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Buying inducements must be disclosed

Lenders need to have all pertinent information to prevent mortgage fraud allegations

An Alberta court has ruled that the contents of a lawyer's file in a real estate transaction may be disclosed to the police when no legal advice was provided to the client, and the circumstances give rise to a presumption that a crime was committed.

Back in April 2007, Christopher and Roya Gour began the process of buying their first home in Edmonton. They contacted a local realtor, Sanjay Sharma, who showed them a house listed at \$405,900. He did not reveal that he was the seller as well as the agent.

When the Gours expressed concern that they would not be able to afford the renovations needed on the property, Sharma informed them that the seller would give them a "renovation credit" of \$40,000 on the purchase.

On May 1, 2007, the Gours agreed to buy the house for \$405,000 and signed the paperwork.

ResMor Trust Company agreed to provide financing for \$364,500 without knowing about the \$40,000 renovation credit. As a result, it unknowingly financed the entire purchase price.

Sharma referred the Gours to David Westra, a local lawyer who would represent seller, buyer and new mortgage lender in the transaction. The deal closed June 30, 2007, and the Gours moved in.

In 2008, the Gours filed a complaint about the transaction with the Edmonton Police Service. The police began an investigation and applied to a judge under the Criminal Code for a warrant to search the Westra law office "on the basis that there were reasonable grounds to believe that Mr. Sharma and Mr. Westra had taken part in the furtherance of a mortgage fraud."

In the search warrant application, ResMor stated that had they known about the \$40,000 credit, they would never have advanced the mortgage funds. They claimed they had been defrauded.

The search warrant was granted and executed. Various files relating to the Gour transaction were seized and sealed pending a second hearing by a judge to determine whether they were protected from disclosure to the police by solicitor-client privilege.

That hearing took place in Edmonton in April before Justice Sheila Greckol. The Crown alleged that there were reasonable and probable grounds to conclude that mortgage funds were obtained by fraud, and as a result, the files should be released to it.

ResMor and the Gours waived solicitor-client privilege, but Sharma strongly objected to the release of the transaction files and accounting records to the Crown.

As further evidence of the alleged offence, the police introduced an appraisal of the house concluding that its value at the time of the Gour purchase for \$405,000 (or \$365,000 after the \$40,000 "credit") was between \$320,000.00 and \$335,000.00.

In her 25-page judgment published last month, Justice Greckol wrote, "The Crown has met its onus of showing, on a balance of probabilities, that there has been the commission of a crime." She ruled that the documents were not protected by solicitor-client privilege and ordered that they be released for purposes of the police investigation.

Two lessons emerge from the Westra Law Office case. The first is that where a criminal offence has allegedly been committed with respect to a real estate transaction and no legal advice has been provided, the transaction files may be released to the police. The second is that when a credit against the purchase price has been arranged but not disclosed to the mortgage lender, the lender may well allege that the mortgage has been arranged by fraudulent means.

A further reminder is in order. Some builders are offering an inducement of \$15,000 as a credit against the contract purchase price. Even though this sort of inducement is perfectly legal, it is typically prepared on a separate document as an amendment to the agreement of purchase and sale.

It is imperative that buyers disclose this credit to their lenders. Failure to disclose may well be regarded as mortgage fraud.

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Westra Law Office (Re), 2009 ABQB 391 (CanLII)

Print: PDF Format

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Docket: 090083601X1

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Noteup: [Search for decisions citing this decision](#)

[Reflex Record](#) (related decisions, legislation cited and decisions cited)

Legislation cited (available on CanLII)

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- [F.H. v. McDougall](#), 2008 SCC 53 (CanLII) (2008), 297 D.L.R. (4th) 193 [2008] 11 W.W.R. 414 (2008), 61 C.R. (6th) 1 (2008), 83 B.C.L.R. (4th) 1
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 - [Matthison v. Odishaw](#), 1999 ABQB 207 (CanLII)
 - Ontario (Securities Commission) v. Greymac Credit Corp., [reflex](#) (1983), 146 D.L.R. (3d) 73
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 - [R. v. Tysowski \(L.\) and Fulham \(R.S.\)](#), [reflex](#) [1997] 8 W.W.R. 493 (1997), 120 Man. R. (2d) 37
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Court of Queen s Bench of Alberta

Citation: **Westra Law Office (Re), 2009 ABQB 391**

Date: 20090625

Docket: 090083601X1

Registry: Edmonton

In the Matter of a Search Warrant issued by the Honourable Judge P.G. Sully on, December 23, 2008 authorizing a search of the office of David Westra, better known as Westra Law Office, located at 300, 12120 - 106 Avenue, Edmonton, Alberta

And in the matter of an application by the Attorney General of Alberta for a determination from this Honourable Court on the issue of solicitor-client privilege in relation to the execution of the said Search Warrant granted under section 487 of the *Criminal Code of Canada*

Reasons for Judgment
of the
Honourable Madam Justice S.J. Greckol

I. Introduction

[1] This case concerns an allegedly fraudulent real estate transaction. The facts alleged are that Edmonton realtor Sanjay Sharma, while acting in that capacity, sold a residential property that he owned to Christopher and Roya Gour for an agreed price of \$405,900.00, less a \$40,000.00 renovation allowance, effectively vitiating the need for a down payment. ResMor Trust Company (ResMor) gave the Gours a mortgage for \$364,500.00, which it would not have done if it had known about the renovation allowance. David Westra is the solicitor who acted for the vendor, purchaser, and the mortgage company on this transaction.

[2] Following a complaint by the Gours, an investigation was commenced on May 22, 2008. On December 23, 2008, Constable Hayduk swore an Information to Obtain a Search Warrant (ITO) in support of an application for a warrant to search Westra Law Office on the basis that there were reasonable grounds to believe that Mr. Sharma and Mr. Westra had taken part in the furtherance of a mortgage fraud.

[3] Under s. 487 of the *Criminal Code*, a search warrant was issued by the Honourable Judge P.G. Sully authorizing a search on the offices of Mr. Westra. On December 29, 2008, the search warrant was executed by the Edmonton Police Service (EPS). The EPS seized documents relating to the real property transaction involving 8004 - 15A Avenue, Edmonton, Alberta, including trust account ledgers, other accounting records as well as certain computer records.

[4] On January 23, 2009, Hillier J. found that the Court of Queen s Bench had the jurisdiction to determine whether solicitor-client privilege attached to any or all of the seized items.

[5] The Crown now requests a review of the seized items, with the exception of the computer records, to determine whether solicitor-client privilege applies to the documents or whether that privilege is displaced by the crime- fraud exception.

[6] No issue has been taken with the seizure process nor have counsel argued that there has been failure to observe or take into account the stringent conditions appropriate to the issuance of a warrant for the seizure of a solicitor's file, as summarized by LeBel J. in *Maranda v. Richer* 2003 SCC 67 (CanLII), (2003), 178 C.C.C. (3d) 321 at para.10.

II. Legislation

[7] Rule 305 of the *Rules of Court* provides:

305(1) Affidavits shall be confined to the statement of facts within the knowledge of the deponent.

(2) In an action or proceeding to which a corporation is a party any affidavit required by these Rules to be made by a party may be made by an officer, servant or agent of the corporation having knowledge of the facts required to be deposed to, who shall state therein that he has that knowledge.

(3) On interlocutory motions affidavits containing statements as to the belief of the deponent with the source and grounds thereof may be admitted.

[8] Section 487 of the *Criminal Code* states:

487(1) A justice who is satisfied by information on oath in Form I that there are reasonable grounds to believe that there is in a building, receptacle or place

(a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

...

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

...

[9] Section 488.1 of the *Criminal Code* states in part:

488.1(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(a) seize the document and place it in a package and suitably seal and identify the package; and

(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(a) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make

application, to a judge for an order

- (i) appointing a place and a day, not later than twentyone days after the date of the order, for the determination of the question whether the document should be disclosed, and
- (ii) requiring the custodian to produce the document to the judge at that time and place;

(b) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(c) if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the question.

(4) On an application under paragraph (3)(c) the judge

(a) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(b) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect the document;

(c) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(d) shall determine the question summarily and,

- (i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who claimed the solicitor|client privilege or to the client, or
- (ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) Where the judge determines pursuant to paragraph (4)(d) that a solicitor|client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(b), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(a) or that following such an application no further application has been made under paragraph (3)(c), the judge shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

...

(8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor|client privilege to be made under subsection (2).

...

(10) An application under paragraph (3)(c) shall be heard in private.

[10] The Crown relies on the ITO, sworn by Constable Hayduk, alleging that the following events took place between April 20, 2007 and July 19, 2007.

- a. In April 2007, Christopher and Roya Gour began the process of buying their first home and were referred to an Edmonton realtor, Sanjay Sharma, who advised them to get pre-approved for a mortgage. After the Gours obtained pre-approval for a mortgage loan worth \$406,000.00 from a mortgage specialist, Mr. Sharma showed the Gours several properties valued from \$450,000.00 to \$475,000.00, which were beyond their price range.
- b. On April 28, 2007, Mr. Sharma informed the Gours that he had found a house located at 8004 - 15A Avenue valued at \$405,900.00, owned by a motivated seller who was moving to the United States. When the Gours expressed concern that they would not be able to afford the cost for the needed renovations on the property, Mr. Sharma informed the Gours that they could receive from the seller a renovation credit of \$40,000.00 on the property. On May 1, 2007, the Gours agreed to the deal and signed the paperwork, but did not receive a copy of their offer to purchase from Mr. Sharma or Mr. Westra, the solicitor overseeing the transaction. Mr. Sharma later informed the Gours that they would receive the renovation credit money at the lawyer's office. On May 18, 2007, Mr. Sharma faxed the Gours a copy of an amendment to the purchase contract to extend the possession date to June 30, 2007, and the Gours signed the document, noting that the seller was listed as C/O LB (care of listing broker).
- c. On June 29, 2007, the Gours were called in by Mr. Westra to sign some papers. When the Gours asked about the renovation credit, Mr. Westra informed them that he had made some arrangements and that the Gours could simply keep the down payment instead of receiving a cheque. When the Gours asked Mr. Westra for copies of certain documents including the offer to purchase, they were informed that Mr. Sharma held all of the paperwork and that Mr. Westra would mail out any documents in Mr. Westra's possession to the Gours within the next few days.
- d. In the weeks following the amended possession date of June 30, 2007, the Gours noticed that mail addressed to Mr. Sharma was being delivered to the property.
- e. On July 16, 2007, Mr. Gour received paper work copies from Mr. Westra, including a cover letter, statement of account, a statement of receipts and disbursements and a statement of adjustments. The latter two documents showed:

...

c. The statement of receipts and disbursements contained the following information:

- i. ResMor mortgage for \$364,500.00
- ii. Funds disbursed
 1. Cash to close to Fraser Milner of \$363,809.64

d. The statement of adjustments contained the following information:

- i. Vendor is SHARMA
- ii. Purchaser is GOUR
- iii. Sale price is \$405,000.00
- iv. Basement renovation credit is \$40,000.00
- v. Cash to close of \$363,809.00

- f. When the Gours confronted Mr. Sharma about his name appearing as owner of the property in the paperwork from Mr. Westra, Mr. Sharma stated that the seller wished to remain anonymous. The Gours then obtained copies of the purchase contract and amendments from their mortgage specialist and noticed that Mr. Sharma's name was written in where C/O LB was crossed out in the documents.
- g. Constable Hayduk attended at the Real Estate Board office and found that the house was listed by Mr. Sharma on August 31, 2006 for \$284,000.00. It was sold on September 17, 2006 for \$265,000.00. Mr. Sharma represented both the buyer and seller.

- h. Constable Hayduk formed the opinion that the MLS document that Mr. Sharma provided to the Gours was a fake: the listing showed the list price for the house at \$405,900.00; there was no MLS number in the space provided indicating that it had never been entered on the MLS system; and the selling agent on the MLS listing was shown as Priya Sharma. Constable Hayduk formed this opinion in part because the format of the listing was identical to the listing of August 2006, except for the price; there had been no subsequent listing on the MLS system; Priya Sharma is Mr. Sharma's wife; and the MLS Manager advised him that realtors have the ability to type over the MLS highlight sheets with a program called Design Tool.
- i. The historical certificate of title showed that Mr. Sharma went on title on January 10, 2007 and that on July 19, 2007 the property was transferred to the Gours for \$405,000.00. The documents registered on title also showed that Mr. Westra represented the vendor Sharmas, the purchaser Gours, and the mortgage company ResMor.
- j. On receiving notification of the Gours complaint, ResMor commenced an investigation and provided Constable Hayduk with documents that were obtained from Mr. Westra. In comparing those documents with the ones from the Gours, Constable Hayduk found that the statement of receipts and disbursements sent to the Gours showed funds of \$363,809.64 disbursed to Mr. Westra as cash to close, whereas the same document sent to Mr. Sharma showed funds disbursed as Balance to you (Sanjay) \$150,000; and Balance to you (Sanjay) \$6,674.40. The copy of the real estate purchase contract showed Mr. Sharma as the buyer representative, displayed an illegible seller's signature, and did not contain the \$40,000 renovation credit. The addendum to the contract sent to Mr. Sharma, which was not received by ResMor, did not identify the vendor, displayed an illegible seller's signature, appeared to show Mr. Sharma's signature as the witness signature, and included the \$40,000 renovation credit.
- k. In the documents provided by Mr. Westra to ResMor, the cash to close was shown as payable to Mr. Westra, while the cash to close was shown in the documents provided to the Gours as payable to Fraser Milner. Further, the seller was not shown as Mr. Sharma even though he was the seller of the house.
- l. ResMor advised Constable Hayduk that it would not have provided the Gours with mortgage funding for this house had it received all of the documents that it later did, because with the renovation credit there was no down payment, and ResMor essentially financed 102.46 percent of the value of the house, assuming the sale price was not inflated.
- m. Constable Hayduk had an appraisal of the house done as of December 18, 2007. The house was valued at \$290,000.00 less the cost to cure the deficiencies, including mould, in the sum of \$5,000.00 to \$8,000.00. The appraiser concluded that the value of the house at the time of purchase was between \$320,000.00 and \$335,000.00.
- n. Constable Hayduk asserted that some of the necessary documents could only be attained at the Westra Law Office, such as trust account ledgers and other accounting materials that would show who had benefited from the transaction, as well as Mr. Westra's notes and other recordings by him.

[11] The Crown submits that there are reasonable and probable grounds to believe Mr. Sharma and Mr. Westra took part in the furtherance of a mortgage fraud based on the following analysis of the alleged facts:

- a. Mr. Sharma, in his capacity as real estate agent, made a misrepresentation to the Gours when he failed to tell them that he was the owner of 8004 - 15A Ave.;
- b. Mr. Sharma, in his capacity as real estate agent, facilitated a fraud on ResMor by advising the Gours that they could receive a renovation credit of \$40,000.00 on the property from the seller if they applied for a mortgage of \$373,977.00 and made a down payment of \$40,500.00 (this amounts to a mortgage given for the full amount of the purchase price with no down payment made by the borrower);
- c. Mr. Westra, in his capacity as the Gours solicitor, made a misrepresentation to them when he provided them with documents that indicated funds had been disbursed to Fraser Milner Casgrain when in truth the funds had been disbursed to Westra Law Office, acting as solicitor for Sanjay Sharma, as evidenced by the documents Mr. Westra provided to ResMor (two sets of legal documents exist, the ones sent to the Gours and the ones sent to ResMor);
- d. Mr. Westra made a further misrepresentation to his clients, the Gours, when he had them sign a copy of the purchase contract which did not list Sanjay Sharma as the seller, later altering or facilitating an alteration to the contract to list Sanjay Sharma as the seller;
- e. Mr. Westra made a misrepresentation to the financial lending institution, ResMor, when he initially withheld the addendum to the purchase agreement which referenced the \$40,000.00 renovation credit (although he did provide this document when it was specifically requested by ResMor);
- f. Mr. Westra, in his capacity as Gours solicitor, facilitated the fraud on ResMor by advising the Gours that it was legal for them to receive a renovation credit of \$40,000.00 on the property from the seller if they applied for a mortgage of \$373,977.00 and made a down payment of \$40,500.00 (this amounts to a mortgage for the full amount of the purchase price with no down payment by the borrower);
- g. Mr. Westra indicated to the Gours that instead of getting the renovation credit, they could simply keep their down payment cheque; and

- h. A representative from ResMor indicated that if agents for ResMor had had accurate information from Mr. Westra from the beginning, specifically, information regarding the agreed on renovation credit, the loan on the address 8004 - 15A Ave. would not have been funded.

[12] The search warrant was executed on December 29, 2008 and the following items were seized by the Edmonton Police Service:

- a. documents relating to the real property transaction involving 8004 - 15A Avenue, Edmonton, Alberta;
- b. trust account ledgers and other accounting records relating to this same transaction; and
- c. computer equipment, including magnetic or other machine readable storage equipment, digital cameras or other recording devices, programs or software associated with the said equipment, or any other device and associated software and manuals, used or capable of being used to create, store or manipulate electronic documents, records, electronic mail or graphic files related to the property transaction regarding 8004 - 15A Avenue, Edmonton, Alberta and financial records related thereto.

[13] Mr. Sharma has provided a letter from his tenant asserting that during the last week of April 2007, Mr. Sharma advised him that he would be showing the house and introduced the Gours to him as his tenant. The tenant says the property was not listed on MLS and there was no realtor sign or lock box. The tenant asserts that on the Gours second visit to the house, the conversation made it clear that Mr. Sharma was the owner of the house.

[14] Mr. Sharma also provided a letter from ResMor stating that had the Gours given the mortgage company a copy of the addendum to the sale showing the \$40,000.00 cash back for the renovation, ResMor would never have funded the sale.

[15] Mr. Sharma provided an appraisal of the property, effective May 15, 2007, showing its value as \$360,000.00 to \$370,000.00.

[16] Mr. Sharma argued that the reference to Fraser Milner in the statement of adjustments was nothing more than a typographical error, a logical explanation in the age of computer generated precedents.

IV. Issues

[17] There are three issues that arise on this application:

- A. Whether the real estate transaction file and related documents are privileged.
 - 1. Whether real estate transaction documents and related records (accounts and ledgers) are communications directly related to the seeking, formulating or giving of legal advice.
 - 2. Whether the real estate transaction documents and related records here were communications of a confidential nature, given that Mr. Westra represented all parties and the Gours have waived their solicitor-client privilege.
- B. Whether the Crown has adduced reliable evidence on which a determination can be made, on a balance of probabilities, that the crime-fraud exception applies to any solicitor-client privilege.
- C. Whether the Crown has met its onus of showing, on a balance of probabilities, that there has been the commission of a crime so that the crime-fraud exception applies to any solicitor-client privilege.

V. Analysis

[18] ResMor and the Gours have waived their potential claim to solicitor-client privilege over materials seized and have done so freely and voluntarily with a full appreciation of their right to claim privilege and the consequences of waiving that right.

[19] Mr. Westra acknowledges that if the documents are privileged, the privilege does not belong to him. Therefore, he takes no position with respect to that issue. However, he adopts Mr. Sharma's position that there is no evidence before the Court on this application, in any event, since there are no affidavits from the parties who have evidence to provide. Mr. Westra also takes issue with the Crown making factual assertions in the absence of proven facts. He contends that the ITO contains nothing more than hearsay on

hearsay.

[20] The realtor and vendor, Mr. Sharma, claims the seized documents are subject to solicitor-client privilege. The onus of establishing a privilege lies on the party asserting it: *Steeves (Guardian ad litem of) v. Rapanos* 1982 CanLII 509 (BC C.A.), (1982), 41 B.C.L.R. 312 (C.A.).

[21] Mr. Sharma emphasizes the fundamental role that solicitor-client privilege plays in the legal system. He submits that in approaching the issues in this case, the Court must be mindful that the privilege has become a fundamental civil and legal right and the Court must adopt ...stringent norms to protect it: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), 2002 SCC 61 at paras. 16 and 36, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209; *Solosky v. The Queen*, 1979 CanLII 9 (S.C.C.), [1980] 1 S.C.R. 821 at 839. The full protection of the privilege is particularly critical when an individual is the target of a criminal investigation: *Lavallee* at para. 23.

[22] The rationale for the existence of solicitor-client privilege is set out in the following passage from *Canada (Director of Investigation & Research) v. Shell Canada Ltd.*, (1975), 22 CCC (2d) 70 at 78-79 (F.C.A.), cited with approval in *Solosky* at para. 21:

... 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.

A. Whether the Real Estate Transaction File and Related Documents are Privileged?

[23] Four conditions must be established in order for solicitor-client privilege to apply:

- (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.

(*Canada (Minister of National Revenue fM.N.R.) v. Reddy*, 2006 FC 277 (CanLII), 2006 FC 277 at paras. 12 to 16 (F.C.(T.D.)), citing *B. v. Canada* 1995 CanLII 2007 (BC S.C.), (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 fOntario, Regarding Solicitor-Client Privilege* (1985); *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 S.C.R. 809 at para. 15, citing *Solosky* at p. 834).

[24] Section 488.1(4)(a) of the *Criminal Code* provides the Court with authority to examine the solicitor's files that have been seized for the purpose of determining the application for disclosure.

[25] The documents contained in the files seized from the Westra Law Office include the following:

(a) Envelope 1:

This envelope includes computer hardware.

(b) Envelope 2:

This envelope includes a file for Mr. Sharma regarding the real estate transaction. It contains accounting records and the real estate transaction documents: 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, and correspondence from ResMor to Westra.

(c) Envelope 3:

This envelope includes a file for the Gours regarding the real estate transaction. It contains accounting records and the real estate transaction documents: the certificate of title, the real property report, statement of account, statement of adjustments, transfer of land, residential real estate purchase contract and addendum, solicitor's final report, mortgage documents, and instructions to solicitor from ResMor.

1. Whether the real estate transaction documents and related records (accounts and ledgers) are communications directly related to the seeking, formulating or giving of legal advice?

[26] The *Reddy* decision (at para. 14) suggests that real estate documents on a solicitor's file are not clothed with privilege since they are actions by the solicitor rather than communications related to the seeking, formulating or giving of legal advice and, therefore, one of the four conditions for establishing privilege is not met. In *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Ont. Div. Ct.), the court stated:

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, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material.

... The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter to which the client himself could claim the privilege, because it is not a communication at all. It is an act.

[27] According to the Ontario Superior Court of Justice in *R. v. Serfaty*, [2004] O.T.C. 401 at para. 47⁵⁴, transactions in solicitor's trust account do not attract solicitor-client privilege as they "relate to questions of objective fact, independent of communications between the solicitor and client..."

[28] In *R. v. Tysowski* *reflex*, (1997), 120 Man. R. (2d) 37, [1997] 8 W.W.R. 493, the Court examined whether files pertaining to various real estate transactions seized from a lawyer's office attracted solicitor-client privilege. The files that were seized included agreements covering the sale and purchase of certain properties, instructions from the mortgage lenders, correspondence with the lawyer for the vendors, statements of adjustment, tax certificates, zoning memoranda, and reporting letters. After considering the general principles pertaining to solicitor-client privilege, the court found (at paras 23 and 24) that the documents seized were not protected by the privilege as all of the files related to the sale and/or purchase of real estate and not with the obtaining of legal advice, and the trust ledger sheets and cancelled cheques were evidence of an accounting nature. In addition, the court concluded (at para. 25) that the advice given by way of reporting letters to the clients on the closing of a real estate transaction was not subject to solicitor-client privilege as it was of a factual nature and not legal advice in the strict sense of the word. In any event, the court concluded that no evidence had been tendered in support of the claim for solicitor-client privilege and, therefore, the documents seized could be disclosed.

[29] In *Eastwood & Co. v. Canada (Minister of National Revenue FM.N.R.)*, [1993] B.C.J. No. 3105 (B.C.S.C.) (QL), the court considered conveyancing documents and statements of account to be documents of fact that did not attract solicitor-client privilege, whereas documents containing elements of advice given to or sought by the client were considered privileged.

[30] In *Re Wirick*, 2005 BCSC 1821 (CanLII), 2005 BCSC 1821, 51 B.C.L.R. (4th) 193, the issue before the court was whether a cheque payable out of a solicitor's trust account was subject to solicitor-client privilege or confidentiality such that its production should not be ordered or it should be ordered produced in a redacted or altered form. Some of the relevant points articulated by the court included the following:

In the context of the solicitor/client relationship, not all confidential information is privileged and confidentiality alone is not sufficient to attract privilege;

Documents such as cheques, ledgers, and deposit slips form a part of the solicitor's records and are not ordinarily privileged because they are a report of acts, not communications;

There is a distinction between facts which may be in a solicitor's file and confidential communications, as it is clear that regarding matters of fact no privilege attaches to documents and that they are not confidential;

Evidence as to whether a solicitor paid moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. As acts are not privileged, a solicitor may be compelled to produce transaction records; and

The privilege does not apply to documents merely held by the lawyer, including accounting records and trust reconciliations, conveyancing documents and documents relating to the sale of property where no advice was sought or given in respect of them.

[31] In *Canada (Minister of National Revenue FM.N.R.) v. Vlug*, 2006 FC 86 (CanLII), 2006 FC 86, the court considered whether a solicitor could be compelled to disclose certain documents related to a purchase and sale agreement executed by the solicitor's former client. Having examined the documents in question, the court determined that the statement of adjustment, as an act of communication between the solicitor and the client, and the other party and its solicitor, could not be considered a privileged communication and the cheques that were issued in relation to the transaction were principally an act, not a communication. Accordingly, the documents related to the real estate agreement did not have the character of privileged communication.

[32] *Ontario (Securities Commission) v. Greymac Credit Corp. reflex*, (1983), 146 D.L.R. (3d) 73 (Ont. H.C.J.) was a receivership case in which the receivers were unable to determine the whereabouts of large payments of money made by Greymac to two law firms. The law firms stated they no longer had the money and refused to provide information about where it went on the basis that to do so would breach the solicitor-client privilege claimed on behalf of Greymac by its president, who was out of the country and refused to return. After considering the basis for the protection, Southey J., for the court, suggested at para. 24 that it is helpful to ask whether the client in such a case, if testifying, could refuse to disclose particulars of the transactions directed by him through his solicitor's trust account. He concluded that the fact the client has left money with his solicitor is an act rather than a communication and, therefore, not subject to a claim of solicitor-client privilege.

[33] *Greymac* has been followed in Alberta. In *Matthison v. Odishaw*, 1999 ABQB 207 (CanLII), 1999 ABQB 207, Ritter J., as he then was, considered an application by the plaintiff for an order directing that certain questions relating to the amount of outstanding legal fees, the actual accounts, and security documents signed by the defendant lawyer's client, be answered. The lawyer raised the privilege asserted by his client. Ritter J. agreed (at para. 11) that the evidence relating to the movement of funds in and out of the solicitor's trust account was factual and existed independent of any communication between the solicitor and his client and, therefore, was not the subject of privilege. He held that questions relating to the flow of money in and out of the solicitor's trust account did not constitute an inquiry which would breach a privileged communication, as no communication existed.

[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.

[35] In case I am wrong in this conclusion, I have gone on to consider the other two issues.

2. **Whether the real estate transaction documents and related records were communications of a confidential nature, given that Mr. Westra represented all parties and the Gours have waived their solicitor-client privilege?**

[36] As noted, ResMor and the Gours have waived their potential claim to solicitor-client privilege over materials seized and have done so freely and voluntarily with a full appreciation of their right to claim privilege and the consequences of waiving privilege. The realtor and vendor, Mr. Sharma, claims the seized documents are subject to solicitor-client privilege.

[37] The Crown submits that where a lawyer represents both purchaser and seller in a transaction, and the seller is aware of that fact, the seller cannot later claim solicitor-client privilege over any communications or documents, trust ledgers or any other accounting records relating to the property transactions as between seller and buyer. It maintains that both the Gours and Mr. Sharma are the true owners of the client file relating to the real estate transaction, the Gours have waived privilege over those communications, and Mr. Sharma has not proved they are privileged.

[38] Rule 2, Chapter 6 of the Alberta Law Society's *Professional Code of Conduct* states:

A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.

[39] The rationale supporting this Rule is explained in Commentary C.2.2 to the Rule regarding Disclosure and consent.

If a lawyer determines that multiple representation is permissible, the consent of the parties must then be obtained. See the definitions of consent and disclosure in *Interpretation*. Consent in this context will be valid only if full and fair disclosure has been made by the lawyer (to all parties together unless completely impractical) of the advantages and disadvantages of, first, retaining one lawyer and, second, retaining independent counsel for each party. Such disclosure must include the fact that no material information received in connection with the matter from one party can be treated as confidential so far as any of the other parties is concerned. [Emphasis added.]

[40] The Crown relies on *Sutherland v. D.A. Townley and Associates Ltd.*, 1997 CarswellBC 444 at para. 20 for the proposition that when two or more parties consult with one solicitor for their mutual benefit, communications between either party and the solicitor are not privileged as against each other since there is no expectation of privacy.

[41] The Crown also argues that the situation is akin to a common interest waiver, where a partial waiver of privilege is made as between two parties with joint interest in future potential litigation, relying on *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31 (CanLII), 2004 SCC 31, 2004 SCC 31 (CanLII), [2004] 1 S.C.R. 809 and *R. v. Dunbar reflex*, (1982), 138 D.L.R. (3d) 221 at para. 80 (Ont. CA).

[42] There were three parties to the transaction in question here; Mr. Sharma as seller, the Gours as purchasers, and ResMor as mortgage company. Mr. Westra represented all parties to the transaction. The Gours and ResMor waive solicitor-client privilege with respect to the transaction documents. The commentary to the Alberta Law Society's *Professional Code of Conduct* Rule concerning joint representation is clear that ... no material information received in connection with the matter from one party can be treated as confidential so far as any of the other parties is concerned. Any materials received by Mr. Westra from any of the three parties is not confidential as between them. Each party is expected to share in and be privy to all communications passing between each of them and their solicitor. There is no expectation of confidentiality between the parties. Mr. Sharma cannot assert privilege to prevent disclosure of the documents to the Gours or ResMor, and the Gours and ResMor have waived their privilege over those materials.

[43] I find the *Sutherland* case, and the authorities on which it is based, authoritative on this point: Mr. Sharma has not demonstrated solicitor-client privilege over the documents held by Westra Law office pertaining to this real estate transaction as against the Gours or ResMor. The parties to the real estate transaction all used the services of Mr. Westra to effectuate the deal and each is entitled to be privy to the information he had respecting the arrangements pertaining to the others. The communications are not confidential as between the parties, so as to meet that condition of solicitor-client privilege, although they are confidential *vis a vis* the outside world. However, the Gours and ResMor have waived any privilege that did exist as against the outside world. Documents that are communications between Mr. Westra and any of the three parties must be disclosed on that basis.

B. Whether the Crown has Adduced Reliable Evidence on which a Determination Can be Made, on a Balance of Probabilities, that the Crime-Fraud Exception Applies to any Solicitor-Client Privilege?

[44] Mr. Sharma argues that the Crown has not adduced reliable evidence on which a determination can be made, on a balance of probabilities, that the crime-fraud exception to the privilege applies. He argues that what is sought is a final order and contends that the ITO only contains information based on belief, rather than facts within the knowledge of the deponent as required by Rule 305 of the *Alberta Rules of Court*. He says the ITO contains substantial information from the Gours that is hearsay and is incapable of submission to cross examination. Mr. Sharma maintains that, in any event, the Crown has not met its onus of showing on a balance of probabilities that there has been the commission of a crime so as to rely upon the crime-fraud exception to the solicitor-client privilege. He notes that no charges have yet been laid.

[45] Mr. Sharma relies on the *Lavallee* decision and submits that where there is any equivocation about the evidence submitted by the Crown, that evidence ought to be rejected and the application rejected.

[46] Constable Hayduk asserted in the ITO that he had reasonable and probable grounds for believing that Mr. Sharma and Mr. Westra took part in the furtherance of a fraudulent real estate transaction. Constable Hayduk was the lead investigator on the case and it is clear that he was thorough in his investigation. In the ITO, he reviewed various records that were maintained in the course of the transaction. These documents included:

- (a) Documents provided by Mr. Sharma and/or Mr. Westra to the Gours: a cover letter; statement of account; statement of receipts and disbursements; purchase contract and amendments and a copy of the MLS document listing.
- (b) Records or registered documents related to the property: MLS documents provided by the Edmonton Real Estate Board office; historical certificate of title for the property; transfer of land documents (registered on title); *Dower Act* form (registered on title); affidavit of transferee (registered on title); mortgage loan (registered on title);
- (c) Resmor's file on the transaction, including documents provided by Mr. Westra to Resmor: statement of adjustments; statement of receipts and disbursements from Mr. Westra to the Gours; statement of receipts and disbursements from Mr. Westra to Mr. Sharma; copy of the Residential real estate purchase from Mr. Westra to Mr. Sharma; addendum to the real estate purchase contract from Mr. Westra to Mr. Sharma; amendment to the real estate purchase contract from Mr. Westra to Mr. Sharma; notice of waiver of conditions.

[47] Constable Hayduk also made further inquiries and spoke to various individuals who provided additional information in relation to the transaction. Those individuals included a representative of ResMor, a representative from Fraser Milner Casgrain, an appraisal company representative, and an investigator from the Law Society of Alberta. As a result of the investigation, Constable Hayduk identified discrepancies between the Sharma, Gours, and Wesmor real estate and mortgage documents and found grounds for believing that an offence had been committed by Mr. Sharma and Mr. Westra.

[48] Rules 305(1) and (3) are rules of procedure. Rule 305(3) does provide that affidavit evidence based on information and belief may be adduced in interlocutory applications. Rule 305(1) does not go so far as to proscribe evidence based on information and belief in every other type of application. The authorities indicate that hearsay evidence is admissible in the ITO to show reasonable and probable grounds, and that the question is whether there is reliable evidence on which the issue of a crime-fraud exception to solicitor-client privilege can be determined.

[49] In *R. v. Leibel reflex*, (1993), 111 Sask. R. 107 at para. 23, 7 W.W.R. 407 (Q.B.), the court noted that hearsay evidence, in the form of affidavits sworn in support of search warrants, may be used to establish the requisite proof to displace or disallow the claim of privilege by alleging fraud. The court cited *Borden & Elliot v. R.* (1975), 13 O.R. (2d) 248 at 249, 70 D.L.R. (3d) 579 (H.C.J.), aff'd (1975) 13 O.R. (2d) 248, 70 D.L.R. (3d) 579 (C.A.), in which Southey J. stated:

In order to displace the solicitor-and-client privilege on the ground that the documents are a part of a crime or a fraud, there must be an intelligible, specific allegation to that effect. The information on which the search warrant is based must clearly state reasonable grounds for believing in a specific crime or fraud. A vague or ambiguous information, which leaves the reader to guess at the precise nature of the charges alleged would not be sufficient to give jurisdiction to issue a search warrant in respect of documents which otherwise be covered by the solicitor-and-client privilege.

[50] The Court in *Leibel* noted (at para. 24) that the issuance of a search warrant must be accompanied by reasonable and probable grounds for believing that there has been the commission of a crime, as well as sufficient information to show that the documents sought will afford evidence with respect to the offence. The court found that where the factual background is sufficient for the affiant peace officer to reasonably form an opinion that an offence has been committed, a *prima facie* case of criminal activity is established such that any solicitor-client privilege attached to the seized documents is displaced.

[51] Ritter J., as he then was, considered this question in *R. v. Bastidas* (1993), 140 A.R. 294 (Q.B.). Mr. Bastidas applied to the Court for an order directing that documents seized pursuant to a search warrant from the office of his solicitor were privileged and should be returned to his solicitor. The documents were trust records, a bank statement, a cancelled cheque and a solicitor's file. Mr. Bastidas was the controlling mind of two corporations, a management company and a janitorial company. The Crown alleged a loan was obtained from the Royal Bank of Canada on the basis of a false statement regarding a contract of the janitorial company. The Crown maintained that the loan purportedly was obtained for the purpose of purchasing a piece of equipment but, instead, the proceeds of the loan were transferred to the account of the management company and from there to the solicitor's trust account. A search warrant was obtained and the materials removed to the Court for consideration of the privilege issue.

[52] Ritter J. decided (at para. 19) that the communications which dealt with the question of the utilization of the money by the solicitor were not privileged as such communications had a criminal purpose attached to them. It was not relevant that the solicitor was wholly unaware of such purpose - a person who surreptitiously involved another in criminal activity is not entitled to have his activities kept confidential by that person.

[53] As to the process to be undertaken, Ritter J. indicated at paras. 23 to 26 that the onus on the Crown was beyond a mere suspicion but less than proof beyond a reasonable doubt. He referred to *Re Romeo's Place Victoria Ltd. reflex*, (1981), 128 D.L.R. (3d) 279, in which Collier J. of the Federal Court Trial Division held that proof of fraud should be on a balance of probabilities where proof of that offence is required to circumvent solicitor-client privilege. In terms of what can constitute such proof for the purposes of this type of application, he was of the view that each matter must be determined on its unique circumstances. However, where the communications have been seized pursuant to a search warrant, the fact that issuance of the warrant followed a judicial decision-making process is something that should be considered as tending to establish proof of the offence. If issuance of the warrant is to be challenged, that challenge should precede or be coupled with the application for an order directing that the documents are privileged.

[54] On the question of whether there must be direct evidence to properly support a determination that the privilege does not attach, Ritter J. found that the question was reliability of the information (at paras. 37 and 38):

It is my view that what is in question is the reliability of the information before the Court. The reliability of information obtained by information and belief can, in some circumstances, be as great or greater than direct evidence. Surely the reliability of information obtained from financial records, which are obtained from persons who have a duty to maintain such records, is as great or greater than the reliability of direct evidence of an accomplice who has just been offered a deal by the Crown in exchange for that evidence.

I note also the provisions of ss. 24, 25, 29, and 30 of the *Canada Evidence Act* and that it is unlikely that virtually any of the information contained in the "grounds for belief" could be advanced other than pursuant to one of those sections. I cannot imagine that having a bank officer swearing that he is producing a bank record makes it more reliable than having a police officer advance it in his grounds for belief. It remains the same record, the bank officer is not likely to have been involved in its making, and is not likely to have any greater personal knowledge with respect to it than does the police officer who has just reviewed it.

[55] The Court in *Bastidas* was dealing with bank records referred to in the ITO and that appeared to have been made in the course of the business of the record maker (at paras. 42-43). They were directed to be disclosed.

[56] In this case, the Crown has gathered information comprised of documents papering a real estate transaction and a mortgage, as well as interviews of the purchasers and of the mortgage lender. The Judge who issued the warrant here found the information contained in the ITO met the reliability threshold. While not based on personal knowledge, the material in the ITO, particularly the documentary evidence, is sufficiently reliable to warrant consideration of whether the Crown has met its onus to establish the crime-fraud exception to solicitor-client privilege.

[57] It is not clear to me that the *Rules of Court* apply to this proceeding. It is an application that originated under s. 487 of the *Criminal Code* and is in furtherance of a criminal investigation. Second, even if the *Rules* do apply, when the entire context of this matter is considered, it is apparent that this is a step along the way towards possible criminal charges. In that sense, this is an interlocutory application. The *Rules* were not intended to be roadblocks, but rather to be facilitative of efficient process. Finally, as found in *Bastidas*, the question is one of the reliability of the evidence. I conclude that the evidence contained in the ITO, particularly the documentary evidence created in the ordinary course of business, is sufficiently reliable to support this application.

C. Whether the Crown has met its onus of showing, on a balance of probabilities, that there has been commission of a crime so that the crime-fraud exception applies to any solicitor-client privilege?

[58] The Crown and Mr. Sharma agree that solicitor-client privilege does not arise in the commission of a crime. The Crown bears the onus of showing, on a balance of probabilities, that the crime-fraud exception applies to the solicitor-client privilege: *Serfaty* at para 23; *Bastidas* at para 23; *F.H. v. McDougall*, 2008 SCC 53 (CanLII), 2008 SCC 53, [2008] 3 S.C.R. 41.

[59] The crime alleged to have been committed is described in the ITO as:

CC 368(1)(a)#2 - uttering a forged document

Between the dates 20 day of April, 2007 and 19 day of July, 2007, at or near Edmonton, Alberta, did, knowing that a document, to wit: statement of adjustments and statement of disbursements, was forged, unlawfully use, deal with or act upon the said document as if it were genuine, contrary to section 368(1)(a) of the *Criminal Code of Canada*. (Sic)

CC 380(1)(a)#4 - fraud over \$5000 (money)

Between the 20 day of April, 2009 and 19 day of July 2008, at or near Edmonton, Alberta, did by deceit, falsehood or other fraudulent means, unlawfully defraud christopher and roya gour of \$30,000.00 of a value exceeding \$5000.00, contrary to section 380(1)(a) of the *Criminal Code of Canada*.

[60] In *Desc teaux v. Mierzwiniski*, 1982 CanLII 22 (S.C.C.), [1982] 1 S.C.R. 860 at para. 20, Lamer J., speaking for the Court, adopted the following passage from Wigmore (8 *Wigmore on Evidence*, para. 2292 (McNaughton rev. 1961)):

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

[61] He then discussed the exceptions to the privilege at para. 22:

There are exceptions. It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication. Communications made in order to facilitate the commission of a crime or fraud will not be confidential either, regardless of whether or not the lawyer is acting in good faith.

[62] On receiving notification of the Gours complaint, ResMor commenced an investigation and provided documents that were obtained from Mr. Westra to Constable Hayduk. In comparing those documents with the ones from the Gours, Constable Hayduk found that:

1. The statement of receipts and disbursements sent to the Gours showed funds disbursed to Mr. Westra as cash to close for \$363,809.64, whereas the same document sent to Mr. Sharma showed funds disbursed as Balance to you (Sanjay) \$150,000; and Balance to you (Sanjay) \$6,674.40 ;
2. The copy of the real estate purchase contract showed Mr. Sharma as the buyer representative, displayed an illegible seller's signature, and did not contain the \$40,000 renovation credit; and
3. The addendum to the contract sent to Mr. Sharma, which was not received by ResMor, did not identify the vendor, displayed an illegible seller's signature, appears to show Mr. Sharma's signature as the witness signature, and includes the \$40,000 renovation credit.

[63] In addition, there is information in the ITO from the Gours and ResMor. The identity of the realtor as vendor may not have been disclosed, at least initially. The documentation confirms that the renovation credit back from the vendor was promised, and the addendum confirming that arrangement was not provided to ResMor. The information from ResMor shows that a mortgage would not have been extended to the Gours had the true facts been presented. As Mr. Westra acted on all sides of this real estate transaction, and would have known the mortgagor did not have the information about the renovation allowance, there are reasonable and probable grounds to conclude that he facilitated the obtaining of the mortgage based on a false premise. The real estate transaction and mortgage documents establish the grounds.

[64] While the actual articulation of potential charges is poor, Constable Hayduk is clear in the ITO about the basis on which he finds reasonable and probable grounds to conclude mortgage funds have been obtained by fraud and this has been facilitated by the solicitor. This allegation alone establishes the crime-fraud exception so that it is unnecessary to go further and consider whether there are grounds to conclude a fraud has been perpetrated in relation to the Gours concerning the value of the property.

[65] The Crown has met its onus of showing, on a balance of probabilities that a fraud has been perpetrated on ResMor, so that the crime-fraud exception applies to any solicitor-client privilege.

IV. Conclusion

[66] The real estate transaction file and related records (accounts and ledgers) are not clothed with solicitor-client privilege. The Crown has adduced reliable evidence on which a determination can be made, on a balance of probabilities, whether the crime-fraud exception applies to any solicitor-client privilege. The Crown has met its onus of showing, on a balance of probabilities, that there has been the commission of a crime so that the crime-fraud exception applies to any solicitor-client privilege.

[67] The files seized from the Westra Law Office should be disclosed. In accordance with s. 488.1(4)(d)(ii) of the *Criminal Code*, I direct the Clerk of the Provincial Court to deliver the Westra Law Office files to M. Duckett, QC who seized the files pursuant to the authority vested in her.

Heard on the 8th day of April, 2009.

Dated at the City of Edmonton, Alberta this 25th day of June, 2009.

S.J. Greckol
J.C.Q.B.A.

Appearances:

Tamara Friesen

Alberta Justice - Special Prosecutions

for the Crown

Joseph M. Shafir

for Sanjay Sharma

Mr. Baker

for Mr. Westra

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