1990 C.AR. No. 02514

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

NICK LASCH

PLAINTIFF

- and -

THE MUNICIPALITY OF THE COUNTY OF ANNAPOLIS, a body corporate

DEFENDANT

HEARD: At Annapolis Royal, Nova Scotia, on the 10th day of November, A.D. 1992

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

SUBJECT: Application for an Order Restraining Counsel

DECISION: The 1st day of December, A.D. 1992

COUNSEL: W. Bruce Gillis, Q.C., Esq., for the Plaintiff

David A. Miller, Q.C., Esq. and
John Cameron, Esq. for the Defendant

D E C I S I O N

HALIBURTON, J.C.C.

This application is brought on behalf of the Plaintiff, Nick Lasch, seeking a declaration that John Cameron, the solicitor for the Defendant Municipality and associate Counsel in conducting the Defence in this particular action be declared ineligible to continue representing the Municipality on the basis of a conflict of interest.

The action is brought by the Plaintiff claiming wrongful dismissal by the Municipality by whom he was employed as Director of Planning. The Statement of Claim includes allegations of **mala fides** and **improper motives** on the part of the municipal authorities in connection with his discharge. In short, his claim against the Municipality is, in part, based on the proposition that his dismissal was **"engineered"** by the Warden and others who improperly and intentionally set the stage for his dismissal.

While the solicitor of record in the conduct of the action is David Miller, Q.C., of the firm Stewart McKelvey Stirling Scales, he is assisted by John Cameron who, since 1988, is Municipal Solicitor and, according to a letter on file herein, the Municipality desires to have him continue to be involved in the conduct of the action because of his familiarity with the history of the subject matter.

The other salient facts in brief are that on September 2nd, 1986, the Plaintiff consulted Mr. Cameron, seeking from him professional advice as to his appropriate response to a letter recently received from R. H. Sanford, then Warden of the

Municipality, alleging unauthorized use of travel expense moneys. Mr. Cameron gave advice, charged the Plaintiff $20 which he apparently paid, and the Plaintiff responded to the Warden's inquiries. Mr. Cameron rendered an account on that date, detailing his services as follows:

> To consulting with you concerning the terms and conditions of employment; to discussing with you the terms and conditions of letter in reply

For Mr. Cameron's part, it is argued that there is no conflict of interests in fact. There was "no ongoing solicitor/client relationship"; the consultation between Mr. Lasch and Mr. Cameron constituted an isolated retainer related exclusively to the problem involving his employee expense account and that the brevity and simplicity of the terms of engagement are reflected by the minimal fee of $20 which was charged.

It is simply coincidence and the function of a small bar in the County of Annapolis that at the time of the Lasch/Cameron consultation, Mr. Gillis, now solicitor for the Plaintiff, was on retainer as solicitor for the Defendant Municipality. The disposition of this matter requires that three questions be answered:

(1) Was there a solicitor/client relationship between the Plaintiff and Mr. Cameron?

(2) Did the solicitor receive confidential information arising from that relationship which is relevant to the present action?

(3) Is there a risk that such information would be used to the Plaintiff's (former client's) prejudice?

Both parties have filed affidavits in connection with this matter and the Plaintiff has given **viva voce** testimony. The relevant clause in the Plaintiff's Affidavit is paragraph No. 3:

> 3. **THAT** I attended at Mr. Cameron's office and spoke to him at great length about my concerns in a wide-ranging discussion in which we discussed my relationship with the Warden and other members of Council, my concerns as to the pressure being placed on me to carry out the administration of the County's Planning and Development Regulations and By-Laws in a way that was not consistent with my understanding of them, the conflicts in direction I was being given by the various people at various times, and seeking his advice as to how to deal with these concerns.

Mr. Cameron's affidavit in response says, at paragraph 4:

> 4. **THAT** on September 2, 1986, I was consulted in my capacity as a barrister and solicitor by Nick Lasch, the Plaintiff herein, respecting a letter forwarded to him under signature of H. Robert Sanford, warden of the said Municipality, alleging certain irregularities in travel expense claims and requesting a written reply; a copy of this letter is hereto annexed as Exhibit "A" to this my affidavit.
>
> 6. **THAT** during the course of our discussion, to my recollection there was only incidental reference to Mr. Lasch's employment relationship.
>
> 7. **THAT** our discussion was relatively brief and an account in the amount of $20.00...was rendered and paid.
>
> 9. **THAT** at various times, primarily after I became municipal solicitor, Mr. Lasch discussed with me at some length his employment situation and relations with the members of the municipal council. At no time were any of these discussions in the context of a solicitor-client relationship.

In his **viva voce** evidence, Mr. Lasch testified that the consultation between he and Mr. Cameron had lasted between one and a half and two hours. He reiterated the assertion in his Affidavit that it was a wide ranging discussion dealing with the terms of his employment in general and was not confined to an "incidental reference"; that he and Mr. Cameron spoke specifically about his understanding of his duties in relation to the Subdivision By-Laws and Regulations and the attitude of the Municipal Council to them. Their discussion included some reference to comments made by the local M.L.A. with respect to his work and, what I take it, was a perceived animosity between Mr. Lasch and the M.L.A., as well as talk of the respective wives and families of Messrs. Lasch and Cameron.

Lasch conceded that he had had numerous discussions with Mr. Cameron in his capacity as Municipal Solicitor after September of 1988. He was well aware of Cameron's appointment but he said that after his appointment, Mr. Cameron "avoided" any discussion of his (Mr. Lasch's) employee/empoyer relationship.

He testified that he had talked to Mr. Cameron on other occasions at other places before his appointment as Municipal Solicitor, and after, about subdivision rules and other matters of mutual interest as he had talked to other lawyers in the county. September 2nd was the only occasion on which he had been billed by Mr. Cameron with respect to any of his discussions with him.

That there was a solicitor/client relationship between Messrs. Lasch and Cameron and that such a relationship existed is obvious. There is no need to consider that first question further.

THE AUTHORITIES

Both Counsel have advanced the case MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd. (1990) 77 D.L.R. (4th) 249, (1991) 121 N.R. 1 as being the leading case on the subject of solicitors' conflicts. In it, Mr. Justice Sopinka succinctly sets forth the competing values which must be weighed in making a finding on this type of application:

> "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..."

In his concurring judgment, Mr. Justice Cory would have imposed a stricter duty upon lawyers to satisfy the Court that there is no conflict, either real or perceived, in respect of their duty to represent their clients. He said these words at page 271:

> ...Neither the merger of law firms nor the mobility of lawyers can be permitted to adversely affect the public's confidence in the judicial system. At this time, when the work of the courts is having a very significant impact upon the lives and affairs of all Canadians, it is fundamentally important that justice not only be done, but appear to be done in the eyes of the public.

> My colleague stated that this appeal called for the balancing of three competing values, namely: the maintenance and integrity of our system of justice; the rights of litigants not to be lightly deprived of their chosen counsel; and the desirability of permitting reasonable mobility in the legal profession.
>
> Of these factors, the most important and compelling is the preservation of the integrity of our system of justice...

The Nova Scotia Barristers' Society has adopted a code of professional conduct as outlined in Legal Ethics and Professional Conduct, a handbook for Lawyers in Nova Scotia, Chapter 6 of which deals with impartiality and conflict of interests between clients. The text defines conflicting interests and the lawyer's appropriate conduct in relation to it. I find the notes appearing at page 27 interesting in the present context, citing as authority Spector v. Ageda [1971] 3 All E.R. 417. The text says:

> "What he cannot do is to act for the client and at the time withhold from him any relevant knowledge that he has..."

And later, citing Sinclair v. Ridout [1955] O.R. 167 at 182-83:

> "It is the duty of a solicitor-...(8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage...' **This is a principle of ethical standards that admits of no fine distinctions but should be applied in its broadest sense,** and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved in litigation over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter."

And at page 28 citing Fisher v. Fisher (1986) 73 N.S.R. (2d) 181 (T.D.) among others:

> Decisions in several recent cases have focused upon the appearance of professional impropriety created in situations in which a solicitor acting against a former client **might have received** confidential information from that former client.
>
> (My emphasis added)

In Fisher v. Fisher, one member of the law firm had given advice to Mrs. Fisher, including a suggestion that she obtain other counsel. An associate was subsequently found to be ineligible to represent the opposing party. It was not questioned that the associate had no knowledge either of the consultation or of any information which Mrs. Fisher might have communicated in the course of that consultation. On the other hand there was no question but that Mrs. Fisher had disclosed relevant information during that interview. It seems that because of the appearance of the possibility that information might be passed from one associate to the other, the firm was disqualified.

Madam Justice Glube reviewed a number of these cases in a recent decision J. Cameron Widrig v. Cox Downie et al S.H. No. 81206, June 26th 1992, in which she quotes extensively from MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd. (supra) also known as Martin v. Gray (from page 10 of her decision):

> "...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.

(From Madam Justice Glube's decision at page 11, citing page 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."

"...A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail..."

"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..."

(My emphasis added)

One point I think needs to be emphasized in a situation such as the present. **Counsel, having taken on a new brief for a new client, is obliged by the ethics of our profession to utilize all his skill and training together with all his knowledge accumulated from whatever source for the**

benefit of his client. Any information which has come to his knowledge through his contacts in the community or through his previous experience in his professional office, he must place at the disposal of his client. To do otherwise would be to make his services conditional and limited. The profession would obviously lose any credibility if the present client were not assured that their solicitor's complete store of skill and knowledge was not at their disposal. To fulfill the terms of his retainer, then, Mr. Cameron is under an obligation to use for the benefit of the Municipality in this cause of action any knowledge of the facts disclosed and the attitudes displayed by Mr. Lasch in the course of that consultation.

Was the solicitor/client communication relevant to this litigation?

The Plaintiff says it was and has testified to that effect. Mr. Cameron has filed an affidavit in effect saying he has no recollection of relevant specifics being discussed. Mr. Justice Sopinka says the burden on the Counsel is a heavy one and difficult to displace. Mr. Justice Cory appears to consider that burden virtually impossible to displace. **The subject matter of the consultation related specifically to the terms of the employment of Lasch by the Municipality and the difficulties which he was then experiencing as an employee.** His assertion that the conference lasted at least an hour and a half is not rebutted, notwithstanding the very modest account rendered which, in its own terms, appears to establish the Plaintiff's point: "To consulting with you concerning the terms and

conditions of employment..." Excepting the assertion that there was a wide ranging discussion on the subject of "the terms of his employment", the denial (to paraphrase Sopinka) "is no more than the lawyer saying 'trust me'".

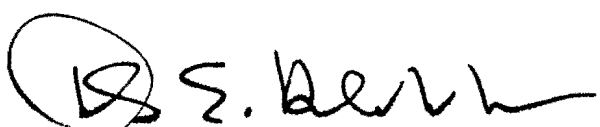
My sense of the appropriate onus to be placed on the respective parties in dealing with such an application as this after reviewing the various cases to which I've been referred by Counsel is that the Court's discretion is to be exercised in such a way that "a reasonably informed member of the public" would be satisfied that **no relevant information** has passed from the former client to the lawyer **which could now** be of any benefit to his present client in the action against the former.

The final question to be put is, if such information did pass from Lasch to Cameron, **is there a danger that it might be used for the benefit of his present client?**

As already indicated, it is my view that if any such information did pass, then **he is obligated to use it** for the benefit of his present client.

Having reached these conclusions, I allow the application. Mr. Cameron will be disqualified.

DATED at Digby, Nova Scotia, this 1st day of December, A.D. 1992.



CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

TO: Mrs. Patricia Connell
Clerk of the County Court
P.O. Box 129
Annapolis Royal, Nova Scotia
B0S 1A0

Mr. W. Bruce Gillis, Q.C.
Durland, Gillis & Parker
Barristers, Solicitors, Notaries
P.O. Box 700
Middleton, Nova Scotia
B0S 1P0
Solicitor for the Plaintiff

Mr. David A. Miller, Q.C.
Stewart McKelvey Stirling Scales
P.O. Box 997
Halifax, Nova Scotia
B3J 2X2
Solicitor for the Defendant

Mr. John R. Cameron
Orlando & Hicks
Barristers & Solicitors
P.O. Box 639
Bridgetown, Nova Scotia
B0S 1C0
Solicitor for the Defendant

CASES AND STATUTES CITED:

MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd. (1990) 77 D.L.R. (4th) 249, (1991) 121 N.R. 1

Legal Ethics and Professional Conduct (A Handbook for Lawyers in Nova Scotia), Chapter 6

Spector v. Ageda [1971] 3 All E.R. 417

Sinclair v. Ridout [1955] O.R. 167 at 182-83

Fisher v. Fisher (1986) 73 N.S.R. (2d) 181 (T.D.)

J. Cameron Widrig v. Cox Downie et al S.H. No. 81206, June 26th, 1992