

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Daniels Estate v. Darling*, 2024 NSSC 103

**Date:** 20240412

**Docket:** 527895

**Registry:** Kentville

**Between:**

Linda Margaret Harris and Michael Kenneth Daniels, Personal Representatives of  
the Estate of Leota Maie Daniels

*Applicants*

v.

Caroll Louise Darling

*Respondent*

**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** February 22, 2024, in Kentville, Nova Scotia

**Final Written** February 28, 2024, by the Respondent

**Submissions:** March 1, 2024, by the Applicants

**Counsel:** Rebecca Hiltz LeBlanc, KC, for the Applicants  
Andrew S. Nickerson, KC, for the Respondent

**By the Court:**

**Introduction**

[1] This is a motion for production in a contested application to pass accounts under s.71 of the *Probate Act*, S.N.S. 2000, c.3. The issue is whether an estate can rely on solicitor-client privilege to refuse to disclose its lawyer's file materials to a beneficiary when those file materials relate to litigation brought by the beneficiary against the estate.

[2] Linda Margaret Harris and Michael Kenneth Daniels are the Personal Representatives of the Estate of Leota Maie Daniels. They have applied to pass the accounts of the Estate. In the application, they seek, in part, Court approval of the Estate's legal bills.

[3] Carol Louise Darling, one of the beneficiaries, has objected to the passing of accounts. She objects, in part, to the amount of the legal bills. She sought a number of documents from the Estate, including the files of the Estate's lawyers.

[4] Paige McInnis, of McInnis Cooper, is the lawyer who has represented the Estate in the administration of the Estate. She is referred to as the Proctor. The

Estate has agreed to provide copies of Ms. McInnis' files and her detailed legal accounts to Ms. Darling.

[5] Rebecca Hiltz LeBlanc, also of McInnis Cooper, is the lawyer who represented the Estate in litigation brought against the Estate by Ms. Darling in September of 2021, which is now concluded. The Estate has agreed to provide Ms. Hiltz LeBlanc's detailed legal accounts to Ms. Darling. The Estate has claimed solicitor-client privilege over Ms. Hiltz LeBlanc's files.

[6] Ms. Darling has brought a motion to compel production of Ms. Hiltz LeBlanc's files.

[7] In order to determine whether Ms. Darling is entitled to disclosure of Ms. Hiltz LeBlanc's files, I will consider the following:

1. The nature of solicitor-client privilege.
2. The common interest exception to solicitor-client privilege.
3. Whether Ms. Hiltz LeBlanc's files are protected by solicitor-client privilege because they relate to litigation in which the Estate and Ms. Darling were adverse in interest.
4. Whether Ms. Darling is entitled to Ms. Hiltz LeBlanc's files because she alleges bad faith on the part of the Personal Representatives.

### **The Nature of Solicitor-Client Privilege**

[8] Solicitor-client privilege is a rule of substance applicable to all interactions between a client and their lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer. It is fundamental to the proper functioning of our legal system. It must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances. See *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at paras.9-10.

### **The Common Interest Exception to Solicitor-Client Privilege**

[9] It is a long-held principle that a trustee cannot claim solicitor-client privilege as against a beneficiary over any documents related to advice sought and obtained with respect to the administration of the trust. A trustee and a beneficiary have a common interest in the administration of the trust and legal advice sought by the trustee furthers the interests of the beneficiary. See *Ballard Estate (Re)*, 1994 CanLII 7307 (Gen. Div.) at para.2, relying on the statement of Lord Wrenbury in *O'Rourke v. Darbishire*, [1920] A.C. 581 at pp. 626-27, [1920] All E.R. Rep. 1 (H.L.); *Wells (Estate) v. The Society for Pastoral Counselling Research*, 2014 ONSC 347 at paras.12-13; *Chang v. Lai*, 2014 BCSC 128 at para.16; and *Whitell v. Whitell*, 2020 ONSC 2310 at para.19.

[10] In recognition of this principle, the Estate in this case has agreed to provide Ms. Darling with a copy of the Proctor's files.

### **Files Relating to the Litigation between Ms. Darling and the Estate**

[11] A beneficiary's entitlement to obtain communications between a trustee and the trustee's counsel is not unlimited. The court will not allow the production of any documents related to a separate and distinct matter in which a beneficiary and a trustee are in an adversarial relationship. Where the beneficiary and the trustee are adverse in interest, there is no common interest that compels the disclosure of communications that would normally be protected by solicitor-client privilege. A beneficiary is entitled to opinions received by the trustee in the course of determining the proper distribution of the trust. A beneficiary is not entitled to opinions procured by the trustee for its own protection in relation to claims made against it. See *Wells* at para.15; *Chang* at para.17; *Ballard Estate* at para. 10; *Haydu v. Nagy*, 2012 BCSC 1870 at para.25; and *Whitell* at para.20.

[12] In this case, the files sought by Ms. Darling relate to litigation commenced by Ms. Darling in September of 2021. On September 28, 2021, Ms. Daniels filed a Notice of Appeal of a Letter of Direction from the Registrar of Probate. In the Letter of Direction, the Registrar had set a deadline for Ms. Darling to (a) arrange

for the delivery of the specific gifts that she was entitled to under the will, and (b) inform the Estate of the chattels that she wished to receive from the Estate. In the Notice of Appeal, Ms. Darling made serious allegations of misconduct against the Registrar, the Personal Representatives and Ms. Hiltz LeBlanc. A Motion for Directions was held before me on December 9, 2021. A further Motion for Directions was held before the Honourable Justice Gregory Warner on January 14, 2022. The hearing was ultimately scheduled to take place on April 20, 2022. Several affidavits, briefs and other documents were filed. The Estate filed a motion to enforce a settlement agreement reached by the parties. The motion was granted, as reflected in an Order of Warner J. dated April 25, 2022. In a Costs Order dated August 2, 2022, Warner J. ordered Ms. Darling to pay the Estate \$16,000 in costs.

[13] Ms. Hiltz LeBlanc represented the Estate in the appeal. It is her files that Ms. Darling seeks in this motion. The Estate properly claims solicitor-client privilege over these file materials. Ms. Darling does not have a common interest with the Estate in Ms. Hiltz LeBlanc's files. Those files relate to litigation in which Ms. Darling and the Estate were in adverse in interest.

### **Allegation of Bad Faith**

[14] There is a qualification to the principle that a beneficiary is not entitled to production of the communications between a trustee and their counsel obtained for the protection of the trustee when the trustee and the beneficiary are in an adversarial relationship. In proceedings where a beneficiary is alleging a lack of good faith or breach of fiduciary duty, documents relevant to those claims are to be made available to the beneficiary: *Ballard Estate* at paras.17-18; *Whitell* at para.21.

[15] In her brief in support of the motion for production, Ms. Darling argued that she is entitled to the contents of Ms. Hiltz LeBlanc's files because the disclosure will aid her in assessing "[e]vidence of a conflict of interest or bad faith."

[16] Ms. Darling asserts that the Ms. Hiltz LeBlanc's files are relevant to Ms. Darling's allegation of bad faith on the part of the Personal Representatives.

[17] Under Civil Procedure Rule 15.02, a party to a contested application must disclose "relevant" documents. "Relevant" is defined in Rule 14.01(1) as having the same meaning as at the trial of an action or on the hearing of an application. The motions judge assesses whether the judge presiding at the trial or at the hearing of the application would find the document to be relevant. At this stage in the process, relevance can only be assessed based on the pleadings and the evidence known to the judge at the time.

[18] A relevant document is one that is probative of a material fact in issue in the proceeding. A document is probative if it logically makes something more or less likely. The motions judge does not assess how probative the document would be in the context of the trial or hearing of the application, but whether it is probative of a material fact in issue. If the evidence has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence, then it is relevant. See *Murphy v. Lawton's Drug Store Limited*, 2010 NSSC 289 at para.16; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4 at para.46; and *Wilson Fuel Co. v. Power Plus Technology Inc.*, 2015 NSSC 304 at para.16.

[19] A request for production should be supported by evidence, lest it amount to a fishing expedition: see *Intact Insurance Company v. Malloy*, 2020 NSCA 18 at paras.36-41. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application: see *Intact* at para.35

[20] In the Notice of Objection, Ms. Darling did not plead bad faith. She therefore cannot rely on such a claim to support her motion for production.

[21] Ms. Darling argues that she plead breach of fiduciary duty and that such an allegation includes an allegation of bad faith. The claim of a breach of fiduciary duty in the Notice of Objection to Accounts is made with respect to the commission claimed by the Personal Representatives, and is worded as follows:

X object to the amount of commission claimed by the personal representatives on the following grounds:

1. Breach of their fiduciary duties to all Beneficiaries and the Objector in particular, to conserve the estate assets for the Beneficiaries by placing personal interests above their fiduciary duties;

...

[22] Even if I were to accept the argument that the allegation of a breach of fiduciary duty includes an allegation of bad faith, the allegation is a bare assertion without an evidentiary basis.

[23] During oral argument, I asked counsel for Ms. Darling whether he could point to an evidentiary basis for the claim that the Estate acted in bad faith. He could not.

[24] During reply argument, counsel for Ms. Darling asserted that the Court should review the affidavits that Ms. Darling filed in the appeal to find an evidentiary basis for her allegation of bad faith. I decline to do so. First, the invitation for the Court to rely on those affidavits came in counsel's reply

submissions, giving the Estate no opportunity to respond. Second, the onus is on Ms. Darling to establish the relevance of the documents to her allegation of bad faith. The Court will not review affidavits filed in a different proceeding to determine, on its own, whether there is an evidentiary basis for Ms. Darling's allegation of bad faith.

[25] Ms. Darling has failed to establish that the requested documents are relevant to her allegation of bad faith on the part of the Personal Representatives.

### **Conclusion**

[26] The motion for production fails. The files of McInnes Cooper related to the litigation between Ms. Darling and the Estate are protected by solicitor-client privilege. The Estate is entitled to its costs of the motion. If the parties cannot agree on costs, I will receive written submissions from the Estate within two weeks of this decision, and from Ms. Darling within two weeks of the Estate's submissions. Counsel for the Estate is to prepare the draft Order.

Gatchalian, J.