C.A. No. 116418

NOVA SCOTIA COURT OF APPEAL

**Clarke, C.J.N.S., Roscoe and Bateman, JJ.A.**
**Cite as: Montreal Trust Company of Canada v. Basinview Village Ltd., 1995 NSCA 131**

**BETWEEN:**

| | | |
|---|---|---|
| MONTREAL TRUST COMPANY OF CANADA | ) | Victor J. Goldberg |
| | ) | Peter C. Rumscheidt |
| | ) | for the appellant |
| | ) | |
| appellant | ) | Robert Murrant, Q.C. |
| | ) | for the respondents |
| - and - | ) | |
| | ) | Appeal Heard: |
| | ) | June 1, 1995 |
| BASINVIEW VILLAGE LIMITED, a body corporate, LINDA YATES and M. SAMI AL-HAMWI | ) | |
| | ) | Judgment Delivered: |
| | ) | June 27, 1995 |
| | ) | |
| respondents | ) | |
| | ) | |
| | ) | |

**THE COURT:** Appeal allowed per reasons for judgment of Bateman, J.A.; Clarke, C.J.N.S. and Roscoe, J.A. concurring.

BATEMAN, J.A.:

The appellant, Montreal Trust applied to a Chambers judge of the Supreme Court for an order prohibiting counsel of record from acting for the respondents, Basinview

and Sami Al-Hamwi on the basis of a disqualifying conflict of interest. The Chambers judge declined to grant the Order. This is an appeal from that decision.

**Facts:**

Basinview Village Limited, owns two properties in Wolfville, Nova Scotia. In December, 1989 Montreal Trust Company of Canada, provided refinancing for the properties to Basinview in an amount in excess of two million dollars. D. William MacDonald of the firm Murrant Brown, in which firm Mr. Murrant was a partner, acted on behalf of the Appellant in the preparation and execution of the mortgages and other documents associated with the refinancing including the certification of title. Montreal Trust holds a mortgage on each of the two properties. Mr. Al-Hamwi is the guarantor on each mortgage. Mr. MacDonald, with the consent of the parties, acted on behalf of Basinview, it's principal Mr. Al-Hamwi and Montreal Trust.

In July of 1994 Montreal Trust commenced an action seeking a declaration clarifying its powers pursuant to the mortgage. The Respondents filed a defence. In October the Respondents, Basinview and Mr. Al-Hamwi, retained Mr. Murrant to represent them in that action.

In February and March of 1995, Montreal Trust commenced foreclosure proceedings on the two mortgages. The respondents, through Mr. Murrant, have filed defences.

Mr. Murrant resigned from the Murrant Brown firm on September 30, 1991. The law firm has since been dissolved. On May 1, 1992 the 'Murrant Brown & Co.' law firm was established. Mr. Murrant is the senior partner. Mr. MacDonald is not and has never been associated with that firm. Mr. Al-Hamwi was a client of the former Murrant Brown firm prior to the mortgage transactions.

Mr. Murrant deposes in his affidavit of April 3, 1995, filed on the Chambers

application:

> 17. That prior to October 1, 1994, I never heard of or had any professional or personal dealings with Al-Hamwi or Basinview regarding this matter;
>
> 20. That prior or subsequent to the 1st day of October 1994, I received no information, confidential or otherwise, from D. William MacDonald or any other source, with regard to the aforementioned mortgage;
>
> 21. That the main issues that are now in dispute between the parties have arisen subsequent to Mr. D. William MacDonald's representation of the Defendants.

The appellants sought an order restraining Mr. Murrant from acting for the respondents on the three actions.

**The Power of the Court on Appeal:**

In **Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.** (1990), 96 N.S.R. (2d) 82, Matthews, J.A. wrote at p.85:

> The approach an appeal court must adopt in considering a discretionary order made by a chambers judge has been stated by this Court in **Exco Corporation Limited v. Nova Scotia Savings and Loan** et al. (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, wherein Chief Justice MacKeigan in delivering the unanimous judgment of the Court on an appeal concerning an interlocutory injunction stated at p. 333:
>
> > "This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

**Martin v. Gray**:

The leading case in the area of conflicts of interest is **MacDonald Estate v. Martin et al** (1990), 121 N.R. 1 (S.C.C.), commonly referred to as **Martin v. Gray**. While that case is factually distinct from this, Sopinka, J., writing for the majority, offers

direction on the procedure and principles to be followed by a court when considering such an application.

He identifies the competing interests involved. At p. 8:

> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.

At p. 30 Sopinka, J. says:

> In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in **Rakusen**, "that is a thing which you cannot prove" (at p. 841). I would add "or disprove". If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, 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. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.
>
> Typically, these cases require two questions to 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?

He gives direction as to how those questions are to be answered. As to the first question, at p. 30:

> 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.(emphasis added)

The rationale for imputing that confidential information has passed from client to lawyer is clear. As stated by Sopinka, J., to do otherwise would require the court to delve into the nature of the information imparted by the client, which would, of course, divulge the information and defeat the purpose of the application.

As to the second question, Sopinka, J. states at p. 31:

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic.

In respect of whether knowledge of the confidential information is imputed to partners and associates of the lawyer, Sopinka, J. is sensitive to the problem this issue presents for the mobility of lawyers. He says at p.32:

> Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese walls and cones of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession. It can be expected that the **Canadian Bar Association**, which took the lead in adopting a **Code of Professional Conduct** in 1974, will again take the lead to determine whether institutional devices are effective and

> develop standards for the use of institutional devices which will be uniform throughout Canada. Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession...
>
> **...A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me".** This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, **even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used**. In this regard I am in agreement with the statement of Posner C.J. in **Analytica**, supra, to which I have referred above, that **affidavits of lawyers difficult to verify objectively will fail to assure the public.**
>
> (emphasis added)

**The Decision of the Chambers Judge:**

The Chambers judge considered that there would be some hardship to the respondents if required to retain new counsel. He found, however, that this would not prevent the court from removing a solicitor "if there were circumstances which would affect the integrity of the justice system or if there was a true conflict of interest." He said:

> However, when I examine the evidence before me there is no evidence that the continuing retention of Mr. Murrant would adversely affect Montreal Trust Company of Canada **and when I questioned counsel for Montreal Trust I did not receive answers which convinced me that there was any detriment to the plaintiff's position by reason of Mr. Murrant's retention. The answer to my question to counsel for the plaintiff was that Mr. Murrant may have received information concerning the collection policies or practices of Montreal Trust.**(emphasis added)

As to the two questions posed by Justice Sopinka in **Martin v. Gray**, the Chambers judge said:

> In answering the first question if it is shown that there is a relationship related to the retainer, then the court should infer confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. The court emphasized that the burden on the solicitor to discharge this onus is a heavy one.

He found that such a relationship does exist by reason of the partnership of Mr. Murrant and Mr. MacDonald. However, he said:

> ... I am convinced that a reasonably informed member of the public would be perfectly satisfied on the burden ascribed to Mr. Murrant that he had no confidential information nor information which was relevant. We have Mr. Murrant's uncontradicted affidavit and when I examine the position of Montreal Trust I cannot find or infer what type of information would come to Mr. Murrant that would be to the disadvantage of the plaintiff.

**Analysis:**

The Chambers judge correctly found that the matter was sufficiently related to the original retainer. Mr. MacDonald had represented Montreal Trust in placing the same mortgages now in issue. According to the test set out by Sopinka, J., however, once the matters are found to be 'sufficiently related', and the burden has shifted to the responding lawyer, there are limited ways in which that lawyer can discharge the burden. Indeed, Sopinka J. contemplates only institutional mechanisms within the new firm such as 'Chinese walls', and then, only after such procedures have been studied and approved by the Canadian Bar Association or a like body. These institutional mechanisms are intended to address the situation in which a lawyer, with knowledge of a file, has moved to another law firm. In such circumstances arrangements are made to ensure that he or she does not disclose the relevant information to the other lawyers

in the new firm. These institutional mechanisms could not address the specific circumstances of this case, as Mr. Murrant is presumed to have confidential information by reason of his association with Mr. MacDonald at the time the mortgages were placed. Sopinka J. specifically rejects the notion that the lawyer can discharge the burden by "conclusory affidavits" the contents of which cannot be objectively verified.

In referring to the 'uncontradicted' evidence of Mr. Murrant, to the effect that he had received no confidential information, the Chambers judge accepted just such a conclusory affidavit and, effectively, shifted the burden back to the plaintiff to prove that confidential information was, in fact, imparted. In so doing, with respect, I find that the Chambers judge erred.

The rationale for the initial presumption is to avoid the requirement that a client be forced to reveal the confidential information. Furthermore, a client may not know what constitutes 'confidential information'. This may be so, for example, because of the passage of time since the contact with the lawyer, because the client is a corporation and a number of the client's employees have spoken to the lawyer, or simply because the client does not appreciate how certain information imparted might be used to the client's detriment in the subsequent matter. It is fundamental to the solicitor client relationship that a client feel free to openly communicate with the lawyer without fear that such confidences will ever be revealed, let alone used against the client in a future proceeding.

Mr. Murrant submits that the appellant, in failing to allege that confidential information had definitely been revealed, albeit, not disclosing the nature of the information, did not provide an adequate factual foundation for the application. Had Montreal Trust so deposed, Mr. Murrant acknowledges that there would have been a disqualifying conflict of interest. For the reasons set out above, however, this cannot be a requirement. A client cannot be expected to remember all of the information

imparted to the solicitor, nor appreciate what may be 'confidential' in the sense of being relevant to the second matter. Where the two matters are not obviously 'sufficiently related', the client may have an obligation to provide more specific information about the first retainer to establish the connection between the two matters. Where, however, as here, the solicitor is involved in another stage of the same matter, such specific pleading is not a requirement. The matters are, clearly, 'sufficiently related' and the burden is squarely on the lawyer and cannot be discharged by a bald denial that information has been revealed.

Nor do I accept the submission of Mr. Murrant that Mr. MacDonald would not have acquired confidential information in acting for Montreal Trust in the placing of the security documents. There is no evidence from Mr. MacDonald to that effect. This is not a situation in which Mr. MacDonald acted in a minimal capacity, say, for example, to take a witness's oath on the mortgage documents, or some other such minor function, where confidential information would not likely be imparted. Additionally, the nature of the initial retainer is relevant only to determining whether the second matter is 'sufficiently related' to the first. Once that finding is made, the presumption operates.

While **Martin v. Gray** has been the focus of submissions, the law on conflicts, as regards the factual situation presented here, pre-dates the pronouncement by the Supreme Court of Canada, nor is it altered by that case. **Martin v. Gray** deals with a circumstance in which a lawyer, who had worked on a particular file, joins the firm acting for the opposition. The issue before the Court was whether the information possessed by the new associate should be imputed to all members of the new firm. In that context, the case had potential impact on the mobility of lawyers.

Such is not the factual situation here. The focus in **Martin**, **supra**, was the imputation of knowledge of confidential information to other lawyers in the associate's new firm. While the matter before this Court can be resolved within the principles

established by **Martin v. Gray**, it is not necessary to resort to that case. The law in this area is well established.

In **Fisher v. Fisher** (1986), 76 N.S.R. (2d) 326 (N.S.C.A.), the court commented upon a solicitor's duty not to act against the former client of an associate, in the same matter. The facts are captured in the headnote:

> The appellant had contacted a barrister with respect to custody and other matrimonial matters; he had arranged for her to consult one of his associates who gave her advice and whose firm subsequently billed her for services. She later retained other counsel and eventually found that her husband, the respondent, had retained the barrister she had originally contacted.

In determining that the solicitor was disqualified from continuing to act Macdonald, J.A., for the Court, said at p. 330:

> In our opinion, **it is no excuse for the barrister to say that, since he was not aware of what Mrs. Fisher told his associate, he should be allowed to continue to act against her. The knowledge of the associate surely must be deemed to be also the knowledge of the barrister.** In any event, once he was made aware that Mrs. Fisher had been advised by his associate on the child custody issue, the barrister should have immediately withdrawn from the case.
>
> In our view, the barrister had no other choice. There is no possible justification we can see in the circumstances here present that would permit him to act against Mrs. Fisher on the matter of child custody or any related issue when he knew that she had been previously advised on those very matters by his associate.
>
> In our opinion, the barrister committed a grave error in judgment in not withdrawing from the case when he first became aware of his associate's previous involvement on a solicitor-client basis with Mrs. Fisher.(emphasis added)

In **McCallum v. McCallum Estate and Montena** (1981), 47 N.S.R. (2d) 530 (T.D.) an application was made to restrain a solicitor from acting for the plaintiff in a claim for relief against an estate. The defendant estate relied upon the provisions of a will drafted by an associate of the plaintiff's lawyer. McLellan, Loc. J., after referring to

provisions from the **Canadian Bar Code of Professional Conduc**t, said at p 532:

> I pause here to comment that I take it to be common ground that the thrust of this rule, and indeed all rules relating to conflict of interest, is that it will encompass and include not only the lawyer acting personally but also those associated with him in the practice of law...

McLellan, Loc. J. continued at p. 537:

> Not specifically mentioned in the citations referred to above nor in argument before me is the effect upon the public of permitting Mr. MacLeod to continue to act in this matter. The public would certainly view this as a case where Mr. MacLeod is attacking the provisions of a will drafted by another member of the firm to which he belongs (the public would not be familiar with the niceties of the legal relationship within the group of lawyers practicing together). I am sure the public would find this to be an incongruous situation...

The Barristers Society of Nova Scotia has published **"Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia"**. The **Handbook** was adopted by the Council of the Nova Scotia Barristers' Society on February 23, 1990 and declared to apply to conduct of the Society's members occurring on or after August 1, 1990. The relevant parts are as follows:

**IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN CLIENTS**

**Rule**

A lawyer has a duty not to

> (a) advise or represent both sides of a dispute; or
>
> (b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.

**Guiding Principles**

What is a conflicting interest?

> 1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or

> loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.

**Subsequent matters**

> 8. 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.
>
> 9. Nothing in this paragraph prohibits a lawyer from acting against a person in a fresh and independent matter wholly unrelated to any matter in which the lawyer previously represented that person.

Issue Number 3, August 1994, of the **Legal Ethics Reporter** of the Nova Scotia Barristers' Society contains Ruling 1994-2 as follows:

**Representation in a Foreclosure Proceeding**

> It is unethical for a lawyer to represent a client as counsel in respect of the foreclosure of a mortgage where the lawyer, the lawyer's partner or anyone with whom the lawyer is associated has represented both the mortgagor and the mortgagee in respect of that mortgage.

The profession has spoken through this ethical ruling. The **Code of Professional Conduct** of the Canadian Bar Association contains Rules to a similar effect.

As to such statements by professional associations, Sopinka, J. says at p.11:

> ...an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy.

While not binding on the Court, such pronouncements should not be lightly disregarded. Care must be taken, however, to ensure that such statements of principle be applied by a Court with some restraint. A litigant should not be deprived of counsel of choice save in clear circumstances.

A recent case, remarkably similar on the facts to this, is **Jans v. Coulter (G.H.) Co.** (1993), 105 Sask. R. 7, (Sask.C.A). Jans purchased a ranch from the Coulter Co.

and granted the company a mortgage. One lawyer acted for both parties. Jans defaulted and the company notified him of its intention to commence an action on the mortgage. The lawyer representing the company was with the same law firm that the lawyer, who had acted for the parties on the purchase and mortgage transaction, had been with. Jans applied for an order to restrain the law firm from acting for the company. The Court of Queen's Bench Chambers judge dismissed the application. Jans appealed. The Saskatchewan Court of Appeal allowed the appeal.

Jackson, J.A., writing for the Court said at p. 9:

> With one explainable exception we can find no case where a law firm, having previously prepared documents while representing both parties to the transaction, was allowed to represent one of the parties in litigation arising out of those documents. In each of the following cases the court restrained the firm in the position of MacBean Tessem from choosing to act for one party: see **The Queen v. Burkinshaw** (1967), 60 D.L.R.(2d) 748 (Alta. S.C.) (in a loan transaction with guarantees, a solicitor who had given advice to the guarantors chose to act for the lender to enforce the guarantees); **McCallum v. McCallum Estate and Montena** (1981), 47 N.S.R. (2d) 530; 90 A.P.R. 530 (N.S.S.C.T.D.) (a partner in the firm drafted the will that was being contested by another member of the firm); **MTS International Services Inc. v. Warnat Corp. (1980)**, 118 D.L.R. (3d) 561 (Ont. H.C.) (a solicitor in a firm prepared agreements which were now the subject of litigation by another member of the firm); and **Enerchem Ship Management Inc. v. Ship "Coastal Canada" and Greater Sarnia Investment Corp. et al.**, [1988] 3 F.C. 421; 83 N.R. 256 (Fed.Ct. of Appeal) (a lawyer who was acting for both sides in reducing an agreement to document-form purported to withdraw his services from one side when a dispute arose). Also see **LaBanque Provinciale du Canada v. Adjutor Levesque Roofing Ltd.et al.** (1968), 68 D.L.R.(2d) 340 (N.B.C.A.) where each of the judges commented adversely, by way of an aside, on counsel's practice of acting for the lender and giving advice to the guarantors. A case where the law firm was not restrained from acting in **Canada Southern Railway Co. v. Kingsmill, Jennings** (1978), 8 C.P.C. 117 (Ont. H.C.). The firm was allowed to act because the lawyer who had prepared the agreement died 75 years prior to a dispute arising with respect to the agreement, and the party who could be considered in the same position as Mr. Jans in this case was a shell company without employees capable of giving

instructions to the firm.

We agree that the Martin case has replaced the courts' preoccupation with the old tests, i.e., possibility or probability of mischief, **but we do not accept counsel's contention that the Martin case requires a finding that there is a risk of a breach of confidentiality before a court will restrain a law firm from acting in this type of case**. Although the cases referred to above cite no central reason for ordering that a law firm cannot act for a particular client where the firm has represented both parties, none of the above cases turned on a question relating to breach of confidentiality. Rather, each case points to some aspect of perceived prejudice to the litigants or to the process. In **Burkinshaw**, Allen, J.A., spoke in terms of "high probability of mischief". In **McCallum**, McLellan, J., was concerned that the drafter of the will who was a member of the firm would be called as a witness. In **Enerchem**, MacGuigan, J., said (at p. 436) that the Court could intervene when there was unfairness to the prejudice of the aggrieved party. In **MTS International**, Montgomery, J., posed the question this way (at p. 562): **"How can they have confidence in a just result when their former solicitor acts for the other side in a matter when he advised both parties? "**

It is also useful to refer to **R. v. Speid** (1983), 8 C.C.C.(3d) 18 (Ont. C.A.) where Dubin, J.A., makes this comment (at p. 22):

> "It was fundamental to [the client's] rights that her solicitor respect her confidences and that he exhibit loyalty to her. A client has every right to be confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed."

**Speid** was a criminal case, but the words are appropriate here.

When Mr. Jans agreed that Wilson MacBean MacIntosh Tessem and Wiebe would represent both him and Coulter Co., he had every right to expect that the firm would not choose to act against him on behalf of Coulter Co. There is no doubt that Coulter Co. would have expected the same. This expectation must be viewed in light of the need for fairness in the system considered as a whole. **Ultimately, the integrity of the profession and the court system**

> **depends on fulfilling this need. In whatever way one characterizes the basis for the court's authority in a case such as this, the result is that the court retains unto itself the authority to control its own process to ensure the proper administration of justice.**(emphasis added)

MacGuigan, J. in **Enerchem**, cited by Jackson, J.A., above, stated at p. 261:

> I believe that Judge Kaufman in the United States captured the fundamental principle at stake in this kind of case when he said for the Second Circuit Court of Appeals in **Emle Industries Inc. et al. v. Patentex Inc. et al.** (1973), 478 F 2d 562 at 571:
>
> > The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.

It is no answer that Mr. Murrant and Mr. MacDonald are no longer associated in the practice of law.

Mr. Murrant submits that this matter was not raised by the Appellants in a timely fashion. Mr. Murrant was first retained in October of 1994. The record reveals that there was a period, prior to the commencement of the foreclosure actions, during which the parties were attempting to find a resolution. The alleged conflict was raised by the appellants as soon as it became clear that litigation was inevitable. The appellants acted reasonably and on a timely basis.

It is of further concern that the Defences filed challenge the validity of the mortgage. Mr. Murrant says that this is standard pleading and not the real thrust of the defence. That aspect of the defence has not, however, been abandoned by the Respondents. It is likely that Mr. MacDonald will be a witness on this issue. Should that occur, it is untenable that Mr. Murrant would be examining his former associate on the quality of his work in placing the security, which services were rendered at a time when Mr. Murrant and Mr. MacDonald were members of the same law firm.

In summary, then, while **Martin v. Gray** provides useful guidance, the existence of a conflict here is not dependent upon the imputation of confidential information to Mr. Murrant. There is a clear 'disqualifying conflict of interest' within the principles outlined above.

I would allow the appeal, set aside the order of the Chambers judge, grant the order prohibiting Mr. Murrant from acting in the three matters, and award costs to the appellant in the amount of $1000., including disbursements.

J.A.

Concurred in:

Clarke, C.J.N.S.

Roscoe, J.A.

C.A. No. 116418

**NOVA SCOTIA COURT OF APPEAL**

BETWEEN:

| | |
|---|---|
| MONTREAL TRUST COMPANY OF CANADA<br><br>appellant<br><br>- and -<br><br>BASINVIEW VILLAGE LIMITED a body corporate, LINDA YATES and M. SAMI AL-HAMWI | REASONS FOR JUDGMENT BY:<br><br>BATEMAN,J.A. |

)
respondents )