SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Rudolph*, 2017 NSSC 333

Date: 20171006
Docket: CRH 455297
Registry: Halifax

Between:

Her Majesty the Queen

v.

Douglas George Rudolph and Peter Arthur Donaldson Mill

Decision – Charter Application

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	July 6, 7, 10, 14, August 28, 29, 31, September 1, 13, 2017 Halifax, Nova Scotia
Counsel:	Peter Dostal and Roland Levesque, for the Crown/Respondent Lee Seshagiri and Paul Sheppard, for the Defendant/Applicant Douglas George Rudolph Eugene Tan and Ian Gray, for the Defendant/Applicant Peter Arthur Donaldson Mill

By the Court:

[1] The matter before the court is Her Majesty the Queen v. Peter Donaldson Mill and Douglas George Rudolph.

[2] The accused are charged in a multicount indictment, alleging offenses pursuant to section 380 of the Criminal Code. The offenses arise from the accuseds' involvement with the CanGlobe group of companies, between the years 2004 to 2008.

[3] The accused have made application pursuant to ss. 7, 8, 11(c) and (d) of the Charter. They claim that certain actions by the police in their investigation of these matters were so flawed as to breach the applicant's charter rights. They seek a stay of proceedings.

[4] I have been provided, thanks to the work of counsel, with an agreed statement of facts. I also have other exhibited documents, and I have heard viva voce evidence. I start by relating the background facts which are the most significant to the decision I am making:

1. In April 2008, a complaint was made to the police. The complainant alleged that she had been defrauded funds which she had forwarded to

Peter Mill as part of a bridge financing loan to CanGlobe financial group. The funds had been sent to lawyer Mark David, in his capacity as a lawyer, in trust. A complaint was also lodged with the Nova Scotia Barristers Society ("NSBS") about Mr. David.

2. The NSBS commenced an investigation. It retained Graham Dennis to perform a trust audit, and Susan McMillan to conduct a forensic accounting analysis.

3. The police also opened an investigation. More complainants began coming forward.

4. In July 2009, the NSBS released its decision with respect to Mark David. He had agreed to a voluntary disbarment for professional misconduct, relating to events surrounding his involvement, as a solicitor, in the CanGlobe matter.

5. Over the next number of years the police met with representatives of the NSBS, starting in September 2009, in an effort to discuss the possibility of the police obtaining the material in the possession of NSBS in relation to their investigation and discipline of Mr. David, and the appropriate process for doing so.

6. On January 5, 2010, Cpl. Brian Cameron spoke to Mark David by telephone. He advised Mr. David that he (Mr. David) was one of three persons known by investigators to have been involved in CanGlobe. Mr. David told Cpl. Cameron that he was not involved in any criminal wrongdoing, and asked if he would be charged. Cpl. Cameron said he did not have reasonable and probable grounds, and that he was simply seeking a witness interview at that time. However, if he developed reasonable and probable grounds during the interview, Mr. David would be cautioned and warned. Mr. David indicated that he would like to help, but that he would be seeking legal advice before deciding whether to provide a statement.

7. On February 2, 2010, Cpl. Cameron met with Mr. David at a coffee shop. Mr. David advised that he needed more time to discuss the solicitor-client issue with a lawyer. Cpl. Cameron contacted Mr. David twice more after this meeting, and was told the same on both occasions.

8. On May 6, 2010, Mr. David told Cpl. Cameron that he had been advised by two lawyers to uphold solicitor-client privilege, and he was therefore unwilling to give a statement.

9. In March 2011, a Production Order was granted, authorizing the release by NSBS of the 2008 financial audit, as well as the two audit reports from Mr. Dennis.

10. These documents were subject to a Lavallee process in court on June 21, 2011, and were released.

11. On November 3, 2011, Mark David decided to give a statement to police. The statement was five hours long and was related to his involvement with Peter Mill, Douglas Rudolph, and CanGlobe.

12. Prior to or during the statement, a handwritten agreement was prepared by Mr. David's legal counsel, Don Presse, and signed by the police officers present (Cpls. Cameron and Buglar), and Mr. David. The agreement stated as follows:

> Nov 3, 2011
>
> Mark David has agreed to provide an induced statement to the RCMP with respect to his involvement with CanGlobe for the sole purpose of allowing the Crown to determine if he will be granted an immunity agreement and appear as a Crown witness with respect to the prosecution of individuals involved with this matter. The statement is being provided for that purpose alone and can be used for no other purpose. If the Crown decides to grant immunity to Mark David, then this statement can be used for any purpose they deem appropriate.

13. At the end of the interview, Mr. David expressed the view that he believed solicitor client privilege "no longer applied" in the case.

14. On August 7, 2012, Mark David provided a second statement to police.

15. In early 2013, the police sought further information from the Bank of Nova Scotia and Royal Bank of Canada by way of production orders. The information sought was in relation to Mark David's trust account banking records. The ITOs for those production orders contained, among other information, some of the information obtained from the statements of Mark David to police.

16. On February 28, 2013, the NSBS provided the police with a box of materials in their possession relating to Mark David (Box 23). This was done in the absence of any warrant or order. Box 23 was taken by police to their office. The material therein was scanned into a police hard drive, and the box was returned to their exhibit locker. It was later subject to a Lavallee process, and released by the court.

17. Within Box 23, Doug Rudolph is listed in the trust bank journals and client trust listings. This includes one trust bank journal entry with an unspecified explanation "retainer".

[5] I should note, since I am reviewing the evidence, that I have not been provided with: either statement of Mark David; the ITOs mentioned in para. 15 hereinabove; the contents of Box 23.

[6] I go on to articulate the arguments that have been advanced by the applicants. The applicants have pointed to the following circumstances that, they say, supports their submission that the circumstances constitute a breach of sections of the Charter and that the matter should be stayed:

1. That the police interviewed Mark David, who the accused say was their legal counsel at all material times, without regard for solicitor client privilege; this interview was conducted without prior judicial authority, and without a subsequent Lavallee process (that is, the information being immediately sealed, and subject to judicial vetting or permanent re-sealing). The applicants further note that prior to this interview Mr. David had been disbarred due to his involvement with CanGlobe; further, prior to or in the course of this interview, Mr. David was provided with immunity from prosecution in relation to the matters being investigated by police. Those additional facts, in their view, are also supportive of their claim.

2. that as a result of this interview of Mr. David, the police came into possession of information, which they then included in ITOs, and used to obtain further information through judicial authorization;

3. that the police were given solicitor client information (Box 23) by the NSBS without warrant, and without prior judicial authority;

4. that all of this information has been given to and reviewed by police and prosecution, and provided to both co-accused as disclosure, with no vetting done for privilege.

[7] All of this, in the applicants' submission, results in Charter breaches of the sections they have identified. The relevant sections of the Charter are:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search and seizure.
>
> 11. Every person charged with an offence has the right:
>
> …
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Solicitor Client Privilege

[8] This case is fundamentally about solicitor-client privilege. Solicitor-client privilege has long been recognized as a principle of fundamental justice within the meaning of s. 7 of the Charter (*R. v. McClure* [2001] 1 S.C.R. 445; *Lavallee, Rackel & Heinz v. Canada* [2002] 3 SCR 209). There can be no doubt as to the over-arching importance of this class privilege within the justice system.

[9] The best-known leading case dealing with solicitor-client privilege is *Lavallee* (supra). The police had obtained a regular s. 487 search warrant for a law firm in Edmonton, seeking information relating to a person suspected of money laundering. When the law firm claimed privilege, the officers followed the procedure (as it then was) in s.488.1 of the Criminal Code: the documents were taken, sealed, and brought by police to court for judicial determination of privilege. The law firm argued that s. 488.1 was unconstitutional. The problems identified were as follows:

1. The claim of privilege in 488.1 depended on the lawyer's asserting such a claim. If the lawyer did not assert a claim, for whatever reason, nothing prevented the officers from seizing and examining the contents. Privilege would therefore be lost.

2. The section required that the lawyer name the client whose privilege was being threatened. The name of the client could be subject to privilege.

3. The section failed to ensure that all interested clients were notified.

4. The time limits in the section were unreasonably strict and unworkable.

5. The section provided no discretion to the court where procedures were not followed.

6. The section allowed access of the Attorney General to the documents, prior to judicial determination, in certain cases.

[10] The Supreme Court's analysis started from the following premise:

> 24. It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.
>
> 25. It is in that context that we must ask whether Parliament has taken all required steps to ensure that there is no deliberate or accidental access to information that is, as a matter of constitutional law, out of reach in a criminal investigation.

[11] After confirming that the standard of "minimal impairment" was the standard by which the court would measure the reasonableness of the legislation, the court stated:

> 38 Does s. 488.1 more than minimally impair solicitor-client privilege? It is my conclusion that it does.
>
> 39 While I think it unnecessary to revisit the numerous statements of this court on the nature and primacy of solicitor-client privilege in Canadian law, it bears repeating that the privilege belongs to the client and can only be asserted or waived by the client through his or her informed consent. In my view, the failings of s.488.1 identified in numerous judicial decisions and described above all share one principal, fatal feature, namely, the potential breach of solicitor client privilege without the clients knowledge, let alone consent. The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder. Privilege does not come into being by an assertion of a privilege claim; it exists independently. By the operation of s. 488.1, however, this constitutionally protected right can be violated by the mere failure of counsel to act, without instruction from or indeed communication with the client. Thus, s. 488.1 allows the solicitor client confidentiality to be destroyed without the clients express and informed authorization, and even without the client's having an opportunity to be heard. (emphasis added)

[12] The court concluded that s. 488.1 was unconstitutional, and it was struck down. In crafting general principles that would govern in the interim, the court noted:

> 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.

[13] Further judicial comment as to the importance of solicitor-client privilege can be found in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* [2008] 2 SCR 574:

> 9 Solicitor client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":
>
> > [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[14] In *R. v. McClure* [2001] 1 SCR 445:

> 2 Solicitor client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
>
> …
>
> 4 Solicitor-client privilege and the right to make full answer and defense are integral to our system of justice.

[15] In *R. v. D.P.F.* [2003] N.J. No. 136, an inmate had escaped from prison. The police searched his lawyer's office, pursuant to search warrant, looking for information about him. During the search, they found, reviewed, and seized four communications between D.P.F. (who was charged with sexual assault) and his

lawyer. D.P.F. sought a stay of proceedings because of the breach of solicitor-client privilege.

[16] The court held that the search warrant did not authorize seizure of these documents. The officers conducting the search had, for some reason, not prepared for how to deal with solicitor-client privileged material, despite the fact that they were searching a law office. The officers did not recall seeing the four documents in question; however, the court found that the officers would have seen them and viewed them, at least to determine whether they were relevant to their search:

> 32 I am satisfied that, on the balance of probabilities, Constable Stanford saw the four communications and viewed them, if for no other reason than to eliminate them as "product of the search". Here the breach of Mr. D.P.F.'s solicitor client privilege occurs. This does not fit with Mr. Maher's instruction that material not be viewed but be sealed. The group of documents, of which these four communications were a part, at a minimum, should have been sealed by Ms. Cahill at the request of Constable Stanford without his viewing them and should have been carried in Ms. Cahill's presence to the High Sheriff. I do not comment on whether that would have given the minimum protection which the Supreme Court of Canada in *Lavallee* expects.

[17] The court found that the actions of the police in D.P.F. constituted a breach of s. 8, and granted a stay of proceedings.

[18] In *R. v. Power* (2009) 98 O.R. (3d) 272, the prosecution had come into possession of a defense document protected by solicitor-client and litigation privilege, and sought to introduce the document into evidence. The JP hearing the matter found that s. 8 of the Charter had been breached, and stayed the charges.

The stay was set aside by the Ontario Court of Justice. On further appeal to the Ontario Court of Appeal, the court noted the following conclusions:

> 1. In a case where the Crown comes into possession of a defense document that is protected by solicitor client and litigation privilege, prejudice to the defense will be presumed; this presumption is rebuttable; and
>
> 2. The stay in this case should be restored.

[19] At paragraphs 64 to 66:

> 64 In my view, the appeal judge erred in reversing the decision of the justice of peace. The appeal judge said her decision would have been different had the report contained advice indications of legal counsel. She failed to give any credit to the justice of the peace's finding that the report clearly sets out items that could well be used to the disadvantage and prejudice of the appellants. The appeal judge also gives little or no weight to the failure of the crown to rebut the presumption of prejudice.

[20] I have only touched upon a few cases which provide these guiding principles, there are many others. The most recent Supreme Court of Canada cases on solicitor-client privilege once again repeat its importance, and in fact strengthen its protections: in *Canada v. Chambre des notaires* [2016] 1 SCR 336:

> 28 On the first question, it should be remembered that professional secrecy, which started out as a mere rule of evidence, became a substantial rule over time. The court now recognizes that this rule has deep significance and a unique status in our legal system. In *Lavallee*, the court reaffirmed that the right to professional secrecy has become an important civil and legal right and that the professional secrecy of lawyers or notaries is a principle of fundamental justice within the meaning of section 7 of the charter. Moreover, professional secrecy is generally seen as a "fundamental and substantive" rule of law. Because of its importance, the court has often stated that professional secrecy should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible."

[21] The court in *Chambre des Notaires* went on to point out that, at least in cases involving solicitor client privilege in the section 8 context, the usual balancing between privacy interests and state interests would not apply, given the supreme importance of protecting the privilege.

[22] The court goes on to say:

> 38 In *Lavallee*, the court stated that "solicitor client privilege must remain as close to absolute as possible if it is to retain relevance (p. 36). In *Smith*, the court noted that "the disclosure of the privileged communication should generally be limited as much as possible".
>
> …
>
> 40 From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected. The line between facts and communications may be difficult to draw. For example, there are circumstances in which nonpayment of a lawyer's fees may be protected by professional secrecy. The court has found that "certain facts, if disclosed, can sometimes speak volumes about a communication" (*Maranda* 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."

[23] In the companion case of *Canada v. Thompson* [2016] SCR 381, a case which turned on many of the very same questions, the Supreme Court repeated the same comments regarding the importance of this privilege. At pp 18-19:

> 18 In *Descoteaux*, one of the earliest cases in which this Court acknowledged that solicitor client privilege involves a substantive right, Lamer J as he then was, elaborated on the various aspects of the privilege as follows:
>
> > 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 the 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 third and fourth elements of this substantive rule have together been interpreted to support the proposition that an intrusion on solicitor client privilege must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation.
>
> > 19 Although Descoteaux appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category based approach to solicitor client privilege that distinguishes between fact and a communication for the purpose of establishing what is covered by the privilege. While it is true that not everything that happens in a solicitor client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in Maranda) must be presumed to be privileged absent evidence to the contrary. This rule applies regardless of the context in which it is invoked. (emphasis added)

[24] From the very beginning, the *Lavallee* decision showed, in very strong terms, the enormous significance that the Supreme Court gave to solicitor-client privilege. It was to be "as close to absolute as possible". As strong as that statement was, with their most recent cases of *Chambre des Notaires* and *Thompson*, the Supreme Court has even gone somewhat further, making protection of this privilege even more essential. The Court has stated in explicit terms that solicitor client material, both facts and communications, are presumed privileged.

[25] It is therefore clear that it is no longer good law to use a category-based approach in assessing solicitor-client privilege. The most recent caselaw bring us to the conclusion that all information connected to the relationship between a lawyer and his/her client, is to be presumed privileged, unless and until it can be shown to be otherwise.

[26] In the case at bar, therefore, I start with an issue that was the subject of much debate within this application: "presumed" vs. "actual" privilege. This is important because this debate has caused much disagreement as to what evidence should be before me in this application.

[27] I have not seen the statement of Mark David. I do not know what he actually said, nor do I know if what he said was, in actual fact, solicitor client privileged. I do know that the Crown intends to call Mark David as a witness against Mr. Mill and Mr. Rudolph, at their trial. I therefore accept (and the Crown concedes) that Mr. David's evidence is inculpatory as against the 2 accused.

[28] The Crown submits that I do not have the information I need to grant this application. They submit that the applicants should have, during this application, introduced into evidence the statement of Mark David. In that way, we could look at the words uttered by Mr. David so as to determine whether they were, in fact,

privileged. In other words, it is the Crown's contention that the applicants need to show a breach of actual privilege, in order to be successful. Failure to do so, they submit, should be fatal to the applicants' claim.

[29] The applicants respond that they did not introduce that statement, because their application is based on the unconstitutional process by which the statement was obtained. The fruits of an unconstitutional process, they note, cannot be used to justify it. They further submit that the statement is presumptively privileged, and that actual privilege is not the relevant question here. The applicants claim privilege over the statement of Mark David, and what is said therein. They claim that to introduce it might, or would, constitute a waiver of that privilege; it would also perpetuate the breach that has occurred, if it has.

[30] That debate highlights an essential difficulty with material that may/may not be solicitor client privileged: must the applicants disclose it, in order to prove it is privileged, to thereby protect it? Or do we assume it is privileged, protect it, and insist upon a proper process to determine actual privilege? In my view, the only acceptable answer is the latter.

The Lavallee process - searches

[31] The approach of "presumed" privilege over solicitor-client material must apply while the state conducts an investigation. In the case of a law office search, our Supreme Court has developed the *Lavallee* process. Pursuant to that procedure, all material seized from a law office is immediately sealed, without review by law enforcement. It is, at that stage, presumptively privileged. It is then taken before a court for review, to determine whether there is actual privilege in the documents: if there is, they remain sealed forever from all parties; if there is not, they are released.

[32] The front end, "seizing / sealing" process is the same, whether the material is actually privileged or not.

[33] This is the only reasonable approach to take, if solicitor-client privilege is to have any meaning at all. If we did not presume privilege at the pre-seizure and seizure stage, that means we would be leaving it to law enforcement to decide, on a document by document basis, whether privilege exists, and whether the *Lavallee* process should be followed. This is unacceptable. Such a process would render solicitor-client privilege (which is, we must continually remind ourselves, an essential constitutional protection), completely toothless.

[34] As caselaw has developed around searches of law offices, we have all become very accustomed to the idea of presumed privilege in that context, and the need for the police to undertake a search process that respects solicitor-client privilege and the Charter. By now, I doubt anyone would debate the proposition that documents contained in a law office are presumably and presumptively privileged, at least from the point of view of the state wishing to search/seize them.

[35] This is the case regardless of the documents seized, and regardless of whether they are actually privileged or not. I note that, generally speaking, a similar procedure would be expected in relation to solicitor-client material seized from any location.

[36] The question of actual privilege is answered by the court, later, not by the seizing officer. The point, of course, being that the seizing officer's process must conform to the Charter, regardless of its result.

[37] Courts have found breaches of the Charter where the state deliberately disregarded the rights of the accused in this context. In *R. v. Morris* [1992] NSJ No. 524, the accused faced many charges in the nature of assault against his partner. His residence was searched pursuant to warrant; the warrant provided that one of the items to be searched for was "Writings of John Morris addressed to his

lawyer relating to Mary Jane Harkins". During the search police found a file containing relevant notes and correspondence to the accused from a law firm. Despite an assertion of a claim of privilege, some of the material was kept by police.

[38] The court concluded that the documents seized were privileged, and that they had been reviewed by police in the Crown. This constituted a breach of section 7 and s. 11(d) of the Charter, as both a breach of the right to silence, and a breach of the right to consult with counsel in private. The charges were stayed. It is interesting to note that although this case involved a search, the court's analysis focused on section 7, and not section 8.

Searches / other investigative techniques

[39] To this point, I have focused on search and seizure of presumptively privileged documents. The *Lavallee* case, as with the others I have mentioned, is a search and seizure case. In looking at examples of breach of solicitor-client privilege, this is the most common scenario.

[40] There have been other scenarios considered, for example, the case of wiretap authorizations. In the case of *R. v. Doiron* [2004] N.B.J. No. 208, a wiretap authorization was granted in a case where the police suspected a lawyer of criminal

activity. The authorization specifically provided that the lawyer would be intercepted when speaking to a particular client, and provided certain clauses to address the solicitor-client privilege issues which necessarily were raised. In particular, the tapes were to be sealed, and first listened to by a "senior" police officer, to determine actual privilege, prior to their release to investigators.

[41] The court in *Doiron* held that these clauses were not sufficient to protect possible privilege in the intercepts. After quoting from the *Lavallee* decision, the court noted:

> 96 It seems to me that very similar stringent steps must be followed when intercepting potential solicitor client communications. As pointed out in paragraph 30 of these reasons, clauses 9 and 10 of the order provide that the intercepts are to be sent to a superior police officer for a determination of privilege. This should send a chill throughout the legal profession. As well, this procedure has the potential of recording any other unrelated solicitor client conversations not just those of the target and such a far-reaching outcome without additional judicial supervision undoubtedly brings the administration of justice into disrepute. Clearly there is potential for numerous breaches of solicitor client privilege without the client's knowledge or consent.
>
> 97 At the very least the intercept tapes should not be listened to, sealed, and returned to the Court to make a determination of solicitor client privilege. I am of the opinion that the procedure set out in clauses 9 and 10 are improper and contrary to section 8 of the Charter of Rights and Freedoms…
>
> 98 I realize the objectives of the wiretaps were to determine if Eric Doiron was engaged in criminal activity. But by monitoring the solicitor client room next to the Provincial Court without very stringent procedure to safeguard solicitor client privilege brings the administration of justice into disrepute.

[42] What I take from *Doiron* is, although it was not a "search" case involving documents, the principles underpinning *Lavallee* remain the same. Investigators

are not entitled to solicitor-client privileged information, and must effect their investigations in ways that do not intentionally or accidentally breach that privilege, and/or minimize any intentional or accidental intrusion. I conclude that these principles are universal to all forms of investigation, and must be applied consistently throughout.

[43] In other words, we must presume privilege in the "non-search" context as well. The *Lavallee* process and philosophies must be respected from the beginning, regardless of actual privilege. The question of whether material is "actually privileged" can only be answered by a court empowered to answer it. In my view, this encompasses all questions relating to "actual" privilege, including whether the material is not privileged due to the criminality exception.

[44] On that point, I note that during the hearing of this Application, the Crown raised the issue of the criminality exception to solicitor-client privilege, and wished to present evidence showing that the interactions between Mr. David and the accused were, in fact, criminal in nature, and therefore no privilege existed *ab initio*. I gave a separate decision on that point, which I will not repeat here, but suffice it to say that I held that evidence of criminality was immaterial to the question of whether the actions of the police had breached the Charter.

[45] As I said in that decision, even if the statement of Mark David showed evidence of criminality, in my view, to allow that evidence would be an impermissible *ex post facto* review of the fruits of a "search" being used to justify it (*Hunter v. Southam* (1984) 14 C.C.C. (3d) 97; *R. v. Ciarnello* [2004] O.J. No. 3457). We do not ignore breaches of the Charter simply because inculpatory evidence is found.

[46] With respect to other, independent, evidence of criminality, in my view that is not relevant at this stage either. Evidence known to the police, prior to the statement of Mr. David, would be irrelevant since regardless of the strength of their case, they would still need to follow *Lavallee*. Evidence discovered since, in my view, could not possibly retroactively cure a past breach of presumed privilege.

Statement of Mark David

[47] In the case before me, the material we are concerned with came in the form of a witness statement, of a lawyer, in relation to persons who, it appeared, were his clients. That is very unusual. So unusual in fact, that I know of no other case in Canada where this fact scenario has presented itself, nor has any been identified to me. This means that in grappling with the Charter implications of this case, I am in some respects breaking new ground.

[48] The information obtained by police here was not obtained by way of a search, nor through any court order or authorization, such as a search warrant or wiretap authorization. In fact, ostensibly no authorization was required, since the police were simply engaged in that most ancient of investigative techniques: a witness statement.

[49] It is often said that there is no property in a witness. It is also often said that the police may ask questions, generally speaking, of anyone. Of course, there is also, generally speaking, no obligation on the person to respond, whether accused, suspect, person of interest, or member of the public. In that way a witness statement is significantly different than a search warrant (where the person being targeted must comply).

[50] The Crown argues that this is an important difference here. The police did not impose anything upon Mr. David, such as in the case of a warrant. The police merely asked questions, which Mr. David was free to answer, or not answer, as could any witness. The Crown argues that nothing special is required of the police when taking voluntary statements from witnesses. It would be inappropriate, in the view of the Crown, to impose any “new” or “special” requirements upon the police in taking this statement, simply because Mr. David was a lawyer.

[51] I can understand why the Crown takes this position, given the novelty of this set of facts.

[52] However, I cannot agree. In relation to the statement of Mr. David, I find the facts enormously troubling. In my view, it is disingenuous for the police/Crown to call a statement from Mr. David, about Mr. Rudolph and Mr. Mill, a mere "witness statement", like any other. It is not.

[53] Let me repeat a few of the salient facts: The police well knew, prior to contacting or meeting Mr. David, that he had been involved in the CanGlobe group of companies as a lawyer. They knew, in particular through their meetings with the NSBS, that solicitor client privilege was very much a live issue in this case, as least as it related to documentation. The police also knew that Mark David was disbarred.

[54] The police had a first contact with Mr. David in January 2010, by telephone. The police expressed to him that there were three people of interest to them, including himself. (It would have been obvious who the other two persons were, from the circumstances.) The police told Mr. David that they sought a witness statement from him. Mr. David responded that he was not involved in criminal

wrongdoing, and wondered if he would be charged. He also advised that he would be seeking legal advice before responding to the statement request.

[55] Other discussions occurred between police and Mr. David between February of 2010 and May of 2010. In a face-to-face meeting on February 2nd, Mr. David again indicated his need to seek legal advice relating to solicitor-client privilege. On at least 2 further occasions, the police again contacted Mr. David, still seeking a witness statement from him. On both those occasions Mr. David deferred the question and repeated, for the third and fourth times, his wish to obtain legal advice as to solicitor-client privilege. On May 6, Mr. David finally advised the police that he had decided not to give a witness statement, because of solicitor-client privilege concerns.

[56] In other words, from the very beginning, Mr. David was repeatedly expressing concerns about speaking to police about CanGlobe, Mr. Mill, and Mr. Rudolph, due to solicitor client privilege. But it is also clear that from the beginning, Mr. David was very worried for himself, and worried about a prosecution against him. He said this to police. Mr. David was obviously in a very difficult and precarious situation. This would not have been lost on the investigators.

[57] We know that on November 2, 2011, Mr. David changed his mind, and decided to speak to police. We do not know why Mr. David changed his mind, or what intervening events might have caused him to reconsider. However, we do know that on November 2nd, Mr. David's concern was protection for himself. Mr. David's lawyer and the police agreed upon a document, meant to shield Mr. David from prosecution if he spoke about Mr. Mill and Mr. Rudolph. It is not a great stretch of imagination to infer that this "immunity" agreement was the reason Mr. David changed his mind and spoke to police.

[58] The Crown notes that this document was unenforceable, in point of fact, and therefore meaningless. In my view, that misses the point. This document, and its creation, clearly shows two very important things: first, that Mr. David's primary concern on that day, was protecting himself and not his clients; and second, that the police's interest was not truly in Mr. David, but rather, in Mr. Rudolph and Mr. Mill. In fact, the police were so interested in Mr. Rudolph and Mr. Mill that they were prepared to possibly forgo prosecution against Mr. David, without even knowing what he would say. This document provides us with a clear indication of everyone's true interests at the time of this statement.

[59] It appears that the police engaged in all of this because they honestly believed the activities between Mr. Mill, Mr. Rudolph, and Mr. David were

criminal in nature. As a result, they believed that there was no need for them to worry about solicitor-client privilege. Although this may explain what occurred, it frankly remains an inappropriate way of thinking for law enforcement. Certainly in other contexts, it would be unacceptable for police to disregard the rights of a suspect merely because they are convinced of his ultimate guilt. For example, it would be unconstitutional for police to engage in a law office search without any *Lavallee* safeguards, merely because they believed the lawyer to be engaged in criminal behaviour; no matter how strong their belief. That is not how the Charter is meant to work.

[60] In *R. v. Doiron* [2004] NBJ No 208:

> 94 Perhaps it is oversimplifying the procedure but in a situation where a police officer seizes a document in the possession of a lawyer, the document must be placed in a sealed package, unread and brought before the Court, which then makes a determination as to whether it is privileged and thus inadmissible, or, not privileged and admissible. There are very stringent steps to be followed. The police certainly do not make the determination of admissibility. (Emphasis is mine)

[61] As I have said before in this decision and in interim decisions, where information is potentially solicitor-client privileged, it is presumably solicitor-client privileged. When dealing with information between lawyers and their clients, the police are not empowered to decide for themselves, whether the information they seek, or find, is or is not privileged. Nor are the police

empowered to decide for themselves whether a situation meets the criminality exception. The police can have suspicions, of course, and their suspicions could be quite well founded. But the decision is not theirs to make.

[62] It is not my intention, with this decision, to needlessly place roadblocks to police, in the proper execution of their law enforcement powers, and in their investigation of crime. However, I find that in this case, the police procedure was flawed, in a way that breached solicitor-client privilege.

[63] Although statements are taken from witnesses all the time, we must acknowledge that in the case of certain witnesses, special rules must be followed. This is certainly the case where a witness is in fact suspected of a crime, where special rules exist and warnings are required. (see *R. v. Oickle* [2000] 2 SCR 3).

[64] Where a police officer wants to ask a lawyer questions about his clients, surely that circumstance also requires something special. This is obviously a rare circumstance, as one would expect that a lawyer in good standing would never voluntarily speak about his clients to police. But this particular case is a "perfect storm" of circumstances that demonstrates that even rare possibilities sometimes occur.

[65] When investigating crime, the police must remember that solicitor-client privilege is a constitutional protection, and a principle of fundamental justice. It is the responsibility of law enforcement to seek to avoid breaches of solicitor-client privilege, and to avoid actions that specifically or inadvertently breach same. In the case of law office searches, the *Lavallee* process provides them with a clear and safe road map; in other contexts, law enforcement must develop other safe road maps. The spirit of *Lavallee* must be respected in those other contexts as well; the state must "[take] all required steps to ensure that there is no deliberate or accidental access to information that is, as a matter of constitutional law, out of reach in a criminal investigation." (*Lavallee*, supra, para. 25)

[66] The police in this case were careless as to the possible solicitor-client privilege issues involved. This is unacceptable. It appears that the police assumed that nothing special needed to be done, since Mr. David was "voluntarily" speaking to them. It also appears that the police simply believed privilege was vitiated *ab initio* by criminal activity, which they believed to be the case here. Whatever their reasons, I find that their actions in taking this statement from Mr. David, with no safeguards whatsoever, were unacceptable.

[67] Solicitor-client privilege was, or should have been, an obvious issue to those officers wanting to interview Mr. David. This situation should have been flagged

as requiring special consideration and safeguards. The police know, or should have known, that in every other circumstance, (in this file and in others) solicitor-client privilege is, and was, jealously guarded. The NSBS had told them that the material in the possession of NSBS (relating to their investigation of Mr. David) was presumptively privileged, and required a court order and a *Lavallee* process. The police had already gone through a search/seizure and *Lavallee* process in relation to some NSBS documents already.

[68] Furthermore, Mr. David had himself raised solicitor-client privilege a number of times in their earlier discussions, and refused to speak to police on that basis. The police continued to actively seek a statement from Mr. David through a total period of nearly 2 years, and they eventually succeeded. But in doing so they did not set up any process at all, to protect potentially privileged information. The police knew, or should have known, that solicitor-client privilege is the privilege of the client, not the lawyer. The information does not belong to the lawyer, and <u>it is not his to give</u>.

[69] In my view, for the police to have gone ahead with the collection of this evidence under the circumstances, with no safeguards whatsoever, was very simply negligent.

[70] What if, to change the fact scenario slightly, the police had asked Mr. David to consent to giving them some of his materials? Mr. David would be providing material that was not his, and over which his clients would have a reasonable expectation of privacy, and which was presumptively privileged. This action would clearly be a breach of *Lavallee*. Would we accept the actions of the police in simply taking those materials and using them at will? Of course we would not. I fail to see the difference here.

[71] I find that the fact scenario before me is very disturbing. Not only did the police establish no safeguards, they actually went a step further: they created a situation that actually invited a breach of solicitor-client privilege.

[72] We might recall that, in some of the cases I have reviewed, the police ignored solicitor-client privilege by inadvertence: they were either unaware, or lacked caution, as to the existence of privileged material in a given situation.

[73] That is not the case here. In this case, the police did more than simply ignore potential and presumptive solicitor-client privilege. They, in fact, sought it out. They sought to interview a lawyer. In seeking and setting up that interview, they behaved as if solicitor-client privilege was a non-issue, despite the issue being put

squarely before them, at every turn, on this file. And most disturbing in the context of these facts, was the offer and use of an immunity agreement, with a lawyer.

[74] Lawyer Mark David was offered/given immunity from prosecution if he gave information about persons who, according to the information the police had, were (or were possibly) his clients. In other words, an incentive was given by police to entice Mr. David to speak. Mr. David clearly felt vulnerable to prosecution, and faced no repercussions from the bar society (as he was disbarred). A solicitor-client privilege breach was entirely foreseeable by the police, was ignored, and then was aggravated by their actions.

[75] To be clear, I am certainly not suggesting that Mr. David was completely off-limits to police, simply because he was a lawyer. Nor am I suggesting that police can never take a witness statement from a lawyer. However, all situations must be assessed on a case by case basis.

[76] In my view, all of the particular circumstances of this case should have raised obvious and multiple red flags for police wanting to speak to Mr. David. The situation required extreme caution on their part, which should have resulted in multiple safeguards being put in place. But instead, despite the situation before them, the police here did absolutely nothing to protect presumptively privileged

information. In fact, they aggravated the situation by offering Mr. David a positive incentive to "throw his clients under the bus", when they knew he was worried about criminal prosecution. The police also knew Mr. David was disbarred, and therefore likely unconcerned about NSBS repercussions for breaching solicitor-client privilege. Mr. David was, in these circumstances, quite vulnerable to these tactics. It is the state's duty to avoid breaches of privilege, not to seek ways to get around its protections.

[77] The fact that this material was obtained within the supposed "voluntary" circumstances of a witness statement, does not detract from its essentially problematic nature. It is important to remember that, sometimes, even though a particular police method or action is not overtly prohibited, it can still be inappropriate (*R. v. Hart* [2014] SCC 52).

[78] The Ontario Court of Appeal case *R. v. XY* 2011 ONCA 259 is illustrative of a case where the court noted the negligence of the police and prosecution in relation to, in that case, informer privilege:

> 18 To characterize the police and prosecutorial conduct in breach of the informer privilege as anything less than gross negligence is to ignore reality.
>
> 19 Even if we assume that the recording of the discussion of the appellant's activities as a police informer was inadvertent, it must have been clear to investigators when the transcript of the interview was delivered that it (the transcript) included significantly more than the brief preliminary questioning about the offence charged. The officer who received the transcript was at the

> interview, thus knew the nature of the discussion that took place. The officer did nothing to ensure that informer privilege was not breached. The officer took no steps to separate the informer activities discussion from the rest of the interview, for example, to place it in a sealed packet, to solicit the advice of senior officers, to seek legal advice from the prosecutor or even to confirm the informer status of the appellant.
>
> 20 When the prosecutor received the interview transcript from the police, the earlier breach of privilege was exacerbated. The prosecutor took no steps to confirm the appellant's status of the informer, or edit the interview before disclosure to several defence counsel. In the result, disclosure included material that not only revealed the appellant's activities as an informer, but included the substance of what the appellant disclosed during the interview.

[79] I have also reviewed the recent case from our Supreme Court of *R. v. Sandeson* 2017 NSSC 196, dealing with privilege. A private investigator hired by defence counsel had spoken to two witnesses already identified by the Crown. The PI then contacted police to advise them that one of these witnesses had told him that their earlier statement to police was untruthful. The police then re-interviewed this witness. Defence counsel argued that privilege had been breached, either solicitor-client or litigation privilege.

[80] The Court in *Sandeson* held that the fact scenario before it did not raise solicitor-client issues. In relation to litigation privilege, the Court held that nothing the Crown or police did caused, either directly or indirectly, any privilege to be breached:

> [117] While litigation privilege must be vigorously protected, especially in the context of criminal law, the defense cannot race to a witness, take a statement from them, and then stick a flag in their facts, claiming those facts solely as the property of the defense.

> Additionally, there is no property in a witness: R. v. Roulette 2015 MBCA 9, [2015] M.J. No. 16, at para. 122.
>
> [118] I do not think the Crown played a role in breaching Sandeson's litigation privilege. Webb arrived on the doorstep of the police. They did not seek him out. Webb's notes and/or reports were not requested by or provided to the police. The statements themselves, and any notes or reports prepared by Webb in relation to the taking of those statements, are covered by litigation privilege. The facts are not protected.
>
> [119] Webb did tell the police the gist of what Blades and McCabe told him, suggested that the police interview them, met with the police to assist them in obtaining a statement from Blades and provided the police with contact information for both Blades and McCabe. Finding Blades and McCabe would not have been difficult for a modern police department. Blades and McCabe would have been interviewed by the Crown prior to trial. Blades wanted to provide a new statement. Therefore, in the alternative, if litigation privilege was breached by Webb, all of the privileged information was easily discoverable by the police and would have inevitably been discovered by the police.

[81] This is not, at all, the fact scenario before me. The police here sought out Mr. David. He was a lawyer, albeit a disbarred one, who raised solicitor client privilege concerns on numerous occasions with the police. Other information coming from this lawyer's relationship with the accused had already been the subject of a *Lavallee* process. The information he had to give, presumptively, was privileged. Moreover, it was not discoverable any other way. I find the Sandeson case to be entirely distinguishable on the facts.

Lavallee **process as applied to statements of lawyers**

[82] One might ask what the police should have done under these circumstances. Without attempting to provide a comprehensive outline as to a more appropriate procedure, I can easily think of safeguards that would have greatly minimized the

breach here, and perhaps addressed it altogether. These safeguards would be in the nature and spirit of *Lavallee*.

[83] For example, the police could have engaged the services of a third party to interview Mr. David; possibility a person with, or engaged by, the barrister's society. That interview could have been recorded, and the recording sealed. The interviewer would disclose nothing to the investigating police, and the interviewer would have no further involvement.

[84] The investigating police/Crown would then bring the recording to a court, in a process similar to Lavallee, to determine what, if anything was privileged in the interview. This would take into account, one assumes, the criminality issue/evidence.

[85] Should such a process ever be undertaken, I leave it to another court to undertake a full analysis given its particular facts; but at the very least such a process would demonstrate a level of care and caution on the part of authorities relating to solicitor-client privilege that is completely absent in the case before me.

[86] It is the burden of the applicants to show, on a balance of probabilities, that a breach of the Charter has occurred in the police interview of Mark David in November 2011. In my view, the applicants have met that burden. The process

undertaken by the police in interviewing Mr. David in November 2011 constituted a breach of the applicant's Charter rights pursuant to s. 7.

Use of Mark David statements in bank ITOs

[87] I have already noted that any information provided by Mr. David about Mr. Rudolph and Mr. Mill was presumptively solicitor client privileged. It might follow that the use of any of this information in a later ITO, seeking authorization for further information, would constitute a further and continued breach of the privilege.

[88] The Crown disagrees. It notes that where the state seeks a search warrant, the ITO put before the issuing justice must be full, frank, and fair. The Crown argues that the ITO officer therefore had a duty to provide all of the relevant information known to that officer at that time, including the Mark David information. It could not be left out.

[89] While I certainly agree with those basic principles, that answer does not respond to the problem before me. The information given by Mark David in the statement was presumptively privileged, and therefore, was not supposed to be accessible by law enforcement at that stage. It required a process to determine privilege, before it could be "known" at all. The police simply skipped that step,

and disseminated the information as if it was theirs to give. This dissemination perpetuated the breach that I have already described hereinabove.

[90] I note that I have not seen the ITO's, and therefore, I do not know what information was provided, nor its significance. Regardless, in my view the use of any information from Mr. David was inappropriate at that stage, as its use continued the breach I have already described. Having said that, questions relating to the details and severity of this breach, may well be a matter for remedy.

Box 23

[91] In relation to the Box 23 materials, the ASF states the following:

> 59 The parties agree that the NSBS Box 23 trust account materials in fact include Mark David's "Client Trust Listings", "Trust Bank Journals", and other documents which at times set out the names, addresses, trust account balances and client numbers, and matter numbers associated with arms-length (non-Canglobe) clients of Mr. David's law practice. Doug Rudolph is listed within the Trust Bank Journals and Client Trust Listings, including one Trust Bank Journal Entry with an unspecified explanation "retainer"…

[92] In my view the issues relating to Box 23 are easily dealt with. The seizure of this box is clearly a s. 8 issue. This box was retrieved by the police from the NSBS in February 2013, without a warrant. A warrantless search is presumptively unreasonable. The contents of the box were documents that had been seized from

Mr. David's law practice; as such, those documents properly "belonged" to Mr. David and/or his clients.

[93] At the time of the seizure of Box 23, various people had opinions as to its contents being privileged or not. Its possessor, the NSBS, seemed to believe there was no privilege, and therefore voluntarily surrendered it. In my view, that was incorrect: based on the law as I quoted it, Box 23 contained, at the time of its seizure, presumptively privileged material.

[94] Box 23 was formally unsealed by the Court in September 2013. In the intervening period, the police took possession of the material and scanned it into their system; it is unknown the extent to which it was reviewed prior to the *Lavallee* process in September.

[95] Was the process used to seize this box constitutional? I conclude that it was not. The NSBS was not entitled to voluntarily provide these documents to the police. The police were not entitled to take this box and scan the contents into their system. While the Crown eventually sought to correct one flawed part of the process (by way of *Lavallee* hearing), that does not correct the previous errors.

[96] I find that the seizure of Box 23 by police from the NSBS without authorization was an unreasonable search and seizure contrary to s. 8 of the Charter.

Possible vetting of material by Crown before disclosure

I see no need to address this question, given the decisions I have already made herein.

Remedy

[97] I shall be seeking further submissions from counsel as to appropriate remedy, in respect of the Charter breaches I have found.

Boudreau, J.