SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Real Estate Commission v. Lorway, 2009 NSSC 266

Date: 20090902
Docket: Hfx. No. 247204
Registry: Halifax

Between:

The Nova Scotia Real Estate Commission

Applicant

v.

Charles Lorway, Duncan MacEachern, Lorway MacEachern,

Respondents

Nova Scotia Barristers' Society, The Nova Scotia Association of Realtors

Intervenors

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	March 25, 2009, in Halifax, Nova Scotia
Final Written Submissions:	March 31, 2009
Counsel:	Jeff Aucoin, for the Applicant, Robert Risk, for the Respondent

By the Court:

[1] This is an application pursuant to Rule 20.06 of the *Civil Procedure Rules 1972* for an Order for the production of certain Fee Agreement and Agreements of Purchase and Sale produced by the Respondents, who are solicitors and their firm, in the course of advising clients on the purchase and sale of property.

Background

[2] The Applicant is constituted under the *Real Estate Trading Act*, S.N.S. 1996, c. 28, as a regulatory agency, responsible for licensing individuals and corporations as brokers or agents to market and sell real property in Nova Scotia. The Respondents are a law firm in Sydney, Nova Scotia, and the partners of that firm, who are members of the Nova Scotia Barristers Society. In addition to carrying on a legal practice, the Respondents act for clients in the sale or purchase of real property. They offer certain services to clients pertaining to real estate transactions, including negotiation and preparation of documents related to the sale or acquisition of real property. Clients customarily agree to services being performed that include marketing, advertising, and negotiating the sale of real property on their behalf. Such services involve advertising, placing lawn signs and

showing property to prospective purchasers. Neither of the Respondent solicitors hold license to trade in real estate pursuant to the *Real Estate Trading Act*.

[3] The Applicant commenced an action against the Respondents seeking relief under the *Real Estate Trading Act*, including an injunction restraining the Respondents from trading in real estate without a license. They rely on s. 4(1) of the Act, which provides that "no person shall trade in real estate or hold out as being available to trade in real estate unless that person is licensed to do so...." The Respondents filed a defence in which they claimed that they are exempt from the Act pursuant to s. 3(d), which provides that the Act does not apply to "any person who is a member in good standing of the Nova Scotia Barristers' Society and the trading is in the course and as part of that person's practice as a barrister or solicitor."

[4] During the examination for discovery of the Respondent Mr. MacEachern, the Applicant sought copies of the agreements of purchase and sale and legal fee agreements with respect to the properties sold by the Respondents since 2001. The Respondents refused to disclose these documents, claiming solicitor/client privilege and, additionally, maintaining that the requested documents were not

relevant. At the hearing, they filed a copy of the Client Fee Agreement, but not a copy of the standard Agreement of Purchase and Sale of Real Property. At the Court's request, the Respondents provided a copy of the standard Agreement of Purchase and Sale for the purpose of determining the terms, whether such agreements are subject to solicitor/client privilege and, if not, whether such an agreement is relevant.

[5] I confirmed at the hearing that the application would be dealt with under the 1972 *Civil Procedure Rules*, since the application was filed prior to December 31, 2008.

The Rule And The Law

[6] Rule 20 of the *Civil Procedure Rules 1972* provides, in part, as follows:

> 20.01. (1) Unless the court otherwise orders, a party to a proceeding shall, within sixty (60) days after the close of the pleadings between an opposing party and himself, or within seven (7) days after the service of the originating notice where there are no pleadings, serve on the opposing party a list in Form 20.01A of the documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding and file with the prothonotary the list without a copy of any document being attached thereto.

> (2) A list of documents under paragraph (1) shall enumerate the documents in a convenient order with a short description of each document or, in the case of bundles of documents of the same nature, of each bundle.
>
> (3) A claim that any document is privileged from production shall be made in the list of documents with a sufficient statement of the grounds of the privilege.
>
> ...
>
> 20.06. (1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.
>
> (2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the court may, on notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.
>
> (3) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

[7] The test for the production of documents is whether the document has a semblance of relevancy. A low threshold for production of documents is clearly applicable. I have considered a number of decisions of the Court of Appeal, including *Dominey v. Cosmetology Association of Nova Scotia*, [2005] N.S.J. 262, where the Court held that it was necessary to give careful consideration to the

entirety of the pleadings and the issues raised in them in order to determine whether documents have a semblance of relevancy. I also refer to the Court of Appeal decision in *Dowling v. Securicor Canada Ltd.* [2003], 221 N.S.R. (2d) 79, where the Court similarly applied a liberal interpretation. The Applicant also refers to *Upham v. You* [1986], 73 N.S.R. (2d) 73 (S.C.A.D.), where the Court stated, at para. 27, that the disclosure rules are designed to "ensure the fullest possible disclosure of the facts and issues before trial and thereby avoid the element of surprise" (citing *C.M.H.C. v. Foundation Co. of Can.* [1982], 54 N.S.R. (2d) 43 (S.C.A.D.) at 49).

[8] The Applicant's position is that if a document pertains to the sale of real estate I should order its production and disclosure. The interpretation of the words "trading ... in the course and as part of that person's practice as a barrister or solicitor," it is submitted, are an issue for trial.

[9] The copy of the Respondents' Fee Agreement that was filed is a standard form of agreement without any identification of the client. It purports to be an agreement which is signed by all clients who propose to have that the respondent market their real estate. Certain provisions of the Agreement should be set out:

NOW THIS AGREEMENT WITNESSETH that in consideration of the mutual agreements and understandings between the Clients and the Solicitor and further conditions and covenants as here in before provided it is hereby agreed as follows:

1. THAT we have agreed to be your solicitor in regards to providing services to assist in the sale and representations of the completion of the sales transaction in regard to the property for sale. This legal fee agreement will terminate when:

(i) a binding Contract of Purchase and Sale has been entered into for the sale of the property, and the completion of the contract has taken place;

(ii) you appoint another solicitor or real estate agent to sell your property, or;

(iii) you advise us in writing that you are discharging us.

2. THAT your retainer with Lorway MacEachern (hereinafter known as L.M.) will include:

(a) Obtaining a land title search of property and conversion of the property to an LRA. designation;

(b) Examining the title, and advising the Client(s) or encumbrances, covenants, mortgages, easement and right-of-way, which may effect title;

(c) Obtaining an assessment from the relevant Municipal Authority and obtaining an appraisal from a certified land Appraiser;

(d) The preparation, display and distribution of sale particulars;

(e) The placing and removal of a "for sale" sign.

(f) Newspaper Advertisement

(i) Advertising your property for sale in the Maritime Merchant;

(ii) Advertisements in the Cape Breton Post will attract additional disbursements and would not be incurred without your prior written consent.

(g) Undertaking reasonable efforts to obtain a sale for the subject property;

(h) Reviewing and providing legal advice on offers of purchase;

(i) Drafting a contract of Purchase and Sale, where appropriate;

(j) Procuring the report of a Certified Building Inspector;

(k) Paying out and discharging any financial encumbrances on title from the proceeds of the sale;

(l) Advising you with respect to all steps in the closing process;

(m) Providing complete legal services involved in representing you on the sale of the property, including preparation of Deeds, Release of Mortgage documents, HST Certificates, Urea Formaldehyde Form Insulation (UFFI) Certificates, calculating and preparing the Statement of Adjustments at the Closing of the transaction, attending property with prospective purchasers, etc.;

(n) Reporting in full to Client(s) at the close of the transaction.

3. THE "FOR SALE" SIGN

It is necessary for us to have your signature upon this Agreement prior to placement for a "For Sale" sign on your property. Unless you specifically in writing instruct us otherwise, your signature will be taken as consent for the placement of such sign. The "For Sale" sign is seen as a highly visible and important part of our efforts to sell your property.

4. LEGAL FEE

(a) It is agreed by the client and the solicitors that reasonable compensation is to be paid for the services of L.M., and the amount of compensation shall be $3,500.00 or 5% of the purchase price, whichever is greater, plus payment of all reasonable and proper disbursements and the recording fees;

(b) The fees payable to Lorway MacEachern will be based on a percentage amount of the actual selling price of the property. The percentage, shall be 5% of the sale price and this amount shall represent the payment to L.M. or the sum of $3,500.00 whichever is greater, subject to paragraph 4(a) plus extraordinary disbursements as provided by special agreement;

(c) In addition HST shall be charged on both fees and those disbursements which by law must be charged;

(d) If you appoint another solicitor or a real estate agent to cell your property prior to the termination of this Agreement, payment shall be made by you to Lorway MacEachern for only the disbursements incurred by Lorway MacEachern

in the employment of outside agencies plus a discount for you $1000.00 plus HST and disbursements associated with conversion of your par pretty to have LRA;

(e) The Client(s) acknowledges that the solicitor has provided the Client with an undated Agreement on the 28th day of April, A.D., 2005;

...

(i) This Agreement may be reviewed by a taxing officer or an Adjudicator of the Small Claims Court at the Client's request, and may either at the instance of the taxing officer or Adjudicator of the Small Claims Court or the Client be further reviewed by the Court, and either the Adjudicator or taxing officer of the Court may vary, modify or disallow the Agreement.

(j) If the client wishes to terminate the agreement or dismiss the solicitor before the solicitor has procured a sale for the property, the client shall pay the solicitor One Hundred (100%) percent of all disbursements incurred by the solicitor in retaining the services of outside agencies for advertisement costs attributed to the file and legal fees associated with conversion of the property to LRA.

(k) At your request, we will quote you for special "extraordinary disbursements" such as promotional activities, or advertisement in the Cape Breton Post which attracts additional expenses over and above what is anticipated as an advertisement in the Maritime Merchant web site and signage. The cost, nature and payment of these extraordinary disbursements will be agreed to first and then confirmed in writing separate to this Agreement and signed by the client and solicitor;

(l) Upon completion of a title search should we discover any title defects which call for rectification beyond the normal fees usually charged to a vendor, we will advise you of the defects and an estimated cost as to what is required to rectify title problems. In all cases the client will be provided with advance written notification of any title problem or difficulty or circumstances which give rise to additional legal services. The firm will not proceed without the Client's written instruction to proceed and acceptance of the extra fees involved. On signing this Agreement, you hereby irrevocably confirm that your solicitor shall be authorized to deduct its fees, disbursements and taxes from the proceeds of the sale upon completion.

(m) You confirm you have not listed this property with any real estate agency in the last eight months and no contract exists with any real estate agency for which you would be held responsible to pay a commission.

5. ASKING PRICE

In accordance with your written instructions, the property will be offered for sale at a price reflective of a certified appraisal. This asking price is variable by written agreement between Lorway MacEachern and you, the Client (or any one of the Clients, where there is more than one). The asking price is not a valuation of the property, but rather a figure for marketing purposes;

6. UNOCCUPIED PROPERTY

We do not accept liability or responsibility for the maintenance or repair of, for any damage to the property while occupied or unoccupied. If the property is expected to be vacant, you are strongly advised to take all necessary action to protect your property from any possible risks and to ensure that you have adequate insurance coverage.

7. PROPERTY

Lorway MacEachern accepts no liability or responsibility for the protection of the property, for such things as: taxes, maintenance, damage, vandalism, insurance, etc. The Vendor hereby authorizes Lorway MacEachern, its staff and employees, at any time to enter into the property at any time from the date of the execution of this Agreement until the completion of the Agreement for the purpose of permitting prospective purchases to view the premises;

...

9. PRIVILEGE

All communications and information between you and Lorway MacEachern are privileged, which was we cannot disclose such information with a third party without your consent. In order to properly assist you in the sale of your property, however, it is recommended that certain information be available to third parties. By signing this Agreement, you specifically authorize Lorway MacEachern to provide to potential purchasers and third parties the following information regarding the property: legal description and title search which will include your name, civic address, Municipal tax assessment, and any appraisal obtained by Lorway MacEachern, photographs of property, copy of survey or mylar plan of property, and other information which you permit us to release;

10. THAT the Solicitor may discontinue representing the Client at any time prior to a sale being completed should the Solicitor form the opinion that the property cannot be successfully sold that the asking price or if the Client refuses to follow the Solicitor's reasonable instructions. Under such circumstances where the Solicitor discontinues representing the Client, the Client shall pay the Solicitor for ONE HUNDRED PERCENT (100%) of all disbursements incurred on behalf of the client, and payment of legal fees in regard to conversion of the property.

[10] The Respondents argue that all of the documents, including the Fee Agreements, are protected by solicitor/client privilege if they disclose the names and other particulars of clients.

[11] The Applicant maintains that not all communications between lawyer and client are privileged. The privilege, it is submitted, only exists where the communication is intended to be made in confidence and in the course of seeking or providing legal advice. The rationale is to permit full disclosure by the client and the solicitor and to facilitate an all-encompassing communication when the client is seeking legal advice.

[12] The Supreme Court of Canada set out a three-part test for establishing solicitor/client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. The privilege requires "(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" (p. 837). The burden is on the party asserting the privilege. Once privilege has been satisfactorily established the onus shifts to the person seeking disclosure of the communication to satisfy the Court that it should find in his favour.

[13] The Applicant argues that if a lawyer is being consulted in a capacity other than as a lawyer, there is no solicitor/client privilege. Where a lawyer is consulted in more than one capacity, it is submitted, the privilege only attaches to the extent that the client is seeking or receiving legal advice. If the lawyer is being consulted for general business advice or about potential business transactions, the Applicant maintains, there is no solicitor/client privilege. Where a client seeks advice about the sale of real estate, then, the privilege will only attach if the lawyer is advising in the capacity of a legal adviser.

[14] The Applicant maintains that the Fee Agreement and the Agreement of Purchase and Sale do not contain legal advice, nor does they allow opposing counsel to draw any inference of the nature and extent of any legal advice provided, beyond what could be reasonably inferred by any third party with general knowledge of the Respondents' practice, which is already disclosed on their website. The Fee Agreement is a standard document that does not change from one client to the next. It is intended to govern the relationship the firm has with all perspective clients. It is not a communication to obtain legal advice, but a communication of facts, which are not privileged. The Applicant also contends

that in order to assert solicitor/client privilege, the communication must at a minimum, be confidential. It says the documents lose any confidentiality they might have once they are disclosed to a third party who is not a party to the Fee Agreement.

[15] Confidentiality, while it is a component of solicitor/client privilege, is not identical to privilege. In *Straka v. Humber River Regional Hospital* [2000], 193 D.L.R. (4th) 680 (Ont. C.A.), the Court considered whether certain letters, provided in confidence to the recipient, should be disclosed. The Court of Appeal stated, at para. 59:

> It has been long established that confidentiality alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure: Wigmore at subsection 2286. Something more than confidentiality must exist and this something more must satisfy the Wigmore conditions: *Slavutych v. Baker et al*, [1976] 1 S.C.R. 254; *R. v. Grunke*, [1991] 3 S.C.R. 263; and Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999) at pp. 723-724.

[16] The Court referred, at para. 58, to the four-part "Wigmore test" for privilege, as described at §2285 in Vol. 8 of *Wigmore on Evidence* (McNaughton Rev. 1961):

> . . . [F]our fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

> (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. [Emphasis in the original text].

[17] If the application is granted, this will have the effect of disclosing the names of the clients. The Applicant says names are generally not protected by solicitor/client privilege. Ronald D. Manes and Michael P. Silver, in *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993), write, at p. 140, that "[t]he general rule is that the identity of a client is not privileged. However, where the essence of the consultation with the solicitor is the identity of the client, then the client's identity can be privileged." The Applicant also refers to *Gaetz v. N.S. (A.G.)* [2005], 235 N.S.R. (2d) 392, where Nathanson, J. said:

> Disclosing identifying information such as the subject line, the date of communication or the name of the solicitor from whom advice is sought, may effectively reveal the nature of the advice sought by the client. Such reasoning was applied in the case of *Stevens v. Canada (Privy Council)*, (1998) 161 D.L.R. (4th) 85 where it was found that bills of account of solicitors' fees fell within the solicitor-client relationship. Justice Linden reasoned at para. 46 that able opposing counsel may be able to extract privileged information from apparently neutral information. This conclusion was refined by the Supreme Court of Canada in *Maranda v. Richer* [2003] 3 S.C.R. 193...

[18] Given the information already available to the public – including the blank Fee Agreement, the website, the lawn signs and the newspaper and internet advertisements – the Applicant submits that the disclosure of the names will not expose anything of substance about legal advice that is not already known. The nature of the client's relationship is well-known.

[19] The Respondents argue that it is not necessary to make any further disclosure in order to prevent surprise or ambush, and submit that if the purpose of the existing rule is to provide full pre-trial disclosure in order to discourage the need for continued litigation, the production of the additional documents requested by the Applicant will not achieve that objective. The Applicant has already been provided with the standard form of Legal Fee Agreement. To require the Respondents to disclose each of the Fee Agreements requested by the Applicant would be to disclose the names and particulars of each client. Additionally, the respondent argues, the confidential specifics of the Agreements of Purchase and Sale, such as the names of the parties and the purchase prices, will not assist in addressing the issue of whether the Respondent falls under s. 3(d) of the Act. The

Respondents argue that the additional information or additional documents does not have a semblance of relevance to the issue between the parties.

[20] The Respondents concede that the information in question could be a basis for the quantification of damages, such as the purchase price, commissions, etc., but submit that this is irrelevant because the Applicant is not seeking damages, but only an order enjoining the Respondents from continuing to trade in real estate. The Respondents claim the only reason that the Applicant is seeking disclosure of names is to identify the individuals for the purpose of interviews.

[21] Furthermore, the Respondents submit, the issue of whether they fall within the exemption is a matter for trial and not for this application.

[22] The Respondents claim that the requested documents are irrelevant and are subject to solicitor/client privilege, because they involve communications between the law firm and the real estate clients, they detail the provision of or receipt of legal advice in relation to the real estate transactions and they were intended to be confidential. The respondent notes that the parties specifically address the issue of privilege in the Legal Fee Agreement by stating that the agreement and all

communications are privileged, and that only certain aspects of their communication can be released to third parties with the client's consent. The Respondents say this intention is significant to an assessment of whether the information sought by the Applicant is not only confidential but privileged.

[23] The Respondents take issue with the Applicant's argument that confidential information can be disclosed. They the following comments of Lamer, J. (as he then was), for the Court, in *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 894:

> 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.
>
> 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.

[24] The Respondents argue that the Applicant's interpretation of this decision – which concerned the issuance of a warrant to search a legal aid office, leading to

the seizure of the form on which the applicant had made false statements – is overbroad, and that the decision should be restricted to particular findings of fact.

[25] The Respondents also take issue with the Applicant's characterization of *Ontario Securities Commission and Geymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Ont. S.C. – Div. Ct.). In that case, the court held that a company president who was a solicitor could not claim solicitor/client privilege over information he obtained in performing duties that would usually be performed by an employee or an agent, who was not a solicitor. Privilege would only attach to information that he received in the capacity of a solicitor. In this case, the Respondents maintain that they are only acting as solicitors.

[26] In *Solicitor-Client Privilege in Canadian Law*, the authors consider the extent of privilege arising from the provision of legal advice. At p. 26 they write:

> There has been a debate over the extent to which legal advice can extend to clothe the communications between a solicitor and client with privilege. On the one hand, there is the broad view that all communications are privileged if "they pass as professional communications in a professional capacity," or "come within the ordinary scope of professional employment," or "relate to matters within the ordinary scope of a solicitor's duty." These statements suggest that practically any communication between solicitor and client is privileged if the solicitor was acting professionally. This view focuses on the professional relationship between solicitor and client. The narrower view focuses on the communication and its

> purpose. These cases hold that communications between solicitor and client are privileged if they are "professional communications of a confidential character for the purpose of getting legal advice". This would mean that a solicitor and client could meet for the purpose of legal advice and exchange protected communications, but in the course of the same conversation make statements unrelated to the obtaining of legal advice in which case *those statements* would *not* be privileged. [Emphasis in original.]

[27] The Respondents claim that communications with clients relating to the Legal Fee Agreement and the Agreements of Purchase and Sale satisfy both the broad and narrow approaches to privilege. In addition, the communications occur within the framework of a fee retainer set out in the agreement, and are not made by the respondents outside their capacity as barristers and solicitors. The Respondents maintain that para. 9 of the Legal Fee Agreement makes it clear that all communications with their real estate clients, with certain exceptions, are privileged and confidential. The Respondents also take issue with the Applicant's position that the names of the clients are not protected by privilege.

[28] The Respondents take the position that it is unlikely that the Legal Fee Agreements or the Agreements of Purchase and Sale will be relevant at trial, as they will allegedly not assist the trial judge to resolve the issues between the parties and the failure to disclose these documents to the Applicant will not put the Respondents in a more advantageous position.

[29] The Respondents maintain that *Minister of National Revenue v. Reddy,* 2006 FC 277,2006 CarswellNat 484 (F.C.) is not binding. That decision involved an application by the Minister of National Revenue for disclosure of documents respecting the proceeds of a real estate transaction, in connection with unpaid income taxes of the respondent. There was a specific definition of solicitor/client privilege in ss. 232(1) of the *Income Tax Act*. The Court held that the privilege only attached to communications between the solicitor and the client, not to actions by the solicitor, documents relating to monies flowing through the solicitor's account to or from a client or to documents relating to the real estate transactions. The Respondents say *Reddy* must be read in conjunction with the decision of the Supreme Court of Canada in *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67, [2003] 3 S.C.R. 193, to the effect that lawyers billings for fees and disbursements are privileged. On this point, it is worthwhile to cite *Reddy* at some length, at paras. 14-17:

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

> Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material.
>
> . . .
>
> The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter to which the client himself could claim the privilege, because it is not a communication at all. It is an act.

...

The distinction has not been removed by the Supreme Court of Canada decisions in *R. v. Lavallee, Rackel & Heintz* (2002), 216 D.L.R. (4th) 257 (S.C.C.) *and Maranda c. Québec (Juge de la Cour du Québec)* (2003), 232 D.L.R. (4th) 14 (S.C.C.). In a case that followed those decisions, the Ontario Superior Court of Justice held that transactions in a solicitor's trust account "relate to questions of objective fact, independent of communications between the solicitor and client 1/4" and therefore do not attract solicitor-client privilege. (*R. v. Serfaty*, [2004] O.J. No. 1952 (Ont. S.C.J.), at para. 47-54.)

This has been confirmed recently in Minister of *National Revenue v. Singh Lyn Ragonetti Bindal LLP*, a case which dealt with privilege in the context of section 231.7 of the *Income Tax Act*. At pp.6-7, the Court stated:

> Contrary to the respondents' submission, in my view *Greymac* remains good law notwithstanding *Lavallee* and *Maranda*. In *Maranda*, Justice LeBel, for the majority (Justice Deschamps concurring in the result) held that the substantive rule of privilege cannot rely on the distinction between facts and communication and thus, in that case, defence counsel's fee records were protected. However, he expressly noted, at paragraph 30, that not everything that happens in the solicitor-client relationship falls within the scope of privilege "as has been held in cases where it was found that counsel was not acting in that capacity but simply as a conduit for transfers of funds citing *Greymac* as authority.

(*Minister of National Revenue v. Singh Lyn Ragonetti Bindal LLP*, 2005 FC 1538 (F.C.).)

On the principles stated above, the Courts have recently affirmed that in the context of a real estate transaction, cheques from a solicitors' account and a statement of adjustments are not subject to solicitor-client privilege. (*Wirick, Re*,

2005 BCSC 1821, 2005 CarswellBC 3187 (B.C. S.C. [In Chambers]); *Minister of National Revenue v. Vlug*, 2006 FC 82 (F.C.).)

[30] It should be noted that the court's conclusion that privilege did not apply was founded both on the definition of privilege in the statute and in common law (para. 18). While the facts in Reddy are not on all fours with the present situation – the argument in this case does not revolve around the distinction between acts or transactions and communications – it does support the view that not everything that occurs between solicitor and client is privileged. Where the lawyer is not giving legal advice, but is, in effect, acting as a client's real estate agent, I fail to see how those specific activities can be subject to privilege. Cloaking such conduct with a claim of privilege does not mean the privilege actually exists.

Conclusion

[31] I am satisfied that solicitor/client privilege does not protect communications between counsel and their client that does not involve the giving or receiving of legal advice. The fact that the Legal Fee Agreement purports to create a solicitor-

client relationship is not determinative where there is no giving or receiving of legal advice. Furthermore, the information to which the privilege allegedly relates has, in many cases, clearly been disclosed to third parties, if only by way of “for sale” signs in the Respondent’s names. I am satisfied that the documents requested should be produced and allow the application with costs of $1000 payable in the cause.

J.