

Date: 20070831

Docket: T-2088-05

Citation: 2007 FC 879

Toronto, Ontario, August 31, 2007

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

**TAZCO HOLDINGS INC., EXCALIBRE OIL TOOLS LTD.,
and TEBO INDUSTRIES LTD.**

**PLAINTIFFS
(Respondents)**

and

**ADVANTAGE PRODUCTS INC., GENESIS MACHINING SERVICES INC.,
and WEATHERFORD CANADA LTD.**

**DEFENDANTS
(Applicants)**

REASONS FOR ORDER AND ORDER

[1] This motion raises once again the vexing issue of whether a law firm is in a position of conflict in acting against a former client. The Defendants seek an order to remove the firm of Brownlee LLP (“Brownlee”) as solicitors for the Plaintiff. The Defendants allege that Brownlee is

in a position of conflict because the lawyer from Brownlee who is acting on this patent infringement action had previously been engaged by the Defendant, Advantage Products Inc. (“Advantage”), to pursue patent infringement litigation on its behalf. The parties have agreed that this motion be dealt with as a Rule 369 motion under the *Federal Courts Rules*. As these cases are often fact driven, it is necessary to set out in some detail the evidence contained in the various affidavits filed. There were no cross-examinations on any of the affidavits.

Background

[2] This action was commenced by statement of claim issued November 22, 2005 by Brownlee on behalf of the Plaintiffs. A statement of defence and counterclaim was served and filed on January 25, 2006. The action is a patent infringement action in which it is alleged that the defendants have infringed a patent of the plaintiffs for the production of a device called a Torque Anchor. The device which the defendants manufacture and sell which is alleged to infringe the plaintiffs patent is called a TorqStopper. It is a device primarily used in the oil industry.

[3] In support of its position Advantage filed the affidavit of Lynn Tessier (“Tessier”) sworn March 29, 2006 and the affidavit of Daniel R. Horner (“Horner”) sworn March 29, 2007. Tessier is the inventor of the anti-rotation tool known as the TorqStopper, the patented device which is in issue in these proceedings. He is also a principal of Advantage. Horner is a director of and corporate counsel for Advantage.

[4] The plaintiffs filed affidavits from Edward C. Moore (“Moore”) sworn March 20, 2007 and one from Neil F. Kathol (“Kathol”) sworn March 21, 2007. A reply affidavit from Kathol sworn May 7, 2007 is also filed. Moore is the President of the plaintiffs, Tazco Holdings Inc. (“Tazco”) and Excalibre Oil Tools Inc. (“Excalibre”). Kathol is a partner of Brownlee and acts for the plaintiffs. Kathol is also the lawyer at Brownlee who acted for Advantage in a prior patent infringement lawsuit involving the TorqStopper.

Evidence of Advantage

[5] Prior to this proceeding, Advantage had retained the services of Kathol to pursue a patent infringement action on their behalf (the “Corlac Action”). This retainer lasted from approximately October 2001 through August 2002 (the “Brownlee Retainer”). Tessier deposes that during the Brownlee Retainer, Kathol worked closely with various individuals from Advantage including Tessier, Horner, John Doyle, an employee of Advantage, and others associated with the TorqStopper patent. During the course of the Brownlee Retainer, Tessier deposes that confidential information was shared by Advantage with Kathol and more specifically:

6. In the course of the advantage Communications, the Plaintiffs’ solicitors, and specifically Mr. Kathol:
 - (a) drafted licence agreements and sub-license agreement including those involving MSI and Advantage;
 - (b) discussed, in detail, aspects of the TorqStopper and the nature of its operation;
 - (c) discussed, in detail, patent infringement issues respecting the Corlac Action with myself, Mr. Weber, Mr. Goodwin, Mr. Doyle and Mr. Malyszko;

- (d) discussed, in detail, litigation strategy concerning patent infringement issues respecting the Corlac Action with Mr. Weber, Mr. Goodwin, Mr. Doyle and Mr. Malyszko;
- (e) assisted in drafting the Statement of Claim issued by Advantage and MSI in the Corlac Action;
- (f) prepared Affidavits on behalf of Mr. Weber and Mr. Doyle respecting patent infringement issues in the Corlac Action; and
- (g) generally, obtained knowledge of Advantage's finances, share structure, off shore interests and intentions, corporate make-up, customers, suppliers of machined goods, distributors and litigation strategy.

7. As a result of the Advantage Communications, I am of the belief that the Plaintiffs' solicitors, Brownlee Fryett, and specifically, Mr. Kathol, have confidential information concerning Advantage's business, interests and affairs as well as the personal characteristics and litigation tolerances of myself and Mr. Weber, which the Plaintiff might use to the disadvantage of Advantage.

[6] Tessier further states that he did not consent to either Kathol or Brownlee releasing confidential information obtained during the Brownlee Retainer relating to the Corlac Action. Attached as exhibits to the Tessier affidavit are copies of accounts rendered by Brownlee to Advantage commencing in October 2001 to August 2002. The total of the accounts is in excess of \$23,000. The accounts are all signed by Kathol on behalf of Brownlee. The work done by Brownlee for Advantage is extensive as appears from the accounts and it would be impossible to believe that during the course of the Brownlee Retainer that confidential information relating to the TorqStopper and Advantage generally was not shared with Kathol and Brownlee.

[7] The itemization in the accounts refers to, *inter alia*, telephone calls with the client; meetings with the client; reviewing the patent application; correspondence to and from the client;

correspondence to Corlac regarding passing off and patent infringement; drafting outline of patent technology licenses; drafting the statement of claim; drafting license agreements; detailed review of Canadian Patent; drafting of affidavits; telephone call with Tessier; advice regarding the claim etc. All of these entries indicate the kind of communication one would expect between counsel and client. The inference to be made is that Advantage shared with its counsel confidential information relating to its business. It is to be noted that Kathol was engaged in drafting affidavits. Although it is not clear from the accounts, presumably this was in support of the interlocutory injunction claimed in the Corlac Action. In an affidavit in support of an injunction there must be full and frank disclosure to the Court. Thus, in order to draft such affidavits, Kathol must have had a detailed understanding of the business of Advantage. He may have forgotten what he learned, as he says in his affidavit, but that is not the issue.

[8] Prior to the commencement of this action, there was an exchange of correspondence and telephone conversations between Brownlee and Advantage's intellectual property counsel. Brownlee sent Advantage and others a letter dated February 3, 2005 demanding that Advantage not infringe the patent of the plaintiffs and that Advantage cease and desist from doing so. Advantage's counsel responded by letter dated February 11, 2005 advising that Brownlee was in a conflict and could not act against Advantage. The letter went on to recite the *Alberta Code of Professional Conduct*, Chapter 6, Rule 3(b):

Except with the consent of the client or approval of a court pursuant to (c) a lawyer, must not act against a former client if the lawyer has confidential information that could be used to the former client's disadvantage in the new representation.

[9] The letter invited Brownlee to withdraw as counsel based on conflict in that it possessed, through Kathol, confidential information of Advantage. The exchange of correspondence continued and in a letter dated March 31, 2005, Horner formally requested that Brownlee withdraw as counsel in relation to this matter. The letter listed four areas of confidential information that were acquired by Kathol in his representation of Advantage in the Corlac Action. The confidential information identified in the letter included:

1. confidential information relating to the structure of Advantage;
2. confidential information relating to the development of the patents and intellectual technology;
3. Advantage's client base, marketing strategies, client lists, income and expense documents; and
4. information regarding the manner in which Advantage conducted its litigation and strategies.

The letter also went on to comment “[s]uffice it so say that if this is not a conflict, then nothing is”. The letter then advised that if Brownlee did not withdraw that a motion would be brought to obtain an order prohibiting Brownlee from acting.

[10] Horner, in his affidavit, states that Advantage always took the issue of conflict seriously and that in an effort to persuade Brownlee to withdraw they sent the Tessier affidavit to Brownlee in April, 2006. In response, Kathol advised Advantage's counsel that Brownlee had sealed the Tessier affidavit and that it was not reviewed because “there would be the possibility that the affidavit contains allegations of your clients having imparted information . . . that goes beyond what was

actually imparted. We do not want to be informed of any such additional information”. Horner also attaches as an exhibit to his affidavit an e-mail from Kathol dated April 25, 2006. In that e-mail, Kathol indicates that Tazco is rethinking whether Brownlee should continue to act. Brownlee did not withdraw.

[11] The action languished for a number of months. Horner states that because the matter did not move forward thereafter that Advantage was of the view that Brownlee might in fact withdraw as counsel. Horner deposes that only in December 2006, when Brownlee responded to the Notice of Status Review, did Advantage realize that Brownlee intended to continue to act. Horner says in light of these circumstances the motion to remove Brownlee was brought as soon as reasonably possible.

The Plaintiff's Evidence

[12] In response to the motion, Moore deposes that Kathol has acted for Excalibre since 1997 and that Kathol “has an intimate knowledge of the facts and circumstances of this case”. Moore also states that he “has been advised” that if Advantage wanted to remove Brownlee as solicitors “it would have to so without delay”. Moore then relates the history of this action to support the delay argument.

[13] The statement of claim was issued and a statement of defence and counterclaim was served and filed. Thereafter, there was skirmishing between the parties over the pleadings, however, no motion was brought to disqualify Brownlee. Pleadings were finally completed in February 2007

and the defendants again indicated they would bring a motion to have Brownlee disqualified. The plaintiffs delivered their affidavit of documents in February 2007. This motion was finally launched in March 2007.

[14] Moore states in his affidavit that he would be “disappointed” if the conflict issue can now be raised. He also deposes that James Weber (“Weber”), the President of Advantage, is the “front and centre” person at Advantage and expresses surprise that Tessier swore the affidavit on behalf of Advantage and not Weber. He also describes an altercation that arose between Weber and himself at a trade show over their respective patents. Nothing turns on this event, however.

[15] Moore also states that he has not been told anything by Kathol whatsoever relating to Advantage dealing with personal characteristics and litigation tolerances of Tessier, Weber or others and has not been told anything dealing with Advantage’s finances, structure, litigation tolerances, customer base or litigation strategy. Indeed, Moore deposes that much of this information, such as names of suppliers is available on Advantage’s website and Moore states that he knows most of Advantage’s customers because they are in the same market.

[16] Kathol, in his affidavit sworn March 21, 2007, confirms the Brownlee Retainer and admits he drafted the statement of claim in the Corlac Action and drafted Royalty Agreements which he says were standard royalty agreements based on precedents. Kathol deposes that he has no recollection of receiving any information about Advantage or its principals that was unique and denies discussing “in detail, litigation strategy”. Essentially, Kathol denies he was privy to any

confidential information from Advantage and categorizes information received as “common knowledge” in the “oil patch” or available through public sources. Much of his affidavit tosses off the “confidentiality” allegations of Advantage as so much standard run of the mill work that there was no relevant confidential information received by Kathol or Brownlee.

[17] In a supplemental affidavit sworn May 7, 2007, Kathol describes an exchange of correspondence with counsel for Advantage in which Advantage’s counsel sent a cease and desist letter to Brownlee dated September 18, 2006 regarding infringement of Advantage’s patents relating to the TorqStopper. Brownlee responded by letter dated September 26, 2006 and reiterated that they were counsel to Tazco. Nowhere in this exchange of correspondence is there any allegation of conflict.

Issues

[18] The issues for the Court are:

1. Is Brownlee in a position of disqualifying conflict such that it should no longer be able to act for the plaintiffs?
2. If Brownlee is in a position of disqualifying conflict, does the failure of Advantage to move expeditiously to disqualify Brownlee permit Brownlee to continue to act for the plaintiffs?

Disqualifying Conflict - The Test to be Applied

[19] The Supreme Court of Canada has set out the approach to be taken when dealing with a potential conflict of interest. In *Macdonald Estate v. Martin*, [1990] 3 S.C.R. 1235, Justice Sopinka observed that the Court is concerned with at least three competing values, as follows:

1. Maintaining the high standards of the legal profession and the integrity of our system of justice;
2. Not depriving litigants of their counsel of choice without good cause; and,
3. Allowing reasonable mobility in the legal profession.

[20] Thus, when analyzing whether a disqualifying conflict of interest is present, the test “must be such that the public, represented by the reasonably-informed person, would be satisfied that no use of confidential information would occur” (par. 47). It is a two-part test. Part one requires that the solicitor actually receive confidential information relative to the matter at hand. Part two entails a consideration of whether there is a risk to the client that the confidential information will be used to the prejudice of the client.

Analysis

[21] In this case, the first question is whether Brownlee, during the Brownlee Retainer, received confidential information relevant to this action. Notwithstanding his protestations to the contrary, it is inconceivable that Kathol did not receive some confidential information regarding Advantage during the retainer relating to the Corlac Action. A brief review of the accounts rendered by Brownlee to Advantage indicates that information was shared by Advantage with Kathol. Further,

the amount of the accounts indicates that Kathol did more than just a standard statement of claim. A significant amount of work was done and it is unquestionable that it related to patents held by Advantage or its associated companies which are directly in issue in this proceeding.

[22] Justice Sopinka noted with respect to the receipt of confidential information:

“In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court’s degree of satisfaction be such that it would withstand the scrutiny of the reasonably-informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.”

[23] Having determined that confidential information was imparted by Advantage to Brownlee via Kathol, the next question for consideration is whether there is a risk that it will be used to the detriment of the client. This is a much more difficult question to answer. The Brownlee Retainer occurred almost four years before the current action was commenced. Kathol says he does not recall any confidential information being imparted to him. He has not reviewed the former file and says any documentation received from Advantage was returned. However, this is not in and of itself enough to answer this question. As Justice Sopinka observed:

“The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize

his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere.” (par. 50)

[24] The overriding policy concern is “a risk” that confidential information will be used to the detriment of the client. The level of “risk” is not qualified but only “a” risk. Given the extent to which Kathol was engaged on behalf of Advantage and the scope of work undertaken by him and Brownlee a risk exists that confidential information will be used to the prejudice of Advantage. While Kathol says he does not currently remember any confidential information being imparted to him, there is a risk that his memory will be refreshed during the current litigation such that confidential information will be used against Advantage. Thus, to maintain the integrity of our system of justice in the mind of public the Brownlee firm must be disqualified from acting on behalf of the plaintiffs in this case. Having determined that Kathol has confidential information he and Brownlee cannot act against their former client.

[25] I am supported in this conclusion by a consideration of Rule 6 of the *Code of Professional Conduct* (the “Code”) of the Law Society of Alberta. That Rule provides:

“A lawyer who possesses confidential information of a client or *former client*:

(b) must not act or continue to act for another client if the lawyer would have a duty to disclose such information to that client.”

[26] There are other provisions of the *Code* which support this overriding obligation of lawyers to their clients.

[27] Similarly, many other cases have reiterated the proposition that there must be an unqualified perception of fairness in the eyes of the public (see, for example, *O'Dea v. O'Dea* (1987), 68 N.F.L.D. & P.E.I.R. 67 aff'd N.F.L.D. C.A).

[28] These principles were reaffirmed by the Supreme Court of Canada in *R. v. Neil*, [2002] 3 S.C.R. 631. Mr. Justice Binnie, speaking for the Court, stated that the “duty of loyalty” is “essential to the integrity of the administration of justice and its high public importance that public confidence in that integrity be maintained” (par. 12). Further, the Court approved the reasoning of Justice Ground in *Drabinsky v. KPMG* (1988), 41. O.R. (3d) 565 (Ont. Gen. Div.) wherein Justice Ground observed that:

“I am of the view the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client.”

[29] All of these principles were discussed and approved again by the Supreme Court of Canada in the recent decision of *Strother et al. v. 3464920 Canada Inc. et al.*, [2007] S.C.J. No. 24. While this case deals with concurrent clients, Justice Binnie noted at par. 51:

“In *MacDonald Estate v. Martin*, similarly, the legal rule was arrived at after balancing various interests, including trading off a client’s ability to choose counsel against other considerations such as lawyer mobility. Once arrived at, however, the *MacDonald Estate v. Martin* rule protecting against disclosure of confidential information is applied as a “bright line” rule. The client’s right to confidentiality trumps the lawyer’s desire for mobility. So it is with *Neil*. The “bright line” rule is the product of the balancing of interests not the gateway to further internal balancing. In *Neil*, the Court stated (at para. 29):

The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyers reasonably believes that he or she is able to represent each client without adversely affecting the other. [Emphasis in original.]

Further, Justice Binnie went on to discuss the “duty of loyalty” as follows:

[56] While the duty of loyalty is focussed on the lawyer’s ability to provide proper client representation, it is not fully exhausted by the obligation to avoid conflicts of interest with other concurrent clients. A “conflict of interest” was defined in *Neil* as an interest that gives rise to a

substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, **a former client**, or a third person. (emphasis added)

(*Neil*, at para. 31, adopting § 121 of the *Restatement (Third) of the Law Governing Lawyers*, vol. 2, at pp. 244-45)

[30] Thus, to adapt Justice Binnie’s phraseology to this case – the former client’s right to confidentiality trumps the current clients’ right to counsel of their choice.

[31] The Plaintiffs argue that they should not be removed as counsel for three main reasons. First, they argue there is nothing more than general allegations that confidential information was imparted to Kathol. They argue there are no details in Tessier’s affidavit of the specifics of the confidential information and that Kathol’s work was based upon “conventional documents and records which were of a public nature” and thus Brownlee is not possessed of any confidential

information. Second, they argue an adverse inference ought to be drawn from the failure of Advantage to file an affidavit of its CEO, Jim Weber. Finally, they argue that because of the significant delay in bringing this motion that the plaintiffs were “lulled into believing that the defendants no longer had a real concern about conflict of interest” and ought not to be deprived of their counsel of choice. They cite a number of cases which they say support the proposition that on the facts of this case they ought not to be disqualified as counsel.

[32] I would not give effect to any of these arguments. First, where there is a previous retainer by a client, there is an inference that confidential information has been imparted to counsel. In this case there is more than an inference. There is the evidence of Tessier as to the type of confidential information given to Kathol. Even more telling are the recorded entries in the accounts rendered by Kathol to Advantage. Those entries support the fact that that there were meetings, telephone calls and discussions with representatives of Advantage including Tessier. It is a stretch of the imagination to believe that all that was imparted during these meetings, telephone calls and discussions was nothing more “conventional documents and records which were of a public nature”. As the confidential information related to the patents of Advantage it is clearly relevant to the issues in this proceeding.

[33] The cases cited by the plaintiffs do not assist their cause. The case of *Denharco Inc. v. Forespro Inc.* [1999] F.C.J. No. 97, a judgment of this Court, concerned the threshold question whether there was evidence of a previous solicitor-client relationship sufficiently related to the retainer in dispute. The Court found there was not and thus did not disqualify counsel. The Court

was also critical of the fact that it was an associate in the law firm who had no personal knowledge of whether there was any relevant confidential information passed on to counsel and not the client who swore the affidavit. In this case there is clear and convincing evidence that Brownlee was in possession of confidential information that is relevant to the current retainer.

[34] They also cite *Groupe Tremca Inc. v. Techno Bloc Inc.*, [1999] F.C.J. No. 1813, a decision of the Federal Court of Appeal. In this case a defendant had consulted plaintiff's counsel regarding the marketing of a product that might infringe a patent held by the plaintiffs. The party received advice that the patent would not prevent marketing of its product. Seven years later, the plaintiff retained the same counsel who had given that advice to act against that party. These plaintiffs argue that this case supports their position because in that case there was a clear relationship between the former client and the lawyer which led to the disqualification. They argue that the same relationship does not exist in this case and that Advantage has failed to prove a sufficient relationship between the Brownlee Retainer and this action. The evidence, however, is to the contrary. There is more than sufficient evidence before the Court to conclude that there is a relationship between the Brownlee Retainer and the current action.

[35] Second, with respect to the argument that an adverse inference should be drawn because Tessier and not Weber swore the affidavit in support of this motion, the evidence is that Tessier is the co-inventor of the TorqStopper and is involved in the business of the defendants. There is also an entry on one of the accounts of a telephone call with Tessier. The nexus between Tessier and

Advantage is sufficient for Tessier to be able to depose to the confidential information imparted to Kathol. No adverse inference will be made.

The Delay in Bringing this Motion

[36] Finally, the plaintiffs argue that because the defendants have delayed in bringing this motion they should be allowed to have counsel of their choice continue to act. As Moore puts it in par. 16 of his affidavit:

“Owing to the delay by the Defendants of at least twelve (12) months and due to their not raising the conflict until after the Plaintiffs invested their time and resources towards the steps taken with Brownlee LLP as their counsel, I would be very disappointed if the Defendants could now raise the conflict before this Honourable Court. I am disappointed that the conflict motion has apparently brought delay to the issuance of a Scheduling Order.”

[37] This argument rings hollow. Advantage did not create this problem. It was a problem created by Brownlee. The question of Brownlee’s conflict was raised prior to the issuance of the statement of claim. It continued to be an issue notwithstanding that Advantage filed a statement of defence and counterclaim. The affidavit of Tessier was sent to Kathol on April 10, 2006 after the pleadings were filed. Brownlee took no steps to deal with the issue other than to deny they had a conflict. They could have sought an opinion from the Law Society of Alberta as counsel did of the Barreau du Quebec in the *Denharco* case. They could have brought their own motion for directions. They did not and having created the conflict they must deal with the consequences.

[38] On the issue of delay, one further matter that must be considered. That is, what is the motive for now bringing the motion for disqualification. Justice Ground of the Superior Court of Justice of Ontario noted in *Credit Union Central of Ontario Limited v. Heritage Property Holdings*

Inc. et al. (2007), CanLII 16821 that courts should be vigilant in examining the motive for bringing a motion to disqualify counsel to ensure that it is not for pure tactical advantage. At par. 29 of the decision he stated:

In addition, the court may examine the motives of the party bringing a motion for the removal of a solicitor of record and that the courts should be on guard against parties bringing such motions for tactical advantages. In *Skye Properties Ltd. v. Wu* (2003) O.J. No. 384, Blair, J. stated at paragraph 70:

I agree that Courts should be vigilant in weeding out disqualification motions that are simply brought for purposes of gaining a tactical advantage by one side over the other. The authorities are clear that such a ploy will not be tolerated. For example, in *Canadian Pacific Railway Company v. Aikins, MacAulay and Thorvaldson* 1998 CanLII 5073 (MB C.A.), (1997), 123 Man. R. (2d) 281 (C.A.) Monnin J.A. stated, at para. 19:

The second issue is one that was not addressed by any of the parties, but it is one which must sound alarm bells for any court hearing a matter of this nature: the concept or practice of removal litigation. It is incumbent to ask if there is genuinely an issue of conflict, or is the issue simply being raised as a strategic tool where it might well advantage the party raising it simply to delay matters or for other positioning purposes.

Justice Binnie also highlighted this concern in *Strother* as follows:

Sometimes the claim of conflict is asserted for purely tactical reasons, an objectionable practice criticized in *Neil* at paras. 14-15, and a factor to be taken into account by a court in determining what relief if any is to be accorded: *De Beers Canada Inc. v. Shore Gold Inc.*, 2006 SKQB 101 (CanLII), [2006] S.J. No. 210 (QL), 2006 SKQB 101; *Dobbin v. Acrohelipro Global Services Inc.* 2005 NLCA 22 (CanLII), (2005), 246 Nfld. & P.E.I.R. 177, 2005 NLCA 22. Sometimes, however, the dilemma is of the lawyer's own making. (par. 36)

[39] In this case, the question of the conflict was raised prior to the commencement of proceedings and remained a festering sore in this proceeding. Advantage threatened a motion early

on but did nothing. However, they argue that the e-mail from Kathol in which he said that Tazco was reconsidering whether Brownlee should continue to act was an indication that they did not need to bring the motion until they heard further from Brownlee. That e-mail was sent in April after the affidavit of Tessier was sent to Brownlee. Certainly, Brownlee did not move the matter forward diligently as a Notice of Status Review was sent out in December 2006. Brownlee's response was filed on January 15, 2007. Advantage's counsel filed responding submissions arguing for a dismissal of the proceeding. It was only after the order was made permitting the matter to continue that Advantage's counsel say that a motion was required.

[40] On balance, the facts in this case do not support an improper motive on behalf of Advantage for bringing this motion. The issue was clearly raised at the outset and was never finalized in any way. Each side was busy making assumptions about the position of the other side. Advantage assumed that Tazco was reconsidering using Brownlee and Tazco assumed that as Advantage did not bring their motion that they were not proceeding to push the conflict button. In the best interests of the clients, the lawyers should have acted sooner to deal with the issue.

[41] However, the conflict exists and Brownlee is disqualified from acting for the Plaintiffs. The delay by Advantage in bringing this motion and the fact they continued to deal with Brownlee notwithstanding the conflict are matters that should be considered on the issue of costs. While in the ordinary course costs will follow the event, this is a case where it is appropriate that no costs be awarded.

ORDER

THIS COURT ORDERS that

1. Brownlee LLP is disqualified from acting as counsel for the plaintiffs in this proceeding and they are hereby removed as counsel of record;
2. There shall be no costs of this motion;
3. The plaintiffs shall appoint new counsel to represent them in this proceeding on or before September 14, 2007; and,
4. New counsel acting for the plaintiffs shall, no later than October 1, 2007, submit a joint schedule for completion of the next steps in the proceeding or, in the event of disagreement, requisition a case management conference for the purpose of fixing a schedule.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2088-05

STYLE OF CAUSE: TAZCO HOLDINGS INC. ET AL v. ADVANTAGE
PRODUCTS INC. ET AL

CONSIDERED AT TORONTO, ONTARIO PURSUANT TO RULE 369

**REASONS FOR ORDER
AND ORDER:** AALTO P.

DATED: August 31, 2007

WRITTEN REPRESENTATIONS BY:

Dennis K. Yasui FOR THE PLAINTIFFS

Daniel R. Horner FOR THE DEFENDANTS

SOLICITORS OF RECORD:

BROWNLEE LLP
Barristers and Solicitors
Calgary, Alberta FOR THE PLAINTIFFS

SCOTT HALL LLP
Calgary, Alberta FOR THE DEFENDANTS