SUPREME COURT OF NOVA SCOTIA
Citation: *Medjuck v. Medjuck*, 2018 NSSC 321

Date: 2018-12-20
Docket: Hfx. No. 461806
Registry: Halifax

Between:

Harold L. Medjuck

Plaintiff

v.

Ralph M. Medjuck, Hedda Medjuck (in her capacity as the Executrix of the Estate of the late Franklyn D. Medjuck) and 51/56 Investments Limited

Defendants

Revised decision: **The text of the original decision has been corrected according to the appended erratum dated January 3, 2019**

Judge: Honourable Justice Peter P. Rosinski

Heard: December 17, 2018, in Halifax, Nova Scotia

Decision: December 20, 2018

Counsel: Ian M.P. Gray, for the plaintiff, Harold L. Medjuck

Gavin Giles, Q.C., for the Estate of Franklyn D. Medjuck and Ralph M. Medjuck

Augustus M. Richardson, Q.C., for the Estate of Franklyn D. Medjuck

John A. Keith, Q.C., Caitlin Regan-Cottreau and John Fowler, articled clerk, for 51/56 Investments Limited

By the Court:

Introduction

[1] Harold, Ralph and Franklyn Medjuck are brothers. Franklyn, a lawyer, passed away in 2016. Hedda is the Executrix of Franklyn's estate.

[2] Harold is suing his brothers and an associated private corporation.

[3] In his November 30, 2018 brief, Harold's counsel summarizes his claim:

> This case involved alleged breaches of the plaintiff's trust that took place over the period of years ranging from the late 1970s through the late 1990s. The plaintiff says that in all cases, the actions of the defendants were fraudulently concealed from him. It should be noted that my client alleges that his brothers misappropriated money that, had it gone to him as it should have, would represent the entirety of his assets.

[4] This decision addresses three motions that the parties have presented to the court, although two are not opposed, and I grant both those motions without further comment.

[5] The third motion relates to a possible appointment of a referee to examine contents of what is believed to be Franklyn's laptop computer and desktop computer for relevant information regarding Harold's claims, and to ensure solicitor- client privileged information is not disclosed.

[6] The Estate of Franklyn Medjuck, based on his status as a defendant lawyer, takes the position that Harold should bear at least 50% of the costs. The Estate of Franklyn Medjuck, based on his status as an individual defendant, takes the position that it should not bear any of the costs associated with the appointment of the referee. 51/56 Investments Limited takes no position.

[7] I grant the motion to appoint lawyer Eric Slone as the referee. No party questioned his qualifications or suitability otherwise. I am informed that he is able and willing to fulfil this role in the very near future.

[8] I direct that all the necessary and reasonable expenses incurred by Eric Slone in his investigation of this matter, including his own reasonable fees and expenses, be borne by the following in the percentage shown: The Estate of Franklyn D. Medjuck, Q.C.: 100%

Background

[9] Since February 7, 2017, Mr. Gavin Giles, Q.C., has been in continuous custody of two computers, a laptop and a CPU component of what appears to be have been a desktop computer, which are reasonably believed to have been used by Franklyn Medjuck in his personal and professional capacity (as a lawyer).

[10] Harold has alleged in his concurrently filed Second Amended Notice of Action (Statement of Claim):

> This claim in large measure relates to OSP Investments Limited, formerly known as One Sackville Place Limited ("OSPL"), a Nova Scotia Corporation with its registered office located in Halifax. OSPL was in the business of real estate development, investment and management.… Harold is a shareholder of OSPL, and a former Vice-President and Director of OSPL… At all material times, Ralph and Frank controlled and directed the business and affairs of OSPL, and had fiduciary obligations to OSPL… Ralph is a shareholder of OSPL and a former Director and Officer of that corporation. Ralph was also a Director and Officer of the corporate defendant [51/56 Investments Limited].… Frank was at all material times a Director of OSPL. He was Vice President until 1994, and replaced Ralph as President that year. He was also a lawyer and handled legal matters for OSPL… The defendant 51/56 Investments Limited is a corporation incorporated pursuant to the laws of Nova Scotia. 51/56 is the continuation of 5151 Investments Limited and 5670 Investments Limited, both Nova Scotia corporations. 51/56 is in the real estate business.… On November 22, 1996, Frank incorporated 5151. Unbeknownst to Harold, Ralph and Frank had agreed to incorporate 5151 for the purpose of taking back an interest in the Property, just nine months after OSPL quit-claimed its interest in the Property to Prudential Properties. Ralph is the President of 5151; Ralph and Frank were Directors of 5151; and Ralph directed the business and affairs of 5151 either solely or jointly with Frank, or principally with other close family members, excluding Harold… Including and in addition to these transactions, the defendants Ralph and Frank Medjuck diverted a total of $5,212,514.07 away from or out of OSPL into various business ventures of their own, always without the knowledge or approval of the Company's other directors and shareholders including Harold. These appropriations of funds properly belonging to OSPL took place between 1962 and the Company's winding up in 1997. Virtually all of it took place after 1982, when Harold moved to Toronto… Ralph and Frank obtained information during the course of their involvement with OSPL that enabled 5151 to obtain the rights to the lease and the property.… As a result of Ralph and Frank's breach of fiduciary duty, OSPL was denied the opportunity to
>
> a. take back an interest in the Property from Prudential Properties
>
> b. acquire the rights to the Lease and the Property; and

> c. benefit from the subsequent income from and sale of the Property, and has suffered damages as a result.
>
> In the alternative, as a longtime business partner of Harold and as Directors of OSPL, Ralph and Frank owed Harold a fiduciary duty and the duty to act in utmost fairness in good faith. Harold reasonably relied on Ralph and Frank to manage the business and operations of OSPL with a view to the interests of all shareholders equally, including to pursue OSPL's business opportunities, and was vulnerable to any breach by Ralph and Frank of their duties.…

[11] Harold asks the court to appoint a referee to examine the contents of a laptop computer and hard drive, on the basis that they are believed to have been used by Franklyn D. Medjuck, Q.C., and they might contain information touching and concerning Harold's claims against his two brothers, and a private corporation 51/56 Investments Limited.

[12] Harold Medjuck states in his sworn November 28, 2018 affidavit:

> This lawsuit concerns my allegation that the defendants, including my two brothers, took money that should rightfully have gone to me as a one third shareholder in OSP Investments Limited, a family investment company. Instead, the Defendants fraudulently concealed this misappropriation from me. In the course of this litigation, I have received documents that indicate wider misappropriation than I was initially aware of. For this reason, I have sought to amend my pleadings. This lawsuit is seeking the return of several million dollars taken from me by the Defendants, two of whom are simultaneously my brothers, partners, lawyers, and fellow shareholders.

The three motions herein

Motion number one

[13] In his Amended Notice of motion filed November 23, 2018, Harold seeks to amend the Statement of Claim contained within his Notice of Action filed July 6, 2017. None of the other parties oppose his motion, and I grant it, without costs.

Motion number two

[14] All defendants, have made a motion similar to the following:

> Directing that the Plaintiff post with this Honourable Court security for costs as a condition precedent to the continuation of his prosecution of the within proceedings… directing the Plaintiff to pay for, or to contribute substantially to the cost of, the appointment of a referee to review certain documents contained on

> computers for solicitor/client privilege; directing that in the event of any failure on the part of the Plaintiff to post security for costs, these Defendants shall be at liberty to move for a future order dismissing the Plaintiff's claims against them; and directing the Plaintiff to pay costs to the Defendants for this motion (per Hedda Medjuck as Executrix).

[15] All the parties agree that the motions for Security for Costs, which were to be heard December 17, 2018 should be adjourned without date to allow the parties to better prepare their factual and legal positions. I grant this motion, without costs.

Motion number three

[16] Harold also seeks an order from the court "appointing a referee to determine the privileged status of the contents of a hard drive or hard drives in the Defendants' possession". This motion is not opposed, although there is a dispute over which party or parties must pay for this process.

[17] In his sworn November 23, 2018 affidavit Mr. Giles states:

> I have been informed by Carmel Degan, and believe that she was the late Mr. [Franklyn] Medjuck, QC's Legal Assistant for many years. I have been informed by Carmel Degan, and believe, that *following the death of the late Mr. Medjuck, QC, she located two computers in storage at his former offices which she believed were his, or might have at least been used by him personally or in his legal practice*. Consonant with normal discovery and disclosure requirements, I asked Carmel Degan to send the two computers to me and she did so on or about February 7, 2017. The two computers have been in my secure custody since that date. Of the two computers, one is a laptop computer and one is the CPU component of what was most likely, at least in my belief, a desk top computer. I have no knowledge of the working status of the two computers as I have not so much as tried to turn them on. The CPU component is simply a box without so much as a power cord. I have no knowledge of any password protections as may have been applied to the two computers. I have no knowledge of anything of relevance which either computer might contain, assuming that either computer can in fact be made operational and then accessed. I have made such inquiries of Carmel Degan, and believe, that she does not know the answers to these questions either.
>
> [My italicization]

Should the court appoint a referee to examine the contents of a laptop and hard drive in the possession of Gavin Giles QC, which is believed to have been used by Franklyn Medjuck QC for personal and professional matters, which party or parties should bear the costs incurred by, and for, the referee?

[18] Rule 14.08 (1) presumptively requires of parties, that they make full disclosure of, and preserve, "relevant documents, electronic information and other things" in their custody or control.

[19] Rule 14.08 further reads:

> (2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents in electronic information.
>
> …
>
> (5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12, [Order for production] Rule 15.07 of Rule 15 – Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 – Disclosure of Electronic Information, Rule 17.05 of Rule 17 – Disclosure of Other Things, or Rule 18.18 of Rule 18 – Discovery.

[20] Rule 16 governs Disclosure of Electronic Information. The duty to disclose electronic information may be fulfilled by an agreement between the parties, or if no agreement can be reached, disclosure according to the default Rules, or if no agreement can be made and the default Rules (ie. 16.06-16.12) cannot be complied with, directions of a judge under Rule 16.14.

[21] The upshot of these Rules is that the burden to disclose "relevant documents, electronic information and other things" is on the Estate of Franklyn D. Medjuck, Q.C., in these circumstances.

[22] This is why Mr. Giles preserved the laptop and hard drive in issue. The circumstances strongly suggest that these two items were those of Franklyn D. Medjuck, Q.C., and that there is a reasonable possibility that they contain relevant information regarding the issues in this litigation.

[23] In *Lauschway v. Messervey*, 2014 NSCA 7, the court affirmed a trial judge's decision ordering the plaintiff to turn over his computer to the defendants for the purpose of the forensic analysis of its hard drive on the basis it was thought to

contain information necessary for a fair trial in a personal injury case. Therein, Justice Saunders stated:

> 36 Under the so-called Interpretation Section in Rule 14.02 we see this definition of "electronic information":
>
> > electronic information" means a digital record that is perceived with the assistance of a computer as a text, spreadsheet, image, sound, or other intelligible thing and it includes metadata associated with the record and a record produced by a computer processing data, and all of the following are examples of electronic information:
> >
> > (i)an e-mail, including an attachment and the metadata in the header fields showing such information as the message's history and information about a blind copy,
> >
> > (ii)a word processing file, including the metadata such as metadata showing creation date, modification date, access date, printing information, and the pre-edit data from earlier drafts,
> >
> > (iii)a sound file including the metadata, such as the date of recording,
> >
> > (iv)new information to be produced by a database capable of processing its data so as to produce the information;
> >
> > …
>
> 45 Rule 14.05(2) says:
>
> > 14.05 (2) A provision in a Rule in Part 5 for disclosure of a relevant document, electronic information, or other thing means disclosure of a relevant document, electronic information, or other thing that is not privileged. (Underlining mine)
>
> 46 The words "relevant" and "relevancy" are defined in Rule 14.01. It provides:
>
> > Meaning of "relevant" in Part 5
> >
> > 14.01 (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
> >
> > > (a)a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
> > >
> > > (b)a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or

> hearing of the proceeding would find the information relevant or irrelevant.
>
> (2)A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

47 From this we know that Robertson, J. was obliged to imagine herself in the shoes of the trial judge and from that perspective decide whether she (if she were presiding over the trial) would find the metadata from Mr. Laushway's computer to be relevant or irrelevant. In arriving at that decision she would apply a "trial relevance" test, which replaced the old "semblance of relevancy" test when the new Rules came into effect on January 1, 2009. See for example, the decisions of Bryson, J.A., writing for a unanimous Court, in Brown v. Cape Breton (Regional Municipality), 2011 NSCA 32; and Moir, J. in *Saturley v. CIBC World Markets Inc*., 2011 NSSC 4.

48 In Brown, my colleague Justice Bryson expressed this Court's endorsement of Justice Moir's comments in Saturley. He declared:

> [12] ... In any event, I agree with Justice Moir's comments at para. 46 of *Saturley* that:
>
> > [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
> >
> > The semblance of relevancy test for disclosure and discovery has been abolished.
> >
> > The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
> >
> > The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally.
> >
> > The Rule does not permit a watered-down version.
> >
> > Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
> >
> > In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.
>
> [13] I also agree with Justice Moir that this does not mean a retreat from liberal disclosure of relevant information.

49 The observations of Wood, J. in a subsequent decision in *Saturley v. CIBC World Markets Inc*., 2012 NSSC 57 are also instructive. *In particular, I agree with Justice Wood's comments at para.9-10 where he said:*

> [9] *In my view, the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial*. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
>
> [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.
>
> …

65 Rule 14 contains an important presumption. Under the heading Presumption for Full Disclosure, Rule 14.08 says:

> (1) Making full disclosure of relevant ..., electronic information ... is presumed to be necessary for justice in a proceeding.
>
> ...
>
> (2) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden and delay proportionate to both of the following: ...
>
> (3) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found. ...
>
> (4) The presumption for disclosure applies, unless it is rebutted....
>
> (5) In an application, a judge who determines whether the presumption has been rebutted must consider the nature of the application, whether it is chosen as a flexible alternative to an action, and its potential for a speedier determination of the issues in dispute, when assessing cost, burden, and delay.
>
> …

74 *To assist judges in future cases, the 3-step analysis that ought to be conducted when disposing of motions such as this are:*

> 1.Has the moving party satisfied the court that the sought-after information is "electronic information" and therefore subject to a production order under the Rules?
>
> 2.If so, has the moving party established that the sought-after information, now properly characterized as electronic information is relevant?

> 3.If so, the moving party is then entitled to the presumption established by Rule 14.08 such that the responding party must then rebut the presumption in order to defeat the request for a production order. When considering whether or not the presumption has been rebutted several Rules offer illustrations of the kinds of criteria which might be considered by the judge -- see for example, Rule 14.08(3), (6); 14.12(3), (4); and Rule 16.
>
> [My italicization]

[24] I note that Rule 14.12 and 14.13 read:

> (1) *A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party* or at the trial or hearing of a proceeding if the moving party provides all of the following representations:
>
> (a) The party is in compliance with rule 15 – Disclosure of documents and rule 16 – Disclosure of electronic information;
>
> (b) The party believes the delivery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief;
>
> (c) The party will pay the reasonable costs of making the delivery, unless a judge directs otherwise.
>
> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
>
> (3) A judge who orders a person to provide access to an original source of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:
>
> (a) A requirement that a person assist the party in obtaining temporary access to the source;
>
> (b) Permission for a person to take temporary control of a computer, part of a computer, or a storage medium;
>
> (c) Appointment of an independent person to exercise the access;
>
> (d) Appointment of a lawyer to advise the independent person and supervise the access;
>
> (e) Payment of the independent person and the person's lawyer;
>
> (f) Protection of privileged information that may be found when the access is exercised;
>
> (g) Protection of the privacy of irrelevant information that may be found when the access is exercised;

> (h) Identification and disclosure of relevant information, or information that could lead to relevant information;
>
> (i) Reporting to the other party on relevant electronic information found during the access.
>
> (4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.
>
> *A judge may order a party to cause data on a computer or in a storage medium actually possessed by the party*, or in a database accessed by the party to the exclusion of another party, *to be processed so as to produce relevant electronic information.*
>
> [My italicization]

[25] The Estate of Franklyn D. Medjuck, Q.C., believed that the contents of the laptop and hard drive were relevant or likely to lead to relevant evidence, and *as a party*, who I find was actually in possession thereof, it is under obligation to examine and disclose the relevant contents.

[26] Mr. Giles is counsel to Ralph M. Medjuck, Q.C., and Franklyn D. Medjuck, Q.C., represented by Hedda Medjuck (in her capacity as the Executrix of the Estate of the late Franklyn D. Medjuck, Q.C.) specifically regarding Ralph and Frank's actions as individuals - not as lawyers - whereas Mr. Richardson represents the Estate, and specifically, regarding Frank's actions as a lawyer.

[27] At the hearing, the Estate (Mr. Giles) argued that it should pay none of the expenses of the referee; and that Harold should pay at least 50% of those costs (Mr. Richardson).

[28] Mr. Giles argued that only because of Franklyn Medjuck's use of the computer as a lawyer is the referee required, and therefore the Estate (of the individual party Franklyn Medjuck) should not be responsible for any of those costs.

[29] Mr. Richardson argued that it is only because of Franklyn Medjuck's use of the computer as a lawyer that the referee is required, therefore the Estate should not be responsible for more than half of any of those costs; because the appointment is primarily Harold's responsibility:

1. Although Harold is arguing that some of the relevant documents that could reasonably be thought to be on the computers are documents of

OSP Limited- he as a shareholder would have had copies of these in the past (albeit he may no longer have them);

2. The solicitor-client privileged documents are not able to be reviewed by Franklyn's personal representative, because that would be in violation of the solicitor-client privilege;

3. Were Franklyn Medjuck alive, it would be inappropriate for him to go through the documentation on his computers because he is a party, and in a conflict of interest regarding this task. That he is no longer alive makes no difference.

[30] I reject these positions for the following reasons:

1. There is no evidence to support the assertion that Harold would have had at any time, any or much less all the documentation relevant to this litigation that could reasonably be expected to be on the computers;

2. There should be no solicitor-client privileged documents on the computers of Franklyn Medjuck – if there are, as is reasonably believed there may be, the necessity for protecting that privilege is a problem that has been created by Franklyn Medjuck while still alive, and his estate should bear the financial responsibility for addressing that issue now (parsing his actions as an individual and lawyer is not a material distinction in this exercise);

3. This is a moot point presently; however, had Franklyn Medjuck addressed these matters while alive, he would not have been in a conflict of interest.

[31] Mr. Richardson also relies upon the reasoning in *Hillwood Holdings Ltd. v. Cangra Distributions Inc.*, to support his position that where the appointment of a referee is thrust upon litigants in a private litigation matter "out of which the need arose to protect [solicitor client privilege]", and "until the contents are reviewed, the holders of the privilege in the nature of the legal representation, is uncertain… the starting point would be a 50/50 allocation in terms of the sharing of costs."(para. 120 per Murray J.).

[32] Ultimately, Justice Murray allocated 60% of the costs to the Applicants, Hillwood Holdings Limited and Howard Dwyer, who sought two motions for disclosure as against Cangra Distribution Inc., Michael Iosipescu (a lawyer), Philip Whitehead (a lawyer) and the firm Iosipescu, Whitehead and Metlege. The

Applicant sought further and better production of documents, and directions regarding the disclosure of specific documents (three boxes of documents including two compact discs of Cangra Distribution Inc.).

[33] The Applicants claimed repayment of loans from Cangra, and liability in contract and in negligence against the Respondent law firm and lawyers in their legal representation of the Applicants.

[34] The Nova Scotia Barristers Society intervened. "The stated purpose of the Society's intervention is twofold. First, they wish to raise before the court the issue of solicitor/client privilege, so as to ensure it will be addressed in whatever order is made in respect of the materials [the three boxes and two CDs whose contents were not known with precision]. Second, the Society wishes to offer its assistance in the disposition of these issues." (para. 85)

[35] Notably Justice Murray also stated:

> Arguably, the cause of the motion can be said to be Cangra, who did not respond to the Applicant's requests and did not respond to the motion itself… In the present case, the privilege holder may be identified as Cangra . It, however, has not responded to notice. Consequently, it must be dealt with as if the privilege holder has not been notified. Further, it is possible there are additional privilege holders… I *turn now to the important issue of whom shall bear the cost of the referee appointed by the court. It is a difficult issue in that there is little in the way of precedent.* I have appointed a third party to act and not the Society, given the Society's involvement, as regulator with two of the Respondents, [the lawyers].… Mr. Richardson states that any costs ought to be borne by the moving party given: 1) disclosure has already been made; and 2) they [the Applicants] are the ones who believe production is necessary. *I believe one must ask, who was the cause of the motion assuming there are relevant documents to be disclosed?* The object here must be to strike a balance between necessary disclosure and the protection of solicitor/client privilege. Arguably, it is Cangra and perhaps Mr Iosipescu as agent and Director that is the cause of the motion… Unlike *Rosenfeld* ([2003] O.J.No. 834), there is no natural or obvious payer for the services of the referee in the case before me… In the present case the Society as identified a public interest by their own intervention… This is not a usual case where the Society may levy costs against a member for their involvement in, for example a disciplinary or trust account matter. Also, the Applicants may have recourse to reimbursement in the seeking of costs at the conclusion of the hearing. For these reasons, I propose to have the cost of the referee shared as between the moving party Applicants and the Society, subject to an allocation. (at paras. 92-118)
>
> [My italicization]

[36] *Hillwood Holdings* is factually distinguishable, since the owner of the documents and compact disks on which the information was located was not present at the hearing, nor did it take any steps to defend itself. That fact was very significant to the outcome there, which was driven by the factual circumstances. The Estate of Franklyn Medjuck is present at this hearing. Justice Murray acknowledged that there was "little in the way of precedent". Therefore, in my opinion, it is most appropriate for me to be guided by general principles.

Conclusion

[37] I am satisfied that the anticipated contents of the computers meet the necessary standards for "relevancy" to the existing litigation, and a reasonable possibility that there may be solicitor – client privileged content, including content subject to a privilege held by the Estate of Franklyn Medjuck itself.

[38] Under the Civil Procedure Rules, the primary responsibility for ensuring the disclosure of any relevant electronic information contained on the laptop and hard drive would normally be that of the Estate of Franklyn Medjuck, Q.C., represented by Mr. Giles/Ms. Hodder (as an individual) and Mr. Richardson (as a lawyer).

[39] Nevertheless, I also recognize that given the pleadings herein, all parties may be seen to have a residual interest, to varying degrees, in having access to any properly disclosable information contained in the computers.

[40] The fact that some of the information thereon may be protected by solicitor-client privilege creates a necessity for someone independent, and as authorized by a court, to examine the computers' contents for relevant non-privileged information.

[41] It is in the interests of justice that Eric Slone be appointed to this task, and that the appropriate party or parties bear some share of the costs of accessing that information.

[42] I have attempted to assess the Estate's obligations for preservation and disclosure of the information, as well as the relative interests of each of the other parties in receiving and accessing such information. Conceivably, some of the information may favour the position of the Defendants, whereas some of the information may favour the position of the Plaintiff. It also may not be possible to access the computers. The costs of the referee's work may be recovered if the paying party is ultimately successful in the litigation.

[43] I keep in mind that to some extent, unknown at present, there is a reasonable possibility that matters involving the practice of law of Franklyn D. Medjuck, Q.C. are contained on these computers. The responsibility to take the proper protections to preserve this privileged and non-privileged information rests on the members of the Bar who have/had possession of, or a realistic basis to suspect that there is such information on, a computer used in the practice of law.

[44] My cost allocation of this task is based on these considerations and those in the jurisprudence, including as identified in *Lauschway* by Justice Saunders. Therefore, the court will order the Estate of Franklyn D. Medjuck, Q.C. (as an individual and lawyer on a 50/50 basis) to be responsible for the total necessary and reasonable costs incurred by, and for, the referee.

[45] I direct Mr. Giles to draft a form of order acceptable as to form by all parties. I believe it appropriate to include a provision that Mr. Slone be permitted to notify the Barristers Society in relation to any solicitor – client privileged contents he discovers so that the Society may follow-up as its regulatory role may dictate.

[46] Given the unusual nature of these motions, I award no costs.

Rosinski, J.

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Ralph M. Medjuck, Hedda Medjuck (in her capacity as the Executrix of the Estate of the late Franklyn D. Medjuck) and 51/56 Investments Limited

Defendants

Revised decision:	**The text of the original decision has been corrected according to the appended erratum dated January 3, 2019**
Judge:	Honourable Justice Peter P. Rosinski
Heard:	December 17, 2018, in Halifax, Nova Scotia
Decision:	December 20, 2018
Counsel:	Ian M.P. Gray, for the plaintiff, Harold L. Medjuck
	Gavin Giles, Q.C., for the Estate of Franklyn D. Medjuck and Ralph M. Medjuck
	Augustus M. Richardson, Q.C., for the Estate of Franklyn D. Medjuck
	John A. Keith, Q.C., Caitlin Regan-Cottreau and John Fowler, articled clerk, for 51/56 Investments Limited

Erratum:

Paragraph 7, where it reads: "I grant the motion to appoint lawyer Eric Sloane as the referee. No party questioned his qualifications or suitability otherwise. I am informed that he is able and willing to fulfil this role in the very near future"; should read instead: "I grant the motion to appoint lawyer Eric Slone as the referee. No party questioned his qualifications or suitability otherwise. I am informed that he is able and willing to fulfil this role in the very near future."

Paragraph 8, where it reads: "I direct that all the necessary and reasonable expenses incurred by Eric Sloane in his investigation of this matter, including his own reasonable fees and expenses, be borne by the following in the percentage shown: The Estate of Franklyn D. Medjuck, Q.C.: 100%"; should read instead: "I direct that all the necessary and reasonable expenses incurred by Eric Slone in his investigation of this matter, including his own reasonable fees and expenses, be borne by the following in the percentage shown: The Estate of Franklyn D. Medjuck, Q.C.: 100%".

Paragraph 41, where it reads: "It is in the interests of justice that Eric Sloane be appointed to this task, and that the appropriate party or parties bear some share of the costs of accessing that information"; should read instead: "It is in the interests

of justice that Eric Slone be appointed to this task, and that the appropriate party or parties bear some share of the costs of accessing that information."

Paragraph 45, where it reads: "I direct Mr. Giles to draft a form of order acceptable as to form by all parties. I believe it appropriate to include a provision that Mr. Sloane be permitted to notify the Barristers Society in relation to any solicitor – client privileged contents he discovers so that the Society may follow-up as its regulatory role may dictate"; should read instead: "I direct Mr. Giles to draft a form of order acceptable as to form by all parties. I believe it appropriate to include a provision that Mr. Slone be permitted to notify the Barristers Society in relation to any solicitor – client privileged contents he discovers so that the Society may follow-up as its regulatory role may dictate."

Rosinski, J.