SUPREME COURT OF NOVA SCOTIA

Citation: Brogan v. Bank of Montreal , 2013 NSSC 76

Date: 20130613
Docket: Syd. No. 279326
Registry: Sydney

Between:

THOMAS BROGAN, SR., THOMAS BROGAN, JR., PATRICK BROGAN, PATRICIA BROGAN and FRANCIS A. REASHORE

Plaintiffs

v.

BANK OF MONTREAL, JOAN DEAN, DUNDEE PRIVATE INVESTORS INC./SERVICES FINANCIERS DUNDEE INC, amalgamated from **3947327 CANADA INC.,** formerly known as **HERITAGE FINANCIAL SERVICES LIMITED** and **MITCHELL WHALEN**

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: February 12th and 27th, 2013 in Halifax, Nova Scotia

Final Written Submissions:

By Derrick J. Kimball, Esq.:	March 28th, 2013
By Alexander S. Beveridge, Q.C.:	March 13th, 2013
By Roderick (Rory) H. Rogers, Q.C.:	March 21st, 2013
By D. Kevin Burke, Esq.:	May 31st, 2013

Written Decision: June 13th, 2013

Counsel: Derrick J. Kimball, Esq. on behalf of the Plaintiffs
Alexander S. Beveridge, Q.C. on behalf of the Bank of Montreal and Joan Dean
Roderick (Rory) H. Rogers, Q.C. on behalf of Dundee Private Investors Inc./Heritage Financial Services Limited
D. Kevin Burke, Esq., on behalf of Mitchell Whalen

By the Court:

[1] This case involves an action by the Plaintiffs against the Defendants for losses said to have been incurred as a result of various investments. The Plaintiffs allege, *inter alia*, that the Defendants counselled and advised each of them to engage in a "scheme" for the purchase of investments. The alleged "scheme" involved the lending of money to the Plaintiffs, who would then invest the funds with the Defendant Heritage. In their pleadings, the Plaintiffs claim for breach of fiduciary duty, breach of trust, breach of industry regulations and standards, breach of contract, negligence and professional malpractice.

[2] The Plaintiffs are represented by the firm of Kimball Brogan. Derrick J. Kimball is the solicitor of record for the Plaintiffs. His partner, Nash T. Brogan, is co-counsel with Mr. Kimball on the file. [1] Mr. Brogan is related to all of the Plaintiffs. In particular, he is the son of Thomas Brogan, Sr. and Patricia Brogan, the brother of Thomas Brogan, Jr. and Patrick Brogan, and the brother-in-law of the Plaintiff, Francis Reashore.

[3] Counsel for the Defendant, Mitchell Whalen, has brought a motion for an order disqualifying the law firm of Kimball Brogan from acting as counsel for the Plaintiffs in this proceeding. The other Defendants support the motion.

[4] This matter (along with two other motions) was heard before me on February 12th, 2013. On February 27th, 2013, the court rendered its decision in relation to the two other motions (see 2013 NSSC 75.) In relation to the motion seeking to remove Kimball Brogan as counsel for the Plaintiffs, the court referred counsel to certain

additional authorities that it had located dealing with this issue and asked to be briefed further on the matter. In particular, the court asked to be briefed on the issue of whether Mr. Brogan's relationship with the Plaintiffs precluded him from acting in relation to this matter, regardless of whether he is going to be a witness at trial.

[5] On March 28th, 2013, Mr. Kimball filed a supplementary brief with the court. In this document, he objects to the court considering the question of whether Mr. Brogan's relationship with the Plaintiffs precludes him from acting in this matter. He submits that this issue was not advanced by counsel at the time of the hearing but, rather, was raised by the court. Mr. Kimball questions the "authority or propriety of the court considering an issue not properly before the court or not raised in the original motion". He goes on to suggest at p. 4 of his supplementary brief:

> .....The family relationship was raised as a matter of context in the course of briefing and arguing the issues but was never advanced or argued as a stand alone issue for consideration. This has been done on the directions of and authority referred to counsel by the court.

[6] At p. 5 of the supplementary brief, Mr. Kimball added the following:

> In this case, the Plaintiffs say the court is addressing an issue the court has chosen to address, not the issue that was advanced in the motion. As a result the court lacks jurisdiction to address the question.

[7] It is difficult to reconcile Mr. Kimball's position with the realities of what occurred during the hearing of this matter.

[8] As indicated, the Defendant Whalen had brought a motion to disqualify the firm of Kimball Brogan as counsel for the Plaintiffs. During the course of argument,

the court asked Mr. Burke (counsel for Mr. Whalen) to clarify whether he was taking the position that Mr. Brogan is precluded from acting as counsel regardless of whether he is going to be a witness at trial. Mr. Burke indicated that he was taking that position. The court then inquired as to whether Mr. Burke had any authority to support his suggestion that a lawyer who is not going to be a witness may, nevertheless, be precluded from acting for a family member in a proceeding. Mr. Burke indicated that he didn't have any such authority with him that day.

[9] With the issue having been raised at the hearing and Mr. Burke confirming that his position is that Mr. Brogan is precluded from acting as counsel regardless of whether he will be a witness, the court set about to see if there is any case law on the matter. Finding that there was, the court disclosed the authorities that it had found to counsel and asked to be briefed further on the matter.

[10] Mr. Kimball's position that the court lacks jurisdiction to deal with this matter is without merit. The issue was properly raised during the course of the hearing and there is no reason why the court should not consider this issue when deciding the motion. Even if Mr. Burke had not taken the position that he did, counsel or the parties cannot deprive the court of jurisdiction merely by omitting to deal with an issue that is properly within the scope of the proceeding.

MR. WHALEN'S POSITION

[11] The Defendant Whalen submits that Nash Brogan was present when he discussed key aspects of Patricia Brogan's investments with her. Mr. Whalen filed an affidavit in support of this motion. In it he states that it was his belief that Nash

Brogan was overseeing his mother's investments and that Mr. Brogan periodically participated in Mr. Whalen's meetings with Patricia Brogan, during which Ms. Brogan's investment objectives, the structure of her accounts and the associated risks were discussed. Mr. Whalen further states that he met Nash Brogan alone and at various times and places during which they discussed Patricia Brogan's investments and investing generally. He states that Nash Brogan was presented with copies of his mother's investment statements and says that on at least one occasion, Mr. Brogan visited Mr. Whalen's office in Truro where they discussed Patricia Brogan's investments and other unrelated investment issues.

[12] In the prehearing memorandum filed on behalf of Mr. Whalen the question is asked (at p. 22):

> .....How can Nash Brogan be counsel, law partner of counsel, son of two estranged plaintiff clients (father 83 and mother 82), brother of two other plaintiff clients, brother-in-law of another and witness, without there being a conflict, potential conflict or apprehension of conflict?

[13] Counsel for Mr. Whalen has referred the court to Chapter 3 of the Nova Scotia Barristers' Society *Code of Professional Conduct* and, in particular, Section 3.4-1 dealing with conflicts which provides:

> **Duty to Avoid Conflicts of Interest**
>
> **3.4-1** A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

[14] In addition, the court has been referred to the following commentary from this section:

> .....
>
> **The fiduciary relationship, the duty of loyalty and conflicting interests**
>
> **[5]** The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.
>
> .....
>
> **Examples of areas where conflicts of interest may occur**
>
> **[8]** Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.
>
> .....
>
> (d) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client. A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.
>
> (e) A lawyer has a sexual or close personal relationship with a client. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs

> held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.
>
> .....

[15] Reference has also been made to Chapter 5 of the Nova Scotia Barristers' Society *Code of Professional Conduct* and, in particular, Section 5.2 -1 dealing with the lawyer as a witness. This Section provides:

> **Submission of Evidence**
>
> **5.2-1** A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

[16] The commentary from this section provides:

> **[1]** A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

[17] Further, reference has been made to the Canadian Bar Association's *Code of Professional Conduct* where at Ch. IX, s. 5, it is stated:

> The Lawyer as Witness
>
> 5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions upon the advocate's right to cross-examine another lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.
>
> [Emphasis added]

[18] Mr. Whalen submits, *inter alia*, that the familial relationship between Mr. Brogan and the Plaintiffs calls into question Mr. Brogan's ability to maintain the necessary degree of professional independence and detachment required of a lawyer. He states that the proper administration of justice requires that parties to an action receive sound and dispassionate legal advice and that Mr. Brogan is not able to provide this advice due to his close personal relationship with his clients. He notes counsel's obligation as an officer of the court to refrain from acting where conflict exists. He states that a conflict exists in the circumstances of this case.

[19] Mr. Whalen has raised a number of additional issues including the dual relationship between Nash Brogan and the Plaintiffs (Mr. Brogan being both a family

member and counsel) and the difficulties that this can cause relating to confidentiality and solicitor/client privilege. For example, when Nash Brogan and Patricia Brogan have a casual conversation concerning this matter are they speaking as mother/son or solicitor/client?

[20] On the broader issue of whether another lawyer in Mr. Brogan's firm is able to act, Mr. Burke has referred the court to a number of cases that have considered the issue of whether a firm is prevented from acting in a matter in which a member of the same firm will be or is likely to be called as a witness at trial.

[21] One of the leading cases on this issue appears to be **Essa (Township) v. Guergis; Membery v. Hill** (1993) 15 O.R. (3d) 573 (Ont. Ct. J. (Gen. Div.) (Div. Ct.)). That case involved two appeals that raised similar issues: first, whether there should be a judicial policy prohibiting counsel from appearing on an application where a member or associate of the same firm provides affidavit evidence; and second, whether there should be a judicial policy prohibiting trial counsel from appearing on an application where a member or associate of the same firm is, or is likely to be, a trial witness. In coming to its conclusion, the court stated at p. 582:

> I believe courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. In view of the expense of litigation and the enormous waste of time and money and the substantial delay which can result from an order removing solicitors, courts should do so only in clear cases.....

[22] At p. 583 the court stated:

> I accept submissions made by counsel for the Advocates Society that in these applications a court should approach the matter by following a flexible approach and

> consider each case on its own merits. A variety of factors should be considered. These will include:
>
> - the stage of the proceedings;
> - the likelihood that the witness will be called;
> - the good faith (or otherwise) of the party making the application;
> - the significance of the evidence to be led;
> - the impact of removing counsel on the party's right to be represented by counsel of choice;
> - whether trial is by judge or jury;
> - the likelihood of a real conflict arising or that the evidence will be "tainted";
> - who will call the witness, if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising;
> - the connection of a relationship between counsel, the prospective witness and the parties involved in the litigation.

[23] The court has also been referred to **Stevens v. Salt** (1995), 22 O.R. (3d) 675 (Ont. Ct. (Gen. Div.)). That case involved a failed agreement of purchase and sale relating to land. The solicitors for the vendor and purchaser were said to be the crucial, if not the only, witnesses. The solicitor for the Plaintiff (who, it appears, was going to have to testify) acknowledged that he would have to be removed as solicitor of record. He sought an order restraining the solicitors for the Defendant from acting as counsel. Those solicitors were in practice with another lawyer who was also going to have to testify. The issue was whether counsel associated in the practice of law with a crucial witness could continue to act in relation to the proceeding. Wright, J. stated at p. 677:

> The conflict of interest or potential conflict of interest that arises when one member of a legal firm acts as counsel in a case where another member of the firm is a crucial witness is not the sort of conflict of interest that can be remedied by these modern devices, 'Chinese Walls' or 'Cones of Silence'.
>
> The rule prohibiting a member of a firm from acting as counsel in a case where another member of the firm is a crucial witness is intended to protect the independence of counsel and to prevent any appearance that this independence might be compromised.
>
> Counsel owe a duty, not only to the client, but to the court, to opposing counsel, to the bar, to the public and, on occasion, to the opposing party. In balancing these sometimes conflicting duties counsel must be fiercely independent.
>
> In the execution of these duties counsel must not be encumbered by a sense of obligation to a partner/associate/employer.....

[24] In that case, the court noted that the Defendant's firm was "inextricably bound up in the litigation" (p. 678), presumably since they acted in relation to the sale of the property. An order was issued preventing the Defendant's solicitors and those associated with those solicitors from acting in the matter.

[25] Mr. Whalen also relies on **Griffin v. Zerabny,** [2006] O.J. No. 1764 (Sup. Ct. J.) which involved a motion by the Respondent to remove the solicitors of record for the Applicant. The Respondent intended to call as a witness at trial the lawyer who represented the Applicant in the negotiation and execution of a Separation Agreement. That lawyer was a partner of the lawyer who was presently acting for the Applicant. There was no doubt that the lawyer who represented the Applicant in relation to the Separation Agreement would be testifying at trial as the Respondent's lawyer had undertaken to call him as a witness. In addition, the court was satisfied that the evidence from the lawyer went "to the heart of the issue before the court" (¶

22) and that the firm where both lawyers practised was "inextricably bound up in the litigation" (¶ 22). An order was issued removing the firm as solicitors for the Applicant.

[26] Reference has also been made to **Clifton v. Thomas**, 2012 NLTD(G) 76. In that case, the Defendant intended to subpoena as a witness, the partner of the lawyer who was representing the Plaintiff. One of the issues in the proceeding was the competency of an individual. The witness that was to be subpoenaed had prepared and witnessed a Power of Attorney for this individual. It appears from the decision that the Plaintiff was not arguing that there was no possibility of a conflict of interest but, rather, took the position that the application for removal of Plaintiff's counsel was premature. The court noted that the Law Society of Newfoundland and Labrador's *Code of Professional Conduct* contains a prohibition against testifying in a proceeding in which another member of the firm is advocate. The court reviewed the factors set out in **Essa (Township) v. Guergis; Membery v. Hill**, *supra*, and concluded that the Plaintiff's solicitor should be removed as solicitor of record.

[27] Finally, Mr. Burke has referred to **McCloskey v. Mills Estate** (1988), 86 N.B.R. (2d) 137 (C.A.) where the court stated at ¶ 12:

> PROFESSIONAL CONDUCT
>
> In this case, counsel for the deceased was called upon to testify. At all times, he was a partner of counsel for the executor of the deceased's estate. Once it was determined that the action between the parties could not be resolved, it was inevitable that the lawyer who originally counselled the deceased would be called upon to testify by one side or the other. Here, the lawyer was called by the McCloskeys. His testimony conflicted with that of Mrs. McCloskey yet he was cross-examined by his partner. During the examination in chief the situation deteriorated into one in which the partner acting as counsel had to object not only to various leading questions but also had to claim solicitor-client privilege on behalf of his partner, the witness. When a lawyer knows that his partner or associate will be an essential witness in an action,

> he ought not to act or continue acting as counsel. This admonition does not apply to testimony in proceedings as to merely formal matters but it is one that should be observed whenever there is a potential conflict.
>
> [Emphasis by the Defendant Whalen]

THE PLAINTIFFS' POSITION

[28] The Plaintiffs submit that this motion is vexatious and amounts to an abuse of process. They further submit that this is "a bald and unsubstantiated attempt to have the Plaintiffs' lawyer removed from the case without any factual foundation".

[29] Nash Brogan filed an affidavit in response to the motion. In his affidavit, Mr. Brogan states that during the investment period he was unaware of the leveraged investment "scheme" and was not aware that his mother had borrowed money to invest proceeds in the said "scheme". He says that he was not aware of Mr. Whalen's specific investment strategies for his mother nor was he aware of any specific promises or guarantees made to his mother. He acknowledges seeing Mr. Whalen at his mother's home on several occasions during which time Mr. Whalen would review Ms. Brogan's investment portfolio. Mr. Brogan denies being his mother's financial advisor and says that he was never provided with copies of his mother's investment statements unless it was in her presence. Further, he denies ever meeting with Mr. Whalen for the purpose of discussing his mother's investments.

[30] At page 6 of the Plaintiffs' prehearing memorandum it is stated:

> .....Mr. Brogan has no knowledge or information that would assist any party to this litigation. He will not be called as a witness for the Plaintiffs. If he had

> knowledge that would affect this case, the firm Kimball Brogan would not have agreed to act for the Plaintiffs.

[31] The Plaintiffs submit that the right to choose one's own counsel is "fundamental". While they acknowledge that this is not an absolute right, they submit that it should not be interfered with except for very substantial reasons.

[32] The Plaintiffs further submit that as a matter of principle lawyers are entitled to act for friends and family. They suggest that the willingness of counsel to act in these situations can be a solution to the growing problem of access to justice.

[33] The Plaintiffs note that there is uncertainty about whether the Defendants will even call Nash Brogan as a witness at the time of trial and they reiterate their position that he has no material evidence to give if he is called by the Defendants. The Plaintiffs distinguish the cases relied on by Mr. Whalen, saying that in those cases the solicitor was found to be a "crucial" witness or that the solicitor's evidence was found to be central to the allegations.

[34] The Plaintiffs state that requiring them to obtain new counsel will create a hardship upon them. Further, they suggest they may not be able to retain alternate counsel if the motion is granted. In the words of their supplementary brief, their position is, "[r]emove counsel and the case may well die on the vine".

ANALYSIS AND CONCLUSIONS

[35] The matter before me involves two primary issues: whether Mr. Brogan is precluded from acting as counsel in the matter and, further, whether another lawyer

in Mr. Brogan's firm (such as Mr. Kimball) is precluded from acting. Both of these questions involve competing interests; first, the right of a party to select counsel of their choice; and second, maintaining the high standards of the legal profession and the integrity of our system of justice. The tension between these interests has been considered by other courts. In **R. v. Speid** (1983), 43 O.R. (2d) 596 (Ont. C.A.) the court stated at p. 598:

> In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons.....

[36] In **MacDonald Estate v. Martin**, [1990] 3 S.C.R. 1235 (*sub nom:* **Martin v. Gray**) the Supreme Court of Canada was dealing with the competing values that arise when considering the removal of a solicitor who had moved to a new firm. Cory J. stated at p. 1265:

> 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 right 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 necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. Reasonable mobility may well be important to lawyers. However, the integrity of the judicial system is of such fundamental importance to our country and, indeed, to all free and democratic societies that it must be the predominant consideration in any balancing of these three factors.

[37] I will deal first with the issue of whether Nash Brogan is precluded as acting as counsel in relation to this matter.

[38] As indicated previously, Mr. Brogan is related to all of the Plaintiffs. In addition, he was a witness in this motion (by the filing of his affidavit) and may be a witness at trial (Mr. Kimball denies that Mr. Brogan will be a witness at trial; in his brief dated March 8th, 2013, Mr. Burke suggests that it is "more probable than not" that Mr. Brogan will be a witness at trial.) The court must consider whether Mr. Brogan's relationship with the Plaintiffs, and the fact that he was a witness in this motion and may be a witness at trial, precludes him from acting in relation to this matter.

[39] In my view, Mr. Brogan's familial relationship with the Plaintiffs does not automatically preclude him from acting as counsel in this matter. As was stated in **Chouinard v. Chouinard**, [2007] O.J. No. 3279 (Sup. Ct. J.) at ¶ 27:

> There is no prohibition against lawyers acting for friends, even good friends. It is only where the relationship becomes intimate and emotional that the Court will become concerned that the necessary degree of independence and detachment may not be present.....

[40] Reference is also made to **Judson v. Mitchele**, 2011 ONSC 6004.

[41] The Nova Scotia Barristers' Society *Code of Professional Conduct* reflects the fact that there is no blanket prohibition against representing a friend or a family member. The commentary under Section 3.4 dealing with conflicts provides:

> **[8]** Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that **may** give rise to conflicts of interest. The examples are not exhaustive.
>
> .....

> (e) A lawyer has a ..... close personal relationship with a client. Such a relationship **may** conflict with the lawyer's duty to provide objective, disinterested professional advice to the client.....
>
> [Emphasis added]

[42] While one may question the advisability or wisdom of acting for a family member (particularly in a contested proceeding), there is no blanket prohibition against such a practice. Rather, the court analyzes the nature of the relationship and whether the relationship will interfere with the lawyer's duty to provide objective, disinterested professional advice. The court will also consider whether the lawyer has a personal involvement or interest in the proceeding. The concern is the lawyer's ability to remain objective and independent when advising the client and dealing with the other parties and the court.

[43] In **McWaters v. Coke**, 2005 ONCJ 73, the Applicant was represented by her husband in a motion for child support against another individual. An order was granted precluding the husband from representing his wife. The court noted, *inter alia*, the lawyer's personal involvement in the matter and questioned whether that may impair his professional judgment and obligations to his client. The court also recognized that the potential existed for the lawyer to be called as a witness during the proceeding. See also **Kam v. Hermanstyne**, 2011 ONCJ 101, where the Respondent's lawyer (who had a romantic relationship with the Respondent and was co-habiting with him) was removed as counsel and **Windsor-Essex Children's Aid Society v. D.(B.)**, 2013 ONCJ 43, where the Respondent's father, who was found to be personally and emotionally involved with both the Respondent and her child and had a personal interest in the outcome of the proceeding, was precluded from acting.

In that latter case, the court noted at ¶ 56 that the solicitor involved could not be both the lawyer for his daughter and a witness in the proceeding.

[44] In the case before me, I have little information about the relationship between Mr. Brogan and his family beyond the fact that they are immediate family members. We know, however, that Nash Brogan is involved in the proceeding as a witness. As indicated previously, he filed a detailed and substantive affidavit in response to this motion. While he was not cross examined on this affidavit, it is clear from the submissions given at the hearing that Mr. Brogan's evidence concerning his involvement in his mother's affairs is being called into question by Mr. Whalen. His evidence is not "purely formal or uncontroverted" (see Section 5.2-1 of Chapter 5 of the Nova Scotia Barristers' Society *Code of Professional Conduct*.)

[45] In addition, Mr. Burke has advised that he will be discovering Nash Brogan in relation to the action. I am satisfied that his intention to discover this witness is legitimate and is not an improper attempt to remove Mr. Brogan from the file.

[46] While there is disagreement between the parties as to the extent of Mr. Brogan's involvement in his mother's affairs and whether he will end up being a witness at trial, I am satisfied that his involvement is such that it is inappropriate for him to continue to act as counsel in the matter. He was a witness in this motion and will be questioned on discovery. He may be a witness at trial. Mr. Brogan should not be a witness and counsel at the same time. An order will issue precluding Nash Brogan from acting further in relation to this action.

[47] That takes me to the issue of whether Mr. Kimball (or another lawyer in Mr. Brogan's firm) is precluded from acting in relation to this matter.

[48] The Nova Scotia Barristers' Society *Code of Professional Conduct* does not support the suggestion that other members of Mr. Brogan's firm are necessarily conflicted from acting for the Plaintiffs in this action. For example, the commentary in Section 3.4-1 dealing with conflicts of interest provides:

> **[8]** Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.
>
> .....
>
> (e) A lawyer has a ..... close personal relationship with a client. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. <u>If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handle the client's work</u>.
>
> .....
>
> [Emphasis added]

[49] Further, unlike the Canadian Bar Association's *Code of Professional Conduct* (which indicates at Ch. IX, s. 5, that a lawyer's partners and associates, generally speaking, should not testify in proceedings except as to merely formal matters) the Nova Scotia Barristers' Society *Code of Professional Conduct* does not contain a

similar admonition respecting partners and associates. One must assume that this distinction is intentional in light of the fact that the previous Nova Scotia *Legal Ethics Handbook* followed the CBA *Code*. In particular, former Rule 14.4 provided:

> **The lawyer as witness**
>
> **14.4** A lawyer who appears as an advocate in a proceeding, **and every partner or associate of that lawyer in the practice of law** has a duty not to submit an affidavit or testify in the proceeding, except as permitted by local rule or practice or as to purely formal or uncontroverted matters.
>
> [Emphasis added]

[50] While relevant, codes of professional conduct are not binding on the courts. The court's jurisdiction to deal with these issues stems from the fact that lawyers are officers of the court and their conduct is subject to the court's supervisory jurisdiction (see **MacDonald Estate v. Martin**, *supra*, at p. 1245.) In this case, we have a provincial *Code* which does not prohibit a partner or associate from testifying in a proceeding but a national *Code* which states that "generally speaking" a lawyer's partners and associates should not testify except to merely formal matters.

[51] A similar situation was considered in **Essa (Township) v. Guergis; Membery v. Hill**, *supra*, where the Canadian Bar Association's *Code* and the *Rules of Professional Conduct* of the Law Society of Upper Canada differed on this issue. The court in that case declined to follow the CBA *Code*.

[52] In my view, the factors referred to in **Essa (Township) v. Guergis; Membery v. Hill,** *supra*, are helpful in deciding this matter. After reviewing these factors, I have determined that at this stage there is an insufficient basis to conclude that the

firm of Kimball Brogan should be precluded from acting in relation to this matter. I will review these factors below.

[53] First, the parties are at a relatively early stage of this proceeding despite the fact that the action was commenced over six years ago. Discoveries have not yet been held. As a result, it is difficult to determine the significance or lack thereof of any evidence that Nash Brogan might have to give.

[54] Further, while Nash Brogan gave evidence in this motion (by way of affidavit) and will be a witness at discovery, there is uncertainty about whether he will be a witness at trial. As indicated, the Plaintiffs have advised that they will not be calling Nash Brogan as a witness at trial, whereas Mr. Burke suggests that it is more probable than not that this individual will be called. Put simply, it is too soon to say whether Nash Brogan will be testifying and, if so, how important his evidence will be.

[55] I reject the Plaintiffs' submission that this motion is vexatious and represents an attempt to have Plaintiffs' counsel removed without any factual foundation. No evidence was presented to call into question the good faith of Mr. Whalen in bringing this motion. The matter of Nash Brogan's involvement in this case as a possible witness was raised by Mr. Whalen's solicitor early on in the proceeding. While it has taken some time to bring the matter before the court, all parties have been aware for some time of the Defendant Whalen's concerns in this regard.

[56] I am satisfied that the impact on the Plaintiffs of removing their counsel of choice will be significant in this case. I have already determined that it is necessary

to remove Nash Brogan as counsel. I accept the suggestion that removing Mr. Brogan's partners and associates would cause further difficulty for the Plaintiffs.

[57] Counsel advised that they have not yet decided whether this will be a judge alone or jury trial.

[58] In addition, since we do not yet know whether Mr. Brogan will be testifying at trial, I cannot assess the likelihood of a real conflict arising, etcetera.

[59] The preservation of the integrity of the justice system must be the predominant factor for the court to consider in this type of motion. Having said that, there is uncertainty at this stage about the importance of Nash Brogan's evidence or whether he will even be testifying at trial. In these circumstances, I am not prepared to order that the remainder of the lawyers at Kimball Brogan be precluded from acting in relation to the matter.

[60] This aspect of the motion is dismissed reserving to the Defendants the right to bring a further motion for the removal of Nash Brogan's partners and associates as the case develops and further information is known.

[61] I appreciate that the possibility exists that the Plaintiffs' solicitors may get heavily involved in the case and end up being removed prior to trial. It will be for the Plaintiffs to decide whether they are prepared to take this risk.

[62] I am hopeful that the parties will be able to agree on the issue of costs. If not, written submissions shall be filed with the court by July 12th, 2013.

Deborah K. Smith
Associate Chief Justice

Note

[1] Mr. Kimball's letter to Mr. Dunphy dated October 27th, 2008 – attached as Exhibit "B" to Mr. Kimball's affidavit sworn February 4th, 2013.