Date: 19980908 **Docket**: C.A. 144882

NOVA SCOTIA COURT OF APPEAL
Cite as: Shirley v. Gould, 1998 NSCA 160

Glube, C.J.N.S.; Hart and Pugsley, JJ.A.

BETWEEN:

CLAYTON SHIRLEY, EVELYN RUSHTON, GARY LEWIS, EILEEN LEWIS, JAMES STEELE, MURIEL STEELE and WAYNE HELPARD	)	W. Dale Dunlop for the Appellants
Appellants	)	David H. Christie, Q.C.
- and -	)	for the Respondents
IVAN GOULD and SYLVIA GOULD	)	
Respondents	)	Appeal Heard: September 8, 1998
	)	Judgment Delivered: September 24, 1998

THE COURT: Appeal allowed; order granted by Justice Anderson on January 22, 1998 is quashed, without costs, per reasons for judgment of Glube, C.J.N.S.; Hart and Pugsley, concurring.

C.A. No. 144882

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CLAYTON SHIRLEY, EVELYN RUSHTON, GARY LEWIS, EILEEN LEWIS, JAMES STEELE, MURIEL STEELE and WAYNE HELPARD	)	
Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
IVAN GOULD and SYLVIA GOULD	)	GLUBE, CJ.N.S.
Respondents	)	

GLUBE, C.J.N.S.:

As a result of a dispute between neighbours in the cottage community known as Tidnish Head, an action was commenced in 1985 in the Supreme Court of Nova Scotia, in Amherst, by Ivan Gould and Sylvia Gould (respondents on appeal) against Clayton Shirley, Evelyn Rushton, Gary Lewis, Eileen Lewis, James Steele, Muriel Steele and Wayne Helpard (defendants/appellants). In issue was the location of property lines and the location and widths of certain rights-of-way.

Initially, the first four named defendants were represented by W. Dale Dunlop of Halifax. James Steele, Muriel Steele and Wayne Helpard were represented by Douglas J. Morris of the Amherst law firm Hicks, LeMoine. Following discoveries in which Mr. Morris took an active part on behalf of his clients, it was agreed that Mr. Dunlop would continue the carriage of the action and represent all the defendants.

The trial was scheduled for October 28, 1996. On October 17, 1996, Mr. Dunlop obtained an opinion letter from Morris J. Haugg, Q.C., of Hicks, LeMoine, concerning the ownership of the various roads and rights-of-way in the Tidnish Head area.

On October 29, 1996, after a day and a half of evidence and following a meeting with the presiding judge, Justice MacLellan, a consent order was signed by all the parties. The order contained a number of terms including that the boundaries and locations of the rights-of-way were to "... be redefined to accord with the red line sketched by Douglas K. MacDonald, N.S.L.S., on a portion of a survey plan of Michael

Greene, N.S.L.S., dated December 20, 1995 ..." Another term of the order was, "That a plan of survey be forthwith prepared by Michael Greene, N.S.L.S., in order to describe the terms of this Order and that costs of this survey will be borne by the Defendants; ..."

After the new survey was completed, Mr. Dunlop, on behalf of the defendants, objected to the resurvey and refused to pay the account.

On September 17, 1997, an application "... for an Order requiring the Defendants to pay thte [sic] account of Michael Greene, N.S.L.S., and costs of this application" was filed by the solicitor for Ivan and Sylvia Gould, as petitioners against the defendants, using the same heading and file number as the original 1995 Supreme Court action. This application was essentially made on behalf of Mr. Greene.

Although the application was originally scheduled for October 1997, it was delayed until January 1998. Following a pre-trial conference call with Justice MacLellan, Mr. Greene obtained his own counsel, David H. Christie, Q.C., of Hicks, LeMoine. On January 6, 1998, in a letter to Mr. Dunlop, Mr. Christie advised he was now representing Mr. Greene on the application filed in September. He further wrote that Mr. Greene was aware that the Steeles and Mr. Helpard were at one time represented by Hicks, LeMoine, but they had verbally indicated no objection to his representing Mr. Greene on the application scheduled for January 22, 1998.

Mr. Dunlop, in correspondence to Mr. Christie dated January 7, 1998 and in his

brief to the Court dated January 20, 1998, dealt only with the issue of the validity of the resurvey and the standing of Mr. Greene in the particular application.

On January 21, Mr. Dunlop sent a fax to Mr. Christie raising the conflict of interest issue for the first time and he did so again in his fax to the Court on January 22, 1998, the day of the hearing of the Application. Mr. Dunlop advised both Justice Anderson and this Court that he had not focused on this issue until January 21.

Because of the amount involved and considering the time and the cost of attending in Amherst for oral presentation, Mr. Dunlop relied on his brief and letter and did not appear before Justice Anderson, the judge presiding in Amherst in chambers on January 22, 1998.

Justice Anderson read into the record portions of Mr. Dunlop's January 20 and 22 letters. Mr. Christie dealt with the conflict issue orally and at the conclusion of his remarks, Justice Anderson found there was no conflict of interest. He found this on the basis of Mr. Christie's excellent reputation as a barrister and solicitor. He then went on to deal with the merits of the application. After hearing testimony from Mr. MacDonald and Mr. Greene, Justice Anderson found the revised survey plan prepared by Mr. Greene complied with the October 1996 consent order. He ordered payment of the survey in the amount of $2,176.55, together with interest at 5% from December 31, 1996, to the date of the order. In addition, he ordered Mr. Dunlop to personally pay the account of Douglas K. MacDonald, who had filed an affidavit and attended as a witness

on the application to be available for cross-examination. He further granted costs of the application to the plaintiffs/applicants and Michael E. Greene, payable by the defendants.

On this appeal, the appellants seek to have Mr. Christie removed as solicitor for Mr. Greene on the basis of conflict of interest, solicitor and client costs against Mr. Greene and/or Mr. Christie, and that the order confirming the survey and payment to Mr. Greene be quashed.

Although there are other concerns relating to who made the application, how Mr. Greene obtained status before the Court and how the matter was heard in chambers, both counsel limited the issue on appeal to whether or not Justice Anderson erred in law in finding that Mr. Christie was not in a conflict of interest when he acted for Mr. Greene on the Interlocutory Application on January 22, 1998.

In referring to codes of professional conduct, Sopinka, J. stated in **MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd.**, [1990] 3 S.C.R. 1235; 121 N.R. 1; 77 D.L.R. (4th) 249 (S.C.C.) (known as **Martin v. Gray**), that even a perception of impropriety should be avoided (p. 257).

Nova Scotia Rule 8 of Chapter 6 of the **Code of Legal Ethics and Professional Conduct** states:

> A lawyer or any associate of the lawyer who has acted for a person in a matter has a duty not to act against that person in the same or a related matter.

Although not bound by codes of conduct, courts do pay deference to the philosophy and statement of public policy expressed in that Rule.

As stated by Matthews, J.A. in **Gallagher and Lumsden v. Wood et al.** (1995), 142 N.S.R. (2d) 127; 407 A.P.R. 127 at p. 133:

> The test is not to determine whether counsel did in fact receive confidential information, but whether counsel "might have" received such information and further that a court ought to be concerned not only with the actual possibility of a conflict of duty, but also with the appearance of such a possibility. The issue is not only related to the clients' perception but as well the public's perception, given all the facts, that a conflict might occur to the prejudice of the client and the public's interest and perception of the administration of justice.

As stated by Mr. Dunlop during his oral presentation, it is recognized that Mr. Christie has a sterling reputation. It is accepted that when he acted for Mr. Greene, he believed there was no conflict.

Mr. Christie did recognize in his submission to Justice Anderson a perception of conflict, adding that was why he contacted his former clients. However, he submitted to Justice Anderson, as he did on appeal, that there was no actual conflict. However, he failed to recognize there was an actual conflict of interest when he acted for Mr. Greene on the application because if successful, he would be required to pursue collection of a sum of money from his former clients. In addition, there is no evidence of informed consent being given by the firm's former clients. Finally, at the time Mr. Christie

approached the former clients, they were represented by another solicitor. Any contact should have been made through Mr. Dunlop.

I would find on these facts there was an actual conflict of interest when Mr. Christie acted for Mr. Greene on this application. Therefore, I would find Justice Anderson erred in law.

It was only on the day of the hearing that Mr. Dunlop formally notified the Court and Mr. Christie that he was raising an objection to Mr. Christie acting for Mr. Greene. Even on that date he did not make a formal application to have Mr. Christie removed; nor did he request an adjournment to deal with that issue. However, Justice Anderson appeared to accept that this issue was before him and Mr. Christie proceeded to make his submission without receiving proper notice. He did not have time to consider any evidence relating to the issue or to prepare a proper response. In spite of the lack of a request for an adjournment by either counsel, it would have been appropriate for Justice Anderson to adjourn the matter to allow time for Mr. Christie to respond.

The appeal is allowed. I would quash the entire order granted by Justice Anderson on January 22, 1998. In light of the circumstances surrounding that day, I

would not grant any costs, in this Court or in the Court below.

C.J.N.S.

Concurred in:

Hart, J.A.

Pugsley, J.A.