

Stephen J. Donell, Receiver appointed by the California Superior Court County of Los Angeles,
Over GJB Enterprises, Gerald Berke and Judith Berke (appellant/petitioner) v. GJB Enterprises
Inc., Gerald Berke and Judith Berke (respondents/respondents)
(CA038848; 2012 BCCA 135)

Indexed As: Donell et al. v. GJB Enterprises Inc. et al.

British Columbia Court of Appeal
K. Smith, Chiasson and Neilson, JJ.A.
March 27, 2012.

Summary:

The petitioner was a Receiver appointed in March 2009 by a California court over the assets of GJB Enterprises Inc. (a "Ponzi scheme") and its principals, the Berkes (the GJB parties). The court ordered the Berkes to disclose certain personal financial information. In July 2010, Mr. Berke came to British Columbia, and a Vancouver law firm ("Farris") paid him some \$524,000 through its trust account. The Receiver learned that Mr. Berke had a bank account at HSBC.

The British Columbia Supreme Court made a recognition order pursuant to s. 270 of the Bankruptcy and Insolvency Act, recognizing the California receivership proceedings. The court ordered that HSBC pay into court all monies it held in the name of any of the GJB parties. HSBC paid some \$374,000 into court. The Receiver learned that the source of those funds was the \$524,000 trust cheque drawn by Farris in July 2010. Farris declined the Receiver's request to produce documents and records belonging to the GJB parties, on the grounds of solicitor-client privilege. The Receiver applied for: (1) "a declaration that no solicitor-client privilege or other privilege attaches to communications, files or other documents of any kind in the possession of Farris relating to the GJB Parties as a result of the GJB Parties' unlawful conduct. (2). Alternatively, a declaration that no solicitor-client privilege or other privilege attaches to communications, files or other documents of any kind in the possession of Farris relating to the GJB Parties from March 23, 2009, to the present."

The British Columbia Supreme Court, in a decision reported at [2011] B.C.T.C. Uned. 758, dismissed the Receiver's application. "[N]ot only are almost all of the files not producible on the basis of relevance in the civil context, I conclude that solicitor-client privilege attaches to all of the files and documents in the possession of Farris". The Receiver sought leave to appeal the order to the extent it applied to the trust account ledgers of Farris that pertained to the funds paid to Berke in July 2010.

The British Columbia Court of Appeal, per Newbury, J.A., in a decision reported at [2011] B.C.A.C. Uned. 89, granted leave to appeal.

The British Columbia Court of Appeal, K. Smith, J.A., dissenting, allowed the appeal and ordered that the trust account ledger information and entries identified by the Court be provided to the Receiver.

Bankruptcy - Topic 6763

Practice - Orders - Assistance of foreign courts - [See **Evidence - Topic 4245.1**].

Barristers and Solicitors - Topic 1641

Relationship with client - Confidential communications - General - The British Columbia Court of Appeal set out the basic principles of solicitor-client privilege - See paragraphs 33 to 38.

Barristers and Solicitors - Topic 1641

Relationship with client - Confidential communications - General - The British Columbia Court of Appeal considered the effect of *Maranda v. Leblanc* (2003) (S.C.C.) on the scope of solicitor-client privilege, and the distinction between communications and facts - "Maranda and subsequent decisions have held that solicitor-client privilege is all but absolute. Expressly in the criminal law context, Maranda held that because of the connection of lawyers' bills to the core of the solicitor-client relationship, lawyers's bills are privileged presumptively. Neither Maranda nor subsequent decisions abolished the distinction between communications and facts or actions, but that distinction must be considered in light of the strengthened support accorded to solicitor-client privilege and the analysis mandated by Maranda." - See paragraphs 50 to 59.

Barristers and Solicitors - Topic 1643

Relationship with client - Confidential communications - Ledgers, including trust ledgers - A Receiver sought production of a law firm's trust account ledgers - The British Columbia Court of Appeal stated that "[t]his case does not concern lawyers' bills; it concerns trust account ledgers which involve money management. Insofar as this management reflects the solicitor-client relationship and what transpires within it, the entries are presumed to be privileged. Those that do not reflect that relationship are not privileged" - The court concluded that "four entries merely relate to money management and record the movement of funds held in trust into and out of investment vehicles. They do not arise out of the solicitor-client relationship and what transpires within it; in other words, they do not relate to communications to obtain legal advice. They are not subject to solicitor-client privilege" - See paragraphs 60 to 66.

Barristers and Solicitors - Topic 1644

Relationship with client - Confidential communications - Lawyer's accounts - [See second **Barristers and Solicitors - Topic 1641** and **Barristers and Solicitors - Topic 1643**].

Barristers and Solicitors - Topic 1650

Relationship with client - Confidential communications - Loss of privilege where communications used to facilitate crime - On this appeal, the appellant contended that the chambers judge erred by her interpretation and application of the "crime exception" or "public interest" exception to solicitor-client privilege - The British Columbia Court of Appeal held that the judge did not err - "The crime exception applies when a person seeks legal advice with the intention of facilitating the commission of a crime. In that case, the involvement of the lawyer does not attract protection. It has been said that the advice

obtained is obtained by fraud. Solicitor-client privilege also may be lost if the lawyer is duped or becomes a conspirator. ... [T]he chambers judge covered both of these potential scenarios" - See paragraphs 67 to 71.

Evidence - Topic 4232

Witnesses - Privilege - Lawyer-client communications - Requirement of confidential communication - [See **Barristers and Solicitors - Topic 1643**].

Evidence - Topic 4245.1

Witnesses - Privilege - Lawyer-client communications - Extent of privilege - Effect of client's bankruptcy - A recognition order pursuant to s. 270 of the Bankruptcy and Insolvency Act (BIA), recognized California receivership proceedings against the respondent, and ordered a bank to pay into court all monies it held in the respondent's name - The Receiver learned that the source of the monies was a trust cheque drawn by a law firm - The law firm declined the Receiver's request to produce documents and records belonging to the respondent, on the grounds of solicitor-client privilege - On this appeal, the Receiver argued that the files should be produced as a matter of cooperation pursuant to principles set out under the BIA - The British Columbia Court of Appeal dealt with that argument summarily - "While s. 275(1) of the BIA requires the British Columbia Supreme Court to 'cooperate, to the maximum extent possible' with foreign representatives and courts, in this case the Receiver and the California court, such cooperation is not relevant to a determination of whether material is covered by solicitor-client privilege or is relevant under Canadian law. These are the matters under consideration in the present proceedings." - See paragraphs 27 and 28.

Evidence - Topic 4245.6

Witnesses - Privilege - Lawyer-client communications - Privilege - Lawyer's accounts - [See **Barristers and Solicitors - Topic 1643**].

Evidence - Topic 4251

Witnesses - Privilege - Lawyer-client communications - Loss of privilege - Communications respecting crime - [See **Barristers and Solicitors - Topic 1650**].

Practice - Topic 4577

Discovery - What documents must be produced - Privileged documents - Attorney-client communications (legal advice privilege) - [See **Barristers and Solicitors - Topic 1643**].

Practice - Topic 5002

Conduct of trial - Open court - Power to hear in camera - This appeal involved matters of procedure to be followed by a court in determining issues of solicitor-client privilege - The British Columbia Court of Appeal stated that "[a]lthough the law supports the use of in camera submissions in matters concerning solicitor-client privilege, I was troubled by the prospect of this Court's receiving in camera submissions ex parte and, in particular, submissions that were not made to the chambers judge. The respondent submitted that solicitor-client privilege should be treated similarly to informer privilege in this context, pointing out that both have been treated as nearly absolute. ... I would not import such

proceedings automatically or casually into the procedure for considering solicitor-client privilege. One important distinction between informer and solicitor-client privilege is the safety of the informer. ... In my view, courts should avoid in camera proceedings when it is feasible to do so; in camera ex parte proceedings more so" - See paragraphs 79 to 82.

Cases Noticed:

- Maranda v. Leblanc, [2003] 3 S.C.R. 193; 311 N.R. 357; 2003 SCC 67, consd. [paras. 1, 102].
- Maranda v. Richer - see Maranda v. Leblanc.
- Canada (Attorney General) v. Hodson et al., [2010] B.C.T.C. Uned. 1274; 324 D.L.R. (4th) 222; 2010 BCSC 1274, refd to. [paras. 30, 102].
- Czech Republic v. Slyomovics - see Canada (Attorney General) v. Hodson et al.
- Wirick, Re, [2005] B.C.T.C. 1821; 15 B.C.L.R.(4th) 193; 2005 BCSC 1821, refd to. [paras. 30, 102].
- Criminal Lawyers' Association (Ont.) v. Ontario (Minister of Public Safety and Security), [2010] 1 S.C.R. 815; 402 N.R. 350; 262 O.A.C. 258; 2010 SCC 23, refd to. [para. 32].
- Blood Tribe Department of Health v. Privacy Commissioner (Can.) et al., [2008] 2 S.C.R. 574; 376 N.R. 327; 2008 SCC 44, consd. [para. 95]; refd to. [para. 32].
- Solosky v. Canada, [1980] 1 S.C.R. 821; 30 N.R. 380, refd to. [para. 34].
- Lavallee, Rackel & Heintz et al. v. Canada (Attorney General), [2002] 3 S.C.R. 209; 292 N.R. 296; 312 A.R. 201; 281 W.A.C. 201; 164 O.A.C. 280; 217 Nfld. & P.E.I.R. 183; 651 A.P.R. 183; 2002 SCC 61, refd to. [para. 34].
- R. v. McClure (D.E.), [2001] 1 S.C.R. 445; 266 N.R. 275; 142 O.A.C. 201; 2001 SCC 14, refd to. [paras. 34, 112].
- Ontario Securities Commission v. Greymac Credit Corp. (1983), 146 D.L.R.(3d) 73; 41 O.R.(2d) 328 (Div. Ct.), consd. [paras. 36, 102].
- Taylor Ventures Ltd. (Bankrupt) et al., [1995] B.C.T.C. Uned. 192; 60 B.C.L.R.(3d) 348; 9 C.B.R.(4th) 146 (S.C.), refd to. [paras. 37, 102].
- R. v. Joubert (R.M.) (1992), 7 B.C.A.C. 31; 15 W.A.C. 31; 69 C.C.C.(3d) 553 (C.A.), refd to. [paras. 38, 103].
- Wyoming Machinery Co. v. Roch et al., [2009] 3 W.W.R. 433; 446 A.R. 356; 442 W.A.C. 356; 2008 ABCA 433, consd. [para. 52].
- Ontario (Attorney General) v. Information and Privacy Commissioner (Ont.) (2005), 197 O.A.C. 278; 251 D.L.R.(4th) 65 (C.A.), consd. [para. 56].
- Legal Services Society (B.C.) v. Information and Privacy Commissioner (B.C.) et al. (2003), 182 B.C.A.C. 234; 300 W.A.C. 234; 226 D.L.R.(4th) 20 (C.A.), refd to. [para. 56].
- Stevens v. Prime Minister (Can.), [1998] 4 F.C. 89; 228 N.R. 142 (F.C.A.), refd to. [para. 56].
- Majormaki Holdings LLP v. Wong et al., [2007] B.C.T.C. Uned. F24; 161 A.C.W.S.(4th) 543; 2007 BCSC 1399, refd to. [para. 69].
- R. v. Campbell (J.) and Shirose (S.), [1999] 1 S.C.R. 565; 237 N.R. 86; 119 O.A.C. 201, refd to. [para. 69].
- R. v. Basi (U.S.) et al., [2009] 3 S.C.R. 389; 395 N.R. 240; 277 B.C.A.C. 305; 469 W.A.C. 305; 2009 SCC 52, consd. [para. 119]; refd to. [para. 79].

Jones v. Smith, [1999] 1 S.C.R. 455; 236 N.R. 201; 120 B.C.A.C. 161; 196 W.A.C. 161, refd to. [para. 79].
Vancouver Sun et al. v. Canada (Attorney General) et al., [2007] 3 S.C.R. 253; 368 N.R. 112; 247 B.C.A.C. 1; 409 W.A.C. 1; 2007 SCC 43, consd. [para. 119]; refd to. [para. 79].
Named Person v. Vancouver Sun - see Vancouver Sun et al. v. Canada (Attorney General) et al.
Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al., [2006] B.C.T.C. Uned. B56; 59 B.C.L.R.(4th) 264; 2006 BCSC 1180, refd to. [para. 82].
Société d'énergie Foster Wheeler ltée v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc., [2004] 1 S.C.R. 456; 318 N.R. 111; 2004 SCC 18, consd. [para. 97].
Rieger et al. v. Burgess et al. (1989), 76 Sask.R. 184; 34 C.P.C.(2d) 154 (Q.B.), refd to. [para. 103].
Kruger Inc. v. Kruco Inc., [1988] R.J.Q. 2323; 20 Q.A.C. 106 (C.A.), refd to. [para. 103].
Madge v. Thunder Bay (City) (1990), 72 O.R.(2d) 41 (S.C.), refd to. [para. 108].
Municipal Insurance Association (B.C.) v. Information and Privacy Commissioner (B.C.) et al., [1996] B.C.T.C. Uned. 114; 143 D.L.R.(4th) 134 (S.C.), refd to. [para. 108].
Hodgkinson v. Simms (1988), 55 D.L.R.(4th) 577 (C.A.), refd to. [para. 109].

Authors and Works Noticed:

Bryant, Alan W., Lederman, Sidney N., and Fuerst, Michelle K., Sopinka, Lederman & Bryant: The Law of Evidence in Canada (3rd Ed. 2009), p. 931-32, para. 14.58-59 [para. 35].
Cross, Rupert, and Tapper, Colin, Evidence (9th Ed. 1999), p. 442, para. 3 [para. 35].
Phipson on Evidence (17th Ed. 2010), p. 672 [para. 35].

Counsel:

W.E. Skelly and B. La Borie, for the appellant;
R.S. Anderson, Q.C., for the respondent, Gerald Berke.

This appeal was heard at Vancouver, British Columbia, on October 17, 2011, before K. Smith, Chiasson and Neilson, J.J.A., of the British Columbia Court of Appeal. The Court delivered a majority judgment on March 27, 2012, with the following reasons:

Chiasson, J.A. (Neilson, J.A., concurring) - see paragraphs 1 to 91;
K. Smith, J.A., dissenting - see paragraphs 92 to 122.

Appeal allowed.

Editor: E. Joanne Oley

Bankruptcy - Topic 6763

Practice - Orders - Assistance of foreign courts - A recognition order pursuant to s. 270 of the Bankruptcy and Insolvency Act (BIA), recognized California receivership

proceedings against the respondent, and ordered a bank to pay into court all monies it held in the respondent's name - The Receiver learned that the source of the monies was a trust cheque drawn by a law firm - The law firm declined the Receiver's request to produce documents and records belonging to the respondent, on the grounds of solicitor-client privilege - On this appeal, the Receiver argued that the files should be produced as a matter of cooperation pursuant to principles set out under the BIA - The British Columbia Court of Appeal dealt with that argument summarily - "While s. 275(1) of the BIA requires the British Columbia Supreme Court to 'cooperate, to the maximum extent possible' with foreign representatives and courts, in this case the Receiver and the California court, such cooperation is not relevant to a determination of whether material is covered by solicitor-client privilege or is relevant under Canadian law. These are the matters under consideration in the present proceedings." - See paragraphs 27 and 28.

Barristers and Solicitors - Topic 1644

Relationship with client - Confidential communications - Lawyer's accounts - The British Columbia Court of Appeal considered the effect of *Maranda v. Leblanc* (2003) (S.C.C.) on the scope of solicitor-client privilege, and the distinction between communications and facts - "Maranda and subsequent decisions have held that solicitor-client privilege is all but absolute. Expressly in the criminal law context, Maranda held that because of the connection of lawyers' bills to the core of the solicitor-client relationship, lawyers's bills are privileged presumptively. Neither Maranda nor subsequent decisions abolished the distinction between communications and facts or actions, but that distinction must be considered in light of the strengthened support accorded to solicitor-client privilege and the analysis mandated by Maranda." - See paragraphs 50 to 59.

Barristers and Solicitors - Topic 1644

Relationship with client - Confidential communications - Lawyer's accounts - A Receiver sought production of a law firm's trust account ledgers - The British Columbia Court of Appeal stated that "[t]his case does not concern lawyers' bills; it concerns trust account ledgers which involve money management. Insofar as this management reflects the solicitor-client relationship and what transpires within it, the entries are presumed to be privileged. Those that do not reflect that relationship are not privileged" - The court concluded that "four entries merely relate to money management and record the movement of funds held in trust into and out of investment vehicles. They do not arise out of the solicitor-client relationship and what transpires within it; in other words, they do not relate to communications to obtain legal advice. They are not subject to solicitor-client privilege" - See paragraphs 60 to 66.

Evidence - Topic 4232

Witnesses - Privilege - Lawyer-client communications - Requirement of confidential communication - A Receiver sought production of a law firm's trust account ledgers - The British Columbia Court of Appeal stated that "[t]his case does not concern lawyers' bills; it concerns trust account ledgers which involve money management. Insofar as this management reflects the solicitor-client relationship and what transpires within it, the entries are presumed to be privileged. Those that do not reflect that relationship are not privileged" - The court concluded that "four entries merely relate to money management

and record the movement of funds held in trust into and out of investment vehicles. They do not arise out of the solicitor-client relationship and what transpires within it; in other words, they do not relate to communications to obtain legal advice. They are not subject to solicitor-client privilege" - See paragraphs 60 to 66.

Evidence - Topic 4245.6

Witnesses - Privilege - Lawyer-client communications - Privilege - Lawyer's accounts - A Receiver sought production of a law firm's trust account ledgers - The British Columbia Court of Appeal stated that "[t]his case does not concern lawyers' bills; it concerns trust account ledgers which involve money management. Insofar as this management reflects the solicitor-client relationship and what transpires within it, the entries are presumed to be privileged. Those that do not reflect that relationship are not privileged" - The court concluded that "four entries merely relate to money management and record the movement of funds held in trust into and out of investment vehicles. They do not arise out of the solicitor-client relationship and what transpires within it; in other words, they do not relate to communications to obtain legal advice. They are not subject to solicitor-client privilege" - See paragraphs 60 to 66.

Evidence - Topic 4251

Witnesses - Privilege - Lawyer-client communications - Loss of privilege - Communications respecting crime - On this appeal, the appellant contended that the chambers judge erred by her interpretation and application of the "crime exception" or "public interest" exception to solicitor-client privilege - The British Columbia Court of Appeal held that the judge did not err - "The crime exception applies when a person seeks legal advice with the intention of facilitating the commission of a crime. In that case, the involvement of the lawyer does not attract protection. It has been said that the advice obtained is obtained by fraud. Solicitor-client privilege also may be lost if the lawyer is duped or becomes a conspirator. ... [T]he chambers judge covered both of these potential scenarios" - See paragraphs 67 to 71.

Practice - Topic 4577

Discovery - What documents must be produced - Privileged documents - Attorney-client communications (legal advice privilege) - A Receiver sought production of a law firm's trust account ledgers - The British Columbia Court of Appeal stated that "[t]his case does not concern lawyers' bills; it concerns trust account ledgers which involve money management. Insofar as this management reflects the solicitor-client relationship and what transpires within it, the entries are presumed to be privileged. Those that do not reflect that relationship are not privileged" - The court concluded that "four entries merely relate to money management and record the movement of funds held in trust into and out of investment vehicles. They do not arise out of the solicitor-client relationship and what transpires within it; in other words, they do not relate to communications to obtain legal advice. They are not subject to solicitor-client privilege" - See paragraphs 60 to 66.