SUPREME COURT OF NOVA SCOTIA
Citation: *Lappin v. Bauer*, 2015 NSSC 108

Date: 2015-04-09
Docket: *Syd*. No. 431635
Registry: Sydney

Between:

Jacqueline Lappin

Plaintiff/Applicant

v.

Colin Bauer and Patricia Curry-Bauer

Defendants/Respondents

Judge:	The Honourable Justice Frank Edwards
Heard:	February 18, 2015, in Sydney, Nova Scotia
Final Written Submissions:	March 6, 2015
Written Decision:	April 9, 2015
Counsel:	Sean MacDonald, for the Plaintiff/Applicant Robert Risk, for the Defendants/Respondents

By the Court:

[1] The Plaintiff/Applicant/Mover (the Applicant) moves for an order declaring the law firm of Sampson McDougall (S.M.) to be in a conflict and removing any lawyer associated with the firm of S.M. as solicitor of record for the Defendants/Respondents.

Facts

[2] The Applicant retained the services of Murray Hannem of S.M. on June 17, 2010, to assist in the purchase of her current residence, 93 Point Pleasant Road in Northside East Bay. Subsequent to the closing of the sale, the Respondent, Collin Bauer, advised the Applicant that her property did not possess a legal easement to a well that provided water to her home. As a result of this conversation, the Respondent again met with Murray Hannem in August of 2010.

[3] At this meeting, Mr. Hannem advised the Applicant that although there was not a legal easement to the well, any attempt to restrict the use of the well would be met with legal action. To that end, Mr. Hannem advised the Applicant to leave the situation as it existed and to contact him should any issues arise with the well in the future.

[4] In July of 2013, the Respondent, Collin Bauer, further advised the Applicant that the property did not possess a legal easement to pass over a portion of the Respondents' driveway to access the Applicant's property. The assertion was made despite the Applicant and her predecessors in title having used such portion of the driveway for that purpose. As part of this conversation, the Respondent, Collin Bauer, advised that the Respondents intended to construct a fence along the shared portion of the driveway. Such fence would block the Applicant's access to the shared portion of the driveway.

[5] In September, 2013, the Respondents began construction of the fence. On September 17, 2013, the Applicant phoned the office of S.M. in an effort to speak with Mr. Robert Sampson. Mr. Sampson was not in but returned the Applicant's call at 8 p.m. that evening. At that time, the Applicant and Mr. Sampson spoke for approximately 45 minutes (Lappin, cross-examination). In her affidavit, the Applicant states:

> 15. Mr. Sampson returned my phone call on September 17th, 2013, at approximately 8:00 p.m. We spoke in depth about the issue currently before this Court, being my claim of an easement or right-of-way over the shared portion of the driveway.
>
> 16. During the course of this conversation, Mr. Sampson advised me that at that stage it was his opinion that I had a good case for establishing an easement or right-of-way over the shared driveway but he wanted to speak with the previous owner of 89 Pleasant Point Road, Tommy Fiander.

17. Robert Sampson advised me he would take steps to send a letter to the Defendants instructing them to cease and desist in the construction of the fence.

18. On September 18th, 2013, at approximately 11:53 a.m., I sent an email to Mr. Sampson's assistant, Norma Bishop, enclosing 9 photos. I provided these photos for the purpose of assisting Mr. Sampson with his discussion with Mr. Fiander. Attached hereto and marked as Exhibit "D" is a true copy of this email.

19. Also on September 18th, 2013, at approximately 2:40 p.m., I had a telephone call from Jennifer Anderson, an associate at Sampson McDougall. Ms. Anderson advised me that she was researching the survey map which had information regarding a possible right-of-way. Ms. Anderson also advised that she would remind Mr. Sampson to contact Mr. Fiander.

20. On September 19th, 2013, at approximately 4:18 p.m., I sent another email to Mr. Sampson's assistant, Norma Bishop, enclosing another photo. In this email I also provided information and expressed concerns about what the Respondents were doing with the shared portion of the driveway. Attached hereto and marked as Exhibit "E" is a true copy of this email.

21. On Friday, September 20, 2012, at approximately 3:00 p.m., I had another telephone call with Ms. Anderson. During the course of this conversation, Ms. Anderson advised and I do verily believe, that Mr. Sampson had spoken with Mr. Fiander. Ms. Anderson advised that in light of this conversation, it continued to be the Firm's opinion that I had a good position to establish prescriptive rights.

22. Ms. Anderson also advised that there existed a 25 foot right-of-way along the roadway of Pleasant Point Road and that such right-of-way was found within the deed to my Property.

23. However, during the course of this conversation, Ms. Anderson further stated that Sampson McDougall was in a conflict and was not able to represent me. She did not reveal the nature of the conflict.

[6] The Applicant then retained the services of Greg Rushton of The Breton Law Group (BLG). Between October, 2013 and May, 2014, the Applicant and the Respondents, while both were represented by BLG, attempted unsuccessfully to resolve the dispute between them. In May of 2014, the Respondents retained the services of Robert Risk of S.M.

[7] The Respondents provided no affidavit evidence for this motion. The factual basis of the motion is therefore confined to the affidavit of the Applicant, her answers given during cross-examination, and the filing dates of the pleadings and motion.

[8] Accordingly, and contrary to page 3 of the Respondents' brief, there is no evidence that, prior to accepting the Respondents' retainer, S.M. conducted a conflict check and satisfied itself that it was not in possession of confidential information from the Applicant. There is no evidence that S.M. did not open a file or that Mr. Sampson did not draft a cease and desist letter (brief p.9).

[9] Nor is there any evidence about the details of the conversation Mr. Sampson had with a key witness and predecessor in title, Mr. Fiander (Lappin affidavit paras. 16 and 21). Respondents' Counsel states (brief p. 13) "… Mr. Fiander's comments have been incorporated into a Statutory Declaration dated May 5,

2014." There is no evidence that the Statutory Declaration accurately reflects the substance and extent of the conversation Mr. Fiander had with Mr. Sampson.

[10] On page 14 of his brief, Respondents' Counsel states "… the communications between Ms. Lappin and either Mr. Sampson or Ms. Anderson … were simply general in nature, pertaining to the elements necessary to establish a prescriptive easement." That statement is not evidence and is in marked contrast to the plain meaning of the Applicant's evidence that she was told that she had a "good case" and that Mr. Sampson would take concrete steps on her behalf (send a cease and desist letter and speak to Mr. Fiander).

[11] To complete the chronology: after Mr. Risk's retainer in May, 2014, he and Applicant's Counsel corresponded in attempting to reach a settlement until September, 2014. On September 15, 2014, the Applicant filed a Notice of Action. The Respondents filed a Defence on October 31, 2014. The Applicant filed the Defence to Counterclaim on November 13, 2014. At that time, Applicant's Counsel advised S.M. that he intended to file this conflict motion. On November 17, 2014, the Applicant filed a formal complaint with the Nova Scotia Barrister's Society (still pending). The Applicant filed the present motion on January 23, 2015. At that time, there had been no exchange of documents or examinations for discovery.

Analysis

(a) The 2010 Representation of the Applicant by S.M.

[12] From the outset, I would be inclined to disqualify S.M. solely on the basis of its representation of the Applicant when she purchased the property in 2010.

[13] In ***Johnson v. Rudolph***, 2013 NSSC 2010 at paragraphs 47-51, Hood J. noted the following:

> b) The Law Respecting Former Clients
>
> [47] Lawyers are not automatically prevented from acting against former clients. A lawyer does, however, owe a duty of loyalty to a former client. That duty is owed even when there is no question of confidential information being passed. The leading case on lawyers' conflict of interest is *MacDonald Estate v. Martin, supra*.
>
> [48] As Cromwell J.A. (as he then was) stated in *Brookville Carriers Flatbed GP Inc v. Blackjack Transport Ltd.*, 2008 NSCA 22, a lawyer has a duty "not to act against a former client in a related matter whether or not confidential information is at risk" (para. 17). He referred to the authority for this proposition being traced to *Montreal Trust Co. of Canada v. Basinview Village Ltd.* (1995), 142 N.S.R. (2d) 337. Cromwell, J. said that in that case the Court of Appeal held that a lawyer was disqualified where the new retainer put him "in an adversarial position with his firm's former client with respect to the very legal work his firm had done in the course of the earlier retainer" (para. 28).
>
> [49] The Nova Scotia Barristers' Society Code of Professional Conduct, effective January 1, 2012, as amended, includes the following provisions respecting acting against a former client:
>
> > Acting Against Former Clients
> >
> > 3.4-10 Unless the former client consents, a lawyer must not act against a former client in:

> (a) the same matter,
>
> (b) any related matter, or
>
> (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

[50] The Commentary to this Rule states:

> This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

[51] The Code of Professional Conduct is not binding on the court. The authorities indicate that the courts should consider such codes of professional conduct as indicators of public policy. In, for instance, *MacDonald Estate, supra*, Sopinka, J. said in para. 21:

> 21 ... 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. ...

[14] It would require a technical and excessively legalistic argument to hold that the two matters respecting the same property are not related. On the contrary, I am satisfied that the 2010 representation of the Applicant in the property purchase and the 2014 representation of the Respondent regarding the driveway easement dispute regarding the same property are related. I am confident that a reasonable person, informed of the background, would see it the same way. That person could reasonably take the view that S.M. was now attempting to knock down what it had helped to build through its previous retainer. To hold otherwise would be

inconsistent with preserving the integrity of the justice system (I paraphrase para. 69 ***Bhandal v. Khalsa Diwan Society of Victoria*** 2013 BCSC 1425).

[15] In its defence, S.M. notes that the Applicant in 2010 waived the condition in the agreement of purchase and sale requiring the vendor to provide her with a current property description disclosure statement. S.M. also points out that at the time of purchase, she waived her ability to obtain a survey of the property. Whether either of those measures would have alerted her (and, incidentally, her counsel at the time) is debatable and not relevant to the present discussion.

[16] Implicit in the 2010 purchase representation was the assurance by S.M. that the Applicant was free to enjoy her new property and that, if there was a problem, she could look to S.M. for support. Mr. Hannem assured her as such when she advised him a month after the purchase of the easement to the well. "… if anything should happen in the future then I should contact him" and he would take legal action (Lappin affidavit para. 11). I am confident Mr. Hannem would have taken the same position if the Applicant in 2010 apprised him of a problem regarding the driveway easement. As it turns out, that was precisely and understandably the Applicant's expectation when she contacted S.M. three years later. And, apparently, that was also Mr. Sampson's initial position.

[17] S.M. say that another firm had migrated the title to the property and therefore they are not responsible for any title problems. In view of what I have noted above, S.M. cannot simply say that the driveway problem belongs to someone else. At the very least, a reasonable person, informed of the facts, would find it surprising and inappropriate, that S.M. would now take the position that the Applicant cannot use what she reasonably believed was the established driveway to her home.

(b) The Events of 2013

[18] To briefly reiterate, when the driveway easement issue arose in 2013, the Applicant contacted S.M. and had a lengthy telephone conversation with the founding partner, Robert Sampson, Q.C. Mr. Sampson provided the Applicant with an opinion that she had a good case for a prescriptive easement; he also undertook to send a cease and desist letter to the Respondents; and also to speak with Mr. Fiander, a predecessor in title of the subject property.

[19] The Applicant forwarded emails and photos to S.M. to assist Mr. Sampson in his discussion with Mr. Fiander. Three days later, the Applicant spoke with Ms. Anderson, another lawyer with S.M. At that time, Ms. Anderson advised that she had done some research on the matter and that Mr. Sampson had in fact spoken

with Mr. Fiander. Ms. Anderson confirmed that the Applicant had a good case for a prescriptive easement. Ms. Anderson also advised the Applicant that S.M. had a conflict and could not accept her retainer.

[20] The seminal case on conflicts is ***MacDonald Estate v. Martin***, [1990] 3 SCR 1235 (SCC). That case makes it clear that the lawyer's main duty to a former client is to refrain from misusing confidential information. ***Martin*** also set out a two part test: (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 it will be used to the prejudice of that client? If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice.

[21] Did a solicitor client relationship arise as a result of the September 17 – 20, 2013 interaction between the Applicant and S.M.?

[22] In ***Descoteaux et al v. Mierzwinski***, 1982 CanLII 22 (SCC) the Supreme Court noted:

> The following statement by *Wigmore* (*8 Wigmore, Evidence*, para. 2292 (McNaughton rev. 1961)) of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.
>
> Seeking advice from a legal adviser includes consulting those who assist him professionally (for example, his secretary or articling student) and who have as such had access to the communications made by the client for the purpose of obtaining legal advice.
>
> There are exceptions. It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication. Communications made in order to facilitate the commission of a crime or fraud will not be confidential either, regardless of whether or not the lawyer is acting in good faith.

[23] In her brief, the Applicant says, it is clear that the Applicant contacted S.M. in their professional capacity. Her evidence is clear that she considered herself to be an ongoing client of SM. There is simply no means by which it could be said that the Applicant contacted Mr. Sampson and Ms. Anderson in anything other than a professional capacity (excerpted from pages 1-4 of the Applicant's post-hearing brief):

> With respect to the various arguments made in the Respondents' brief that no solicitor-client relationship existed because no retainer was ever formalized and no bill issued to or paid by the Applicant, the Court in ***Descoteaux*** is also instructive on this point.
>
> > When dealing with the right to confidentiality it is necessary, in my view, to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises. The latter arises as

> soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice.
>
> The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (*Minter v. Priest*, [1930] A.C. 558; *Phipson on Evidence*, 12th ed., 1976, p. 244, No. 589; *8 Wigmore, Evidence* (McNaughton rev. 1961), p. 587, para. 2304).

It is clear from this passage that a solicitor-client relationship pursuant to which a client can expect that confidentiality of communications will be maintained even where no retainer is established between the parties. This principle is further fortified by the following statement from the Court:

> It is also clear that solicitor-client privilege can extend to conversations in which a person makes disclosures while seeking to retain a solicitor, though in fact the retainer is not perfected. In *Minter v. Priest*, [1930] A.C. 558 at p. 573, Viscount Dunedin said:
>
> > Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion.
>
> It follows from the authorities referred to above that conversations with a solicitor's agents held for the purpose of retaining him would also be privileged, even though the solicitor was not then, or ever, retained. In my view, the principle protects from disclosure a conversation between an applicant for legal aid and the non-lawyer official of the Legal Aid Society who interviews him to see if he is qualified.
>
> The privilege protecting from disclosure communications between solicitor and client is a fundamental right--as fundamental as the right to counsel itself since the right can exist only imperfectly without the privilege. The Courts should be astute to protect both.

> The Court ultimately summarized as follows the law on this point as creating a substantive right on the part of a client, or potential client, who provides information to a lawyer for the purposes of obtaining legal advice:
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> > In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[24] I have therefore satisfied myself that a solicitor client relationship arose between the Applicant and S.M. between September 17 – 20, 2013. Obviously, S.M.'s retainer of the Respondents is "sufficiently related" to the matters on which S.M. acted for the Applicant in that time period, the driveway easement dispute. There is therefore a rebuttable presumption that S.M. possesses confidential information that raises a risk of prejudice to the Applicant.

[25] Respondents' Counsel has argued that he has successfully rebutted that presumption during his cross-examination of the Applicant. I am not satisfied that that is so. As noted, I have no evidence from S.M. to counter the contents of the Applicant's affidavit. In addition, she does maintain that she and Mr. Sampson discussed litigation strategy through she could not give a verbatim account of what

was said. That's hardly surprising given the length of the discussion and the Applicant's distraught emotional state at the time. I also have no evidence of the details of the evidence Mr. Sampson would have secured on the Applicant's behalf when he spoke to Mr. Fiander.

[26] But, if I am wrong and there is no confidential information at risk, I would still disqualify S.M. from acting for the Respondents. In his brief, Applicant's Counsel quoted ***Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.,*** 2008 NSCA 22:

> The Court in ***Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.,*** 2008 NSCA 22 ("Brookville") provides a helpful overview of the case law dealing with applications to have counsel removed for a conflict of interest (see, generally, paragraphs 20-48 of that decision). Having reviewed the voluminous case law and academic text authorities on the issue, the Court stated the following:
>
> > 49 In my view, lawyers have a duty not to act against a former client in the same or a related matter and this duty may be enforced by the courts. Although in general, the focus of the analysis will be on whether, by acting, the lawyer is placing at risk the former client's confidential information, the duty is not limited to situations in which that is the case. The chambers judge was right not to limit the duty in that way.
>
> The Court in *Brookville* went on to undertake an analysis of when retainers will be sufficiently "related" to merit intervention from the Court:
>
> > 51 Under the principle relevant here, that concerning acting against a former client in a related matter, the focus is different. As the cases and commentators show, the scope of this duty is very limited absent confidential information being at risk. This broader continuing duty of loyalty to former clients is based on the need to protect and to promote

> public confidence in the legal profession and the administration of justice. What is of concern is the spectre of a lawyer attacking or undermining in a subsequent retainer the legal work which the lawyer did for the former client or of a lawyer effectively changing sides by taking an adversarial position against a former client with respect to a matter that was central to the previous retainer. Basinview is an example of the former: the new retainer involved the lawyer attacking or attempting to undermine the very legal services provided to the former client. Harris and Chiefs of Ontario are examples of the latter: the new retainer involved attacks on the honesty and integrity of the former client in relation to exactly the same sort of matters as the lawyer acted to defend in the previous retainer. In either type of case, the relationship between the two retainers must be very close so that the lawyer in the new retainer is attacking or undermining the value of the legal work provided to the former client or effectively changing sides in a matter that was central to the previous retainer.

The Court in *Brookville* was also careful to differentiate an analysis on the basis of whether confidential information was disclosed to counsel who is alleged to be in a conflict of interest:

> 55 I cannot accept this argument. As I have attempted to explain, the approach to the question of whether two matters are related is entirely different in a MacDonald Estate situation than it is in the case of an alleged disqualifying conflict of interest where confidential information is not at risk. The purpose of assessing the relationship between the two retainers in MacDonald Estate is to determine whether an inference should be drawn that confidential information obtained in the course of the first retainer is relevant to the second. ***When, as here, confidential information is not at risk, the relationship between the two retainers is considered in order to identify whether the second retainer involves the lawyer attacking the legal work done during the first retainer or amounts, in effect, to the lawyer changing sides on a matter central to the earlier retainer***. The concept of relatedness for this purpose is much narrower and has an entirely different focus than the concept as applied in the MacDonald Estate analysis. (Emphasis mine)

In the result, the Court in *Brookville* upheld the Chambers judge's decision to discharge the appellant's counsel due to conflict of interest. On the facts, the respondents to the appeal (and applicants before the Chambers judge) had been former clients of the Appellant's counsel in a previous lawsuit. The Chambers judge found that the subject matter of the previous litigation was sufficiently related to the action for which the Appellant's counsel now sought to act against its

former client, thus creating a conflict of interest. This case, and its affirmation by the Court of Appeal, supports the principle that a Court's power in remedying a conflict of interest is sufficiently broad to discharge counsel even where a Chambers Judge does not believe that confidential information is at risk.

In light of this principle, the Applicant respectfully submits that your Lordship is well within his rights to discharge counsel for the Respondent in the present case. It should be clear that confidential information that relates to the very subject matter of the present litigation, and could therefore be highly prejudicial to the Applicant, was disclosed to the Respondent's counsel. If a Court is within its rights to discharge counsel even where such confidential information is *not* disclosed, then there should be absolutely no concern in awarding the same remedy where confidential information was disclosed.

A case similar to *Brookville* is *Miller v. Dartmouth Dodge Chrysler* (1991) Inc., a body corporate, 1999 CanLII 3292 (NSSC) ("Miller"). In *Miller*, Saunders J. (as he then was) also undertook a fulsome analysis of the case law at the time regarding the disqualification of counsel due to conflict of interest (see, generally, the analysis set out at pages 10-15). Having reviewed the case law, Saunders J. provided the following summary:

> In MacDonald Estate Justice Sopinka framed the question this way by asking whether:
>
> > "... there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor ..."
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> Obviously the comparison is not restricted to the subject matter of the new litigation. In my view the question must be examined broadly if one is to give proper weight to the public interest of maintaining respect for the administration of justice and in order to preserve the confidentiality which lies at the core of any solicitor/client relationship.
>
> The entire circumstances must be examined including the nature of the litigation, the facts alleged in the pleadings, the interests at stake, the

> parties and likely witnesses, and the likely strategy that might be presumed in advancing those interests.

> In the result, Saunders J. determined that counsel for the Respondent had not displaced a "difficult burden" of satisfying the Court that no information was imparted to the disqualified solicitor which could be relevant to the case for which the applicant sought to have counsel disqualified. It is respectfully submitted that the Respondents face the same issue here. The Applicant's evidence is clear in indicating that she provided information about the very subject matter of this litigation that were personal in nature and not a matter of public record.
>
> Simply put, the information provided by the Applicant to Sampson McDougall is clearly relevant to the "likely strategy that might be presumed in advancing" the Applicant's interests, to use Saunders J.'s wording. In the present case, Sampson McDougall provided the applicant with legal advice and spoke to one of the Applicant's key witnesses. These are measures that lay clearly at the heart of the type of threat to the solicitor/client relationship that Saunders J. sought to protect.

Conclusion

[27] The Respondents do not argue that their present lawyer, Mr. Risk, played no part in the prior interaction of the Applicant with S.M. and therefore should not be disqualified. I will therefore not address that issue.

[28] Counsel for the Respondents argues that it is untenable for the Applicant to bring this motion when she had previously consented to concurrent representation of herself and the Respondents by the law firm now representing her. With

respect, that argument is irrelevant to this motion. The issue in the present motion is not whether the Applicant's counsel is in a conflict.

[29] Finally, ***Canadian National Railway Co. v. McKercher LLP***, 2013 SCC 39 (CanLII), [2013] S.C.J. No. 39, sets out a balancing of factors that must be undertaken to access the relative risks of prejudice to either party:

> 65 On the other hand, it must be acknowledged that in circumstances where the lawyer-client relationship has been terminated and there is no risk of misuse of confidential information, there is generally no longer a concern of ongoing prejudice to the complaining party. In light of this reality, courts faced with a motion for disqualification on this third ground should consider certain factors that may point the other way. Such factors may include: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

[30] Here I am satisfied that the motion is not being brought to secure tactical advantage. The motion is brought early in the proceedings and not at the eleventh hour (as was the case in ***ECBC v. Crown Jewel Resort Ranch***, 2014 NSSC 105).

[31] Second, though it will be inconvenient for them, the Respondents should not have insurmountable difficulty in securing new counsel. In any event, that inconvenience does not supersede the interests of the Applicant or S.M.'s duty of loyalty to the Applicant.

[32] Third, I am satisfied that S.M. acted in good faith in accepting the Respondents' retainer. I am satisfied that the firm made a simple error in judgement.

[33] On balance, I have concluded that the Applicant's motion should be granted with costs of $1,500.00 payable forthwith. I assume S.M. will pay the costs and not oblige the Respondents to do so.

Edwards, J.