SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Rudolph*, 2017 NSSC 334

Date: 20171220
Docket: CRH 455297
Registry: Halifax

Between:

Her Majesty the Queen

v.

Douglas George Rudolph and Peter Arthur Donaldson Mill

Decision – Charter Application (Remedy)

Judge:	The Honourable Justice Denise Boudreau
Heard:	July 6, 7, 10, 14, August 28, 29, 31, September 1, 13, November 16, 2017, in 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 applicants are charged in a multicount indictment, alleging offenses pursuant to section 380 of the Criminal Code. The offenses arise from the applicants' involvement with the CanGlobe group of companies, between the years 2004 to 2008. The matter is scheduled for trial with a jury in 2018.

[2] The applicants made a pre-trial application to me, as the trial judge, alleging breaches of the *Canadian Charter of Rights and Freedoms*. Following a number of days of hearing/submissions, I gave a decision on October 6, 2017, where I found that there had occurred breaches of the applicant's s. 7 and s. 8 *Charter* rights. I then sought further submissions from counsel as to remedy.

[3] I now address the appropriate remedy for those breaches.

[4] By way of background, I will repeat the salient facts noted in my earlier decision:

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. Starting in September 2009, the police met and/or spoke with representatives of the NSBS on a number of occasions. The police were interested in obtaining the material in the possession of NSBS relating to their investigation and discipline of Mr. David, and wished to discuss an 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, he noted that if he developed reasonable and probable grounds during the interview, Mr. David would be cautioned and warned. Mr. David responded 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 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 on trust bank journal entry with an unspecified explanation "retainer".

[5] In my earlier decision, I agreed with the applicants that their s. 7 and s. 8 Charter rights had been infringed, in relation to the taking of the statement of Mark David; the inclusion of portions of that statement in the bank ITO's; and the warrantless seizing of Box 23. I found that the circumstances created a situation of

presumed solicitor-client privilege in the information provided by Mark David about the applicants, and in Box 23, and that this presumed privilege had been violated. In the case of Box 23, the privilege was eventually lifted by the Court following a hearing. In regards to the statement of Mark David, privilege has never been lifted by any Court.

Applicant position / Remedy

[6] The applicants seek a stay of proceedings, arguing that this case falls within those rare cases where such a remedy is warranted. The applicants submit that the breaches of solicitor-client privilege cannot be remedied in any other way.

[7] The applicants point to the following determinative facts: firstly, the police actively sought and took the statement from Mr. David without any safeguards in place to protect solicitor-client privilege. They then used the information given by Mr. David in ITOs to obtain original banking documents from Mr. David's trust accounts. The statement of Mr. David was provided to the Crown, who intends to use Mr. David as a Crown witness against both applicants at their trial. The statement was disseminated to both counsel in their disclosure packages; as such, the applicants also have each others' presumptively solicitor-client privileged information. They say they intend to use it against each other at trial.

[8] I should also note that, in the course of argument before me, counsel advised that the Crown's expert forensic accountant, Greg Leeworthy, appears to also have seen the statement of Mr. David. It is unclear to me the extent to which he has made use of it, although the Crown acknowledges that Mr. Leeworthy's report refers to Mr. David's statement in its footnotes. It is reasonable to infer that Mr. Leeworthy has been privy to the entire statement.

[9] As I described in my previous decision, all of this took place without any form of *Lavallee* hearing or process in relation to the statement. In *Lavallee, Rackel & Heinz v. Canada* [2002] 3 SCR 209, the Supreme Court struck down the existing Criminal Code provisions for law office searches, and set out the following mandatory process in cases of searches involving presumptively solicitor-client privileged material:

> 49 In the interim, I will articulate the general principles that govern the legality of searches of law offices as a matter of common law until Parliament, if it sees fit, re-enacts legislation on the issue. These general principles should also guide the legislative options that Parliament may want to address in that respect. Much like those formulated in *Descôteaux*, *supra*, the following guidelines are meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege, and to govern both the search authorization process and the general manner in which the search must be carried out; in this connection, however, they are not intended to select any particular procedural method of meeting these standards. Finally, it bears repeating that, should Parliament once again decide to enact a procedural regime that is restricted in its application to the actual carrying out of law office searches, justices of the peace will accordingly remain charged with the obligation to protect solicitor-client privilege through application of the following principles that are related to the issuance of search warrants:

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

[10] These principles have been held to apply to any situation where privileged documents might foreseeably be seized, not just law offices (*Festing v. Canada* 2003 BCCA 112; *R. v. A.B.* [2014] N.J. No. 38). In other words, these principles

apply in any context where solicitor-client privilege is a live issue, and is possibly vulnerable to breach. As a further example, the court in *R. v. Doiron* [2004] N.B.J. No. 208 addressed a situation which involved the wiretapping of solicitors in discussions with their clients. The principles were held to be the same.

[11] The case before me is highly unusual. I have found no case where a lawyer gives a statement to police about their client (or purported client). Having said that, in my earlier decision finding a breach of the Charter, I held that the same *Lavallee* principles should govern in such circumstances.

[12] Given that the *Lavallee* principles and process have not been respected, say the applicants, this prosecution should not continue.

Crown position / Remedy

[13] The Crown submits that a stay is not warranted, that other remedies are available, and that I should hear further evidence in order to fully consider these further remedies.

[14] As a starting point, it is the view of the Crown that this decision requires actual review of the material. As I noted in my earlier decision, I have not seen the statement of Mark David, nor have I seen the ITOs, nor have I seen the contents of

Box 23. In the submission of the Crown, any decision as to remedy should be based on a review of this material, to determine if there was disclosure of information that was "actually" solicitor-client privileged, and not only "presumably" privileged.

[15] The Crown suggests this Court should move forward with a "vetting" process, which they deem a 24(2) remedy: firstly, that this Court review the statement of Mark David and the ITOs in detail. The Crown submits they would provide these documents to the Court as exhibits, for review. The Crown did not provide me with any proposed process of review; in the Crown's submission, the process would be entirely left to the Court's discretion. Perhaps, for example, it could exclude the Crown entirely (as in a regular *Lavallee* process). Having reviewed the statement, in the Crown's submission the Court could then simply excise those parts found to be privileged, and order that those portions be deemed inadmissible and un-usable by any party to this matter. The remaining (non-privileged) material could theoretically admitted in evidence at the trial.

[16] The Crown further submits that, in order for me to be able to make these determinations as to privilege, I also need to hear evidence as to "criminality" in the dealings between Mr. David and the two applicants. To that end, the Crown seeks to tender expert forensic witness Greg Leeworthy; the MacMillan/Dennis

reports; and a formal list of allegations from the NS Securities Commission in relation to the CanGlobe affair. (The Crown acknowledges that the impugned material itself (the statement, the ITOs and Box 23) could not themselves be used as proof of criminality.)

[17] This "criminality" evidence has already been the subject of argument and an interim decision in this case. I then held that this evidence of "criminality" was non-responsive to the Charter Application before me, and I did not allow it.

[18] Now that we are dealing with remedy, the Crown submits that this evidence should be admitted for that purpose. The Crown notes that while it accepts that the case at bar constitutes a situation of presumptive solicitor–client privilege, such is a "rebuttable" presumption. The Crown submits that it therefore ought to be permitted to lead evidence, within this hearing, to rebut that presumption. Assuming they could do so, they argue, this would lead to the conclusion that the Mark David / CanGlobe / applicants' relationship was in furtherance of a criminal objective, and therefore that none of the Mark David material was ever actually solicitor-client privileged.

[19] The Crown also seeks to tender further evidence relating to a 24(2) analysis, specifically viva voce evidence from Cpls. Cameron and Buglar (in relation to

"good faith"). Furthermore, the Crown wishes to call further evidence as to Box 23, which was released to the parties following a *Lavallee* process (although it was not reviewed by the Court in detail at that time). The Crown wishes to tender portions of the contents of Box 23, and call the administrative assistant who handled the box contents following seizure. This is to show that the breach relating to Box 23 was less serious, and of short duration.

[20] In relation to the Crown's proposed procedure of "vetting" the statement of Mark David and the ITOs, the applicants strongly object. They claim privilege over the statement of Mark David and the information contained therein. They object to its introduction as evidence in these proceedings, due to the open nature of a court proceeding. More fundamentally, they submit that this material should not be tendered by anyone: not by the applicants, since they should not be forced to disclose material over which they claim privilege, in order to protect it; and not by the Crown, since they should be in a position to tender it, or to argue anything about its contents, since the Crown should not even have it.

[21] The applicants further submit that, if the Crown's "vetting" proposal is meant to be understood as a "modified" or after-the-fact *Lavallee* process, it would be an entirely unconstitutional process. This is because the police/Crown already have the material. The applicants note that a *Lavallee* procedure must

occur “pre-disclosure”; in fact, that is the entire point of a *Lavallee* process. It is a process where a Court decides what the police and Crown can see. One of its clear requirements is that the Crown cannot and must not have seen the material when the hearing is undertaken. It would be inappropriate and unfair, say the applicants, to undertake such a review when the Crown has had the benefit of seeing and knowing the content of the material.

Caselaw

[22] I wish to start by highlighting and acknowledging the extremely rare and unusual facts before me.

[23] This case, and in particular the present Charter motion, has been described as “breaking new legal ground”. I must agree. To my knowledge, the particular fact scenario before me has never been judicially considered. I have not been provided with any case (nor have I found any) where a lawyer has provided a statement to authorities about activities involving his purported clients. Furthermore, I have not seen any case where a “vetting” process of presumptively solicitor-client privileged material, such as proposed by the Crown, was held as a pre-trial motion (with the possible exception of the *Douglas* case, which I will

discuss later). Nor have I seen any case where a finding of "criminality" was sought in a pre-trial motion, before a trial judge.

[24] A stay of proceedings is clearly a remedy of last resort. A stay means that the case will not be tried on its merits, which is never a desired outcome; therefore, a stay is reserved for those most rare and unusual cases where a court believes that a prosecution should not continue. There are very serious competing values at stake.

[25] The leading case relating to stays of proceedings is *R. v. Babos* [2014] 1 SCR 309:

> 30 A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan* 2002 SCC 12, [2002] 1 SCR No. 297, at para. 53) It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.
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> 31 Nonetheless, this Court has recognized that there are rare occasions - the "clearest of cases" - when a stay of proceedings for an abuse of process will be warranted (*R. v. O'Connor* [1995] 4 SCR 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused's trial (the "main" category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category) (*O'Connor*, at para. 73). The imputed conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.
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> 32 The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
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> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);

> (2) There must be no alternative remedy capable of redressing the prejudice; and
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> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favor of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid*., at para. 57).

[26] It is the submission of the applicants that both categories of the *Babos* test are met in the case at bar: firstly, they say, this trial has been compromised; the damage will only be compounded at a trial. Secondly, say the applicants, the integrity of the judicial process "writ large" has been undermined.

[27] As I described in my earlier decision, solicitor-client privilege has always been a principle of utmost and primary importance in Canada. Having said that, in reviewing the most recent Supreme Court of Canada cases, one can see that the Court is speaking out even more strongly as to the primacy of this privilege. The Court effectively invalidates previous law relating to the distinction between "facts" and "communications", in determining what is privileged and what is not. In *Canada v. Chambre des Notaires* [2016] 1 SCR 336:

> 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." (emphasis added)

[28] And in *Canada v. Thompson* [2016] SCR 381 :

> 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)

[29] In *R. v. DPF* [2003] NJ No. 136, the police searched a lawyer's office, pursuant to a warrant, seeking information in relation to his client Mr. Ryan. In the course of the search, they came across documents relating to DPF, another client. DPF was facing a charge of sexual assault. The documents were four letters from Mr. DPF to his lawyer.

[30] Interestingly, the evidence in *D.P.F.* is not as clear as I might have made it seem. The officers involved could not recall ever seeing, or reviewing, these documents. They had no recollection as to their contents. Regardless, the Court was satisfied that on the evidence before it (simply put, the documents were located in an area being searched by police), the officers would have/must have seen the four letters, "if for no other reason than to eliminate them as 'product of

the search'" (par. 32). This constituted a breach of privilege. As to remedy, Mr. D.P.F. sought a stay of the sexual assault prosecution.

[31] The court undertook a fulsome review of the authorities, as well as the facts of the matter, and concluded that no other remedy than that of a stay would address the problem. The court noted:

> 46 In my view, the review by the state of Mr. D.P.F.'s solicitor-client privileged communications cannot be cured in the context of this trial. To the extent it has occurred that occurrence will always stand in the face of this continued prosecution and trial. A cloud falls over these proceedings by that occurrence. I do not see that cloud dissipating.
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> 47 The prejudice, to the extent which it has occurred, does not lend itself to removal by another judicial remedy available to the trial of this matter. Trial fairness has been compromised. The public confidence in the administration of justice as well is compromised.
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> 48 The Supreme Court of Canada, as noted above, has clearly placed the sanctity of the solicitor-client privilege at the hallmark and underpinning of the conduct of the administration of justice in this country. As pointed out in *Lavallee*, communications to a lawyer represent an important exercise of the right to privacy and are central to the administration of justice in an adversarial system. The Supreme Court of Canada is clear in *Lavallee* that even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. Any perception of erosion will undermine, if not render nugatory both the confidence in the administration of justice and the ability to give strength, integrity and independence to a system that rests its history and future on the Rule of Law. This breach is serious. This conduct by the police can best be termed unfortunate. It was the first time those representatives of the state were themselves involved in a law office search. The conduct cannot be termed accidental. The misunderstanding of what was necessary in order to protect solicitor-client privilege and the resultant view of communications from Mr. D.P.F. to Mr. Buckingham, though viewed in hindsight, was very predictable based on the approach taken, and has to be classified as well as conduct that is egregious and unjustified. Once the material was viewed in order to be understood as irrelevant to the search, the police officers were acting at variance with the understanding of their legal counsel which he had communicated to them. The breach of Mr. D.P.F.'s rights occurred. Once viewed, even to be eliminated as

relevant or permitted by the search, cognitive occurrence has to be assumed and an analysis of its extent or permanence is both unavailable and inappropriate.

[32] The court described its conundrum:

> 50 If I may characterize the balance that must be struck in weighing the appropriateness of granting a stay of these proceedings. It is:
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> (a) on the one hand, to allow to go unprosecuted the complaint by a young female person of offenses against her person which additionally could discourage other victims of similar offenses from having the necessary confidence in the administration of justice to come forward, and so to allow a person who may have violated another not to become subject of sanction; while these particular offenses might not be classified as of the most serious of these types of charges, that of itself would not lessen the possible discouragement of other victims; and,
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> (b) on the other hand, to permit the state to continue a prosecution where it has entered a law office in the absence of any lawyer and viewed the solicitor-client privileged communications of the accused acting clearly in excess of the authority given to do so, which, if not dealt with in the clearest manner and with the strongest of sanctions, wood leave persons, whose need for and right to communicate with their lawyer in confidence as an understood, entrusted and guaranteed right, with the clear impression that such guarantee has been and in the future may be eroded.
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> 51 Neither of these alternatives is acceptable. This decision is difficult. However the actions of the state in this case necessitate a choice as to which of these alternatives is less acceptable to the public and the continuance of which will, in a greater way, undermine the public confidence in the administration of justice.
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> 52 In my view, the less acceptable of these alternatives is not to choose to strongly sanction the conduct of the state in entering a lawyer's office and presuming authority to view written material and communications at random, knowing that privileged communications could be on any next piece of paper or computer screen viewed, on the basis that it was necessary to determine whether the material was relevant to their search, when all that was authorized, without viewing, was the seizure of accounting records related to the charge and the accused specified in the warrant.
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> 53 The other unacceptable alternative, that is, the end of the prosecution in this matter, as a consequence, has to occur. As noted, I am aware that this is unacceptable but in this case it must occur as a consequence necessary to maintain the continued confidence in the administration of justice.

[33] It must be acknowledged that in *D.P.F.*, privilege had been breached in an arguably minor way. Even if the police had seen the letters, they had no memory or knowledge as to their contents. Even in those circumstances, a stay was granted. The message I take from such a decision is that solicitor-client privilege is a bedrock principle; not subject to debate, negotiation, or compromise.

[34] In *D.P.F.*, the evidence as to the contents of the letters was as follows:

> 7 Mr. D.P.F. waved the solicitor-client privilege in respect of two of these communications in his own evidence on this application. He reserved the privilege in respect of the other two on the basis that they dealt specifically with matters related to this trial. Mr. D.P.F. did confirm that the reason for the claim of privilege was because these two letters to Mr. Buckingham dealt with the pending trial and trial strategy prior to severance of counts order and a bail hearing and that the contents of those letters was relevant to this trial. He testified that the trial strategy noted in the two letters referenced this trial. <u>The content of these two letters was not disclosed.</u> Photocopies of the heading, greeting to Mr. Buckingham, ending and signature of Mr. D.P.F. were entered. These aspects were consistent with the two letters in respect of the contents were disclosed. The undisclosed contents are subject to a claim of solicitor-client privilege in this proceeding. In this regard, Mr. D.P.F. having re-elected trial by Judge alone, that is, before me, I see no way in which any limited disclosure of the contents was available for my consideration without mandating disclosure of the continued privilege as a condition to the acceptance of this application. (Emphasis is mine)

[35] The Court later again commented as to the content of the letters:

> 30 …. While I do not have the benefit of the content of the two communications, I am satisfied that, on the balance of probabilities, these are solicitor-client privileged communications related to this trial which at the time was not yet severed.

[36] I think it also important to note that *D.P.F.* was decided after *Lavallee*, but before *Chambre des Notaires* and *Thompson*.

[37] In the recent case of *R. v. Douglas* [2017] M.J. No. 187 (Man. C.A.), a search warrant had authorized the seizure of a list of documentation, including "legal correspondence", from a residence. The search was effected and legal correspondence was seized.

[38] The accused filed an application for certiorari to quash the warrants and exclude the evidence. This was dismissed by the application judge. Later the accused was charged with counts of fraud and theft as detailed in the warrants. The accused appealed and sought a stay of proceedings.

[39] The Manitoba Court of Appeal allowed the appeal in part. The Court held that the issuing justice did not have the jurisdiction to authorize a seizure of presumptively privileged material. The law respecting solicitor-client privilege, the court noted, had significantly evolved from the days of "facts" vs. "communications". Legal correspondence, as had been sought and seized here, was presumptively privileged. The Court noted:

> 61 Where the information sought is presumptively privileged, the onus on the Crown was described in *Maranda* as follows (at para. 34):
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> > Accordingly, when the Crown believes that disclosure of the information would not violate the confidentiality of the relationship, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. The judge will have to satisfy himself or herself of this, by a careful examination of the application, subject to any review of his or her decision.

> 62 In this case, the ITO constable did not consider the legal correspondence to be presumptively privileged and therefore did not allege that its disclosure would not violate the confidentiality of the solicitor-client relationship. Nothing in the record suggests that the issuing justice considered the issue.
>
> 63 Of course, as pointed out in *Maranda*, the issuing judge may issue a warrant for privileged documents where the informant establishes that an exception applies, such as the crime exception. In this case, because the ITO constable did not consider the information to be presumptively privileged, the issue of the crime exception was not addressed in the ITO and therefore it was not considered by the issuing justice.
>
> 64 Regardless, even where a warrant is issued for presumptively privileged documents based on the crime exception, the warrant applied for may only be granted "on terms that seek to keep breaches of privilege to a minimum" (*Maranda* at para 22). That did not occur in this case. (Emphasis is mine)

[40] Having found a breach of the Charter, the court next considered remedy. In relation to a stay of proceedings, the court noted:

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

[41] It should be noted that the impugned documents had remained sealed throughout this entire court process. When notified of the accused's application, the police had copied the documents, returned the originals to the accused, and sealed the copies. Neither level of court reviewed the documents for "actual" privilege, since the decision involved a breach of presumed privilege.

[42] Having denied the application for a stay of proceedings, the Court next had to fashion a remedy to deal with a significant problem: that the documents had, in fact, been seen by police. The court noted:

> 86 In this case, the RCMP may have seen privileged documents. The electronic processing of the documents had commenced prior to the claim of privilege. However, the application judge considered the evidence before him and found that the documents had only been given a "cursory" examination by way of a controlled key word search and that none of the results from that search had been forwarded to the investigating officers. Further, he noted that the ITO constable could not remember any specific document that had been seized.
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> 87 In the civil context in *Descoteaux*, Lamer J. stated that a third party who accidentally views the contents of a lawyer's file "could be prohibited by injunction from disclosing them" (at p 871). In *R. v. Bastidas*, 1993 CarswellAlta 22 (QB), Ritter, J, as he then was, cited the above decision and wrote (at para 12):
>
> > It follows that if the accidental viewing of a lawyer's file is subject to a prohibitive injunction, the intentional viewing of the file either surreptitiously or pursuant to a search warrant is also subject to such injunction.
>
> 88 In my view, an injunction is appropriate in this case. Thus, I would order that each of the RCMP officers, who may have viewed a document presumptively protected by solicitor-client privilege (i.e. any legal correspondence seized), not be allowed to disclose the documents or use their knowledge of the documents in furtherance of this investigation, or any other investigation or charges, involving the applicant. To be clear, the RCMP officers who have possibly seen the privileged documents will be allowed to continue the investigation and testify as required, but they will be prohibited from disclosing to anyone any knowledge that they may have obtained from any presumptively privileged document, and prohibited from using that knowledge in their investigation.
>
> 89 At this point, I would add that, had there been *mala fides* on behalf of the RCMP, my decision on remedy may have been different…

[43] The court then returned the documents to the applicant, subject to a *Lavallee* hearing in the future to address "actual" privilege.

[44] 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. They sought to introduce the document into evidence. The justice of the peace hearing the matter, found that s. 8 of the Charter had been breached, and stayed the charges. It should be noted that in this case, the actual report had been put before the JP. She noted that while the report was primarily "informational", in her view some items therein were clearly intended to be, and were, privileged. The stay was set aside by the Ontario Court of Justice.

[45] On further appeal to the Ontario Court of Appeal, the court came to 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.

[46] 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.
>
> 65 The appeal judge said that there was no evidence to support the justice of the peace's finding that the Crown failed to limit access to report except to counsel for Vipond. The fact is that the Crown's witness list at trial contains the names of four employees from Vipond. There is no evidence as to what distribution, if any, was made of the contents of report by Vipond. All we know is that counsel for Vipond retrieved the report from his client and returned it to counsel for Bruce Power.
>
> 66 I would allow the appeal and restore the stay of proceedings on the charges against the appellants

[47] I have also reviewed the Nova Scotian case of *R. v. Morris* [1992] NSJ No. 524, where the court found a breach of solicitor- client privilege. In relation to remedy, the Crown argued that exclusion of evidence would be appropriate; the defence sought a stay of proceedings. Having considered the matter, the court concluded that it would be impossible for the accused to receive a fair trial, given that the Crown had the advantage of knowing defence strategy.

> The evidence presented on the voir dire establishes that the Crown was aware of the claim of solicitor-client privilege. The Crown testified that the police were advised to seal the documents. The police on the other hand testified that they were never told that they should seal these documents. Either the police knew that they should seal the documents and chose to disregard the Crown's advice or they were not told to seal the documents despite defence counsel's request to the Crown to do so. In either case there was a deliberate disregard for the rights of the accused. This disregard can only be viewed in the circumstances as flagrant and deliberate. I can only conclude that the violation of the accused's rights under s. 7 and 11(d) of the Charter was either done deliberately or with a wilful blindness towards the consequences. As Sopinka J. said in *R. v. Kokesh* (1991) 61 CCC (3d) 207, at p. 232:
>
> > This court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude individual privacy.

> I believe that any reasonably informed member of the community knowing that an accused has the right to remain silent, the right to have effective counsel and to the right not to have his privileged communications with his counsel used against him at his trial would be offended to know that these rights were present in name only. It would in my opinion be prejudicial to the public interest in the integrity of the judicial process to condone what has transpired.
>
> The right to privacy has been deemed important enough to be granted constitutional protection. The accused's privacy in this case has been violated by the state's prying into his privileged discussions with his counsel and the state's subsequent attempt to use the knowledge gained against him at his trial. To allow this would amount to a complete erosion of this constitutional protection.
>
> Accordingly the only remedy is to order that these proceedings be stayed.

[48] In *R. v. Shah* [2015] OJ No. 4129, a cell phone had been seized from an alleged drug trafficker. Text messages were seen on the phone from a "Simon"; it was later confirmed, as the investigation continued, that this was the accused's lawyer. The police stopped their search of the phone and the Crown brought the matter before the court for directions.

[49] It was the Crown's position that the Court should allow the police to review the messages, given that no claim of privilege had been made. Counsel for the accused argued that such a process might result in a breach of solicitor-client privilege. They proposed that copies should be presented to defence alone, who could then decide whether to claim privilege; the matter would then be referred to the court.

[50] It should be noted that this question was brought forward to the Court during an investigation; no charges were yet laid. It also appears that the actual content of the messages was not, at the time of this hearing, before the court.

[51] The Court in *Shah* first dealt with the question of "actual" privilege vs. "presumed" privilege in the messages, noting that at that stage, "actual" privilege was not the point:

> 17 Mr. Morris relies on the Supreme Court of Canada's decision in *Lavallee, Rackel & Heintz v. Canada (Attorney General)* for the general principles to be applied in this situation. In that case, the Supreme Court of Canada considered whether the procedure provided in the *Criminal Code* for dealing with search warrants to seize files in a solicitor's office violated the *Charter*. The Supreme Court held that the *Code* did not provide sufficient protection to ensure that solicitor-client privilege was not breached, even if inadvertently. The Court also set out guidelines to be followed by judges dealing with these matters at common-law.
>
> 18 In the case before me, the Crown takes the position that unless and until there is an actual assertion from Mr. Shah that there are solicitor and client communications on his phone, the principles in *Lavallee* do not arise.
>
> 19 I do not agree. Admittedly, the fact situation in *Lavallee* is not exactly the same. The presumption that a file kept in a solicitor's office will likely contain matters protected by privilege is an obvious one and it is easy to understand why they would be no need for the client (or the lawyer) to present evidence that there are privileged communications in the file.
>
> 20 However, in the case now before me, it is established that Simon King was Mr. Shah's lawyer and it is also established that there were actual communications between Mr. Shah's phone and a phone number set out on Mr. King's business card. In my view, that is sufficient to give rise to a concern and is sufficient to require that the utmost care be taken to ensure that any privilege is protected….
>
> 21 Mr. Morris was candid in conceding that his client is not able to say that his only relationship with Mr. King was a solicitor and client one, such that any communications between them were necessarily related to that relationship. They had conversations about various things, some of which were related to the fact that Mr. King acted as legal counsel for Mr. Shah, and some of which were not.

> Without reviewing the content of the phone, it is not possible to say whether the privilege will arise. However, in my view, these circumstances require that we err on the side of caution. (Emphasis is mine)

[52] The Court went on to address a proper process for moving forward with the material, noting in particular the clear requirement that the material not be reviewed by police/prosecution prior to a determination of "actual" privilege:

> 23 I am therefore of the view that there is a real risk of breaching solicitor-client privilege if the phone is examined in the first instance by the police or the Crown. Precautions must be taken to ensure this does not happen, in accordance with the general principles in *Lavallee.*
>
> …
>
> 25 On the initial day of the hearing before me, the Crown proposed that police officers in the forensic unit should first make a copy of the content of the phone before providing this disclosure to the defence. The defence submitted that this first step should be carried out by a neutral person. I had no evidence before me to determine whether it was even possible for police to download the content of the phone on to some device without reading, or at least seeing, that content. My concern was that if police saw information protected by solicitor-client privilege, even if inadvertently, the damage would be done.
>
> 26 The importance of making the decision about the existence of the privilege without the state seeing the privileged material was emphasized by the Supreme Court in *Lavallee*, as follows (at para. 44):
>
> > I also find an unjustifiable impairment of the privilege in the provision in s. 488.1 (4)(b), which permits the Attorney General to inspect the seized documents where the applications judge is of the opinion that it would materially assist him or her in deciding whether the document is privileged. This particular aspect of s. 488.1 was disapproved by the Law Reform Commission of Canada who felt that "granting the Crown access to confidential communications passing between a solicitor and his client would diminish the public's faith in the administration of justice and create a potential for abuse" (p. 60). See Law Reform Commission of Canada, Report 24, *Search and Seizure* (1984), Recommendation Seven, at p. 58. I agree. As Goudge J.A. stated at para. 40 of his reasons in *Fink, supra*: "The effect of this provision is the complete loss of the protection afforded by the very privilege that may subsequently be determined to apply." It should be noted however that while the substantial aspect of the privilege is irremediably lost by operation of s. 488.1 (4)(b), its

> evidentiary component remains untouched and continues to protect the privileged documents from being entered into evidence. See *Borden & Elliott*, [1975] O.J. No. 2637 supra, at p. 343. However, in my opinion and as Southey J. recognized in that case, "[i]t would be small comfort indeed" for the privilege holder that the law prevents the introduction of his or her confidential documents into evidence when their contents have already been disclosed to the prosecuting authority. Ultimately, any benefit that might accrue to the administration of justice from the Crown's being in a better position to assist the Court in determining the existence of the privilege is, in my view, greatly outweighed by the risk of disclosing privileged information to the state in the conduct of a criminal investigation. I also cannot understand the logic of the argument that the Crown should be trusted not to use information obtained under that provision if it subsequently proved to have been the proper subject of a privilege. If, as would be the case under this provision, the conduct of the Crown examining the documents would have been entirely lawful, it is difficult to understand why the Crown should then refrain from making use of such knowledge lawfully acquired. In the end, this provision is unduly intrusive upon the privilege and of limited usefulness in determining its existence. (Emphasis is mine)

[53] After repeating the specific process set down in *Lavallee*, the Court in *Shah* outlined its process for the material in question:

> 29 The Crown and the police have already taken the first appropriate step. They did not examine the content of the phone, but rather took steps to notify all parties of the potential problem and placed the issue before the Court for direction. Both the police officers and the Crown are to be commended for the ethical position taken.
>
> 30 In order to prevent inadvertent disclosure of privileged communications, the contents of the LG cell phone should be copied by an independent expert retained by the Crown. I therefore direct that the Crown turn over the phone in question to Steve Rogers of Digital Evidence International Inc., upon Mr. Rogers signing an undertaking that he will make two copies of the entire contents of the phone and that he will do so without reading or reviewing that content except as is necessary to do the copying, and will not disclose to any person any of the content he does see.
>
> 31 Mr. Rogers shall create two identical copies of the contents of the phone in PDF format and Microsoft Excel format on a USB flash drive, or any other accessible device, (one labelled "Court Copy" and the other labelled "Defence

> Copy") and shall place both copies and the phone in a sealed envelope and deliver same to the Crown.
>
> 32 Upon receipt of the sealed envelope, the Crown shall deposit same with the Criminal Trial office and advise defence counsel that this has been done. The Defence Copy shall be provided to Mr. Morris by the Court staff.
>
> 33 Defence counsel shall have 30 days from the date of receipt of the copy to advise the Crown and the Court in writing, whether or not solicitor-client privilege is asserted for any portion of the material on the phone.
>
> 34 If there is no privilege asserted, the Court staff shall turn over to the Crown the remaining copy and the phone.
>
> 35 If a claim for privilege is asserted, the Court Copy and the phone shall remain in the custody of the Court until a judge determines whether a valid privilege claim has been established. The Crown is not entitled to see the material for which privilege is asserted unless the Court determines there is no valid privilege claim….

[54] The procedure described by the court in *Shah* is somewhat similar to the suggestion I made in my earlier decision, as to how the police could potentially have dealt with the situation of Mr. David in 2010/2011.

[55] The issue of the police seeing presumptively privileged material, prior to judicial determination of actual privilege, was also canvassed in *R. v. Doiron* [2004] N.B.J. No. 208. In that case, the police had set up an authorized wiretap of a meeting between a certain lawyer and a certain client, in the belief that the two were engaged in criminal behaviour. The authorization provided that the intercept would not be listened to, would immediately be sealed, and would be taken to a senior police officer, who would determine whether there was privilege. If he determined there was not, the recording would be released to the investigators. The Court pointed out the inappropriateness of such a procedure:

92 I have grave concerns with respect to the interception of conversation at the solicitor-client room at the Springhill Institution and the solicitor-client room at the Provincial Court facilities. In particular I am of the view that clause 9 and 10 of the Orders are not sufficient protection against breaches of solicitor-client privilege.

93 The Supreme Court of Canada has struck down portions of section 488.1 of the Criminal Code dealing with documents in the possession of a lawyer. In this area of the law, there is still the question of whether the procedures set out in Descoteaux v. Mierzwinski *[1982] 1 S.C.R. 860* are available. In any event, there are very strict procedures to be followed in the seizure of documents in the possession of a lawyer.

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.

…

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. Consequently, any evidence obtained from the solicitor-client room adjacent to the Provincial Court and the solicitor-client room at the Springhill Institution should be excluded.

[56] In the *Doiron* decision, the court did not have access to the intercepts themselves. Again, the issue was the breach of presumptive privilege. The question of actual privilege is a matter for a *Lavallee* hearing.

Analysis / Crown proposal

[57] Since a stay is meant to be a remedy "of last resort", it is necessary for me to explore the other suggested options, as possible remedies.

[58] The exclusion of evidence, the remedy provided at 24(2) of the Charter, can be granted in situations where evidence is collected in a way which is determined to have breached a constitutional right. I must consider whether this is a viable remedy. I also consider whether any of the additional evidence, proposed to be put forward by the Crown, would assist me in making this decision.

[59] The leading case dealing with exclusion of evidence pursuant to 24 (2) of the Charter is *R. v. Grant* (2009) 66 CR (6th) 1 (SCC):

> "When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances,

> admission of the evidence would bring the administration of justice into disrepute." (para. 71)

[60] In relation to Box 23, it would certainly be within the list of possible remedies to exclude its admission in court. I leave that aside for now.

[61] In relation to the statement of Mr. David, the Crown submits that this evidence does not lend itself to a classic 24(2) "exclusion", as the statement itself is not intended to be tendered. I have not been provided with any authority to suggest that disallowing Mr. David from testifying as a witness for the Crown would be a valid and appropriate 24(2) remedy. In any event, none of the parties have put that option forward.

[62] The proposal put forward by the Crown is that I accept as an exhibit, and review, the statement of Mark David. The point of that review would be to determine if "actual" solicitor-client privilege was breached. As part of this assessment of "actual" privilege, says the Crown, I would also hear evidence of criminality in the relationship between Mr. David and the applicants. If I determine that criminality existed, the presumption of privilege between Mr. David and the applicants would be completely rebutted. The statement would not be privileged, and never would have been.

[63] As I have I noted, in most of the cases I have cited in this decision (*DPF; Douglas; Morris; Shah; Doiron*) the actual impugned material was not before the Court. The courts in those cases found that the material seized was presumptively privileged, and that the method by which it had been collected and retained was unconstitutional.

[64] That is the issue before me as well. It is clear to me from the caselaw (as I have already said in my earlier decision) that where material is potentially solicitor-client privileged, it enjoys a presumed absolute protection, until the material is reviewed by a Court in a properly constituted "*Lavallee*" hearing. That hearing is where the issue of "actual" privilege gets decided.

[65] In relation to the evidence given by Mr. David in his 5 hour interview, I repeat my earlier conclusion, that I am satisfied that the evidence before me clearly raises this reasonable presumption.

[66] Mr. David was being asked by the police about his involvement with CanGlobe / Mr. Mill / Mr. Rudolph. Mr. David had been acting as a lawyer in those dealings. Mr. David himself raised solicitor-client privilege numerous times, as a reason why he should not give a statement to police about these issues. Those facts are sufficient, in my view, to raise the presumption of privilege.

[67] I want to make a specific note in relation to applicant Mr. Rudolph. The Crown, in their written submissions, noted that while they agree that Mr. Mill was a client of Mr. David's, they submit that it is not as clear that Mr. Rudolph was actually a client. This issue was not expanded upon in their oral argument.

[68] The issue of whether any individual is actually a client of any lawyer, is also a matter of privilege. Having said that, when the police interviewed Mr. David, they were aware that he had acted within the CanGlobe organization as a lawyer. They specifically indicated to Mr. David that they were interested in three people: himself, Peter Mill, and Douglas Rudolph, in relation to the processes and actions of CanGlobe.

[69] Mr. David, when contacted by police for a statement, expressed repeated concerns about breaching solicitor-client privilege. He refused to give a statement on more than one occasion because of those concerns. Mr. David did not differentiate between the two applicants in his expressions of those concerns. The police should have approached information coming from Mr. David about Mr. Rudolph and/or Mr. Mill as containing similar dangers. The circumstances, in my view, are sufficient to provide presumptive solicitor-client privilege over both applicants information. A *Lavallee* process was required.

[70] In my view, the Crown's "vetting" proposal is not a *Lavallee* process. The Crown's proposal is, put simply, a process which would determine the admissibility of the evidence. That is a voir-dire.

[71] *Lavallee* is not a test of admissibility of evidence; it is a disclosure process. The presumptively privileged material is not *disclosable to anyone* until a Court says it is. This is why the Supreme Court made it clear in *Lavallee* that the determination of actual solicitor-client privilege must be made prior to the document/material being viewed by prosecuting authorities. This is to emphasize the complete protection afforded to privileged information. Only after review by a Court, if it is determined that any part of the material is non-privileged, can it then be disclosed.

[72] In the matter before me, an irremediable breach of the *Lavallee* process has occurred in relation to the statement of Mark David. In fact, the *Lavallee* process has been skipped entirely. The police actively elicited information from Mr. David that they knew, or should have known, attracted presumptive solicitor-client privilege. They did not put in place any *Lavallee* processes whatsoever, nor did they seek a *Lavallee* hearing.

[73] At this point, the police and Crown have heard and reviewed the statement of Mr. David in detail. They have had it since 2011. They have used it in ITOs to obtain further information from Mr. David's trust account(s). The Crown's forensic expert has been privy to it. It has been disclosed to both applicants. The Crown intends to use some or all of this information in its prosecution against both applicants.

[74] The only case I have reviewed, with somewhat similar facts, is the *Douglas (supra)* case. In that case, the Court decided that the only possible way to effect a proper *Lavallee* process after-the-fact, would be to "sanitize" the process: that is, all police and Crown counsel who had seen the material would be removed from the case, and replaced by others who had not seen it.

[75] No one before me has seriously put forward this proposal as a viable option. In fact, the scenario before me is very different than the one in *Douglas.* There, the officers had only effected a very "cursory" look at the problematic material. That is not the case here. Here, the material has been in the possession of the police/prosecution for a number of years, and has been extensively reviewed and used. I do not believe that the *Douglas* solution is an option here.

[76] Furthermore, we must acknowledge the enormous practical and logistical difficulties of such an option. Defence counsel have now seen the material; would they, too need to be replaced? What of the substantial delay which would inevitably occur? The charges against the applicants were first laid in March 2014. Let us also recall that the applicants themselves have now been given the information. They obviously cannot be replaced. The "sanitizing" option, even if theoretically possible, is completely unworkable.

[77] In relation to the statement, then, the *Lavallee* process has been entirely skipped. We cannot effect it now. The Supreme Court in *Lavallee* did not provide any permissible modifications to the process, nor did it provide any circumstances whereby its process could be avoided entirely. I simply do not see how I could proceed as suggested by the Crown, and stay within constitutional boundaries. I have found no precedent or authority for the Crown's proposal. In fact, the authorities I do have, are to the contrary.

[78] The Crown has pointed out that solicitor-client privilege is a "rebuttable" presumption; that is to say, where the relationship between a lawyer and client is for a criminal purpose, no privilege exists. The Crown has argued that they must be allowed the opportunity to rebut the presumption now, by calling evidence

showing that the relationship here was never "solicitor-client", but was in fact "criminal".

[79] I agree that solicitor-client privilege is a rebuttable presumption. However, there is an appropriate time for seeking such a finding, and in my view, the time for doing that analysis has passed. It could only be done at a *Lavallee* hearing. More particularly, where the Crown seeks to "rebut" solicitor-client privilege, the analysis must take place before the police/prosecution see the evidence. To allow otherwise would be to give the Crown a clear and unfair advantage. In my view it would be completely unfair, as well as a breach of the clear rules set down in *Lavallee*, to allow such a question to be litigated now. The Crown, the investigators, and their witnesses have now had the full benefit of the statement (the presumptively privileged evidence) for over six years.

[80] I have further serious misgivings about the Crown's request that I hear evidence and make findings of "criminality" in the relationship between Mr. David and the applicants. I have no caselaw or authorities wherein a trial judge considered, or made a finding of, "criminality" in the defendants, in a pre-trial application context.

[81] In my view, it would be completely inappropriate for me to make, or even entertain, such a finding. I am the trial judge in this matter, meant to sit with a jury at the trial of these applicants, as to the question of their ultimate guilt. How can any criminal trial Court, at a pre-trial stage, assess the "criminality" of the parties?

[82] Moreover, if it could be done, what standard of proof would be used to decide whether the evidence of criminality trumped solicitor-client privilege "ab initio", at this pre-trial application? Despite having raised this numerous times, I still have been given no caselaw or authority by the Crown to answer that question. Is it the criminal standard, or something less? The Crown proposes that the standard would be "prima facie", with no authority for saying so. The applicants, unsurprisingly, disagree with that. It seems obvious to me that there is no caselaw or authority for this proposition because it has not been done, and should not be done.

[83] This particular discussion serves to emphasize the point I have already made: timing is a crucial factor in putting forward these issues. Judges routinely hear evidence of "criminality" when faced with applications at the investigative stage (e.g. requests for warrants, or wiretap applications), and on the strength of that evidence, authorizations are sometimes granted. That is not the case here. We are at the trial stage of the process.

[84] Quite frankly, while I have been given theories about the "criminality" evidence, I have no clear answers, and no precedent to rely upon. In my view it would be inappropriate for me to hear it at this stage. I therefore decline to hear the "criminality" evidence within the present process.

[85] In my view, the Crown's "vetting" proposal in relation to the statement of Mark David (and the ITOs) is not an appropriate remedy. I am not satisfied that it is a constitutionally valid option. It does not fix the real and fundamental problem: that everyone involved, including the police, the prosecution, their witnesses (experts), defence counsel, and applicants, have seen and used the statement of Mark David. That statement has always been, and remains, presumptively privileged.

[86] This would remain a problem even if the Crown was prevented from tendering this evidence in court. There is simply no way of knowing how it has affected the state's trial strategy, decisions made, or avenues pursued. Nor could we know how it affected the applicants' trial strategy, decisions made, or avenues pursued (in relation to the privileged information that was not theirs).

[87] At the risk of repeating myself, this is precisely why the *Lavallee* process includes the direct and clear prohibition that the police/prosecution not see the

material prior to the *Lavallee* hearing. If the state sees the material in advance, even if they can never tender it, one cannot discount the possibility that having seen it, they adjust their investigation and/or strategy accordingly.

[88] I remind myself that in *Lavallee*, the fact that s. 488.1 of the *Code* allowed the Crown/police's prior review of presumptively privileged material, was one of the very reasons the section was struck down as unconstitutional. It seems to me that to permit a process such as that proposed by the Crown in relation to the statement of Mr. David, would run into the very same constitutional problems.

[89] This problem exists, but to a lesser extent, for Box 23 as well. I say "lesser", because this box was eventually brought before a court, and released to the parties. The police's unauthorized handling of its contents was for a short duration.

[90] The caselaw clearly shows that a circumvention of the *Lavallee* process is no slight procedural irregularity. Solicitor-client privilege enjoys the same level of support as our most fundamental and cherished legal principles. The fact that the *Lavallee* process was completely bypassed must therefore be treated as extremely serious. The cases I have cited in this decision are unanimous in their denunciation of any "sloppy" or careless treatment of this issue.

[91] On this point, I wish to make a few additional comments about police "good faith", as it relates to this proposed 24(2) remedy. The Crown submits that the police in the present case acted "in good faith"; that is to say without intent to cause harm, and within a "grey" area of the law. This should, says the Crown, mitigate against a stay. The Crown also wishes to call further evidence in relation to the investigators' understanding as to the seizure of Box 23.

[92] I do not need to hear from the officers on this point. It was made abundantly clear to me from the evidence at this application, and I accept, that both the police and the Barristers Society mistakenly believed that Box 23 was covered by a generous interpretation of the Order of Justice Robertson, and could be released to police. I have already concluded that they were wrong in this belief.

[93] I note the following quote from *Grant (supra)*:

> "… ignorance of Charter standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith." (para. 75)

[94] In the case before me, the Mark David statement is clearly the more serious of the breaches. The Crown has argued that the police were sincerely unaware that they had to concern themselves with solicitor-client privilege in this interview, given that a witness statement does not normally require any special

considerations. I have already rejected that submission. While I agree that this was not a typical situation for the police, I have no difficulty in finding that their actions were grossly careless.

[95] The police were very much alive to the issue of solicitor-client privilege in this case. Because of their dealings with the NSBS, they were aware that the *Lavallee* process was required for lawyers' material. For example, they first sought the NSBS's files in their entirety, but had to adjust their expectations when the process was explained. Furthermore, on the many occasions when they approached Mr. David himself, he repeatedly expressed concerns about solicitor-client privilege.

[96] In those circumstances, I find it completely disingenuous for the police to suggest that in taking a statement from Mr. David, they were unaware that they might be breaching privilege. The situation before the police was fraught with risk. Mr. David was a disbarred lawyer and therefore not likely subject to sanction. The police were actively seeking information about his work for persons who were believed to be his clients. They enacted no safeguards in doing so. Furthermore, in an act which I can only describe as indefensible, the police offered Mr. David immunity from prosecution for giving information against the applicants. That

offer was put forward, and accepted, as an inducement. Whether it was enforceable is hardly the point.

[97] In my view the facts before me point to only two possibilities: either the police knowingly proceeded in a way to purposefully avoid the *Lavallee* process; or in the alternative, they wilfully blinded themselves to the reality of the situation. Neither scenario amounts to good faith on their part.

[98] I acknowledge that this was not a "typical" *Lavallee* situation, of a law office search, or a search for solicitor-client documents. But as I have already said in my first decision, that is a distinction without a difference. The *Lavallee* rules exist to protect solicitor-client privilege, which must surely extend to information in a lawyer's head, as much as to information in a lawyer's file or trust account.

[99] It is not for the police (or anyone else) to seek out and handle presumptively privileged information as they see fit. This is inappropriate even if the police sincerely believe that "criminality" exists. It is inappropriate even if the police are unconvinced that a person is actually a lawyer's client. Those questions are solely for a court to answer.

[100] Let us imagine a different scenario: suppose the police entered a law office and searched without warrant, seized documents, reviewed them in detail, used the

information in further warrants, and circulated the information to their witnesses and to the co-accused. In such a case, would we simply "vet" the evidence from the Crown case, and proceed with the trial? Would that address the harm, past and ongoing? In my view, it would not.

[101] To continue with this analogy, let us further assume the police were to suggest that they had acted in this manner because they were, in their own analysis, convinced that the lawyer was engaged in criminal activity with the accused. Would that excuse the breach, or the remedy? Again the answer is clear, in my view: obviously not. Such is not their call to make.

[102] If *Lavallee* is to have any meaning at all, it must be applied consistently. It cannot be compromised on a case-by-case basis. Such will lead, little by little, to a complete erosion of its principles and protections. The courts must actively lead in this area of the law, to make it clear to investigating authorities that solicitor-client privilege is an area requiring utmost caution and care.

[103] In conclusion, I reject the Crown's 24(2) proposal of "vetting" the statement of Mark David and related documents. I find it would be a serious violation of the *Lavallee* process to proceed in such a fashion, when the Crown has seen the

information. The *Lavallee* process set down by the Supreme Court is clear. It provides no alternative method. I see no authority for creating one.

Conclusion

[104] In my view, this case meets the first category of the *Babos* test. Presumptive solicitor-client privilege has been breached, and in my view, it cannot be remedied in any way which allows this prosecution to continue. The state's conduct in the taking of a statement from Mark David, and disseminating it as they did, in my view has seriously compromised the fairness of the applicants' trial. The breach cannot be remedied and will be manifested, perpetuated or aggravated through the conduct of the trial.

[105] In addition, or in the alternative, I also find that the second branch of *Babos* is met on the facts of this case; perhaps even more conclusively than the first branch. Even if there is no threat to trial fairness in this case, in my view this fact scenario poses a serious and palpable risk of undermining the integrity of the judicial process. Solicitor-client privilege is a very important principle of fundamental justice, a privilege to be jealously protected by our judicial system. If I were to allow this prosecution to proceed in these circumstances, I firmly believe that the integrity of the administration of justice, and the reputation of our system

of justice, would be harmed. The message to the public would be that even such a blatant attack on solicitor-client privilege would have no effective remedy; and that even such a prosecution soldiers on.

[106] My conclusion is not a satisfying one. I consider this to be a very unfortunate result, in the sense that it precludes a trial of the accused on the merits of this case. That is never a desirable outcome. In an effort to avoid that result, I have extensively considered other options. I simply am not satisfied that any other remedy would address the harm here. I therefore order a stay of these proceedings.

Boudreau, J.