In the Court of Appeal of Alberta

Citation: Milot Law v Sittler, 2025 ABCA 72

Date: 20250228
Docket: 2303-0176AC
Registry: Edmonton

Between:

Milot Law Professional Corporation, as assignee of BDO Canada Limited's interest in these proceedings pursuant to section 38 of the Bankruptcy and Insolvency Act

Respondent
(Cross-Appellant)

- and –

Heather M. Sittler and Sheldon L. Sittler

Appellants
(Cross-Respondents)

The Court:

The Honourable Justice Anne Kirker
The Honourable Justice Tamara Friesen
The Honourable Justice Karan Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice G.S. Dunlop
Dated the 23rd day of August, 2023
Filed the 6th day of November, 2023
Amended the 8th day of March, 2024
Filed the 18th day of March, 2024
(Docket: B203 417903)

2025 ABCA 72 (CanLII)

Memorandum of Judgment

The Court:

Introduction

[1] On a preliminary application before him related to bankruptcy proceedings, the chambers judge found that Duane Milot, principal of the respondent Milot Law Professional Corporation, did not breach any duties of privilege and/or confidentiality by disclosing to the bankruptcy trustee information and records he obtained while representing Heather and Sheldon Sittler in pre-bankruptcy tax litigation, with one exception: an email from Mr Milot to the Sittlers that the chambers judge found contained legal advice.

[2] The Sittlers appeal the chambers judge's finding that Milot Law's actions did not breach privilege and seek a declaration that no party in the bankruptcy proceedings may rely on the information disclosed to the trustee by Milot Law. Milot Law cross-appeals the chambers judge's finding that the email constituted legal advice, and applies to adduce new evidence, most significantly an unredacted version of the impugned email.

[3] For the reasons below, the appeal is dismissed and the cross-appeal is allowed. The application to admit new evidence is granted in part.

Background

[4] Heather and Sheldon Sittler were clients of DeMara Consulting Inc, a company involved in a large-scale tax evasion scheme. The Sittlers refiled their taxes following the discovery of the DeMara scheme and received a gross negligence penalty from Canada Revenue Agency. They hired Duane Milot of Milot Law to act as their counsel in dealing with Canada Revenue Agency and anticipated litigation. At the time the Sittlers retained Milot Law, they had an outstanding tax debt of approximately $4 million. Over the course of their professional relationship with Mr Milot, they became indebted to Milot Law for legal fees totalling $167,109.17. That relationship ended in April 2017.

[5] On September 7, 2018, the Sittlers assigned themselves into bankruptcy. Two months prior to this, the Sittlers had transferred their collective 82% shares in a numbered Alberta company to a trust called the Sittler Family Trust.

[6] Following the Sittlers' assignment into bankruptcy, Milot Law became one of their creditors under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. In his capacity as a creditor, Mr Milot received correspondence from the bankruptcy trustee with documents which included the Sittlers' bankruptcy Statements of Affairs. It was clear to Mr Milot from reviewing the Statements of Affairs that the Sittlers had not disclosed all their assets to the trustee. This placed

2025 ABCA 72 (CanLII)

Mr Milot, an experienced lawyer, in an unenviable position. He knew the Sittlers had not met their disclosure obligations to the bankruptcy trustee pursuant to the *Act*, but he had obtained the information about the Sittler Family Trust, as well as other undisclosed financial information, while working as the Sittlers' lawyer.

2025 ABCA 72 (CanLII)

[7] On October 31, 2018, Milot Law sent a letter to the Sittlers and their then counsel. The letter said that if all assets were not disclosed, Milot Law would provide information about the Sittlers' assets to the trustee. The Sittlers did not respond. Prior to taking further action, Mr Milot consulted with the practice advisor for the Law Society of Ontario, who reminded him of Rule 3.3-5 of the *Rules of Professional Conduct*. That Rule states: "A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required." Rule 3.3-5 of the Law Society of Alberta's *Code of Conduct* is the same.

[8] On December 19, 2018, after receiving this advice from the Law Society of Ontario, Mr Milot provided the trustee with previously undisclosed records and other information about the Sittlers' assets and transfers of assets, in redacted form.

[9] The bankruptcy trustee then requested further disclosure from the Sittlers. On April 10, 2019, the Sittlers provided the bankruptcy trustee with more detailed disclosure of their assets. On October 15, 2019, the Sittlers filed an affidavit in their bankruptcy actions with additional information on their assets and transfers of assets. On August 3, 2020, Heather Sittler provided the bankruptcy trustee with information about certain trust deeds, and the Sittlers' counsel then provided the trustee with copies of documents relating to the various trusts.

[10] On September 2, 2020, the bankruptcy trustee filed an application under s 96 of the *Act* with respect to alleged transfers made at undervalue; however, the trustee was unable to continue with the application because of lack of funds in the Sittlers' bankruptcy estates.

[11] On December 12, 2022, a chambers judge granted an order under s 38 of the *Act* on the application of Milot Law with respect to Heather Sittler's bankruptcy. The order authorized Milot Law to step into the shoes of the trustee in bankruptcy and pursue the s 96 application against Heather Sittler. The order provided Milot Law with the same rights and powers as the bankruptcy trustee to require delivery of books and records and conduct examinations in accordance with ss 163(1) and 164 of the *Act*. On the same date, Canada Revenue Agency obtained a similar s 38 order in Sheldon Sittler's bankruptcy.

[12] On August 23, 2023, Milot Law applied to compel Heather Sittler to attend questioning, and the Sittlers brought a cross-application to set aside the s 38 order and to disallow Milot Law

or any other party from relying on the Sittlers' "privileged information" in the bankruptcy proceeding.

Chambers Judge's decisions

[13] In an oral decision delivered August 23, 2023, the chambers judge ordered questioning to occur and dismissed the Sittlers' cross-application. He found that the Sittlers' assignment into bankruptcy triggered extensive disclosure obligations under the *Act*, particularly as set out in s 158, and that "almost everything that Mr. Milot disclosed to the trustee and in an affidavit filed in Court is information and documents the Sittlers were obligated to disclose to the trustee under section 158".

[14] The chambers judge observed that once the Sittlers assigned themselves into bankruptcy, Mr Milot, as their former lawyer, could have been examined by the trustee and if examined, would have been required to disclose everything about the Sittlers' property relating to their trusts or corporate holdings "or anything else", except legal advice and communications disclosed in the course of seeking legal advice. Referring to ***Re Chilcott and Clarkson Co Ltd*** (1984), 48 OR (2d) 545 at 548 (CA) he found that in the context of bankruptcy proceedings such "communications with respect to property are not privileged". Upon the Sittlers' assignment into bankruptcy, Milot Law also became entitled to "voluntarily" disclose information about the Sittlers' property to their trustee and the Court.

[15] The chambers judge reviewed the material before him and found that Mr Milot had not disclosed legal advice, with the exception of an email from Mr Milot to the Sittlers on May 13, 2016 at 5:18 pm. The email concerned a second mortgage on property owned by the Sittlers through a trust. The chambers judge said that one exception "was not nothing" and that Mr Milot should have redacted "a couple of lines" in the email. In failing to redact those lines in the email, he had "breached privilege to that limited extent".

[16] On October 17, 2023, Milot Law applied before the chambers judge for an order per Rule 9.13 of the *Alberta Rules of Court* varying the August 23, 2023 order and seeking to adduce additional evidence in support, being the unredacted email string containing the impugned email. The chambers judge was not persuaded he should hear more evidence or modify his judgment and dismissed both applications. On March 8, 2024, he granted an amended order setting out his findings with respect to Mr Milot's disclosure, including the email of May 13, 2016.

[17] The parties were granted leave to appeal and cross-appeal the August 23, 2023 order as amended: 2024 ABCA 116. The chambers judge's decision in relation to the Rule 9.13 application was subsumed in the grant of leave to appeal the amended order. The Sittlers do not take issue with the chambers judge's refusal to set aside the s 38 order on appeal.

2025 ABCA 72 (CanLII)

2025 ABCA 72 (CanLII)

Analysis

General principles

[18] The right to be able to communicate in confidence with one's lawyer is a fundamental civil and legal right, founded on the unique relationship of solicitor and client. It ensures full and frank discussions in pursuit of the best possible legal advice and has long been recognized as fundamental to the due administration of justice: ***Solosky v The Queen***, [1980] 1 SCR 821 at 833-834, 839, 105 DLR (3d) 745; ***Descôteaux v Mierzwinski***, [1982] 1 SCR 860 at 886, 141 DLR (3d) 590; ***Wong v Luu***, 2015 BCCA 159 at para 32, 30 BCAC 271, leave ref'd 2016 CanLII 3182 (SCC). The law protects this right in a variety of ways, but most importantly through restricting the use and admissibility of privileged communications and enforcing a lawyer's fiduciary duty of confidentiality.

[19] The party asserting solicitor-client privilege bears the onus of proving it. To prove the existence of solicitor-client privilege, the document in question must constitute:

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.

Solosky at 837; ***Pritchard v Ontario (Human Rights Commission)***, 2004 SCC 31 at para 15, [2004] 1 SCR 809.

[20] Once established, the right to solicitor-client privilege can only be waived by the client: ***0678786 BC Ltd v Bennett Jones LLP***, 2021 ABCA 62 at para 40, 460 DLR (4th) 464, leave ref'd 2021 CanLII 94827 (SCC). The right may be waived expressly, or by inference "where the client takes a position fundamentally inconsistent with the privilege": ***Bennett Jones*** at para 40; ***Marion v Wawanesa Mutual Insurance Company***, 2004 ABCA 213 at para 8, 27 Alta LR (4th) 201.

[21] Under the umbrella of privilege in the context of a solicitor-client relationship, there are two main categories of privilege, although others, such as settlement privilege, also exist. The two main categories are legal advice and litigation. An assertion of solicitor-client privilege based on legal advice is interpreted broadly as extending to a "continuum of communication" encompassing communications directly related to the seeking or formulating of that advice: ***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at para 60, [2006] 2 SCR 319; ***The Blood Tribe v Canada (Attorney General)***, 2010 ABCA 112 at para 26, 317 DLR (4th) 634; ***TransAlta Corporation v Alberta (Environment and Parks)***, 2024 ABCA 127 at para 28, 495 DLR (4th) 424; ***Hirch v***

Lethbridge, 2024 ABCA 170 at para 30. This is the type of privilege most people are thinking of when they talk about solicitor-client privilege.

[22] Of course, clients cannot cloak financial records and business documents with "solicitor-client privilege" merely by providing them to their lawyer, even if the documents were provided to the lawyer to seek legal advice; rather, the documents must have been brought into existence specifically for that purpose: ***British Columbia Securities Commission v Branch***, [1995] 2 SCR 3 at para 43, 123 DLR (4th) 462; ***Gault Estate v Gault Estate***, 2016 ABCA 208 at para 10, 42 Alta LR (6th) 209. Such documents may also be subject to litigation privilege, which is distinct from the type of privilege attaching to legal advice. For example, accounting records based on pre-existing financial documents created for the dominant purpose of litigation are subject to litigation privilege: ***Gault Estate*** at para 10.

[23] While it is true that a bankrupt's solicitor can be compelled to disclose information about the bankrupt's "affairs, transactions and the whereabouts of his property, etc.", communications for the purpose of giving legal advice remain protected and must not be disclosed: ***Chilcott*** at 548. Both solicitor-client privilege and litigation privilege belong to the bankrupt and the trustee has no authority to waive either type of privilege: ***Wong*** at para 34; ***Bre-X Minerals Ltd (Trustee of) v Bennett Jones Verchere***, 2001 ABCA 255 at para 3, 206 DLR (4th) 280.

[24] Confidentiality and privilege are both essential components of the solicitor-client relationship. Information known to third parties is never privileged, although it may in some circumstances be considered confidential: see Adam M Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis, 2014) at ss 2.15-2.16. The duty of confidentiality is "ordinarily wider than privilege, and a lawyer may not voluntarily disclose to others any facts which he learns while representing a client": ***Clark v Law Society of Alberta***, 2000 ABCA 242 at para 23, 84 Alta LR (3d) 314.

Application to this appeal

[25] The Sittlers argue that by voluntarily disclosing their financial information as well as other impugned documents to the trustee, Mr Milot improperly breached both their solicitor-client and litigation privilege. They argue in the alternative that the information Mr Milot disclosed, even if not technically subject to solicitor-client or litigation privilege, was intended to be kept confidential. At minimum, they say Mr Milot breached his fiduciary duty of confidentiality by voluntarily providing that information to the trustee.

[26] We disagree.

[27] The ability of a trustee under the *Act* to compel a bankrupt's solicitor to disclose information about the bankrupt's financial affairs and property does not represent a statutory

2025 ABCA 72 (CanLII)

exception to solicitor-client privilege or litigation privilege; rather, it is a statutory override of the broader rules and principles surrounding lawyers' fiduciary duty to protect their clients' *confidentiality*.

2025 ABCA 72 (CanLII)

[28] The Sittlers say the information disclosed in this case included details of their shareholdings, share transfers, corporate account, property ownership, corporate financial statements and interests, a private contract trust and the Sittler Family Trust. We agree with the chambers judge that this information was *not* privileged information. It was, however, confidential information. This is important because as per this Court's decision in ***Clark*** at para 23, lawyers' duty of confidentiality bars the voluntary disclosure of facts they have learned through the solicitor-client relationship, even facts which are not otherwise privileged.

[29] In the normal course, a lawyer would not voluntarily approach a client's bankruptcy trustee to disclose any facts at all. In many circumstances, a lawyer who voluntarily discloses to a trustee non-privileged information about a client's assets, without the client's knowledge or direction, might be subject to professional sanctions and legal consequences for breach of fiduciary duties. However, that is not the situation here. Mr Milot was not only the Sittlers' former lawyer, he was also one of their creditors.

[30] Mr Milot did precisely as he should have done in the circumstances: he contacted his Law Society to seek advice about his professional conundrum. He was properly informed that it would not be a breach of his fiduciary duty to his client for him to reveal limited confidential information to the trustee as it was only through the trustee that Milot Law could try to collect the legal fees owed.

[31] Therefore, apart from the chambers judge's finding with respect to the May 13, 2016 email, which is addressed below, we see no reviewable error in the chambers judge's decision that Mr Milot did not breach any duties of privilege and/or confidentiality by disclosing to the bankruptcy trustee, and using in these court proceedings, information and records Mr Milot obtained while previously representing the Sittlers as legal counsel.

New evidence application and the impugned email

[32] While it was not a significant aspect of either counsel's submissions in the original application, the importance of the redactions Mr Milot made to the impugned email string before disclosing it to the trustee became apparent on release of the chambers judge's reasons. Mr Milot tried sincerely to *avoid* disclosing information unnecessarily. Unfortunately, this resulted in omissions which led the chambers judge to draw an entirely erroneous conclusion. In response, Mr Milot properly made an application under Rule 9.13 to place the unredacted email string before

the chambers judge for consideration. The chambers judge refused to allow the unredacted email into evidence. This was an error.

[33] We have reviewed the full context of the email string for the purposes of the new evidence application and the cross-appeal. The only possible conclusion to be drawn from reading the unredacted version of the email is that the impugned portion does not contain any legal advice and therefore, disclosing it did not breach solicitor-client privilege.

[34] The application to admit as new evidence the unredacted email string, including the May 13, 2016 reference to risk and a second mortgage, is granted. It is decisive on the issue of whether there was a breach of solicitor-client privilege. If the chambers judge had allowed Milot Law to file a copy of the unredacted email in an envelope, and had then reviewed the unredacted version privately, he could *not* have found that disclosure of the email was a breach of solicitor-client privilege.

[35] The remaining evidence included in the new evidence application is not relevant to determining the cross-appeal, and the application with respect to that evidence is dismissed.

Conclusion

[36] The appeal is dismissed, and the cross-appeal is allowed.

Appeal heard on February 7, 2025

Memorandum filed at Edmonton, Alberta
this 28th day of February, 2025

Authorized to sign for: Kirker J.A.

Friesen J.A.

Shaner J.A.

2025 ABCA 72 (CanLII)

Appearances:

D.A. England
for the Respondent

C.M. Floden
for the Appellants

2025 ABCA 72 (CanLII)