COURT FILE NO.: F871/02
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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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HER MAJESTY THE QUEEN	)	Robert Goldstein and Valerie Chenard, for Her Majesty the Queen
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- and -	)	
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VICTOR SERFATY, ALAN BENLOLO, ELLIOT BENLOLO, and SIMON BENLOLO	)	Victor Serfaty, in person Howard Cohen and L. Sabsay, for Alan Benlolo, Elliot Benlolo, and Simon Benlolo
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	)	**HEARD:** April 1, 5 and 6, 2004

MOLLOY J.

REASONS FOR DECISION
(Ruling on Solicitor and Client Privilege)

A. INTRODUCTION

[1] The accused are charged with ten counts of knowingly or recklessly making misleading representations to the public contrary to s. 52 of the *Competition Act*. They elected to be tried by a jury. As part of the prosecution case, the Crown proposes to introduce into evidence seven documents seized pursuant to search warrants from the offices of two lawyers who previously represented certain of the accused. The accused object to the admission of such evidence, claiming it is protected from disclosure by solicitor and client privilege. The Crown argues that privilege does not attach at all to six of the documents and that the other document falls within the crime/fraud exception to the privilege and is therefore not protected. Alternatively, the Crown argues that if the privilege does attach to any of the documents, such privilege has been

waived. A *voir dire* was conducted to determine these issues. What follows are my rulings on the *voir dire.*

[2] At the outset, it is useful to provide some background to explain the context in which these issues arise. The charges relate to five mass mailings sent to business and non-profit organizations across Canada in 2000, purportedly to solicit subscriptions for an internet business listing service. The Crown alleges that the mailings are misleading in two respects: 1. they appear to be invoices or bills rather than solicitations; and 2. they appear to be directed to existing customers, rather than prospective ones. Section 52(1) of the *Competition Act* provides:

> 52 (1). No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[3] The theory of the Crown is that all four accused were engaged in a joint criminal enterprise in respect of all five mailings, with each of them playing different roles in the scheme. The first mailing, sent in May 2000, was under the name Yellow Business Pages.Com and had a logo at the top similar to the well-known "walking fingers". The Crown alleges that this document was deliberately designed in a format similar to a Bell Canada bill in order to confuse recipients. Bell Canada objected to the May mailing, and in particular to the use of the words "yellow pages". Thereafter, the mailings named the sender as Yellow Business Directory.Com and the walking fingers logo was replaced with a globe. There were also some changes in the wording of the mailings sent after May 2000. The Crown's position, however, is that these changes were minor and that all of the mailings were nonetheless deliberately designed to appear to be bills (rather than advertisements) and to be addressed to existing customers (rather than prospective ones).

[4] The accused Victor Serfaty acknowledges that he, through his company 1421628 Ontario Limited, is responsible for the content of the last four mailings. However, he denies that these mailings are misleading. He denies any responsibility for the first mailing, claiming to have purchased the business from Golan Rabin after the May mailing had already been sent. The position of the accused Simon Benlolo is that he was merely an employee, taking instructions from Mr. Serfaty, and had no control over the content of any of the mailings. Both Alan and Elliot Benlolo deny any involvement in the content of any of the mailings. Elliot Benlolo takes the position that his only connection was that, through a company he controlled with his brother Alan, he lent money to the internet business. Alan Benlolo takes the position that he was merely a supplier of the software that ran the website, and a lender (with his brother Elliot).

[5] There are seven documents which the Crown seeks to introduce into evidence and which are objected to by the accused on the grounds of solicitor and client privilege. Each was made an exhibit on the *voir dire*. The following is a brief description of the documents:

(a) Exhibit 1 is a reporting letter dated March 23, 2000 from a solicitor, Larry Fischer, to Alan Benlolo advising on the incorporation of a new company named "Yellow.Com Business Pages Corp."

(b) Exhibit 2 is a letter dated January 12, 2001 addressed to Alan Benlolo c/o 1421628 Ontario Limited at 180 Steeles Ave. West in Toronto. The letter was sent by a solicitor, David Gicza, and indicates that it encloses a letter of reference to the Royal Bank of Scotland.

(c) Exhibit 3 is a Direction and Authorization dated December 12, 2000 given to David Gicza with respect to the disbursement of $94,512.83 to Perkins Mailing from funds held in trust. The Direction indicates it is in respect of File No. 00-0968. The direction is signed by Victor Serfaty on behalf of 1421628 Ontario Limited and by Elliot Benlolo.

(d) Exhibit 4 is a Direction and Authorization dated December, 2000 given to David Gicza directing the disbursement of trust funds in respect of the same file in the amounts of $12,000 to Elliot Benlolo and $22,000 to Sharon Benlolo (the wife of Alan Benlolo). That direction is signed twice by Elliot Benlolo; on his own behalf and on behalf of 1421628 Ontario Limited.

(e) Exhibit 5 is two pages of an account rendered by David Gicza to Elliot Benlolo dated December 12, 2000 on File #00-0968 covering services rendered from October 24, 2000 to December 12, 2000, and which includes a brief description of the services rendered by date. The total amount of the bill is $487.17.

(f) Exhibit 6 is the third page of the December 12, 2000 account. It is a Trust Statement indicating receipt of $135,000.00 from 1421628 Ontario Limited and payments of $94,512,83 to Perkins Mailing and $487.17 to David Gicza for fees.

(g) Exhibit 7 is a detailed computer generated client ledger for services rendered by David Gicza to Elliot Benlolo in respect of File #00-0968 from October 24, 2000 to March 4, 2001.

[6] At the conclusion of the *voir dire*, I ruled that Exhibits 1, 2, 3, 4 and 6 do not qualify for protection under the solicitor and client privilege rule. Exhibits 5 and 7 are privileged. Although these documents were previously ordered to be disclosed to the Crown, such that privilege was arguably waived, I exercised my discretion to protect the documents from disclosure. I indicated at the time that my reasons for these rulings would follow in writing. The trial then continued before the jury. The jury found: Alan Benlolo and Elliot Benlolo guilty on all ten counts on the indictment; Victor Serfaty guilty on the eight counts for mailings other than the May mailing; and Simon Benlolo guilty on the two counts related to the December mailing. My reasons for the evidentiary rulings follow.

B. THE NATURE OF THE SOLICITOR AND CLIENT PRIVILEGE

[7] The protection of the confidentiality of communications between a solicitor and client is widely regarded as integral to maintaining a properly functioning justice system and preserving the rule of law in Canada: *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, [2004] S.C.J. No. 18 (S.C.C.). Its importance is such that it is now accepted as far more than an evidentiary rule, but rather a general rule of substantive law and a principle of fundamental justice: *Lavalee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 at para 49; *Maranda v. Richer*, [2003] S.C.J. No. 69, 2003 SCC 67 at paras 11-12.

[8] That said, not everything that passes between a solicitor and client is protected by the privilege. For example, the privilege extends only to communications between the solicitor and client for the purpose of seeking and giving legal advice. Sometimes, the connection between the parties is more in the nature of a commercial or business relationship, such that the role of professional legal advisor is not engaged and the privilege does not attach. Sometimes, the disclosure sought is of actions taken, rather than communications passing between the solicitor and client. Sometimes, what otherwise might be communications between a solicitor and client protected by privilege can be shown to be communications for the purpose of furthering a criminal or fraudulent activity, which would fall within an exception to the rule and outside the protection. Sometimes, although the privilege might initially have attached, there has been an explicit or implicit waiver, and the privilege is lost. All of these potential qualifications on the privilege are raised in this case.

[9] I will deal in more detail with each of these categories in my analysis of the issues raised by particular documents. However, before embarking on this specific review, it is useful to state two principles of general application which underlie any consideration of whether solicitor and client privilege applies in a given situation.

[10] The first general principle is that the rule protecting the confidentiality of solicitor and client privilege should be applied bearing in mind its purpose. The usual starting point is Wigmore. In *Descouteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 at 398 (S.C.C.), the Supreme Court described Wigmore's statement of the rule as a good summary "of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality" and quoted the following (8 Wigmore, Evidence Section 2292, p. 554 (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.

[11] Solicitor and client privilege is inextricably bound to the right to legal counsel. As noted by the Supreme Court of Canada in *Decoteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 at 404,

the importance of protecting solicitor and client privilege is "as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege."

[12] In *Canada v. Solosky*, [1980] 1 S.C.R. 821, the Supreme Court noted that the history of the privilege can be traced to the reign of Elizabeth I and has its roots in not compelling a solicitor to testify against his client out of respect for the "oath and honour" of the lawyer to guard closely the secrets of his client. At the foundation of the rule is the recognition that it is in the interests of justice that persons be able to obtain advice from professionals skilled in the law and that such advice will only be relevant and valuable if the person giving it is fully informed as to the underlying facts. The Court in *Solosky* quoted with favour, the decision of Jessel M.R. in *Anderson v. Bank of British Columbia* (1976), 2 Ch. 644 at 649, as follows:

> 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 o others; that he 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.

[13] Thus, the underlying purpose giving rise to the privilege is to ensure that people are able to speak free with lawyers in order to obtain legal advice and without any fear that their communications will ever be divulged. In determining whether the privilege arises in any given situation, it is useful to remember the purpose for which the privilege exists and consider whether the situation presented falls within it.

[14] The second general principle is that any analysis as to the existence of the privilege in a particular fact situation must recognize the fundamental importance of the privilege. Therefore, any ambiguity should be resolved in favour of protecting the privilege, rather than denying it. The extent to which the privacy of communications between a solicitor and client will be protected is illustrated in the Supreme Court of Canada's decision in *R. v. McClure* (2000), 151 C.C.C.(3d) 321. In *McClure*, the accused, who was facing criminal charges of sexual assault, had also been sued civilly by a complainant. The accused sought access to material in the files of the complainant's lawyer in the civil action, which were clearly protected by solicitor and client privilege. The Supreme Court ruled that the right of an accused to make full answer and defence will not prevail over solicitor and client privilege. It is only where the accused can demonstrate innocence at stake, where "core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction, that the Court should infringe upon the confidentiality of solicitor and client communications, and even then only with strict limits:

McClure at paras 45 – 61. Major J., writing the unanimous opinion of the Court, noted at para 35 that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance." At para 61, he held:

> The difficulties described in successfully overcoming solicitor-client privilege illustrate the importance and solemnity attached to it. As described earlier, it is a cornerstone of our judicial system and any impediment to open candid and confidential discussion between lawyers and their clients will be rare and reluctantly imposed.

[15] Needless to say, deciding whether to order disclosure of material clearly protected by solicitor and client privilege (the issue before the Court in *McClure)* is not the same as deciding whether a privilege arises in the first place (the main issue before me). However, the extent of the protection accorded to solicitor and client privilege by the Court in *McClure* is instructive and the general principles expounded have application in any situation in which solicitor and client privilege potentially arises.

C. ANALYSIS

Exhibit 1: The Crime-Fraud Exception

[16] Exhibit 1 on the *voir dire* is a letter from a lawyer (Mr. Fischer) to his client (Alan Benlolo), reporting the incorporation of a company under the name Yellow.Com Business Pages Corp. and providing certain advice in connection with that company. Mr. Fischer advises Mr. Benlolo that Ontario law prohibits the use of a name that is similar to the name of another company or if the use of the name would be likely to deceive. He confirms his recommendation to Mr. Benlolo that he not use the name Yellow.Com Business Pages Corp. and Mr. Benlolo's instructions to use the name notwithstanding that advice. On its face, the letter is clearly a privileged communication between solicitor and client for the purposes of providing legal advice. Mr. Goldstein, for the Crown, acknowledges this, but argues it falls within the crime-fraud exception and is therefore not protected by the privilege.

[17] It is well-recognized that communications with a lawyer for the purpose of obtaining legal advice to facilitate the commission of a crime is not protected by the solicitor-client privilege: *Decoteaux v. Mierzwinski, supra*; *R. v. Campbell*, [1999] 1 S.C.R. 565. The oft-quoted source for this exception is generally thought to be an English Queen's Bench decision dating back to 1884: *The Queen v. Cox and Railton* (1884), 14 Q.B.D. 153. In that case, Railton had consulted a solicitor about transferring his assets to his partner, Cox, in order to avoid a civil judgment against him. His solicitor advised him that he could not do so because of the existence of the partnership. Thereafter, Railton transferred his assets to Cox and produced a memorandum of dissolution of partnership which purported to be dated prior to the date of judgment. Both Cox and Railton were charged with fraud and the solicitor who had been consulted testified at trial as to their discussions. On appeal, the Queen's Bench ruled that there was no breach of solicitor and client privilege. It was accepted that the solicitor involved was completely unaware that the client intended to use his advice to commit a fraud. However, there

was also a finding that the client's communication with the solicitor was "a step preparatory to the commission of a criminal offence, namely a conspiracy to defraud". The Court examined the purpose of the privilege and found that communications with a criminal object in mind did not fall within the purpose for which confidentiality is required. Stephen J. held at p. 167:

> The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment".

[18] There is a fundamental difference between retaining a lawyer for advice on the legality of a contemplated course of action and seeking the assistance of a solicitor with the intent of using the solicitor's services, even without the solicitor's knowledge, in the course of planning or committing a crime. In *R. v. Campbell, supra*, the Supreme Court of Canada noted the absence of a significant body of Canadian case law in this area, and referred with approval to American authors and case law. The law in the United States has developed along the same lines as in England and here in Canada. An excellent summary of the crime-fraud exception can be found in an article published in Loyola University's Annals of Health Law, "The Attorney/Client Privilege: A Fond Memory of Things Past", Mustokoff, Swichar and Herzfeld, 9 Ann. Health L. 107 at 115, as follows:

> Although most lawyers are cognizant of the crime-fraud exception, the point at which it may be used to pierce the privilege is not easily determined. The crime-fraud exception is intended to deter clients from using the attorney/client relationship for improper purposes. "It is the purpose of the crime-fraud exception to the attorney/client privilege to assure that the 'seal of secrecy' ... between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." The crime-fraud exception applies to both the attorney/client and work-product privileges. The application of the crime-fraud exception is contingent on whether the communications relate to past or future wrongs. Communications remain privileged when the lawyer is consulted with respect to past wrongdoing, and only lose their privileged character when the attorney is consulted in order to further a continuing or contemplated fraudulent scheme.
>
> The crime-fraud exception does not require a completed crime or fraud, but rather only requires that the client consulted the attorney in an effort to complete one. The crime-fraud exception does not require that the attorney be aware of the illegality involved. Any communication between the client and attorney can be "in furtherance of" the client's criminal conduct even if the attorney does nothing after the communication to assist in the client's commission of a crime, and even though the communication turns out not to help (and perhaps even hinders) the client's completion of the crime. In order for the exception to apply, however, the

> party seeking application of the exception must make a prima facie showing of intent to commit a crime. Accordingly, it is the client's knowledge and intentions that are of paramount concern when applying the crime-fraud exception.
> (emphasis added, footnotes omitted)

[19] It is important to recognize that the crime-fraud exception does not involve breaching the confidentiality of a solicitor and client relationship. Rather, the nature of the relationship is fundamentally changed once the purpose of the client is to use the services of the solicitor in furtherance of the client's own criminal scheme. Communications in that situation are not in the context of a true solicitor/client relationship and do not fall within the kinds of communications that the privilege rule was designed to protect.

[20] In the case before me, the Crown alleges that Alan Benlolo deliberately sought to incorporate a company with a name that could be used in a fraudulent scheme to deceive the public. The company was to be the vehicle through which the crime would be committed. If the Crown's allegations are proven on the facts, this would clearly fall within the crime-fraud exception. The entire scope of the retainer, completely unbeknownst to Mr. Fischer, was in furtherance of a planned criminal act. As a consequence, any communications between the solicitor and client are not privileged.

[21] I was not directed to, and am not aware of, any case authority as to the standard of proof I should apply in determining whether there is a factual foundation for the position of the Crown. Mr. Goldstein submits the standard should be proof on a balance of probabilities and accepts that the burden should be on the party seeking to invoke the exception, in this case the Crown. The defence argues that the Crown should be held to a higher standard.

[22] Whether or not Alan Benlolo was engaged in a criminal scheme in respect of the charges before the court is ultimately a question the jury will have to decide. The issue before me is the admissibility of one piece of evidence relevant to the decision the jury must make. However, in order to determine whether Mr. Benlolo's communications with his lawyer were part of a criminal enterprise, I must first determine whether there was in fact a criminal enterprise contemplated, a question very close to being the ultimate question for the jury to decide. It does not seem logical that I should apply the standard of proof beyond a reasonable doubt to answer the question I must decide. The American authorities speak of the requirement of a "prima facie case" in order to apply the crime/fraud exception, a standard clearly lower than proof beyond a reasonable doubt. In *R. v. Cox and Railton*, the Court applied a balance of probabilities standard. Although it must be noted that this decision was in 1884, in my view it continues to be good law. Stephen J. stated at p. 175:

> . . . in each particular case, the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped to commit it.
> (emphasis added)

[23] Although I am not aware of any other authority directly on point, the general case law on the standard of proof to be applied on a *voir dire* supports the conclusion that the appropriate standard here is the balance of probabilities. In *R. v. Evans*, [1993] 3 S.C.R. 653, [1993] S.C.J. No. 115, the Supreme Court of Canada held that factual questions which are a condition of the admissibility of evidence should, as a general rule, be determined based on the balance of probabilities standard. In *R. v. Arp*, [1998] 3 S.C.R. 339, [1998] S.C.J. No. 82, Cory J. who delivered the unanimous decision of the Court, affirmed this general principle from *R. v. Evans* and then held (at para 71) that this general rule is departed from only "in those certainly rare occasions when the admission of the evidence may itself have a conclusive effect with respect to guilt". See also *R. v. Terceira* (1998), 38 O.R. (3d) 175 (C.A.).

[24] The issue before me is the admissibility of evidence. I must make factual findings as to whether Mr. Benlolo retained Mr. Fischer with a criminal purpose in mind, not to determine his ultimate guilt on criminal charges, but solely to determine whether the crime/fraud exception to privilege applies. If I find Mr. Fischer's letter to be admissible, it is just one piece of evidence among many which may be used by the jury to determine the guilt or innocence of the accused. It is by no means conclusive of guilt. I would not even characterize it as pivotal or crucial evidence in that regard, although it is certainly relevant. Accordingly, I conclude that the applicable standard of proof for the questions of fact I must determine is proof on a balance of probabilities.

[25] There is no clear Canadian authority as to whether I may take the contents of the subject letter into account in determining the threshold factual issue. In the United States it would appear that the subject communications may themselves be used to establish the *prima facie* case: see *In re Natural Gas Pipeline*, 2000 Tex. App. LEXIS 7459 (Tex. App. – Amarillo [7th Dist] 2000), citing *Freeman v. Bianchi*, 820 S.W.2d at 853 (Tex. App. - - Houston [1st Dist.] 1991, *orig. proc.*). I have some reluctance in importing that concept here. I can see, however, that in cases involving the crime/fraud exception there will often be circumstances where the only evidence of the criminal purpose behind consulting the solicitor will be in the solicitor's files or through the testimony of the solicitor. I therefore do not purport to lay down any kind of general rule as to the use which may be made of the communications themselves at this stage. Suffice to say, for purposes of the matter before me, I am able to reach a conclusion on the factual circumstances without relying on the substance of any otherwise privileged communication and I will therefore limit my considerations accordingly.

[26] The charges in this case relate to five mailings sent in May, July, August, September and December 2000. For purposes of this ruling it is not necessary that the crime/fraud contemplated at the time of the communication with the lawyer be the same as the offence charged in the indictment before the court. However, in this case, I am satisfied that the communications did in fact deal with the planning stages of the very offences before the court. It is not necessary for me to deal with all of the charges. I will focus on the May mailing.

[27] That mailing was sent on May 25, 2000 to 50,000 business and non-profit organizations across Canada. I have no hesitation in finding that this mailing appears to be an invoice, rather

than a solicitation. Further, the document is very similar in appearance to a Bell Canada bill, with almost the identical format, font and layout. The colour scheme is also similar, although a little more yellow than the Bell Canada bills. It is a two-sided document, with a detachable lower section to be mailed back with payment. In the upper left-hand corner appears the well-known logo of the yellow walking fingers (although they are apparently inverted and walking in the opposite direction from the Bell Canada yellow pages logo, a detail I did not detect myself until I was told about it). Beneath the logo is "yellow business pages.com", with the words "yellow" and "pages" in bold type and the word "com" in a font about half the size of the other words. The heading on the document is "Account Summary" and in each case the account number shown is the telephone number of the recipient. Directly below that appear the words "Bill Date May 25, 2000". The description of services is "Business listing in Yellow Business Pages.com". The total amount due is $25.52 for yearly services from May 25/00 to May 24/01. The document itself is laid out like an invoice. It has a heading for payments, adjustments and balance forward. Under the heading "Total Amount Due" the mailing states, "Please pay upon receipt. To avoid a late payment charge, please ensure we receive your payment on or before June 24, 2000." On the back of the document under the heading "Payment Information", the following appears:

> Your account is due 30 days from bill date on front of invoice.
> A late payment charge is applied to overdue accounts.
> Failure to pay invoice in full will result in delisting of your business information.

[28] Quite simply, the document is, on its face, an invoice. It even calls itself an invoice. It was sent randomly to 50,000 unsuspecting businesses, which had never ordered any services. It does not appear in any respect to be a mere advertisement or solicitation of business. Rather, it is a representation to the recipient that monies are due and owing for a business listing service and implies that the recipient is already a customer who will incur late charges if timely payment is not made. As such, it is false and misleading in a material respect. An alert recipient who reads the May mailing closely may notice that Bell Canada's name is not on the invoice. A well-organized and alert recipient may also realize that these services were never ordered and that there is therefore no obligation to pay. However, it is not necessary that anybody be actually deceived by the document. All that is necessary is that there be a false or misleading representation. It would be completely reasonable for anybody to conclude, even reading the document closely, that it is a bill for services that the recipient is obliged to pay. That is both false and misleading.

[29] In order to constitute an offence under s. 52 of the *Competition* Act, the person making the representation must either know it is false or misleading, or be reckless as to whether it is. I find that this requirement is also met. It is not possible that any person sending out such a document could do so without knowing it to be false and misleading. The degree of similarity between the document sent in the May mailing and a Bell Canada bill could not possibly be a coincidence. It follows that the format of an invoice from an existing supplier of similar services was deliberately mimicked. This document was designed in a deliberate attempt to trick people into paying money for a service they had not ordered. Even apart from the similarity to a Bell Canada bill, no person responsible for creating this document could honestly believe that people

would not be misled by it. It is deliberately designed in format and content to appear to be an invoice. Thus, all of the elements required to constitute a violation of s. 52(1) of the *Competition Act* are met. I am fully satisfied, regardless of what standard of proof is applied, that those involved in the design and mailing of this document in May were engaged in a criminal enterprise.

[30] The next factual issue is whether Alan Benlolo was involved in the May mailing and whether the creation of Yellow.Com Business Pages Corp was part of the illegal scheme. There is considerable evidence supporting the Crown's theory that Alan Benlolo was party to a joint criminal enterprise in connection with the May mailing. It was Alan Benlolo, through some corporate entity or other which he controlled, who acquired the software that was to run the yellow business pages website. On March 14, 2000, Alan Benlolo incorporated a company named Yellow.Com Business Pages Corp. with a listed corporate office address of 111 Mill Arbour Lane, Thornhill, Ont. L4J 6M9. The May mailing provided for cheques to be sent to P.O. Box 7400, Station B, Willowdale. The application form filled out to obtain that post office box gives the applicant's name as Alan Benlolo, with an address of 111 Mill Arbour Lane and the firm name as Yellow Business Pages.com, with an address of 4632 Yonge St. Aira Ranta, a postal clerk at Station B Willowdale, testified that she has known Alan Benlolo and his brother Elliot since they were teenagers because they played hockey in the same league as her sons. She further testified that both Alan and Elliot came into the post office from time to time to pick up the mail from P.O. Box 7400. She identified both Alan and Elliot Benlolo in the courtroom, although she stated she was not sure which one was which, and indeed did mix them up when she pointed them out, identifying Alan as Elliot, and vice versa. Ms Ranta did not ask for ID from either of the Benlolo brothers when they came to get the mail as she knew both of them and knew Alan Benlolo was the registered holder of the box. Although Ms Ranta did mix up which brother was which, I found her evidence as to the two of them picking up mail from time to time to be highly reliable. She had known them over many years, knew their names and had many opportunities in good conditions to observe them at the post office.

[31] There is an issue as to whether it was actually Alan Benlolo who opened the post office box, or somebody else posing as Alan Benlolo. There is no positive evidence identifying the person who attended and signed the application form, and Alan Benlolo denies the signature on the form is his. However, even if Alan Benlolo did not attend himself and sign the form, it is a logical inference that whoever did attend had Alan Benlolo's authority to do so. This is particularly the case since personal information such as his address and birthdate were provided and business registration documents would have been required. Further, after the box was opened Mr. Benlolo attended and picked up the mail. He therefore had a connection with and some control over the post office box to which all of the proceeds from the May mailing were directed.

[32] The address provided for the firm on the post office box application was 4632 Yonge St. The call center which was to handle all incoming calls from the May mailing was located at 4632 Yonge St. One of the telephone numbers provided for the firm on the post office box application form is 512-7742. That is also the local Toronto phone number on the May mailing and one of the numbers at the call center at 4632 Yonge St. A search warrant was executed at 4632 Yonge

St. in October 2000. One of the documents found there was an AT&T Canada Credit Information form. Under customer information, the legal business name is stated to be Yellow.Com Business Pages, which is described as having been incorporated by Alan Benlolo on March 14, 2000. The bank for Yellow.Com Business Pages is correctly identified as the Bank of Montreal at 1 Promenade Circle and the name and number of a contact person at the bank is provided. The phone numbers provided for Yellow.Com Business Pages on this document match the phone numbers on the May mailing.

[33] Perkins Mailing was hired to do some printing work and to provide bulk mailing services for the May mailing. Victor Harris of Perkins Mailing testified at trial that his first contact was a telephone call in April from a man who identified himself as "Glen" and who sought pricing information. Thereafter he had other telephone calls with Glen and was provided with a computer file and information to do the mailing. The first time Mr. Harris met anyone face to face in connection with the mailing was when Elliot Benlolo, Alan Benlolo's brother, came to the plant while the May statements were being printed. Later, in connection with another mailing, Mr. Harris met at his office with Victor Serfaty, Elliot Benlolo and Alan Benlolo. At that time, he had discussions with Alan Benlolo about the timing of the mailing and expected return rates. Alan Benlolo spoke about the nature of the website and the plans for its future development.

[34] Perkins Mailing issued an invoice for the May mailing in the amount of $30,227.50. That invoice was paid by a bank draft from the account of Alan Benlolo's company Yellow.Com Business Pages Corp on May 24, 2000. Perkins required the payment before it would post the mailing. Mr. Harris testified that Elliot Benlolo personally delivered the bank draft as payment for the May mailing. Part of the funds ($30,000.00) used by Yellow.Com Business Pages Corp for this purpose came on May 23, 2000 from another corporation, Nation's Discount, a business owned and operated by Alan and Elliot Benlolo. A further $10,000.00 was deposited into the bank account of Yellow.Com Business Pages by way of cheque dated May 23, 2000 from a numbered company which operated the call center at 4632 Yonge St. That cheque is payable to Yellow Business Pages.Com (the name on the May mailing) and is described at the bottom of the cheque as being "Re First Investment Y.B.P.Com".

[35] For purposes of this motion, I do not propose to review every piece of evidence that was before me. In particular, I note that there is substantial additional evidence with respect to payment of invoices, payments to the company incorporated later by Mr. Serfaty and payments made out of proceeds from the May and other mailings which were received by companies or persons associated with Alan Benlolo. I have highlighted the main evidence I relied on in reaching my conclusion. I have considered the evidence given by various of the accused on pre-trial motions before me. I did not find their evidence as to who was responsible for the May mailing to be credible. Their testimony was inconsistent with the documentary evidence and the evidence of other witnesses whom I did find to be credible, such as Ms Ranta. At the time of the motion before me on the solicitor and client privilege issues, I was satisfied on a balance of probabilities that Alan Benlolo was a major player in the group of individuals who acted together to plan and execute the criminal activity represented by the May mailing. As such, he is

responsible for the content of the May mailing. Having now heard all of the evidence at trial, I remain satisfied, indeed reinforced, as to the correctness of that factual conclusion.

[36] It was crucial to the planned criminal enterprise to have the use of a business name under which the May mailing would be sent. I find as a fact that a key element of the plan was to confuse people as to whether this "invoice" was related in some way to the Bell Canada yellow pages. Hence the importance of the words "yellow pages" appearing in the business name. I find, on a balance of probabilities, that this was the purpose for which Yellow.Com Business Pages Corp was initially set up. That being the case, all communications with a solicitor in furtherance of that purpose are within the crime/fraud exception to the solicitor and client privilege. The fact that Mr. Fischer was unaware of Mr. Benlolo's purpose, and indeed advised him against using the name, does not alter that determination. It is Mr. Benlolo's underlying purpose that matters. He did not retain and consult counsel for the purpose of obtaining legitimate legal advice, but rather for the purpose of facilitating a criminal activity. Accordingly, the letter from Mr. Fischer, which was Exhibit 1 on the *voir dire*, is admissible in evidence.

Exhibit 2: Business Reference

[37] Exhibit 2 on the *voir dire* is a letter dated January 12, 2001 from David Gicza to Alan Benlolo. At the time, David Gicza was a solicitor who did legal work on various matters for all of the accused. The reference line on the letter is "Re: Reference letter to the Royal Bank of Scotland". The letter to the Royal Bank of Scotland was introduced on the *voir dire*. The branch of the bank to which it is addressed is in the Bahamas. It is basically a letter of introduction and a business and personal reference for Alan Benlolo from Mr. Gicza, who states in the letter that he has known Mr. Benlolo since high school.

[38] The Crown does not seek the admission into evidence of the reference letter to the Bahamas bank. That is not relevant to any issue in this trial. The Crown seeks to put in only the covering letter to Mr. Benlolo, which enclosed the bank reference letter. The only aspect of this letter relied on by the Crown is the fact that Alan Benlolo's address is indicated to be c/o 1421628 Ontario Limited, 180 Steeles Ave. West. (This would support the Crown's theory of a connection between Alan Benlolo and the business carried out at 180 Steeles Ave, which was the call center for Yellow Business Directory from about July 2000.) The Crown argues that there is no privilege for this letter from Mr. Gicza to Alan Benlolo because the services provided by Mr. Gicza were not legal in nature.

[39] Mr. Gicza testified that Alan Benlolo consulted him because he was interested in opening an offshore bank account. Mr. Gicza further testified that his legal practice from about the middle of 2000 to 2003 was almost exclusively offshore financing and "asset relocation". He said he opened a separate file solely for this matter and considered this retainer by Mr. Benlolo to be legal in nature. Obviously, Mr. Gicza's view of the matter, although relevant, is not determinative. Whether the consultation in question was legal in nature is a question of fact to be determined, on a balance of probabilities, from all of the surrounding circumstances.

[40] The purpose of the solicitor and client privilege is to enable a client to speak freely with a lawyer for the purpose of obtaining legal advice. It is a precondition to the privilege arising that the consultation with the solicitor be in that context, such that the lawyer is consulted for advice in his capacity as a legal professional. Advice or assistance given by a lawyer on matters outside the solicitor and client relationship are not covered by the privilege: *Canada v. Solosky*, [1980] 1 S.C.R. 821; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc.*, *supra*, at paras 37 – 42; *R. v. Campbell*, [1999]1 S.C.R. 565, [1999] S.C.J. No. 16 at para 50. As noted by Binnie J. delivering the unanimous decision of the Supreme Court of Canada in *R. v. Campbell*, at para 50:

> In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.) at pp. 668-69:
>
> > [It] is not sufficient for the witness to say "I went to a solicitor's office." . . .Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. (emphasis added)

[41] There is nothing about the reference letter from Mr. Gicza to the Royal Bank of Scotland in the Bahamas that is legal in nature. He mentions in the letter that he has known Alan Benlolo since high school "both in a personal capacity and recently as a client of my firm". He then provides a reference as to Mr. Benlolo's veracity and entrepreneurial abilities. That was the extent of Mr. Gicza's role. There is nothing in the surrounding circumstances to support a contrary conclusion. I therefore conclude that the service provided by Mr. Gicza in connection with the reference to the Bahamas bank was of a business, rather than legal nature. His letter to Mr. Benlolo enclosing the reference letter does not raise any issues of solicitor and client privilege. It is admissible in evidence. Any potential prejudice to Mr. Benlolo arising from inferences that might be improperly drawn from the existence of offshore bank accounts could be avoided by an appropriate instruction to the jury as to the limited relevance of the document.

Exhibits 5 and 7: Solicitor's Bill and Dockets

[42] As noted above, on the July, August, September and December mailings, the entity identified as running the website and to which payments were to be made is Yellow Business Directory.Com, rather than Yellow Business Pages.Com (which appears on the May mailing). Yellow Business Directory.Com is a style name registered to 1421628 Ontario Limited, a company incorporated by Victor Serfaty in June 2000. From the date of its incorporation, proceeds from the mailings were deposited into the 1421628 Ontario Limited bank account. Although the original P.O. Box rented in May 2000 remained the same for the July, August and September mailings, the phone numbers changed. The new numbers went to an office at 180 Steeles Ave in Toronto, from which a call center and other administrative functions were

operated. The theory of the Crown is that all of the accused continued in the same criminal enterprise as before, although through a new corporate entity and with some modifications to the content of the mailings prompted by the complaints generated by the May mailing. In particular, the Crown argues that Elliot and Alan Benlolo continued to be key players after June 2000 and were active participants in the business carried on by 1421628 Ontario Limited. The defence position is that Victor Serfaty was the sole directing mind of 1421628 Ontario Limited, that Victor Serfaty is solely responsible for the content of the last four mailings, and that Alan and Elliot Benlolo were only involved as lenders.

[43] On October 24, 2000, the Competition Bureau executed several search warrants, pursuant to which it seized hundreds of documents from various locations, including 180 Steeles Ave. which was the business address from which 1421628 Ontario Limited operated. That same day, Mr. Gicza was consulted by Elliot Benlolo about the search warrants and opened a file bearing file number 00-0968. On December 12, 2000, Mr. Gicza rendered a bill to Elliot Benlolo in respect of this file (Exhibit 5 on the *voir dire*). The description of the services provided is set out by date and is largely taken from a computerized client ledger/docketing system (Exhibit 7 on the *voir dire*.

[44] There is a legal presumption that the contents of a lawyer's account to his client are *prima facie* privileged. That presumption may be rebutted by demonstrating that disclosure of the information sought would not violate the confidentiality of the relationship: *Maranda v. Richer*, [2003] S.C.C. 67; [2003] S.C.J. No. 69 at paras 33-34.

[45] From the account and dockets, and from the evidence on the *voir dire*, it is apparent that the file at issue here was opened as a direct result of the Competition Bureau search warrants. Further, this is a classic situation of a person contacting a lawyer in the face of an impending legal problem upon which the client seeks advice. Mr. Gicza reviewed the search warrants, researched defences available under the *Competition Act* and provided advice to his clients about this situation. It may also be the case that he gave some advice to Alan and Elliot Benlolo about a loan agreement between them (or their company Nations Discount) and 1421628 Ontario Limited. However, the evidence on that is sketchy, at best. Although Mr. Gicza testified on the *voir dire* that only Victor Serfaty provided instructions with respect to 1421628 Ontario Limited, there is little evidence of this in the file. There is some reference to Mr. Serfaty being present, but most of the meetings, telephone calls and interaction appeared to be with Elliot Benlolo and Alan Benlolo. Needless to say, this is consistent with the Crown's theory of Alan and Elliot Benlolo being actively involved in the business operated by the numbered company. The evidence is therefore highly relevant to issues central to this case. However, that does not affect whether privilege exists.

[46] The account and dockets set out in some detail the services provided and who Mr. Gicza was dealing with. The nature of the advice and the context in which it was sought cannot be severed from other matters set out in the accounts. This falls squarely within the underlying purpose for the solicitor and client privilege rule. These clients consulted Mr. Gicza for legal advice on the very matters at issue here. Disclosure of the these documents would violate the

confidentiality of the communications between Mr. Gicza and his clients. Therefore, both documents are privileged and cannot be introduced into evidence at trial.

Exhibits 3, 4 and 6: Trust Statement and Directions

[47] Attached to the December 12, 2000 bill on File No. 00-0968 is a Trust Statement in respect of that file (Exhibit 6 on the *voir dire*). The trust statement shows the funds held by Mr. Gicza in his trust account and payments out of that trust fund. There are two payments by 1421628 Ontario Limited into the trust account on November 27, 2000 in the amounts of $110,000.00 and $25,000. There are two payments out of the trust funds: one to Mr. Gicza in payment of his account rendered on December 12, 2000 in the amount of $487.17; the other to Perkins Mailing in the amount of $94,512.83. This left a trust balance of $40,000.00. The payment to Perkins Mailing was for its invoiced services relating to the December mailing. It is described on the statement as being "Paid per direction".

[48] Exhibit 3 on the *voir dire* is the Direction authorizing the payment to Perkins Mailing. It is stated to be from "1421628 Ontario Limited o/a Yellow.com Business Pages and Elliot Benlolo". It is signed by Victor Serfaty on behalf of 1421628 Ontario Limited and by Elliot Benlolo.

[49] Exhibit 4 on the *voir dire* is a Direction relating to the same trust account and file number. It authorizes the payment of $12,000 to Elliot Benlolo and $22,000 to Sharon Benlolo (Alan Benlolo's wife). It is not dated, but since the payments authorized by it were actually made on December 28, 2000, the Direction was likely signed at about the same time. The Direction is stated to be from "1421628 Ontario Limited o/a Yellow.com Business Pages and Elliot Benlolo". It is signed twice by Elliot Benlolo; once personally and once on behalf of 1421628 Ontario Limited.

[50] The mere fact that the trust statement is attached to the solicitor's account does not necessarily protect it from disclosure. The Supreme Court of Canada recognized in *Maranda v. Richer, supra*, (at para 30) that "not everything that occurs in the solicitor-client relationship falls within the ambit of privileged communication", citing with approval *Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div.Ct.). The central issue before the Court in *Greymac Credit* was whether transactions in a solicitor's trust account are protected from disclosure by solicitor and client privilege, the same issue before me. The Divisional Court held that documents and information relating to the payment of monies into and out of a solicitor's trust account are not privileged because they relate to questions of objective fact, independent of communications between the solicitor and client. Southey J. stated at p. 284:

> . . . Evidence as to whether a solicitor holds or has paid 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 questions and produce the material.
>
> It may be helpful to ask in such a case whether the client himself, if he were a witness, could refuse on the ground of the solicitor-and-client privilege to disclose particulars of a transaction directed by him through his solicitor's trust account. 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 as to which the client could claim the privilege, because it is not a communication at all. It is an act. The solicitor-and-client privilege does not enable a client to retain anonymity in transactions in which the identity of the participants has become relevant in properly constituted proceedings. (emphasis added)

[51] Elliot Benlolo was the client identified on the file opened by Mr. Gicza. The accounts were rendered to Elliot Benlolo. The file was opened on the same day as the search warrants were executed and the matters discussed between the solicitor and client largely relate to that issue. Criminal charges were laid against Elliot Benlolo, Alan Benlolo and Victor Serfaty on November 24, 2000 in relation to the May, July, August and September mailings. Three days later, 1421628 Ontario Limited deposited $135,000 into Mr. Gicza's trust account. Thereafter disbursements are made to Perkins Mailing, Elliot Benlolo and Sharon Benlolo. In each case, although Mr. Gicza testified that the monies were held in trust for 1421628 Ontario Limited, a direction was required from both Elliot Benlolo and the numbered company before payment was made. Indeed, on one of the occasions, Elliot Benlolo signed on behalf of the numbered company as well as himself. There was no evidence to suggest that any of the payments were in connection with a transaction involving Mr. Gicza's professional legal services. Mr. Gicza testified that the funds were deposited by the numbered company because Elliot Benlolo was concerned that money he had lent to the numbered company as start-up capital might be frozen or tied up in litigation. He further testified that Elliot Benlolo received trust statements so that he could monitor what was happening with the funds deposited by the numbered company. According to Mr. Gicza, Elliot Benlolo either signed the Directions because he was receiving funds or because Mr. Gicza had made a mistake.

[52] I regret to say I am unable to accept Mr. Gicza's explanation. Both Directions are signed by Elliot Benlolo, including the one for payment to Perkins Mailing, from which Elliot Benlolo received no direct benefit. No other recipients of trust monies were asked to sign Directions, and there is no reason they would be. I do not accept the explanation that Elliot Benlolo signed the Directions because he was receiving funds. Further, including Mr. Benlolo's name on the Direction cannot have been a simple typing error. Both Directions require his signature, and they were prepared about one month apart. Mr. Benlolo actually attended on both occasions and signed the Directions. Having a client attend to sign a Direction before monies will be paid out is not an insignificant matter and would likely have been caught if this was merely a mistake and there was no reason to require Mr. Benlolo's signature. One of the Directions was signed only by Mr. Benlolo, which makes it unlikely his signature was not required at all. The most logical and probable explanation for Mr. Benlolo being required to sign these Directions is that Mr. Gicza was under instructions that no monies were to be paid out without Elliot Benlolo's

agreement, perhaps as a way of protecting the Benlolo financial investment in the company, or perhaps because Elliot Benlolo was one of the directing minds of the business. The reason for the deposit of funds by 1421628 Ontario Limited was likely also for the protection of Mr. Benlolo's investment, although it could well also have been for the purpose of preventing it from seizure, as suggested by Mr. Gicza.

[53] The fact remains, however, that the deposit of funds into Mr. Gicza's trust account does not appear to be related to the giving or receiving of advice. It is not a communication. It is an act designed to tie up funds or protect them from seizure by others. There is no particular reason why these funds needed to be placed in a solicitor's trust account. If the purpose was to ensure Elliot Benlolo's control over disbursements, the funds could just as easily have been placed in an ordinary bank account requiring two signatures for any payments out. The fact of the payment to Perkins Mailing, the source of the funds and who authorized payment of the account are all relevant facts, which the Crown is entitled to explore in this case. If these funds had been routed through a bank, this information would be compellable. The parties cannot funnel the funds through a solicitor's trust account and then claim the facts have somehow become immune from disclosure. The same reasoning applies to the Directions. In this context, Directions to the solicitor for payment out of his trust account are no different from directions to any trustee authorizing the release of funds from a trust. They are not communications between a solicitor and client for the purpose of giving or receiving legal advice.

[54] In my view, the *Greymac Credit* decision is a compete answer to the question before me. The transactions through Mr. Gicza's trust account, including the trust statements and any directions he received, are not protected by solicitor and client privilege.

Waiver: Exhibits 5 and 7

[55] Mr. Goldstein, for the Crown, submits that any documents I have found to be privileged are nevertheless admissible because privilege has been waived. This argument affects Exhibits 5 and 7, Mr. Gicza's account and dockets.

[56] The documents in question were originally seized on May 7, 2002 pursuant to a valid search warrant. Mr. Gicza, quite properly, on behalf of his clients asserted solicitor and client privilege over all documents seized and they were sealed in the presence of a representative of the Law Society of Upper Canada. The Crown then brought an application for a determination as to whether the documents were actually privileged and, if not, for an order unsealing them and turning them over to the Crown. Initially, the application was returnable in Ottawa on July 15, 2002, but at the request of the defence was adjourned on consent to be heard in Toronto on September 23, 2002. On that date, the matter was further adjourned on consent to October 21, 2002. At the time, Elliot, Alan and Simon Benlolo were represented in the criminal proceedings by Mr. Czernick; and Mr. Serfaty, by Mr. Neuman. Mr. Czernick was instructed by his clients to assert privilege and resist production of the seized documents. He was also retained as agent for Mr. Neuman to forward the same position on behalf of Mr. Serfaty. Unfortunately, due to a scheduling error, Mr. Czernick missed the October 21, 2002 court date. On October 21, 2002, in the absence of any objection, an Order was made in this Court unsealing the documents and

releasing them to the Crown. The documents were thereafter reviewed by the Crown and by Competition Bureau investigators. In accordance with its ongoing disclosure obligations, the Crown provided disclosure of these documents to the defence in November 2002. Mr. Czernick did nothing. He did not review the disclosure materials. He did not notify his clients that he had failed to attend at the hearing, nor of the consequences of the Order made. He did not advise the Crown that he had failed to attend due to inadvertence. He did not bring an application to set aside or vary the earlier Order made releasing the documents to the Crown. Consequently, none of the accused became aware that the documents had been released to the Crown.

[57] The preliminary hearing was scheduled to proceed on November 18, 2002. On that date, all of the accused waived their right to a preliminary hearing. Therefore, no evidence was presented and there was no occasion for the accused individuals to learn that the documents seized from their previous solicitor's office had been released to the Crown. The trial in this Court was originally scheduled for November 3, 2003. By this time, Mr. Serfaty was representing himself, but Mr. Czernick still represented the other three accused. On the eve of trial, Mr. Czernick conceded that he had a conflict which precluded him from continuing to act. The trial was adjourned to March 8, 2004 so that the accused could retain new counsel. Soon thereafter Mr. Cohen was retained and began the arduous task of reviewing all of the disclosure and preparing for trial and for an extensive *Charter* motion under s.11(b). Mr. Cohen discovered the problem with the documents seized from lawyers' offices and discussed it with the Crown in February 2004. This was not an unreasonable delay given the amount of documentation that had to be reviewed and absorbed. The Crown does not fault Mr. Cohen for his handling of this matter, nor do I. By the time he learned of the problem, the documents had been in the hands of the Crown for over a year and trial was imminent. It was reasonable to take no further steps at that time, but rather to deal with the solicitor and client privilege issue as an evidentiary point before the trial judge.

[58] The traditional rule is that once a document is disclosed, it is no longer confidential, and any privilege attaching to it is waived: *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.); *Lord Ashburton v. Pape*, [1913] 2 Ch. 69 (C.A.). Further, although the privilege belongs to the client, a waiver by a solicitor with ostensible authority to represent the client, is binding on the client: *Calcraft v. Guest* at p.764. In *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 2 All ER 485 (C.A.), the English Court of Appeal held that a waiver of privilege by a solicitor acting without instructions and against his client's wishes was nevertheless a binding waiver and that a trial judge has no discretion to relieve the client of the consequences.

[59] In this case, Mr. Czernick was solicitor of record for three of the accused and had been retained as agent to act for the fourth. He had ostensible authority to represent their interests. The result of his non-attendance at the hearing on October 21, 2002 was certainly predictable; an Order would be made releasing the documents. Further, he was later served with the additional disclosure obtained as a result of the Order. In these circumstances, there is an implied waiver of any privilege attaching to the documents. Although Mr. Czernick did not have instructions from his clients to make the waiver, he had authority to act on their behalf and the Crown was entitled to rely upon that. Therefore, it was appropriate for the Crown to assume that privilege had been waived and to act accordingly.

[60] It does not necessarily follow, however, that the Crown is entitled to place the documents into evidence simply because privilege has been waived. I referred above to the traditional line of cases on this point. That approach preceded more modern cases which have elevated the solicitor and client privilege to a substantive right, and not merely a rule of evidence, as well as cases which have noted the interplay of this privilege and *Charter* rights. See, for example, *Lavalee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 and *R. v. O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1. In more recent years, with increasing recognition of the importance of protecting the confidentiality of the relationship between a solicitor and client, courts have begun to adopt a more flexible approach. There is no longer a fixed rule, rigidly applied, that once privilege is waived it is waived forever and for all purposes. Rather, courts will look at the surrounding circumstances to determine whether, as an exercise of discretion, evidence subject to a privilege should be excluded even though the privilege has been waived.

[61] Madam Justice Wein of this Court took that approach in *Airst v. Airst* (1998), 37 O.R. (3d) 654 (Ont.Ct.Gen.Div.), a divorce case in which the husband inadvertently disclosed correspondence with his solicitor to an evaluator jointly retained by the spouses to value certain matrimonial assets and the wife sought production of the correspondence arguing that privilege had been waived. Wein J. held that common law rules "should develop in accordance with *Charter* principles and values" and that in this context the "rigid approach embodied in [the traditional cases] must be modified to reflect the fairness approach developed in more recent years". She then outlined a number of factors relevant to the exercise of the Court's discretion in determining whether to permit otherwise privileged material to be admitted into evidence, including:

- the way in which the documents came to be released;
- the timing of the discovery of the disclosure;
- whether there was a prompt attempt to retrieve the documents after the disclosure was discovered;
- the timing of the application to recover the documents or prevent their use in evidence;
- the number and nature of third parties who have become aware of the documents;
- whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party;
- the impact on the fairness, both actual and perceived, of the processes of the Court.

[62] The approach taken by Wein J. in *Airst v. Airst* was considered and adopted by C. Campbell J. in *United States of America v. Levy*, [2001] O.J. No. 864 (S.C.J.). The decision of Campbell J. was upheld by the Ontario Court of Appeal with a brief endorsement stating simply, "As to the general merits we agree with Campbell J. and would dismiss the appeal.": [2003]

O.J.No. 56. I conclude from the modern line of cases that I do have a discretion in this matter to relieve the accused from the consequences of the action (or inaction) of their former solicitor. It is not entirely clear from the case law whether the exercise of discretion occurs after finding there has been a waiver of privilege (so as to relieve the party from the consequences of the waiver) or whether the discretion is exercised by finding there has not in the circumstances been a waiver at all. In my opinion, the first course of action is the appropriate one: *i.e.* recognizing that there has been a waiver, but nevertheless relieving the party of the consequences. However, the result is the same whichever approach is taken.

[63] In the case before me, I am of the view that it is appropriate in these circumstances to exercise my discretion in favour of the accused. It was never the intention of any of the accused to waive privilege in respect of these documents and they were not involved in the disclosure itself. Even in respect of Mr. Czernick, the disclosure was inadvertent rather than deliberate. Steps should have been taken at an earlier stage to deal with the issue. However, the accused themselves did not know the documents had been released. Once Mr. Cohen was retained and became aware of the problem, trial was imminent. It was reasonable at that point to leave the issue to be dealt with at trial. The documents were not publicly released, but rather viewed only by the Crown and Competition Bureau investigators in the course of preparing for trial. The documents are highly prejudicial to the accused, particularly to Alan Benlolo and Elliot Benlolo. The Crown is somewhat prejudiced in that evidence showing the extent to which Elliot and Alan Benlolo were involved in the affairs of 1421628 Ontario Limited is no longer available as part of the Crown's case. However, evidence such as this would not ordinarily have been available to the Crown and there is no suggestion that the Crown elected not to proceed with other lines of inquiry because of an expectation that these documents would be available at trial. As I have noted above, the type of communication involved here falls squarely within the kind of situation the solicitor and client privilege is designed to protect. The importance of the privilege generally, and the context in which it arises in this case, are factors influencing my decision to exclude the evidence. This is evidence to which the Crown would never have had access, but for the inadvertence of the former counsel for the accused and his failure to implement their instructions. It would be fundamentally unfair to the accused, and not in the interests of justice, to permit the admission of such evidence based solely on this type of error by their lawyer. In all of these circumstances, I consider it appropriate to relieve the accused of the consequences of their counsel's inadvertence. Exhibits 5 and 7 on the *voir dire* are therefore not admissible at trial.

D. CONCLUSIONS

[64] To summarize:

(a) The reporting letter from Mr. Fischer to Alan Benlolo about the incorporation of Yellow.Com Business Pages Corp falls within the crime/fraud exception and is not protected by solicitor and client privilege.

(b) The letter from Mr. Gicza to Alan Benlolo addressed to him at the premises of the numbered company and enclosing a reference for the Royal Bank of Scotland in the

Bahamas is not privileged because the services provided by Mr. Gicza were of a business nature rather than legal advice.

(c) Mr. Gicza's trust statement and directions pursuant to which monies were paid out of his trust account are not privileged because they are financial transactions rather than confidential communications and cannot be shielded from disclosure merely by passing them through a solicitor's trust account.

(d) Mr. Gicza's account to Mr. Benlolo and his client ledger setting out his dockets contain confidential communications between a solicitor and client relating to legal consultation and advice. They are privileged. Although that privilege was waived by the inadvertence of the former counsel for the accused, in all of the circumstances it is appropriate to maintain the privileged nature of those documents and keep them out of the evidence at trial as an exercise of discretion balancing the competing interests involved.

MOLLOY J.

Released: May 11, 2004

COURT FILE NO.: F871/02
DATE: 20040511

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

VICTOR SERFATY, ALAN BENLOLO, ELLIOT BENLOLO, and SIMON BENLOLO

REASONS FOR DECISION

MOLLOY J.

Released: May 11, 2004