Court File No.: CV-13-1 0280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

DBDC SPADINA LTD.,
and THOSE CORPORATIONS LISTED ON SCHEDULE "A" HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED IN SCHEDULE "B" HERETO, TO BE BOUND BY THE RESULT

Book of Authorities of Schonfeld Inc.

(Motions Returnable May 3, 2016)

INDEX

I N D E X

Tab No.	Authority
A.	*Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531, 238 A.C.W.S. (3d) 373 (Sup. Ct. [Commercial List])
B.	*Hunjan International Inc., Re,* 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Sup. Ct.)
C.	*Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 C.B.R. (5^{th}) 265
D.	*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499, 1983 CarswellBC 147 (Sup. Ct.)
E.	*Smith v. Smith,* [1957] O.J. No. 700 (Ont. Master)
F.	*T. Eaton Co. v. Neil J. Buchanan*, [1979] NSJ No. 197. (C.A.)
G.	Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada,* 3rd ed (Markham: LexisNexis Canada, 2014) (excerpt)
H.	*George Doland Ltd. v. Blackburn & Co.*, [1972] 1 W.L.R. 1338
I.	*Kaiser, Re*, 2012 ONCA 838, 2012 CarswellOnt 16539
J.	*Descoteaux c. Mierwinski*, [1982] 1 S.C.R. 860
K.	*Maranda c. Quebec (Juge de la Cour du Quebec)*, 2003 SCC 67
L.	*Cunningham v. Lilles*, 2010 SCC 10
M.	*Katz, Re*, 2013 ONSC 4543, 2013 CarswellOnt 9050 (Comm. List)

A

2014 ONSC 1531
Ontario Superior Court of Justice [Commercial List]

Royal Bank of Canada v. Atlas Block Co.

2014 CarswellOnt 2780, 2014 ONSC 1531, 238 A.C.W.S. (3d) 373

Royal Bank of Canada, Applicant and Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

D.M. Brown J.

Heard: February 13, 2014
Judgment: March 10, 2014
Docket: CV-13-10201-00CL

Counsel: S. Babe, for Applicant, Royal Bank of Canada
R. Fisher, for Business Development Bank of Canada
S. Friedman, for Receiver, KPMG Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property

MOTION by receiver for court approval of distribution of net sales proceeds from certain of debtors' assets between two main secured creditors.

***D.M. Brown J.*:**

I. Receiver's motion to allocate sales proceeds and its costs between two secured creditors

1 By order made October 4, 2013, KPMG Inc. was appointed receiver of all of the assets and undertakings of Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario Inc. o/a Atlas Block Trucking (the "Debtors"). Pursuant to orders of this Court the Receiver has sold most of the Debtors' assets. The Receiver moved for the approval of the distribution of the net sales proceeds from certain of the Debtors' assets between the two main secured creditors, the Royal Bank of Canada and the Business Development Bank of Canada, as well as the approval of its allocation of fees and costs as between RBC and BDC.

II. Background

2 The Debtors manufactured a range of brick and concrete building and landscaping products for sale to industrial and commercial construction contractors. The head office of Atlas Block was located in Midland, Ontario, at what was called the Victoria Harbour Plant. Atlas operated manufacturing facilities at (i) the Victoria Harbour Plant, (ii) the Hillsdale Plant, and (iii) the Brockville Plant.

3 The Hillsdale Plant was the major asset of Atlas Block. Its construction and equipping was financed with $17.5 million in loans from BDC, $4.8 million from the Ontario government, and $2.2 million in equipment financing from RBC.

4 RBC and BDC provided other financing to Atlas Block.

5 Production at the Brockville Plant ceased about two weeks prior to the appointment of the Receiver. The Receiver continued production at the Hillsdale and Victoria Habour Plants for a short period of time until the end of November, 2013.

6 As a result of a sales and marketing process, the Receiver entered into two asset purchase agreements to sell the equipment, inventory and real estate of Atlas Block to Brampton Brick Limited ("BBL"). Those agreements received court approval on December 20, 2013. In my endorsement approving the BBL sale I wrote, in part:

> This motion is not opposed, however BDC reserves its rights with respect to distribution and my order is made subject to that reservation...

7 The sales to BBL were completed on January 6, 2014, however they did not include the sale of the real property at the Victoria Harbour Plant. On January 14, 2014, BBL informed the Receiver it that it would not be acquiring the real property at Victoria Harbour.

III. The BBL Asset Purchase Agreement

8 Under the November 29, 2013 Asset Purchase Agreement (the "Atlas Block APA") BBL purchased the following land and equipment:

> (i) Hillsdale: (a) the Hillsdale Real Property, (b) certain molds and forklift equipment; (c) manufacturing equipment; and (d) inventory;
>
> (ii) Victoria Harbour: (a) office furniture and equipment; (b) certain manufacturing equipment; and, (c) inventory; and,
>
> (iii) The interest of Atlas Block in RBC Equipment Leases, which included some leased equipment at the Hillsdale Plant, as well as at the Brockville Plant.

9 Section 2.7 of the Atlas Block stated that the purchase price would be allocated amongst the purchased assets as set forth on Schedule "K" to the APA, in part, as follows:

Asset	*Allocated Amount*
Hillsdale Real Property	$1,000,000
RBC Equipment Leases	$2,611,539
Hillsdale and Victoria Harbour Equipment	$7,638,458

10 In the Atlas APA BBL agreed to assume the obligations under the RBC Equipment Leases and the allocated $2.61 million represented the remaining obligations due under those leases.

11 Under the December 12, 2013 Asset Purchase Agreement (the "Brockville APA"), BBL agreed to purchase from the Receiver (i) the Brockville Real Property, (ii) the Brockville Equipment, (iii) the Brockville office furniture and equipment, and (iv) the Brockville Inventory. The purchase price of $600,000 was allocated pursuant to section 2.6 of the Brockville APA amongst the purchased assets, in part, as follows:

Asset	*Allocated Amount*
Brockville Real Property	$100,000
Brockville Equipment and office equipment	$100,000
Brockville Inventory	$400,00

IV. The Receiver's proposed distribution of the sales proceeds

A. The Receiver's proposal

12 In its Third Report dated January 31, 2014 the Receiver stated that under the two APAs BBL had allocated about $8.2 million of the purchase price to assets subject to the security held by BDC. It continued:

> The Receiver has no basis on which to consider the allocation by BBL to be unreasonable and therefore has used the BBL allocation set out in the Purchase and Sale Agreements as the basis for determining the proceeds to be paid to BDC and RBC.

Observing that it had incurred certain costs and fees on behalf of BDC during the Receivership, the Receiver proposed to deduct those costs from the Gross BDC Proceeds to arrive at a net figure payable to BDC. Appendix "O" to the Third Report set out the Receiver's calculations. Based on those calculations, the Receiver proposed to distribute to BDC proceeds of $7.7 million.

13 The Receiver reported that the majority of the remaining funds in its receivership accounts related to proceeds from RBC's security. The Receiver proposed to make a distribution to RBC of $3.46 million.

14 RBC supported the distribution proposed by the Receiver.

B. BDC's position

15 BDC objected to the Receiver's proposed distribution on the grounds set out in the February 5, 2014 affidavit of Lori Matson, Director, BDC Business Restructuring Unit. As of October, 2013, the Debtors owed BDC approximately $17.39 million.

16 Matson confirmed that BDC had received from the Receiver a draft of the Atlas APA as early as November 7, 2013, some three weeks prior to its execution, and BDC had understood at that time that part of the purchase price involved BBL assuming about $2.6 million in RBC Equipment Leases. According to Matson, BDC did not take issue with the BBL purchase price, but did have concerns about the allocation of the purchase price:

> (i) Matson alleged that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price;
>
> (ii) BDC contended that by assuming the remaining obligations under the RBC Equipment Leases, BBL was "factoring in the transaction structure (i.e.: assumption of capital leases), into its allocation rather than the value of the assets being obtained thereunder. The result is a purchase price allocation that is not reflective of the value of the various assets being acquired based upon appraisals...the allocation becomes arbitrary as it does not distinguish the financing aspect from the underlying value of the assets being acquired". BBL allocated the purchase price based on the amount of the debt being assumed which bore no relationship to the value of the underlying assets. Matson described the situation as an "over-allocation relative to the capital leased assets"; and,
>
> (iii) BBL's allocation of the purchase price did not reflect historic appraised values of the purchased assets.

It was Matson's evidence that the Receiver should distribute $10,644,360 to BDC based upon appraised values, not the $7.7 million it proposed based on the purchase price allocation in the APAs.

17 At my request, the Receiver filed a supplementary document which compared the calculation of its proposed distributions to the distributions proposed by BDC.

V. Analysis: Allocation of sales proceeds

A. Allegation of pre-execution discussions between BBL and RBC

18 Matson alleged that "negotiations took place between the Purchaser and RBC as part of the Purchaser's due diligence process in advance of the bidding that had the effect of creating an opportunity for the Purchaser to finance part of this purchase and as well creating expectations relative to the allocation of the sale proceeds on the part of RBC".

19 Matson did not disclose in her affidavit any source or basis for her allegation.

20 Mark Swanson, a Manager in RBC's Special Loans and Advisory Services Department, deposed, in his February 6, 2014 affidavit, that RBC had no communication with BBL prior to being told by the Receiver that BBL's offer included, amongst its terms, the assumption of the RBC Equipment Leases on an undiscounted basis. Swanson stated that the Receiver had asked RBC whether it would support a motion to approve a transaction under which BBL assumed the leases, rather than paying cash for them, but Swanson deposed that there had been no discussion between RBC and the Receiver of a discount or reduction of payments under the leases.

21 In the Second Supplement to its Third Report the Receiver responded to Matson's allegations:

> ...BDC suggests that negotiations took place between BBL and RBC prior to the submission of BBL's offer. The Receiver provided all potential purchasers who signed the Receiver's confidentiality agreement with information on Atlas' various leases and fixed assets through the Receiver's online data room so that they could perform their due diligence. BDC was also provided access to the Receiver's data room and was therefore aware of the information available to all purchasers. The Receiver is not aware of any other information supplied to BBL nor any negotiations between RBC and BBL prior to the submission of BBL's offer. The Receiver notes that BDC has not provided any evidence to support their allegations.

22 Given the failure of BDC to disclose the evidence upon which it based its allegation of the pre-execution negotiations between BBL and RBC and in light of the strong direct evidence to the contrary from the Receiver and RBC, I give no effect whatsoever to BDC's allegation that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price. BDC's allegation was without any evidentiary foundation foundation.

B. The RBC Equipment Leases

23 There was no dispute that part of the consideration offered by BBL under the Atlas APA was its agreement to assume the obligations of Atlas Block under the RBC Equipment Leases. The amount allocated for that consideration under the Atlas APA was the amount of the remaining obligations under those leases.

24 I do not accept BDC's submission that such an allocation of consideration was somehow arbitrary or unfair. To the contrary, the consideration allocated for BBL's assumption of that liability corresponded exactly to the monetary amount of the remaining obligations under those leases. There was nothing arbitrary about such an allocation. The crux of BDC's complaint really related to the amount of the purchase price allocated to other assets, in particular the Hillsdale Real Property, so I turn now to that issue.

C. The relationship between allocations of the purchase price to the Hillsdale Real Property and the appraised values of that asset

C.1 The positions of the parties

25 The crux of BDC's complaint about the proposed distribution of sales proceeds was that in the APAs BBL's allocation of the purchase price did not reflect historic appraised values of some of the purchased assets, in particular the Hillsdale Real Property.

26 In section 1.1.7 of its Second Report dated December 12, 2013, the Receiver observed that "the construction of the Hillsdale Plant unfortunately coincided with the start of the 2008/2009 economic downturn..." Schedule "K" to the Atlas APA allocated $1 million of the purchase price to the Hillsdale Real Property. BDC submitted that $3 million should have been allocated to that property.

27 Matson attached to her affidavit extracts from two appraisals of the Hillsdale Real Property performed in 2008 and 2011. The first extracts were from a June, 2008 appraisal that had been prepared by Katchen Appraisals Inc. for BDC. By its terms the Katchen Appraisal was intended to assist for financing purposes only and was "to serve as a benchmark for establishing the projected value of the property *as improved with a completed concrete block manufacturing facility*, in fee simple, assuming a market exposure of twelve months prior to sale under forced sale conditions on June 17, 2008..." Katchen valued the property at $4.5 million.

28 Matson also attached extracts from a second appraisal, one prepared by Appraisers Canada Inc. with an effective date of December, 2011. The appraisal stated that it was intended only "for an accounting function and for no other use" and that its purpose was "to estimate a current hypothetical market value of the subject property, as if unimproved, as at the effective date". Appraisers estimated that value as in a range between $2.162 to $2.883 million, with a "value tendency" of $2.5 million.

29 Pointing to the extracts from both appraisals, Matson deposed that BBL's price allocation "seriously undervalues the land and building" and "allocating $1,000,000 to the real property is not reasonable".

30 In its Second Supplement to the Third Report the Receiver noted that the appraisals relied upon by BDC were prepared at different dates and used different appraisal assumptions:

> The Receiver does not believe that this amalgamation of estimated values is a superior method of allocating the purchase price as compared to the allocation of a third party purchaser of assets.

The Receiver also observed that the Hillsdale Plant was a special purpose asset, remotely located, which was difficult and perhaps cost prohibitive to relocate.

31 Although RBC did not comment directly on the valuations, Swanson did depose that back in August, 2013, just after RBC had commenced this application, it had been asked by the Debtors' financial advisor to adjourn the application to enable the Debtors to work out a refinancing with BDC. A signed memorandum of understanding between the Debtors and BDC provided to RBC disclosed that BDC's existing loan in excess of $17 million would be replaced by a $5 million loan to a Newco which would acquire the Debtors' assets and business. Newco would issue preferred shares to BDC. In the result, that transaction did not proceed and a receiver was appointed. Swanson deposed:

> The history of this matter therefore shows that the Receiver, who RBC drove to appoint, successfully increased BDC's anticipated recovery by over $3 million and reduced BDC's risk by even more. The Receiver has therefore significantly reduced the shortfall that BDC was otherwise willing to incur.

C.2 Analysis

32 In *Bank of America Canada v. Willann Investments Ltd.* [1] Farley J. commented that when examining a receiver's proposed sale of assets in light of the principles set out in *Royal Bank v. Soundair Corp.*, [2] a court might well refrain from approving a sale that proposed an allocation of the purchase price which was significantly different from the latest valuation of the assets because such an allocation would not fairly consider the interests of all creditors. [3] From that it follows that the time for objecting to an allocation of the purchase price in a proposed sale is when the sale is brought before the Court for approval. If the Court agrees with the objection, it can decline to approve the sale, which may or may not result in further negotiations with the proposed purchaser, depending upon the significance to it of the purchase price allocation.

33 Once a court approves a sale agreement, however, as occurred here, it becomes more difficult for a creditor to advance an objection about the fairness of the term of the sales agreement allocating the purchase price because such an objection, in essence, constitutes an objection to a material term of the now-approved sale agreement. Put another way, not having opposed the

approval of a sales transaction, thereby securing the benefit of that sale of the debtor's assets, a creditor faces difficulty in objecting subsequently to a material term of the agreement which it did not oppose.

34 In the present case BDC did not oppose the approval of the BBL APAs - no doubt because the BBL offers were far, far superior to any other offer obtained by the Receiver - but BDC did put a "reservation of rights" on the record, without filing evidence at the time about the nature of its objections. A receiver's distribution motion should not turn into a debate about the fairness of the term in the approved sale agreement which allocates the purchase price to particular assets. The proper time for such a debate is at the hearing of the approval motion. I will consider the objections made by BDC, but their timing weakens the weight to be given to them.

35 Turning to the submission of BDC that the allocated purchase price for the Hillsdale Real Property was far below its appraised value, I have five comments. First, any appraisal must be read in its entirety to understand the methodology used and the assumptions employed. On this motion BDC only filed portions of the reports from which it was not possible to ascertain the methodologies and information used by the appraisers to arrive at their estimates. Failing to file the entire reports significantly undermined their evidentiary value. Second, the reports gave opinion values as of June, 2008 and December, 2011. The reports therefore were quite dated, the last expressing a value some two years prior to the appointment of the Receiver. Since the actions of the Receiver must be assessed at the time taken, stale valuation reports are of little assistance in ascertaining how the market perceived the value of the Hillsdale Real Property as of November, 2013, the date of the Atlas APA.

36 Which leads me to my third point. In the December 12, 2013 Supplement to its Second Report the Receiver stated:

> BDC also has a mortgage on the real property at Hillsdale...Both the Receiver and BDC agreed that an appraisal of the Hillsdale Real Property would not be cost beneficial as the value of the Hillsdale Real Property is intrinsic to the manufacturing plant and could not be separately assessed. It was agreed that an appraisal of the market value of the Hillsdale Real Property on a standalone basis would be theoretical at best, and not provide useful information in assessing offers.

It is difficult to understand how BDC now relies on stale valuation reports to support its submissions on the allocation of net sale proceeds in light of that agreement.

37 Fourth, the material deficiencies in the evidentiary utility of the two appraisal reports referred to by Matson brings one back, then, to the general principle that where a receiver markets a property, appraisals cease to have much significance in the valuation process [4] - a sale is always a better indication of value of a particular property than a valuation. In the present case, the Receiver

contacted 83 different interested parties, 36 of which signed confidentiality agreements, and 8 of which submitted offers. The BBL offer accepted by the Receiver was far, far superior to any other offer.

38 Fifth, and finally, in the Second Supplement to its Third Report the Receiver provided the following evidence:

> [T]he Hillsdale building was a sole purpose building, built for the purpose of block production only. Accordingly, it is likely that the building would only have value in a going concern sale. If the assets were liquidated and removed, the building would at best have scrap value and may have been a liability for a purchaser of the real property as it would likely have to be demolished. Therefore, the allocation of the $1.0 million to the real property is likely superior to liquidation value.

I accept that evidence.

39 Accordingly, I see no reason to interfere with the Receiver's recommendation to distribute the net sales proceeds using a methodology based on the allocation of the purchase price found in the approved Atlas APA and Brockville APA. I therefore grant the relief sought in paragraph (g) of the Receiver's February 3, 2014 notice of motion.

VI. Allocation of the Receiver's costs

40 The Receiver sought approval of its fees and disbursements of $196,882.73 for the period December 1, 2013 to January 15, 2014, as well as for those of its counsel for the same period in the amount of $147,503.13. Recognizing the competing security interests in the receivership, the Receiver and its counsel had tracked their time and expenses in three separate categories: (i) those directly related to BDC asset realization activities; (ii) those directly related to RBC asset realization activities; and, (iii) those shared between BDC and RBC realization activities.

41 BDC took no issue with the direct expenses attributed by the Receiver to BDC assets ($67,598). The Receiver tracked shared expenses totaling $510,782. It proposed allocating $357,159 of those expenses to BDC on the basis that BDC recovered 69.92% of the total sales proceeds. RBC supported the Receiver's proposed allocation. BDC objected to the amount of the fees and to their allocation, contending that only 50% of the shared costs should be allocated to it, or the sum of $255,391. BDC complained that "a significant portion of these costs were expended in the collection of accounts receivable and the production and sale of inventory which clearly solely benefitted RBC. In addition, there are significant Receiver and legal fees relative to the trust claims of Holcim and Tackaberry".

42 This Court approved the Receiver's fees and legal fees for the period up to November 30, 2013 in its December 20, 2013 order. As to the fees incurred after that date, in paragraph

21 of her affidavit Matson "sought clarification" of certain work performed by the Receiver and its counsel. In section 3.1 of the Second Supplement to its Third Report the Receiver provided detailed clarification. In light of that clarification, I conclude that the fees for which the Receiver sought approval were reasonable in the circumstances.

43 As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:

> (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>
> (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>
> (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
>
> (v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;
>
> (vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial. [5]

44 The Receiver responded to BDC's complaint about the allocation of certain time by reporting that it had only charged time for accounts receivable collections and the Holcim/Tackaberry claims to RBC. That addressed that complaint.

45 As to the allocation methodology for shared fees, the Receiver reported that as early as October 18, 2013, it had provided BDC with its allocation method for professional fees and expenses incurred in the estate. Its email to RBC of that date stated:

> The shared time will be allocated on realizations of the secured creditor assets so the exact breakdown of those fees will not be known until the assets are realized.

The Receiver provided BDC with requested weekly reports allocating those fees amongst the three time categories. The Receiver responded to periodic inquiries about the fees and their allocation from BDC, and it was not aware that BDC took issue with the allocation until February 4, 2014.

46 I find it difficult to place must credence in an "11th hour" objection by a creditor to the receiver's proposed allocation of fees when the Receiver disclosed the proposed methodology at the start of the administration of the receivership estate, the creditor did not object, and the Receiver provided on-going, transparent reporting to the creditor of the fees incurred.

47 The Receiver also stated:

> The Receiver believes that BDC derived a significant benefit from the Receiver's operations and eventual sale to BBL. As discussed previously the DSL Appraisal makes it clear that the realizable values of Atlas' assets would have been significantly impaired absent a going concern sale when one compares the appraised value of $6.5 million in a going concern type sale versus a value of $1.5 million in a liquidation sale...The Receiver agrees with BDC that BBL paid more for all of the Atlas assets, and most notably the Hillsdale Equipment (as the Hillsdale plant is the only plant of the two sold in the First BBL Sale that BBL is operating), because of the Receiver's preservation of the Atlas customer base through continued operations during the receivership. This was of great benefit to BDC, perhaps more so than to RBC.

48 The allocation methodology proposed by the Receiver for shared costs based *pro rata* on realizations was *prima facie* reasonable in the circumstances of this case. The Receiver disclosed that methodology to BDC at the start of its administration, and BDC did not object until the 11th hour. BDC has not demonstrated any unfairness in the methodology proposed by the Receiver.

49 Consequently, I grant the orders sought by the Receiver in paragraphs (h) and (i) of its notice of motion dated February 3, 2014.

VII. Costs

50 I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office written cost submissions, together with a Bill of Costs, by March 21, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by March 28, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Motion granted.

Footnotes

1 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List])

2 (1991), 4 O.R. (3d) 1 (Ont. C.A.)

3 *Bank of America Canada v. Willann Investments Ltd.*, *supra.*, para. 5.

4 *B & M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 56 C.B.R. (5th) 313 (Ont. S.C.J.), para. 13; *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List]), para. 5.

5 See the cases cited by C. Campbell J. in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.) and Cameron J. in *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.).

End of Document

B

2006 CarswellOnt 2718
Ontario Superior Court of Justice

Hunjan International Inc., Re

2006 CarswellOnt 2718, 21 C.B.R. (5th) 276

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a plan of compromise or arrangement with respect to Hunjan International Inc., Hunjan Moulded Products Ltd., Hunjan Tools & Mould Ltd. and Hunjan Holdings Ltd. (Applicants)

C. Campbell J.

Heard: March 8, 2006
Judgment: May 3, 2006
Docket: 05-CL-5886

Counsel: Frederick Myers, L. Joseph Latham for KPMG Inc.
Ashley John Taylor, Diana Juricevic for GE Capital Canada Leasing Services Inc., GE Capital Equipment Financing C.P., GE Capital Canada Leasing Trust and GE Capital Leasing Services Company
Paul R. Basso for Canadian Imperical Bank of Commerce
S. Harvey Starkman, Q.C., Kevin W. Fisher for En-Plas Inc.
E. Peter Auvinen, Arthi Sambasivam for CIT Financial Ltd.
Edmond Lamek for Expost Development Canada
Kenneth Dekker for Hunjan Holdings

Subject: Insolvency; Civil Practice and Procedure

HEARING to rule on propriety of receiver's proposed allocation of costs from failed CCAA proceedings.

***C. Campbell J.*:**

1 The issue before the Court concerns the allocation and apportionment of the costs arising from failed *Companies Creditors' Arrangements Act* ("CCAA") proceedings, which evolved into a receivership sale by auction of assets of the Hunjan Group, held November 30 and December 7, 2005.

2 At issue is the allocation of actual disbursements incurred to keep the debtor companies operating during the CCAA proceedings, plus the fees, disbursements and expenses incurred during the receivership proceedings to preserve, protect and realize on the debtors' assets.

3 The recommended allocation of costs by the Receiver as contained in its Tenth Report is challenged by different first-ranking secured creditors on different issues (the "Opposing Creditors.")

4 Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.

5 Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that "any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical."

6 The facts necessary for the determination of the issues that have arisen are largely not in dispute and are set out in the Tenth Report.

7 Pursuant to the Order of this Honourable Court dated May 4, 2005 (the "Initial Order"), the Hunjan Group and Hunjan Holdings Ltd. (the "CCAA Applicants") obtained protection from their creditors under the CCAA. Under the Initial Order, Deloitte & Touche Inc. was appointed to act as Monitor.

8 The Initial Order allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce ("CIBC") pursuant to a special loan facility known as "debtor-in-possession" or "DIP" financing. The Initial Order and the May 16 Order contain specific provisions that deal with certain aspects of the Court-approved DIP financing. In the Initial Order, the CCAA Applicants were limited in the amount that they could borrow by way of DIP financing to $1 million in the aggregate. This amount would allow the CCAA Applicants to continue operations for a period of ten days, during which time it was anticipated that they would attempt to secure the necessary financing and other arrangements with their customers to allow them to continue to operate while they attempted to restructure over a longer period of time.

9 After the Initial Order was granted, the CCAA Applicants began negotiations with CIBC, the CCAA Applicants' principal first-ranking secured lender, and five of their largest customers (the "Participating Customers"). As a result of those negotiations, an accommodation agreement was entered into on or about dated May 13, 2005 (the "Accommodation Agreement.")

10 The Accommodation Agreement provided, among other things:

> (i) that the Participating Customers would continue to order product from the CCAA Applicants (sections 2-6);
>
> (ii) the basis upon which CIBC would provide additional DIP financing to allow the CCAA Applicants to operate during the CCAA Proceedings (the "Amended DIP Facility"), which financing was anticipated to peak at approximately $8.8 million (paragraph 7);
>
> (iii) that the Amended DIP Facility was to be secured by a first ranking charge (subject only to the Administrative Charge contained in the Initial Order) and that all "Post-Filing Receipts" (monies received from operations or production after the Filing Date) would be first used to repay the Amended DIP Facility. This preserved to CIBC's existing secured claims the proceeds of receipts that arose from the operations of the CCAA Applicants prior to May 3, 2005 (the "Pre-Filing Receipts") (section 7); and
>
> (iv) that certain of the Participating Customers' rights of setoff as against pre-CCAA receivables were limited (paragraph 2).

11 The Receiver understands that, when the Accommodation Agreement and DIP Term Sheet (as herein defined) were negotiated and the May 16 Order was issued, it was anticipated that there would be a shortfall of approximately $4.0 million between the DIP financing advances and the estimated Post-Filing Receipts to be generated by the CCAA Applicants to repay those advances. CIBC and the Participating Customers agreed, as set out in section 9 of the Accommodation Agreement, that the Participating Customers would be responsible for fifty percent (50%) of any Amended DIP Deficiency (the "Customer Contribution"), with such Customer Contribution not to exceed $2.0 million. To secure that obligation, the Participating Customers paid $2.0 million to CIBC to be held in trust pending the outcome of the CCAA proceedings and the quantification of the Amended DIP Deficiency.

12 The Amended DIP Facility was set out in the Amended DIP Credit Agreement, dated May 13, 2005 (the "DIP Term Sheet")[which provided, among other things, that CIBC was entitled to recover as part of its DIP loan the full amount of the costs it incurred in respect of the Amended DIP Facility.]

13 The May 16 Order approved the Accommodation Agreement and the DIP Term Sheet, and also ordered that the Amended DIP Facility would be secured by the DIP Charge (as defined in paragraph 32 of the Initial Order). There has been no amendment, variation, or appeal of the May 16 Order.

14 Furthermore, paragraph 6 of the May 16 Order sets out the means by which the Amended DIP Facility and the Amended DIP Deficiency, if any, was to the repaid. Paragraph 6 of the May 16 Order provides that the Amended DIP Facility is to be repaid:

> (i) first from Post-Filing Receipts; and
>
> (ii) to the extent there is a shortfall (that is, if there is an Amended DIP Deficiency), from the proceeds of any unencumbered assets (of which there are none); and
>
> (iii) "the remaining balance, if any, from the net realizations of the collateral which is the subject matter of the security created and issued by the Applicants or any of them to any of their secured lenders prior to the Filing Date and over which such lender or lenders hold a first ranking security interest, charge, mortgage or other encumbrances, pro rata in the proportions that the Applicants or any of them were indebted to each such secured lender as at the Filing Date."

15 What is not at issue is the rationale for the DIP financing. It has become accepted in restructuring in the automotive manufacturing industry that to determine whether the company can succeed and even if it does not, there needs to be a collaborative effort between the debtor's major financiers and its principal customers.

16 The reason for this need for co-operation is that those customers (being other automotive parts manufacturers or automotive assembly companies themselves) are part of a highly integrated "just-in-time" supply chain. A shut-down or failure of one manufacturer in the supply chain can cause a chain reaction shutting down the operations of manufacturers further up or down the supply chain. Such shut-downs affect thousands of jobs and cause millions of dollars in losses. Accordingly, customers have incentive to participate in facilitating a debtor's effort to obtain financing to prevent a sudden shut-down of the debtor.

17 The incentive for the Participating Customers to agree to be responsible for a portion of any Amended DIP Deficiency arose from the fact that they, for a specified maximum cost, were able to secure the timely delivery of necessary inventory during the CCAA Proceedings, and were permitted to have excess inventory banks built to give them an assurance that they would have sufficient time to arrange for alternative suppliers and a smooth transition to such new suppliers if a restructuring failed.

18 There is an incentive for both Participating Customers and major creditors to cooperate even in a very likely bankruptcy, again to maximize the value of the inventory and return from its sale in the ordinary course.

19 During the CCAA proceedings, the CCAA Applicants, with the assistance of the Monitor, carried out a marketing and sales process. However, no restructuring or going-concern sale was achieved.

20 As a result of the failure of the CCAA proceedings, on July 18, 2005, CIBC applied for, and was granted, an Order by the Honourable Justice Stinson terminating the CCAA proceedings and appointing KPMG as the interim receiver and receiver of the Hunjan Group pursuant to Section 47 of the *Bankruptcy and Insolvency Act* (Canada) and Section 101 of the *Courts of Justice Act* (Ontario) (the "Receivership Order.") Pursuant to the terms of paragraph 37 of the Receivership Order, the Amended DIP Facility was terminated going forward but remained available to fund the finalization of certain matters that arose during the CCAA proceedings.

21 The Hunjan Group had ceased all operating activities before the Receivership Order was granted. As a result, there were no on-going revenues generated with which to fund either the Receiver's fees or the disbursements required to fund the costs to be incurred during the Receiver's mandate, such as rent, maintenance, insurance, utilities, and other costs incurred for the preservation, protection and administration of the assets of the estate.

22 Furthermore, pursuant to paragraphs 22 to 30 of the Receivership Order, the terms of the May 16 Order regarding the repayment of the Amended DIP Facility (and any Amended DIP Deficiency) were preserved, such that all Post-Filing Receipts are to be first applied to the Amended DIP Deficiency, and not used to fund the receivership proceedings. Pre-Filing Receipts remain pledged to CIBC's pre-existing secured claims.

23 However, paragraph 22 of the Receivership Order provides that any expenditure or liability that is made or incurred by the Receiver, including the fees and disbursements of its legal counsel, are protected by a court-ordered charge referred to as the "Receiver's Charge".

24 Furthermore, paragraph 25 of the Receivership Order authorized the Receiver to borrow up to $2.0 million for the purpose of funding the exercise of its powers, which borrowings were to be protected by a court-ordered charge referred to as the "Receiver's Borrowing Charge".

25 Both the Receiver's Charge and the Receiver's Borrowing Charge are a charge on all of the assets of the Hunjan Group, except the Pre-Filing Receipts. Both the Receiver's Charge and the Receiver's Borrowing Charge enjoy first-ranking priority over the Amended DIP Deficiency, except in respect of Post-Filing Receipts which, as stated above, are to be applied first to the Amended DIP Facility.

26 On October 7, 2005, with the permission of the Court, the Receiver assigned each member of the Hunjan Group into bankruptcy.

27 On November 30, 2005 and December 7, 2005, the Remaining Assets of the Hunjan Group were auctioned by CIA CPCC Inc. pursuant to an auction services agreement approved by Justice Ground on November 7, 2005.

28 As a result of negotiations on July 18, 2005, paragraph 3A of the Receivership Order granted GE the right to exclude assets over which it had a first-ranking security from the Receiver's auction process. However, over time, the Receiver extended this same option to each secured creditor whose security the Receiver acknowledged was first ranking or was confirmed as first ranking by court order. GE availed itself of this option, as did CIT to a lesser extent.

Allocation of the DIP Financing Costs

29 As anticipated at the time it was put in place, there is a deficiency associated with the DIP financing estimated by the Receiver to be between $3.4 and $3.9 million, *after* applying a $2.0 million customer contribution described below.

30 The Opposing Creditors (other than CIBC) take issue with the Receiver's calculation of the Amended DIP Deficiency and the basis of allocating the Receiver's Charge and the Receiver's Borrowing Charge among Opposing Creditors.

31 The Order of Ground J. dated May 4, 2004 (the "Initial Order") allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce ("CIBC.") The calculation of the Amended DIP Deficiency is a product of the Accommodation Agreement (defined herein), which was approved by the May 16 Order, and paragraph 6 of the May 16 Order, which sets out an incomplete waterfall for the repayment of the Amended DIP Deficiency.

32 Paragraph 6 of the May 16 Order reads as follows:

> THIS COURT ORDERS AND DECLARES that the Amended DIP Facility shall be secured by the DIP Charge (as defined in paragraph 32 of the May 4, 2005 Order herein) and the DIP Charge shall have the relative priority set out in paragraph 65 of such Order, provided however and without in any way limiting the force and effect of the DIP Charge, the DIP Lender shall apply the Post-Filing Receipts first in payment of the Applicants' obligations pursuant to the Amended DIP Facility and in the event any balance remains outstanding thereon following such application (the "Amended DIP Deficiency"), the Amended DIP Deficiency shall be repaid to the DIP Lender, firstly, from any Property (as defined by paragraph 3(a) of the May 4, 2005 Order) which was not subject to any security created and issued by the Applicants on or prior to the Filing Date, and the remaining balance, if any from

> the net realizations of the collateral which is the subject matter of the security created and issued by the Applicants or any of them to any of their secured lenders prior to the Filing Date and over which such lender or lenders hold a first ranking security interest, charge, mortgage or other encumbrances, pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date.

33 The Accommodation Agreement is a complicated agreement to which in addition to the Participating Customers, CIBC and Export Development Canada ("EDC") are both party. (For the purpose of this decision it is not necessary to distinguish between the different interests of CIBC and EDC. They will jointly be referred to as "CIBC.")

34 Paragraph 7 of the Accommodation Agreement, entitled Forbearance and Funding by Lenders, sets out in detail the basis on which CIBC was prepared to forbear from exercising its rights and remedies. At the time of execution of the Accommodation Agreement and the DIP Credit Facility, the cash needs of Hunjan were projected to be somewhat in excess of $3.5 million. In fact, they turned out to be the maximum provided for of $8,800,000.

35 The Opposing Creditors who object to the proposed allocation of the Receiver with respect to the shortfall rely on the wording of Paragraph 9 (b) of the Accommodation Agreement:

> Each Participating Customer will fund its proportionate share of the lesser of (x) 50% of Hunjan's total net funding losses incurred over the period from May 4, 2005 to and including the Termination Date (taking into account any accrued liabilities as at the Termination Date that will be funded by CIBC under the CIBC DIP Credit Facilities), and (y) $2,000,000 (such share, the "Customer Loss Share.") Each Participating Customer's "proportionate share" of such losses shall be as set out on Schedule B. For certainty, the obligation of each Participating Customer under this Section 9 shall continue notwithstanding such Participating Customer may have re-sourced all of its parts production and tooling prior to the expiry or termination of the Funding Period.
>
> CIBC and EDC will each be responsible for their respective shares of the lesser of (x) 50% of Hunjan's total net funding losses over the Funding Period, and (y) $2,000,000. The shares of each of CIBC and EDC shall be as agreed between them.

36 The complaint of the Opposing Creditors is that in the Receiver's calculation of the DIP Deficiency to be borne by the Opposing Creditors pursuant to paragraph 6 of the May 16 Order, the Receiver applied the full amount of the Participating Customers 50% share ($2,000,000) but failed to omit the contribution that they assert was agreed to by CIBC by Section 9(b) of the Accommodation Agreement.

37 Both the Accommodation Agreement and the May 16 Order were preceded by the Amended DIP Credit Agreement dated May 13, 2005 (the "DIP Term Sheet") between CIBC and Hunjan, which INSERT para 15 of Receivers

38 The position of the Opposing Creditors is that Paragraph 9(b) of the Accommodation Agreement calls on CIBC to take into account in determining the obligation to contribute, $2,000,000, which was not advanced but which as between it and the Participating Customers was to be taken into account.

39 The position of CIBC and the Receiver is that the May 16 Order is compatible with the position that the May 16 Order approved the Accommodation Agreement and the DIP Term Sheet, and also ordered that the Amended DIP Facility would be secured by the DIP Charge (as defined in paragraph 32 of the Initial Order). There has been no amendment, variation, or appeal of the May 16 Order.

40 The Receiver calculated the Amended DIP Deficiency as set out in Schedule "K" of the Tenth Report on the basis that, as a result of the last paragraph of subsection 9(b) of the Accommodation Agreement, CIBC must bear the second half of the first $4.0 million of the Amended DIP Deficiency, which would reduce the amount to be allocated among secured creditors by $2.0 million. The Opposing Creditors allege that pursuant to that paragraph, CIBC agreed to fund or write-off up to an additional $2.0 million towards any Amended DIP Deficiency that arose.

41 The Opposing Creditors submit that the obligation of CIBC completely mirrors the obligation of the Participating Customers to fund $2.0 million of any Amended DIP Deficiency. It should be noted that the Opposing Creditors were not parties to the Accommodation Agreement. Among other matters, they complain they were not made aware of it until sometime after July 1, 2005.

42 The position of CIBC and the Receiver rejects the submission of the Opposing Creditors on the following basis:

43 First, CIBC knew in advance that it would be providing the full amount of the Amended DIP Facility. Second, it agreed to provide the Amended DIP Facility knowing that there was projected to be a shortfall and negotiated the Customer Contribution to assist in reducing that loss. Third, the language referred to in paragraph 9(b) states, in respect of CIBC, that it will be responsible for its respective share of the Amended DIP Deficiency, and the numbers referred to in that paragraph reflect the Hunjan Group's projections of a $4.0 million deficiency, and not a cap. Finally, CIBC negotiated language for paragraph 6 of the May 16 Order to ensure that the balance of the Amended DIP Deficiency would be shared by the secured creditors should it exceed $4.0 million.

44 The Receiver reads paragraph 9(b) of the Accommodation Agreement and paragraph 6 of the May 16 Order as working together to first reduce the Amended DIP Deficiency by the Customer

Contribution and then allocating the remaining balance, whatever that may be, among the first ranking secured creditors on a percentage of debt basis.

45 The Opposing Creditors question why Paragraph 9(b) above would refer to the Participating Customers funding 50% of the Funding Losses if CIBC were not agreeing to fund the other 50%.

46 In support of the argument, the Opposing Creditors urge that at the very least, to the extent that the Court concludes that there is inconsistency between the Accommodation Agreement and the provisions of the May 16 Order, the former should prevail since it was incorporated into the May 16 Order and by implication had the approval of the Court.

47 In support of its position that the Accommodation Agreement clearly provides for CIBC providing funding of $2,000,000 of $4,000,000, the Opposing Creditors point to two references to the issue in reports provided to the Court by the Receiver. The first reads as follows:

> The total cash burn pursuant to the Accommodation Agreement is shared 50%/50% between the Participating Customers and the [Opposing] Creditors to a maximum of $4 million. Any excess of over $4 million is to be assumed by the [Opposing] Creditors.

48 The second reference is in Schedule N3 to the Tenth Report as originally filed, and reads as follows:

> Pursuant to the Accommodation Agreement, the DIP deficit is to be shared 50%/50% between the Participating Customers and CIBC to a maximum of $4 million. Any excess of over $4 million is to be allocated between all [Opposing] Creditors.

49 Schedule N3 was amended at the oral hearing to provide as follows:

> Pursuant to the Accommodation Agreement, the Participating Customers were responsible to contribute 50% of the Amended DIP Deficiency, with their maximum contribution being $2 million.

50 While I respect the reasons behind the position advanced on behalf of the Opposing Creditors, I am not prepared to accept the references in the Receiver's reports as determinative. The Opposing Creditors were not parties to the Accommodation Agreement. None of the Participating Customers, the Receiver or CIBC support the meaning now being advanced.

51 I do not find the May 16 Order in any way ambiguous even though it does make reference to the Accommodation Agreement. The closing words of paragraph 6 read, "pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date."

52 At the time of the Accommodation Agreement, the representation in effect of Hunjan was that the DIP Deficiency would be between $3.5 and $4.0 million. I accept the submission on behalf

of the Receiver and CIBC that it is not likely that the latter would have provided the DIP financing if it were aware that in the event the deficiency that it financed exceeded the anticipated amount by 100%, that it would in effect have contributed an additional $2 million.

53 In this as well as many allocation cases, the effect of a decision can be said to operate disproportionately on one or more creditors to the benefit of others or even only one.

54 The first principle of priority is to allocate in the manner prescribed by the Order. [See *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132 (Ont. C.A.) at 137.]

55 Each case is to be considered on its own facts with the exercise of discretion and without the necessity to allocate on a direct "benefit" basis. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*, *supra.*

56 The conclusion at which I have arrived might well have been different had the other Opposing Creditors been parties to the Accommodation Agreement and the surrounding facts and matrix clearly pointed to an understanding of all parties that CIBC would in effect be responsible for an additional $2 million regardless of the DIP Deficiency. That is not the case on the material before me.

57 The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) pp 209-212.]

58 The position advanced by the Opposing Creditors has not met the onus of satisfying me that the allocation prepared by the Receiver is unfair or unreasonable in all the circumstances.

59 I have considered carefully the submission made on behalf of the opposing creditors. Each has some merit. The assertion by CIT is that given its exposure ($20 million), CIBC had more incentive to invest more money in the DIP financing.

60 Counsel for En-Plas made much the same point, suggesting that the parties (CIBC) that take the risk should bear the cost on the basis that no one thought the DIP Financing Deficit would exceed $4 million and the DIP Financing did not particularly benefit En-Plas given its particular position. The DIP Financing did permit the opportunity for improvement of their position by all creditors.

61 The response from counsel for CIBC is simply that it is not equitable for his client to advance $8 million and not have a charge on the DIP Financing simply doesn't make sense.

62 In my view, the reason the cases referred to emphasize the discretion in the presiding judge is that between competing creditors, there is often competing equitable claims. I accept that if one result would work a manifest unfairness, that fact will likely be determinative where as I found here, that there is no manifest unfairness in permitting the creditor (CIBC) with the largest exposure some recovery from the DIP Financing Deficit.

63 As I have concluded on the language of the Accommodation Agreement and the May 16 Order, there is no express restriction on recovery by CIBC. I am not persuaded that there is any manifest unfairness to the Opposing Creditors in accepting the position advanced by the Receiver, CIBC.

Allocation of Receiver's Expenses

64 Not all the issues dealt with in the Receiver's Tenth Report were dealt with on this motion. The one that requires determination at this stage is that submitted on behalf of some creditors, which urge that the general administration expenses should be based on the percentage of pre-filing debt of each of the Opposing Creditors, rather than recovery.

65 The Receiver reports that in allocating costs, it took into consideration the following factors:

> (a) these proceedings evolved from the CCAA Proceedings to the Receivership Proceedings and, as such, proceeds of realizations can be attributed to three different time periods, which may affect the entitlement to the proceeds from such assets and consequent costs allocations:
>
> > (i) *Pre-Filing Period* — The period prior to the Filing Date (being the commencement of the CCAA proceedings);
> >
> > (ii) *Post-Filing Period* — The period between the Filing Date and the commencement of the Receivership Proceedings; and
> >
> > (iii) *Receivership Period* — The period after the commencement of the Receivership Proceedings;
>
> (b) the May 16 Order already mandates how the Amended DIP Deficiency is to be allocated;
>
> (c) the Receiver's Charge and the Receiver's Borrowing Charge were generally incurred for the benefit of all creditors with assets in the Receivership; and

(d) there were some circumstances in which specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between the cost and the benefit derived therefrom.

66 Those creditors who urge that the allocation of costs should be on the basis of pre-filing debt do so on the basis that in their view CIBC derived a benefit from a significant amount of recovery pre-filing that should be taken into account and not just the amount that was recovered post-filing.

67 The total amount of the Receiver's Borrowing and expenses is set out in Schedule W to the Report of the Receiver and totals some $2,087.629.00. On the basis of realization based on security and the allocation, relative cost to CIBC is at a level of 42.7%, that of GE at 38.3%, EnPlas at 14.3% and CIT at 4.5%.

68 The response by the Receiver submits that while CIT's gross realizations were $612,663, of that amount it has already received free of any deduction an account of costs the sum of $300,000, leaving only $312,663 against which CIT's total share of the costs must be charged.

69 There is some evidence of what each of the creditors recognized might be its share of anticipated costs at the time of the May 16, 2005 order, which makes the Receiver's allocation reasonable in relation.

70 I have considered the submissions of those objecting creditors, as well as those of the Receiver.

71 I am mindful that each creditor from its own particular perspective will have a view of what is or is not fair in terms of allocation. There is unlikely to be one specific method that can objectively point to absolute fairness to all parties. The exercise is inevitably one of viewpoint for the creditor and exercise of discretion for the Court.

72 I am satisfied that the Receiver has to the extent possible attempted to apply costs in a reasonable and fair manner and has taken into account to the extent possible a distinction between those costs that could be said to benefit all creditors with assets in the Receivership and those where it was possible, where specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between cost and benefit derived.

73 I also accept that where the allocation is *prima facie* fair, the onus should be on an opposing creditor to satisfy the Court that they are unfair or prejudicial. (See *Canadian Imperial Bank of Commerce v. Acchione Construction Co.* (1989), 36 C.L.R. 144 (Ont. S.C.) [Master] 146.

74 I recognize that there are other bases of allocation and have no issue with the general principles set out by Hall J. in *Hickman Equipment (1985) Ltd., Re*, [2004] N.J. No. 299 (N.L. T.D.)

75 Having considered the submissions of all creditors, I am not persuaded that the onus has been met. The Receiver's cost allocation is therefore approved.

76 Counsel may obtain a further appointment to deal with any issues remaining on the motion and the fixing of costs, if required.

Order accordingly.

End of Document

C

2009 MBQB 204
Manitoba Court of Queen's Bench

Winnipeg Motor Express Inc., Re

2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242,
179 A.C.W.S. (3d) 266, 243 Man. R. (2d) 31, 56 C.B.R. (5th) 265

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the Applicants")

Suche J.

Heard: June 19, 2009
Oral reasons: June 19, 2009
Docket: Winnipeg Centre CI 08-01-56696

Counsel: David R.M. Jackson for Monitor, Ernst & Young Inc.
G. Bruce Taylor, Jennifer J. Burnell for Winnipeg Motor Express ("WME")
Harvey G. Chaiton for Heller Financial Canada Holding Company ("Heller")), GE Canada Leasing Services ("GE"))
Donald G. Douglas for Paccar Financial Services Ltd. ("Paccar"))
Douglas G. Ward, Q.C. for Alterinvest Fund L.P. (BDC)
Robert A. Dewar, Q.C. for Ramwinn Diesel Inc. ("Ramwinn"))
William G. Haight for Key Equipment Finance Canada Ltd.
E. Peter Auvinen for CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc., Stoughton Trailers Canada Corp. ("Stoughton"))
Donald R. Knight, Q.C. for Maxim Transportation Services Inc. ("Maxim"))

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

MOTION for ruling on appropriate distribution of DIP loan and administrative charges incurred since stay of proceedings was granted pursuant to s. 11 of *Companies' Creditors Arrangement Act*.

***Suche J.* (orally):**

1 The issue before me today is the appropriate distribution of the DIP loan and administrative charges (collectively referred to as the "Court Ordered Charges") incurred since May 15, 2008, when I granted a stay of proceedings pursuant to s. 11 of the *CCAA*. The DIP loan represents working capital advanced to WME by Heller during the restructuring period; the administrative charges consist of the monitor's fees, its legal fees, WME's legal fees, and director's charges. The amount of these fees is not in issue and both have been paid by Heller out of receivables collected from WME's operations and sale of assets. Thus, the effect of this order will be to require other parties to reimburse Heller for some portion of the $1.8525 million in issue.

2 The monitor, in its twelfth report dated February 12, 2009, recommends that the Court Ordered Charges be allocated among the secured creditors based on pro rata recovery, using actual or estimated recovery. Total recovery for any creditor includes its direct recovery plus allocated sale proceeds, plus any lease payments recovered, less direct costs, which includes expenditures for such things as repairs or reconditioning.

3 In the result, certain secured creditors will be excluded, namely:

> (i) Daimler Chrysler Financial Services, as I ruled its equipment was not subject to the stay, or the Court Ordered Charges;
>
> (ii) three secured creditors, Richard Sobey, Frontier Capital Partners, and Shaw Satellite Services, whose security is subordinate to BDC, which itself only recovered a minimal amount of WME's outstanding indebtedness.

4 In addition, several office or non-fleet equipment lessors have been excluded on the basis of administrative efficiency because of the very small amount of their respective recoveries.

5 In making its recommendations, the monitor indicates it relied on the following principles:

> (i) all secured creditors should contribute to the cost of restructuring;
>
> (ii) a strict accounting on a cost benefit basis is impractical and not necessary or desirable for allocation purposes;
>
> (iii) security arrangements and priorities should not be readjusted as part of this process;
>
> (iv) the proportion each creditor should be allocated need not be equal; and
>
> (v) the allocation should be equitable, rather than equal.

6 The monitor also recommends that no DIP charge should be allocated to any equipment parked and available for pickup at the date of filing, or for units that have not yet been returned to a lessor/lender.

The Parties and Their Positions

Heller

7 Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at $5,643,297, which was secured by accounts receivable of $5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately $8,750,000 (Cdn.) and $2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately $55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately $394,000 to financing lessors.

8 Heller supports the monitor's recommendation.

GE

9 GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately, GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

10 In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

11 GE supports the monitor's proposed allocation.

Paccar

12 as at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received $279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

13 Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors, particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

14 Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately $2.7 million, compared to Heller's loss of $55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

15 It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

Cit Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

16 These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

17 Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

18 These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

19 When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

20 Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment

lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered $4,738.12 out of the proceeds of sale of WME's redundant assets.

21 Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

22 Finally, Ramwinn has a claim against WME in the amount of $18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

23 Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease. It was paid its lease payments of $5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

24 BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. Since the date of the hearing, I have made an order of bankruptcy against WME.

25 I turn, then, to the legal issues raised on this motion.

True Versus Financing Leases

26 Both Stoughton and Maxim claim to be "true" lessors. The significance of this issue is twofold; s. 11.3(a) of the *CCAA* provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

27 Section 11.3(a) was added to the *CCAA* in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2278 (B.C. C.A.), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the *CCAA* into line with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), which has a similar provision concerning proposals.

28 The leading authority on the proper interpretation of s. 11.3(a) is *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (B.C. S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). The distinction between a true lease - that is, a contract of bailment also known as an operating lease - and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.

29 It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.

30 At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so it is very difficult to generalize about how any particular type of relationship will be structured.

31 All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

32 In *Smith Brothers*, Bauman J. concluded that s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the *CCAA*. He says:

> 56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

33 And further, at para. 61:

> 61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

34 *Smith Brothers* has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

35 I turn, then, to the two creditors in this case, Maxim and Stoughton. I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.

36 I say this because a review of Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment - it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.

37 It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

38 The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.), over that in *Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.* (2005), 18 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

39 The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a). In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

40 The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.

The Law

41 I turn, then, to the question of principles of allocation of Court Ordered Charges under the *CCAA*. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.). While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

42 In *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.), at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

> (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;

(3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;

(4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

43 I also agree with the decision in *Sulphur Corp. of Canada Ltd., Re*, 2002 ABQB 682, 5 Alta. L.R. (4th) 251 (Alta. Q.B.), where LoVecchio J. concluded that the court has jurisdiction to grant a charge for debtor in possession financing which ranks in priority to provincial statutory liens, in that case a builder's lien.

Analysis and Decision

44 I begin with the observation that the s. 11 stay in this case has accomplished exactly what the *CCAA* intends that it do - it allowed a company in desperate financial circumstances the opportunity to restructure so that part of its business which was viable could carry on.

45 Having said that, good news under the *CCAA* is a relative thing. Substantial financial carnage occurred along the way, not just to the secured creditors, almost all of whom have recovered at least something, but more so to a long list of unsecured creditors as well as the investors. The overriding theme of the individual submissions before me was that each of the parties would have been in a much better position had they been able to simply realize on their security. That may or may not have been so, but of course the point of the *CCAA* is that the collective good and the benefit to all stakeholders governs.

46 The starting point, then, on this motion is the recommendation of the monitor to allocate the Court Ordered Charges among the secured creditors on the basis of a pro rata share using total recovery. This method, in effect, amounts to requiring the secured creditors to pay a fee to collect its outstanding receivables. This certainly is not a novel concept in debt collection.

47 In my view, the methodology proposed by the monitor on its face is fair. It has an objective basis and is being applied uniformly. Utilizing an "outstanding indebtedness approach", which has been applied in other cases, would not be better as it ends up favouring Heller substantially at the expense of most of the secured creditors.

48 I agree with the view expressed in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), that where the allocation is *prima facie* fair, the onus is on an objecting creditor to demonstrate that the proposal is unfair or prejudicial. The monitor, after all, is both court appointed and is intimately familiar with the details of the restructuring, including the particular costs incurred and what has transpired within the company's business operations during the restructuring period.

49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.

50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.

51 My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. Ramwinn's effort, cost and delay in having its accounts paid was substantially less than had it been required to engage in collecting from the equipment lessors, institute court proceedings, and potentially undergo the process of realizing on equipment in its possession. Those creditors, including Heller, BDC and Ramwinn, who shared in the proceeds from the sale of redundant assets or the purchase by Newco, also received real and meaningful benefit from the efforts of WME and the monitor in conducting the sale and the purchase by Newco would not have happened without the restructuring.

52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the *CCAA*.

53 I am also of the view that the relative loss - the issue raised by Paccar -results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and Alterinvest's loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

54 At the same time, I do not accept Ramwinn's argument that requiring it to pay the allocation recommended by the monitor is also a violation of this principle. The allocation proposed is not at all disproportionate, in my view, to the benefit accrued to Ramwinn.

55 I also conclude that there is no basis on which I can or should direct that the funds be held to pay for the outstanding claim Ramwinn advances against WME.

56 As to equipment obtained directly by lessors, I am of the view that regardless of how lessors recovered equipment, any equipment recovered post stay should be included in the allocation as suggested by the monitor. Self-help is not to be condoned, and a potential benefit not realized due to a creditor's actions, should not be discounted in this analysis, as to do so falls into a detailed cost benefit analysis.

57 There is one adjustment, however, that I do feel is in order. A discount rate of 9.25% on the present value of GE's leases was used by the monitor. I am not persuaded that this is justifiable. I accept what I take to be the monitor's secondary position of 6% as being reasonable.

Equipment Leases

58 Much attention was paid during these proceedings to the situation of equipment lessors who hold financing leases. Paccar, in particular, but also others, advocated forcefully that they were unduly prejudiced by the stay. They maintain that not only are they not being paid while their assets are being used to the benefit of the other stakeholders, but their underlying security is being rapidly and substantially deteriorated in the process. This, they say, violates one of the fundamental objectives of preventing one creditor from obtaining an advantage over other creditors during the stay period.

59 It strikes me that the fact that true lessors are entitled to be paid further aggravates this problem in circumstances such as WME's where it has a variety of arrangements with equipment suppliers, including some true leases. It is clearly in a debtor company's economic interests to use financed rather than leased equipment during restructuring. This is what seems to have occurred here (although I make no criticism of WME for doing so).

60 It is difficult to know how this situation can be remedied, given that the whole point of the *CCAA* is to relieve a company of ongoing financial burden to allow it the opportunity to

restructure. In this case, for example, WME would not have succeeded had been obliged to pay for its equipment during the entirety of the restructuring.

61 On the particular facts of this case, this issue became somewhat easier to address given the nature of WME's business. Equipment to a transportation company is akin to raw goods to a manufacturer, and I was of the opinion that if WME was going to be viable, at a certain point it would have to demonstrate it could pay for the essential means of production. Otherwise, there would be no purpose to continue the stay. Accordingly, I ordered that financing leases would be paid as of August 1, 2008.

62 I say all this not to justify or revisit the basis for my earlier decision, but to get to the point that in considering what is equitable, undue prejudice is a reason to adjust what would otherwise be a uniform approach. I am satisfied that equipment lessors in a business operation such as WME's do suffer undue prejudice. In this case, however, the equipment lessors were paid as of August 1. Being financing leases, those payments were not just for use, but included some amount on account of equity. I conclude, then, that the undue prejudice suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount to justify the uniform application of the methodology proposed by the monitor.

63 The last issue is one that perhaps is more controversial. Maxim, the only true lessor, has, in my view, derived the same benefit as the financing lessors from these proceedings. Its trailers were part of WME's network which stretched across North America. As a result of WME's continued operations, its equipment was gathered in and ultimately it was able to assign its leases to Newco without any interruption. While s. 11.3(a) specifically allows for payments for use of equipment despite the stay, I do not see that there is any statutory prohibition against requiring a contribution to the Court Ordered Charges against such a party. Taking a broad and purposive approach to the *CCAA*, which I am obliged at law to do in determining an equitable distribution of the costs of the restructuring, I conclude that Maxim should share in these charges on some basis.

64 I do this, recognizing that the only authority on point that was provided to me, *Western Express Air Lines Inc.*, came to a different conclusion. However, I note that there, Brenner C.J.S.C. specifically found that:

> 20 ... If costs are to be allocated in the basis of the benefit to be derived from a successful restructuring, then the lessors should arguably pay nothing. As ordinary creditors for the outstanding lease payments they will likely receive nothing. ...
>
> . . . . .
>
> 22 Accordingly under the general equitable principles of the *CCAA* I see no basis for requiring the aircraft lessors to bear a portion of the Existing Charges.

65 Here, I have found the situation to be otherwise. There was a real and meaningful benefit to Maxim.

66 However, just as GE's assumed lease was discounted for the risk of nonperformance by Newco, so, too, should Maxim's. Subject to hearing further submissions on the matter, the amount of Maxim's total recovery should be discounted by the same discount rate, namely, 6%.

Conclusion

67 At the outset of the hearing before me, several disputes remained which concerned the value of various creditors' total recovery.

68 I understand that through a combination of information provided during the hearing and the findings I have made this afternoon, these have all been resolved.

69 I trust that these reasons will allow the monitor to calculate the precise allocation among the parties. However, I recognize that it may be that some aspect of my reasons require either clarification or some addition. Should that be the case, I invite the parties to let me know.

Order accordingly.

D

1983 CarswellBC 147
British Columbia Supreme Court

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.

1983 CarswellBC 147, [1983] 4 W.W.R. 762, [1983] B.C.W.L.D. 1309, [1983] B.C.J. No. 1499, 20 A.C.W.S. (2d) 183, 35 C.P.C. 146, 45 B.C.L.R. 218

S. & K. PROCESSORS LTD., STRANG and SILVERKING PROCESSORS LTD. v. CAMPBELL AVE. HERRING PRODUCERS LTD., OCEAN FISHERIES LIMITED and J.S. McMILLAN FISHERIES LTD.

McLachlin J.

Heard: March 30, 1983
Judgment: May 13, 1983
Docket: Vancouver No. C800876

Counsel: *S. J. Mulhall*, for plaintiffs.
J. K. Lowes, for defendants.

Subject: Civil Practice and Procedure; Evidence

Application for order compelling production of documents.

***McLachlin J.*:**

1 This is an application, brought by way of pre-trial conference, in which the plaintiff seeks an order compelling production of certain documents. The defendants oppose, claiming solicitor-client privilege.

2 The action is a complex one. One of the matters raised in the statement of defence concerns expenses alleged to have been incurred by the defendants on behalf of the plaintiff S. & K. Processors Ltd. but not charged to it. On 17th July 1980 this court ordered that the defendants deliver further and better particulars of these expenses. Complete particulars have not been delivered to date. However, on 23rd December 1982 an accountants' report (the Laventhol & Horwath report), particularizing the claim of the defendants Ocean and McMillan for administration expenses, was delivered to the plaintiffs.

3 The defendants do not object to producing their financial records and statements to the plaintiffs. They do object to producing: (1) correspondence between their solicitors and Laventhol & Horwath for the purpose of preparing the accounting report; (2) notes of meetings between Laventhol & Horwath and representatives of the defendants and the defendants' solicitors; (3) drafts and working papers of representatives of the defendants; and (4) drafts and working papers of Laventhol & Horwath. All these documents, the defendants assert, are confidential in nature, and were made solely for the purpose of giving advice and organizing and preparing evidence under the direction of the defendants' solicitors.

4 The plaintiffs submit: (1) that the documents in question were not privileged; and (2) that if they were privileged, the privilege has been waived by disclosure to the defendants of the Laventhol & Horwath report.

Privilege

5 The defendants' assertion that the documents originated in confidence and were prepared solely for the purposes of litigation has not been negated. It would seem, therefore, that all elements necessary to establish solicitor-client privilege are met. However, the plaintiffs assert that facts observed or noted by experts consulted by a litigant — as distinguished from his inferences, opinions or conclusions — are not privileged: *Bestway Lath & Plastering Co. v. McDonald Const. Ltd.* (1972), 31 D.L.R. (3d) 47, 4 N.S.R. (2d) 1 (C.A.). In my view, that submission is not of assistance in this case. In Bestway, the issue was whether an expert retained by a litigant was required to answer questions under the Nova Scotia rule permitting any person to be examined for discovery. It was held that the expert could be examined on facts observed by him that were patent to the senses, these not being privileged. But in the case at bar, it is not facts which are sought to be produced, but communications which may refer to such facts. Those communications have arisen in circumstances where solicitor-client privilege attaches. The fact that the communications may refer to facts does not deprive them of their privileged character. I conclude that the documents are privileged and need not be produced, unless that privilege has been waived by the defendants.

Waiver

6 Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

7 The plaintiffs contend that by producing the Laventhol & Horwath report, the defendants waived privilege not only with respect to that report but to all the documents and communications which were involved in its preparation. Fairness, they submit, leaves no alternative; if a litigant is to properly evaluate the expert report produced by his opponent, he must have access to the instructions and information upon which it is based.

8 The report in question was produced pursuant to the Evidence Act, R.S.B.C. 1979, c. 116, s. 11 [re-en. 1981, c. 10, s. 21], shortly before the trial of this action (subsequently adjourned) was to commence. The Evidence Act, s. 11, abrogates the privilege attaching to such reports by requiring that they be produced 14 days before the expert gives his evidence. The Act sets out the extent to which the privilege is abrogated by specifying what must be disclosed — the expert's opinion and the facts upon which it is based. Analyzed in this light, the plaintiffs may be said to be seeking an extension of the inroad on privilege legislated by the Evidence Act, s. 11.

9 It is settled that legislation is to be taken as abrogating privilege only if it does so in clear and unambiguous terms: *Dir. of Investigation & Research v. Can. Safeway Ltd.*, [1972] 3 W.W.R. 547, 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 (B.C.S.C.). It is also apparent that had the legislature wished to abrogate privilege, not only with respect to an expert's opinion and the facts upon which it is based, but as to the communications between the expert, the instructing solicitor and the client in the course of preparation of the report, it could have drafted s. 11 to so provide. These considerations weigh against requiring production of the documents here in issue.

10 Notwithstanding the fact that the Evidence Act, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their disclosure? As pointed out in Wigmore on Evidence, McNaughton revision (1961), vol. 8, pp. 635-36 relied on by Meredith J. in *Rogers v. Hunter*, supra, double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.), it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

11 In the case of production of an expert's report under the Evidence Act, s. 11, it can be contended that the pre-trial production of the report and the attendant loss of privilege at that stage is involuntary, being compelled by statute. Being involuntary, it cannot constitute waiver, although

it is clear that under s. 11 privilege will be lost as to the opinion and the facts upon which it is based. Moreover, even if production of the report pursuant to the Act could be said to constitute waiver, in these circumstances it cannot be said to be unfair or inconsistent that the party producing it retain such privilege as is left to him by the Act.

12 In the result, I conclude that the privilege attaching to these documents has not been waived. The plaintiffs are not entitled to production. They are, however, entitled to disclosure of all the facts upon which the inferences and conclusions contained in the Laventhol & Horwath report are based, to be furnished by way of particulars as well as by supplementation of the report insofar as it fails to precisely set forth those facts.

13 I may add that the foregoing comments are confined to what must be disclosed upon the pre-trial production of an expert's report pursuant to s. 11 of the Evidence Act — an expert who may or may not be called as a witness. In the event that the expert takes the stand at trial, the situation respecting waiver may well be different.

14 I have not found it necessary to look at the actual documents, being able to dispose of the application on the basis of the general description of the documents contained in the material. Should particular questions arise of which these reasons do not dispose, counsel have leave to apply.

Application dismissed.

E

Case Name:
Smith v. Smith

Between
Smith et al., and
Smith

[1957] O.J. No. 700

[1958] O.W.N. 135

Ontario Supreme Court - High Court of Justice

Senior Master Marriott

December 20, 1957.

(7 paras.)

Counsel:

L.A. May, for the Applicant.

M.J. Wheldrake and C.E. Woollcombe, for the plaintiffs.

H.F.H. Sedgwick, for the solicitor.

---

1 SENIOR MASTER MARRIOTT:-- This is an application by the defendant for an order compelling Mr. P.F. Greer to return and answer certain questions he refused to answer on examination on a pending motion.

2 The plaintiffs retained a solicitor who commenced this action and upon the death of the solicitor some time thereafter they changed their solicitors to the firm Of Smith, Rae and Greer. An order was obtained by this firm on 9th August 1957 declaring that they had ceased to be the solicitors acting for the plaintiffs. The plaintiffs thereupon sought to engage another solicitor. However, they were informed that as they did not have their papers he could not act for them. Mr.

Smith then sought to obtain his papers from his former solicitors. They refused to give them to him until the plaintiffs paid their fees. At that time he asked Mr. Greer what would happen in the event that this action was brought on for trial in September and he states that Mr. Greer informed him that if the action was brought on and he was not present the presiding judge would adjourn the action until such time as he could appear in Court.

3 The action came on for trial on 12th September and the plaintiffs not being represented, it was dismissed and judgment was given for the defendant on his counterclaim. On 16th October 1957 a notice motion was issued asking for an order setting aside the judgment and in support thereof an affidavit was filed by the plaintiff Thomas Smith. This affidavit contains, inter alia, the Statements imputed to Mr. Smith above. After being cross-examined thereon the defendant examined Mr. Greer on the pending motion, and upon being asked to relate the telephone conversation or personal conversations between himself and Thomas Smith subsequent to 9th August, he declined to answer on the ground that anything which took place between himself and Thomas Smith was privileged. The plaintiff refusing to waive the privilege this application is brought to compel Mr. Greer to answer said questions.

4 The question of whether the plaintiffs are entitled to have this judgment set aside depends upon several factors but clearly one is whether or not they can prove that it was through inadvertence that they were not represented at the trial. Accordingly, the conversations in question between the plaintiff Thomas Smith and Mr. Greer in connection with this matter are most important.

5 As the matters communicated were not of a private nature and in no sense could be termed the subject of a confidential disclosure I am inclined to think they cannot be considered as privileged; Greenough v. Gaskell (1833), 1 My. & K. 98 at 104, but there is some doubt in my mind whether it comes within the category of a professional communication given in a professional capacity even though the solicitors had obtained an order that they had ceased to act: ibid; Shedd v. Boland et al [1942] O.W.N. 316. Therefore, I have concluded that the point can be more certainly decided on the second ground argued, viz., that the plaintiff Thomas Smith by filing an affidavit setting out the gist of the conversations had between himself and his former solicitor thereby waived any privilege he may have had respecting such conversations.

6 There is a dearth of authority on the point in our Courts, but in Wigmore on Evidence, 3rd ed. at p. 214 of the supplement, recent American authorities are cited for the proposition that where a client voluntarily testifies as a witness to confidential communications made by him to his attorney he thereby waives the privileged character of such communications and then both he and his attorney may be fully examined in relation thereto. This appears to be a proper and logical conclusion that should be applied and followed here. It seems to me that it would be most unfair to allow the plaintiff to base his application for relief on information he alleges was given to him by a solicitor, and then obtain privilege for such communication and thus prevent the defendant from checking the accuracy of the plaintiff's statement.

7 Therefore, an order will go requiring Mr. P.F. Greer to reattend and answer any questions relating to the information disclosed in the affidavit of the plaintiff Thomas Smith filed. The costs of the application may be spoken to on the settlement of the order.

F

Indexed as:
T. Eaton Co. v. Neil J. Buchanan Ltd.

Between
Neil J. Buchanan Limited et al., appellants, and
The T. Eaton Company Limited et al., respondents, and
Greenwood Shopping Plaza Limited, respondent

[1979] N.S.J. No. 197

31 N.S.R. (2d) 135

S.C.A. No. 00180, S.C.A. No. 00182

and S.C.A. No. 00183

Nova Scotia Supreme Court - Appeal Division
Halifax, Nova Scotia

MacKeigan C.J.N.S., Hart and Macdonald JJ.A.

Heard: February 15 and 16, 1979.
Judgment: March 7, 1979.

(63 paras.)

Torts -- Dangerous activities -- Particular dangerous situations -- Escape of flammable materials -- Negligence -- Standard of care, particular persons and relationships -- Welders -- Employers.

Appeals by Buchanan Limited, Beattie and Pettipas from the trial judge's findings regarding the cause of a fire. Three consolidated actions arose as a result of the destruction of a substantial portion of the Greenwood Shopping Plaza through a fire. The shopping centre was owned by Greenwood Shopping Plaza. Buchanan Limited was the operator of a Canadian Tire store in the shopping centre. The store was co-managed by Buchanan and Beattie. Pettipas was a welder who worked three nights a week as a clerk in the Canadian Tire store and who, on the night of the fire, had been welding some tire storage racks under the general direction of Beattie in the service bay area of the store shortly before the fire broke out. MacMurtery was an employee of Buchanan Limited, and was assisting Pettipas in the welding operation. The trial judge found that there was a preponderance of

evidence that the fire was caused by effluent from the welding operation carried on by employees of the Buchanan company. The judge concluded that Buchanan, Beattie and Pettipas were liable for damage caused by the fire.

HELD: Appeals dismissed. There was ample evidence upon which the trial judge could have found that the fire was caused by effluent from the welding operation. The trial judge was justified in rejecting an electrical failure as the proximate cause of the fire. The dangerous nature of the work was sufficient to raise the inference that the fire had been caused by the negligence of Buchanan's employees.

Counsel:

David R. Chipman, Q.C., and David A. Miller, for Neil J. Buchanan Limited, R.W. Beattie and R.V. Pettipas.
Lewis A. Bell, Q.C., for The T. Eaton Company Limited, Simpsons-Sears Limited, Metropolitan Stores of Canada Limited, Greenwood Pharmacy Limited, and Wade's Groceteria Limited.
Keith E. Eaton, Q.C., and A. William Moreira for Greenwood Shopping Plaza Limited.

The judgment of the Court was delivered by

1 **HART J.A.**:-- These appeals are from the decisions of Chief Justice Cowan dated May 26, 1978 and July 27, 1978, and the order for judgment based thereon dated July 31, 1978 following the trial of three consolidated actions arising as a result of the destruction of a substantial proportion of the Greenwood Shopping Plaza at Greenwood, Nova Scotia, on March 3, 1976 by a fire originating shortly after certain welding operations in the service bay building of the Canadian Tire Associate Store in that shopping centre.

2 The Greenwood Shopping Plaza was owned by Greenwood Shopping Plaza Limited (hereinafter called "Greenwood"). Neil J. Buchanan Limited (hereinafter called "Buchanan Limited") was the operator of a franchised associate store of Canadian Tire Corporation Limited (hereinafter called "Canadian Tire"), and this store was co-managed by Neil J. Buchanan and Robert Walker Beattie. Roy Vincent Pettipas was a welder by trade, who worked three nights a week as a clerk in the associate store and who, on the night of the fire, had been welding some tire storage racks under the general direction of Beattie in the service bay area of the associate store shortly before the fire broke out. Blair Douglas MacMurtery was an employee of Buchanan Limited, who was assisting Pettipas in the welding operation.

3 Several of the tenants of the shopping centre whose premises and contents were destroyed by the fire, namely, Eatons, Simpsons-Sears, Metropolitan Stores, Greenwood Pharmacy and Wade's

Groceteria brought action against Buchanan Limited, Canadian Tire, Beattie, Pettipas and MacMurtery for the damages they suffered as a result of the fire, claiming negligence by the defendants, their servants and agents. The defendants denied liability and joined Greenwood as a third party claiming that the fire was caused by Greenwood, its servants, agents and contractors as a result of the negligent installation and maintenance of the electrical system provided to the premises leased by Buchanan Limited from Greenwood.

4 Greenwood then brought action against Neil J. Buchanan, Buchanan Limited, Canadian Tire, Beattie, Pettipas and MacMurtery claiming that the defendants caused the fire by negligence and seeking damages for the loss of the shopping centre buildings and rentals during the period of reconstruction. The defendants denied liability and claimed indemnity against any liability incurred as a result of the fire, since they said that the fire was caused by faulty electrical installations by Greenwood. They also pointed to clauses 14 and 15 of their lease with Greenwood which required the owner to insure the buildings against fire without right of subrogation, and claimed that Greenwood's action was therefore barred.

5 A third action was then commenced, this time by Buchanan Limited against Greenwood and Darrell Wade. Wade was at all material times an officer of Greenwood. This action claimed damages for loss of the contents of the associate store and for business interruption as a result of the fire which was alleged to have been caused by improper electrical installations by Greenwood in the premises.

6 Greenwood joined Canadian Tire as a third party to this action alleging that all electrical installations in the premises had been provided and installed in accordance with the ir plans and specifications, and the materials had been supplied by them. Greenwood claimed indemnity for any liability they should incur if the fire should be found to have been caused by a faulty electrical installation.

7 These three proceedings were consolidated for the purpose of trial, and after a lengthy hearing Chief Justice Cowan made the following findings:

1. "There was no direct evidence as to how the fire started or what caused the fire."
2. "Having regard to all the evidence, I am of the opinion that there is a preponderance of evidence to the effect that the fire in question was caused by effluent from the welding operation being carried on by the employees of the Buchanan company."
3. "In my opinion, the doctrine of res ipsa loquitur applies, since I find that control of the welding operation was in the Buchanan company."
4. "The Buchanan company has not discharged the onus which rests upon it, as a result of the application of the doctrine of res ipsa loquitur, and I find that the Buchanan company is liable for the causing of the fire and for the

resulting damage."

5. "... I am of the opinion that Beattie, as the employee of the Buchanan company in charge of the welding operation, is also liable for the damage caused by the fire."
6. "I also find that Pettipas, as the welder, had a primary responsibility to see that the welding operation was carried out, taking all proper precautions, and that he could not delegate this duty entirely to Beattie, who was the employee in charge of the operation. I find that Pettipas is legally responsible for the damage caused by the fire."
7. "In the case of MacMurtery, however, I find that he was employed merely as a helper, ... that he is not liable for the damage caused by the fire."
8. "With regard to the plaintiffs, other than the Greenwood company, I find that they are entitled to recover their respective losses against the Buchanan company, Beattie and Pettipas, with costs to be taxed. Their actions against Neil J. Buchanan personally and against Canadian Tire Corporation Limited are dismissed,..."
9. "The action brought against Darrell Wade personally is ... dismissed ..."

8 After considering the effect of clauses 14 and 15 of the lease between Greenwood and Buchanan, Chief Justice Cowan found that Greenwood could not claim against Buchanan for any amount that it should have insured against under the lease. He further held that the insurer stood in no better position than Greenwood and could not claim against Buchanan by subrogation for the amount of the insurance money paid. He further held that there should be no right of subrogation against the employees of the Buchanan company (Beattie and Pettipas) for whose negligence the Buchanan company is responsible.

9 From the findings relating to the cause of the fire Buchanan Limited, Beattie and Pettipas have appealed, and from the findings relating to the provisions of the lease requiring Greenwood to insure and limiting its right to recover against Buchanan, as well as the right of its insurer to be subrogated, Greenwood has appealed. I will deal in these reasons with the Buchanan appeal.

10 The first ground of appeal relied upon by counsel for Buchanan Limited, Beattie and Pettipas was that the trial judge erred in finding that the fire was caused by effluent from the welding operation. This finding was, of course, based upon proven facts and inferences drawn from those facts, and in considering this ground of appeal this Court must keep in mind the direction of Ritchie, J., when speaking for the Supreme Court of Canada in Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802 at p. 808:

> "These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized

> with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial."

11 The main thrust of the appellant's argument on this point is that the fire could not have started as a result of sparks from the welding operation, since the place where the Court found the fire started was too far away from the location of the nearest welding operation, but that the fire could have started as a result of a spark emitted from the electrical panel located in the area where the fire was first observed.

12 The service garage in which the fire started was a separate building constructed of concrete block with a flat metal roof measuring 60 feet in length, 30 feet in width and 17 feet in height. It was divided into five bays with overhead rolling doors on the south wall, and these bays were numbered I to 5 running east to west. The western wall of the garage was a common wall with the Canadian Tire store and the access door was located at the northwest corner of the garage. The first four bays were open and used for servicing vehicles, but Bay No. 5, the most westerly bay, had been enclosed by a plywood structure and was being used for storage. The enclosure was erected with wood studding and joists enclosed by plywood and measured about 25 feet in depth and 12 feet in width leaving a space of approximately 5 feet between its north wall and the north wall of the garage for passage to and from the Canadian Tire store. The enclosure was 8 feet high with a plywood floor, and this mezzanine floor was itself enclosed on the east and north sides by a 4 foot plywood railing, with the other two sides abutting against the door on the south and the common wall with the Canadian Tire store on the west. There was a doorway at the northwest corner of the enclosure and about 3 feet south of that doorway a set of stairs attached to the common wall leading up to the mezzanine. When one entered this doorway he could either go to his left into the enclosure or up the stairs in a southerly direction to the mezzanine floor. The stairwell was open and there were no risers on the stairs but only treads.

13 The electrical panel for the garage and the store was located on the common wall, that is the west wall of the enclosure, between the south wall and the stairs. The various units were attached to a sheet of 3/4 inch plywood fastened to the concrete block wall measuring approximately 4 x 8 feet, with the bottom edge being approximately 3 feet above the concrete floor. The service entrance which was close to the southern wall was grounded to a ground rod directly beneath, but the connection between this grounding conductor and the system neutral was apparently in a loose condition when inspected after the fire. The utility meter, three feeder switches and the circuit breaker panel spread out northerly along the wall toward the stairway. There was a small opening above the electrical panel for conduits proceeding up the wall beyond the ceiling of the enclosure.

14 The enclosure was lighted by two fluorescent fixtures installed only a few days before the fire.

15 There was an opening in the north wall of the enclosure between the doorway and the eastern

corner which had been used as access to an appointment table located inside the window.

16 When the enclosure was first constructed it was encased with steel mesh, but this was later removed except from the railing above the mezzanine and replaced with plywood, which was nailed to the studding.

17 The main floor of the enclosure was used for storage of tires, rope, plastic pipe and other materials. There was a table against the opening in the north wall on which loose papers usually were found. There were coveralls hung on the east wall of the enclosure when not being worn by the employees, and there was a pail containing used rags somewhere inside.

18 The mezzanine floor was used principally for the storage of items awaiting shipment back to suppliers or customers. These were usually packaged in paper or cardboard containers and were left near the top of the stairs. other materials, such as advertising flyers were stored there as well.

19 There was an elevated metal tire rack running from the middle of the first bay to the middle of the fifth bay adjacent to the northern wall of the garage. Just to the south of this rack there was an elevated metal walkway providing access to the tire storage area and a ladder running from the walkway to the floor in the area just north of the enclosure.

20 Buchanan Limited was expecting a large shipment of summer tires, and since storage space was at a premium they decided to build an additional tire rack south of the elevated walkway. Beattie in his capacity as co-manager arranged with Pettipas, a welder who worked part-time with the company, to construct the new tire rack. Beattie laid out the work to be done, which consisted of cutting and placing vertical drop bars of angle iron 2 x 2 x 1/4 inch with horizontal members of 1 1/4 inch steel pipe. The operation was started on the Saturday evening before the fire and completed on Saturday, March 3, 1976. Pettipas used an oxy-acetylene torch to cut the material and an electric welder, which he obtained from the Canadian Tire store to weld it. MacMurtery, another employee of Buchanan Limited, helped Pettipas hold the bars during the welding process.

21 The events leading up to the fire have been summarized by the trial judge as follows:

> "Pettipas' evidence was to the effect that he arrived at approximately 7.30 p.m., and found Beattie and MacMurtery on the premises. He set up his electric welding machine and, for this purpose, took an arc welder out of the Buchanan company stock in the store. He had brought his own leads, which were approximately 200 ft. long. He set up the equipment in Bay 2 and attached the ground to a column which was near the equipment in that bay. The steel tire racks were attached to that column. Pettipas set the electric welder at 105 amps. on the low range. He said that there were two ranges provided for the welder - a high and a low - and that he set the welder on the low range. He then proceeded up the ladder and on the cat walk. He intended to weld the pipes which were to be set horizontally. The pipes had been pre-cut to lengths of approximately 6 ft.

each. The welding machine was left on the garage floor. He said that he tried to strike an arc and could not maintain an arc, indicating that the power being produced at the welding rod was too low. He called to MacMurtery, who was on the floor, to turn the setting on the machine to a higher level. MacMurtery did so. Pettipas then got an arc and went to work.

"Pettipas did not check the new setting of the welder. He said that he was going by what he could handle at the point where the welding was being done, and the welder was operating perfectly. Pettipas said that he and Beattie and MacMurtery had, prior to the commencing of the welding operation, gone around the garage area picking up material which could cause a fire, if contact were made with sparks from the welding operation. He said that they dealt with obvious problems.

"Beattie's evidence was also to the effect that material was picked up and disposed of. In one case, oily coveralls were picked up from one of the bays, where they had been left by a workman, and were put in the enclosure in Bay 5. They were, apparently, hung on a clothes rack on the east wall of the enclosure. Rags which were picked up were placed in a bucket or pail, near the north-east corner of the enclosure on the ground floor.

"Pettipas said that he started his welding operations in Bay 4 and, when he came to Bay 3, he found that a couple of the pipes were not the correct length and needed a few inches cut off the ends. He used an oxy-acetylene torch for this purpose and was cutting while on the floor of the cat walk, on the edge of the cat walk. He said that some sparks dropped down from the south edge of the cat walk towards the door. Apparently, the sparks fell on two rags which had been stuffed down in a gap in the floor, between the area where alignments were done and the wall. Beattie was on the floor of the garage, watching the operation and watching for falling sparks and for any danger of fire. Apparently, the rags were seen to be smouldering and Beattie picked them up and put them outside the garage door.

"Prior to starting work, Beattie had taken off the garage wall four fire extinguishers, which had been provided to deal with fires which might occur during the ordinary work being carried on in the garage. These were, apparently, large extinguishers with a hose, providing foam to deal with the type of gasoline or oil fire which might be expected in a garage. These were lined up on the

garage floor. Beattie had also obtained a smaller, dry-type fire extinguisher from his own office. He showed MacMurtery how to use these fire extinguishers.

"After the cutting of the pipe was completed, Pettipas continued with the welding operation. The construction of the second tire rack was completed and, after discussion with Beattie, Pettipas began the last welding of the evening. This was done in Bay 4, just a few feet from the wooden enclosure in Bay 5. There were two bars or pipes left to be welded. Apparently, they were intended to provide a third tire rack and there was some discussion as to whether there was sufficient room for tire storage in that space.

"Exhibit 21 consisted of 19 pictures taken after the fire, showing the damaged garage area. Pettipas marked as 1, 2, 3 and 4 on Picture 8, forming part of that exhibit, the location of the four last welds which he made that evening. Weld #1 was the furthest to the west and was the closest to the wooden enclosure in Bay 5. The welds were intended to tack each end of the two pipes in question. Pettipas said that he estimated that he spent approximately one minute doing each tack weld, a total of approximately five minutes for each of the two pipes. He said that the welds were almost at eye level and that there was a very minimal amount of spatter. Beattie was on the garage floor and MacMurtery was standing beside Pettipas.

"Other evidence indicated that there was a gusset at each of the points where the tack weld was made, and the photographs, including #8 of Exhibit 19, show that, in fact, there were gussets at these points. Pettipas was recalled and, while he had no clear recollection of installing gussets at these points, he agreed that it was quite possible that this was done. I find that, in fact, there were gussets, being triangular pieces of steel welded at the points where Pettipas said that he tacked the pipe to the angle iron uprights.

"The evidence was to the effect that the position of Weld #1 was 16 ft. 9 ins. above the concrete floor of the garage and a foot or so north of the northeast corner of the wooden enclosure in Bay 5. The joint to be welded was thus 8 ft. 9 ins. above the, level of the wooden mezzanine of the enclosure and 4 ft. 9 ins. above the top of the railing around the mezzanine of the enclosure. The opening which gave access to the appointment desk or table commenced approximately 6 ft. to the west of the north-east corner of the enclosure.

"Pettipas' evidence was to the effect that, after completing the fourth weld of the series of tack welds, he had a discussion with Beattie as to whether it was practical to use the third tire rack, due to the limited clearance. Beattie obtained tires of different sizes from the tire rack in the garage area, and these were tried. It was found that a 13" tire would fit, but that larger sizes would not fit in the third rack area. All three men were then on the cat walk discussing the problem. It was decided that they would have a break and drink a coke. Beattie left the cat walk and proceeded down the access ladder to the floor of the garage, and then passed the window giving access to the appointment desk, past the door giving access to the stairway to the mezzanine of the wooden enclosure in Bay 5, and through the door at the north-west corner of Bay 5, to the main store area, where he obtained three cokes from a machine located there. All three then drank cokes and continued their discussion of the practicability of storing tires on the third rack level.

"They then decided that they would 'pack it in' for that night. The Buchanan company had a station wagon which had been parked outside the garage. Beattie left the cat walk and proceeded down to the garage floor and out the door of Bay 4, to bring the station wagon inside the garage where it was intended to be left overnight. Pettipas said that he went to pick up his welding gear, consisting of the lead which was draped over the steel forming the tire racks. MacMurtery started to walk on the cat walk to the east end. Pettipas said that, when he bent to pick up his gear, he saw fire coming up the west wall of the enclosure in Bay 5. He said, at first, that this was 20 to 25 minutes from the time when he completed the last of the four tack welds. On cross-examination, he was referred to an answer given on examination on discovery, when he said that it was about 10 to 12 minutes after he finished welding before he saw, smelled or heard fire. He said that it was longer than 10 to 12 minutes and his estimate on the hearing before me was 20 to 25 minutes from the completion of the fourth weld.

"Pettipas said that, when he first noted the fire, it was on the west wall coming up between the mezzanine and the wall itself. He said that there was no fire on top of the mezzanine of the enclosure. He said that there was no fire on the mezzanine deck itself, but the flame was 18" up the west wall, above the deck. He said that he had not noticed anything before that time. He hollered, 'Fire' and dropped his lead. Beattie had reached the door of Bay 4. Pettipas said that he got down off the cat walk and took a fire extinguisher from Bay 4 and entered the doorway of the wooden enclosure in Bay 5. He said that MacMurtery was there before him. He said that the appointment desk was off to his left when

he faced south-east. There was no fire around the appointment desk and he said that the fire was at the southern end of the enclosure. He directed the fire extinguisher hose towards the ceiling on the west side and stayed there long enough to empty the fire extinguisher. He said that the flame that he saw was very yellow and that the teats on the top of the tires which were stored in the enclosure were beginning to burn. He could not say whether the fluorescent lights in the enclosure were then on, but he did say that the lights in the garage area itself were on and did not go off until two or three minutes after he noticed the fire.

"Pettipas said that he then went to the oxyacetylene equipment and shut off the valves of the bottles of acetylene and oxygen, and went to get another fire extinguisher, but found only an empty one. He then closed the Bay 4 door, went outside and moved his own car which was near the garage area, and then went out the front of the shopping centre property and waited for the fire department.

"Pettipas gave evidence in detail with regard to the process of welding, and with regard to the amount of sparks or effluent given off in the course of the welding process. He said that the amount of effluent would not be excessive. He had a welding mask on and did not see where the effluent fell. His attention was directed to the point at which welding was being carried on, and it was left to Beattie to watch for the fall of sparks and other effluent.

"The evidence of Blair MacMurtery.was to the effect that he was called in on the night of the fire to act as a helper for Pettipas, the welder. His job was to hold up the pipes, so that Pettipas could weld them in position. He described the layout and contents of the enclosure and the material which was on the top of the mezzanine floor, near the open stairway. MacMurtery had had no experience in welding or in helping a welder. He said that he had turned up the setting on the electric welding machine at Pettipas' request, to a setting which met Pettipas' requirements. He said that he was alarmed by Pettipas hollering 'Fire' and that it was a good 20 to 25 minutes from the last of the four tack welds. MacMurtery turned around and noticed fire which, he said, was at the southern end of Bay 5 to the west wall, in the general area of the opening in the mezzanine floor, giving access to the meter box and conduits. He said that the fire was running along that wall for about four feet. He saw no fire on the mezzanine floor itself and there was nothing burning on that floor. He went down the ladder at the west end of the cat walk and picked up a fire extinguisher in Bay 4, and went inside the enclosure in Bay 5, Beattie was there ahead of him, starting up the stairs.

MacMurtery hollered to him that the fire was down below. MacMurtery said he stepped in the door of the enclosure and turned to go by the desk and then faced south. The desk was on his left with the window above it. He said there was no fire apparent to him in the north-east corner of the enclosure. He observed fire to the southern end of the enclosure to his right. It was a yellow fire, quite large, with no apparent smell and the smoke did not bother him at that point. The fire was up at the ceiling part, right up into the ceiling itself at the south-west corner. He said that he discharged the fire extinguisher with little effect. He said that he started to go to the store area to find more fire extinguishers and, while going to the store, the lights in the garage were extinguished. Beattie then came and let him out the front door of the store and they waited for the fire department to arrive. He said that it was approximately 10 p.m. when the fire was first noticed.

"MacMurtery was cross-examined as to times and as to the place of the fire when he first saw it. He agreed that his evidence given on discovery, to the effect that it was 10 or 15 minutes after the welding was completed before the fire was noticed, was correct, and that it was long enough for them to drink a Coke and talk. He also agreed that, when he first saw the fire, it was coming up the western wall, right up against the wall, up the side of the wall, and that it was 2 ft. to 4 ft. above the floor of the mezzanine. He said that he was first in the enclosure and he saw the bulk of the fire moving in the south-west corner to his right as he faced south.

"Robert Walter Beattie's evidence was to the effect that he was in charge of the operation of constructing the additional tire racks. He described the precautions taken on the night of March 3, 1976, before the welding operation began. All the lights in the garage were turned on and the fire extinguishers were taken from the walls of the garage and placed on the floor. He showed MacMurtery how to use the fire extinguishers. He picked up a number of rags and a mechanic's uniform or coverall in the alignment bay. He said that he put the uniform on a rack in the enclosure and the rags with the rest of the rags in the box, and the other evidence indicated that this box was kept near the north-east corner of the wooden enclosure in Bay 5. He obtained a fifth small fire extinguisher from his own office in the main store section of the building. In the course of the cutting of pipe by Pettipas, using an oxy-acetylene torch, Beattie picked up two rags which started to smoulder, and put them outside. During the welding operation, he was watching for sparks. He referred, particularly, to the four last welds. He said that these were done sometime between 9.20 p.m. and 9.30 p.m. He estimated that the first of the four welds was done at a point 2 ft. east and 2 ft. north on the horizontal plane from the north-east corner of the

wooden enclosure. He said that he was directly underneath when the welding was being done. He said that he watched the sparks and they came straight down. Some of them hit the wall of the enclosure and bounced off on to the floor, where, he said, they went out. That side of the enclosure was painted with a rubber-based paint. Beattie said that he was not looking at the welding arc, but was looking in that general direction, and watching for sparks. He said that he did not see any sparks go over the top of the enclosure. He said that they seemed to be hitting 6 ft. up from the floor. He saw no fire or anything else out of the ordinary.

"Beattie said that Pettipas moved to the second weld and touched it. Sparks fell - he could see them coming down - there was nothing to it, and it was the same for the third and fourth welds, which took just a few seconds each. It was then that he decided to test, to see if they could have another. row which would take tires. He obtained a tire from the second bay and passed it up to the cat walk where Pettipas and MacMurtery were. That one did not fit, and he obtained a smaller one in the 13" size. It fitted very tightly. They then decided that the additional rack was not feasible. He proceeded to the store area to obtain Coke for the three of them. When he passed the window giving access to the appointment desk, he did not notice anything. He was gone two or three minutes and returned with the Coke, which he passed up to Pettipas and MacMurtery who were on the cat walk, while he was on the floor of Bay 4.

"Beattie then decided to call it a night and he started to go out to bring in the company car. He heard someone yell 'Fire' and ran back to the bottom of the ladder in Bay 5, leading up to the mezzanine of the enclosure. He was part way up the stairs when someone, apparently, MacMurtery, said that the fire was downstairs. He said that he did not see any fire around the top of the stairs. He said that stepped down to the floor of the enclosure. The appointment desk was directly behind him. He looked south and could see the fire in front of him. He directed the hose of the fire extinguisher towards the fire. In seconds, the fire extinguisher was empty. He then left to go to his own office in the store premises to call the fire department, although there was a telephone in the enclosure. Beattie was not accustomed to using that telephone and, apparently, it did not occur to him to use it, rather than the one in the store office.

"When Beattie reached his office, he found that the telephone was not operating, so he ran to a tavern nearby and left a message to have tile fire department called. When he returned to the store from the tavern, the lights were

> not on in the store, although they were on when he left to go to the tavern to telephone. He estimated that it would be 20 to 25 minutes after the last of the four welds was completed, before the fire was discovered.
>
> "Beattie said that he could not see the opening in the north wall of the enclosure, giving access to the appointment desk, from where he was standing. He did not inspect the upper floor of the enclosure in Bay 5, prior to starting the welding operation. He did not inspect any part of the enclosure, either the mezzanine floor or the ground floor, after completion of the four tack welds which was the last of the welding done that evening."

22 After considering all of the evidence of the witnesses who saw the fire and the experts who gave various opinions as to its possible causes, the trial judge made the following finding:

> "I find that the fire started in the ground floor area of the enclosure, below the level of the top of the mezzanine floor. I also find that the fire started in an area close to the west wall of the building and towards the south of the enclosure."

23 Counsel for the appellant argues that this Court is bound by the trial judge's finding as to the location of the start of the fire and with that finding it would have been impossible for the fire to have been started by the escape of effluent from the welding operation. He refers to the evidence of the experts called on behalf of his clients, who expressed the opinion that sparks falling from the position of the nearest weld to the northeast corner of the enclosure could not have travelled the distance necessary to take them to the place where the fire was found to have started between 20 and 24 feet away. He couples with this argument the possibility-of the fire having been caused by a spark emitted from the electrical system and draws support from the same experts for this possibility. Counsel then argues that it is more probable that the fire was caused by the electrical system than by the welding operation and that the trial judge was clearly wrong in reaching the conclusion that the fire was caused by the negligence of his clients in conducting the welding operation.

24 There are, in my opinion, several reasons why this argument must fail.

25 In the first place I do not believe that the trial judge really made as specific a finding about the location of the start of the fire as counsel suggests. He has merely drawn the inference from the facts before him that the fire started within the enclosure between the electric panel and the stairs near the west wall, which would put it just slightly south of the centre of the enclosure in the general vicinity of the stairwell. This view of his finding greatly cuts down the distance the effluent would have had to travel to reach the place where the fire started. To show that the trial judge was thinking generally about this location I quote some extracts from his decision:

> "Based on the evidence of the eye witnesses, Pettipas, MacMurtery and Beattie, I find that the fire started inside the plywood enclosure in Bay 5.
>
> ...
>
> "The evidence appears to me to support the view that the fire started at or near the underside of the mezzanine floor of the enclosure, near the west wall. The west wall itself was built of concrete blocks, so that the fire must have been consuming flammable materials, such as the wooden floor and other wooden portions of the enclosure, or some other flammable materials at that location. An aperture between the floor on the west wall of the building would permit a flame to rise and would create a draft, which would cause such a fire to burn more freely than if the join between the floor and the west wall were airtight.
>
> "A good deal of evidence was given in support of the proposition that the plywood enclosure was well constructed and tightly fitted, with no gaps in the walls and mezzanine floor, except the stairwell and the opening for the electric service. The evidence of Pettipas indicated that there were apertures, as one would expect, having regard to the way in which the plywood enclosure was built by the Buchanan company, acting by its employees.
>
> "I find, therefore, that there were apertures in the mezzanine floor, close to the west wall of the building, in addition to the stairwell and the aperture for the electric service, and that such apertures would permit effluent from welding operations, consisting of hot metal and slag, to fall into the ground floor area of the enclosure, if, in fact, such effluent reached the points where apertures were present."

He said further at p. 41:

> "The fire actually started inside a wooden enclosure, built by employees of the Buchanan company in various stages and used, as one witness said, 'for storing junk'. overalls and coveralls used by employees working in the garage were kept on a rack against the east wall of the enclosure, and a pail of oily rags or oily waste was kept near the northeast corner of the enclosure. Beattie's evidence was to the effect that some of the material which he picked up from the garage area, before starting the welding operations, was placed inside the enclosure, with overalls or coveralls being placed on the rack and rags being placed in the pail, which already contained some rags."

Again at p. 45 he said:

> "In my opinion, there is a preponderance of evidence that the fire started above and to the right of the electric service panel, and quite outside the equipment fastened to the plywood panel. The evidence of the eye witnesses Pettipas, Beattie and MacMurtery, was to the effect that the fire was in the ceiling area when they saw it, at a time when it was well advanced."

And at p. 47:

> " In my opinion, if there were such accumulations of highly flammable material in and about the enclosure, it is more probable that they were ignited by effluent falling from welding operations, than that they were ignited by an electrical fault occurring, by mere coincidence, at a time when welding operations were being carried on."

And finally, at p. 50 he said:

> "In the present case, the fire occurred in a plywood enclosure which was within a few feet of the site of part of the welding."

26 Secondly, there was no need for the trial judge to pinpoint the actual location of the origin of the fire further than to say that it started within the enclosure. This is an inference that can properly be drawn from the proven facts, and, in my opinion, it is only necessary to find that effluent from the welding operation did find its way into the enclosure in order to support the trial judge's finding of causation of the fire.

27 Thirdly, there is, in my opinion, ample evidence to support a finding that effluent from the welding operation could have found its way into the enclosure. Pettipas himself said in his discovery evidence that effluent could travel as far as 30 feet from the site of the welding operation whereas the eastern side of the stairwell is only 12 to 16 feet from the welding point. This measurement would be from a point directly under the welding point and about 6 feet below it, but there appears to be no reason why the sparks from the welding operation would not travel this distance and fall into the spaces between the steps which were open to the interior of the enclosure. Furthermore, the Deputy Fire Marshal who investigated the accident reached the conclusion that the fire had been started from stray sparks or molten hot slag from the welding operation. F.R. Fraser, the Chief Electrical and L.P. Gas Inspector of the office of the Fire Marshal, gave his opinion that hot metal or hot slag could have been thrown far enough to go into the stairwell where it entered the mezzanine thereby setting the fire on the stairs and near the bottom of the stairs. The opinion given at the end of his report is as follows:

> "It is my opinion that this fire was caused by hot fragments of metal or hot fragments of slag or of hot fragments of metal and of slag produced from the

> welding and cutting operations igniting combustibles that were located in Bay No. 5."

G.N. Kent, a professional engineer called as an expert by the respondents, reached the conclusion that the welding operation was close enough to the stairwell opening to have permitted hot sparks and drops of molten metal to gain access to the enclosure and ignite combustible materials. Dr. M.R. Foran, a chemical engineer, said that the globules of steel emitted from a welding operation are disbursed over a considerable range and "the trouble is the ones that bounce and travel so far are the large ones, of course, they retain their heat, they are the things that set fire to things." After indicating that these sparks are so unpredictable in the direction and distance which they travel, he suggested that sparks from the welding could have entered the enclosure through the window or door on the north side or under the base plate at the bottom. In his opinion the probable cause of the fire was the welding operation.

28 G.C. Baker, a consulting electrical engineer, called by the appellants, also agreed that a spark could go through the window. He suggested it might bounce off the foot of the welder or some other obstacle as it fell. He also was indefinite as to the distance that a spark capable of igniting substances would travel if it landed on the mezzanine floor. Although he would not expect one to ignite material beyond 8 feet there was a possibility that it would. Allison D. Tupper, a consulting engineer called by the appellants, thought it was possible that sparks from the welding operations could have gained access to the enclosure through the window, but would have expected the fire to show itself in that area if this had happened. He felt that if the globules made their way to the centre of the enclosure they would have cooled beyond the ignition point by the time they reached that position. He did say, however, that a larger particle would take longer to cool. When asked about the possibility of sparks entering the enclosure through the stairwell he felt that it would be possible for larger particles to reach the stairwell, but believed that they probably would have cooled by that time so as not to ignite solid combustible material.

29 Ross A. Ritchie, a consulting engineer called by the appellants, simulated the conditions prior to the fire and conducted tests to determine how far welding effluent would travel when falling from a similar height upon plywood. As a result of these tests he felt that there was no possibility that the fire had been caused by the escape of the welding effluent because in none of his tests did the particles travel far enough to have gained entry to the enclosure. on cross-examination it was shown that the plywood used in simulation tests was new plywood and that there could have been a difference in the quality of the materials used during the welding operation. Mr. Ritchie went on to suggest that the fire could have been caused by stray currents emanating from the welding operation which found their way back to the faulty ground connection causing a small arc and possibly igniting some combustible material present at that spot. On cross-examination he appeared to abandon this proposition, and the trial judge was apparently not very impressed with this evidence. At p. 586, the following interchange took place:

> "THE COURT

Q. So there's not much to that theory, is there?
A. No, I don't hold strongly on that.
Q. I'm glad you agree, thank you. I'm not interested in possibilities, you telling me that it is absolutely impossible that this fire could start from the welding, I just find that very difficult to accept. You say the possibility is zero. If you say it is unlikely, well, I go along with that. Experts disagree, that's why they are all here, and I've got to try to unthrash it, but to say that there's no possibility, absolutely none ... I find very difficult to accept. And when I find something like that, stray welding currents and so on, it just doesn't make sense."

30 In my opinion this statement by the trial judge was perfectly justified. By this time none of the experts had ruled out the possibility of welding effluent gaining access to the enclosure, except Mr. Ritchie. Although the verbal evidence of Mr. Tyner and Baker had not at this point been heard he had already had the benefit of seeing their reports.

31 After reviewing the evidence as a whole I am satisfied that there was ample evidence upon which the trial judge could have found that the fire was caused by effluent from the welding operation finding its way through one of the apertures to the interior of the enclosure and there igniting combustible materials. It was then his duty to see whether any other reasonable cause of the fire was revealed by the evidence and he directed his mind to this end.

32 The only other possible cause of the fire suggested by the evidence was that it originated through an electrical fault. The electrical equipment had been almost completely destroyed in the fire, but the experts were able to determine that there had been a small arc at the location of the faulty ground connection to the service entrance switch and that there had been arc burns in each of the three feeder switch boxes. The evidence also revealed that the lights had remained on in the garage and store until some time after the fire had been burning with no evidence of flickering beforehand. There was also a photograph taken after the fire had been initially brought under control which indicated burning of the plywood behind the electrical panel only above and to the right of the various units.

33 It was suggested that a fire could have been caused by a high resistance fault inside the enclosure causing overheating and combustion of adjacent materials or by stray welding currents arcing at the ground connection or by prolonged overload conditions breaking down insulation at the main panel board causing arcing adjacent to combustible material or by malfunction and overheating of the ballast in the fluorescent fixtures under the mezzanine floor.

34 Mr. Fraser, the electrical engineering specialist with the Provincial Fire Marshal's office, examined the remains of the electrical equipment and was of the opinion that the fire was not caused by an electrical fault or stray welding current. Donald Thomas Matheson, another professional engineer working in the electrical field, was of the opinion that the fire was not caused by electrical fault since the lights remained on after the fire was observed. In his opinion if there had

been a short circuit the fuses would have blown and the lights extinguished. He believed that the arcing to the feeder switch boxes was caused as a result of the breakdown of the insulation from the heat generated by the fire.

35 Mr. Ritchie, as mentioned earlier, appeared to abandon the theory originally contained in his report about stray welding currents being a possible cause of the fire. He disagreed, however, with Mr. Fraser that the lights would have to flicker or go out prior to a high resistance fault. He said that a high resistance can continue for some period of time before the fuses blow under conditions which would generate sufficient heat to ignite combustible material. Mr. Ritchie said that the fluorescent fixtures which had been newly installed and were thermally protected would have little chance of a malfunction which would overheat the ballast and cause the plywood mezzanine to become ignited.

36 Clifford Ray Tyner, another electrical engineer, examined the parts of the electrical panel that remained after the fire. He reached the conclusion that the arcing in the feeder switches was due to the secondary effect of the fire rather than any fault in the system itself. He also felt that the condition of the panel excluded the possibility that the fire had started below the distribution panel. In his opinion a stray welding current could possibly have. caused the fire, but only if very combustible material was adjacent to the site of the small arc at the time. This arc, in his opinion, could also have been caused as a result of the arcing in the feeder switches after the fire had been burning. In general the evidence indicated to him only the effects of fire rather than the cause.

37 Mr. Baker thought that the chance of a stray current setting the fire was very small, but felt that it should be retained as a possibility. He also believed that a high resistance fault in the panel could have occurred without a dimming of the lights under certain circumstances and held this to be a possibility as well. He concluded that electrical failure was more probable than the escape of welding effluent as a cause of the fire.

38 There was other evidence before the trial judge about the condition of the electrical panel. The electrician who installed the overhead lights a few days earlier said that he noticed nothing wrong with the system. There was no evidence that there had been any fault or difficulty with the system in the past and nothing to indicate such a fault on the night in question.

39 The trial judge also had evidence before him that would indicate that the fire started above the level of the electrical panel and that no difficulty had been encountered during the longer period of welding carried out the week before. There was also the fact that on the very night of the fire.oily rags had been ignited by the effluent from the welding operation, although these were admittedly directly under the site of the weld.

40 The trial judge also had the advantage of having seen and heard the witnesses.

41 In my opinion in the light of all the evidence before the Court the trial judge was justified in discarding an electrical failure as the proximate cause of the fire and in drawing the inference that the fire was in fact caused by the escape of effluent from the welding operation.

42 Having found that the fire was caused by Buchanan Limited as a result of the welding operation conducted by its employees, the trial judge then considered whether their activities amounted to negligence which would render them liable for damages suffered as a result of the fire. He considered that the dangerous nature of the work was sufficient to raise the inference that the fire had been caused by their negligence and therefore invoked the doctrine of res ipsa loquitur shifting the burden to the appellants to show that the fire had not resulted from negligence on their part. He discussed the different tests that have been applied to defendants to satisfy this burden as suggested by Malone v. Trans-Canada Airlines, [1942] O.R. 453; Cudney v. Clements Motor Sales Limited, [1969] 2 O.R. 209; and Erison v. Higgins (1975), 4 O.R. (2d) 631, which were all decisions of the Ontario Court of Appeal. He then went on to say:

> "An inference of negligence, on the part of the employees of the Buchanan company, arises, and there is a burden on the defendant, the Buchanan company. Whether one takes the view that the Buchanan company must give a reasonable explanation of the way in which the accident may have occurred without negligence on its part, or put forward a theory, consistent with the facts, of a way in which the accident may have occurred without negligence on its part, or give an explanation of the cause of the mishap, which is equally consistent with the existence or non-existence of negligence on the part of the defendant, I am of the opinion that the onus or burden has not been satisfied by the Buchanan company.
>
> "Having found that the fire was caused by effluent from the welding operation, I have not heard any evidence or theory which is consistent with a finding that such effluence escaped and caused a fire, without negligence on the part of the employees of the Buchanan company. The operation of welding, using an electric welder, is a dangerous operation in the sense that fire can be caused, unless every reasonable precaution is taken to ensure that the effluent which inevitably falls in the course of the operation, does not ignite flammable materials. In the present case, the fire occurred in a plywood enclosure which was within a few feet of the site of part of the welding. Flammable materials could reasonably be expected to be in and about the area of the enclosure, whether on the mezzanine floor or in the ground floor area. Beattie, who was in charge of the entire operation, did not search the area before the welding operation, and particularly just before the welding operation moved near the enclosure. He did not at any time check the enclosure in the course of the crucial tack welds, which were four in number, and did not check the enclosure at the end of each phase of the welding operation and, in particular, the four tack welds.
>
> "The Buchanan company has not discharged the onus which rests upon it, as a result of the application of the doctrine of res ipsa loquitur, and I find that

> the Buchanan company is liable for the causing of the fire and for the resulting damage."

43 I have no doubt that the trial judge properly used the doctrine of res ipsa loquitur in order to reach his finding of liability on behalf of the appellants but, in my opinion, he could have reached the same conclusion from an affirmative finding of negligence revealed by the evidence as a whole. Beattie and Pettipas were engaged in an activity which was highly likely to cause fire. Their duty of care was to check constantly to see that that likelihood did not materialize, and as Dr. Foran said in his testimony the fire watch should have continued for at least half an hour after each weld. Neither Beattie nor Pettipas made any inspection of the interior of the enclosure, although this must have been known to them to be a prime source of fire. Their failure to take the precautions necessary under the circumstances amounts to affirmative negligence which was causative of the damage resulting from the undetected fire.

44 In my opinion the trial judge did not err in reaching the conclusion that the fire was caused by the escape of effluent from the welding operation and that Buchanan Limited was liable for the damages resulting from the fire by virtue of the negligence of its employees.

45 In the second ground of appeal relied on by.the appellants at the hearing, it was argued that the trial judge erred in finding that Beattie was guilty of negligence. In my opinion Beattie did not exercise that standard of care required by persons undertaking intrinsically dangerous activities, and therefore this ground of appeal must fail. See Donoghue v. Stevenson (1932) A.C. 563.

46 The third ground of appeal advanced was that the trial judge erred in finding Pettipas guilty of negligence and, in particular, that he had a primary responsibility to see that the welding operation was carried out taking all precautions. Pettipas was the welder and should have known the dangers associated with this type of welding operation in premises such as these. In my opinion the trial judge was justified in holding that he had a special duty to take care that fire was not caused by effluent escaping from his welding operation. He would not be entitled to rely solely on Beattie as the fire watcher when he knew in fact that Beattie was not exercising any such duty after the welding had been completed. This ground of appeal must also fail.

47 The final ground of appeal advanced in connection with this phase of the appeal at the hearing was that the trial judge erred in admitting evidence of privileged communications of Beattie, Pettipas and MacMurtery in the presence of their solicitor.

48 Towards the end of the trial during the cross-examination of Mr. Tupper counsel was permitted to ask the expert witness whether there were any differences between the information he relied upon in preparing his report and the information which he heard at the trial. It was shown that he had been provided with copies of the fire marshal's reports,as well as the statements of Beattie and Pettipas. A meeting was arranged by counsel for the appellants between Mr. Tupper and Beattie, Pettipas and MacMurtery, and this took place in the presence of counsel on April 28, 1976. At that meeting Mr. Tupper questioned these gentlemen extensively as to the events surrounding the

fire, and it was on the basis of these pieces of information that the expert produced his initial report to the effect that the fire had not been caused, in his opinion, by the welding operation.

49 Counsel for the appellants objected at the trial to any reference to statements made by the parties to the expert on the ground of solicitor and client privilege, and the trial judge ruled that the witness was not to refer to any legal advice having been given by counsel at that time to the parties or Mr. Tupper, but permitted him to refer to statements of fact given to him by the parties in the course of this conference. It is now said that some of the answers solicited during this cross-examination show that Beattie and Pettipas may have given Mr. Tupper a slightly different version of some of the events than given in their evidence at the trial, and that this may have prejudiced the trial judge against them by showing them not to be credible witnesses.

50 There is no doubt that the communications between the parties and Mr. Tupper were for the purpose of enabling him to give expert advice to their solicitor so that he would be in a position to advise them on the desirability of litigation. This type of communication and report has been consistently held to be privileged at the option of the client based upon the need for confidentiality between solicitors and their clients in the conduct of their legal affairs. A review of the authorities may be found in Bestway Lath & Plastering Co. Ltd. v. McDonald Construction Co. Ltd. (1973), 4 N.S.R. (2d) 1, a decision of the Appeal Division of this Court. The extent of the privilege is, however, limited to communications passing or reports being prepared for the purposes of legal advice. It does not extend to matters of fact observed by the expert in the course of his investigations. Nor does it extend to reports made in the ordinary course of business with a view to the possibility of litigation but not specifically made for communication to counsel concerning a particular cause. Mitchell v. C.N.R. (1973), 5 N.S.R. (2d) 329.

51 A party who intends his communication to be confidential may therefore speak to his solicitor or the expert engaged for the purpose of the legal advice or litigation with confidence that what he says to the expert or the solicitor, and what the expert says in his report to the solicitor, will be protected by privilege unless the party is prepared to waive that privilege.

52 The question of the waiver of a solicitor-client privilege was discussed in Rex v. Prentice (1914), 23 C.C.C. 436, in the Appellate Division of the Supreme Court of Alberta. Simmons, J., said at p. 447:

> "In the course of cross-examination of George Brown, counsel for Prentice directed certain questions to him on the subject of when he first considered commencing criminal proceedings, and inquired whether it was not about the time certain civil proceedings were commenced by Prentice against Brown arising out of a building contract, and counsel asked the witness: 'You remember instructing your solicitor to communicate with Prentice's solicitors at that time?' The learned trial Judge instructed the witness not to answer on the ground of privilege.

"Wigmore on Evidence, ch. LXXIX., par. 2285, gives four fundamental conditions necessary to the establishment of privilege between persons standing in a given relation:

> '(1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which, in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.'

"It has long been established by authority that prima facie in a communication between solicitor and client all four requisites are present. Jessel, M.R., in Anderson v. Bank of B.C., L.R. 2 Ch. 644, defines the object and meaning of the rule as follows:

> 'That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights, or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and, it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret unless with his consent (for it is his privilege and not the privilege of his confidential agent), that he should be enabled properly to conduct his litigation.'

"The client can remove the privilege by consent, and in the case under consideration the question is based upon the assumption that the witness did consent to removal of the privilege by instructing his solicitor to communicate something prima facie privileged.

"I conclude, therefore, that the ruling of the trial Judge was incorrect."

53 The Prentice case was discussed by the Supreme Court of Canada in Howley v. The King, [1927] S.C.R. 529. Mignault, J., said at p. 534:

> "I take it therefore that the Alberta court fully recognized the rule as stated by Wigmore and Sir George Jessel that relevant communications between solicitor and client are privileged unless the client consents to their disclosure. All that was decided in that case was that the client had agreed to this disclosure when he instructed his solicitor to communicate to the opposite party or his solicitor 'something prima facie privileged,' and that under these circumstances the communication which the solicitor was instructed to make to the solicitor of the adverse party was not privileged."

54 The principle behind the solicitor-client privilege is discussed in Phipson on Evidence, 12th ed. at para. 587:

> "The rule is established for the protection of the client, not of the lawyer; and is founded on the impossibility of conducting legal business without professional assistance, and on the necessity, in order to render that assistance effectual, of securing full and unreserved intercourse between the two. The privilege, therefore, may be waived by the client, but not by the adviser."

55 The authorities quoted in Phipson to support this principle make it abundantly clear that the privilege is for the protection of the client and not the solicitor. Phipson goes on to discuss the manner in which the privilege may be waived in para. 597:

> "The privilege may, however, as we have seen, be waived by the client (though not by the solicitor), either expressly or impliedly - e.g. by the client examining the solicitor as to the privileged matter; though if only examined as to part, he cannot be cross-examined as to the residue; or, by sending the opponent a copy (though not necessarily by sending him a mere extract) of the privileged document, The mere acceptance of a report sent by the other party to the litigation unconditionally does not give rise to an inference that the recipient has waived his privilege in respect of his own report on the same matter. The rule that examination as to part of a privileged matter does not expose the holder of the privileged information to cross-examination on other parts of it is narrowly construed. If privilege is waived in respect of one record of a particular transaction, it is waived for all other relevant documents, whether of prior or subsequent date, until some further ground of privilege arises. The privilege which attaches to communications between estranged spouses and those who are trying to effect a reconciliation between them may be waived in part only. Where a corporation elected to answer interrogatories through its town clerk, who was

> also its solicitor, it was held it had impliedly waived its privilege; though it was otherwise where it had no option, but was bound to comply with an order to answer through the town clerk."

56 In England fairly complicated rules under Order 38 have been developed regarding the admissibility of the opinion evidence of experts and their reports as an exception to the hearsay rule. A summons for directions must be taken out and the court determines in advance the extent of disclosure before trial necessary in order to render the evidence or report admissible. Phipson said in para. 1215(c):

> "(c) The fact that the court may order disclosure of experts' reports does not involve a loss of the ordinary privilege which attaches to documents brought into being for the purpose of litigation. Those reports which it is not intended to use in evidence need never be disclosed at all. It is only in those cases where (a) a party wishes to rely on a report at the trial, and (b) the court orders its disclosure (as it will normally do), that the document must be produced. Even then its production is not compulsory: but the sanction of inadmissibility which normally attaches in such a case to non-disclosure is a strong inducement to waive the privilege."

57 In this Province we have only two rules dealing with the admissibility of expert reports, and they are 22.05 and 31.08, which are as follows:

> "22.05. Unless a medical practitioner who prepares a medical report attends on a trial or hearing to give evidence or the parties otherwise agree, a report of a medical practitioner, whether obtained under Rule 22 or otherwise, shall not be used in evidence, either directly or indirectly, on the trial or hearing."

> "31.08. Unless an opposite party has, at least ten days before the commencement of a trial, been given a report of an expert witness who is expected to give evidence on a trial, the evidence shall not be admissible without the approval of the court, which may be granted on such terms as are just."

58 Under our rules the privilege relating to a medical report is only waived if the doctor is called to testify at the trial, but the privilege relating to other reports of experts is waived if the party employing the expert intends to use his evidence at the trial and is thereby forced to reveal his report in advance. The decision by the party to make use of the expert evidence at the trial is tantamount to a waiver of the privilege against its use which previously existed.

59 It seems to me only logical that if the party wished to rely upon the testimony of its expert and was prepared to waive the privilege that he must also have intended to waive the privilege which extends to his discussions with the expert which form the basis of his report. Surely if a solicitor

were called to testify as to an opinion given to his client he would have to reveal the facts related to him upon which the opinion was based. Similarly, in my opinion, an expert employed by the solicitor for the benefit of the party must as an integral part of his evidence be subject to cross-examination on the factual basis for his opinions, and this must be known to the party at the time the decision is made to waive the privilege and present the evidence.

60 In George Doland Ltd. v. Blackburn & Co., [1972] 1 W.L.R. 1338, Geoffrey Lane J. dealt with a situation where the plaintiffs in an action called as a witness their solicitor to give evidence as to the terms of a telephone conversation that the solicitor had had with the plaintiff's managing director relating to two points raised by the action. He said at p. 1340:

> "That evidence having been given, Mr. Lloyd now, on behalf of the defendants, seeks to cross-examine the witness as to any document, or I imagine any oral conversation or instructions relating to either of those two points in the conversation between the witness and Mr. King which may have come into existence, so far as documents are concerned, or taken place, so far as conversations are concerned, from that moment in early January 1967 up to the present date, including any proofs from witnesses, any instructions to counsel, or anything else, providing, of course, that they are related to those two points, the two points being, first of all, did Mr. King instruct Mr. Bedford to investigate the statement of his partner, Mr. Clement, that the companies were no longer losing money, and, secondly, any document relating to the question of whether Mr. Clement had in fact used that expression or something like it.
>
> "Mr. Dehn, on behalf of the plaintiffs, objects to that examination taking place. He concedes, and rightly concedes, that, of course, cross-examination relating to that conversation and relating to any attendance notes or letters in confirmation of that conversation which may have come into existence are plainly matters which are the proper subject of cross-examination. I say, parenthetically, that we are told that there are no such documents in existence and never have been.
>
> "Mr. Dehn objects to anything further than that on two grounds. First of all, upon the time ground, he says that cross-examination on the matters I have indicated up to the commencement of litigation, say about mid-1967 - the date perhaps is not of great importance so far as this judgment is concerned - would be admissible, but thereafter no. The reason for that submission is that thereafter, from the time when litigation was pending or contemplated, a second and different form of privilege arises. No longer, he contends, are the plaintiffs protected merely by the privilege between legal adviser and client, but thereafter

by the second form of privilege which protects documents which come into existence for the purpose of prosecuting litigation.

"Secondly, Mr. Dehn says the defendants are inhibited by the ground which he terms the ambit ground. Even up to that date, he says, when litigation is contemplated the defendants can only ask to see documents if they relate to that particular communication, and that their commission is no more roving than that restricted area.

"Consequently, it is for me to determine to what extent those two contending submissions are correct.

"So far as the first ground I have mentioned, the time ground, in my judgment the contentions of Mr. Dehn are correct. The mere fact that the plaintiffs may have waived the professional privilege which exists between client and solicitor does not, in my judgment, also result in the waiver of the further privilege which protects documents brought into existence for the purpose of litigation; and therefore, in my judgment, the privilege which Mr. Dehn contends for relating to, for instance, brief to counsel and proofs taken from witnesses is a good one and stands, despite the waiver relating to the initial evidence which I have described.

"So far as the second ground is concerned, the ambit ground, I do not consider that Mr. Dehn's contentions are correct. Up to that date, the date of impending litigation, if I may call it that, in my judgment the defendants are entitled to ask for and see any document's relating to the facts, the two items contained in the telephone conversation to which I have made reference."

61 In my opinion Geoffrey Lane, J., was dealing with a situation similar to ours. When a party elects to waive a privilege to withhold specific evidence he must also intend to waive the privilege to withhold the facts and circumstances surrounding that evidence. In deciding to take advantage of the evidence for his own purposes he must be prepared to accept the side effects of that decision, and if, as in the case at bar, some declarations against his interest may be revealed he must take that chance. No one is forcing him to waive his privilege which may be maintained by reserving the expert's evidence for the personal use of his solicitor in conducting the litigation.

62 In my opinion the cross-examination of Mr. Tupper was properly conducted and this ground of appeal must also fail.

63 In the result I would dismiss the appeal of Buchanan Limited, Beattie and Pettipas with costs in one bill to the respondents, The T. Eaton Company Limited et al., and to the respondent, Greenwood Shopping Plaza Limited.

HART J.A.
Concurred in:
MacKEIGAN C.J.N.S.
MACDONALD J.A.

qp/s/qlmwm/qljkb

G

THE LAW OF EVIDENCE IN CANADA

FOURTH EDITION

Sidney N. Lederman • Alan W. Bryant
Superior Court of Justice for Ontario
Superior Court of Justice for Ontario

Michelle K. Fuerst
Superior Court of Justice for Ontario

LexisNexis®

waiver, courts are obliged to step in to prevent a solicitor from making the disclosure.[222] This demonstrates how important the right to communicate in confidence with one's lawyer is. In fact, the Supreme Court of Canada has repeatedly described the privilege as "a fundamental civil and legal right"[223] which should not lightly be abrogated. In *Descôteaux v. Mierzwinski*,[224] the Supreme Court laid down the following rules when there is an attempt to interfere with the privilege:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.[225]

(b) Voluntary Waiver

§14.137 It was once thought that certain requirements should be established in order for waiver of the privilege to be established; for example, the holder of the privilege must possess knowledge of the existence of the privilege which he or she is forgoing, have a clear intention of waiving the exercise of his or her right of privilege, and a complete awareness of the result.[226] But, as will be pointed out, other considerations unique to the adversarial system, such as fairness to the opposite party and consistency of positions, have overtaken these factors.

§14.138 An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a

---

[222] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, at 232, [1991] S.C.J. No. 53 (S.C.C.).

[223] For example, see *Solosky v. Canada*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, at 760, [1980] S.C.J. No. 130 (S.C.C.).

[224] [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43 (S.C.C.).

[225] *Ibid.*, at 875 (S.C.R.).

[226] *Western Canada Investment Co. v. McDiarmid*, [1922] 1 W.W.R. 257, at 261, [1922] S.J. No. 55 (Sask. C.A.), *per* Lamont J.A.; see also *R. v. Perron* (1990), 54 C.C.C. (3d) 108, at 120, [1990] Q.J. no 274 (Que. C.A.).

communication.[227] Thus, the Court in *Frind v. Sheppard*[228] held that a client had waived the privilege which attached to letters passing between himself and his solicitor because they had been read into the record in a previous proceeding. In other cases, waiver was said to have taken place when documents over which privilege was claimed had been disclosed in proceedings in another jurisdiction[229] or were referred to in an Affidavit of Documents and had been inspected.[230] Similarly, if a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject matter.[231] Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered.[232]

§14.139 A party may voluntarily waive solicitor-client privilege on a limited basis to a particular defined subject matter unless the selective disclosure would be misleading or would be taking unfair advantage.[233]

§14.140 If the communication is elicited in cross-examination of the client, it seems that unless it can be shown that the witness was misled or did not comprehend what was being asked of him or her, the assertion of the communication would amount to a waiver.[234] Of course, if the client merely testifies as a witness to the facts in issue, that will not constitute a waiver of privilege. Nor would solicitor-client privilege be lost by a party merely because his or her memory was refreshed from notes made by him or her for counsel in preparation for trial.[235]

---

[227] There will be waiver if one simply asserts an intention to disclose an otherwise privileged document for settlement purposes: see *Marlborough Hotel Co. v. Parkmaster (Canada) Ltd.* (1959), 17 D.L.R. (2d) 720, [1959] M.J. No. 51 (Man. C.A.).

[228] [1940] O.W.N. 135 (Ont. Master).

[229] *Western Assurance Co. v. Canada Life Assurance Co.* (1987), 63 O.R. (2d) 276, [1987] O.J. No. 1153 (Ont. Master).

[230] *Re Briamore Manufacturing Ltd.*, [1986] 1 W.L.R. 1429 (Ch.); *Kennedy v. Diversified Mining Interests (Canada) Ltd.*, [1948] O.W.N. 798, [1948] O.J. No. 272 (Ont. H.C.J.).

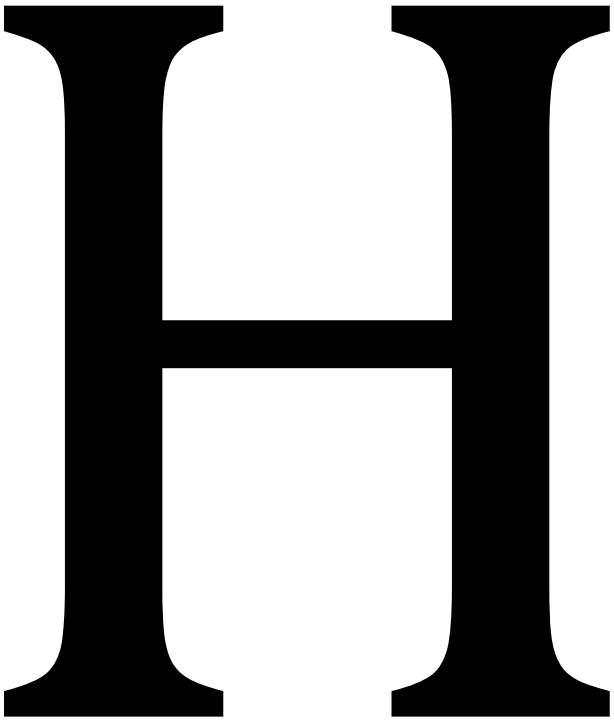
[231] *Smith v. Smith*, [1958] O.W.N. 135 (Ont. H.C.J.). If the solicitor signs an affidavit in place of the client, the privilege is considered waived: *Casino Tropical Plants v. Rentokil Tropical Plant Services Ltd.* (1998), 161 D.L.R. (4th) 750, [1998] B.C.J. No. 1098 (B.C.S.C.).

[232] *Doland (George) Ltd. v. Blackburn, Robson, Coates & Co. (a firm)*, [1972] 3 All E.R. 959 (Q.B.).

[233] *Bone v. Person* (2000), 145 Man. R. (2d) 85, [2000] M.J. No. 107 (Man. C.A.); *Merck & Co. v. Apotex Inc.* (2009), 386 N.R. 377, 2009 FCA 27, [2009] F.C.J. No. 103 (F.C.A.).

[234] Kenneth S. Broun, ed., *McCormick on Evidence*, 7th ed., vol. 1 (St. Paul: Thomson Reuters, 2013), § 93, at 575.

[235] *R. v. Parker* (1985), 10 O.A.C. 156, [1985] O.J. No. 175 (Ont. C.A.), referred to in *R. v. Ticchiarelli* (1990), 1 O.R. (3d) 595, [1990] O.J. No. 2235 (Ont. Dist. Ct.); *Toronto-Dominion*



All England Law Reports/1972/Volume 3 /George Doland Ltd v Blackburn Robson Coates & Co (a firm) and another - [1972] 3 All ER 959

[1972] 3 All ER 959

George Doland Ltd v Blackburn Robson Coates & Co (a firm) and another

QUEEN'S BENCH DIVISION

GEOFFREY LANE J

4 JULY 1972

Evidence - Admissibility - Privilege - Legal professional privilege - Waiver - Effect - Plaintiff company calling their solicitor to give evidence of telephone conversation between him and their managing director - Waiver of privilege in respect of matters dealt with in conversation - Extent of waiver - Whether including documents coming into existence after litigation anticipated.

During the hearing of an action the court, on the plaintiffs' application, admitted evidence given by their solicitor relating to a telephone conversation which he had had with the plaintiffs' managing director relating to two matters raised by the action. The defence sought to cross-examine the plaintiffs' solicitor as to any document which might have come into existence or any oral conversation which might have taken place from the date of the oral conversation up to the date of proceedings, including any proofs from witnesses or any instructions to counsel.

Held - The mere fact that the plaintiffs might have waived the professional privilege which existed between client and solicitor, did not also result in the waiver of the further privilege which protected documents brought into existence for the purpose of litigation. Consequently, cross-examination would not be allowed on matters

relating, for example, to brief to counsel and proofs taken from witnesses. However, the defendants, up to the date of the impending litigation, were entitled to cross-examine on any documents relating to the matters contained in the telephone conversation (see p 962 *a* to *c*, post).

Notes

For the waiver of legal professional privilege, see 12 *Halsbury's Laws* (3rd Edn) 48, 49, para 69,

and for cases on the subject, see 22 *Digest* (Repl) 412, *4428-4433*.

Preliminary issue

By a writ issued on 27 May 1969 the plaintiffs, George Doland Ltd, claimed against the first defendant, Blackburn Robson Coates & Co, a firm, damages for breach of contract and/or duty and/or negligence during the period January to June 1967 as accountants investigating, reporting to and advising the plaintiffs on the businesses of companies known as the Farpoll Group, and against the second defendant, James W Clement, and/or the first defendants, damages for misrepresentation made and/or for breaches of warranties given between December 1966 and June 1967 by or on behalf of the defendants and each of them to induce the plaintiffs to buy the share capital of those companies.

During the hearing of the action, which was eventually compromised, the plaintiffs were given leave to call their solicitor to give evidence as to a telephone conversation which had taken place between him and the plaintiffs' managing director early in 1967. The question then arose to what extent other evidence, which was otherwise privileged, relating to matters which were the subject of the telephone conversation thereby became admissible.

Conrad Dehn QC and Christopher Bathurst for the plaintiffs.

A J L Lloyd QC and Patrick Phillips for the defendants.

4 July 1972. The following judgment was delivered.

GEOFFREY LANE J

made the following ruling. This point arises in the following way. Under the provisions of the new Civil Evidence Act 1968 certain evidence which before the passing of the Act was plainly inadmissible may, under certain conditions, now be admissible. Relying on the provisions of that Act, counsel for the plaintiffs last week submitted to me that the evidence of Mr Jackson, inter alios--Mr Jackson being the plaintiffs' solicitor--was admissible in evidence. It was true that the plaintiffs had not in fact fulfilled the somewhat complicated procedure which they ought to have fulfilled in order to bring themselves within the provisions of the Act, but, in the exercise of my discretion, having heard counsel for the defendants on the point, I allowed the evidence to be given.

That evidence was briefly to this effect. Mr Jackson was and had been the plaintiffs' solicitor for a number of years, not always with the same firm, but that is not a matter of importance. It seems,

from what he tells me, that Mr King, the managing director of the plaintiff company, had been in the habit over the years of ringing Mr Jackson up on the telephone and using Mr Jackson as a sounding board for Mr King's ideas. During the early days of the negotiations which gave rise to these proceedings, into details of which at this stage I do not intend to go, there was, it seems, a telephone conversation between Mr Jackson, on the one hand, and Mr King, on the other. During that conversation, according to Mr Jackson, Mr King told him what had been going on between him (Mr King) and the defendants and the group of companies which the plaintiffs hoped to acquire. It was the reported terms of a conversation between Mr King and Mr Bedford, of the defendants' concern, which Mr Jackson reported. What it was that Mr Jackson said that Mr King had said was this: 'King gave me the background of the negotiations and of his previous conversations with Mr Clement', who is another partner in the defendant firm and also the receiver and/or liquidator of a number of the companies sought to be acquired by the plaintiffs. According to Mr Jackson, Mr King went on to say how he had been

approached by the liquidator in 1966 and how he (Mr King) had rejected that approach to purchase the various companies because of the severe losses which the companies had been sustaining. Mr Jackson went on to say:

> 'I was told that Clement had approached King and the gist of the new situation was that Clement had informed king that Farpoll [ie the companies in liquidation] were no longer losing money. King said that if that was the case, then Farpoll was of interest to him provided that retail outlets were no longer losing money. King went on to say to me that he had instructed Bedford to carry out an investigation to verify whether the new situation was in fact the case; [ie whether the companies were in fact no longer making a loss]. I knew who Bedford was. I knew he was a partner in the vendor's firm [ie a partner of Mr Clement, the liquidator]; I said to King, I would not like it. I told him it would be very unwise because there was a conflict of interest, and it was unwise for him to have instructed Bedford to investigate his partner; but King had gone on to say there were compelling reasons why he had decided to ask Bedford to act. He had asked Bedford on a previous occasion when investigations into a company called Heptons were being made; that Bedford would have ready access to information from the nature of things; and that King had taken a liking to Bedford and found that their approaches to problems were similar.'

To that Mr Jackson said that he could say nothing further, except to repeat that, in his view, Mr King's actions were unwise.

That was the evidence which was given, and it bears on one, and probably two, extremely important aspects of the plaintiffs' claim. That evidence having been given, counsel for the defendants sought to cross-examine Mr Jackson as to any document, or I imagine any oral conversation or instructions, relating to either of those two points in the conversation between Mr Jackson and Mr King which may have come into existence, so far as documents are concerned, or taken place, so far as conversations are concerned, from that moment in early January 1967 up to the present date, including any proofs from witnesses, any instructions to counsel, or anything else, providing, of course, that they are related to those two points, the two points being, first of all, did Mr King

instruct Mr Bedford to investigate the statement of his partner, Mr Clement, that the companies were no longer losing money? and, secondly, any document relating to the question of whether Mr Clement had in fact used that expression or something like it.

Counsel for the plaintiffs objects to that examination taking place. He concedes, and rightly concedes, that, of course, cross-examination relating to that conversation and relating to any attendance notes or letters in confirmation of that conversation which may have come into existence are plainly matters which are the proper subject of cross-examination. I say, parenthetically, that we are told that there are no such documents in existence and never have been.

Counsel for the plaintiffs objects to anything further than that on two grounds: first of all, on the time ground. He says that although cross-examination on the matters I have indicated up to the commencement of litigation, say about mid-1967--the date perhaps is not of great importance so far as this judgment is concerned--would be admissible, but thereafter no. The reason for that submission is that he contends that thereafter, when litigation was pending or contemplated, a second and different form of privilege arises. No longer, he contends, is the plaintiff protected merely by the privilege between legal adviser and client, but thereafter by the second form of privilege which protects documents which come into existence for the purpose of prosecuting prospective litigation. Secondly, he says that the defendants are inhibited by the ground which he terms the ambit ground. Even up to that date, he says, when litigation is contemplated the defendants can only ask to see documents if they relate to that particular communication, and their commission is no more roving than that restricted area. Consequently, it is for me to determine to what extent those two contending submissions are correct.

[1972] 3 All ER 959 at 962

So far as the first ground I have mentioned, the time ground, in my judgment the contentions of counsel for the plaintiffs are correct. The mere fact that the plaintiffs may have waived the professional privilege which exists between client and solicitor does not, in my judgment, also result in the waiver of the further privilege which protects documents brought into existence for the purpose of litigation; and therefore, in my judgment, the privilege which counsel for the plaintiffs contends for relating to, for instance, brief to counsel and proofs taken from witnesses is a good one and stands, despite the waiver relating to the initial evidence which I have described.

So far as the second ground is concerned, the ambit ground, I do not consider that the contentions of counsel for the plaintiffs are correct. Up to that date, the date of impending litigation, if I may call it that, in my judgment the defendants are entitled to ask for and see any documents relating to the facts of the two items contained in the telephone conversation to which I have made reference.

Ruling accordingly.

Solicitors: Campbell Hooper & Austin Wright (for the plaintiffs); Herbert Smith & Co (for the defendants).

E H Hunter Esq Barrister.

I

2012 ONCA 838
Ontario Court of Appeal

Kaiser, Re

2012 CarswellOnt 16539, 2012 ONCA 838, [2012] O.J. No. 5601, 113 O.R. (3d) 308, 225 A.C.W.S. (3d) 313, 300 O.A.C. 161, 30 C.P.C. (7th) 223, 97 C.B.R. (5th) 37

In the Matter of the Bankruptcy of Morris Kaiser, of the City of Toronto, in the Province of Ontario

S.T. Goudge, K. Feldman, R.A. Blair JJ.A.

Heard: June 27, 2012
Judgment: November 29, 2012
Docket: CA C54857

Proceedings: reversing *Kaiser, Re* (2011), 2011 ONSC 7617, 2011 CarswellOnt 15035, 89 C.B.R. (5th) 322 (Ont. S.C.J. [Commercial List]); additional reasons at *Kaiser, Re* (2012), 2012 ONSC 808, 2012 CarswellOnt 1257, 90 C.B.R. (5th) 167 (Ont. S.C.J. [Commercial List])

Counsel: Melvyn L. Solmon, Cameron J. Wetmore, for Appellant, Morris Kaiser
Milton A. Davis, Neil S. Rabinovitch, for Respondent, Soberman Inc., as Trustee of the Estate of Morris Kaiser, a Bankrupt

Subject: Civil Practice and Procedure; Insolvency; Public; Torts; Evidence

APPEAL by bankrupt from judgment, reported at *Kaiser, Re* (2011), 2011 ONSC 7617, 2011 CarswellOnt 15035, 89 C.B.R. (5th) 322 (Ont. S.C.J. [Commercial List]), ordering him to disclose who was paying his legal fees in proceedings arising out of bankruptcy.

R.A. 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 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: *Kaiser, Re*, 2011 ONSC 4877 (Ont. S.C.J. [Commercial List]). He observed, at para. 2:

> 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": *Kaiser, Re*, 2011 ONCA 713 (Ont. C.A. [In Chambers]). 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 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 paragraphs (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 paragraphs (a) — (d). 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 c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), 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:

> [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, 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. 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 c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67, [2003] 3 S.C.R. 193 (S.C.C.), and in *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), 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,[1] 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 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 context in *Ontario (Attorney General) v. Ontario (Assistant Information & Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65 (Ont. 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 Personal 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 "where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may prejudice 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 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.

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 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. 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. 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. 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 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 ONCA 253, 90 O.R. (3d) 122 (Ont. C.A.), at para. 13; and *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont. 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.

***S.T. Goudge J.A.*:**

I agree

***K. Feldman J.A.*:**

I agree

Appeal allowed.

Footnotes

1 Deschamps J. wrote separate but concurring reasons.

J

1982 CarswellQue 291
Supreme Court of Canada

Descôteaux c. Mierzwinski

1982 CarswellQue 13, 1982 CarswellQue 291, [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43, 141 D.L.R. (3d) 590, 1 C.R.R. 318, 28 C.R. (3d) 289, 44 N.R. 462, 70 C.C.C. (2d) 385, J.E. 82-659

Simon Descôteaux and Centre communautaire juridique de Montréal, Appellants and Alexandre Mierzwinski, Respondent and The Attorney General of the Province of Quebec and the Commission des services juridiques, Interveners and André Landry, Normand Huneault, the Quebec Bar and the Commission des droits de la personne, mis en cause

Martland, Ritchie, Dickson, Beetz, Estey, Chouinard and Lamer JJ.

Judgment: June 23, 1982
Docket: 16113

Proceedings: Affirmed (sub nom. Montreal Legal Aid Centre c. Mierzwinski) 16 C.R. (3d) 188, 1980 CarswellQue 15 (Que. C.A.); Affirmed [1978] Que. S.C. 792 (Que. S.C.)

Counsel: *Jean-Marie Larivière* and *Jean-Pierre Lussier*, for the appellants.
Pierre Robert and *Sarto Blouin*, for the respondent and the intervener, the Attorney General of the Province of Quebec.
François Aquin and *Jocelyne Jarry*, for the intervener, the Commission des services juridiques.

Subject: Criminal; Evidence

***Lamer J.*:**

1 A citizen who lies about his financial means in order to obtain legal aid is committing a crime. This appeal concerns the right of the police to be authorized by a search warrant to search a legal aid bureau and seize the form filled out by the citizen at his interview, for purposes of proving that this crime was committed. This issue raises several others, including, in particular, the scope of and procedures for exercising the authority to search lawyers' offices, in view of the confidential nature of their clients' files. This appeal will also give everyone an opportunity to note the deficiencies in the law in this area and the limited ability of the courts to compensate for them since their role is not primarily legislative.

Facts

2 Two peace officers presented themselves at the premises of a legal aid bureau in the judicial district of Montreal with the following search warrant:

> ATTENDU qu'il appert de la dénonciation assermentée de:
>
> *WHEREAS, it appears on the oath of*:
>
> [TRANSLATION]
>
> 1848 Gilles Bertrand
>
> M.U.C. Peace Officer
>
> 10 St. Antoine Est, Mtl
>
> [TRANSLATION] File No. 02-78-05-03-005
>
> Q.P. file No. on behalf of Police force/complainant organization
>
> Que dans la ville de St Laurent district Montreal
>
> *That in the City of District* le 19, on the [TRANSLATION] May 4, 1978, 19, [TRANSLATION] Between January 1, 1975 and January 1, 1978 an indictable offence was committed, to wit a false pretence; Mr. Marcellein [*sic*] Ledoux reported a lower income in order to be eligible for legal aid services, contrary to section 324 of the Criminal Code, and that documents to wit: a legal aid application form, lawyer's retainer and other documents concerning this case.
>
> These documents are allegedly in these premises and will provide evidence concerning the commission of the said offence.
>
> Et que les dites choses ou quelques parties d'entre elles se trouvent dans *And that the said things or some part of them are in de/of* au no./*at no*. 790 de la rue/*of* boul. Laurentien *Street* à/*at* Ville St Laurent district/*district of Montreal*
>
> ci-après appelé les lieux;
>
> *hereinafter called the premises*;
>
> A CES CAUSES, les présentes ont pour objet de vous autoriser à entrer (indiquer à *THIS IS, THEREFORE, to authorize and require you to enter*

Jour & nuit	
(quelles heures)	dans les dits lieux et a rechercher les dites choses
(indicate time)	the said premises, and to search for the said things

et les rapporter devant moi ou tout autre juge pour le district *and to bring them before me, or some other Judge of the Peace for the district* Donné sous mon seing à Montreal District Montreal

Given under my seal at _____ *District of* _____ le *on the* [TRANSLATION] May 4, 1978

_____

J.S.P./Juge de Paix

[TRANSLATION] acting in and for the province of Quebec

RETURNABLE

We do not know the wording of the information that led respondent justice of the peace to authorize the search and seizure of the documents described in the warrant; however, at the hearing counsel agreed to admit for purposes of this appeal that the contents of the information were as set out in the warrant.

3 The syndic of the Bar[1] intervened when the warrant was being executed and, as a result, the two mis en cause police officers did not search the premises, but agreed to receive, without even examining them, since they were in a sealed envelope, documents they were told were those they were looking for. No one has yet seen what the envelope contains, not even the judges of this Court, and everyone agreed not to open the envelope before being authorized to do so by a judgment of this Court. All are agreed, moreover, that it contains two forms completed by Marcellin Ledoux and by a lawyer employed by the Centre communautaire juridique de Montréal [Montreal Community Legal Centre], together with a notice of refusal, and that the information contained in this application for legal aid concerns the matters found in the following printed form:

Graphic 1

Graphic 2

It should be noted that at the bottom of the form the lawyer is asked to enter his "professional notes" on the back of the document.

4 This form must be completed by those applying for legal aid.[2] This is a requirement of the Act (*Legal Aid Act*, R.S.Q. 1977, c. A-14).

> **64**. An application for legal aid must set forth the financial condition of the applicant and the basis of his claim, all the information determined in the regulations and any additional relevant information required by the corporation.

This requirements is aimed at allowing the bureau director to determine whether an applicant is eligible having regard to s. 63 of the same Act, the pertinent part of which reads as follows:

> **63**. The general manager shall, within the scope of the regulations, grant legal aid to any economically under-privileged person establishing the probable existence of a right.

Those who do not comply with the requirement will be deprived of the services of a lawyer paid by the bureau, in the same way as those who do not meet the eligibility criteria.

5 It should also be noted that the information on the first page of the form deals principally with the *financial situation of the applicant* for purposes of determining whether he is eligible for aid as an *economically underprivileged person*, and that the *professional notes on the reverse* concern the *probable existence of the basis of his claim*. These *professional notes* could very well record the applicant's account of the facts which lead him to apply for aid and on which the bureau will decide the *probable existence of the basis of his right*.

In the Superior Court

6 After the documents had been seized and sealed, Mr. Descôteaux and the legal aid bureau (le Centre communautaire juridique de Montrèal) I presented to a judge of the Superior Court, district of Montreal, a motion for the issuance of a writ of *certiorari* requesting that the seizure be quashed on the grounds of nullity and requesting the Superior Court judge to order the justice of the peace to return the sealed envelope and its contents to them.

7 The motion was dismissed, but the judge amended the wording of the warrant, stating that [TRANSLATION] "the words 'other documents concerning this case' should be struck out and no longer regarded as forming part of the said search warrant".

8 The Superior Court judge stated that he was of the view that solicitor-client privilege could be invoked as soon as confidentiality was theratened, "without waiting until the person or persons disregarding the privilege attempted to tender the information thus obtained as evidence". He

found, however, that the documents seized were not privileged since they had been prepared before the solicitor-client relationship came into existence ([1978] C.S. 792, at p. 799):

> [TRANSLATION] Returning now to the problem raised by applicants, I have come to the conclusion that the documents seized, namely two legal aid application forms and one refusal form, are not privileged. The application for legal aid is nothing more or less than a descriptive form filled out by a person wishing to obtain legal aid to let the organization know that he meets the eligibility requirements. There is no relationship at all between the information contained in this form, which deals with the applicant's civil status, matrimonial status and financial situation, and the information he may provide to his counsel in order to obtain legal advice or representation in litigation. Moreover, there is not even a solicitor-client relationship at the time this form is completed, and the retainer does not come into existence until the applicant has been accepted by the appropriate authority, which, in so doing, will have decided that the meets the eligibility requirements. It is only after this administrative decision has been made that there will be created between the applicant citizen and the legal aid lawyer this type of privileged relationship that is scrupulosuly protected by the common law.

I am unable to arrive at any other conclusion, since it seems clear to me that these documents are records of an administrative nature that are necessary precisely because of the nature of the services sought by the applicant. Finally, I think that the "declaration" which the applicant must sign in the presence of a witness and which appears at the bottom of the "application for legal aid" confirms my opinion that this document is not privileged:

> I declare that this information is true and I undertake to inform your bureau or corporation of any change in my economic situation.
>
> I have been informed of my right to be represented by a lawyer of my choice and I have chosen to be represented by:
>
> A lawyer employed full-time by the corporation/a lawyer in private practice.

There is not yet any solicitor-client relationship; at the very most the applicant has expressed his desire to have a lawyer who is employed by the legal aid bureau or a private practitioner, without any further information concerning his identity. Moreover, the undertaking by the applicant to inform the "bureau" or the "corporation" of any change in his economic situation indicates most clearly, in my view, that this type of information is not regarded by the applicant himself as confidential or as forming part of the consultation or legal advice sought from a lawyer whose identity he does not yet know. This seems to me sufficient to dispose of the case of the legal aid application forms, and the same comments apply, it goes without saying, to the notice of refusal. These documents, owing to their very nature and to the

> position the citizen is in when they are filled out, do not fall within the category of privileged communications...
>
> (Emphasis added.)

Finally, I repeat, the Superior Court judge amended the warrant by striking out the words "other documents concerning this case" on the ground that the authorization to search and seize conferred by those words was too general and imprecise.

In the Court of Appeal

9 The Court of Appeal adopted the conclusions of the Superior Court judge, together with his reasons. To these Bélanger J.A. added on behalf of the Court that in any event solicitor-client privilege could not have operated to protect the communication, since the latter was precisely what had been resorted to in order to mislead a representative of the legal aid bureau. On that matter, he stated the following:

> [TRANSLATION] In the case at bar the communications or documents that are alleged to be confidential are those referred to in the charge as having been used in the commission of the offence in question. Apart from common law principles, they are no more privileged than if the same information and documents had been used to mislead the lawyer himself in order to fraudulently obtain his services on special terms. In either case I do not think that false communications made to the eventual victim who will have to bear the cost of the services are confidential in any way. In short, a communication made to a representative of the Commission des services juridiques [Legal Services Commission] is in no way confidential if it is an element of an offence committed to the latter's prejudice, since in such circumstances there is no confidentiality between solicitor and client.

10 I think that at this point I should state my findings in the case at bar; I shall give reasons for them later.

11 In my view it was correctly decided that it is not necessary to wait for the trial or preliminary inquiry at which the communication is to be adduced or sought in evidence before raising it confidentiality. With all due respect for the opposite view, I am of the opinion, however, that *in principle* information concerning one's financial means the basis of the claim, and any other information required by the corporation or the regulations (*Legal Aid Act*, s. 64) which a person applying for legal aid *must* provide in order to obtain the services of a lawyer is, except in the exceptional cases I shall deal with later, privileged. I share the opinion of the Quebec Court of Appeal, however, that, *in the case at bar*, the information concerning Marcellin Ledoux's financial means had lost the benefit of being privileged since, as alleged in the search warrant, it was communicated with a view to criminally obtaining a benefit and, consequently, fell within one of the common law exceptions to the principle of privilege. But since it is alleged that the crime was

committed by means of false pretences only with respect to the applicant's financial means, the professional notes, which concern the basis of his claim, remain privileged.

12 I do not intend to repeat here everything that others have said, on numerous occasions and very clearly and completely, about solicitor-client privilege, or about the issuance and execution of search warrants.

13 I think, however, that I should make a few remarks about the existence and effects of a person's right to have his communications with his lawyer kept confidential; I shall then deal more particularly with the search power provided for in the *Criminal Code*.

The Right to Confidentiality

14 It is not necessary to demonstrate the existence of a person's right to have communications with his lawyer kept confidential. Its existence has been affirmed numerous times and was recently reconfirmed by this Court in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, where Dickson J. stated (at p. 839):

> One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.
>
> (Emphasis added.)

There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that is "founded upon the unique relationship of solicitor and client" (*Solosky, supra*). It is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others. Like other personal, extra-patrimonial rights, it gives rise to preventive or curative remedies provided for by law, depending on the nature of the aggression threatening it or of which it was the object. Thus a lawyer who communicates a confidential communication to others without his client's authorization could be sued by his client for damages; or a third party who had accidentally seen the contents of a lawyer's file could be prohibited by injunction from disclosing them [3].

15 Owing to its importance, in addition to these general remedies available to the holder, various statutes, both federal and provincial, recognize this right by giving it additional, specific protection.

16 These include, for example, statues governing the practice of the profession of barrister or advocate (in Quebec, the *Act respecting the Barreau du Québec*, R.S.Q. 1977, c. B-1, s. 131) [4]

and certain provincial charters of rights (in Quebec, the *Charter of human rights and freedoms*, R.S.Q. 1977, c. C-12, s. 9) [5] .

17 It is again owing to the importance of this right that certain statutes contain special provisions applicable in situations where, were it not for those special provisions, there would be undue interference with the right to confidentiality. An example of such concern for that right can be found in the safeguards set out in s. 232 of the *Income Tax Act*, 1970-71-72 (Can.), c. 63.

18 There is no doubt that this right belonging to a person in his dealings with others, including the State, is part of our Quebec public law as well as of the common law.

19 Although we recognize numerous applications of it today, the right to confidentiality did not first appear until the 16th century, and then did so as a rule of evidence (see, *inter alia, Berd v. Lovelace* (1577), 21 E.R. 33; *Dennis v. Codrington* (1580), 21 E.R. 53).

20 The rule of evidence is well known; it has often been stated. This Court referred to it again recently in *Solosky*. That decision sets out the conditions precedent to the existence of the privilege, as well I as its limits and exceptions. It should be pointed out that the substantive conditions precedent to the existence of the privilege, which the judges have gradually established and defined, are in fact the substantive conditions precedent to the existence of the right to confidentiality, the former being merely the earliest manifestation of the latter. There is no need to list those conditions exhaustively here or to review all the nuances that have been developed by the courts over the years. It will be sufficient to review them in broad outline and to emphasize certain aspects of particular relevance to this appeal.

21 The following statement by Wigmore (8 Wig-more, *Evidence*, para. 2292 (McNaughton rev. 1961)) of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:

> *Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived* .

Seeking advice from a legal adviser includes consulting those who assist him. Professionally (for example, his secretary or articling student) and who have as such had access to the communications made by the client for the purpose of obtaining legal advice.

22 There are exceptions. It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication. Communications made in order to facilitate the

commission of a crime or fraud will not be confidential either, regardless of whether or not the lawyer is acting in good faith.

The Substantive Rule

23 Although the right to confidentiality first took the form of a rule of evidence, it is now recognized as having a much broader scope, as can be seen from the manner in which this Court dealt with the issues raised in *Solosky*.

24 Solosky was an inmate at Millhaven penitentiary. He was seeking a declaration that henceforth all properly identified items of solicitor-client correspondence would be forwarded to their respective destinations unopened.

25 The inmates' right to confidentiality conflicted with the *Penitentiary Act*, R.S.C. 1970, c. P-6, and more particularly with Regulation 2.18 of the *Penitentiary Service Regulations*, allowing the director of the institution to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. On behalf of this Court Dickson J. stated the following (at p. 841):

> Counsel for the Crown submits there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:
>
> > (a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;
> >
> > (b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to sections 2.17 and 2.18 of the *Penitentiary Service Regulations*.
> >
> > (c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.
>
> Counsel contends that to interpret the Regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the Regulations which permits to an inmate the

> maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.
>
> In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the *bona fides* of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communications. Paragraph 7c. of Directive 219 underlines this point.

26 It is quite apparent that the Court in that case applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

27 It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

The Rule of Evidence

28 The rule of evidence is formulated by Cross (*Cross on Evidence*, 5th ed., 1979) as follows (at p. 282):

> In civil and criminal cases, confidential communications passing between a client and his legal adviser need not be given in evidence by the client and, without the client's consent, may not be given in evidence by the legal adviser in a judicial proceeding...

29 The rule of evidence does not in any way prevent a third party witness (I am referring here to someone other than an agent of the client or the lawyer) from introducing in evidence confidential communications made by a client to his lawyer. It is important to note, however, that before allowing such evidence to be introduced and in determining to what extent to allow it, the judge must satisfy himself, through the application of the substantive rule (No. 3), that what is being sought to be proved by the communications is important to the outcome of the case and that there is no reasonable alternative form of evidence that could be used for that purpose.

Confidentiality in the Case at Bar

30 In the case at bar the principal issue is to determine when the solicitor-client relationship, which confers the confidentiality protected by the substantive rule and the rule of evidence, arises.

31 The Superior Court judge, as we have seen, was of the view that this relationship, and consequently the right to confidentiality, did not arise until the legal aid applicant had been accepted, that is, until the retainer was established.

32 When dealing with the right to confidentiality it is necessary, in my view, to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises. The latter arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice.

33 The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (*Minter v. Priest*, [1930] A.C. 558; *Phipson on Evidence*, 12th ed., 1976, p. 244, No. 589; 8 Wigmore, *Evidence* (McNaughton rev. 1961), p. 587, para. 2304).

34 Moreover, the same applies not only to information given before the retainer is perfected concerning the legal problem itself, but also to information concerning the client's ability to pay the lawyer and any other information which a lawyer is reasonably entitled to require before accepting the retainer. First, this information of an administrative nature is just as related to the establishment

of the professional relationship as any other information; this is especially clear when, as in the case at bar, the legal aid applicant "*must set forth* [*his*] *financial means* ... and the basis of his claim". In addition, information of this nature that a person gives his lawyer for that purpose may also be highly confidential and would have been kept secret by that person were it not for that person's need of the assistance of a legal adviser.

35 For example, the legal aid form requires the applicant to provide information concerning his dependants. A person could thus be forced to disclose to the legal aid bureau a paternity that had until then been kept secret, in order to establish his onerous financial obligations and consequently his limited means. One can imagine, given the form the applicant must complete, numerous other situations where the information given would be highly personal.

36 I therefore do not think that a distinction should be made between information that must be given in order to establish the probable existence of a valid claim and that given to establish eligibility from the point of view of financial means, since, on the one hand, information concerning the person's financial situation may be just as highly confidential as any other information and since, on the other hand, the fact of being unable to meet the eligibility requirements respecting financial means is no less fatal to the ability to obtain the services sought.

37 The issue we are concerned with was recently raised in Alberta in *R. v. Littlechild* (1979), 51 C.C.C. (2d) 406.

38 An individual was charged with having defrauded a store by using an N.S.F, cheque. In order to prove that the accused knew that his bank had ordered a suspension of all operations concerning his bank accounts and that consequently he knew that his cheque would not be honoured, the Crown wished to introduce in evidence communications that the accused had made previously to a legal aid bureau employee.

39 During an interview and on a form similar to the one involved in the case at bar, the accused had provided certain information concerning his financial means to this employee, who was not a lawyer, in order to establish his eligibility for the legal aid bureau's services. According to the Crown, part of this information dealt in particular with the fact that the accused knew that he no longer had access to the funds in his bank accounts.

40 The trial judge refused on his own motion to allow the Crown to introduce these communications in evidence.

41 The Attorney General appealed.

42 Laycraft J.A., rendering judgment on behalf of the Court of Appeal, stated the following (at pp. 411-12):

A number of cases establish the principle that solicitor-client privilege extends both to communications between the agents of a client and his solicitor and to communications between a client and agents of the solicitor: In *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 at p. 682, Jessel, M.R., said:

> The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction.

In *Lyell v. Kennedy* (1884), 27 Ch. D. 1, Cotton, L.J., said at p. 19:

> But then this privilege is confined to that which is communicated to or by that man [the client] by or to the solicitors or their agents, or any persons who can be treated properly as agents of the solicitors. We have therefore thought it right, in order to prevent an evasion of what is the proper view of the law by the use of that word 'agents', to require that the Defendant shall put in a further affidavit stating whether the agents mentioned were his agents, or whether they were the agents of the solicitors and persons so employed by the solicitor as to be his agents, including such agents as every solicitor's clerk may be said to be, who would all be entitled to the protection given to solicitors. Subject, then, to that alteration, we think that the protection claimed is in law good.

In *R. v. Chaney* (1908), 13 C.C.C. 289, 17 Man. R. 467 (Man. C.A.), police had a person falsely pose as a representative of the accused's solicitor in order to obtain a statement from the accused. The Court held that the person obtaining the statement must be treated as though he was the solicitor's agent as he represented himself to be, and that the evidence was therefore inadmissible on the ground of privilege.

Recent Canadian cases also holding that solicitor-client privilege extends to communications through the intermediary of an agent are *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353, and *Re Alcan-Colony Contracting Ltd. et al. and Minister of National Revenue* (1971), 18 D.L.R. (3d) 32, [1971] 2 O.R. 365.

It is not a factor against the existence of privilege that the communication between the respondent and the Legal Aid officer which is sought to be introduced in evidence related to the respondent's effort to obtain counsel rather than to advice given for the purpose of the actual defence. In *Wheeler v. Le Marchant, supra*, Jessel, M.R., said at p. 682:

> So again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for the purpose. [6]

This principle has been stated earlier in broader terms in *Minet v. Morgan* (1873), 8 Ch. App. 361, by Lord Selbourne, L.C., at p. 368:

> But there is a later authority by that most accurate and learned Judge, Sir *R.T. Kindersley-Lawrence v. Campbell*, 4 Drew. 485, 490 [62 E.R. 186 at 188], which contains a statement of the Vice-Chancellor's view of the principle and also of the rule which in 1859 had come to be well settled and established in this Court on the foundation of that principle. He says: 'It is not now necessary, as it formerly was, for the purpose of obtaining production that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity'. I can only say that I entirely agree with the views both of the principle and of its proper extension taken in these later authorities.

It is also clear that solicitor-client privilege can extend to conversations in which a person makes disclosures while seeking to retain a solicitor, though in fact the retainer is not perfected. In *Minter v. Priest*, [1930] A.C. 558 at p. 573, Viscount Dunedin said:

> Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor, nevertheless the interview is held as a privileged occasion.

It follows from the authorities referred to above that conversations with a solicitor's agents held for the purpose of retaining him would also be privileged, even though the solicitor was not then, or ever, retained. In my view, the principle protects from disclosure a conversation between an applicant for legal aid and the non lawyer official of the Legal Aid Society who interviews him to see if he is qualified.

The privilege protecting from disclosure communications between solicitor and client is a fundamental right--as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege. The Courts should be astute to protect both. As long ago as *Pearson v. Foster* (1885), 15 Q.B.D. 114, Brett, M.R., warned that free and confident communication within the solicitor-client relationship is so vital a part of the right to counsel that the privilege ought not to be 'frittered away'. At pp. 119-20 he said:

> The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client...

(Emphasis added.)

43 I am fully in agreement with the conclusions of the Alberta Court of Appeal. It is only fair to mention, in passing, that the judgment of the Superior Court judge in the case at bar was rendered prior to that decision.

44 Confidential communications, whether they relate to financial means or to the legal problem itself, lose that character if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime.

45 The same is true *a fortiori* where, as in the case at bar, the communication itself is the material element, (*actus reus*) of the crime; this is all the more evident where the victim of the crime is precisely the office of the lawyer to whom the communication was made.

46 This exception has been recognized for a very long time. The case most frequently referred to is *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, where Stephen J. stated (at p. 167):

> The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not 'come into the ordinary scope of professional employment'.
>
> (Emphasis added.)

47 In the case at bar, the communications dealing with Marcellin Ledoux's financial means are, according to the search warrant, "criminal in themselves", to use Stephen J.'s words, and will not benefit as such from the protection they would otherwise have been afforded by the substantive rule and the rule of evidence, had they been confidential.

The Search Warrant Provided for in S. 443(1)(b) of the Criminal Code and the Right to Confidentiality

48 I do not intend to examine all the questions raised by the interpretation of s. 443 and the determination of the duties and powers it confers on the justice of the peace. Nor is it necessary for the purposes of this appeal that we consider the things that can be searched for and seized under s. 443 (1) (*a*) or (*c*). It is sufficient for the purposes of this appeal to make certain general observations, that suggests a mere reading of s. 443(1)(*b*).

49 We know that, save certain exceptions, one cannot go into someone else's house without a warrant, even in order to search for evidence of a crime. Section 443 permits such entry on certain conditions, but subjects such an activity to a certain degree of judicial control. It provides that the person designated by the justice in the warrant may search the premises for the things described in

the warrant and, if they are found, seize them and carry them before the justice. The only restriction on the type of things the search for and seizure of which a justice of the peace may authorize by warrant is that they be one of the things described in paras. (*a*), (*b*) and (*c*) of s. 443(1):

> **443**. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

In the case at bar we are thus concerned with something provided for in para. (*b*), that is, something that is likely to "afford evidence with respect to the commission of an offence" in a legal proceeding.

50 Moreover, the legislation does not make any distinction with respect to the nature of the premises sought to be searched. One may therefore search anywhere for what is provided for under para. (*b*) of the section, including in a lawyer's offices.

51 Indeed the *jurisdiction* of a justice of the peace to authorize a search thus does not depend on the nature of the place sought to be searched but on a reasonable belief that there are to be found on the premises things covered by para. (*b*) of s. 443(1).

52 It then becomes necessary to reconcile the authority to search, a right that society has assumed as being essential to the suppression of crime, with the right to confidentiality, a right that society recognizes as essential for the better administration of justice.

53 The right to confidentiality enjoyed by a lawyer's client does not, by virtue of the substantive rule, interfere with the *jurisdiction* of the justice of the peace to authorize the search, but might do so by virtue of the rule of evidence. At the very most, in the present state of the law, the substantive rule requires that a justice of the peace be more demanding before authorizing a search of a lawyer's office or one of his files and will lead him, where necessary, to set out special

procedures for the execution of the warrant in order to limit to what is absolutely inevitable the breach of confidentiality.

54 This leads us to a consideration of the effect of the right to confidentiality on searches, first as a rule of evidence and then as a substantive rule. The rule of evidence affects the jurisdiction of the justice of the peace, while the substantive rule affects how he exercises it.

(a) As a rule of evidence

55 Some courts have been unwilling to recognize that a justice of the peace has the right to refuse a search warrant on the sole ground that what is sought to be seized could never subsequently be received in evidence because it is protected by solicitor-client privilege. (See *R. v. Colvin, Ex parte Merrick et al.* (1970), 1 C.C.C. (2d) 8; *Re B.X. Development Ltd. and The Queen* (1976), 36 C.R.N.S. 313 (B.C.S.C.); *Re Alder et al. and The Queen* (1977), 37 C.C.C. (2d) 234; *Attorney General of Quebec v. T., G., W., R. and C.* (1977), 2 C.R. (3d) 30).

56 Others have ruled that he has such a right, either at the time the warrant is being issued (*Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745; *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70; *Re Borden & Elliott and The Queen* (1975), 30 C.C.C. (2d) 337 (Ont. S.C.); *Re Presswood and Delzotto* (1975), 36 C.R.N.S. 322; *Re B.X. Development and The Queen* (1976), 31 C.C.C. (2d) 14 (B.C.C.A.)), or at the time of an application under s. 446(3) to have the things seized returned (*Re Steel and The Queen* (1974), 21 C.C.C. (2d) 278; *Re B and The Queen* (1977), 36 C.C.C. (2d) 235).

57 It is not necessary to review all the decisions to the effect that the justice of the peace can do this at the time the warrant is being issued. It is sufficient, in my view, to quote here in this connection what was said by Southey J. of the Supreme Court of Ontario at trial in *Re Borden & Elliott and The Queen* (1975), 30 C.C.C. (2d) 337, since I agree with his critical analysis of these decisions and his conclusions (the Ontario Court of Appeal, hearing an appeal in that case, chose not to rule on the question and the appeal was decided on another ground). Southey J. stated the following (at pp. 341-43):

> The first question to be decided is whether a search warrant issued under s. 443 of the *Criminal Code* overrides the solicitor-and-client privilege and can be used to give authority to a peace officer to search for and seize documents which are subject to that privilege. The relevant provisions of s. 443 reads [*sic*] as follows:
>
> > 443(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
> >
> > . . . . .

> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> . . . . .
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

The position of the applicants is that a Justice has no jurisdiction to issue a warrant with respect to documents subject to the solicitor-and-client privilege, because the issuance of warrants is limited under s. 443 to documents which the Justice has reasonable grounds to believe will afford evidence of the offence charged. As documents covered by the solicitor-and-client privilege would not be admissible at trial, the Justice could not believe that such documents would afford evidence of the offence. This was the basis of the decision of Judge Rice in the Provincial Court (Criminal Division) in *Re Steel and The Queen* (1974), 21 C.C.C. (2d) 278, 6 O.R. (2d) 644, 29 C.R.N.S. 355.

In *R. v. Colvin, Ex p. Merrick et al.* (1970), 1 C.C.C. (2d) 8, [1970] 3 O.R. 612, Osler, J., quashed a search warrant on the ground that the Justice should not have been satisfied on the information that there were reasonable grounds for believing that there was in the building in question anything that would afford evidence with respect to the commission of an offence. He went on to state in *obiter*, however, that he would not be prepared to quash a warrant simply because the possibility existed that the material in question might be covered by the solicitor-and-client privilege, because that privilege is a rule of evidence and not a rule of property. It was his view that the privilege could only be asserted by way of objection to the introduction of the allegedly privileged material in evidence at the appropriate time.

Almost five years after the decision of Osler, J., the Federal Court of Appeal held in *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70, 55 D.L.R. (3d) 713, 18 C.P.R. (2d) 155, [[1975] F.C. 184], that the authority given to the Director of Investigation under s. 10 of the *Combines Investigation Act* to enter premises on which he believes evidence may be found relating to a matter under inquiry and to examine and copy documents that may afford such evidence, does not override the solicitor-and-client privilege.

Chief Justice Jackett, with whom the other members of the Court agreed, made the following statement at pp. 78-9 C.C.C., pp. 721-2 D.L.R. [p. 193 [1975] F.C.]:

> ...it has been recognized from very early times that the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank

> disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

He then continued at p. 79 C.C.C., p. 722 D.L.R., [p. 194 F.C.]:

> I fully realize that the protection of the confidentiality of the solicitor-and-client relationship has, heretofore, manifested itself mainly, if not entirely, in the privilege, afforded to the client against the compulsory revelation of communications between solicitor and client in the giving of evidence in Court or in the judicial process of discovery. In my view, however, this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly, and with equal injury to our judical system, by the compulsory form of preprosecution discovery envisaged by the *Combines Investigation Act* as it would be by evidence in Court or by judicial discovery.

Thurlow, J., added the following at p. 80 C.C.C., p. 723 D.L.R., [p. 195 [1975] F.C.]:

> Secondly, it appears to me that the confidential character of such communications, whether oral or in writing, comes into existence at the time when the communications are made. As the right to protection for the confidence, commonly referred to as legal professional privilege, is not dependent on there being litigation in progress or even in contemplation at the time the communications take place, it seems to me that the right to have the communications protected must also arise at that time and be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law.

The reasoning of Chief Justice Jackett and Thurlow, J., in the case of an inquiry under the *Combines Investigation Act*, R.S.C. 1970, c. 23, is even more compelling, in my view, in the case of a search warrant issued by a Justice under s. 443 of the *Criminal Code*. If the privilege could not be invoked to prevent the seizure and examination of documents under a search warrant, the Crown would be free in any case to seize and examine the files and brief of defence counsel in a criminal prosecution. It would be small comfort indeed to the accused and to his counsel to discover that his only protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined. Such a result, in my view, would be absurd.

Chief Justice Jackett quoted extensively in his reasons from the decision of Munroe, J., of the British Columbia Supreme Court in *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745, 6 C.P.R. (2d) 41, [1972] 3 W.W.R. 547, in which the same result was reached. That decision, in my view, contains further persuasive reasons for upholding the position taken by the applicants that the solicitor-and-client privilege may be invoked to prevent seizure under a search warrant.

> I find, accordingly, that the applicant is entitled to raise the solicitor-and-client privilege at this stage in the proceeding, as a ground for quashing the search warrant for lack of jurisdiction on the part of the Justice.

I am of this view and would add, by way of clarification, that the justice of the peace should raise the question himself and, where necessary, find that he has no jurisdiction to authorize the search.

(b) As a substantive rule

58 In cases where the justice of the peace has the necessary jurisdiction to authorize the search, he should, in exercising that jurisdiction, take into account the need to protect the fundamental right of a lawyer's client to have his communications kept confidential. This may arise where evidence is being sought of communications which, although made in confidence to a lawyer, are no longer protected because they were made in circumstances such that they fall within an exception to the rule; or where a lawyer's office is to be searched for things covered by para. (*a*) or (*c*) of s. 443(1) (for example, stolen goods). Although the rule of evidence seems to be applicable only with respect to para. (*b*) of s. 443(1), the substantive rule will apply to any search affecting the right to confidentiality, regardless of which of the paragraphs of s. 443(1) such search is to be made under. In either case the search should be limited to what is absolutely necessary in order to seize the things for which the search was authorized. A lawyer's file may contain a host of information concerning a client, some of which has remainded confidential even though other information is no longer so since it falls within an exception to the rule. Even more serious is the fact that a lawyer's office contains confidential files pertaining to other clients which have nothing to do with the crime that is to be proved or with the things searched for under s. 443(1) (*a*) and (*c*).

59 Some would say that the justice of the peace has no discretion to refuse to issue a search warrant or to impose terms of execution once the requirements of form and substance in s. 443 have been met. They would argue that in s. 443 the word "may" means "must" and does not confer any discretion. According to this interpretation, the justice of the peace may issue a warrant only if he is satisfied that there is reasonable ground to believe that one of the things provided for in s. 443(1) is to be found in the place sought to be searched, but must do so as soon as he is so satisfied, and the only condition of execution on the premises that he may impose is set out in s. 444 of the *Code*:

> **444**. A warrant issued under section 443 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night.

Others, on the contrary, would say that generally the justice of the peace has the discretion to refuse the warrant, so long as this discretion is exercised judicially and so long as the decision to refuse the warrant is not capricious or arbitrary (Carter, R.F., *The Law Relating to Search Warrants*,

1939, at p. 52; Fontana, J.A., *The Law of Search Warrants in Canada*, 1974, at pp. 7 and 51 *et seq.; Re Pacific Press Ltd. and The Queen et al.* (1977), 37 C.C.C. (2d) 487).

60 I come down on the side of the discretion, as it allows more effective judicial control of the police. Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled. It goes without saying that the justice may sometimes be in a poor position to assess the need for the search in advance. After all, searches, while constituting a means of gathering evidence, are also an investigative tool. It will often be difficult to determine definitively the probative value of a particular thing before the police investigation has been completed. Be that as it may, there are places for which authorization to search should generally be granted only with reticence and, where necessary, with more conditions attached than for other places. One does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office. One does not search the premises of a third party who is not alleged to have participated in the commission of a crime in the same way as those of someone who is the subject of such an allegation. (See on this subject Fontana, J.A., *The Law of Search Warrants in Canada*, at p. 174.)

61 The justice of the peace, in my view, has the authority, where circumstances warrant, to set out execution procedures in the search warrant; I would even go so far as to say that he has the right to refuse to issue the warrant in special circumstances, such as those found in *Re Pacific Press Ltd. and The Queen et al., supra*.

62 That case involved a search of a newspaper office for information gathered by the newspaper staff. Neither the newspaper staff nor the newspaper itself were accused of having been involved in the commission of an offence. In view of the special situation of a newspaper in light of ss. 1(*f*) and 2 of the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, Nemetz C.J. of the British Columbia Supreme Court quashed the search warrant issued by the justice of the peace, concluding as follows (at p. 495):

> The issuing of any search warrant is a serious matter, especially when its issuance against a newspaper may have, as it did, the effect of impeding its publication. To use the words of my distinguished predecessor in *United Distillers Ltd.* (1948), 88 C.C.C. 338, [1947] 3 D.L.R. 900, the Justice of the Peace 'should have reasonable information before him to entitle him to judicially decide whether such warrant should issue or not'. In my opinion, no such reasonable information was before him since there was no material to show:
>
> > 1. whether a reasonable alternative source of obtaining the information was or was not available, and
> >
> > 2. if available, that reasonable steps had been taken to obtain it from that alternative source.

> In my opinion, the bringing of an application for a search warrant in these circumstances was an abuse of the process of the Court. I, therefore, quash the warrants.

63 *Re Pacific Press Ltd.* involved a search for things provided for in para. (*b*) of s. 443(1), that is, evidence; it goes without saying that the same requirements do not apply in the case of things provided for in paras. (*a*) and (*c*) of s. 443(1).

64 It could be advanced that the two conditions set out by Nemetz C.J. should be met before a warrant is issued whenever a search is sought to be conducted, under 443(1)(*b*), of premises occupied by an innocent third party which are not alleged by the information to be connected in any way with the crime. It is not necessary for purposes of this appeal to decide that point. It is sufficient to say that in situations such as the one in *Re Pacific Press. Ltd.*, where the search would interfere with rights as fundamental as freedom of the press, and, as in the case at bar, a lawyer's client's right to confidentiality, the justice of the peace may and should refuse to issue the warrant if these two conditions have not been met, lest he exceeds the jurisdiction he had *ab initio*. I would add one qualification to these two conditions. The reasonable alternative referred to is not an alternative to the method of proof but to the benefits of search and seizure of the evidence. As I have already stated, a search warrant is not only a means of gathering evidence but also an investigative tool. Therefore a determination of what is reasonable in each case will take into account the fact that a search makes it possible not only to seize evidence but also to ascertain that it exists, and even sometimes that the crime was in fact committed and by whom. Seizure makes it possible to preserve the evidence.

65 Moreover, even if the conditions are met, the justice of the peace *must* set out procedures for the execution of the warrant that reconcile protection of the interests this right is seeking to promote with protection of those the search power is seeking to promote, and limit the breach of this fundamental right to what is strictly inevitable. This is also true of searches under 443(1)(*a*) or (*c*), as soon as they threaten a fundamental right.

66 Generally speaking, where the search is to be made of a lawyer's office, in order to search for things provided for under para. (*a*), (*b*) or (*c*) of s. 443(1), the justice of the peace should be particularly demanding. Where it is a question of *evidence* (443(1)(*b*)), although satisfied that there is such evidence on the premises, he should only allow a lawyer's office to be searched if in addition he is satisfied that there is no reasonable alternative to a search. It will sometimes be desirable, as soon as the informant initiates proceedings, for the justice of the peace to see that the district Crown attorney is notified, if he is not aware of such proceedings, as well as the Bar authorities. With their assistance he should normally be more easily able to decide with the police on search procedures acceptable to everyone that respect the law firm's clients' right to confidentiality without depriving the police of their right to search for evidence of the alleged crime.

67 In this respect he could take guidance from the provisions of the *Income Tax Act*, 1970-71-72 (Can.), c. 63, s. 232, adapting them to fit the particular case, of course.

68 Moreover, the search should be made in the presence of a representative of the Bar, where possible.

69 It is encouraging to read the numerous cases reported in the law reports and see that in almost all cases it was possible to decide upon appropriate execution procedures with the consent of the various parties involved (police, Bar, etc.), without the case law having at the time definitively decided that the justice of the peace had the authority to impose any. This seems to me to have been done in the case at bar, since, although the record is not very clear as to the reasons, it is apparent that the search was conducted in a special manner, with the co-operation of the police and the Bar, and that the documents seized were placed in a sealed envelope without having been examined.

70 Some have expressed the view that Parliament rather than the courts should set guidelines for searching lawyers' offices. (See the statements of the Ontario Court of Appeal in *Re Borden & Elliott and The Queen* (1975), 30 C.C.C. (2d) 337, at p. 348.) Be that as it may, I for my part hope that the courts in the provinces, in view of the discretion of the justices of the peace and the willingness of everyone so far to recognize the importance of the confidentiality of communications made to a lawyer by his client, and their willingness and the need to preserve it, will rectify this legislative gap by developing, through rules of court or informally, by means of a uniform practice, a regional procedure that will take account of local circumstances; they are certainly in an eminently better position to do so than this Court.

Conclusion

71 In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communi cations 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.

72 There are certain exceptions to the principle of the confidentiality of solicitor-client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, *inter alia*.

73 The fundamental right to communicate with one's legal adviser in confidence has given rise to a rule of evidence and a substantive rule. Whether through the rule of evidence or the substantive rule, the client's right to have his communications to his lawyer kept confidential will have an effect when the search warrant provided for in s. 443 *Cr.C.* is being issued and executed.

74 Thus the justice of the peace has no jurisdiction to order the seizure of documents that would not be admissible in evidence in court on the ground that they are privileged (the rule of evidence).

75 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.

76 Applying these principles to the case at bar, I have arrived at the following conclusions.

77 First, all information contained in the form that applicants for legal aid must fill out is provided for the purpose of obtaining legal advice, is given in confidence for that purpose and, consequently, is subject to the applicant's fundamental right to have such communications kept confidential and, as such, is protected by the rule of evidence and the substantive rule.

78 It is alleged in the information laid that the communications made by Ledoux with respect to his financial means are criminal in themselves since they constitute the material element of the crime charged. This is an exception to the principle of confidentiality and these communications are accordingly not protected (this does not mean that we are expressing an opinion as to the validity of the allegations in the information). However, since the allegation concerns only the information dealing with the applicant's financial means, all other information on the form remains confidential.

79 Since the part of the form dealing with Ledoux's financial situation was as an exception admissible in evidence, the justice of the peace had jurisdiction to order its seizure.

80 Acting within his jurisdiction with regard to the rule of evidence, the justice of the peace also exercised his discretion to issue a warrant judicially having regard to the substantive rule. As a result of the refusal of the legal aid bureau's staff and lawyers to disclose to the investigators the contents of the form, or of the oral statements made to them by Ledoux concerning his financial situation, there was no reasonable alternative to a search. How otherwise could the investigators ascertain that Ledoux's statements were fraudulent? Perhaps, as a result of their investigation, they knew that Ledoux was not eligible for legal aid in view of his financial means, but the crime of which they suspected him and concerning which they were entitled to continue the investigation was that of having concealed his means, ineligibility not being a crime in itself.

81 I do not know whether the justice of the peace was the originator of the procedure followed for the search and seizure or whether there was an agreement between counsel. In any event, the manner of proceeding in the case at bar was, again having regard to the substantive rule, proper and acceptable and the justice of the peace was or would have been by law empowered to and justified in making it a condition of granting the warrant.

82 There is one problem, however. The form seized may contain privileged information. I am of the view that the justice of the peace could have, in the presence of everyone — the Crown, the representative of the Bar and the Legal Aid representative — opened the envelope and examined the form to determine whether it contained anything confidential and, if not, dealt with it in accordance with the law like any other thing seized. If he had discovered that the form contained confidential information, he could have (at least this is one of the ways of proceeding) photocopied the part relevant to the applicant's financial means and dealt with that portion of the form like any other thing seized by placing it on the file. He could have placed the original of the document in a sealed envelope also placed on file, ordering that it not be examined without a judge's order.

83 In the case at bar, if the information on the back of the form in fact consists of professional notes, as indicated by the form, they are confidential. This would still have to be verified, however. As for the front of the form, most of the information requested is relevant to the applicant's financial situation, although some only indirectly. This is not the case, however, with the information required on the parts of the form that I have identified with the letters A and B, where the information essentially concerns the "nature of the case" or the "probable existence of a right". I am therefore of the view that the judge, after verifying the back of the form, and if he ascertains that it contains professional notes, should have the front of the form, except parts A and B, photocopied, and deal with the photocopies and the original of the document as suggested, that is, place the photocopies on the Court file and place the original in a sealed envelope, place the envelope on the file and order the Court staff not to open it or allow it to be opened without a judge's order. The sealed envelope will eventually be returned to the legal aid bureau, unless Marcellin Ledoux disputes the authenticity of the photocopy should an inquiry or trial be held; were Ledoux to do so, the judge presiding at the trial or the preliminary inquiry would be fully justified in opening the envelope and allowing those concerned to see the form, since Ledoux would then, in my view, have himself by his allegations made it impossible to reconcile his right to confidentiality for the better administration of criminal justice.

84 Before concluding, I should state that the procedure will vary from one case to another. Here the good faith of counsel was in no way at issue since, as alleged by the police, they were not accomplices of their client but rather his victims. Clearly different execution procedures should be provided for where the information laid alleges that the lawyer participated in the crime. I would also like to add that the justice of the peace from whom a warrant to search a lawyer's office is being sought, if he is not a judge by profession, would be well advised, although in no way obliged

to do so, to refer the applicant to a judge of a court of criminal jurisdiction or even a judge of a superior court of criminal jurisdiction.

85 For these reasons I would dismiss this appeal and refer the matter back to the justice of the peace, ordering him to deal with the envelope and its contents as stated above.

86 *Appeal dismissed*.

Footnotes

1 The syndic of the Bar, in the province of Quebec, is a full-time officer of the Bar whose duties are described at s. 75 of the *Act respecting the Barreau du Québec*, R.S.Q. 1977, c. B-1, which reads as follows:
75. (1) The syndic, of his own initiative or at the request of the General Council of the Executive Committee shall make an inquiry into the conduct of any member of the Bar.

(2) The syndic shall also make an inquiry respecting every person requesting admission or readmission to the Bar.

(3) The syndic shall deal with disputes between an advocate and any person-and shall endeavour to reconcile them.

(4) The syndic shall ensure the inspection of the trust accounts prescribed by the by-laws.

2 I have added the letters A and B for convenience of reference later in these reasons.

3 I am dealing here generally with the effects of the right to confidentiality. In its present state, the rule of evidence, which I shall discuss later, would not prohibit a third party from making such a disclosure (see 8 Wigmore, *Evidence*, at pp. 633 and 634 - McNaughton rev. 1961)

4 *131*. (1) An advocate must keep absolutely secret the confidences made to him by reason of his profession.

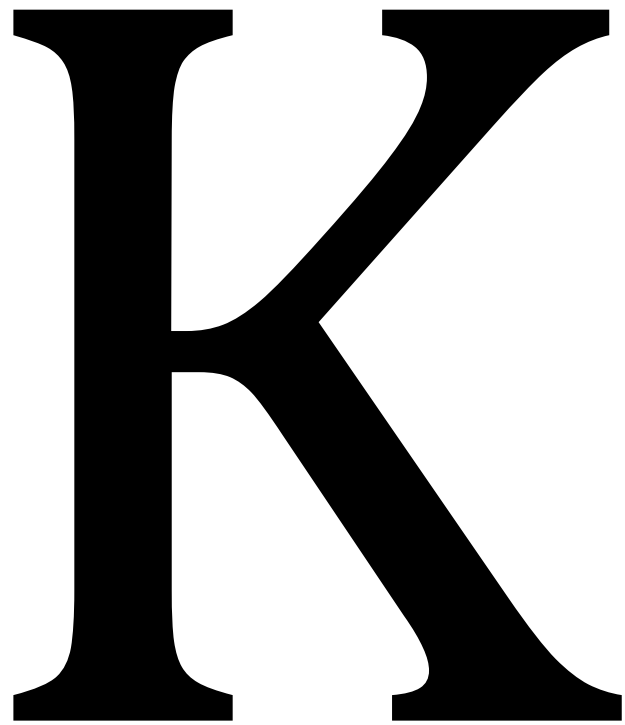
(2) Such obligation, however, shall not apply when the advocate is expressly or implicity relieved therefrom by the person who made such confidences to him.

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

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

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

6 This decision, like the following one, does not seem to me to support Laycraft J.'s conclusion directly in its entirely. I am nonetheless in agreement with that conclusion.



2003 SCC 67
Supreme Court of Canada

Maranda c. Québec (Juge de la Cour du Québec)

2003 CarswellQue 2477, 2003 CarswellQue 2478, 2003 SCC 67, [2003] 3 S.C.R. 193, [2003] S.C.J. No. 69, 113 C.R.R. (2d) 76, 15 C.R. (6th) 1, 178 C.C.C. (3d) 321, 232 D.L.R. (4th) 14, 311 N.R. 357, 59 W.C.B. (2d) 553, J.E. 2003-2138

Léo-René Maranda, Appellant v. Corporal Normand Leblanc, in his capacity as informant, Respondent and The Attorney General of Quebec, the Canadian Bar Association, the Barreau du Québec and the Federation of Law Societies of Canada, Intervenors 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, the Association québécoise des avocats et avocates de la défense and the Association des avocats de la défense de Montréal, Mis en cause

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

Heard: May 12, 2003
Judgment: November 14, 2003 *
Docket: 28964

Proceedings: reversing *Maranda c. Québec (Juge de la Cour du Québec)* (2001), 2001 CarswellQue 2352, 47 C.R. (5th) 162, *(*sub nom. *R. v. Charron)* 161 C.C.C. (3d) 64, *(*sub nom. *Leblanc c. Maranda)* [2001] R.J.Q. 2490 (C.A. Que.); reversing *Maranda c. Québec (Juge de la Cour du Québec)* (1997), [1998] R.J.Q. 481, 1997 CarswellQue 1644, 1997 CarswellQue 2477 (C.S. Que.)

Counsel: *Giuseppe Battista,* for Appellant
Bernard Laprade, Bernard Mandeville, for Respondent
Gilles Laporte, Benoit Lauzon, for Intervenor, Attorney General of Quebec
Denis Jacques, for Intervenor, Canadian Bar Association
Louis Belleau, for Intervenor, Barreau du Québec
Jean-Claude Hébert, for Intervenor, Federation of Law Societies of Canada

Subject: Criminal; Civil Practice and Procedure

APPEAL by lawyer from judgment reported at 2001 CarswellQue 2352, 47 C.R. (5th) 162, *(*sub nom. *R. v. Charron)* 161 C.C.C. (3d) 64, *(*sub nom. *Leblanc c. Maranda)* [2001] R.J.Q. 2490 (C.A. Que.) allowing appeal by police officer from judgment quashing warrant for search of lawyer's office.

POURVOI de l'avocat à l'encontre de l'arrêt publié à 2001 CarswellQue 2352, 47 C.R. (5th) 162, *(*sub nom. *R. v. Charron)* 161 C.C.C. (3d) 64, *(*sub nom. *Leblanc c. Maranda)* [2001] R.J.Q. 2490 (C.A. Qué.), qui a accueilli le pourvoi du policier à l'encontre du jugement qui avait annulé un mandat de perquisition dans un bureau d'avocats.

***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 and the Quebec Court of Appeal, 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 *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.), 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 ("the RCMP") was conducting an investigation of Alain Charron, a client of Léo-René 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 and 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 Pierre 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 c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), 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*, 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. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), which stressed the social importance of that privilege, whose purpose is to protect the confidentiality of communications between solicitor and client (*R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), 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; *Fosty*, 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 (S.C.C.); *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32 (S.C.C.)). 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 (S.C.C.), 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 this Court 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 (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 a 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 (Sask. Q.B.); *R. v. Joubert* (1992), 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 (*Kruco Inc. c. Kruger Inc.*, [1988] R.J.Q. 2323 (C.A. Que.)). 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] 4 F.C. 89 (Fed. C.A.). 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), 55 D.L.R. (4th) 577 (B.C. C.A.); *Madge v. Thunder Bay (City)* (1990), 72 O.R. (2d) 41 (Ont. H.C.); *Municipal Insurance Assn. of British Columbia v. British Columbia (Information & Privacy Commissioner)* (1996), 143 D.L.R. (4th) 134 (B.C. S.C. [In Chambers]), 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*, 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 (*Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Ont. Div. Ct.); *R. v. 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*, 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 p. 450).

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 *Shamirzadi c. Polak*, [1991] R.J.Q. 1839 (C.A. Que.)). 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.

***Deschamps J.*:**

39 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 evey 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. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), 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 between 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 WTS630/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 Corporal Normand Leblanc, September 4, 1996, at paras. 20-22, 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. 1992), 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. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.), 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 c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.). 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 (S.C.C.), 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 (S.C.C.).

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. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), 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.S.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) c. C. (R.)* [2003 CarswellQue 2266 (C.A. Que.)], J.E. 2003-1578. 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 *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.), 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 thirteen 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.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the court on November 18, 2003 has been incorporated herein.

* College of Law, University of Saskatchewan.

* College of Law, University of Saskatchewan.

End of Document

L

2010 SCC 10
Supreme Court of Canada

Cunningham v. Lilles

2010 CarswellYukon 21, 2010 CarswellYukon 22, 2010 SCC 10, [2010] 1 S.C.R. 331, [2010] S.C.J. No. 10, 254 C.C.C. (3d) 1, 283 B.C.A.C. 280, 317 D.L.R. (4th) 1, 399 N.R. 326, 480 W.A.C. 280, 73 C.R. (6th) 1, 87 W.C.B. (2d) 70, J.E. 2010-626

Her Majesty the Queen, Appellant v. Jennie Cunningham, Respondent and Attorney General of Ontario, Law Society of British Columbia, Law Society of Yukon, Canadian Bar Association and Criminal Lawyers' Association (Ontario), Interveners

McLachlin C.J.C., Binnie, LeBel, Deschamps,
Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: November 17, 2009
Judgment: March 26, 2010 *
Docket: 32760

Proceedings: reversing *Cunningham v. Lilles* (2008), 2008 CarswellYukon 42, 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49 (Y.T. C.A.); reversing *Cunningham v. Lilles* (2006), 2006 YKSC 40, 2006 CarswellYukon 51, 41 C.R. (6th) 66 (Y.T. S.C.)

Counsel: Ron Reimer, Peter A. Eccles, for Appellant
Gordon R. Coffin, Nils F.N. Clarke, for Respondent
Susan L. Reid, for Intervener, Attorney General of Ontario
Leonard T. Doust, Q.C., Michael A. Feder, for Intervener, Law Society of British Columbia
John J.L. Hunter, Q.C., Brent B. Olthuis, for Intervener, Law Society of Yukon
Gregory P. DelBigio, for Intervener, Canadian Bar Association
Scott C. Hutchison, Andrea Gonsalves, for Intervener, Criminal Lawyers' Association (Ontario)

Subject: Criminal; Public; Torts; Civil Practice and Procedure

APPEAL by Crown from judgment reported at *Cunningham v. Lilles* (2008), 2008 CarswellYukon 42, 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49 (Y.T. C.A.), finding that preliminary inquiry judge had no discretion to refuse withdrawal of accused's counsel for non-payment of fees.

POURVOI du ministère public à l'encontre d'un jugement publié à *Cunningham v. Lilles* (2008), 2008 CarswellYukon 42, 2008 YKCA 7, 257 B.C.A.C. 1, 432 W.A.C. 1, 59 C.R. (6th) 49 (Y.T. C.A.), ayant conclu que le juge de l'enquête préliminaire n'avait aucune discrétion pour refuser la demande de l'avocate de l'accusé pour cesser d'occuper en raison du défaut de paiement des honoraires.

***Rothstein J.*:**

1. Introduction

1 What is the role of a court when defence counsel, in a criminal matter, wishes to withdraw because of non-payment of legal fees? Does a court have the authority to require counsel to continue to represent the accused? In my opinion, a court does have this authority, though it must be exercised sparingly, and only when necessary to prevent serious harm to the administration of justice.

2. Facts

2 Jennie Cunningham is a criminal defence lawyer employed by the Yukon Legal Services Society ("Legal Aid"). She represented Clinton Lance Morgan, who was charged with three sexual offences against a young child. Mr. Morgan's preliminary inquiry was set for June 26, 2006. The Crown had advised that it intended to bring a motion prior to the preliminary inquiry to have the complainant's testimony admitted by videotape in lieu of *viva voce* evidence.

3 On May 3, 2006, Legal Aid informed Mr. Morgan that he had to update his financial information, which he had previously provided to Legal Aid, and that failure to do so would result in the suspension of his Legal Aid funding. By May 16, 2006, Mr. Morgan had failed to respond to the request and Legal Aid informed him that his counsel, Ms. Cunningham, was no longer authorized to represent him. Ms. Cunningham promptly brought an application to the Territorial Court of Yukon to withdraw as counsel of record. The sole reason for the application was the suspension of Legal Aid funding and Mr. Morgan's inability to otherwise pay for legal services. Ms. Cunningham indicated that she was willing to continue to represent Mr. Morgan if his Legal Aid funding was reinstated.

3. Judicial History

A. Territorial Court of Yukon, R. v. Morgan*, 2006 YKTC 61 (Y.T. Terr. Ct.)*

4 Lilles Terr. Ct. J. heard Ms. Cunningham's application to withdraw. He refused to grant her application to withdraw because: a) legal aid funding could potentially be reinstated and Ms. Cunningham was willing to continue in the event that it was; b) the charges against Mr. Morgan were very serious; c) there was a young child complainant whose memory, emotional and

psychological well-being may have been affected by further delay; d) counsel would have to be appointed to cross-examine the child complainant; e) there was no information on the potential for Mr. Morgan to obtain other representation; f) there was no information on when the preliminary inquiry could be rescheduled if withdrawal was allowed; g) while a preliminary inquiry is not as critical as a trial, it is still important to how the trial is conducted; h) there was a hotly contested and difficult issue regarding videotape evidence that would be difficult for Mr. Morgan to deal with as a self-represented litigant; and i) further delay would prejudice Mr. Morgan as he was labelled as a potential sexual offender as a result of the criminal charges (para. 26).

B. Supreme Court of the Yukon Territory, 2006 YKSC 40, 41 C.R. (6th) 66 (Y.T. S.C.)

5 Gower J. heard Ms. Cunningham's application for an order in the nature of *certiorari* seeking to quash the order of Lilles Terr. Ct. J. Gower J. determined that the preliminary inquiry judge had jurisdiction to exercise discretion over withdrawal on the basis of s. 537(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and s. 77 of the *Territorial Court Act*, R.S.Y. 2002, c. 217. After a thorough review of Canadian authorities on the issue of withdrawal, Gower J. concluded that the weight of authority supported the court having the power to exercise its discretion to refuse withdrawal. He held that Lilles Terr. Ct. J. did not exceed his jurisdiction and dismissed the application for *certiorari*.

C. Court of Appeal for the Yukon Territory, 2008 YKCA 7, 257 B.C.A.C. 1 (Y.T. C.A.)

6 On appeal, the court found that the issue had become moot as a trial of the charges against Mr. Morgan had become unnecessary (para. 17). The appeal nevertheless proceeded in order to obtain appellate court guidance on the legal issue.

7 The Court of Appeal allowed the appeal, finding that Lilles Terr. Ct. J. had no discretion to refuse withdrawal. It reached its conclusion on the basis of three factors. First, the law society has the primary interest in lawyer regulation and court oversight of withdrawal could create a conflict between the court's decision and any disciplinary decision by a law society. Second, the court's supervision of withdrawal potentially threatens solicitor-client privilege in cases where counsel is asked to disclose the reasons for wishing to withdraw. Third, compelled representation puts counsel in the position of a perceived or actual conflict between the client's best interest and the lawyer's interest in ending the matter as quickly as possible. It determined the better approach to withdrawal was to rely on the assumption that lawyers generally do not avoid their professional obligations and, if they do, then the law societies will take appropriate disciplinary action. The court acknowledged, however, that a court could use its contempt power "in extreme circumstances where a lawyer's conduct in connection with a withdrawal amounted to a serious affront to the administration of justice" (para. 29). The court concluded that Lilles Terr. Ct. J. should not have ordered Ms. Cunningham to continue to represent Mr. Morgan.

4. Issue

8 The issue in the present appeal is whether, in a criminal matter, a court has the authority to refuse to grant defence counsel's request to withdraw because the accused has not complied with the financial terms of the retainer. The reasons use the phrase "non-payment of legal fees" to refer to situations where, for example, an accused has actually defaulted on payment, where an accused has failed to provide funds on account at the agreed upon time, or where a legal aid certificate has been suspended or revoked.

5. Analysis

9 An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused (see *R. v. Vescio* (1948), [1949] S.C.R. 139 (S.C.C.), at p. 144; though exceptionally the court may appoint an *amicus curiae* to assist the court). Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly outlined in the rules of professional conduct issued by the provincial or territorial law societies (e.g. Law Society of Yukon, *Code of Professional Conduct*, Part One, r. 21; Law Society of Alberta, *Code of Professional Conduct* (updated 2009), cc. 2, 6-7; Law Society of British Columbia, *Professional Conduct Handbook* (updated 2010), c. 10; Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2009), r. 2). This appeal raises the issue of whether a court's jurisdiction to control its own process imposes a further constraint on counsel's ability to withdraw.

A. Divergent Lines of Authority

10 There are two lines of provincial and territorial appellate court reasoning on this issue. The British Columbia and Yukon Courts of Appeal have determined that a court has no authority to prevent criminal defence counsel from withdrawing for non-payment of legal fees. The Alberta, Saskatchewan, Manitoba, Ontario, and Quebec Courts of Appeal have taken the opposite position — a court may refuse counsel's request to withdraw. Trial courts in New Brunswick and Newfoundland have also followed this line of authority.

11 The British Columbia and Yukon position stems from the British Columbia Supreme Court decision in *Leask v. Cronin* (1985), 18 C.C.C. (3d) 315 (B.C. S.C.). In *Leask*, the court, on an application for an order in the nature of prohibition, found that a provincial court judge has no right in law to order counsel to continue to represent an accused. McKay J. found that this conclusion recognized the role of a strong and independent bar and that the role of disciplining lawyers is vested in the law societies, not the court. He found that the relationship between a solicitor and client is a contractual one and that once the client breaches the contract, the solicitor is entitled to repudiate and bring the contract to an end. McKay J. was also concerned about potential infringements of solicitor-client privilege, which he thought may arise if counsel must disclose the

reasons for withdrawal. Although lawyers may ask for leave, McKay J. found this was a matter of "politeness and courtesy" (p. 325), the court having no discretionary power to refuse.

12 I would note that the issue in *Leask* did not arise from non-payment of fees, like the present appeal, but rather from a breakdown in the solicitor-client relationship. Nonetheless, subsequent British Columbia jurisprudence has relied on *Leask* as a basis for finding that the court is not empowered to refuse counsel's request to withdraw for any reason (see also *Luchka v. Zens* (1989), 37 B.C.L.R. (2d) 127 (B.C. C.A.)), at p. 129, *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83 (B.C. C.A.), at para. 19, *R. v. Huber*, 2004 BCCA 43, 192 B.C.A.C. 75 (B.C. C.A.), at paras. 75-76, *per* Rowles J.A., at para. 101, *per* Southin J.A., and at paras. 121-26, *per* Smith J.A.).

13 In contrast, the Alberta, Saskatchewan, Manitoba, Ontario and Quebec Courts of Appeal as well as their trial courts, and trial courts in New Brunswick and Newfoundland, have all accepted that a court has the authority to refuse counsel's application for withdrawal. The Alberta Court of Appeal's decision in *R. v. Creasser* (1996), 110 C.C.C. (3d) 323 (Alta. C.A.), leave to appeal refused, [1997] S.C.R. vii (S.C.C.)), has received the most attention. In *Creasser*, the Alberta Court of Appeal determined that in addition to counsel's contractual obligations to the client, a lawyer is also an officer of the court. It is in this capacity that counsel owes a duty to the court to "attend before a judge when requested" and "not to walk out on a client in the middle of a trial" (p. 327). So long as counsel has not expressed that he or she appears on a limited retainer, the court may refuse to grant a request to withdraw.

14 The Alberta Court of Appeal appears to recognize two limitations to the court's discretion. First, the court *must* grant a withdrawal request when there is a breakdown in the solicitor-client relationship (p. 328). Second, where counsel seeks to withdraw for non-payment of fees, the court *may* permit withdrawal after considering harm to the Crown's case, inconvenience to witnesses, and whether the allotted court time could be filled with other business (p. 330).

15 The Manitoba Court of Appeal has also considered the court's power to refuse counsel's request to withdraw for non-payment of fees: *R. v. Deschamps*, 2003 MBCA 116, 177 Man. R. (2d) 301 (Man. C.A.). It agreed with the Alberta Court of Appeal that a court has the authority to refuse withdrawal. However, Steel J.A. determined that the assessment should be based on whether allowing withdrawal would cause prejudice to the accused and to the administration of justice (para. 24).

16 The Quebec Court of Appeal has also confirmed that the court may refuse counsel's application to withdraw once a hearing date has been set (*Bernier c. 9006-1474 Québec inc.* (Que. C.A.); see also s. 249 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25). Similarly, both the Saskatchewan and Ontario Courts of Appeal have acknowledged that court permission is required to withdraw as counsel of record (*Mireau v. Saskatchewan (Minister of Justice)* (1995), 128 Sask. R. 142 (Sask. C.A.), at para. 4; *R. v. Brundia*, 2007 ONCA 725, 230 O.A.C. 29 (Ont. C.A.), at

para. 44; *R. v. Peterman* (2004), 70 O.R. (3d) 481 (Ont. C.A.), at para. 38) as have trial courts in New Brunswick and Newfoundland (*R. v. Golding*, 2007 NBQB 320, 325 N.B.R. (2d) 92 (N.B. Q.B.), at paras. 18 and 20; *Dooling v. Banfield* (1978), 22 Nfld. & P.E.I.R. 413 (Nfld. Dist. Ct.)), at para. 27).

17 For the following reasons, I conclude that a court does have the authority to refuse criminal defence counsel's request to withdraw for non-payment of legal fees.

B. Jurisdiction of the Court

18 Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), this Court confirmed that inherent jurisdiction includes the authority to remove counsel from a case when required to ensure a fair trial:

> The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [p. 1245]

It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel's application for withdrawal.

19 Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:

> ... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime ....
>
> (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51)

Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

20 Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it.

C. Exercise of Jurisdiction

21 The more contentious issue in this appeal is whether a criminal court may exercise its inherent or necessarily implied jurisdiction to control its own process by overseeing lawyer withdrawal.

22 The reasons in favour of courts exercising this jurisdiction are numerous. An accused, who becomes unable to pay his lawyer, may be prejudiced if he is abandoned by counsel in the midst of criminal proceedings. Proceedings may need to be adjourned to allow the accused to obtain new counsel. This delay may prejudice the accused, who is stigmatized by the unresolved criminal charges and who may be in custody awaiting trial. It may also prejudice the Crown's case. Additional delay also affects complainants, witnesses and jurors involved in the matter, and society's interest in the expedient administration of justice. Where these types of interests are engaged, they may outweigh counsel's interest in withdrawing from a matter in which he or she is not being paid.

23 On the other hand, Ms. Cunningham and the interveners taking the same position say a court must *always* decline to exercise this jurisdiction. Collectively, they support their position with the three main factors relied on by the Court of Appeal: solicitor-client privilege, the role of law societies and conflict of interest. In addition, they also direct the Court's attention to *Rowbotham* orders as a potential solution. Their position is that the proper approach is for a court to presume that lawyers act ethically and that any professional transgressions are best addressed by the law society. In exceptional cases, however, Ms. Cunningham and the Law Society of Yukon say that the contempt power would be available to a court where counsel seeks to withdraw for an improper purpose or where the manner of withdrawal warrants a citation for contempt. The Canadian Bar Association and the Criminal Lawyers' Association state that there must be clear evidence of a breach of an ethical standard or an abuse of process for a court to cite counsel for contempt.

24 I will address each of these arguments in turn.

(1) Solicitor-Client Privilege

25 Ms. Cunningham and the interveners argue that solicitor-client privilege could be violated in one of two ways: simply by disclosure of the mere fact that the accused has not paid his or her fees, or inadvertent disclosure of privileged information when engaging in a discussion with the court about the reasons for withdrawal.

26 Concern regarding the protection of solicitor-client privilege is warranted. It need hardly be said that solicitor-client privilege is a fundamental tenet of our legal system. The solicitor-client relationship is integral to the administration of justice; privilege encourages the free and full disclosure by the client required to ensure effective legal representation (see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), at para. 45, *per* Cory J. for the majority, and *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 (S.C.C.), at paras. 31 and 33, *per* Major J.).

27 However, revealing that an accused has not paid his or her fees does not normally touch on the *rationale* for solicitor-client privilege in the criminal context. A client must be able to rely on the confidentiality of the communications made between lawyer and client because only then can there be full and frank discussion of the facts of the case, and the giving and receiving of soundly based legal advice (see *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (Eng. C.A.)), at p. 649; relied on in *Smith v. Jones*, at para. 45, and *McClure*, at para. 32). There has been no explanation as to why an accused would be any more inclined to withhold information from counsel, where the court has discretion over withdrawal, than where counsel can unilaterally withdraw.

28 In arguing that disclosure of the mere fact that an accused has not paid or will not be paying his or her legal fees is protected by solicitor-client privilege, the Law Societies of British Columbia and Yukon rely on this Court's decisions in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), and *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67, [2003] 3 S.C.R. 193 (S.C.C.), where this Court held that, in the context of a law office search, an accused's financial and fee information may be privileged. In *Maranda*, the Court was concerned that fee information, specifically the amount of fees and disbursements, may appear to be "neutral" when in fact disclosure of the information could be prejudicial to the accused. In particular, LeBel J. stated that fee information

> 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. [para. 24]

This information could then be used to charge and/or convict the client. Because of the potentially detrimental effect of disclosure on the client, fee information is considered *prima facie* privileged for the purposes of the search. If the Crown seeks disclosure, the ultimate decision of whether the fee information is *in fact* privileged is made by the court, not the police.

29 Counsel seeking to withdraw for non-payment of legal fees is a decidedly different context from a police search of counsel's accounts and records. The most significant difference is the content of the information being disclosed. The only information revealed by counsel seeking to withdraw is the sliver of information that the accused has not paid or will not be paying fees. It has not been explained how, in this case, this sliver of information could be prejudicial to the accused.

Indeed, it is hard to see how this simple fact alone could be used against the accused on the merits of the criminal proceeding: it is unrelated to the information given by the client to the lawyer, and unrelated to the advice given by the lawyer to the client. It would not be possible to infer from the bare fact of non-payment of fees any particular activities of the accused that pertain to the criminal charges against him.

30 To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where 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, solicitor-client privilege may attach.

31 Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *McClure* and *Smith v. Jones*). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

32 In the alternative, Ms. Cunningham and the interveners argue that counsel may inadvertently disclose privileged information when explaining the reasons for withdrawing and answering questions from the judge. They argue that this risk is so unacceptable that it requires the court to decline to exercise any discretion to refuse counsel's request to withdraw. They point to *Leask* where counsel sought withdrawal due to irreconcilable differences between counsel and the accused. The provincial court judge wanted specific details to determine if the differences could be resolved (*Leask*, at pp. 318-19). The accused in *Leask* was drawn into the conversation with the judge as well. They argue that this is dangerous because the accused may unknowingly waive his or her right to privilege and disclose information that is otherwise protected.

33 I agree that the exchange initiated by the provincial court judge in *Leask* was inappropriate. The judge repeatedly pressed counsel for detailed reasons for withdrawal, and continued to press even when counsel attempted to rely on the professional rules of conduct. The judge bluntly asked the accused if he objected to counsel disclosing the specific reason for withdrawal. I think it is fair to say that what occurred in *Leask* was unacceptable.

34 However, lawyers are presumed to know and respect their professional obligations. Judges are presumed to know the law (*R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), at p. 664, *per* McLachlin J. (as she then was)). The integrity of the administration of justice rests on these assumptions. Delicate matters frequently come before courts. For example, although the initial decision not to produce a potentially privileged document is that of counsel, a judge may have to decide whether the document is in fact privileged. The remote possibility of inadvertent disclosure in the course of that proceeding does not mean that the ultimate decision must be left solely to counsel in disputed cases. I am of the view that the same is true with respect to withdrawal for non-payment of legal fees in criminal matters. The remote possibility that a judge will inappropriately attempt to elicit privileged information in hearing the application does not justify leaving the decision to withdraw exclusively to counsel.

(2) Exclusive Law Society Oversight

35 I am also unable to accept the argument of Ms. Cunningham and the interveners that oversight of lawyer withdrawal falls exclusively to the law societies. The law societies play an essential role in disciplining lawyers for unprofessional conduct; however, the purpose of the court overseeing withdrawal is not disciplinary. The court's authority is *preventative* — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is *reactive*. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

36 The rules enacted by the law societies are essential statements of the appropriate standards of professional conduct. They offer extensive guidance on when counsel may seek to withdraw from a case. For example, the Law Society of Alberta rules state the following with respect to withdrawal for non-payment of fees:

> A lawyer may withdraw upon reasonable notice to the client when justified by the circumstances. Circumstances that may justify, but not require, withdrawal include the following:
>
> > (a) the client fails after reasonable notice to provide funds on account of fees or disbursements in accordance with the agreement made with the lawyer; .... [c. 14, r. 1]

The Law Society of Upper Canada rules speak directly to withdrawal for non-payment of fees in the criminal context:

> Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed to enable the client to obtain another licensee or to enable another licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non-payment of fees. [r. 2.09(5)]

37 The Canadian Bar Association also offers guidance on professional conduct. Its rule on withdrawal states:

> The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.
>
> (*Code of Professional Conduct* (2009), c. XII)

The commentary to the rule states:

> Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result. [commentary 6]

38 While the court is not bound to apply law society or Canadian Bar Association codes of professional conduct, these codes "should be considered an important statement of public policy" (*MacDonald Estate*, at p. 1246). These standards complement the court's discretion to refuse withdrawal where the effects on the administration of justice will be severe. For example, the Canadian Bar Association rules recognize the distinct, yet complementary, nature of the functions served by the court and law societies:

> Where withdrawal is required or permitted by this Rule the lawyer must comply with all applicable rules of court as well as local rules and practice. [c. XII, commentary 3]

Both the courts and the law societies play different, but important, roles in regulating withdrawal: the courts prevent harm to the administration of justice and the law societies discipline lawyers whose conduct falls below professional standards. They are not mutually exclusive.

39 Ms. Cunningham and the interveners submit that court supervision over withdrawal threatens the independence of the bar. As I note above, lawyers are intimately involved in the administration of justice. I do not agree that an exceptional constraint on counsel, necessary to protect the integrity of the administration of justice, threatens counsel's independence. For instance, McLachlin J. in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at pp. 135-36, acknowledged that a court can award costs against counsel personally in rare cases where counsel acts in bad faith by encouraging abuse and delay of the court's process. There is no suggestion that this rare constraint has threatened the independence of the bar. Furthermore, court oversight of lawyer withdrawal has been the practice in Alberta at least since the decision in *Creasser* in 1996. There is no suggestion that this practice affects the independence of the Alberta bar. Finally, all law society rules recognize that an independent bar has obligations beyond those owed to clients. Lawyers must comply with their professional obligations to the administration of justice and the public; these obligations do not undermine counsel's independence (see, for example: Law Society of Yukon, Parts Two and

Three; Law Society of Upper Canada, rr. 4 and 6; Law Society of Alberta, c. 1; Law Society of British Columbia, c. 1).

(3) Conflict of Interest

40 I am also unpersuaded by the Law Society of British Columbia's point that forcing unwilling counsel to continue may create a conflict between the client's and lawyer's interests. It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel's financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. This argument, however, is inconsistent with the Law Society's position — with which I agree — that the court should presume that lawyers act ethically. There are many situations where counsel's personal or professional interests may be in tension with an individual client's interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affecting the client. Counsel is obligated to be diligent, thorough and to act in the client's best interest. Similarly, if counsel agrees to be retained *pro bono*, he or she must act just as professionally as if acting for the client on a paid retainer of the same nature. Where the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less.

(4) Rowbotham Orders

41 The interveners, the Law Society of Yukon, Criminal Lawyers' Association and Attorney General of Ontario, directed the Court's attention to *Rowbotham* orders. In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), the Ontario Court of Appeal found that where an indigent accused, who does not qualify for legal aid, requires legal representation to ensure a fair trial, the court may enter a conditional stay of proceedings until the government provides funded legal counsel (at p. 69).

42 This Court has not commented on the correctness of *Rowbotham* orders (*New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 90), and given that this was not at issue in the present appeal, the following comments are made in *obiter dicta*. I will note, however, that if such an order were available it would be relevant to the court's decision on whether to decline to grant counsel's request to withdraw.

43 That said, a *Rowbotham* order could not be a complete substitute to the court's authority to refuse counsel's request to withdraw. As stated by the Ontario Court of Appeal in *R. v. Rowbotham*, at p. 69, and later in *R. v. Rushlow*, 2009 ONCA 461, 245 C.C.C. (3d) 505 (Ont. C.A.), at paras. 17-21 and 24, a *Rowbotham* order is intended to ensure that an accused receives a fair trial; it does not account for the interests of any other party or person affected by the proceeding. Thus, if delay in the proceedings or the affect on others is the determinative factor in an application for

withdrawal for non-payment of fees, a *Rowbotham* order does nothing to address this concern and may even exacerbate it. A *Rowbotham* order requires a separate motion where an accused must satisfy rigorous criteria in order to succeed. A *Rowbotham* order might be relevant to the court's residual discretion to refuse withdrawal, but it cannot operate as a replacement to it.

(5) Remedy of Last Resort

44 Ms. Cunningham's arguments do not, therefore, support a wholesale denial of the court's jurisdiction to refuse counsel's request to withdraw.

45 That being said, ordering counsel to work for free is not a decision that should be made lightly. Though criminal defence counsel may be in the best position to assess the financial risk in taking on a client, only in the most serious circumstances should counsel alone be required to bear this financial burden. In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers. Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.

D. Refusing Withdrawal

46 The court's exercise of discretion to decide counsel's application for withdrawal should be guided by the following principles.

47 If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.

48 Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

49 If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *Creasser*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.

50 If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power (*Creasser*, at p. 327). In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:

- whether it is feasible for the accused to represent himself or herself;
- other means of obtaining representation;
- impact on the accused from delay in proceedings, particularly if the accused is in custody;
- conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
- impact on the Crown and any co-accused;
- impact on complainants, witnesses and jurors;
- fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
- the history of the proceedings, e.g. if the accused has changed lawyers repeatedly.

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

51 Harm to the administration of justice is not simply administrative inconvenience as the interveners suggest. Harm to the administration of justice recognizes that there are other persons affected by ongoing and prolonged criminal proceedings: complainants, witnesses, jurors and society at large. Because of this, I would respectfully observe that the consideration suggested by the Alberta Court of Appeal in *Creasser* of whether allotted court time can be otherwise usefully filled is not a relevant consideration in this balancing of interests.

52 The Manitoba Court of Appeal's decision in *Deschamps* offers a useful example of the appropriate exercise of the court's discretion. Defence counsel was representing the offender in a dangerous offender proceeding. Five days into the proceeding counsel requested an adjournment to allow the offender to be assessed for and receive treatment. The matter was remanded for approximately eight months. During this time difficulties arose with legal aid funding. Because the dangerous offender proceedings were of high complexity, counsel was initially promised a higher fee than provided by the regular tariff. "Financial difficulties" called into question Legal Aid's ability to follow through with the commitment to a higher fee. Defence counsel sought to withdraw due to Legal Aid's alleged breach of contract.

53 The motions judge determined that there was no breach of contract. However, she found that even if there had been a breach, she would have refused counsel's request to withdraw. In the Court of Appeal, Steel J.A. upheld this decision. She agreed with the motions judge that the factors relevant to denying withdrawal were: the proceeding was serious and complex, the offender could not represent himself, the proceeding had already begun, there was no immediate prospect of obtaining another lawyer, and the offender was a difficult client who had finally developed a relationship of trust and confidence with this particular counsel. The Court of Appeal agreed with the motions judge that further delay would have resulted from allowing withdrawal and would have caused serious prejudice to the offender. The Court of Appeal noted that after the initial motion, Legal Aid ensured that fees would still be paid, just not at the higher rate. Counsel's application to withdraw was refused.

54 The question of whether this case meets the high threshold that must be met to refuse leave to withdraw is now moot. The parties and the judge did not have the benefit of these reasons, and the record before this Court does not provide information or analysis on several of the relevant factors. It is, therefore, not clear whether the circumstances of this case would, after full analysis of the relevant factors, justify a refusal of leave to withdraw. I simply emphasize that the threshold for refusing leave to withdraw is a high one and requires a proper basis in the record for its exercise.

E. Procedure to Review a Decision Refusing Withdrawal

55 This appeal originated in the Supreme Court of the Yukon Territory as an unsuccessful application for an order in the nature of *certiorari*. Ms. Cunningham had to apply for *certiorari* because there is no provision in the *Criminal Code* providing for interlocutory appeals (see s. 674 of the *Criminal Code*). Once the superior court heard the application, Ms. Cunningham appealed to the Court of Appeal (s. 784(1) of the *Criminal Code*) and the Crown in turn to the Supreme Court of Canada (s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26).

56 There is some question as to how the matter would have proceeded had it originated in a superior court. Both the Alberta and Manitoba Courts of Appeal have found that they do not have jurisdiction over appeals of withdrawal applications from superior courts (*Creasser*, at p. 330,

Deschamps, at para. 42). While this Court need not decide the correct procedure for appealing a withdrawal application originating in a superior court, some guidance might be useful. These circumstances seem to be analogous to those in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). *Dagenais* involved a media challenge of a publication ban in a criminal matter. As the media was a third party to the criminal proceedings, the Court determined that this was different than an interlocutory appeal by a party to the action. It concluded that the least undesirable route of appeal was directly from the superior court to the Supreme Court of Canada through s. 40 of the *Supreme Court Act* (p. 862). Similarly, defence counsel is a third party to the main criminal action, so it appears this would be analogous to *Dagenais*.

F. Certiorari

57 Orders in the nature of *certiorari* may only be granted where the inferior court has made a jurisdictional error or an error of law on the face of the record (G. Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (1976), at p. 143). Gower J. thought he had to find an excess of jurisdiction to interfere with Lilles Terr. Ct. J.'s exercise of discretion. However, excess of jurisdiction is the standard for a preliminary inquiry judge's decision to either commit an accused to trial or issue a discharge (*R. v. Patterson*, [1970] S.C.R. 409 (S.C.C.), at p. 413; *R. v. Dubois*, [1986] 1 S.C.R. 366 (S.C.C.), at p. 380;*R. v. DesChamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601 (S.C.C.), at para. 17). This high threshold for review is premised on the fact that a preliminary inquiry does not result in a final determination of guilt or innocence; therefore, there is less need for broad supervisory remedies (*Dubois*, at pp. 373-74). However, a lawyer seeking withdrawal is not analogous to a committal or discharge at a preliminary inquiry; it is more closely analogous to *Dagenais*, a third-party application. The judge at first instance has the authority to make an immediate and final determination on counsel's application to withdraw. As noted by Steel J.A. in *Deschamps*, refusing an application to withdraw is a coercive and conclusive order with respect to the lawyer (para. 38). Therefore, in this context an order in the nature of *certiorari* should be given its normal scope and can be allowed where there is an error of jurisdiction or an error of law on the face of the record (*Dagenais*, at pp. 864-65).

58 Because the authority to supervise the conduct of counsel falls within the inherent or necessarily implied jurisdiction of the court, it is difficult to see how a decision to refuse withdrawal could amount to a jurisdictional error. However, it would be open for counsel to argue that the provincial or territorial court judge committed an error of law on the face of the record. Such errors would include, for example, refusing withdrawal when counsel seeks to withdraw for ethical reasons, or failing to consider a relevant factor when exercising discretion over withdrawal for nonpayment of fees (see *R. v. Canadian Broadcasting Corp.*, 2008 ONCA 397, 231 C.C.C. (3d) 394 (Ont. C.A.), at para. 26, and *Ottawa Citizen Group Inc. v. Ontario* (2005), 75 O.R. (3d) 590 (Ont. C.A.), at para. 49).

6. Conclusion

59 In sum, a court has the authority to control its own process and to supervise counsel who are officers of the court. The Supreme Court of the Yukon Territory correctly concluded that the Territorial Court had the jurisdiction to refuse to grant counsel's request to withdraw. This jurisdiction, however, should be exercised exceedingly sparingly. It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary, nor where counsel seeks withdrawal for ethical reasons. Where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether withdrawal would cause serious harm to the administration of justice.

7. Disposition

60 I would allow the appeal. I would decline to grant an order as to costs.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the Court on May 7, 2010 has been incorporated herein.

M

2013 ONSC 4543
Ontario Superior Court of Justice [Commercial List]

Katz, Re

2013 CarswellOnt 9050, 2013 ONSC 4543, [2013] O.J. No. 3113,
229 A.C.W.S. (3d) 987, 2 C.B.R. (6th) 294, 91 E.T.R. (3d) 284

In the Matter of the Bankruptcy of Michael Katz

D.M. Brown J.

Heard: July 2, 2013
Judgment: July 3, 2013
Docket: 31-435114

Counsel: F. Tayar for Bankrupt, Michael Katz
B. Jaeger for Trustee, Sheriff & Sole Inc.
B. Morris for Opposing Creditor, Joe Morra
H. Fulchini, Opposing Creditor for himself

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts; Evidence

VOIR DIRE to consider admissibility of evidence.

***D.M. Brown J.*:**

I. Admissibility of information in possession of a bankrupt's former solicitor at a discharge hearing under section 170 of the Bankruptcy and Insolvency Act

1 By receiving order made May 27, 2004, Michael Katz was adjudged bankrupt. A contested bankruptcy discharge hearing commenced before me yesterday. An issue arose as to whether information in the possession of the bankrupt's former matrimonial lawyer about his pre-bankruptcy assets was cloaked with solicitor-client privilege.

II. Background evidence

2 During the course of his evidence-in-chief Mr. Katz was asked to explain entries on several pre-bankruptcy net worth statements which he had provided to lending institutions to secure financing for various residential real estate developments his business was undertaking. The entries noted that he received significant annual income (about $150,000) from a "family trust". In chief Mr. Katz testified that he had made a mistake in describing that income as coming from a "family

trust", since none had ever existed. He stated that the money represented an allowance which his mother gave him. His mother, Roslyn Fingold, is a Toronto real estate broker.

3 On his October 6, 2007 Statement of Affairs the bankrupt did not disclose the existence of a beneficial interest in a family trust or any income received by him under such a trust. So, too, on his March 2, 2011 section 161 examination by the Official Receiver, the bankrupt did not identify any family trust as a source of income.

4 On cross-examination by Mr. Morris the bankrupt acknowledged that a year or so before his bankruptcy he had experienced matrimonial difficulties with his wife, Skye Katz, and had gone to see a matrimonial lawyer, Sandra Morris. Katz was accompanied by his sister, Cathy, on that visit.

5 Katz was asked whether he had discussed his property with Ms. Morris. Katz testified that he did not remember the appointment or its context, but his sister remained in the room during his meeting with the lawyer. Counsel for Katz then objected to the posing of any questions about what was discussed at that meeting.

6 I ordered the holding of a *voir dire*.

7 On the *voir dire* Katz testified that his purpose in visiting Ms. Morris was to obtain legal advice about his separation from Skye. He could not remember what was discussed nor could he remember whether he received any legal advice. Katz testified that he did not see Ms. Morris again.

8 Sandy Morris testified on the *voir dire*. Back in 2003 she was working as a matrimonial lawyer at the Wilson, Christen law firm. She testified that she did not have any independent recollection about the specifics of her discussion with Katz at that time, including whether they had discussed his assets or any trust in his favour. Ms. Morris, who appeared in response to a summons, stated that she was not able to bring her client file with her to court because she had left the Wilson, Christen firm and was told by the firm that it could not release the file to her without the authorization of the client.

9 Counsel for the opposing creditor submitted that any disclosure made by Katz to Ms. Morris about his assets back in 2003, specifically whether he was the beneficiary of a family trust which paid him a monthly amount, was not protected by solicitor-client privilege and requested that I order the Wilson, Christen law firm to release Katz's file so that non-privileged documents could be produced and Ms. Morris could refresh her memory. Katz's counsel opposed that request, submitting that any disclosure by Katz of his assets to Ms. Morris during that meeting would be cloaked with solicitor-client privilege.

III. Analysis

A. The principles of law

10 Under Canadian law, solicitor-client privilege is that of the client, in this case the bankrupt, and the *Bankruptcy and Insolvency Act* does not attempt to displace that privilege by authorizing the trustee to waive it. [1] In the *Bre-X Minerals* case the Alberta Court of Appeal observed that the common law was evolving in a direction which did not favour recognizing an exception to solicitor-client privilege in favour of trustees generally, [2] and it adopted the approach taken to the issue by the Ontario Court of Appeal in its 1984 decision in *Clarkson Co. v. Chilcott*, [3] commenting that that decision had correctly balanced the importance of solicitor-client privilege against creditor rights. [4]

11 The *Chilcott* case involved a motion by a trustee for an order that the bankrupt's lawyer attend to answer questions relating to the bankrupt's property. In the first instance Ewaschuk J. granted the order sought for two reasons: (i) questions relating to the bankrupt's acquisition, location and disposition of property did not attract any privilege "being objective acts and transactions and not confidential communications"; (ii) the trustee enjoyed the power to waive privilege as regards the client's instructions regarding the property, including the purpose for which the property was acquired or disposed. [5]

12 On appeal, the Court of Appeal agreed that the solicitor "was properly ordered to reattend before the special examiner to answer questions regarding his bankrupt client's affairs". [6] The Court of Appeal disagreed that the trustee possessed the power to waive the bankrupt's solicitor-client privilege with respect to legal advice given to the bankrupt concerning his former property. [7] The Court of Appeal stated:

> In our view, the [bankrupt's solicitor] can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the [bankrupt's solicitor] for the purpose of giving legal advice. These communications with respect to property are not privileged. All questions contained in sch. "A" to the order of Mr. Justice Ewaschuk can be read as falling in this category of non-privileged information and to that extent they should be answered by the [bankrupt's solicitor]. In that respect, there is no privilege to be waived by the client or by the trustee.
>
> The privilege attaches, however, to all information requested by the client for the purpose of obtaining professional advice and assistance and given for that purpose... [8]

13 In his dissent in the *Bre-X Minerals Ltd.* case, LoVecchio J., in referring to sections 163 and 164 of the *BIA*, stated that those sections allowed for the examination of a solicitor and "a solicitor may be compelled to disclose all information relating to the transactions of the bankrupt or the location of the bankrupt's property". [9]

14 Louise Lalonde, in an informative article entitled, *The Bankrupt's Right to Solicitor-Client Privilege: An Unbreakable Cone of Silence or Has the Last Word Been Said?*, [10] reviewed the jurisprudence on the discoverability of transactions by bankrupts with third parties and observed that the Quebec Court of Appeal, in *Laprairie Shopping Centre Ltd., Re*, [11] had reached a similar result as had the Court of Appeal in *Chilcott*.

15 More recent jurisprudence has not eroded the approach adopted in the *Chilcott* case. In *Maranda c. Québec (Juge de la Cour du Québec)* the Supreme Court of Canada observed regarding solicitor-client privilege that:

> 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...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), 41 O.R. (2d) 328 (Div. Ct.); *Joubert, supra*). [12]

16 Recently, in *Kaiser, Re*, the Court of Appeal held that "administrative information" relating to the solicitor-client relationship, such as who was paying the legal bills of the bankrupt's counsel, was presumptively privileged, a privilege which could only be rebutted by showing that disclosure of the information would not lead to the revelation of confidential solicitor-client communications or the requested information was not linked to the merits of the case and its disclosure would not prejudice the client. [13]

17 From these cases about the scope of the solicitor-client privilege enjoyed by a bankrupt I conclude that a solicitor who acted for a bankrupt prior to the making of a receiving order can be compelled to disclose information about a bankrupt's property — what assets the bankrupt owned or possessed an interest in - provided that in so doing the solicitor does not reveal communications made for the purpose of giving legal advice. So, for example, if prior to the making of a receiving order the bankrupt told his lawyer that he owned Asset A, then in the bankruptcy proceedings the solicitor could be compelled to disclose that fact. The solicitor could not be asked to disclose what advice he may have given about what to do with or how to treat Asset A, but the fact of the existence of Asset A would be discoverable.

18 I think this conclusion follows not only from the focus of the privilege's protection on the communications between client and lawyer for the purpose of receiving legal advice, but also from the related principle that solicitor-client privilege may not be invoked for the purpose of

assisting in the commission of a crime, suppressing real evidence of a crime or perpetrating tortious conduct. [14] Section 158(a) of the *BIA* imposes a statutory duty on the bankrupt to "make discovery of and deliver all his property that is under his possession or control to the trustee..." and section 158(b) requires him to "deliver to the trustee all books, records, documents, writings and paper...in any way relating to his property or affairs". The failure of the bankrupt to do any of the things required of him under *BIA* s. 158, without reasonable cause, constitutes the commission of an offence. [15] To permit a solicitor to refuse to answer questions about the existence and location of the bankrupt's property would, in its effect, enable solicitor-client privilege to be invoked to assist the bankrupt in committing an offence — i.e. failing to comply with the duties imposed by section 158 of the *BIA*.

B. Application to the facts

19 Turning to the facts of this case, I conclude that Ms. Morris must answer questions concerning any information in her possession about the existence and location of the bankrupt's property prior to the date of the receiving order because that information does not fall within the scope of solicitor-client privilege.

20 I would also note that in his evidence Mr. Katz testified that his sister, Cathy, had attended his meeting with Ms. Morris. The presence of unnecessary third parties when the communication is made to or from the lawyer may serve to vitiate the solicitor-client privilege because the presence of an individual whose presence is not essential to the consultation leads to the presumption that the communication was not intended to be made in confidence. [16]

21 Ms. Morris has testified that she has no independent recollection of whether she discussed with Mr. Katz the assets which he owned at the time of their meeting. She stated she would need to look at her file in order to ascertain whether she had recorded any such information. Since Mr. Katz's client file remains with the Wilson, Christen firm, it follows that I order that firm to make that client file available to Ms. Morris for the purpose of enabling her to give evidence at this discharge hearing. I will ask counsel for their submissions on how this hearing should proceed in light of my ruling.

Evidence admitted.

Footnotes

1 *Bre-X Minerals Ltd., Re*, 2001 ABCA 255 (Alta. C.A.), para. 35

2 *Ibid.*, para. 45.

3 (1983), 47 C.B.R. (N.S.) 93 (Ont. Bktcy.), appeal dismissed (1984), 48 O.R. (2d) 545 (Ont. C.A.).

4 *Bre-X Minerals*, *supra.*, para. 38.

5 *Chilcott*, *supra.*, Ont. S.C., para. 9.

6 *Chilcott*, *supra.*, OCA, para. 6.

7 *Ibid.*, para. 8.

8 *Ibid.*, paras. 12 and 13. Unfortunately the reported reasons did not reproduce Schedule "A" to the decision of the motions judge.

9 *Bre-X Minerals Ltd.*, *supra.*, para. 82.

10 *2006 Annual Review of Insolvency Law* (Toronto: Carswell, 2007) 672.

11 [1998] R.J.Q. 448 (Que. C.A.), para. 47.

12 [2003] 3 S.C.R. 193 (S.C.C.), para. 30.

13 2012 ONCA 838 (Ont. C.A.), para. 30.

14 Sopinka, Lederman & Bryant, *The Law of Evidence in Canada, Third Edition* (Toronto: LexisNexis, 2009), §14.75 and 14.76.

15 *BIA*, s. 198(2)

16 Sopinka, Lederman & Bryant, *supra.*, §14.49.

End of Document

DBDC SPADINA LTD., et al Applicants	NORMA WALTON, et al Respondents	Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

Book of Authorities of Schonfeld Inc.

(Motions Returnable May 3, 2016)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Brian Empey LSUC#: 30640G
Mark S. Dunn LSUC#: 55510L

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for The Manager