Date: 1998 03 03
Docket: CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE SAWLER

Plaintiffs

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

Application respecting a potential disqualifying conflict of interest for a solicitor.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, NT, on February 13, 1998
Reasons filed: March 3, 1998

Counsel for the Applicant: Adrian C. Wright

Counsel for the Respondent: Richard J. Mallett

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REASONS FOR JUDGMENT

[1] This is an application for declaratory relief with respect to a potential conflict of interest of a solicitor in this litigation.

[2] The applicant is Michael Triggs, barrister and solicitor, of Yellowknife. He seeks a declaration that he is not in a conflict of interest in his role as in-house counsel for the Workers' Compensation Board of the Northwest Territories, and in particular in advising

the Board with respect to this action, due to his previous employment with a firm representing Dale Johnston, one of the defendants in this action. For the reasons that follow, the declaration sought is granted.

[3] The defendant Johnston is sued, as one of the many defendants in this action, for damages attributable to the wrongful death of nine men in 1992. This action was commenced in 1994. Mr. Johnston is represented in this action by the law firm of Brownlee Fryett of Edmonton. He has, however, been a client of the Yellowknife firm of Boyd Denroche since at least 1987. The Boyd Denroche firm is acting as the local agents for the Brownlee Fryett firm in this litigation.

[4] The applicant commenced employment as in-house counsel with the Board in April of 1997. For 6 ½ years before that he was an associate solicitor with the Boyd Denroche firm. The applicant did not, in that time, work directly on matters for the defendant. He did not do any work on the agency retainer for the Brownlee Fryett firm. He has no personal knowledge of the defendant's business affairs or any other matters handled for the defendant over the years by the Boyd Denroche firm.

[5] The only direct contact between the applicant and the defendant, while the applicant was still a member of the Boyd Denroche firm, was in August of 1996. The applicant was asked by one of the firm's partners to meet with the defendant to sign some real estate documents. The applicant has no recollection of their discussions at that time. The meeting lasted fifteen to twenty minutes. In the room, beside the applicant and the defendant, were the defendant's daughter and her boyfriend. At one point during the course of signing the documents there was some discussion about this action. The defendant stated, in his affidavit filed on this motion, that he "provided him (Triggs) with my opinion with respect to the merits of the within action against me and provided some information with respect to the effect the action was having on me personally." These assertions are clarified in the following extract from the cross-examination of the defendant on his affidavit:

> Q MR. WRIGHT: Did you discuss the circumstances of the lawsuit with Mr. Triggs?
> A No.
> Q Did you discuss any advice or opinions that had been given to you by counsel with Mr. Triggs?
> A No.
> Q Did you discuss any of the facts involved with the lawsuit with Mr. Triggs?
> A I'm not sure if I'm clear on "facts."

Q All right. Your discussion with Mr. Triggs regarding the Giant Mine litigation, do you recall how long it took?
A Under two minutes.

. . .

Q MR. WRIGHT: Do you recall if you spent more time on discussion the merits of the action with him or more time on the information regarding the effect the action was having on you personally?
A Oh, I don’t - - I really don’t recall.
Q Okay. Now, when you say in your affidavit that you provided some information with respect to the action, the effect the action was having on you personally, are you referring to the stress that you have gone through as a result of the action having been commenced?
A Partially.
Q Are you also referring tot he financial impact?
A Partially, yes.
Q Did you discuss with Mr. Triggs the financial impact the lawsuit was having on you?
A Not direct figures.
Q Did you tell him that it was having a financial impact on you?
A No.
Q Did you allude in any way to the action having a financial impact on you?
A I believe so.
Q When you say you believe so, is that because you’re saying that what you said could be interpreted by Mr. Triggs as that the lawsuit was having a financial impact on you?
A Yes.
Q But you didn’t say that directly to him?
A Not directly.
Q All right. I take it you told him about the stress that it was causing you?
A No, not directly.
Q Are you prepared to tell me what you told him?
A No.

[6] The applicant’s current employment is problematic because the Board is subrogated to the rights of the plaintiffs in this action. The Board instructs the plaintiffs’ outside counsel on the prosecution of this action. Among the applicant’s duties of employment are to provide advice to the Board on litigation matters and to convey

instructions from the Board to outside counsel retained on those matters (including this action).

[7] The applicant is not personally involved in the actual counsel work in this action. That is carried on by the outside firm of Bishop & McKenzie of Edmonton. Since commencing his new employment, the applicant has not been involved in any way with this litigation. He sought the consent of the defendant Johnston to act but consent was denied. Hence he brings this motion for the Court's determination of the propriety of his acting in this matter.

[8] The Board is involved in another manner with this defendant. Mr. Johnston has sought a ruling from the Board as to whether he is entitled to the protection of the immunity from suit provision of the *Workers' Compensation Act*, R.S.N.W.T. 1988, C.W-6. The Board has retained other outside counsel to advise it on this issue. The applicant has not had and, so he swears, will not have any involvement in connection with this particular matter. Some of the points to be considered in that proceeding will likely relate to Mr. Johnston's business activities and relationships, matters which were the subject of legal services performed for him by the Boyd Denroche firm.

[9] So, on this application, we have a solicitor who was a member of a firm who were not Mr. Johnston's counsel directly in this action but agents for his counsel. There is no indication of what work, other than service of documents, the firm performed in its agency role but there is a statement, which I accept at face value, from one of the firm's partners that he did receive confidential information. This information was not shared with Mr. Triggs. Indeed, except for the one direct meeting between Messrs. Triggs and Johnston noted above, there is no suggestion that Mr. Triggs was involved in any way with the agency work or any other matter involving this defendant. Mr. Johnston's counsel relies on the one meeting, however, to argue that Mr. Triggs is possessed of confidential information that would, if used, be prejudicial to this defendant's position in this action and therefore, in the absence of consent and pursuant to the Law Society's rules of professional conduct, the applicant cannot act in any manner touching on this action in his new employment.

[10] Counsel recognize that the leading case in this area of the law is *MacDonald Estate v. Martin*, [1991] 1 W.W.R. 705 (S.C.C.). That case, in particular the majority judgment authored by the late Justice Sopinka, set certain standards for when a solicitor is to be disqualified due to a conflict of interest. These standards became to some extent the basis for rules of professional conduct set by self-governing law societies.

[11] The facts in *MacDonald Estate* are important because, of course, the standards elucidated therein are related to those facts. As will be seen, the factual situation on this application is different and was not directly addressed in that case.

[12] The *MacDonald Estate* case involved a situation where a young lawyer, who had worked on the litigation while employed by the firm acting for the plaintiff, moved to the firm acting for the defendant. It was recognized by that firm that the lawyer could not act on the case; the lawyer did not act on the case; and, it was intended that the lawyer would have no involvement with the case. Nevertheless, the Supreme Court, unanimously, held that the new firm, even though it had been representing the defendant for some years on this litigation, could not continue to act. The lawyer was clearly in possession of confidential information and, notwithstanding assurances that the lawyer would not be involved in the case, the firm had failed to establish that all reasonable measures had been taken to rebut the strong inference that the confidential information would or could be shared. Thus, the specific point established by *MacDonald Estate* is that where a lawyer, involved in a litigious matter, moves to a firm acting for the opposing side in that same matter, and no specific measures are taken to prevent disclosure of information to members of that new firm, the new firm is disqualified from continuing to act in that matter.

[13] On this application there is no "new firm" to disqualify. The applicant is now employed by a party. This defendant obviously cannot disqualify the party (the W.C.B.) but he seeks to disqualify the specific lawyer. The argument is not that any knowledge the lawyer has is to be imputed to his employer, but that the knowledge the lawyer's former colleagues have can be imputed to him. This, together with knowledge he obtained from his one meeting with Mr. Johnston, should, it is argued, disqualify him.

[14] The issue of imputed knowledge is important because, in the factual context of the *MacDonald Estate* case, it was the knowledge of the tainted lawyer that was imputed to the other lawyers in the new firm. The majority, however, expressly rejected an irrebuttable presumption that "the knowledge of one is the knowledge of all" (see at pages 725-726). In the context of this application, there is a type of "double imputation" since the knowledge of Mr. Johnston's counsel in this litigation, the Brownlee Fryett firm, is imputed to be the knowledge of their local agents, the Boyd Denroche firm, and, even though Mr. Triggs was not personally involved in the conduct of that agency work, the knowledge of the lawyers in the Boyd firm who are involved in that work is imputed to Mr. Triggs. But this scenario was expressly left open for consideration in the *MacDonald Estate* case (as per Cory J. at page 733):

> It must be left for another occasion, when argument has been directed to the issue, to determine whether a lawyer who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent to the client should also be irrebuttably presumed to have received and imparted confidential information to his new firm.

[15] The majority judgment of Sopinka J. in *MacDonald Estate* adopted the following as the test for a disqualifying conflict of interest (at page 724): "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." He said that typically two questions must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

[16] That judgment also set out two strong presumptions: (a) the lawyer with the conflict did receive confidential information; and (b) members in a firm share confidences. Both, however, are rebuttable. The standard for rebutting these presumptions is necessarily very high but it is possible for the solicitor to show, with respect particularly to the first presumption, that no confidential information was imparted or that any such information was not relevant to the matter at hand. The emphasis is on the reality of the situation, not merely the perception. Is there a real risk that confidential information will or could be used to the prejudice of the client? The aim, of course, is to prevent the misuse of confidential information.

[17] One of the other points coming out of *MacDonald Estate* is that each situation must be decided on its particular facts. There must be a fact-specific analysis. This was expressly noted in *Gainers Inc. v. Pocklington* (1995), 125 D.L.R. (4th) 50 (Alta.C.A.), at page 56:

> Only a fact-specific approach can weigh the policy considerations mandated in the cases, including *Martin v. Gray* [*MacDonald Estate*]. Only this approach can match rules to risks.

[18] There are three points relevant to this application which I will address initially.

[19] The applicant's counsel submitted that one cannot presume that the applicant received confidential information since the retainer, with respect to this litigation, was between Mr. Johnston and the Brownlee Fryett firm. I do not perceive this to be an argument that there was no solicitor-client relationship between Mr. Johnston and the

Boyd Denroche firm, merely that one cannot attribute the knowledge of Brownlee Fryett to Boyd Denroche.

[20] There were no authorities provided, either case law or rules of conduct, on the question of the relationship as between a client and the agent of that client's counsel. It seems to me, however, that in this case there was a solicitor-client relationship as between the Boyd Denroche firm and Mr. Johnston, both indirectly in connection with this litigation but also directly due to that firm's recurring work on Mr. Johnston's business and personal matters. So, with respect to the first question posed by Sopinka J. above, there was a solicitor-client relationship and thus it can be presumed that relevant confidential information was imparted to the Boyd Denroche firm. The applicant was a member of that firm. The question now is whether he can show that he has no information either directly or by imputation that could be used to the disadvantage of the client of the firm.

[21] The second point relates to the direct meeting between Mr. Johnston and Mr. Triggs outlined above. The applicant's counsel made the observation that, even if it could be said that relevant information was imparted at that meeting, it cannot be said that it was done so in the expectation of confidentiality. Mr. Johnston's daughter and her boyfriend were present.

[22] This point would be pertinent were this a question of evidentiary privilege as opposed to professional duty. This distinction is outlined in the Canadian Bar Association's Code of Professional Conduct (adopted by the Law Society of the Northwest Territories) in one of the commentaries to Part IV on "Confidential Information" (at page 13):

> 2. This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or written communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

Hence I conclude that the information imparted at the one meeting can be regarded as confidential information.

[23] The third point has to do with the applicant's assertion that he has no personal recollection of his discussion with the defendant. The case law generally holds, however, that it does not matter if the lawyer cannot recall the information: *Rosin v. MacPhail*

(1997), 32 B.C.L.R. (3d) 279 (C.A.). One never knows what may trigger one's memory. Hence this point is not weighty.

[24] There are two cases that are helpful in the analysis of the issues on this application.

[25] The first case, one not referred to by counsel, is *Sun Life Trust Co. v. Bond City Financing Ltd.* (1997), 35 O.R.(3d) 83 (Ont.Ct.Gen.Div.). In that case a lawyer, now a partner in the plaintiff's firm, had some involvement, while a partner in another firm, in earlier proceedings related to the present proceedings, on behalf of the defendant. However, he offered only general advice about procedure and did not have any substantive involvement and did not receive confidential information. The case thus turned on a question of imputed knowledge. The defendant sought to remove the plaintiff's firm.

[26] The motions judge, Spence J., held that, since it was not established that confidential information was imparted to the lawyer, the motion must fail unless there can be an imputation of knowledge to him. The judge quoted from Sopinka J. in the *MacDonald Estate* case (at page 725):

> 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.

He then went on to say (at pages 88-89 of *Sun Life):*

> I understand this paragraph to mean that, for the presumption to arise, there must have been a "sufficiently related previous relationship" between the client and the individual solicitor in question, i.e., in this case Mr. Schwartz, and not merely the old firm and one or more of its other members such as, in this case, Mr Gordon. This reading of the paragraph quoted is consistent with the later passage in Sopinka J.'s decision at p.1261 S.C.R., pp.268-69 D.L.R., where he makes the following statements:
>
> > The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This

> assumes the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm. Furthermore, if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it. This is the "overkill" which has drawn so much criticism in the United States to which I have referred to above.

> It appears that these remarks are related to the discussion of the second test in such cases (i.e., whether the confidential information will be misused) but they are consistent with the view I have expressed about the application of presumption.

In the result Spence J. dismissed the application saying (at page 90):

> Since Mr. Schwartz's previous involvement in this matter seems to have been quite limited in scope and time and it has not been shown that it would have been reasonably necessary or likely for confidential information to be imparted to Mr. Schwartz in connection with his previous involvement, I see no basis to regard that involvement as sufficiently related to the present matter to warrant the application of a presumption.

[27] An appeal from this decision was dismissed by a three-judge panel of the Ontario Divisional Court: [1997] O.J. No.5009 (Q.L.). In doing so, the court said that, "by necessity", the reasons and conclusions of the motions judge were fact driven and that the judge made no palpable and overriding error which affected his assessment of those facts.

[28] The second case I refer to is a decision of Deyell J. of the Alberta Court of Queen's Bench, *Trizec Properties Ltd.v. Husky Oil Ltd.*, [1996] A.J. No. 1041 (Q.L.). There the defendant sought to disqualify the plaintiff's firm because some years earlier the defendant had obtained some advice, indirectly related to what is now the subject-matter of the litigation, from a partner in that firm. That lawyer was no longer with that firm. The advice was brief and limited. It was described as a "routine, one-time, one-question" inquiry. Deyell J. dismissed the application holding that, while the information was confidential, there was no risk of prejudice to the party. None of the other lawyers

in that firm were knowledgeable about the inquiry or the advice given. The case also turned on the significant passage of time (13 years) which was held to have substantially mitigated the relevancy of the information.

[29] That decision was appealed to the Alberta Court of Appeal but the appeal was dismissed: [1997] A.J. No.482 (Q.L.). The court there said:

> In disqualification proceedings the former client has the initial burden of showing that the previous relationship was sufficiently related to the current matter that a risk of prejudice to the former client exists. A presumption arises that relevant confidential information was communicated to the lawyer, that is, information which could be used to the disadvantage of the former client in the present litigation. If the threshold requirement is met, the burden shifts to the lawyer to rebut the presumption by satisfying the court "that no information was imparted which could be relevant": MacDonald Estate v Martin, [1990] 3 S.C.R. 1235, 1260. In other words, if prejudicial confidential information is presumed to have been communicated in connection with the previous retainer, the lawyer, to avoid disqualification, must establish that it is not relevant to the present matter in the sense that it could not be used to the disadvantage of the client.

In dismissing the appeal the court held that the confidential information communicated to the former partner had not been shown to be "relevant" to the current litigation; that is to say, it was not demonstrated to be sufficiently related to the litigation so that a risk arises that it could now be used to the disadvantage of the party.

[30] In both cases an emphasis was placed on the absence of a sufficiently direct relationship between the particular solicitor, and anything he or she may know, and the litigation at hand. These cases note that there must be a realistic approach. The relevant inquiry is as to the risk of prejudice to the client, not some perception of prejudice based on knowledge by association or some perfunctory involvement.

[31] In the case before me, I too find that there is no realistic risk that any information imparted to the applicant could now be used to the disadvantage of the defendant in this litigation. The defendant had a relationship with the Boyd Denroche firm in connection with this specific litigation, and other personal matters, but no relationship directly with the applicant. It is uncontested that the applicant had no involvement with or information about this litigation or the defendant's personal affairs arising out of the applicant's employment by the Boyd Denroche firm. Therefore, any presumption of imparted confidential information or of imputed knowledge has been rebutted.

[32] The fact that the applicant and the defendant met on one occasion and had the discussion related above does not change my conclusion. The meeting was a brief, one-time encounter for the purpose of signing some land transfer documents. The discussion about the law suit lasted a mere two minutes and appears to me to have been nothing more than spontaneous conversation. The defendant acknowledged on his cross-examination that he did not discuss the circumstances of the litigation nor any advice or opinions that he had been given by counsel. The most that can be said is that he talked about the stress and financial impact the litigation was having on him.

[33] Mr. Johnston's counsel argued that even this limited information would give the W.C.B. an advantage both psychological and tactical. It was submitted that the knowledge that the defendant is under stress and worried about the financial impact of the case on him may lead the Board to decide that they could "squeeze" the defendant by keeping him in the litigation (as opposed to dropping the case against him should that arise as a consideration).

[34] In my opinion this is not a realistic risk of prejudice to the interests of the defendant. To say that a litigant is finding the litigation stressful and financially difficult is, to use a phrase used in other cases, "to state the obvious". There is nothing in this type of information that could possibly provide an advantage to the plaintiffs. As has been stated in many of the cases, there must be a real risk of prejudice caused by the misuse of confidential information, not a mere perception. There must also be a connection between the information and the foreseen harm. It cannot be general, common-sense knowledge of human affairs; it cannot simply be general knowledge or familiarity with the specific client. There must be a real risk of prejudice which is material: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1990), 78 Alta .L.R. (2d) 228 (Q.B.); *Gainers Inc. v. Pocklington* (*supra*), at page 62; *Manville Canada Inc. v. Ladner Downs* (1992), 63 B.C.L.R. (2d) 102 (S.C.), at page 117, appeal dismissed at 76 B.C.L.R.(2d) 273 (C.A.).

[35] Mr. Johnston's counsel further submitted that the focus of this inquiry should be on the application of the Law Society's rules of professional conduct. The Law Society has adopted, as its policy directive number 13, a set of guidelines developed by the Federation of Law Societies of Canada on the transfer of lawyers between law firms. These were formulated in response to the issues identified in the *MacDonald Estate* case.

[36] The codes of conduct are certainly persuasive but they are not binding on the courts. They are treated as being influential statements of policy: see *MacDonald Estate* (*supra*), at page 726. As stated by Côté J.A. in the *Gainers* case (age page 53):

> The codes of professional conduct governing lawyers do not govern the court, which must follow the law governing fiduciaries and confidences, not rules of professional ethics. But that theoretical distinction weakens in practice, for the rationales for the law and the ethics are similar, as are the problems. So professional ethics codes are suggestive, even persuasive in court...

[37] The rules with respect to conflicts arising as a result of transfers refer to a lawyer actually possessing confidential information which, if disclosed, may prejudice the former client. It is recognized that the client of a firm is a client of all of the lawyers in the firm. Those rules also recognize that the court may be asked for a ruling and that is what the applicant has done here.

[38] In my opinion, the conclusion in this case is consistent with those rules. Here the lawyer does not actually possess confidential information that may prejudice the client. Hence the rules do not preclude Mr. Triggs from acting in the course of his employment with respect to this litigation. I make no ruling with respect to the defendant's application on the immunity from suit issue since Mr. Triggs has undertaken that he will not be involved in that matter in any manner and his employer has retained outside counsel to advise it on that issue.

[39] I am satisfied, as I think a reasonably informed member of the public would be, that in these circumstances there will be no misuse of confidential information. Therefore a declaration will issue as sought by the applicant.

[40] Counsel may make written submissions, within 45 days of this ruling, on the question of costs if they are unable to agree.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this

3rd day of March 1998

Counsel for the Applicant: Adrian C.Wright
Counsel for the Respondent: Richard J. Mallett

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