

Date: 19971202

Docket: C.A. 141800

NOVA SCOTIA COURT OF APPEAL
Cite as: Homburg v. S-Marque Inc., 1997 NSCA 195
Freeman, Hart and Cromwell, JJ.A.

BETWEEN:

RICHARD HOMBURG, FRANK MATHESON,)	Colin D. Bryson
RON NELSON, OCEAN REALTY)	for the Appellants
CONSULTANTS LIMITED, STAT)	
ENTERPRISES LIMITED, NEWEDGE)	
TECHNOLOGIES INCORPORATED and)	Tim Hill
DOVER CAPITAL CORPORATION)	for the Respondent
)	
Appellants)	
)	
- and -)	
)	
S-MARQUE INC.)	
)	
Respondent)	Appeal Heard:
)	December 2, 1997
)	
)	Judgment Delivered:
)	December 2, 1997
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THE COURT: Appeal allowed with costs per oral reasons for judgment of Cromwell, J.A.; Hart and Freeman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally
by:

CROMWELL, J.A.: (Orally)

This is an application for leave to appeal, and, if leave is granted, an appeal from Justice Hood's dismissal of the appellants' application to remove Tim Hill as solicitor of record for the respondent S-Marque in this proceeding under the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3.

The appellants are defendants in an action in the Supreme Court of Nova Scotia in bankruptcy. Mr. Hill is solicitor of record for the plaintiff S-Marque Incorporated. By consent, the bankruptcy action has been joined, for the purpose of trial, with two other actions involving the respondent, some of the appellants and a related company. Mr. Hill is solicitor of record for S-Marque in all three proceedings. Only the action in the Supreme Court of Nova Scotia in Bankruptcy is the subject of the application before Justice Hood and on the appeal to this Court.

The bankruptcy action was commenced by Mr. Hill on behalf

of his client in February, 1995, pursuant to leave granted by the then Registrar in Bankruptcy under s. 38 of the **Bankruptcy and Insolvency Act**. Mr. Hill was appointed Registrar in Bankruptcy in late September or early October, 1996. The appellants' application to have him removed as counsel of record was heard in the Supreme Court in May of 1997.

Justice Hood dismissed the application holding that any conflict of interest was speculative and unsupported by the evidence before her, and further, that there was no probability of mischief.

As Justice Sopinka said in **MacDonald Estate v. Martin**, [1990] 3 S.C.R. 1235 at 1245 the inherent jurisdiction of the courts to remove solicitors from the record: "...stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction." As Mr. Hill very fairly conceded before us, this jurisdiction is not limited to traditional conflicts of interest, but extends to situations in which the reasonable perception of the integrity of the administration of justice is adversely affected: **781332 Ontario Inc.**

v. Mortgage Insurance Co. of Canada (1991), 5 O.R. (3d) 248 (Ont. G.D.) and **Everingham v. Ontario**.(1992), 88 D.L.R. (4th) 755 (Ont. Div. Ct.)

The Registrar in Bankruptcy has both judicial and administrative responsibilities in relation to matters before the Bankruptcy court. They are set out mainly in s. 192 of the **Act** and include, by way of example, the power to hear and determine any matter relating to the practice and procedure in the courts and to perform all necessary administrative duties relating to the practice and procedure in the courts. It is worth noting that the order granting leave to bring these proceedings was made by Mr. Hill's predecessor as Registrar.

Would Mr. Hill continuing to act in these circumstances give rise to doubt about the integrity of the administration of justice in the view of reasonable, fair-minded and informed persons?

We are of the view that there is a reasonable appearance of impropriety in this situation and that a lawyer who serves as Registrar

of the Supreme Court in Bankruptcy, and thus has both administrative and judicial duties in relation to it, ought not to appear before that same Court as counsel. The person holding the position of Registrar could, and we think would, be perceived as standing in a position of special influence with the Court. This is more than a common and unobjectionable perception that, as is often the case, a lawyer has acquired special expertise and specialized knowledge through experience. The Registrar decides cases, issues orders and has administrative responsibilities that inevitably involve a working relationship with the judiciary. A reasonable, fair minded and informed person, considering this situation, would inevitably conclude that counsel who is also the Registrar of the Court in which the litigation was being conducted, stands in a position of special influence. The situation giving rise to such a reasonable perception is damaging to the integrity of the administration of justice and the Court ought to use its authority to prevent it.

For these reasons we think Justice Hood erred in law in dismissing the application. In so deciding, we would emphasize that there is absolutely no allegation of actual impropriety by Mr. Hill.

In the result, we would grant leave to appeal, allow the appeal and set aside the Order of the Supreme Court Judge. In its place there will be an Order declaring that Mr. Hill cannot act as Registrar in Bankruptcy and as counsel in this proceeding before the Bankruptcy Court.

The appellants are entitled to costs here and before the Supreme Court. The costs before the Supreme Court were fixed at \$400.00 and we would also fix the costs before this Court in the same amount, \$400.00.

Cromwell, J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

RICHARD HOMBURG, FRANK)
MATHESON, RON NELSON, OCEAN)
REALTY CONSULTANTS LIMITED,)
STAT ENTERPRISES LIMITED,)
NEWEDGE TECHNOLOGIES)
INCORPORATED and DOVER CAPITAL)
CORPORATION)

Appellants)

- and -)

S-MARQUE INC.)

Respondent)

REASONS FOR)
JUDGMENT BY:)
CROMWELL, J.A.)
(Orally))