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Client Rights and Lawyers' Files

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Case commented on: *Royal Bank of Canada v Kaddoura*, 2013 ABQB 630

In a recent decision, Master Prowse held that a client who sues a lawyer may obtain production of documents from the files of other clients of the lawyer. The production of specific documents may be resisted on the basis of solicitor-client privilege. Master Prowse did not, however, impose any requirement that those clients be given notice of the production of documents from their files, did not consider whether the documents contain confidential (as opposed to privileged) information, whether the documents are properly considered to be in the "control" of the lawyer, or assessment of the risk of prejudice to the legal interests of those clients from disclosure. In short, the judgment appeared to give no weight or consideration to those clients. This result is unfortunate, and inconsistent with the usual respect afforded to the confidentiality of lawyer-client communications.

The context of Master Prowse's decision was two lawsuits brought against their lawyers by "straw buyers". As Master Prowse explains, straw buyers are individuals who are used by a "mastermind" to buy property for an inflated price. The mastermind already purchased the property for a lower price, but the straw buyer does not know that. The mastermind receives the straw buyer's payment for the property and absconds with the profit; the straw buyer is left with a mortgage debt and ownership of a property that does not have a value sufficient to discharge the liability. In these circumstances, the straw buyer may look to the lawyer who did the transaction for redress, since the lawyer generally "represents the straw buyer, the vendor (i.e., the mastermind or the agent of the mastermind) and the lender" (at para 4). The straw buyer will allege that he or she received "little or no legal advice from the lawyer" while the lawyer will respond that he or she provided "fulsome advice to the straw buyers, and that the straw buyers deceived the lawyer by not telling him/her that they in fact have no intention of… owning the house" (at para 4).

In the particular litigation at issue here, the Royal Bank sued a straw buyer, Kaddoura, who brought third party proceedings against his lawyer, Harris Hanson. The Royal Bank also sued the straw buyer Eade, who commenced a separate legal action against his lawyer Linda Anderson.

During discoveries, questions were asked which raised the issue of whether "prior files handled by Mr. Hanson or Ms. Anderson" had involved "the same mastermind, agent or loan officer" (at para 28). The parties then sought direction from the court as to whether that information was "relevant and material" to the actions (at para 28). In considering that application Master Prowse determined that the real issue to be considered was "whether these files were producible under Rule 5.5" which sets out the requirements on parties to produce affidavits of records (at paras 8 and 29). Master Prowse took this position on the basis that "lawyers being sued should not be

able to take the position that straw buyers are engaging in a 'fishing expedition' in asking about prior files when in fact it is the obligation of those lawyers to produce those prior files (subject to solicitor and client privilege)" (at para 30).

Master Prowse determined that the defendant lawyers should identify past transactions involving the "same mastermind, agent of the mastermind or loans officer of the lender was involved" (at para 11). Documents "regarding previous transactions, if they exist, are in my view relevant and producible under Part 5 of the *Rules of Court*" (at para 25). Claims that documents are privileged will be assessed in light of the particular documents, rather than in an abstract way.

One can understand the rationale for Master Prowse's decision. It certainly seems likely that the existence of past transactions involving similar "masterminds" would be probative of whether the lawyer ought to be considered in some way responsible for the straw buyer's plight. As demonstrated by the law on solicitor-client privilege, however, the mere fact that the disclosure of information may serve some beneficial purpose does not mean that that information ought to be disclosed. Absent exceptional circumstances, we allow clients to have private communication with their lawyers, and we do not disclose the nature of those communications even if some public interest would be served by doing so.

Master Prowse's decision does not reflect that general stance, instead reflecting a troubling lack of attention to the interests of those third party clients. For starters, documents in the file that were provided by the client belong to that client; as noted in the Law Society of Upper Canada's recent *Guide to Retention and Destruction of Closed Client Files* (here), such documents are to be returned to a client upon file closure. As indicated by Rule 2.05(1)(a) of the Law Society of Alberta *Code of Professional Conduct* (here), the lawyer has a duty to preserve the client's property, including

> original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents.

The production of such documents ought therefore be governed by the rules applying to production of information from third parties (i.e., Rule 5.13); the fact that they are in the lawyer's file does not place them in the lawyer's "control" given that the lawyer holds them as a professional fiduciary.

In addition, information contained in the file may be confidential to the client even if not privileged (because, e.g., it was not communicated directly for the purpose of obtaining legal advice, or because it is known to a third party). While confidential information may be producible, courts are normally still careful about disrupting the zone of privacy and confidentiality that surrounds the lawyer-client relationship. As the Supreme Court has consistently recognized in the context of solicitor-client privilege, the confidentiality of the lawyer-client relationship is essential to permitting access to counsel, and ought not be lightly interfered with. While confidentiality does not have the same status as privilege, courts have viewed it as something that warrants a degree of respect (see, e.g., the money-laundering cases, the most recent of which was discussed here: "Independence of the bar and the prevention of money-laundering")

It may be that client confidentiality can be protected on the basis that very little information in the third party client's file will be both relevant and material and not privileged. Master Prowse's reasons do not, however, provide the third party client with any certainty on that point. The third party client must simply rely on the judgment of her former lawyer and that lawyer's lawyer, who of course are making decisions in the context of the former lawyer's litigation, which may conflict with the interests of the third party client.

The key point I am making here is that in any circumstances in which a court or party is producing information from a client's legal file, and is doing so without representation of that client's interests, there are reasons to be seriously concerned. When I teach ethics to my students I generally advise them that the default position is that information in a lawyer's file is privileged. Master Prowse has turned that position on its head, presuming that the information is not privileged unless that claim is made and sustained. That outcome is unfortunate. At minimum, the client whose information may be producible as a consequence of a ruling such as this ought to be notified, and given the opportunity to object. More substantially, the default position should be that information in a lawyer-client file is not producible, absent some basis for production of specific information in that file.

In this case, the less problematic outcome would have been simply to have had the lawyers answer the question they were posed in discovery: have you acted in cases in the past involving this mastermind? If the lawyer had been, then they could be put to the rebuttal of the logical inference that they had reason to be suspicious about the transactions involving these straw buyers, and given them better advice than they did. A more general production of the files of third party clients would be unnecessary, and the interests of those clients respected.