# IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Chisholm v. McArel, 2008 NSSC 202

**Date:** 20080620
**Docket:** SH 208255
**Registry:** Halifax

**Between:**

Pamela Chisholm

Applicant/Plaintiff

and

Sheila McArel and Nancy Bingham

Respondents/Defendants

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** June 16, 2008, in Halifax, Nova Scotia

**Written Decision:** June 24, 2008

**Counsel:** Brian J. Hebert and Sharon Avery, on behalf of the Applicant/Plaintiff
Michael S. Ryan, Q.C., on behalf of the Respondents/Defendants

**By the Court**:

[1] Having already ruled on the merits of the second issue raised by Pamela Chisholm (the "applicant"), the Court must now deal with the first issue which is framed as follows:

**ISSUE NO. 1:** Did a solicitor-client relationship exist between Ms. Awad and the applicant?

[2] I need not reiterate all the facts on which this application is based. I will refer only to those relevant facts that I feel are necessary in order to adequately support the decision reached regarding this particular issue.

[3] In addition to the affidavit evidence of the applicant, filed along with the notice of application on March 3, 2008, a second supplemental affidavit of the applicant was filed in support on April 21, 2008. Counsel for the respondents, McArel and Bingham (the "respondents") filed an affidavit of Michelle C. Awad, Barrister and Solicitor ("Ms. Awad"), on April 11, 2008. A supplementary affidavit of Ms. Awad was filed on April 17, 2008 followed by an affidavit of Charles J. ("Chuck") Ford, Barrister and Solicitor, filed on April 22, 2008. The affidavit of Mr. Ford had no relevance to the first issue. The Court allowed counsel for the applicant to call Ms. Pamela Mills ("Ms. Mills") to give *viva voce* testimony during the hearing of the application. Ms. Mills is the adjuster assigned to the file by the insurers for the defendants. Counsel for the respondents cross-examined Ms. Mills. None of the affiants were called for purposes of cross-examination.

[4] Based on the evidence presented, it is clear that the applicant relied heavily on her mother for guidance and support. The loss of her mother must have been a devastating blow for her. Apparently she had no other family member to turn to for the kind of support she had received from her mother.

[5] According to her affidavit, the applicant never had any direct communication with Ms. Awad about the accident. Rather, any discussions she had about the event were with her mother. The applicant states that she believed her mother was receiving advice from Ms. Awad and was then passing on this advice to her. Ms. Awad adamantly denies giving any such advice to her mother-in-law. Her only involvement was to speak via telephone with Ms. Mills on two occasions. Ms. Awad's recollection as expressed in her first affidavit was that she returned a call to the adjuster at the request of her mother-in-law. Ms. Mills' notes, made at or near the time of the event, indicate that it was her that initiated this first contact. The adjuster was aware that Ms. Awad was the applicant's sister-in-law. She had been apprised of this fact when she first met with the applicant at the residence of her mother on October 24, 2001. It was not the applicant, but rather her mother, who informed Ms. Mills of this.

[6] Ms. Mills' testimony regarding this initial contact is likely more accurate as it is based on the notes she made around the time it happened. It is not surprising that

Ms. Awad could not remember the exact details of this initial call given the elapse of time and the fact that, unlike Ms. Mills, she did not have reason for doing so.

[7] What Ms. Awad does remember, however, is that she was not acting as legal counsel for the applicant. Ms. Mills corroborated this in her cross-examination. It was made abundantly clear to her by Ms. Awad that she did not wish to become involved nor did she wish to have her firm involved on behalf of the applicant. According to Ms. Mills' testimony, Ms. Awad's only stated reason for doing anything was to facilitate contact between the applicant and the adjuster. Indeed, Ms. Mills' notes, tendered as an exhibit at the hearing, indicate that Ms. Awad said she would "contact her mother-in-law and get things rolling...".

[8] Ms. Awad's only other contact with Ms. Mills was by way of a telephone call initiated this time by Ms. Awad. The purpose of this call was to follow-up with Ms. Mills to find out if the applicant had made the desired contact with her.

[9] Ms. Mills and Ms. Awad had no other conversations regarding the matter other than these two brief telephone calls. Even after leaving several telephone messages for the applicant to call her and, after not receiving a return call, Ms. Mills chose not to call Ms. Awad thereafter to enlist her help.

[10] Due to the unfortunate passing of the applicant's mother, we do not have the benefit of her testimony. The applicant has not provided any details of what she might have discussed with her. Such details, although on its face, hearsay evidence, might have been admissible based on a necessity and reliability argument. The lack of details, however, does not affect my decision.

[11] In the Supreme Court of Canada case of **MacDonald Estate** v. **Martin**, [1990] 3 S.C.R. 1235, Sopinka, J. held at para 45 that:

> 45 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?

[12] Before these questions even need to be answered the Court must be satisfied that a solicitor and client relationship exists. It is not enough for one party to

subjectively believe that one exists. In the case of **Campbell** v. **Lienaux**, 1996 CanLii 5417, Justice Suzanne Hood of our Court had this to say about that:

> The dangers of agreeing with this argument that a solicitor-client relationship can be commenced by a subjective view of one party does not need much elaboration. A lawyer would rarely be free to carry on a conversation with anyone, in any setting, where one party discusses personal or business matters without running the risk of a solicitor-client relationship being created. I, therefore, reject that proposition.

[13] In the case of **International Capital Corporation** v. **Schafer**, 1996 CanLii 6847 (Sask. Q.B.), Baynton, J., after referring to the two questions posed by Sopinka, J. in **MacDonald Estate**, *supra*, held:

> It is clear that before the first question can be answered in the affirmative, three factors must be established by the applicant: First, that there was a solicitor and client relationship between the applicant and the lawyer. Second, that the previous relationship is sufficiently related to the retainer from which it is sought to remove the solicitor. Third, that the lawyer received confidential information through the previous relationship. The applicant must prove each of the first and second factors in the usual manner, but once this has been done, proof of the third factor is presumed by the means of a rebuttable presumption that confidential information was in fact imparted. Unless the solicitor satisfies the court that no information was imparted which could be relevant, it is presumed that confidential information was imparted. The presumption is a difficult burden to discharge.

[14] The burden is on the applicant to show that a solicitor-client relationship existed between her and Ms. Awad. It is not enough for her to say that she believed one existed or that one was created through the agency of her mother as was suggested by her counsel. Indeed, her own actions would suggest otherwise. She never spoke directly to Ms. Awad at any time about her case. She never once held out to Ms. Mills in their many conversations that Ms. Awad was her lawyer. If she had Ms. Mills would likely have closed out her file as she did once she learned of Mr. Pressé's retainer.

[15] Ms. Awad's evidence which is corroborated by Ms. Mills' testimony is to the effect that she did not want to be involved other than to facilitate contact between the applicant and Ms. Mills. Even then, Ms. Awad did not contact the applicant directly. The message was relayed through the applicant's mother.

[16] Most of the cases referred to by counsel involved situations in which the party seeking to disqualify the lawyer or law firm had a previous relationship with that lawyer or firm of lawyers. This is not the situation with the application before me.

[17] There is absolutely no evidence that a solicitor-client relationship ever existed between the applicant and Ms. Awad. What evidence there is supports Ms. Awad's contention that she had no desire to become involved on behalf of the applicant nor did she wish to prejudice, in any way, her firm's potential involvement on behalf of the insurers for the defendants.

[18] I have no doubt that Ms. Awad is wise enough to steer clear of this file even though the applicant is no longer her sister-in-law. I say this based on the obvious wisdom she has already demonstrated in ensuring that she would not create a potential or even a perceived conflict of interest for herself and her firm.

[19] The application to have the law firm of McInnes Cooper disqualified based on conflict of interest is therefore dismissed.

McDougall, J.