IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Reagh v. Reagh, 2005 NSSC 365

Date: 20050623
Docket Number: 1204-003644
Registry: Kentville

Between:

Anne Lorene Reagh

Plaintiff/Applicant

v.

Edward Ainsley Reagh

Defendant/Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard and Oral Decision:	June 23, 2005, in Kentville, Nova Scotia
Written Release Of Decision:	**February 6, 2006**
Counsel:	Heidi Foshay Kimball, counsel for the Petitioner/Applicant Robert Belliveau, Q.C., counsel for the Respondent

By the Court:

[1] I reserve the right to add to and edit this oral judgment. I first wish to thank counsel for the very helpful briefs. They were articulate and made the points that each of the parties wanted to make in as persuasive a manner as could be made.

[2] This is the application for the removal of Blaine Schumacher as counsel for Edward Reagh in divorce proceedings between Edward and Anne Reagh. The facts in the case are not disputed. They are contained in the four affidavits filed with the Court: one from Ms. Reagh, two from Bruce Gillis and one from Christopher Parker. Counsel elected not to cross-examine the deponents on the affidavits and, therefore, the facts contained in the affidavits are uncontradicted.

[3] The history of the matter is briefly as follows. In 1977 Christopher Parker entered into a law partnership with Bruce Gillis in a firm called Durland Gillis and Parker. Gillis' office was already established in Middleton and he continued to carry on his law practice from the Town of Middleton. Parker opened his office in Greenwood, Nova Scotia and has always carried on his law practice from that address. Each kept the files they were working on in their respective offices; the affidavit of Mr. Parker makes it clear that neither of them had access to the files of the other, even though I infer, as a matter

of law, that they may have been entitled to access to each other's files because of their business association. In July, 1999, the partnership between Gillis and Parker was converted into an "association", and in April, 2003, the association was terminated, and each continued to practice law from their then-existing offices, as separate independent practitioners.

[4] Between 1980 and 2001, Mr. Parker carried out various legal tasks for Mr. and Mrs. Reagh. The affidavit of Ms. Reagh and of Mr. Parker list the types of services performed by Mr. Parker for the Reaghs. They included the purchase of a home, the purchase of a house, the setting up of two corporations, and the initial franchise agreement, and a personal injury claim. Mr. Parker's affidavit states that at no time did he receive or have knowledge of the financial affairs, statements, or loans of the businesses, or of the parties personally.

[5] The relationship between Parker and the Reaghs was described by Ms. Reagh's counsel as being one of a long term close advisor. It was described by Mr. Reagh's counsel as being a "transaction" lawyer; that is, one who is only involved in specific transactions over a period of time. The descriptions contained in the affidavits lead me to believe that, despite my belief that there may have been some informal discussions over the twenty

years, Mr. Belliveau's description is closer to the actual relationship between Parker and the Reaghs. The affidavits are clear that Mr. Gillis was not given, at any time, access to information about the legal services provided by Parker to the Reaghs.

[6] In September, 2002, the Reaghs separated. In October, 2003, Ms. Reagh commenced divorce proceedings.

[7] In March, 2005, Mr. Blaine Schumacher, a lawyer practising in Calgary, Alberta, became associated with Gillis in the practise of law from Gillis' office in Middleton. He was retained by Mr. Reagh to act for him in the divorce proceedings. It is that retainer that led to this application.

[8] The law is clearly enunciated in **Martin v. MacDonald Estate**, sometimes called **Martin v. Gray**, [1990] 3 S.C.R. 1235. In that case a young lawyer who was actively engaged in defending a longstanding action, moved from the law firm of the defendant to the law firm of the plaintiff. The defendant sought to remove the plaintiff law firm as counsel for the plaintiff. There are several factors which distinguish the facts in **Martin** from those in the case at bar, but, in **Martin**, the Supreme Court of Canada set out the test and standard for identifying and handling conflicts like those in this case. While the court was unanimous in the result, the standard and test is that set out by

Sopinka J. for the majority (four) of the justices, and Cory J. for the rest. Relevant parts of the judgment are contained at pages 4 through to page 7 of Ms. Foshay-Kimball's memorandum, and include paragraphs 15-16, 22, 26, 45, 49, 50, 51, 52, 57-64, and 75. Paragraph 22 reads in part:

> 22 The law in Canada and in other jurisdictions has adopted one of two basic approaches in determining whether a disqualifying conflict of interest exists: (1) the probability of real mischief; or (2) the possibility of real mischief. The term "mischief" refers to the misuse of confidential information by a lawyer against a former client.

[9] The Court determined that the test for determining the presence of a disqualifying conflict of interest is satisfied, when it reasonably appears that disclosure might occur.

[10] Mr. Justice Sopinka rejected both the stricter standard of the United States Courts, and the lesser standard of "probability of mischief", described in the Canadian Bar Association Code of Professional Conduct (and NSBS Legal Ethics and Professional Conduct handbook) as the "likely to be" standard. I agree with the paragraphs from **Martin** cited by the applicant. At paragraph 45 Justice Sopinka says:

> . . . it is evident from this review of authorities that the clear trend is in favour of a stricter test. This trend is the product of a strong policy in favour of ensuring not only that there be no actual conflict but that there be no appearance of conflict.

At paragraph 49 he is careful to qualify this as not being an absolute prohibition against lawyers moving to new firms, or against ex-partners ever suing clients of the former firm. He speaks about the mischief that could be caused in such circumstances. He agrees with the U.S. approach that Courts should infer that confidential information has been imparted unless the solicitor can satisfy the Court that no information was imparted that might be relevant to the current proceedings. He writes that the burden is difficult to discharge, but that the door should not be shut completely.

[11] The first question is whether the respondents have satisfied the court that there is no possibility of information being imparted.

[12] The second question, set out in paragraph 50 of Justice Sopinka's decision, is whether the confidential information will be misused. While a lawyer who has relevant confidential information cannot act against his client or former client, Sopinka J. goes on in paragraph 50 to say, “The answer is less clear with respect to the partners or associates . . .”. He recognizes that there is a scale of relationships between the client and the law firm; he starts with the individual lawyer who dealt with the client; then he considers partners and

associates who are involved in the firm during the time that the lawyer was associated with the client and had a relationship with the client; as a natural extension, a different standard applies to the lawyer who assumes conduct of the matter but was not a part of either firm at the time of the solicitor-client relationship, and only became associated with the ex-partner when he was an ex-partner.

[13] In paragraph 50 - 53, Sopinka J. warned of “overkill” in imputing conflicts to former partners and associates, and I add, by inference, lawyers who were not former associates and partners, but joined one or other of the firms at a later date. There exists a strong inference that lawyers who work together share confidences; Courts should draw the inference that they did, unless satisfied, by clear and convincing evidence, that all reasonable measures have been taken to ensure no disclosure has or will occur by the tainted lawyer to the member or members of the firm who are engaged against the former client.

[14] Undertakings and conclusory statements in affidavits, without more, are not acceptable; they are not clear and convincing evidence. Courts should not be asked by lawyers to simply “trust me”. The Court should require and be

satisfied only with clear and uncontradicted evidence that, in fact, no confidential information will pass to the opposing lawyer.

[15] The applicant's memorandum did not cite paragraph 53 of **Martin;** in paragraph 53 Mr. Justice Sopinka wrote that the test to be applied as to whether or not the possibility of conveyance of confidential information would affect the confidence that the public has in the integrity of the legal profession and the administration of justice This standard is met when:

> . . .a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

[16] M**artin** is the authority which binds this Court. Most cases divided the issues into two or three questions. In the Respondent's memorandum, it is divided into three questions . The first question is: did a solicitor-client relationship exist. In this case, it does not matter who the onus is on, since it is clear that between 1980 and 2001 there was a solicitor-client relationship between the Reaghs and Mr. Parker. By extension, the relationship included Mr. Gillis. The fact that they had separate physical offices is not relevant to the fact that a solicitor client relationship existed.

[17] The Courts have said that all analysis of the risk of disclosure and therefore conflict is fact-based, and individual to each case. While a solicitor-client

relationship clearly existed between Mr. Parker and the Reaghs, and is imputed to Mr. Gillis, the physical and organizational structure of the partnership negated any real impact and consequences as between the Reaghs and Mr. Gillis.

[18] The second question is: if a relationship existed, was the relationship sufficiently related to the matter before the Court now - that is, the divorce proceedings, as to give rise to the presumption that confidential information could have been disclosed to Mr. Gillis.

[19] I quite candidly have a problem as to whether the services provided by Mr. Parker to Mr. and Mrs. Reagh were such that they could give rise to a presumption of receipt by Mr. Parker of relevant confidential information, let alone the possibility of him passing it on. Parker's services involved fairly straightforward and basic legal services; however, on balance, I find that, based solely on the length of time of the relationship over which Parker provided services, it is possible that some information may have been imparted that might constitute confidential information, sufficiently related to the divorce proceedings that it might reasonably be perceived to cause concern to Ms. Reagh, or to an informed member of the public. In my view,

there is a small possibility that Parker had marginally-relevant information. My answer to the second question is a "marginal" yes.

[20] The third question (which, in **Martin**, is Sopinka's second question) is whether any confidential information will be misused.

[21] In my view, the Respondent has rebutted the presumption of possible misuse, by showing that Mr. Schumacher did not, and could not, in fact receive any confidential information that Parker may have acquired and which could be used to the detriment of Ms. Reagh in the present action.

[22] My answer is a "clear" no for the following reasons:

> (a) the relationship between Mr. Gillis and Mr. Parker terminated in the year 2003 (before Schumacher joined Gillis);
>
> (b) any information in the possession of Mr. Parker before that time was only marginally relevant to the present proceedings;
>
> (c) the possession of any information remained with Mr. Parker in April 2003, and was not accessible by Mr. Gillis, or anyone who might become associated with him in the practice of law after April 2003 (including Mr. Schumacher); and
>
> (d) at no time was there <u>any</u> association or relationship between Parker and Schumacher.

[23] This case is not like **Card v. Card**, 1997 CarswellNS 395 (NSSC), where the same lawyer was consulted by a husband and wife regarding the reorganization of their business affairs; after their separation, the lawyer sold

the business for the husband and acted for him in divorce proceedings. He was removed as counsel. The court held that each case operates on its own facts. The facts in **Card** bear no relationship to the facts here.

[24] This case is not like **Fisher v. Fisher**, 1986 CarswellNS 507 (NSSC),where a party had consulted one member of a law firm about a custody matter, and later, another member of the same law firm was retained to act for the other side.

[25] Mr. Parker's relationship with the Reaghs had nothing to do with their matrimonial affairs, his last services were performed before the separation, and there is no evidence that he held a continuing retainer, or that he was their exclusive counsel; most importantly, he and Mr. Gillis had ceased to be partners and Gillis had ceased to have a right of access to (and in fact had never had actual access to) Parker's files before Schmacher became associated with Gillis. These facts differ from the facts in the cases cited to the court.

[26] The primary issue is whether the Court is satisfied, and I am satisfied that there is no possibility that Mr. Schumacher could get access, by reason of the former relationship between Mr. Gillis and Mr. Parker, to any

information that Mr. Parker has, let alone whether it is relevant to the matrimonial proceedings.

[27] Mr. Justice Sopinka set out the three purposes of the rule. One is to protect the integrity of the profession. It was his conclusion that the profession would be demeaned if the public were to believe that Mr. Schumacher had access to information that Mr. Parker may have obtained because of his services for the Reaghs. I have determined that if a member of the public, and by that I do not mean the parties, had the information that the Court has, he or she could not reasonably believe that there is any possibility Mr. Schumacher had any more access to the Reagh's confidential information than Ms. Foshay-Kimball had. There is no basis for any such belief.

[28] Ms. Foshey-Kimball has raised another issue which is discussed in **Fisher**. It is an issue upon which many people hold a view that is understandable but incorrect. It involves the perceived integrity of the profession. Separate and apart from whether a reasonable member of the public would believe that Mr. Schumacher could have access to confidential information, is the question of whether it looks "bad" that Mr. Schumacher, who is now associated in law with Mr. Gillis, should be acting for Mr. Reagh against

Ms. Reagh, when both had used Mr. Parker as a lawyer for some unrelated matters when Mr. Parker was associated in law with Mr. Gillis.

[29] There are people who believe that once a lawyer has acted for a client that he or she cannot thereafter, at any time, act against them. Similarly, there are some people who believe that, once a law firm has acted for them, that the same law firm, no matter what changes in personnel occur, has no right to take action against them, or further still, that all former members of that firm, or lawyers associated with them, have no right to act against them. That is flawed and unreasonable thinking. It may be that the parties will feel hurt by the fact that someone they used before is suing them, or on the other side of the coin - may be responding to suit they have started. It may be a public relations matter for the legal profession, but, the ethical guidelines for lawyers recognize that clients may retain different lawyers, and different law firms, to act for them for different matters, and similarly, it is not improper for a lawyer to take on a matter against a former client in an unrelated matter, provided that the former client is protected from disclosure or misuse of related confidential information. Binding a lawyer, or firm, to not act against a client requires a continuing contract, and that is what retainers (common in the old days) were about; there is no evidence of a retainer in

this case. By extension, associates, and former associates, and lawyers who become associated with them, all of whom are further removed from the solicitor-client relationship would have even fewer ethical or legal restrictions.

[30] The Court considered the cases cited by the Respondent. In **United Steel Workers of America v. King et al**, (1993) 127 N.S.R.(2d) 161, Gruchy J. determined that there had been no solicitor client relationship between the lawyers who were said to be in conflict. Similarly, in **Manville Canada Inc. v. Ladner Downs**,[1992] 2 W.W.R. 323, the BC Supreme Court found that there had been no legal relationship, and, if there had, the Court clearly found that the facts did not pass the second threshold question. That case did deal with the appearance or perception of impropriety, beginning at paragraph 45, where the court wrote:

> The appearance or perception has to be based on something more than speculation. It is not a subjective test which is to be applied but an objective test. The test must be whether an appearance of impropriety would arise in the mind of a reasonable, fair minded, knowledgeable person who is fully informed of all the facts.

[31] The **Widrig v. Cox Downie** case, (1992) 114 N.S.R.(2d) 320, is again not, in my view, on the same issue as before this Court. Mr. Widrig's company had used the firm of McInnes Cooper for some corporate work, and he had

some unrelated personal legal work done by them. The work was not related to the subject matter for which Mr. Wrathall, a member of McInnes Cooper, was subsequently retained to act. Chief Justice Glube found that no conflict existed.

[32] In the case of **2475813 Nova Scotia Limited v. Green**, **Barry M. Green**, (2000) 186 N.S.R.(2d) 374, Mr. Justice Goodfellow again found that the lawyer for the condominium corporation, while indirectly the lawyer for the individual unit holder, was not directly the lawyer for the individual unit holder, so as to prevent him from acting against the individual.

[33] The issue today is not whether there was a solicitor-client relationship. There was. The second issue today is whether that relationship was related to the subject matter of these proceedings, and I have said marginally yes; that conclusion affects my assessment of the third issue of this case. The third issue is whether I am satisfied that the respondent has shown that, by reason of the termination of the association between Mr. Parker and Mr. Gillis - which predated this litigation, and which did not involve Mr. Schumacher, there is any possibility of disclosure or misuse of relevant confidential information. I find there is no such possibility because there is no logical reason that Mr. Parker would have to disclose any such

information. This case differs from most of the cases cited where there were ongoing relationships between the firms or the parties that would, recognizing human nature, cause someone to be suspicious. There is no reasonable basis for suspicion in this case.

[34] I read the decision of Mr. Justice Cacchione in **Chapates v. Petro Canada**, 2004 NSSC 52. The facts in that case are not similar to these. In that case, the lawyer had a closer relationship with the former firm and there was more reason for concern than in the case at bar. He accepted the reasoning of, and applied **Martin**, including the test in paragraph 17 of a reasonably informed member of the public. I found Justice Cacchione's reasoning to be quite similar to the analysis and the results that I have come to in this case. The decision must be reasonable to all parties.

[35] In this case, the three principles enunciated by Mr. Justice Sopinka have not been breached. The integrity of the legal profession should not be viewed, by a reasonable person, as resulting in any unfairness or impropriety. For that reason, I dismiss the application. I do say, however, that it was not an unreasonable application to bring. Mr. Gillis and Mr. Parker hung out a shingle with their names side by side for twenty some odd years and whatever they now say - that they were not always partners as we know it, it

was not unreasonable that a member of the public, or Ms. Reagh, would believe, without knowing what is before the court, that there was a possibility of some prejudice. Mr. Gillis and Mr. Schumacher may have a problem of perception, now and in the future, arising from the former association of Parker and Gillis.

[36] With regard to costs, the new table, that came into effect last April, says that for applications of half a day, costs range, I think, between $750.00 to $1,000.00. I am prepared to give costs of $750.00, unless there is some other reason or other information that I should know.

[37] I do not order that the $750.00 be paid now. I order it be paid and adjusted when the matrimonial matter is finally resolved. The Reaghs appears to have been in a long term marriage, and have a very successful business. I read the application for interim support; it appears that there is going to be further adjustments between the parties and, quite possibly, a spousal support obligation for some period of time if one applies the **Federal Spousal Support Guidelines**. There probably is going to be some financial adjustment in favour of Ms. Reagh, so this costs order will be an adjustment at that time. My intent is that Ms. Reagh should not be impoverished today by money out of her pocket when she is the one who is seeking spousal

support, and I understand Mr. Reagh controls the business, or the source of their livelihood, even if he does not own it all.

[38] This was a reasonable application to bring, and should merit nothing more than the minimum scale.

J.