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Insolvency Law

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FRASER MILNER CASGRAIN LLP

SOLICITOR AND CLIENT PRIVILEGE IN BANKRUPTCY - REVISITED AND AFFIRMED

In *Ultra Information Systems Canada Inc. v. Pushor Mitchell LLP* (2008 Carswell BC 1537 (B.C.S.C.)), one of the corporate Defendants had become bankrupt. There was an issue as to whether some of the bankrupt Defendant's production documents were privileged. The Court considered whether the Trustee in Bankruptcy could waive the previously claimed solicitor and client privilege and therefore produce the documents.

The British Columbia Supreme Court applied and followed *Bre-X Minerals Ltd.* ((2001) A.B.C.A. 225 (Alta. C.A.)) which held that (i) solicitor and client privilege fell into a category of interests which are not transferred to or conferred upon the Trustee by the *Bankruptcy and Insolvency Act*, (ii) solicitor and client privilege is not property under the BIA, and (iii) the right to waive privilege is not a right attaching to property divisible amongst creditors.

The Court also found that a former director of the bankrupt company does not have the right to waive the company's solicitor and client privilege after the director's resignation. Nor can the former director retroactively waive solicitor client privilege over documents created while he was still a director.

The Court also went further than the discussion in *Bre-X*, and found (1) being struck from the corporate register does not waive a company's right to solicitor and client privilege, and (2) the sole director of the company at the time of its bankruptcy was the only person (in this case) with authority to review the documents and either assert or waive privilege. The Court specifically ordered that this director review the documents in question and determine whether or not to assert privilege over them.

For further information please contact David Mann at 403 268-7097 or David LeGeyt at 403 268-3075, or visit our **website** www.fmc-law.com/insolvency.