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Solicitor-Client Privilege in *Westra* and *Wyoming* – Artificial Linguistic Pigeonholes and the Inappropriate Prioritization of Truth-Seeking

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Cases Considered:

Westra Law Office (Re), 2009 ABQB

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In *Westra Law Office (Re)*, 2009 ABQB 391 ("*Westra*"), the Alberta Court of Queen's Bench recently had an opportunity again to consider the scope of solicitor-client privilege. The decision was founded on several grounds, only one of which interests us here, namely that involving the scope of solicitor-client privilege.

The Court gave three bases for disclosure: the crime-fraud exception; what the Court calls the loss of confidentiality consequent upon the clients' decision to retain joint counsel; and that the documents simply are not privileged. The Court was likely correct on the first, therefore, the ultimate decision is likely correct. It is on that basis that the decision should have been made. The problem is that the Court very clearly made its prime decision on the basis described above: that all of these records constitute actions not communications. It is the latter that interests us here.

Over the last decade, the Supreme Court of Canada has clarified the doctrine of solicitor-client privilege, expanded it, and placed it high among other fundamental principles of justice. That Court has used high-minded rhetoric, emphasizing and re-emphasizing the systemic importance of solicitor-client privilege. It is, the Supreme Court of Canada says, the most jealously guarded of all class privileges and comes as close to absolute as anything in Canadian law.

Despite those strong statements, there exists a series of self-referencing lower court decisions that seek to narrow that principle, that effectively turn it into a semantic plaything. The most recent of those decisions is *Westra*. In that decision in 2009 and in the 2008 decision of *Wyoming Machinery Company* v. *Roch*, 2008 ABQB 136 ("*Wyoming*"), the same Court determined that an assertion of solicitor-client privilege over documents in the lawyer's file failed on the basis that the documents represented an "action" by the lawyer rather than a "communication". That distinction is essentially meaningless, yet it has been repeated by several Courts who truly appear to believe that one's actions as counsel can be objectively distinguished from one's communications, forgetting perhaps that on that superficial linguistic basis speaking and writing - both acts - might not be privileged. Indeed, that is the result in several cases, as documents written or created by lawyers or their staff have come to be characterized as "facts", not communications, and have been found not to be protected by solicitor-client privilege.

The effect of the distinction that renders a lawyer's actions non-privileged and his or her communications privileged is to create a discretion in Chambers Justices that permits the effective elimination of solicitor-client privilege in any case in which that judge believes that the assertion of privilege unjustly interferes with the truth-seeking function of the judicial process. It turns a fundamental class privilege that benefits and legitimizes the legal system generally into a case-by-case determination that undermines systemic concerns in the interests of a subjective determination of "justice" in the instant case.

Facts

In *Westra*, a search warrant of a solicitor's office was granted in relation to an allegedly fraudulent real estate transaction. The solicitor had acted for the vendor, purchaser, and the mortgage lender on the transaction. Following a complaint by the purchaser, an investigation was commenced and a search warrant obtained on the basis that there were reasonable grounds to believe that the vendor and the solicitor had taken part in mortgage fraud. The vendor had apparently posed as a real estate agent on behalf of an absent owner and allegedly misrepresented the value of the property, inducing the purchaser to obtain a mortgage with a value in excess of the true value of the property. Pursuant to the search warrant, the police seized documents relating the real estate transaction including trust account ledgers, accounting records, and computer records from the solicitor's office. The Attorney General of Alberta applied for a determination as to whether the documents under the search warrant were protected by solicitor-client privilege.

The Court ruled that they were not, stating, at paragraph 34:

> [34] I conclude in the present case that documents pertaining to the real estate transaction and related documents, including accounts and ledgers, are not clothed with solicitor-client privilege ***as they are actions rather than communications directly relating to the seeking, formulating or giving of legal advice***. For this reason, the documents in the files seized from the Westra Law Office must be disclosed. [***emphasis added***]

Solicitor-Client Privilege

In *Foster Wheeler Power Co.* v. *Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, LeBel J. for a unanimous Court said the following regarding solicitor-client privilege, at paragraph 34:

> 34 Although the relevant jurisprudence consists for the most part of criminal law cases, it still clearly establishes the fundamental importance of solicitor-client privilege as an evidentiary rule, a civil right of supreme importance and a principle of fundamental justice in Canadian law that serves to both protect the essential interests of clients and ensure the smooth operation of Canada's legal system, as stressed by Arbour J. in *Lavallee, Rackel & Heintz* v. *Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 49 (see also *Maranda*, *supra*, at para. 11). The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients. Protecting the integrity of this relationship is itself recognized as indispensable to the continued existence and effective operation of Canada's legal system. It ensures that clients are represented effectively and that the legal information required for that purpose can be communicated in a full and frank manner (*R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289, *per* Lamer C.J.; Royer, *supra*, at pp. 891-92).

Solicitor-client privilege is a principle of fundamental justice and a civil right recognized as serving systemic purpose of fundamental importance. That being the case, it is best served both by very clear rules and by clearly-defined exceptions that should not be subject to discretion on a case-by-case basis, particularly where the discretion being exercised is being exercised in an attempt to ensure that the so-called truth in the particular case being adjudicated appears to the judge to require the evidence's admission, as was the case before the Court in both *Westra* and *Wyoming*.

In *R.* v. *McClure*, [2001] 1 S.C.R. 445, Major J., for a unanimous Court stated that principle in no uncertain terms at paragraphs 34 and 35:

> 34 Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. *Jones*, *supra*, examined whether the privilege should be displaced in the interest of protecting the safety of the public, *per* Cory J. at para. 51:
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> > Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to ***clearly defined exceptions.*** The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.
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> 35 However, solicitor-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.*** [***emphasis added***]

All of that was again confirmed by the Supreme Court of Canada in *Pritchard* v. *Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31, at paragraphs 14 through 18, again clearly eliminating the discretion of a court to undermine privilege by way of some kind of case-by-case balancing as was done by the Court in *Wyoming*, as follows:

> 14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 46.
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> 15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837, as: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, at p. 834.
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> 16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to

communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, *supra*, at p. 835.

17 As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 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.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

18 In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*:

> . . . solicitor-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. [Emphasis in original.]
> (Arbour J. in *Lavallee*, *supra*, at para. 36, citing Major J. in *McClure*, at para. 35.)

The Way Out: "Non-Communications" – "Acts" or "Facts"

The same Court that decided *Westra* in 2009 decided *Wyoming* in 2008. In the latter case, the Court erroneously set out the basis for establishing solicitor-client privilege as the four-point "Wigmore" test, that (at paragraph 15): "(1) the communication must originate in a confidence; (2) the confidence must be essential to the relationship in which the communication arises; (3) the relationship must be one which should be "sedulously fostered" in the public good; and (4) the interests served by protecting the communications from disclosure must outweigh the interest of pursuing the truth and disposing correctly of the litigation."

Since at least the 1991 decision of the Supreme Court of Canada in *R.* v. *Gruenke*, [1991] 3 S.C.R. 263, it has been clear that the Wigmore test is not applied to a determination of solicitor-client privilege, which is properly considered a "blanket" or "class" privilege, but is applied only to judicial determinations as to whether a form of privilege has arisen that would justify exclusion of otherwise relevant, reliable, and admissible evidence on a case-by-case basis. That unique type of privilege, which is essentially a rule of exclusion and is not to be misunderstood as a means of admitting otherwise privileged information is known as "case-by-case" privilege. In *Gruenke*, Lamer C.J., for the majority said, at 286:

> Before delving into an analysis of the issues raised by this appeal, I think it is important to clarify the terminology being used in this case. The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the

> communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category (see: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 and *Solosky v. The Queen*, [1980] 1 S.C.R. 821). The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.

That very clear distinction was confirmed in 2001 by the Supreme Court of Canada in *McClure*, *supra*, at paragraphs 26 to 28:

> 26 The law recognizes a number of communications as worthy of confidentiality. The protection of these communications serves a public interest and they are generally referred to as privileged.
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> 27 There are currently two recognized categories of privilege: relationships that are protected by a "class privilege" and relationships that are not protected by a class privilege but may still be protected on a "case-by-case" basis. See *R. v. Gruenke*, [1991] 3 S.C.R. 263, *per* Lamer C.J., at p. 286, for a description of "class privilege" [the Court then quoted the paragraph cited above].
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> 28 For a relationship to be protected by a class privilege, thereby warranting a *prima facie* presumption of inadmissibility, the relationship must fall within a traditionally protected class. Solicitor-client privilege, because of its unique position in our legal fabric, is the most notable example of a class privilege. Other examples of class privileges are spousal privilege (now codified in s. 4(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5) and informer privilege (which is a subset of public interest immunity).

In 2008, the Court in *Wyoming* employed a method for determining privilege that did not apply in the circumstances and that can only properly be applied in circumstances where the Court is conducting the discretionary balancing process that arises in determining if something should be said to be privileged on a case-by-case basis. The difficulty created by such an incorrect starting point is demonstrated in *Wyoming* when the Court stated, at paragraphs 32 and 33:

> [32] . . . . In this case, if the information is not disclosed, material and relevant evidence will not be adduced with the result that arriving at the truth and a just result may not be possible.
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> [33] As noted in *Ryan*, at para. 20, even if the Ledger could be considered a communication for the purposes of the Wigmore test, and the first three requirements are met, the Court must consider whether the interests served by protecting the communication from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation. Here, the imperative of truth outweighs any interest in shielding the Ledger information relating to disbursement of the missing funds.

That conclusion by the Court in *Wyoming* was inappropriate, forming as it did one of the bases for determining that the documents at issue were not subject to solicitor-client privilege, because

the doctrine of privilege and the long-standing common law policy concerning its protection has always protected certain information, certain facts, certain statements, and certain actions from disclosure and from admissibility in judicial proceedings despite the absolute certainty that the such evidence was relevant, material, *prima facie* admissible, and true.

Privilege, as a rule of evidence, is unlike most other rules of evidence, which generally seek to exclude relevant information on the basis that such information might be unreliable (if it is or appears to be, it must be excluded and never becomes "evidence"). By contrast, the exclusion of privileged information is a policy-based recognition by the legal system that "arriving at the truth", as quoted in *Wyoming*, is not an absolute value and that it does not equate to "a just result". Truth-seeking is not one of the "societal values" that is permitted to prevail over privilege in the clearly defined exceptions referred to by Cory J. as quoted in *McClure, supra*.

With privilege, the law asserts that the pursuit of truth is less important than is the systemic need for properly informed lawyers whose ability to maintain the confidentiality of privileged communications renders possible the delivery of just results, over time, in the general run of cases. When it comes to solicitor-client privilege, the "imperative" is not "getting at the truth". To the contrary, the societal and systemic imperative is in fostering open and forthright communications between solicitor and client to ensure that an officer of the Court can then assist both the Court and his or her client in permitting justice to be done.

In these "tough on crime" times it is essential to remember, as Patrick Healy (now Justice Healy) said:

> Justice has obviously failed when judgment is given on false proof, but it cannot be said that justice is always served by proof of the truth. For this reason the common law and the legislature have erected rules of policy that suspend or obstruct pursuit of truth."
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> Patrick Healy, "Admissibility, Discretion and the Truth of the Matter – Developments in the Law of Evidence: the 1993-1994 Term", 6 Supreme Ct. Law Rev (2d) 379 at 381.

Solicitor-client privilege is one of those obstacles to the truth that is simultaneously a fundamental principle of justice. The Court in *Wyoming* erred gravely in upending the analysis of solicitor-client privilege so as to ensure that evidence that it considered to be true could be disclosed and ultimately admitted into evidence.

The Court of Appeal [*Wyoming Machinery Company* v. *Roch*, 2008 ABCA 433] upheld the decision that the documents at issue in that case must be disclosed but not because they constituted "actions" rather than "communications", that they were not privileged in accordance with the Wigmore test, or that the imperative of truth-seeking trumped privilege. Rather, the Court found, very simply, that the party asserting the privilege had waived it in two distinct paragraphs of its own Statement of Defence. Having waived solicitor-client privilege, there was no need to conduct the privilege analysis.

The Court of Appeal then said something unusual at paragraph 17:

> [17] We do not wish to leave this appeal with any implication that we endorse all the propositions found in the reasons of the Chambers judge.

The Court of Appeal then, in paragraph 18, confirmed what has been said above regarding the Wigmore test, namely that it only applies to the determination of new heads or types of privilege and should not be used for established heads of privilege, the limits of which are set by rules of law [as opposed to the case-by-case exercise of discretion by judges seeking admissibility of the truth].
The Court of Appeal then said, at paragraphs 19 to 23:

> [19] Nor can one short-circuit the whole discussion of privilege by saying that it only applies to communications, and so does not apply to a solicitor's bookkeeping or money flows, on the theory that
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> (a) they are information, not communications, or
> (b) they are acts, not communications.
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> (See Reasons, paras. 17, 20, 21, 22, 31, 32.)
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> [20] Distinction (a) is almost meaningless, and would eat up the entire doctrine of privilege. The basic danger in revealing solicitor-client communications is not revealing who said it or when or how; it is revealing the contents of the secrets. Someone must be able to tell his or her lawyer safely, "I did it, and here's how and when and where I did it." See *Maranda v. Leblanc (Richer)*, 2003 SCC 67, [2003] 3 S.C.R. 193, 311 N.R. 357 (paras. 30-33) (on solicitor's account records), and the discussion in Stevenson and Côté, *Civil Procedure Handbook* 2009, p. 13 (2008).
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> [21] Distinction (b) makes more sense, but it has two limitations. The first is that very often what is sought is the lawyer's bookkeeping records or accounts to the client, not the cancelled cheques or the deposit slips. Strictly speaking, those bookkeeping records are communications, not acts.
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> [22] The second limitation to distinction (b) is more substantial and important. Lawyers usually get money for purposes ancillary to their retainer, and the purpose of their retainer is usually to
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> (a) run or defend litigation or potential litigation,
> (b) give legal advice,
> (c) protect a client in closing a deal,
> (d) negotiate a deal, or
> (e) some combination of the foregoing.
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> If legal advice, or running or defending litigation or potential litigation is the dominant purpose of the retainer, then a solicitor's accounting records ancillary to that may well be privileged. And if litigation or legal advice is a distinct part of the retainer, then the solicitor's accounting records ancillary to that distinct part may well be privileged. Conversely, if the retainer at the time of receipt of funds is merely to act as a paying agent, there might be no privilege: *Maranda v. Leblanc*, *supra*, at para. 30.
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> [23] The precise limits of that will have to be worked out through the case law. Whether these records would have been discoverable without the pleading (waiver) or agency issues, need not be decided in this case, especially as there is no evidence to do so.

The Court of Appeal's conclusions and analysis in paragraph 19 and 20 are surely correct given the above-quoted statements from the Supreme Court of Canada on privilege. The analysis in paragraphs 21 and 22 are incomplete and also either inapplicable or incorrect, but, as was stated by that Court in paragraph 23, a decision could not actually be made on the evidence available and need not have been made in any event.

What the Court of Appeal did not say, which it must now say, is that this idea, that only "communications" are protected, that if only one can find a way of describing the sought documents as "non-communications", then one can get around the doctrine of solicitor-client privilege, is pedantic, inappropriate, and undermines the essential features of solicitor-client privilege.

***Westra: Wyoming* Revisited**

In *Westra*, the Court did not again apply the Wigmore test. Instead, it applied a different four-part test focussed on "communications", as though that word, however defined, somehow constitutes the essence of getting or giving legal advice. In the Court's reasons for decision on this issue, the Court did not cite any of the above-cited Supreme Court of Canada cases, even though some of them had been referred to the Court by counsel. Nor, indeed, did it even mention the decision of the Court of Appeal in *Wyoming*. Instead, it purported to find an applicable four-part test in a 2006 decision of the Federal Court Trial Division [*Canada (Minister of National Revenue - M.N.R.) v. Reddy*, 2006 FC 277 at paras. 12 to 16 (F.C.(T.D.)), citing *B. v. Canada* (1995) 3 B.C.L.R. (3d) 363 at para. 22 (S.C.), citing the Report of the Special Committee of the Canadian Bar Association - Ontario, Regarding Solicitor-Client Privilege (1985); *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 15, citing *Solosky* at p. 834).]. The Court used the following test, at paragraph 23:

a. There must be a communication, whether oral or written;
b. The communication must be of a confidential character;
c. The communication must be between a client or his agent and a legal advisor; and
d. The communication must be directly related to the seeking, formulating or giving of legal advice.

The proper test is that set out unanimously by the Supreme Court of Canada in 2004 in *Pritchard, supra*, at paragraph 16:

> 16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, *supra*, at p. 835.

The privilege, being a principle of fundamental justice arising from the relationship between solicitor and client, is easy to establish and, as stated by Major J. above, applies as long as the communication falls within the usual and ordinary scope of the professional relationship. The list of three specific items are provided at the end of the above-quoted paragraph as exceptions to that general rule. The Court in *Westra* has again upended that statement of the law by creating, and literally interpreting, a strict four-part test for finding "privilege".

The obvious rebuttal point of the legal technician will be to point out that each of the quotations from the Supreme Court of Canada refer to "communications", that that Court has therefore ruled that only "communications" are protected, and that, of necessity, "non-communications", whether "acts" or "facts" or otherwise, are not protected from disclosure. That point is probably

not even correct definitionally. Read within the policy context as described almost since time out of mind, however, the fallacy of that pedantic rebuttal is exposed. The foundational modern common law case on this issue is *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821**,** in which a unanimous Court said the following:

> As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly stated in *Re Director of Investigation and Research and Shell Canada Ltd.* (1975), 22 C.C.C. (2d) 70, [1975] F.C. 184, at pp. 78-9:
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> > ... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.
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> The history of the privilege can be traced to the reign of Elizabeth I (see *Berd v. Lovelace* (1577), 21 E.R. 33 and *Dennis v. Codrington* (1580), 21 E.R. 53). It stemmed from respect for the 'oath and honour' of the lawyer, duty bound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in *Greenough v. Gaskell* (1833), 39 E.R. 618, at p. 620:
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> > The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).
> >
> > But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.
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> The rationale was put this way by Jessel M.R. in *Anderson v. Bank of British Columbia* (1876), 2 Ch. 644, at p. 649:
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> > The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim,

> or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, Evidence (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

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

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, *O'Shea v. Woods* [1891] P.286, at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* (1884), 14 Q.B.D. 153, in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. See *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 (B.C.S.C.); *Re Director of Investigation and Research and Shell Canada Ltd., supra*; *Re Presswood et al. and International Chemalloy Corp.* (1975), 65 D.L.R. (3d) 228 (Ont. H.C.); *Re Borden and Elliot and The Queen* (1975), 30 C.C.C. (2d) 337, (affirmed on other grounds (1975), 30 C.C.C. (2d) 345 (Ont. C.A.); *Re BX Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14 (B.C.C.A.); Re *B and The Queen* (1977), 36 C.C.C. 2(d) 235 (Ont. Prov. Ct.).

While there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, I do not think the concept has been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. . . .

There is almost no doubt in my mind that, in light of the broad and important purpose of this doctrine, it never occurred to any of the judges cited above, and particularly not to Chief Justice Jackett, who speaks above of the client being free to disclose to his or her lawyer "all his facts and thoughts" that later courts could interpret the word "communications" as being somehow narrow, as a characteristic that could be employed as a means of emasculating privilege, as providing a semantic and definitional trick around which one need only argue in order to cause the disclosure of all such confidential "facts" or "actions".

In *Westra*, the Court concluded that the trust account ledgers on the solicitor's file were not clothed with privilege since they represented a record of actions by the solicitor rather than communications with the client. The Court opined that evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction – not a communication. Knowing that a lawyer cannot move trust funds without a client's instructions, express or implied, this conclusion makes no sense. The "actions" of receiving trust funds, of moving them into the trust account, of filling out the trust cheque requisition, of preparing the cheque, of signing the cheque, of delivering it to its recipient, and of recording those trans- "actions" in the ledger are all done on advice by the lawyer and on instructions by the client, and thus as a consequence of "communications". The Court erred.

The result of the Court's conclusion was that "computer hardware", without any description of its contents, was disclosed. Also disclosed were all of the accounting records and the real estate transaction documents, listed by the Court as: land titles documents, statements of receipts and disbursements, mortgage documents, the transfer of land and associated documents, statements of adjustments, taxation documents, residential real estate purchase contract, the solicitor's final report, instructions to the solicitor from one of the parties, and correspondence between the parties and the law firm.

Fact or Action vs. Communication: A Problematic Dichotomy

In *Westra*, the Court did not actually analyze the documents in issue, although it is obvious that it looked at them. The Court's analysis on this issue consists of a description of the documents (above), the four-part test (above), a series of quotations from and references to other cases that have similarly analyzed other real estate transaction documents in other matters, and a conclusion.

The series of cases relied upon all conclude that certain documents are not privileged because they are either facts or acts and not communications. That dichotomy can be traced to a 1983 decision of the Ontario Divisional Court: *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.) ("*Greymac*"). *Greymac* stands for the proposition that if a record is characterized as a fact or act rather than a communication, it is not protected by solicitor-client privilege. *Greymac* concerned whether solicitor-client privilege protected a solicitor from answering questions as to the movement of funds into and out of his trust account. The court concluded that it did not on the basis of a test that asked whether, if the client were asked the question, he could refuse to answer it. There is a body of case law dealing with solicitor trust accounts (especially in the context of real estate transactions) which relies on *Greymac*. *Greymac* is still frequently cited as a leading case. It has been cited in support of other Alberta decisions regarding solicitor-client privilege: *Matthison v. Odishaw*, 1999 ABQB 207; *Re Murphy*, 1998 ABQB 695, 229 A.R. 157; and in *Bank of Montreal v. Lysak*, 2003 ABQB 200, 337 A.R. 150.

The distinction between a fact and a communication has been criticized by both courts and academic commentators. In Sopinka, Lederman & Bryan*t: The Law of Evidence in Canada*, 3d ed. [Markham: LexisNexis, 2009], the authors caution at 932 that "[t]he distinction between 'fact' and 'communication' is often a difficult one and courts should be wary of drawing the line too fine lest the privilege be seriously emasculated."

The Court of Appeal's comments in *Wyoming* suggest that a functional approach to trust account records is called for when evaluating solicitor-client privilege. Where a solicitor is merely acting as a financial conduit or a "paying agent" of the client, solicitor-client privilege should not be

found. An example is where, to avoid creditors, a client provides a lawyer with the entire contents of its bank account, then, invoice by invoice, asks the law firm to pay its creditors. There is nothing privileged about each of those payments to the client's creditors: the firm has become the client's payables department. The client's instructions are privileged, as is the advice regarding the efficacy of this concept as a means of avoiding creditors. Further, any payments to the law firm out of such a fund for its services are privileged. The remainder is probably not. Why? Because the purpose of solicitor-client privilege is to protect and enable the provision of legal advice. Where there is no legal advice, broadly understood, there can be no privilege. The answer depends, not on the type of document, whether a cheque, a deposit slip, or a trust ledger, but on whether that document is part of the getting or giving of legal advice, something that is a matter of evidence, not presumption.

The fact/communication or action/communication dichotomy does not capture the nub of the problem; rather, it creates a discretion that permits the emasculation of privilege on the basis of the breadth of one's understanding of "communication", whether verb or noun.

If any of the documents disclosed by the Court in *Westra* are not privileged, it is because they do not constitute part of the legal advice provided by the law firm to the client [Or because privilege has otherwise been waived, as with the delivery of the statement of adjustments, for example, to the other client's lawyer. Draft versions of such statements remain privileged, even though they constitute "actions", whether incorrect, incomplete, or false ones.] No evidence regarding these documents is available in the text of the decision.

In my opinion, that they are on the solicitor's file and that the solicitor was retained for the purpose of conducting a real estate transaction renders the documents privileged unless they are shown not to be by way of, as *Solosky* counsels, a document by document analysis used to show either that they constitute part of the legal advice or that they do not. The burden of proving privilege remains on the party asserting it, but the requirement of proof is as described by the Court in *Solosky* and not as required in *Westra*.

Is a trust ledger privileged? That question cannot be answered in the abstract but only in relation to the retainer (if any). That a trust ledger has been found by another Court in another case not to be privileged is not a reason to determine that such a ledger is therefore not privileged. The line of cases cited by the Court in *Westra* appears on the verge of determining that real estate transaction documents generally are not privileged, by presumption. Such a presumption would be nonsense.

Drawing a line as to exactly when solicitor-client privilege should begin and end is a matter of judgment and discretion and it may even sometimes be difficult to determine. Labeling a document as being the result of an act or a communication is the pigeon-holers way out. The correct approach focusses on the underlying purpose of the privilege (protecting, enabling, and ensuring completeness in communications as between lawyer and client in respect of legal advice) not on artificial linguistic considerations.

That that line of cases continues to exist is striking considering the decision of the Supreme Court of Canada in *Maranda v. Richter*, 2003 SCC 67, [2003] 3 S.C.R. 193 ("*Maranda*"). *Maranda* concerned whether information relating to amount of legal fees and disbursements billed to the client was protected by solicitor-client privilege. The police suspected the solicitor's client of being involved in drug trafficking and money laundering. They sought to obtain information about the amount of legal fees and disbursements paid by the client, arguing that this

was neutral information of a factual nature that was not covered by solicitor-client privilege. The Quebec Court of Appeal agreed, relying heavily on the fact/communication dichotomy. The Quebec Court of Appeal concluded that disclosure of the amount of fees paid would not jeopardize the fundamental purpose of solicitor-client privilege, which that Court correctly said is to create an environment where the client can freely confide in the lawyer for the purpose of obtaining legal advice.

The Supreme Court disagreed and allowed the appeal. Lebel J., writing for eight justices, concluded at paragraph 32 that "issues relating to the calculation and payment of fees constitute an important element" of the solicitor-client relationship and could not be readily separated from the provision of legal advice. Therefore, as a general rule, such information will protected by solicitor-client privilege. When considering whether the amount of legal fees is protected by solicitor-client privilege, Lebel J. said the following (at paras. 30-32):

> 30 That rule cannot be based on the distinction between facts and communication. The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence (*Stevens*, *supra*, at para. 25). It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for transfers of funds (*Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.); *Joubert*, *supra*).
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> 31 However, the distinction does not justify entirely separating the payment of a lawyer's bill of account, which is characterized as a fact, from acts of communication, which are regarded as the only real subject of the privilege. Sopinka, Lederman and Bryant, *supra*, highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, §14.53):
>
> > The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.
>
> 32 While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in *Mierzwinski*, there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties. The fact that such issues are present frequently necessitates a discussion of the nature of the services and the manner in which they will be performed. The legislation and codes of professional ethics that govern the members of law societies in Canada include often complex mechanisms for defining the obligations and rights of the parties in this respect. The applicable legislation and regulations include strict rules regarding accounting and record-keeping, an obligation to submit detailed accounts to the client, and mechanisms for resolving disputes that arise in that respect (*Act respecting the Barreau du Québec*, R.S.Q., c. B-1, s. 75; *By-law respecting accounting and trust accounts of advocates*, R.R.Q. 1981, c. B-1, r. 3; *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, ss. 3.03.03 and 3.08.05; *Regulation respecting the conciliation and arbitration procedure for the accounts of advocates*, (1994) 126 O.G. II, 4691). The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client

> relationship and of what transpires within it. That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.

For reasons known only to them, including the Court that decided *Westra* without distinguishing either *Wyoming* or *Maranda*, some lower court decisions appear generally to regard *Greymac* as expressing the proper statement of law, rather than *Maranda* [As opposed to recognizing the correctness of the result in *Greymac*, as the *Maranda* Court did, much as I, on other grounds, recognize the correctness of the result in both *Wyoming* and *Westra*. It is only the reasoning in those cases that is flawed and, then, only on the issue discussed here, which is fundamental.]

For example, in *Canada (Minister of National Revenue) v. Reddy*, 2006 FC 277, 146 A.C.W.S. (3d) 568, Shore J. stated at para. 15 that the distinction between an act/fact and a communication "has not been removed by the Supreme Court of Canada decisions in *Lavallee, Rackel & Heintz v. Canada* and *Maranda v. Richter*". The same conclusion regarding the continued validity of *Greymac* was reached in *Wirick (Re)*, 2005 BCSC 1821, 51 B.C.L.R. (4th) 193 and in *Canada (Minister of National Revenue) v. Singh*, 2005 FC 1538, 143 A.C.W.S. (3d) 1132.

All of them are incorrect. *Maranda* eliminates the possibility of the facile analysis employed in *Greymac* and in all the cases that have followed it, including *Westra*. It did not need to, of course, for such an approach has, with all due respect to those who disagree, not been available on our law to chambers Justices since the decision in *Solosky* at the latest. The proper approach is that taken in *Maranda* applying the test laid out in *McClure*.