IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett

B E T W E E N :

HER MAJESTY THE QUEEN	)	***R. I. Histed***
	)	*for the Appellant*
	)	
Respondent	)	***C. P. R. Murray***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
DAVID JOSEPH DOUGLAS	)	***February 10, 2017***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***June 29, 2017***

CAMERON JA

Introduction

[1] This appeal involves a claim of solicitor-client privilege regarding documents that were seized in the execution of two search warrants (the warrants). Those warrants authorized, in part, the seizure of legal correspondence relating to a number of real estate transactions (the transactions). The application judge found that the legal correspondence sought constituted transactional documents that were not presumptively protected by solicitor-client privilege.

[2] For the reasons that follow, I am of the view that the legal correspondence authorized for seizure, including lawyers' reporting letters,

was presumptively privileged. On the facts of this case, the issuing justice was without jurisdiction to authorize the seizure of legal correspondence and, to that extent, the warrants were issued in breach of section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[3] By way of remedy, I would excise the term "legal correspondence" from the warrants.

[4] All of the documents seized by the RCMP are currently sealed and will remain so. The court which would be best placed to decide whether any documents, as identified by the accused (the applicant), are subject to solicitor-client privilege is the court which will be first required to consider them in the context of the criminal proceedings to which the applicant is currently subject.

[5] Neither the RCMP nor the Crown Attorney may view the seized documents prior to a determination of solicitor-client privilege by a judge. RCMP officers who have viewed any presumptively privileged documents are prohibited from disclosing or using their knowledge of them in any fashion. Any documents found to be protected by solicitor-client privilege shall be returned to the applicant.

Background and Proceedings

[6] The applicant worked in various capacities in real estate transactions, including as a mortgage broker. He also owned and directed a number of businesses related to the financing of such transactions. As part of a mortgage fraud and theft investigation into certain activities of the applicant, the RCMP obtained the warrants pursuant to section 487 of the

Criminal Code (the *Code*) in relation to his home and business. The warrants authorized the seizure of evidence relating to specific real estate transactions. Of import to this decision, each of the warrants authorized the seizure of "[c]orrespondence, contracts, agreements, legal correspondence, real estate files, mortgage documents or other documents in either electronic or paper format" relating to the transactions. The warrants were executed resulting in numerous seizures, including hard copy documents, computers and digital storage devices.

[7] Despite the seizures, the applicant was not charged with any criminal offence at that time. He filed an application pursuant to section 24(1) of the *Charter* requesting: a) an order of *certiorari* quashing the warrants; b) an order for the interim and final recovery of all property that was seized; and c) an order prohibiting the prosecution of any of the charges described in the warrants. He claimed, among other things, that the legal correspondence seized was subject to solicitor-client privilege.

[8] In response to the application, the RCMP investigation was halted and the seized material was sealed pending a determination of the issue. Eventually, the RCMP copied the documents and contents of the computers and digital storage devices and returned the originals to the applicant. The copied materials remain sealed.

[9] The application judge dismissed the application. The applicant appealed that decision to this Court.

[10] After the applicant's appeal was perfected, the RCMP charged him with the charges as detailed in the warrants (the charges). The Crown then filed a motion to quash the applicant's appeal, claiming that it was

interlocutory as the applicant was now charged. That motion was denied by this Court in *R v Douglas*, 2016 MBCA 81 (*Douglas 1*).

[11] Thus, this appeal concerns the dismissal of his application for relief under section 24(1) of the *Charter*. Since he was charged post-application, he is now also requesting that the charges be stayed.

Decision of Application Judge

[12] At the hearing of the matter, in support of its position that the term "legal correspondence" as referenced in the warrants was only intended to apply to transactional information, the Crown provided affidavit evidence from the constable who swore the information to obtain (ITO) the warrants (the ITO constable). The relevant excerpts from his subsequent examination for discovery are reproduced below:

> [Applicant's counsel] So I understand you to be saying that you were interested in the correspondence between [the applicant] and his lawyers with respect to these five transactions?
>
> [ITO constable] If he was involved in the transaction, then yes.
>
> [Applicant's counsel] So you were looking for lawyer/client communications regarding these transactions of [the applicant]
>
> [ITO constable] It was those reporting letters that we were most interested in. And I termed it as legal correspondence and there was, sort of, the correspondence detailing what the transactions were done in those houses.
>
> [Applicant's counsel] Right. So a report by [the applicant's] counsel to him as to actually how the transaction proceeded, whether it was completed, et cetera?
>
> [ITO constable] Yes.

[13] When questioned by the Crown, the following exchange occurred:

> [Crown] When you used the term legal correspondence in the warrants, were you seeking legal advice?
>
> [ITO constable] No.
>
> [Crown] Were you seeking transactional information?
>
> [ITO constable] It was that transactional information or, you know, reporting information. I'm not sure what the correct term [is].

[14] The application judge found that the transactional legal correspondence sought by the warrants constituted "actions and objective facts" rather than "communications that attract protection". In support of his conclusion, he cited case law suggesting that documents related to real estate transactions do not involve the provision of legal advice. Therefore, he held that the legal correspondence referenced in the warrants was not subject to solicitor-client privilege.

[15] Having found that solicitor-client privilege did not apply, the application judge rejected the argument that there was no jurisdiction to issue the warrants.

[16] He further rejected the applicant's position that the legal correspondence seized was presumptively privileged and therefore that the protections set out in *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61, regarding searches of law offices, applied. In his view, the applicant's home and business could not be considered to be within the definition of a law office.

[17] Based on all of the above, the application judge dismissed the applicant's section 8 *Charter* argument as being premature. In his view, the determination of solicitor-client privilege, including the determination of whether the fraud exception found in *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860, existed, was to be determined on a document-by-document basis in "any subsequent hearing to determine privilege".

[18] Given the above, the application judge held that he had no need to consider a remedy pursuant to section 24(1) of the *Charter*.

Grounds of Appeal

[19] The applicant relies on three grounds of appeal. First, he alleges that the application judge erred in finding that the warrants were restricted to transactional real estate correspondence passing between him and his solicitors. Next, he argues that the application judge erred in finding that the transactional real estate correspondence referenced was not privileged. Finally, he submits that application judge erred in finding that his section 8 *Charter* right to be free from unreasonable search and seizure was not infringed.

Ground #1—Did the application judge err in finding that the warrants were restricted to transactional real estate correspondence passing between the applicant and his solicitors?

[20] In my view, this first ground of appeal can be dealt with summarily. I agree with the Crown that the authorization to seize legal correspondence only referred to correspondence relating to the transactions specified in the warrants and not all legal correspondence possessed by the applicant. The scope of the warrant must be determined by reading it as a

whole, in consideration of the description of the offences and the items to be seized. See *Canada (Commissioner of Competition) v Falconbridge Ltd* (2003), 173 CCC (3d) 466 at paras 13-14. The warrants in this case specifically stated that they were for legal correspondence "relating to" the transactions and were therefore limited in that regard.

[21] For ease of reference, I will deal with the second and third grounds together.

Ground #2—Did the application judge err in finding that the legal correspondence authorized for seizure was not protected by solicitor-client privilege?

Ground #3—Did the Application Judge err in finding that the applicant's section 8 Charter right to be free from unreasonable search and seizure was not infringed?

Positions of the Parties

[22] In support of his assertion that the legal correspondence sought, including any reporting letters to the applicant from his solicitor(s) regarding the transactions, was subject to solicitor-client privilege, he asserts that the case law relied on by the application judge was dated and not in accord with Supreme Court of Canada jurisprudence.

[23] Further, relying on *Lavallee,* the applicant argues that the special procedures and protections that provided for the search and seizure of presumptively privileged documents are not restricted to law offices, but rather, apply to the seizure of materials that can be presumed to be privileged by their very nature.

[24] Thus, the applicant argues that the issuing justice had no jurisdiction to issue the warrants and that they resulted in a breach of his section 8 *Charter* right to be free from unreasonable search and seizure.

[25] The Crown argues that the application judge did not err when he held that the legal correspondence sought referred only to transactional real estate documents not known to be protected by solicitor-client privilege. Further, it maintains that the targeted legal correspondence, including lawyers' reporting letters, is not subject to the rebuttable presumption of privilege created by the Supreme Court of Canada for lawyers' bills and accounts in the context of law office searches.

[26] Regarding section 8 of the *Charter*, the Crown agrees that, if the warrants are found to be defective, the resulting warrantless search would have been unreasonable. However, absent such a finding, the Crown argues that the applicant must prove a breach on a document-by-document basis. Thus, it submits that the application judge did not err when he held that it was premature to consider the applicant's section 8 *Charter* arguments.

[27] If a breach of section 8 of the *Charter* is found, the Crown asserts that there are many potential remedies short of a stay of proceedings that would be appropriate and just.

Standard of Review

[28] The parties agree, appropriately in my view, that the issues of whether the legal correspondence referred to in the search warrant was protected by solicitor-client privilege and whether a breach of section 8 of the *Charter* occurred are questions of law reviewable on the standard of

correctness. See *R v Tran*, 2010 SCC 58 at para 40; *R v Buzizi*, 2013 SCC 27 at para 15; and *R v Farrah (D)*, 2011 MBCA 49 at para 7.

Discussion

Solicitor-Client Privilege

[29] Before dealing with the legal correspondence in question, it is helpful to review the importance of solicitor-client privilege. Over the last two decades, the Supreme Court of Canada has consistently emphasized the significance of the principle of solicitor-client privilege and ultimately constitutionalized it. In *Douglas 1*, Beard JA described the development of the law as follows (at para 60):

> The principles of solicitor-client privilege, which have evolved and increased in importance over time (see, for example, *R v McClure*, 2001 SCC 14 at paras 17-37, [2001] 1 SCR 445; and *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 SCR 809), were described by Arbour J for the majority in *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61, [2002] 3 SCR 209 as follows (at para 49):
>
> > Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.

[30] In the recent decision of *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, Côté J, for the majority, summarized the current significance of the principle, concluding (at para 43):

> This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary ([*Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20], at para. 28, citing *Lavallee*, at paras. 36-37, *McClure*, at para. 35, *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, at para. 27, and *Goodis*, at para. 15).

[31] See, also, *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 44.

[32] Moreover, solicitor-client privilege has long been known as a presumptive, prima facie, or class privilege. The nature of this privilege was described by Lamer CJ in *R v Gruenke*, [1991] 3 SCR 263 (at p 286):

> I think it is important to clarify the terminology being used in this case. The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should <u>not</u> be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category (see: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 and *Solosky v. The Queen*, [1980] 1 S.C.R. 821).

[33] In *Maranda v Richer*, 2003 SCC 67, LeBel J, writing for a majority of the Court, affirmed that solicitor-client privilege "is one of the rare class privileges" recognized by the common law (at para 11):

> [S]olicitor-client privilege is one of the rare class privileges recognized by the common law. The decisions of this Court have clearly distinguished that privilege from privileges that are recognized on an individual, case-by-case basis for legal policy reasons, under the Wigmore test (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 713-15; *Gruenke*, at pp. 286-87).

[34] He explained that the presumption of privilege provides guidance to the methods by which it is given effect (at para 33):

> 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.
>
> [emphasis added]

[35] Thus, documents that are presumptively privileged are subject to more stringent procedures and controls regarding their seizure and disclosure.

Solicitor-Client Privilege and Transactional Documents

[36] In *Solosky v The Queen*, [1980] 1 SCR 821, Dickson J summarized the criteria required to establish solicitor-client privilege. There must be (at p 837):

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

[37] Historically, some jurisprudence had developed holding that real estate documents, including reporting letters from lawyers to clients, are merely transactional documents and are therefore not subject to solicitor-client privilege. In Manitoba in *R v Tysowski*, 1997 CarswellMan 339 (QB), Oliphant ACJQB held that the files seized from a lawyer's office regarding real estate transactions were not subject to solicitor-client privilege. Regarding reporting letters, he stated (at para 25):

> Although it must be conceded that advice is given by the solicitors to their respective clients by way of reporting letters on the closings of the transactions involved in the various files, the advice really is a factual report as to what has transpired in the various transactions and not legal advice in the strict sense of the word. I hold that advice given by way of reporting on the closing of a real estate transaction is not subject to a solicitor-client privilege.

[38] In reaching his conclusion, he relied on the case of *B v Canada*, 1995 CarswellBC 63 (SC), where the Court considered the confusion that can arise between conversations and documents involving a lawyer and a client which are not privileged because either the conditions of confidentiality and/or legal advice have not been met.

[39] In this case, when determining that the legal correspondence referred to in the warrants was not protected by solicitor-client privilege, the application judge applied *Tysowski*, stating:

> Moving on to the warrants sought by the RCMP, in my view, the RCMP sought nothing improper in requesting the authority to search for transactional legal correspondence relating to the impugned transactions. It is well-settled in our law that a lawyer's real estate transaction files are not subject to solicitor-client privilege, even though they may have been confidential records. The rational is a simple one; that is, because they represent actions and objective facts rather than communications that attract protection.

[40] The application judge further noted that *Tysowski* was applied in *Canada (Minister of National Revenue) v Reddy*, 2006 FC 277; and *Westra Law Office (Re)*, 2009 ABQB 391.

[41] In brief, the application judge considered that the documents were not privileged on the basis that: 1) they did not include the provision of legal advice; and 2) that they represented acts reflected in the transactional documents that are not confidential.

[42] However, since *Solosky*, courts have continued to define and expand the meaning of legal advice. They have also called into question whether there should continue to exist a distinction between actions and objective facts and communications. Thus, the evolution of each of these concepts will be examined.

Defining Legal Advice

[43] At the outset, I recognize that certain transactional or

conveyancing documents are not privileged. For example, documents that end up in a public registry, such as transfers of land, are not privileged. See *Kaddoura v Hanson*, 2015 ABCA 154 at para 28; and *R v Li*, 2013 ONCA 81 at para 66.

[44] Nevertheless, there is a line of case law evidencing an expansive approach to the interpretation of what constitutes legal advice, including situations where the lawyer is simply acting as a lawyer, rather than strictly providing legal advice. This development can be traced to *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, where Binnie J, writing on behalf of a unanimous Court, stated (at para 10):

> While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity.
>
> [emphasis added]

[45] In *Simcoff v Simcoff*, 2009 MBCA 80, Steel JA highlighted this comment and stated, "courts lean toward finding that such a privilege exists whenever a lawyer acts in their professional capacity" (at para 19) and that, "One can find many cases where solicitor-client privilege was upheld despite the assertion that the communication did not involve what one might label as 'legal advice'" (at para 21).

[46] More recently, in *Slansky v Canada (Attorney General)*, 2013 FCA 199, leave to appeal to SCC refused without written reasons, 2014 CarswellNat 264, Evans JA, writing for the majority, stated that the above

comment in *Blood Tribe* "somewhat broadened the scope of legal advice privilege" and concluded (at para 79):

> Thus, a solicitor-client relationship is established for privilege purposes if the lawyer has been asked either to give legal advice or otherwise to act as a lawyer, that is, to perform services related to a legal issue pertaining to the client for which the professional skills and knowledge of a lawyer are required.

[47] Furthermore, while *Tysowski* may have been the leading case in Manitoba, there exist differing opinions as to whether reporting letters in a real estate transaction are protected by solicitor-client privilege. These cases also take a somewhat more expansive view of what constitutes legal advice.

[48] For example, in *Metro Concrete Floors v Fieldview Construction*, 2012 ONSC 2966, Healey J denied a motion for production of a reporting letter and solicitor's account from a purchase transaction in a civil case where it was alleged that trust funds were misappropriated to facilitate a real estate transaction. She wrote (at para 3):

> Clients seek solicitors for purchase transactions to offer both guidance and advice, and the reporting letter and account to the client are direct by-products of the legal advice and assistance both sought and given for such transactions.

[49] Also see *Nathawad v Minister of National Revenue*, 1998 CarswellBC 3223 (SC); *Re Krhanek and Slyomovics*, 2006 BCSC 956; and *Normc Developers Inc v Dolson*, 2011 ONSC 2770, wherein reporting letters were considered to be privileged.

[50] Similarly, solicitor-client privilege has been found where there is a

link between a description of the services provided and solicitor-client privilege. As earlier stated, in *Maranda*, the majority of the Supreme Court of Canada held that a lawyer's bill of accounts fell prima facie within the category of solicitor-client privilege. In *Wong v Luu*, 2015 BCCA 159, Willcock JA explained (at para 38):

> A lawyer's bills are presumptively privileged because they are ordinarily descriptive; by recording the work done by the solicitor, they disclose the client's instructions, which the client cannot be compelled to divulge and the confidentiality of which the solicitor is obliged to protect.

[51] See, also, *Southern Railway of British Columbia Ltd v Deputy Minister of National Revenue*, 1990 CarswellBC 1828 at para 9 (SC); and *R v 1496956 Ontario Inc*, 2009 CarswellOnt 1537 at para 8 (Sup Ct J).

[52] Thus, there is support for a finding that a reporting letter is protected by solicitor-client privilege for the reason that it falls within the definition of legal advice. That is, a reporting letter involves a lawyer providing legal services and it involves a description of the services provided, thereby disclosing the client's instructions.

The Distinction Between Facts and Communications

[53] The application judge held that legal correspondence, including reporting letters, constituted transactional documents which "represent actions and objective facts" as opposed to solicitor-client communications.

[54] In my view, this historical distinction has eroded over time as well. In *Maranda*, LeBel J considered the distinction between facts and communications in the context of a criminal investigation, stating (at

paras 28, 30, 32-33):

> 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.
>
> 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* [*Stevens v Canada (Prime Minister)*, 1998 CarswellNat 1051 (FCA)] at para. 25).
>
> 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.
>
> Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this Court forcefully stated even more recently in *McClure*, *supra*, at paras. 4-5.
>
> [emphasis added]

[55] More recently, in the civil context in *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, the Court considered the

issue in the context of "professional secrecy", which it noted had strong similarities with the common law's solicitor-client privilege, stating (at para 40):

> [I]t is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected (*Maranda*, at paras. 30-33; *Foster Wheeler* [*Foster Wheeler Power Co v Société intermunicipale de gestion et d'elimination des déchets (SIGED) inc*, 2004 SCC 18], at para. 38). The line between facts and communications may be difficult to draw (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 941). For example, there are circumstances in which non-payment of a lawyer's fees may be protected by professional secrecy (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30). The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication" (*Maranda*, at para. 48). This is why there must be a rebuttable presumption to the effect that "all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42).

Also see *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 19.

[56] In my view, a reporting letter is within that class of interactions that fall between communications that arise out of the solicitor-client relationship and those that transpire within it.

Conclusion—Presumption of Privilege

[57] In determining that the legal correspondence, including reporting letters, referred to in the warrants did not constitute material that was protected by solicitor-client privilege, the application judge relied on Manitoba jurisprudence. In my view, that jurisprudence can no longer be

considered to be an accurate representation of the law of solicitor-client privilege as it has evolved.

[58] Rather, the legal correspondence, including reporting letters, authorized for seizure by the warrants constituted information that was subject to a rebuttable presumption that it was protected by solicitor-client privilege. Such correspondence is the direct result of a lawyer providing legal advice or otherwise acting as a lawyer, is descriptive of the services provided by the lawyer and arises as a result of the solicitor-client relationship.

Jurisdiction and Section 8 of the Charter

[59] In *Lavallee*, the majority of the Supreme Court of Canada held that section 488.1 of the *Code* (as it then was), dealing with the procedure to be followed when documents are examined or seized and solicitor-client privilege is claimed, breached section 8 of the *Charter*. That case dealt with searches of law offices. After finding the section to be lacking, the Court set out a number of principles regarding the issuance of warrants authorizing seizure of materials from law offices. They are (at para 49):

> 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.

[60] I am cognizant that documents found in a law office can be presumed to be privileged and that such a presumption does not necessarily apply to the search of a person's residence. However, in this case, the warrants specifically targeted solicitor-client information that was subject to the presumption of privilege. In my view, if the documents are presumptively privileged, it matters not whether the documents are seized from a lawyer's office or from some other location. That is because solicitor-client privilege belongs to the client, not the lawyer. See *Chambre des notaires du Québec* at para 48; and *Alberta (Information and Privacy Commissioner)* at para 35.

[61] Where the information sought is presumptively privileged, the onus on the Crown was described in *Maranda* as follows (at para 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.

[62] In this case, the ITO constable did not consider the legal correspondence to be presumptively privileged and therefore did not allege that its disclosure would not violate the confidentiality of the solicitor-client relationship. Nothing in the record suggests that the issuing justice considered the issue.

[63] Of course, as pointed out in *Maranda*, the issuing judge may issue a warrant for privileged documents where the informant establishes that an

exception applies, such as the crime exception. In this case, because the ITO constable did not consider the information to be presumptively privileged, the issue of the crime exception was not addressed in the ITO and therefore it was not considered by the issuing justice.

[64] Regardless, even where a warrant is issued for presumptively privileged documents based on the crime exception, the warrant applied for may only be granted "on terms that seek to keep breaches of privilege to a minimum" (*Maranda* at para 22). That did not occur in this case.

[65] In light of the above, the issuing justice acted outside of her jurisdiction when issuing the warrants for legal correspondence. As the Crown rightfully concedes, in as far as the issuing justice acted without jurisdiction, a breach of section 8 of the *Charter* is also established.

Remedy

Positions of the Parties

[66] The applicant asks that the warrants be quashed in their entirety. Further, he states that, since the seizure of the documents referred to in the warrant was in breach of section 8 of the *Charter*, they are inadmissible. However, his main argument is that the charges which he is facing regarding the offences outlined in the ITO and the warrants should be stayed pursuant to section 24(1) of the *Charter*. It is his position that the police deliberately went looking for privileged documents and viewed them while executing the search warrant and after. He contends that the taint of the breach affects his ability to have a fair trial and that to subject him to one would seriously compromise the integrity of the administration of justice.

[67] The Crown suggests the term "legal correspondence" be excised from the warrant and that management of the documents proceed in a manner ordered by the Court. The Crown agrees that any privileged documents should be returned to the applicant and that an order be made prohibiting anyone who has seen a privileged document from revealing or making use of any privileged information.

Discussion

Scope of Remedy

[68] Regarding the issue of remedy in a situation such as this, where both jurisdictional and *Charter* issues arise, Beard JA, in *Douglas 1*, considered the issue and noted the following passage from *Mills v The Queen*, [1986] 1 SCR 863 at 965 (at para 27):

> There will no doubt be cases where the claim for relief under s. 24(1) of the *Charter* will be based on an allegation of jurisdictional error in respect of which prerogative relief in the superior court could be available. The two avenues to seek relief, that is, to the court in which the issue arises for an appropriate remedy under s. 24(1), or to the superior court for prerogative relief where the jurisdictional ground[s] exist, will remain open but must be kept separate and applied according to circumstances. All *Charter* violations and infringements will not be jurisdictional. Remedies which may be ordered are not limited to prerogative remedy, that is, *certiorari*, prohibition and mandamus. These, of course, may be given where grounds for such relief, according to the law and practice which has grown up concerning them, are present. Otherwise, the remedy will be what the court considers appropriate and just under s. 24(1) of the *Charter*.

Also see *R v Ciarniello*, 2004 CarswellOnt 3394 at para 26 (Sup Ct J); and

BGI Atlantic Inc v Canada (Minister of Fisheries and Oceans), 2004 NLSCTD 165 at paras 27, 41.

[69] In this case, the application was made pursuant to section 24(1) of the *Charter*. Thus, this Court has jurisdiction to grant a remedy pursuant to that section and, in my view, such a remedy is appropriate.

[70] When fashioning a remedy pursuant to section 24(1) of the *Charter*, the court is to take a "generous and expansive" approach and may fashion one which it considers "appropriate and just" (see *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 24, 55).

[71] Briefly, an appropriate and just remedy is one which will (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of the court; and (4) be fair to the party against whom the order is made. See *Doucet-Boudreau* at paras 52-58.

Severance and Quashing of the Warrants

[72] Prior to the enactment of the *Charter*, severance of "the bad parts" of search warrants existed in the context of applications for certiorari. See *Re Regina and Johnson & Franklin Wholesale Distributors* (1971), 3 CCC (2d) 484 (CA), leave to appeal to SCC refused, [1971] SCR ix; and *R v B (JE)* (1989), 52 CCC (3d) 224 (NSSC (AD)).

[73] In *Grabowski v The Queen*, [1985] 2 SCR 434, a case involving an authorization for the interception of private communications, Chouinard J

explained (at para 61):

> When there is a clear dividing line between the good and bad parts of an authorization, and they are not so interwoven that they cannot be separated but are actually separate authorizations given in the same order, the Court in my opinion can divide the order and preserve the valid portion, which then forms the authorization. In such a case interceptions made under the valid authorization are admissible.

[74] Courts have held, and I agree, that the same logic is to be applied to search warrants. See *Regina v Paterson, Ackworth and Kovach* (1985), 18 CCC (3d) 137 (Ont SC (CA)); *R v S (SJ)*, 1999 CarswellSask 501 (QB), aff'd without comment on this point, 2000 SKCA 118; *R v Sonne*, 2012 ONSC 584.

[75] The issue of severance of documents considered to be protected by solicitor-client privilege was considered in *Re Church of Scientology and The Queen (No 6)* (1987), 31 CCC (3d) 449 (Ont CA) (*Scientology No 6*), leave to appeal to SCC refused, [1987] 1 SCR vii. While rejecting the argument that the documents listed in the warrant in that case were privileged, the Court nonetheless stated (at p 534):

> However, if the search warrant had specifically included the legal bureau documents, that part of it could be severed and quashed without invalidating the search warrant itself. In *Re Regina and Johnson & Franklin Wholesale Distributors Ltd.* (1971), 3 C.C.C. (2d) 484, 16 C.R.N.S. 107, [1971] 4 W.W.R. 534, Tysoe, J.A., delivering the judgment of the British Columbia Court of Appeal, reviewed the authorities at pp. 489-90 C.C.C., pp. 540-1 W.W.R., and held that the doctrine of severability can properly be applied to a search warrant. We agree.

[76] In my view, while severance may be ordered as a remedy in

response to an application for certiorari, it may also form part of a remedy fashioned pursuant to section 24(1) of the *Charter*.

[77] As earlier stated, the warrants authorized the seizure of numerous types of documents such as correspondence, contracts, agreements, real estate files and mortgage documents. Aside from the reference to legal correspondence, it was within the jurisdiction of the issuing justice to authorize seizure of the other documents as they were not presumptively privileged. The search and seizure of those documents would not prima facie constitute a breach of section 8 of the *Charter*. Thus, I would deny the applicant's request to quash the warrants. In my view the term "legal correspondence" should be excised from the warrants.

[78] I would deny the applicant's request for a stay of proceedings. While presumptively privileged documents were seized, the evidence of the police was that they had barely begun to vet the documents and were unaware of their contents. The ITO constable indicated that he could not recall the content of the documents seized during the search. The application judge accepted this evidence, and his finding in this regard is subject to deference. At this point, it cannot be stated that the applicant will have an unfair trial.

Supervision Order and Injunction

[79] Despite the fact that I have refused the applicant's request to quash the warrants and his application for a stay of the criminal charges, the fact remains that the warrants authorized the seizure of prohibited documents.

[80] I earlier reviewed the principles enunciated in *Lavallee* concerning

the protection of solicitor-client privilege governing the search authorization process. Regarding the general manner in which the search must be carried out, the Court further provided (at para 49):

> 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.
>
> 6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
>
> 7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
>
> 8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
>
> 9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
>
> 10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.
>
> [emphasis added]

[81] As earlier stated, all of the material seized as a result of the execution of the warrants has been sealed. In situations similar to this, courts have fashioned orders attempting to comply with the principles of *Lavallee*. For example, in *R v Shah*, 2015 ONSC 4853, Molloy J considered the possibility that solicitor-client privilege could arise in the execution of a search warrant for an accused's cell phone. He held that, if a claim for privilege was asserted, the phone would remain in the custody of the court until a judge could determine whether privilege had been established. Further, he stipulated that the Crown was not entitled to see the material over which the claim was asserted, although it was entitled to notice of any application to determine the privilege issue (at para 35).

[82] In *Descôteaux*, Lamer J held that, where solicitor-client privilege is asserted, it is "not necessary to wait for the trial or preliminary inquiry at which the communication is to be adduced" before raising its confidentiality (at p 869). Thus, as I would allow the appeal in part, the proceedings should be remitted back to the application judge for a determination regarding which documents are protected by solicitor-client privilege.

[83] Unlike a situation where a person subject to a warrant is unaware of what documents are being seized and, therefore, which ones might be privileged, the applicant in this case knows precisely what documents were seized as the originals have been returned to him. Thus, I would order that the applicant identify the specific documents over which he claims solicitor-client privilege within thirty days of the issuance of this judgment or any later date with leave of the application judge. See *Emms Re*, 2005 CarswellOnt 969.

[84] Courts have chosen various procedures to review documents over which solicitor-client privilege is claimed. In *Regina v Zaharia and Church of Scientology of Toronto* (1985), 21 CCC (3d) 118 (Ont H Ct J), rev'd on other grounds (see *Scientology No 6*), the parties consented to the nomination of a retired judge to make a detailed examination of them. In *Attorney General v Law Society*, 2010 ONSC 2150 (Sup Ct J), Hennessy J held that either the "presiding judge" or a "person appointed by the court" may conduct the review (at para 27). Also see *R v KE*, 2015 SKQB 342; and *R v Law Office of Simon Rosenfeld*, 2003 CarswellOnt 2407 (Sup Ct J), where the court appointed a "referee" to examine the documents. Ultimately, the judge would review the documents to make a final determination. The procedure to follow in this case is left to the application judge to determine.

[85] Any documents found to be protected by solicitor-client privilege must be returned to the applicant. Neither the RCMP nor the Crown are entitled to view the documents until a determination has been made that they are not protected. In *Lavallee*, Arbour J explained that allowing the state to inspect the seized documents, even if such was an attempt to "help" the application judge to determine whether a document is privileged, would diminish the public's faith in the administration of justice and create a potential for abuse. Citing *Re Borden & Elliot and The Queen* (1975), 30 CCC (2d) 337 (Ont CA), she noted that it would be "small comfort indeed" to not allow privileged documents into evidence when their contents have already been disclosed to the prosecuting authority (at para 44).

[86] In this case, the RCMP may have seen privileged documents. The electronic processing of the documents had commenced prior to the claim of

privilege. However, the application judge considered the evidence before him and found that the documents had only been given a "cursory" examination by way of a controlled key word search and that none of the results from that search had been forwarded to the investigating officers. Further, he noted that the ITO constable could not remember any specific document that had been seized.

[87] In the civil context in *Descôteaux*, Lamer J stated that a third party who accidentally views the contents of a lawyer's file "could be prohibited by injunction from disclosing them" (at p 871). In *R v Bastidas*, 1993 CarswellAlta 22 (QB), Ritter J, as he then was, cited the above decision and wrote (at para 12):

> It follows that if the accidental viewing of a lawyer's file is subject to a prohibitive injunction, the intentional viewing of the file either surreptitiously or pursuant to a search warrant is also subject to such injunction.

[88] In my view, an injunction is appropriate in this case. Thus, I would order that each of the RCMP officers, who may have viewed a document presumptively protected by solicitor-client privilege (i.e. any legal correspondence seized), not be allowed to disclose the documents or use their knowledge of the documents in furtherance of this investigation, or any other investigation or charges, involving the applicant. To be clear, the RCMP officers who have possibly seen the privileged documents will be allowed to continue the investigation and testify as required, but they will be prohibited from disclosing to anyone any knowledge that they may have obtained from any presumptively privileged document, and prohibited from using that knowledge in their investigation.

[89] At this point, I would add that, had there been *mala fides* on behalf of the RCMP, my decision on remedy may have been different. However, "the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be" (*R v Cornell*, 2010 SCC 31 at para 23). In this case, the dated case law understood at the time in Manitoba would have allowed the police to obtain a warrant for legal correspondence such as reporting letters.

Conclusion and Decision

[90] In the circumstances of this case, the issuing justice was without jurisdiction to issue warrants for legal correspondence, including the reporting letters sought by the RCMP, on the basis that such documents are presumptively privileged. To the extent that he did make such an order, it was in breach of section 8 of the *Charter*. While the reference to legal correspondence is in contravention of the *Charter*, the remaining documents were properly authorized for seizure. Therefore, the authorization to seize legal correspondence should be excised from the warrant.

[91] The seized documents must remain sealed until such a time as a determination can be made regarding the issue of privilege. The proceedings are therefore returned to the application judge for this purpose. The seized material is not to be inspected by the RCMP or Crown until a determination regarding privilege has been made. If protected by privilege, the documents must be returned to the applicant. Any RCMP officer who viewed a privileged document is prohibited from disclosing its contents and using any knowledge gleaned from that document in this case or any future case.

[92] I would allow the appeal to the extent that I have described above.

Cameron JA

I agree: Monnin JA

I agree: Burnett JA