richer*, 2003 SCC 67 (CanLII), [2003] 3 S.C.R. 193 on the scope of the privilege. In particular, this appeal considers the distinction between communications and facts, the crime exception to solicitor-client privilege and matters of procedure to be followed by a court in determining issues of solicitor-client privilege.

Background

[2] The appellant Receiver was appointed over the assets of GJB Enterprises Inc. ("GJB") by a court in the State of California on March 23, 2009. On September 3, 2009, the California court ordered the principals of GJB, Gerald and Judith Berke, to disclose certain personal financial information. By a stipulation made and confirmed by court order on July 9, 2010, the receivership was expanded to include the Berkes personally. The stipulation included a statement that:

> For the purposes of this Stipulation, Gerald Berke does not contest the allegations that GJB was a 'Ponzi scheme' operated by Gerald in that for a number of years, there was no legitimate business operated by GJB, that money invested in GJB by third parties was used to pay earlier investors, that this was a pyramid scheme, and that eventually there were no remaining funds to pay investors.

Judith Berke denied any knowledge of the Ponzi scheme.

[3] Sometime in July 2010, Mr. Berke came to British Columbia.

[4] On July 19, 2010, $524,085.61 was paid by the Vancouver, B.C. law firm of Farris, Vaughn, Wills & Murphy LLP ("Farris Vaughn") to Mr. Berke. In August 2010, the Receiver learned that Mr. Berke had a bank account with a bank in British Columbia; on September 8, 2010, the British Columbia Supreme Court

issued an order recognizing and giving full force and effect in Canada to the orders of the California court made on March 23, 2009, September 3, 2009 and July 9, 2010. On September 13, 2010, $373,619.93 was paid into court by the bank; subsequently, the money was paid to the Receiver.

[5] The Receiver wrote to Farris Vaughn on October 28, 2010 requesting production of documents and records belonging to GJB and Mr. and Mrs. Berke (the "GJB Parties"). Farris Vaughn declined to produce the material on the grounds that it was subject to solicitor-client privilege.

[6] On January 12, 2011, the Receiver delivered an application in the Supreme Court seeking:

1. A declaration that no solicitor-client privilege or other privilege attaches to communications, files or other documents of any kind in the possession of Farris relating to the GJB Parties as a result of the GJB Parties' unlawful conduct.
2. Alternatively, a declaration that no solicitor-client privilege or other privilege attaches to communications, files, or other documents of any kind in the possession of Farris relating to the GJB Parties from March 23, 2009, to the present.
3. An order compelling Farris, within 14 days:
    a. deliver any assets, undertakings or property of the GJB Parties in its possession or control to the Receiver or to Heenan Blaikie LLP, solicitor for the Receiver; and
    b. provide any books, documents, files, securities, contracts, orders, communications, corporate and accounting records and any other papers, records or information of any kind including electronic records in its possession or control relating, in whole or in part, to the business or affairs or Property of the GJB Parties to Heenan Blaikie LLP, solicitor for the Receiver.

[7] At the hearing of the application, the respondent Mr. Berke filed the affidavit of Gordon Love, a lawyer at Farris Vaughn who had acted for years for Mr. Berke. Appended to this affidavit were a list of files and copies of trust account ledgers. Having reviewed the materials, the chambers judge held that the affidavit and the appended exhibits were subject to solicitor-client privilege. The materials were not shown to the Receiver or his counsel.

[8] The application was dismissed on February 1, 2011.

[9] Leave to appeal was granted by this Court and on September 2, 2011, the Chief Justice granted leave to the respondent to file a supplemental appeal book containing Mr. Love's affidavit. The appeal book was to be sealed and a copy not provided to the appellant. In addition, the respondent was granted leave to file a supplemental factum dealing with issues raised by Mr. Love's affidavit. The factum was to be sealed and remain so unless and until the division hearing the appeal determined the propriety of the presentation of the

supplemental factum. Leave was granted to Mr. Berke to adduce fresh evidence that the appellant knew as of March 11, 2011 that he had been indicted by the United States Department of Justice.

The chambers decision

[10] The chambers judge recited the history of the proceedings involving the GJB Parties. She noted at para. 16 that the Receiver had learned that the source of funds in Mr. Berke's British Columbia bank account was the trust cheque drawn by Farris Vaughn on July 19, 2010 and that the Receiver "wants to know or determine the source of those funds by reviewing the files of Farris".

[11] The judge stated the position of the Receiver as follows at para. 17:

> Mr. La Borie for the Receiver candidly states that he does not know what is in Farris' files and has therefore just asked for everything. He contends that solicitor-client privilege does not attach to communications in the face of fraud and here there were two frauds:
>
> 1. There is a *prima facie* reason to believe that the payment has been made to Mr. Berke in direct violation of the order of July 9, 2010, which is therefore a fraud on the Receiver and on the California court; and
> 2. The California court on April 13, 2010 found that "GJB conducted a Ponzi-like investment scheme".

[12] Mr. Berke relied on *Maranda*. At para. 23 of her reasons, the judge quoted the following passage from that decision:

> The decisions of this Court have consistently strengthened solicitor-client privilege, which it now refuses to regard as merely an evidentiary or procedural rule, and considers rather to be a general principle of substantive law. The only exceptions to the principle of confidentiality established by that privilege that will be tolerated, in the criminal law context, are limited, clearly defined and strictly controlled. The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients. In determining the propriety of the authorization and execution of the search in Mr. Maranda's office and examining the problem of the confidentiality of the information about the fees and disbursements billed to his clients, care must be taken to follow the general approach that can be seen in this Court's decisions in this area. [Para. 12; citations omitted]

[13] The judge summarized the position of Mr. Berke as follows at para. 24:

> Mr. Anderson [counsel for Mr. Berke] argues that not only is the scope of the order sought by the Receiver breathtaking in magnitude, the Receiver in its application seeks a declaration that no solicitor-client privilege attaches as far back as March 23, 2009 when all that occurred was the consent order appointing the Receiver of GJB. He argues that a solicitor cannot be compelled to provide his client's file in an investigation against his client or to gather evidence against his client, except in a very narrow crime exception, or

where counsel is not acting as counsel but simply as a conduit for the transfer of illegal funds: *Maranda* at para. 30.

[14] She continued at para. 25:

> I conclude that the law does not go so far as to destroy solicitor-client privilege when a client has engaged in a crime or a fraud. While there is a crime exception to the solicitor-client privilege, it is not as broad as the Receiver suggests it is.

[15] The judge then read the affidavit of Mr. Love, the partner at Farris Vaughn who had acted for Mr. Berke. It was agreed that Mr. Love's affidavit would not be provided to the Receiver or his counsel. The Receiver's counsel initially invited the judge to inspect all of the law firm's files pertaining to Mr. Berke, but was "content that [the judge] rely on the contents of the affidavit".

[16] The judge observed at para. 29:

> On this application there is no suggestion that Farris has participated in a crime, is a conspirator with Mr. Berke, or has been duped by Mr. Berke. There is no suggestion that the communications between Mr. Berke and Mr. Farris were criminal or were made with a view to Mr. Berke obtaining legal advice in order to facilitate the commission of a crime.

[17] She concluded at para. 30 that

> ... having reviewed the affidavit of Mr. Love, and on the basis of the law, I am satisfied that not only are almost all of the files not producible on the basis of relevance in the civil context, I conclude that solicitor-client privilege attaches to all of the files and documents in the possession of Farris.

Positions of the parties

[18] On appeal, the Receiver narrowed the scope of his request to seek only the trust account ledgers of Farris Vaughn that pertain to Mr. Berke and, in particular, that pertain to the funds paid to him in July 2009. The Receiver seeks these documents to attempt to trace the source of the money paid by Farris Vaughn to Mr. Berke.

[19] The Receiver asserts that the chambers judge erred in the following respects:

a) in determining that solicitor-client privilege attaches to the Ledgers;

b) by her interpretation and application of the "crime exception" or "public interest" exception to solicitor-client privilege;

c) by relying on the Love Affidavit *in camera* to determine the scope and extent of solicitor-client privilege, and in the alternative, by relying on the Love Affidavit alone in determining the scope and extent of solicitor-client privilege;

d) by failing to apply the principles under the BIA for a Canadian Court to cooperate to the maximum extent possible with respect to a foreign

representative and the foreign Court involved in a foreign receivership proceeding;

e) in determining that Farris Vaughn was not "duped" by Gerald Berke or that communications between Gerald Berke and Farris Vaughn were not made in order to facilitate a crime by Gerald Berke; and

f) in determining that the Ledgers were not relevant to the proceedings.

[20] In his factum, the respondent contends simply that the judge "was correct in holding that the materials sought by the Appellant were the subject of solicitor-client privilege". He does not address the relevance issue.

Discussion

Grounds of appeal

[21] I begin by addressing the grounds of appeal advanced by the Receiver.

[22] In his first ground of appeal, the Receiver asks this Court to determine an issue not put to the chambers judge: the production of the trust account ledgers only. The application before the judge sought production of all of the files of Farris Vaughn. In his factum, the Receiver states:

> In her Reasons for Judgment, the Trial Judge did not make the distinction between the Ledgers and any other information in Farris Vaughn's possession. The Trial Judge erred by doing so.

The judge was not asked to consider production of only one part of the material.

[23] In this Court, much of the debate focused on the discussion in *Maranda* concerning the production of a lawyer's statements of account and the applicability of that discussion to the production of records in the civil as opposed to the criminal context. I note that this issue, as well, does not appear to have been canvassed before the chambers judge.

[24] Although it might be preferable to remit the matter to the Supreme Court for a determination based on the request now advanced by the Receiver, I consider it to be in the interests of justice to resolve this matter in this Court.

[25] The second ground of appeal, which concerns the judge's interpretation and application of the crime or public interest exception to solicitor-client privilege, is related to the fifth, that is, whether Farris Vaughn was "duped". I shall discuss these grounds in due course.

[26] The appellant's next ground of appeal asserts that the judge's *in camera* reliance on the Love affidavit amounted to an error, but no exception was taken to that procedure at the time. The judge observed at para. 28 that "[i]t is agreed that Mr. Love's affidavit would not be provided to the Receiver or to Mr. LaBorie because to do so would waive privilege" and that "Mr. LaBorie initially invited me to inspect each of the files, but is content that I rely on the contents of the

affidavit". I would not accede to the third ground of appeal advanced by the appellant.

[27] With regard to the fourth ground of appeal, it is not at all clear that the Receiver argued before the chambers judge, as he does in this Court, that the Farris Vaughn files should be produced as a matter of cooperation pursuant to principles set out under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("the *BIA*").

[28] This argument can be dealt with summarily. While s. 275(1) of the *BIA* requires the British Columbia Supreme Court to "cooperate, to the maximum extent possible" with foreign representatives and courts, in this case the Receiver and the California court, such cooperation is not relevant to a determination of whether material is covered by solicitor-client privilege or is relevant under Canadian law. These are the matters under consideration in the present proceedings. I would not accede to the Receiver's fourth ground of appeal.

[29] I shall address the sixth ground of appeal, the relevance of the ledgers, in due course, noting that the question is one of fact or mixed fact and law and the decision of the judge is entitled to considerable deference.

Privilege

[30] The Receiver relies on the case of *Czech Republic v. Slyomovics*, 2010 BCSC 1274 (CanLII), 324 D.L.R. (4th) 222 (referred to as "Hodson" hereinafter, as per the style of cause employed by the parties), in which a distinction was drawn between communications for the purpose of obtaining legal advice, which are privileged, and "actions involving transactions within a solicitor's trust account, which are not privileged ..." (para. 31). In *Hodson*, Mr. Justice Savage referred to the extensive analysis of Mr. Justice Sigurdson in *Re Wirick*, 2005 BCSC 1821 (CanLII), 15 B.C.L.R. (4th) 193. Both cases refer to the decision of the Supreme Court of Canada in *Maranda*, a case relied on heavily by the respondent.

[31] The Receiver asserts that *Maranda* should be confined to the criminal context. The respondent contends that solicitor-client privilege must be approached on the basis that the former distinction between communications and facts or actions no longer retains its significance.

[32] The respondent notes that the Supreme Court of Canada continually has strengthened solicitor-client privilege. For example, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815 at para. 53, the Court referred to "solicitor-client privilege, which has been held to be all but absolute" and to the many decisions that have supported this principle, including *Maranda* and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574.

[33] It is helpful to begin the privilege analysis with basic principles.

[34] In Canada, solicitor-client privilege has become a substantive rule of law. This evolution from considering the rule as evidentiary only began with *Canada v. Solosky*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; it now is entrenched firmly as a substantive principle (see *Lavallee, Rackel& Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209 at para. 18; *Maranda* at para. 12). The Supreme Court in *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445 had this to say at para. 33:

> The importance of solicitor-client privilege to both the legal system and society as a whole assists in determining whether and in what circumstances the privilege should yield to an individual's right to make full answer and defence. The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.

[35] The articulation of the general rule, both in the case law and in commentaries, is that it pertains to communications for the purpose of obtaining legal advice. The distinction between communications, which are privileged, and facts, which are not, has been recognized generally (see John Sopinka and Sidney N. Lederman, *The Law of Evidence in Canada,* 3d ed. (Markham: LexisNexis Canada, 2009) at 931-32, para. 14.58-59; Colin Tapper, *Cross on Evidence,* 9th ed. (London: Butterworths, 1999) at 442, para. 3; Hugh M. Malek et al., eds., *Phipson on Evidence*, 17th ed. (London: Thomas Reuters, 2010) at 672).

[36] In *Ontario Securities Commission and Greymac Credit Corp. Re Ontario Securities Commission and Prousky* (1983), 1983 CanLII 1894 (ON SC), 146 D.L.R. (3d) 73 at 82-3, 41 O.R. (2d) 328 (Div. Ct.), the court had this to say on the question of the application of privilege to the movement of funds in and out of a trust account:

> The only case directly in point that was cited to us was the decision of Clyne J. in the Federal Court of Bankruptcy in Australia in *Re Furney, a debtor*, [1964] A.L.R. 814. There a solicitor for a bankrupt, when summoned by the registrar in bankruptcy to attend and give evidence relating to moneys received from the debtor, or held in trust for the debtor, or paid from his trust account to the debtor, refused to answer on the grounds of solicitor-and-client privilege. He also refused to produce documents relating to such payments. In very short reasons, Clyne J. ruled that the solicitor was obliged to answer the questions, and should produce any relevant documents, because the privilege was intended to protect communications, whereas the questions related to "questions of objective fact".
>
> In my judgment, if I may say so with respect, the *Furney* case was rightly decided. 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.
>
> It may be helpful to ask in such a case whether the client himself if he were the witness, could refuse on the ground of the solicitor-and-client privilege to disclose particulars of a transaction directed by him through his solicitor's trust account. The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter as to which the client himself could claim the privilege, because it is not a communication at all. It is an act. The solicitor-and-client privilege does not enable a client to retain anonymity in transactions in which the identity of the participants has become relevant in properly constituted proceedings.

[37] *Greymac* was cited with approval at para. 30 of *Maranda*. Although the Court in *Maranda* refers to the fact that counsel in *Greymac* was being used as a conduit for the transfer of funds, the articulation of principle by the Ontario Court of Appeal was stated more broadly. *Greymac* has been referred to by courts in this province on a number of occasions (see, e.g., *Hodson* at para. 21; *Re Wirick* at paras. 13 and 14; *Taylor Ventures Ltd. (Re)* (1999), 1999 CanLII 5475 (BC SC), 60 B.C.L.R. (3d) 348, 9 C.B.R. (4th) 146 (S.C. Chambers) at para. 15).

[38] This Court in *R. v. Joubert* (1992), 1992 CanLII 1073 (BC CA), 7 B.C.A.C. 31, 69 C.C.C. (3d) 553 at 569 also provides some support for distinguishing between communications and facts. The court concluded in that case that a record of money paid into and out of a lawyer's trust account was not subject to solicitor-client privilege.

[39] Keeping in mind these basic principles, I turn now to *Maranda*.

[40] In *Maranda* the Court affirmed at para. 12 that:

> The decisions of this Court have consistently strengthened solicitor-client client privilege, which it now refuses to regard as merely an evidentiary or procedural rule, and considers rather to be a general principle of substantive law.

To this statement, the Court added:

> The only exceptions to the principle of confidentiality established by that principle that will be tolerated, in the criminal law context, are limited, clearly defined and strictly controlled.

The Court explained that this is to avoid lawyers becoming "a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients" (para. 12).

[41] In my view, the present case must be considered against the backdrop of the criminal law. Repeatedly, Mr. Justice LeBel spoke of the relevance of the criminal law context to the matter at issue: the seizure of records from a lawyer's

office during the criminal investigation of the lawyer's client. At para. 28 he stated:

> The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. In the context of criminal investigations and prosecutions, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination.

[42] At para. 29 he distinguished the case from those dealing with the production of solicitors' records in the civil law context, saying that because the Court was "dealing here with a criminal law case, we must not overestimate [those cases'] authority ...".

[43] Much has been made of LeBel J.'s treatment in *Maranda* of the distinction between communications and actions or facts. In this province there has been debate as to whether *Maranda* did away with the distinction. In my view, it did not.

[44] It is important to remember that the issue before the Supreme Court concerned the production of a lawyer's bill for fees and disbursements. This was the issue that was placed into the context of the distinction between communications and facts.

[45] At para. 29, LeBel J. explained the basis for distinguishing one of his own civil law decisions, stating that the case in question

> ... involved a dispute between two groups of shareholders who claimed to be entitled to complete financial information concerning the company's affairs, including information about the lawyers' fees that some of them had allegedly arranged to be paid by the company in which they all had an interest.

He went on to comment that because the Court in *Maranda* was dealing with a criminal case,

> [a]n application by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.

[46] At para. 30, Justice LeBel noted that the rule to be adopted, in the case itself, "cannot be based on the distinction between facts and communications". He commented that

> [t]he protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decision or representation in the courts.

He referred to the distinction between communications and facts as follows:

> The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence. ... It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication ... .

[47] It was LeBel J.'s view that "the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication". This was because of "the nature of the relationship in question"; as he stated at para. 32:

> ... The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.

[48] At para. 34, LeBel J. returned to the basic theme of the judgment, stating, in regard to the information sought by the Crown:

> As a general rule, however, a lawyer cannot be compelled to provide that information, in an investigation or as evidence against his or her client.

[49] I see nothing in *Maranda* that erodes generally or does away with the distinction between facts and communications. The case concerned a specific type of document – a lawyer's fee account – which is intrinsically connected to the solicitor-client relationship and the communications inherent to it; to repeat LeBel J.'s formulation, "[t]he existence of the fact consisting of the bill and its payment arises out of the solicitor-client relationship and what transpires within it". As noted by LeBel J., what transpires within that relationship is communication for the purpose of enabling clients to obtain legal advice; it is that communication that is protected by solicitor-client privilege.

[50] *Maranda* neither does away with the distinction between facts and communications nor holds that entries in a lawyer's trust account ledgers are presumptively privileged. It does mandate that such entries must be considered in light of any connection between them and the solicitor-client relationship and what transpires within it.

[51] In the present case, we are not concerned with a lawyer's bill. The Receiver seeks production of trust ledgers. Generally, such documents record facts, not communications, and are not subject to solicitor-client privilege, but I would not favour a blanket endorsement of the automatic production of such records. In my view, while the analysis in *Maranda* did not dispose of the distinction between facts and communications, it requires the court to ensure that entries on a trust ledger do not contain information that is ancillary to the provision of legal advice.

[52] The Alberta Court of Appeal in *Wyoming Machinery Co. v. Roch*, 2008 ABCA 433 (CanLII), [2009] 3 W.W.R. 433 addressed the production of trust account records and discussed the distinction between acts and communications. Although the comments of the court are *obiter dicta* because "the evidentiary record [was] insufficient to find that the trust record entries

sought here were protected by solicitor-client privilege" (para. 9) and any privilege had been waived, I find them to be consistent with the approach of the Court in *Maranda*.

[53] At paras. 19 and 21 in *Wyoming,* the court observed:

> [O]ne [cannot] short-circuit the whole discussion of privilege by saying that it only applies to communications, and so does not apply to a solicitor's bookkeeping or money flows, on the theory that
>
> (a) they are information, not communications, or
>
> (b) they are acts, not communications.
>
> ...
>
> Distinction (b) makes more sense, but it has two limitations. The first is that very often what is sought is the lawyer's bookkeeping records or accounts to the client, not the cancelled cheques or the deposit slips. Strictly speaking, those bookkeeping records are communications, not acts.

[54] At para. 22 the court stated:

> The second limitation to distinction (b) is more substantial and important. Lawyers usually get money for purposes ancillary to their retainer, and the purpose of their retainer is usually to
>
> (a) run or defend litigation or potential litigation,
>
> (b) give legal advice,
>
> (c) protect a client in closing a deal,
>
> (d) negotiate a deal, or
>
> (e) some combination of the foregoing.
>
> If legal advice, or running or defending litigation or potential litigation is the dominant purpose of the retainer, then a solicitor's accounting records ancillary to that may well be privileged. And if litigation or legal advice is a distinct part of the retainer, then the solicitor's accounting records ancillary to that distinct part may well be privileged. Conversely, if the retainer at the time of receipt of funds is merely to act as a paying agent, there might be no privilege: *Maranda v. Leblanc, supra*, at para. 30.

The court added that the precise limits of privilege will have to be worked out through the case law.

[55] I adopt the reasoning of the Alberta Court of Appeal. In my view, whether the financial records of a lawyer are subject to solicitor-client privilege depends on an assessment of the connection between the record in issue and "the nature of the relationship in question" (*Maranda* at para. 32). As was held in *Maranda*, a lawyer's bill arises out of the solicitor-client relationship and generally will be protected. This is because bills flow out of communications between the solicitor and the client seeking legal advice. In *Greymac*, the court held that generally evidence of deposits to and transfers from a lawyer's trust account is evidence of facts, not of communications. The court held that such records are not

privileged, adding the caveat that the "advice and communications from the client relating to advice" must be expunged (para. 22).

[56] In *Maranda*, the Court concluded that lawyer's bills are presumptively subject to solicitor-client privilege (at para. 33). The Ontario Court of Appeal in *Ontario (Attorney General v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 2005 CanLII 6045 (ON CA), 251 D.L.R. (4th) 65, 197 O.A.C. 278, concluded that the presumption is rebuttable "if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege" (para. 12). Referring to this Court's decision in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 2003 BCCA 278 (CanLII), 226 D.L.R. (4th) 20, the Ontario Court of Appeal continued:

> If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed.

This same concern was identified by the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)*, 1998 CanLII 9075 (FCA), [1998] 4 F.C. 89, as noted by LeBel J. at para. 27 of *Maranda*.

[57] In *Stevens*, the court referred to *Greymac* and confirmed that a distinction exists between communications and facts. Mr. Justice Linden observed at para. 42 that

> ... the jurisprudence in this area is not really in conflict. It merely reflects the existence of a broad exception to the scope of privilege, namely, that it is only communications which are protected. The acts of counsel or mere statements of facts are not protected.

He continued at para. 44:

> The statement of account is privileged because it is integral to the seeking, formulating and giving of legal advice. The trust account ledger is not protected because it relates to acts done by counsel.

[58] *Maranda* and subsequent decisions have held that solicitor-client privilege is all but absolute. Expressly in the criminal law context, *Maranda* held that because of the connection of lawyers' bills to the core of the solicitor-client relationship, lawyers' bills are privileged presumptively. Neither *Maranda* nor subsequent decisions abolished the distinction between communications and facts or actions, but that distinction must be considered in light of the strengthened support accorded to solicitor-client privilege and the analysis mandated by *Maranda*. The inquiry as to whether there is a reasonable possibility that an assiduous inquirer could deduce, infer or otherwise acquire communications that are protected by solicitor-client privilege arises once the *Maranda* analysis has determined that privilege is presumed.

[59] In summary, in my view:

1. at a minimum, *Maranda* establishes that lawyers' bills, in the criminal law context, are presumptively subject to solicitor-client privilege;
2. this presumption flows from the connection between lawyers' bills and the nature of the relationship between lawyers and clients; the account reflects work done on behalf of the client which involves communications that are privileged;
3. the presumption may be rebutted if it is established that there is no reasonable possibility that disclosure will directly or indirectly reveal any communications protected by privilege;
4. *Maranda* did not do away with the distinction between communications, which are privileged, and facts, which are not;
5. other financial records of lawyers are not presumptively subject to solicitor-client privilege insofar as they merely represent records of actions or facts, but they should not be produced automatically solely for that reason;
6. *Maranda* mandates that it is necessary to consider such records in order to determine whether they arise out of the solicitor-client relationship and what transpires within it, that is, communications to obtain legal advice;
7. if it is concluded that the records do arise out of that relationship and what transpires within it, they are presumed to be privileged, but the privilege can be rebutted and the document produced if it is established that production will not permit the deduction or acquisition of communications protected by solicitor-client privilege.

[60] I now turn to the circumstances of this case. This case does not concern lawyers' bills; it concerns trust account ledgers which involve money management. Insofar as this management reflects the solicitor-client relationship and what transpires within it, the entries are presumed to be privileged. Those that do not reflect that relationship are not privileged.

[61] At the hearing of the appeal, the Court reviewed Mr. Love's affidavit and the exhibits appended to it, as did the chambers judge. These documents were not made available to the Receiver or his counsel. The Receiver took no exception to this Court's looking at the documents, but objected to a consideration of arguments *in camera* by the chambers judge and by this Court. Submissions were made on this issue, but no decision was taken concerning the respondent's sealed factum.

[62] The Receiver seeks access to the ledgers in order to trace the source of the payment made by Farris Vaughn to Mr. Berke on July 19, 2010. In my view, there is no need to produce the entry related to that payment because the Receiver has that information.

[63] Although the entries on the ledger prior to July 19, 2010 merely record payments into and out of the trust account and *prima facie* are not privileged, they must be considered in light of the analysis in *Maranda*. Do they arise out of the solicitor-client relationship and what transpires within it, that is, do they relate to communications to obtain legal advice?

[64] Entries subsequent to the entry dealing with the July 19, 2010 payment to Mr. Berke do not fall within the scope of the information sought by the Receiver and need not be produced. In addition, in my view, some or all of these entries do arise out of the solicitor-client relationship and what transpires within it. That is to say, they do relate to communications to obtain legal advice and I am not satisfied that there is no potential that these entries could be used to deduce or otherwise acquire communications protected by solicitor-client privilege. For that reason, they should not be produced. The same reasoning applies with respect to two specific entries prior to July 19, 2010; these also should not be produced.

[65] As to the other entries prior to July 19, 2010, I identify those which, in my view, should be produced and state why. First, I see no reason why the "matter" to which the ledgers refer – a real estate transaction – should not be produced, as it reflects a fact that is known to others. Second, the entries dated 06/06/2007, 07/06/2007, 03/12/2008 and 08/06/2009 should be produced.

[66] These particular four entries merely relate to money management and record the movement of funds held in trust into and out of investment vehicles. They do not arise out of the solicitor-client relationship and what transpires within it; in other words, they do not relate to communications to obtain legal advice. They are not subject to solicitor-client privilege.

The crime or public interest exception

[67] The judge had the following to say at para. 29:

> On this application there is no suggestion that Farris has participated in a crime, is a conspirator with Mr. Berke, or has been duped by Mr. Berke. There is no suggestion that the communications between Mr. Berke and Mr. Farris were criminal or were made with a view to Mr. Berke obtaining legal advice in order to facilitate the commission of a crime.

[68] The Receiver contends that this statement is based on an error of law. In particular, he asserts that the judge erred by requiring him to show that Farris Vaughn had participated in a crime, was a conspirator with the respondent or was duped by the respondent. He states in his factum that "[t]he requirement to show wrong doing on Farris Vaughn's part or that it was 'duped' was an error of law".

[69] In my view, although the treatment of the crime exception by the chambers judge was somewhat cursory, I do not think the judge erred. At para. 21, drawing on the case of *Majormaki Holdings LLP v. Wong,* 2007 BCSC 1399 (CanLII), 161 A.C.W.S. (4d) 543, she stated:

> Mr. Justice Hinkson ... reviewed the law relating to the future crimes and broad exception discussed by Mr. Justice Binnie in *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, and stated at para. 18:
>
> > At para. 62 of the decision, Mr. Justice Binnie underlines the distinction between the situation where a client consults with a lawyer with the intent of committing a crime of fraud and the situation where the client has no criminal or fraudulent intent when consulting a lawyer who later engages in such activity:
> >
> > > In my view, destruction of the privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator."

Mr. Justice Hinkson, as he then was, correctly identified the context of Mr. Justice Binnie's comments in *Campbell* and the separate indicia that apply to a consideration of the crime exception.

[70] In *Campbell,* Binnie J. was addressing the proposition that solicitor-client privilege may be lost when a person obtains advice with no intention of committing a crime but later does so. He began his analysis by stating that it takes more than the existence of both advice and a crime to lose privilege. The crime exception applies when a person seeks legal advice with the intention of facilitating the commission of a crime. In that case, the involvement of the lawyer does not attract protection. It has been said that the advice obtained is obtained by fraud. Solicitor-client privilege also may be lost if the lawyer is duped or becomes a conspirator.

[71] At para. 29 the chambers judge covered both of these potential scenarios. She stated that there was no suggestion that Farris Vaughn was a conspirator or had been duped and then observed that there was no suggestion the respondent had consulted the firm to obtain legal advice to facilitate the commission of a crime. That analysis was wholly consistent with the law as stated by Binnie J.

[72] On this appeal, the appellant contends that Farris Vaughn was duped because it paid money to Mr. Berke in contravention of the California court order. I question whether a mere payment of money contravened the California court order, noting that it was argued that the California order did not have extra-territorial effect. In any event, I would not entertain this contention in light of the observations of the chambers judge that no suggestion was made to that effect in the proceedings before her.

[73] In his factum the Receiver makes two points regarding the respondent's asserted fraud:

> There were two obvious frauds committed by Gerald Berke. The first was the "Ponzi-like investment scheme" carried out by the GJB Parties, including Gerald Berke. A Ponzi scheme is by definition a fraud which requires the

> return of assets unjustly obtained. This casts doubt upon the origin of any funds in the hands of the GJB Parties.
>
> The second fraud was the release of the funds to Gerald Berke in violation of the Expansion Order. Here the intention of Gerald Berke may easily be assessed. *Any* communications that he had with Farris Vaughn in and about July 2010 with respect to release of the funds to his benefit were in contemplation of breaching the Expansion Order that was about to be made or which had already been consented to. This constituted a fraud on the California Court or flaunting of its Order and wrongful conduct to which privilege should not attach.

[74] The first point, in part, is answered by the portion of the ledger which I would order produced. The entries simply record money in and money out. The extent to which they assist the Receiver in ascertaining the origins of the funds paid to Mr. Berke will be for him to determine. The second point is answered by the fact that the Receiver is fully aware of the July 19, 2010 payment.

[75] In addition, an examination of the complete ledger and of the Love affidavit satisfies me that any communications that might be revealed by the ledger do not involve facilitating the commission of a crime.

[76] I would not accede to the second and fifth grounds of appeal.

The sealed factum

[77] Because Mr. Anderson advised us that the respondent's sealed factum could be of assistance in deciding this appeal and because the protection of solicitor-client privilege has been said to be as close to absolute as possible (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association* at paras. 53, 54 and 75), we decided to read the sealed factum.

[78] By reference to Mr. Love's affidavit and to information in it concerning Mr. Berke's relationship with United States criminal authorities, Mr. Anderson was able to make clear to the Court the position that is advanced in the sealed factum.

[79] Although the law supports the use of *in camera* submissions in matters concerning solicitor-client privilege, I was troubled by the prospect of this Court's receiving *in camera* submissions *ex parte* and, in particular, submissions that were not made to the chambers judge. The respondent submitted that solicitor-client privilege should be treated similarly to informer privilege in this context, pointing out that both have been treated as nearly absolute. He relies on *Lavallee, R. v. Basi*, 2009 SCC 52 (CanLII), [2009] 3 S.C.R. 389, *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455 and *Named Person v. Vancouver Sun*, 2007 SCC 43 (CanLII), [2007] 3 S.C.R. 253.

[80] In *Named Person*, the Court described informer privilege as absolute. The Court in *Basi* stated rather that "informer privilege has been described as 'nearly absolute'" (para. 37), but noted that "the privilege itself is 'a matter beyond the discretion of a trial judge'". In *Lavallee*, the Court observed that solicitor-

client privilege is not absolute, but "must remain as close to absolute as possible" (para. 36). The Court in *Smith v. Jones*, while recognizing the significance of solicitor-client privilege, stated repeatedly that it is not absolute.

[81] While these authorities support *ex parte in camera* proceedings I would not import such proceedings automatically or casually into the procedure for considering solicitor-client privilege. One important distinction between informer and solicitor-client privilege is the safety of the informer. This was a factor noted repeatedly by the Court in *Named Person*, although the case concerned divulging information to the media as opposed to the other side. Divulging information to the other side was the subject of *Basi*. There, the Court suggested that trial judges should be creative in protecting informer privilege while ensuring that accused persons have a fair trial.

[82] In my view, courts should avoid *in camera* proceedings when it is feasible to do so; *in camera ex parte* proceedings more so. While recognizing that *in camera* proceedings may be required in some circumstances, I support the comments of Madam Justice Gray in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 (CanLII), 59 B.C.L.R. (4th) 264 at paras. 74 and 75:

> In my view it is preferable to resolve disputes over whether documents are privileged on the basis of affidavits rather than review of the document by the court. That ensures that the process is open rather than secret, and as a result, the parties can understand the basis for the decision.
>
> There may be occasions when a party cannot provide the information required to establish privilege without revealing the privileged information itself. In such cases, it is entirely appropriate for the court to review the documents themselves to determine the question of privilege. However, parties should be discouraged from relying on the court to review documents as a method of saving the parties the time and trouble of preparing the evidence necessary to establish the basis for privilege.

Relevance

[83] The judge stated that she was satisfied that "almost all of the files [are] not producible on the basis of relevance" (para. 30). There was no analysis leading to this conclusion, which was based on the judge's review of Mr. Love's affidavit, the contents of which were not made known to the appellant. In this Court, the scope of the relevance inquiry would be limited to the trust ledgers.

[84] The appellant addressed relevance in his factum as follows:

> The Ledgers are clearly relevant to these proceedings as they relate to the origin of the HSBC Funds, funds which may be proceeds of a Ponzi Scheme. Tracing the assets of the GJB Parties for the benefit of defrauded creditors is the entire purpose of these proceedings.
>
> Even if the Ledgers are unrelated to the GJB scheme, Berke stipulated to the California Court that he would identify the entirety of his assets over $1000.00 to the Receiver under the Expansion Order and has been ordered to disclose his bank account information since 2002. He has been found in contempt as a result of his failure to abide by Orders of the California Court. Information

> regarding Berke's assets in these circumstances is relevant and should be disclosed.

As noted, the respondent did not address the issue.

[85] The application before the chambers judge was for a declaration that no solicitor-client privilege attached to communications, files or other documents in the possession of Farris Vaughn and for an order for the production of such material.

[86] The focus of the parties and of the judge appears to have been on the issue of solicitor-client privilege. The extent to which, if at all, relevance was addressed is not apparent to me. Even if it were to have been addressed, the focus would not have been on the trust account ledgers, but on the more general request before the judge.

[87] It is apparent from an examination of the reasons for judgment of the justice of this Court who granted leave to appeal that the focus on that application was on the issue of solicitor-client privilege, not relevance.

[88] In my view, it is not appropriate for this Court to consider whether the trust account ledgers are relevant. Such a determination would require a greater appreciation of the mandate of the Receiver, the history of the dispute and the information he presently has than is available to this Court. I suspect that the ledgers will provide the Receiver with little helpful information, but whether they prove to be relevant to his mandate potentially is a matter for subsequent inquiry.

[89] I would not accede to the sixth ground of appeal.

Conclusion

[90] I would allow this appeal and order that the trust account ledger information and entries identified at para. 65 herein be provided to the Receiver.

[91] I also would order that the sealed material be resealed and dealt with as proposed by Mr. Justice Smith in his dissenting reasons.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Neilson"

Reasons for Judgment of the Honourable Mr. Justice K. Smith:

[92] I have read the reasons for judgment of my colleague the Honourable Mr. Justice Chiasson in draft form and find I am unable to agree with his proposed disposition of this appeal.

[93] My colleague has set out the background facts and I will not repeat them save as necessary to explain why I have reached a different conclusion. I would dismiss the appeal because, in my view, to disclose the trust account ledgers as he proposes will undermine the solicitor-client privilege in the circumstances of this case.

[94] Solicitor-client privilege is a substantive rule of law. The privilege protects from disclosure all information arising out of the solicitor-client relationship while the lawyer is giving legal advice or is otherwise acting as a lawyer. Thus, it protects not only direct exchanges of information, such as by speech or writing, but also facts and events that convey information indirectly by way of inference drawn from their existence and surrounding circumstances. Moreover, it applies whether or not such information is relevant to the particular request for disclosure. The privilege is virtually absolute – the only exception excludes transactions that are intrinsically criminal or are intended to facilitate crime. The privilege does not apply, however, to information arising out of dealings between lawyer and client when the lawyer is acting not as a lawyer but in some other role, such as a business advisor, a stakeholder, or a mere channel for the transfer of the client's funds. Nor does it apply to communications, facts, or events that arise during a solicitor-client relationship but independently of the relationship, such as the coincidental occurrence of unrelated events.

[95] The reason for the rule, its importance, and its nature and scope are summarized in clear and unequivocal terms in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574, *per* Binnie J., writing for the Court:

> [9] Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. 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.
> >
> > (*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (CanLII), at para. 35, quoted with approval in *Lavallee, Rackel& Heintz v.*

> *Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII), at para. 36.)
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.
>
> [10] At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity: *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263; *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18 (CanLII), at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 (CanLII), at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31 (CanLII); *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36 (CanLII); *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8 (CanLII). A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).

[96] In *Blood Tribe*, a dismissed employee sought disclosure of her personnel file from her employer because she believed the employer had improperly collected inaccurate information about her and had used it to discredit her with its board. When the employer refused to disclose her file, she complained to the Privacy Commissioner, who sought access to her employment records under statutory authority. The employer, which had sought legal advice at the time of the dismissal, claimed solicitor-client privilege for "a bundle of letters" from its lawyers. In upholding the claim of privilege, Binnie J. held that all information shared in a solicitor-client relationship is presumptively privileged. He wrote,

> [16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42). ...

[97] That the presumption of privilege applies to all information arising out of the solicitor-client relationship, including "facts" and "events", and is not restricted to communications seeking or providing legal advice, is illustrated by the decision in *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18 (CanLII), [2004] 1 S.C.R. 456, to which Binnie J. referred in para. 16 of *Blood Tribe.*

[98] *Foster Wheeler* concerned whether lawyers for a party could be compelled to answer certain questions on examination for discovery in an action for damages for breach of contract. In reasons given for the Court, LeBel J. addressed the nature of privileged information and the necessarily "sensitive and complex" approach to its protection in many cases. He said,

> 38 ... It would be inaccurate to reduce the content of the obligation of confidentiality to opinions, advice or counsel given by lawyers to their clients. While this is, on many occasions, the main goal in creating a professional relationship with a lawyer, it is often the case that this relationship can also entail some highly diverse activities, such as representing clients before various tribunals or administrative bodies, negotiating or drawing up contracts, preparing reports, filling out various forms and having discussions with members of governing bodies of public entities or private corporations. In the course of carrying out these mandates, lawyers receive and send out a wide range of information. ...

Such cases, he noted, require a close examination of the relationship between the lawyer and the client since

> 39 ... not all facts and events that lawyers deal with in the execution of their mandates are covered by professional secrecy, nor does the legal institution of professional secrecy exempt lawyers from testifying about facts involving their clients in all situations. ...

[99] "Facts" and "events" arising coincidentally and independently of the solicitor-client relationship are not within the privilege, as LeBel J. noted:

> 39 ... To illustrate, let us take the case of a lawyer who holds discussions with a client while riding as a passenger in the client's car. In the event of an accident, the lawyer would not be competent to testify about the opinion he or she was giving the client at the time of the incident, but could be forced to answer questions regarding whether the car was travelling above the speed limit. ...

[100] As well, apart from such independent facts or events, distinct professional acts may emerge from the relationship. In simple cases of this type, LeBel J. noted, the burden of justifying privilege for the act can safely be placed on the solicitor without compromising the privilege (at para. 40). However, it is difficult to segregate single professional acts from the complex of facts, events, and communications that characterizes ongoing solicitor-client relationships. In the following passage, LeBel J. identified the danger of inadvertently undermining solicitor-client privilege if the solicitor should be required to attempt to isolate such facts and to justify the claim of privilege in respect of each:

> 41 In the case of complicated and prolonged mandates, the obligation of justifying each case as one where confidentiality and, by extension, immunity from judicial disclosure apply is poorly adapted to the nature of professional relationships and the safeguards required to maintain secrecy in an effective manner. In a case such as the one before this Court, the client and lawyer would be expected to dissect all facets of their relationship in order to characterize them and consequently invoke immunity from disclosing some elements, but not others (*Québec (Sous-ministre du Revenu) v. Legault*, supra, at p. 231). Proceeding in this manner multiplies the risks of disclosing confidential information and further weakens professional secrecy, an institution that the legislature and the courts have afforded strong and generous protection (*Poulin c. Prat*, [1994] R.D.J. 301 (Que. C.A.), at p. 307; *R. v. McClure*, *supra*, at para. 33).

[101] Accordingly, he concluded, as Binnie J. noted in *Blood Tribe* at para. 16, there should be a rebuttable presumption in such cases that all information arising out of the solicitor-client relationship is privileged. He said,

> 42 In such cases, a different method would be preferable. It would be enough to have the party invoking professional secrecy establish that a general mandate had been given to a lawyer for the purpose of obtaining a range of services generally expected of a lawyer in his or her professional capacity. At this stage, there would be a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature. Although the case concerned a different field of law, namely criminal procedure, this Court recommended an analogous method in the initial steps of the examination of difficulties arising out of potential conflicts between solicitor-client privilege in the common law and the need to protect the presumption of innocence (*R. v. McClure*, *supra*, at paras. 46-51). ...

[102] As my colleague has noted, the appellant relies on cases such as *Hodson*, *Wirick*, *Taylor Ventures*, and *Greymac* and argues that only communications made for the purpose of obtaining legal advice are privileged – that "objective facts", such as "actions involving transactions within a solicitor's trust account" are not. That view, which enjoyed a measure of general acceptance for a time, has been overtaken by the more nuanced analysis set forth by the Supreme Court of Canada in its decisions in *Blood Tribe* and *Foster Wheeler*, as I have explained, as well as in *Maranda*. Indeed, the fact/communication approach to solicitor-client privilege was rejected in *Maranda* as a viable basis for a general rule to govern the privilege analysis.

[103] *Maranda* arose out of the execution of a search warrant in the course of an investigation of a lawyer's client for money laundering and drug trafficking. The warrant authorized a search of the lawyer's office for any documents relating to fees and disbursements billed to his client. As LeBel J. observed, writing for the majority, the appellate court placed "great weight on the distinction between a fact and a communication" (at para. 26). Moreover, he pointed out, "[t]here is a line of cases that supports the position taken by the Quebec Court of Appeal" (at para. 27). In this connection, he referred to *Rieger v. Burgess* (1989), 1989 CanLII 4593 (SK QB), 76 Sask. R. 184, 34 C.P.C. (2d) 154 (Q.B.); *R. v. Joubert*

(1992), 1992 CanLII 1073 (BC CA), 69 C.C.C. (3d) 553, 67 B.C.A.C. 31 (C.A.); and *Kruger Inc. v. Kruco Inc.*, 1988 CanLII 962 (QC CA), [1988] R.J.Q. 2323, 20 Q.A.C. 106 (C.A.), a decision he had written and on which this Court had relied in *Joubert*.

[104] *Rieger* concerned whether a client could be compelled to answer on an examination in aid of execution whether a fee he paid his lawyer was paid pursuant to a contingency fee agreement. The court ordered him to answer, stating, at para. 4,

> ... The defendants are not seeking disclosure of any communications between the plaintiffs and their solicitors that deal with the prosecution of the action or the advice given with respect thereto. They are seeking to determine if any monies are owed to the plaintiffs by their solicitors which they are entitled to do on an examination in aid of execution. This in my opinion is not privileged information as it has nothing to do with the seeking and obtaining of legal advice and the past or future conduct of litigation.

[105] In *Joubert*, the police sought the lawyer's trust account information in connection with an allegation that the lawyer's client had used the trust account to "launder" large sums of money. Mr. Justice Wallace, writing for this Court, held the trust account information was not privileged in those circumstances. He said, at 569,

> ... Mr. Gardner's knowledge of the transfer of the large sums of money through his trust account was not acquired as a consequence of communications which he had with his client for the purpose of obtaining or giving legal advice. Rather it was "real" evidence of an accounting nature and not professional communications made in a professional capacity; accordingly, the information was not protected. (See *Descôteaux et al. v. Mierzwiski and Attorney General of Quebec* (1982), 1982 CanLII 22 (SCC), 141 D.L.R. (3d) 590, 601-2 (S.C.C.)).

[106] As LeBel J. noted (at para. 27 of *Maranda*), *Kruco* held under Quebec law that the solicitor-client privilege did not protect information contained in billings that did not disclose any details of the services rendered.

[107] By way of contrast, LeBel J. observed (also at para. 27) that there are other judgments in which this fact/communication distinction was not helpful in determining whether solicitor-client privilege should apply. He said,

> ... The most important of those judgments is undoubtedly the decision of the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)*, [1988] 4 F.C. 89. In that case, although it dealt with the problem of applying federal access to information legislation, Linden J.A. had concluded that the amount of fees fell within the framework of the solicitor-client relationship and had to be protected (paras. 29-30). His reasons stressed the importance of the information that able counsel could sometimes extract from apparently neutral information such as the mere amount of the fees paid by opposing counsel's client (para. 46) (see also, for example: *Hodgkinson v. Simms* (1988), 1988 CanLII 181 (BC CA), 55 D.L.R. (4th) 577 (B.C.C.A.); *Madge v. Thunder Bay (City)* (1990), 1990 CanLII 6838 (ON SC), 72 O.R. (2d) 41 (S.C.); *Municipal Insurance Assn. of British Columbia v. British Columbia (Information and*

> *Privacy Commissioner)* (1996), 1996 CanLII 521 (BC SC), 143 D.L.R. (4th) 134 (B.C.S.C.), at paras. 47-49). [Emphasis added.]

[108] The judgments cited took the view, as did *Stevens*, that even apparently neutral facts, such as the mere fact of delivery by the defendant of certain minutes of a meeting to her solicitor (*Madge*) and the total amount of a legal bill incurred in the defence of a lawsuit (*Municipal Insurance Assn. of British Columbia*), can amount to the indirect disclosure of privileged information.

[109] *Hodgkinson* is of particular interest, since it was a decision of this Court. The case concerned the litigation privilege and in particular whether photocopies of documents gathered by the plaintiffs' lawyer from third parties for his litigation brief were privileged even though the original documents were not created for the purpose of litigation. The chambers judge held the document photocopies were not protected by privilege, reasoning that they were not and never had been "communications". In allowing an appeal, McEachern C.J.B.C. (Taggart J.A. concurring, Craig J.A. dissenting but not on this point) said, at 580,

> I do not find it helpful to approach this question of privilege just from the perspective of "communications." Privilege attaches in proper cases to conventional communications where information is transferred from a client to his solicitor and vice versa by letter or conversation, but other documents such as cheques, invoices, legal bills and many other commercial or non-commercial documents may also be privileged even though they convey information or ideas indirectly. For example, a cheque may be evidence of a secret commission, or it may be completely innocent, but it is not a conventional communication. For that reason, I would not support the distinction which apparently found favour with the Chambers judge.

[110] The difficulty inherent in applying a fact/communication test caused LeBel J. to look in *Maranda* for a more efficacious approach. Thus, he said (at para. 28),

> The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege.

[111] He cautioned that the authority of the civil judgments to which he had referred must not be overestimated in a criminal case; noted that the rule to be adopted must respect the fundamental principles of criminal procedure, particularly the right to silence and the protection against self-incrimination; and emphasized that the distinction between facts and communication serves only to ensure that facts existing independently of any solicitor-client communications are not given the protection of the solicitor-client privilege (at para. 29). Then, he rejected the fact/communication distinction as a workable basis for a general rule. He said,

> 30 That rule cannot be based on the distinction between facts and communication. The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is

> made in an effort to avoid facts that have an independent existence being inadmissible in evidence (*Stevens, supra*, at para. 25). It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for transfers of funds (*Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 1983 CanLII 1894 (ON SC), 41 O.R. (2d) 328 (Div. Ct.); *Joubert, supra*).

[112] Returning to the specific issue before the Court, he remarked that the distinction between "fact" and "communication" is often not easily drawn (at para. 31) and that it is so difficult to draw in the case of a lawyer's bill that the general rule should be that the amount of a lawyer's fees should be presumptively regarded as privileged. He noted that such a rule would serve two goals: first, it would respect the importance of the constitutional values that would be endangered by disclosure of the fees in a criminal context and, more broadly, that the "presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court has forcefully stated even more recently in *McClure*, *supra*, at paras. 4-5" (at para. 33). He added (at para. 34) that the judge will have to carefully examine the application for disclosure in order to be satisfied that disclosure will not violate the confidentiality of the relationship.

[113] Thus, consistent with the decisions in *Foster Wheeler* and *Blood Tribe*, *Maranda* held that in cases in which the facts alleged to be outside the ambit of the privilege are such that their disclosure might indirectly disclose privileged information, protection of the privilege requires that they be presumptively regarded as privileged until the judge is satisfied otherwise.

[114] This general rule applies to all information arising out of solicitor-client relationships whatever may be their legal context. Accordingly, I would reject the appellant's submission that *Maranda* is applicable only to lawyers' bills delivered in criminal cases.

[115] Since reading my colleague's reasons I have learned I will be dissenting in the result. Accordingly, I will be less circumspect in my treatment of the evidence than I would otherwise be. Here, the chambers judge found the relevant solicitor-client relationship had existed for a number of years. The Love affidavit discloses that numerous legal matters were involved in the relationship and that Mr. Love gave the respondent legal advice in respect of each matter to which the trust ledger entries were directly related. The entries are therefore not "facts" arising independently of the solicitor-client relationship, as in the example given by LeBel J. in para. 39 of *Foster Wheeler*, which I have quoted at para. 99 of these reasons. Nor are they information arising out of a relationship between solicitor and client in which the solicitor was not acting as such, as described in *Joubert* in the passage I have quoted above in para. 105 of these reasons. Rather, they are the type of information described in the remarks of LeBel J. in *Foster Wheeler* at para. 38 ("negotiating or drawing up contracts, preparing reports, filling out various forms"), which I have quoted above at para. 98 of these reasons, and in paras. 41 and 42, (information arising in a lengthy and diverse mandate) which I

have quoted above at paras. 100 and 101, and the type described in the remarks of Chief Justice McEachern in *Hodgkinson* (documents that may "convey information or ideas indirectly"), which I have quoted above in para. 109, and by LeBel J. in *Maranda* ("information that able counsel could sometimes extract from apparently neutral information"), which I have quoted above in para. 107.

[116] It is also important to note in this connection that Mr. Berke has been indicted by the United States Department of Justice for "Other White Collar Crime/Fraud" arising out of the facts underlying the appellant's appointment as receiver to collect and distribute assets to victims of the alleged fraud, that the period during which it is alleged this crime was committed encompasses the period in which the relevant trust ledger entries were made, and that there is evidence that the appellant and the lead prosecutor have been communicating with each other. In my view, an assiduous examination of the ledgers, which can be expected if they are disclosed, would result in the disclosure of privileged information even if they were to be edited as proposed by my colleague and the danger that the solicitor may be "compelled to provide ... information in an investigation or as evidence against his ... client" has not been dispelled in this case (*Maranda*, at para. 39).

[117] The chambers judge rejected the appellant's submission that the criminal exception to the privilege rule is applicable in the circumstances. My colleague has quoted the judge's conclusion at para. 67 above and the basis upon which she proceeded at para. 69 above. I am not persuaded she erred in disposing of this issue as she did. Nor would I accede to the appellant's submission that she erred in finding the trust ledgers are protected by solicitor-client privilege.

[118] The appellant also submits the chambers judge erred in hearing *ex parte* submissions from the respondents' counsel *in camera*. As well, he objected to this Court reading a sealed supplementary factum tendered by the respondents on the appeal. He contends this procedure is an unwarranted interference with his right to a hearing and amounts to a breach of the rules of natural justice.

[119] Judges are of necessity the arbiters of claims of solicitor-client privilege and they must hear all relevant evidence and submissions if they are to make properly-informed decisions. This will require that judges receive evidence and submissions *ex parte* and *in camera* if the privilege would otherwise be destroyed. That is a corollary of the rule that information shared in a solicitor-client relationship is presumptively privileged. Such procedures have been sanctioned in cases involving informer privilege which, like solicitor-client privilege, is nearly absolute. An *in camera* procedure was approved in *Named Person v. Vancouver Sun*, 2007 SCC 43 (CanLII), [2007] 3 S.C.R. 253 and, in *R. v. Basi*, 2009 SCC 52 (CanLII) at para. 53, [2009] 3 S.C.R. 389, the Court observed that an *in camera* hearing to resolve a claim of privilege should proceed *ex parte* if the privilege cannot otherwise be protected. Thus, a judge should embark on *ex parte* and *in camera* proceedings only where the privilege cannot otherwise be protected and should adopt all reasonable measures to mitigate unfairness to the excluded party: see *Basi* at paras. 52-58.

[120] In this case, the information sought was presumptively privileged and it was therefore not improper of the chambers judge to receive the Love affidavit in sealed form and to review it *in camera*. Whether she should have heard submissions in the absence of the appellant was a matter within her discretion. I am not persuaded that she acted unfairly to the appellant or that she erred in proceeding as she did.

[121] The use of a sealed factum in this Court must be, if not unprecedented, at least extraordinary. My reasons should not be taken as encouraging such a problematic procedure. Counsel for the respondent urged upon us that the sealed factum would assist us to properly decide the appeal. On the basis that we could take comfort from this expectation and in the belief that we cannot do justice with one eye shut, so to speak, we read the factum. In my view, it added nothing that we would not have discerned ourselves from the respondents' submissions made in open court taken together with a careful examination of the Love affidavit, albeit with perhaps the expenditure of more time and effort. In other words, it assisted us only by guiding us more easily through an understanding of the information in the Love affidavit. We advised counsel for the appellant that, if we should read the sealed factum and if we should conclude he should have an opportunity to respond to anything in it, we would give him that opportunity. In my view, there is nothing in the sealed factum that would warrant affording the appellant an opportunity to respond in the circumstances.

[122] I am not satisfied that the chambers judge made any error that would justify our interfering with her order. I would dismiss the appeal. I would direct that the sealed materials be resealed and held in the registry and, subject to the agreement of counsel or further order, if no application for leave to appeal this order should be made within the time limited therefor, that they be returned to the respondents' solicitors upon application to the registry.

"The Honourable Mr. Justice K. Smith"