SUPREME COURT OF NOVA SCOTIA
Citation: Johnson v. Rudolph, 2013 NSSC 210

Date: 20130703
Docket: Hfx. No. 303901
Registry: Halifax

Between:

A. Patricia Louise Johnson

Plaintiff

v.

Douglas G. Rudolph, Gordon R. Rudolph, Henry Rudolph,
3222578 Nova Scotia Limited, a body corporate,
Archie Hattie and Richard Connolly

Defendants

DECISION

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	March 5, 2013, in Halifax, Nova Scotia
Written Decision:	July 3, 2013
Counsel:	William Ryan, Q.C. for the plaintiff Christopher I. Robinson for the Defendants

By the Court:

[1] One defendant seeks to have plaintiff's counsel disqualified on the basis of a conflict of interest.

ISSUES

1) Delay in bringing motion

2) Conflict of Interest

FACTS

[2] The Plaintiff, A. Patricia Johnson, has commenced an action for fraudulent conveyance. She alleges that the individual Defendants, as co-owners of the property, arranged to fraudulently convey their interest to the Defendant numbered company, 3222579 Nova Scotia Ltd., in order to avoid a potential judgment in the Plaintiff's favour against another Defendant, Douglas Rudolph.

[3] Plaintiff's counsel is George W. MacDonald, Q.C. The Statement of Claim was issued on November 12, 2008 by Ms. Johnson's previous counsel. Mr. MacDonald amended the pleadings in June 2011 to add Archie Hattie as a defendant.

[4] On this motion, the Mr. Hattie seeks to have the Plaintiff's counsel, George MacDonald Q.C., and his firm, McInnes Cooper, disqualified on the basis of conflict of interest. Mr. Hattie asserts that he is a current client of McInnes Cooper. The firm's lawyers, particularly Wayne Marryatt, have handled legal work for himself, his family, and his companies over several decades. In the alternative, Mr. Hattie says he is a former client and that the firm possesses confidential information that could be used to his prejudice.

[5] In his affidavit of November 30, 2012, Mr. Hattie stated that Wayne Marryatt, a partner with McInnes Cooper, had done "extensive legal work for me and my companies" since 1982 (para. 5). He said he considered Mr. Marryatt and McInnes Cooper to be lawyers for his companies and his family. He said the legal services provided by McInnes Cooper included buying and selling properties, negotiating and paying off accounts, dealing with regulatory authorities, and

"negotiations with third parties." (para. 6). McInnes Cooper, and particularly Ed Harris Q.C., had done estate planning for him and his family, and was therefore, he claimed, "fully aware of my assets and financial position..." (para. 7). He attached as an exhibit to his affidavit a list of open and closed McInnes Cooper files allegedly relating to himself and his various companies.

[6] Mr. Hattie went on to state that in "acting for me and my companies, and in particular Loon Lake Developments Limited", of which he is Director, President, and Secretary, "McInnes Cooper has gained confidential information on my business practices. This includes my negotiation habits, my net worth and other specifics of my circumstances." (para. 12) It was Mr. Hattie's belief that "the knowledge McInnes Cooper has gained in representing me and my companies would give them a considerable advantage should they continue to represent the Plaintiff against me." (para. 22)

[7] As to the property which was purportedly fraudulently conveyed, PID 41049099, Mr. Hattie stated in his affidavit that he obtained an interest in it around 1999. The property is "a roughly sixty acre piece of property located in

Bedford, Nova Scotia."(para. 14) Neither Mr. Marryatt, nor McInnes Cooper, acted for him in acquiring an interest in the lands. He said in para. 15:

> 15. Around that time I spoke with Marryatt and informed him that I now had an interest in the Lands and that they would fall under the Loon Lake 'umbrella' of land which could potentially be developed in the future, and with which I would involve Marryatt as the need arose.

[8] In 2008 he spoke with Mr. Marryatt about an issue respecting an access road over the property. The resulting legal work was done by another McInnes Cooper partner.

[9] Mr. Hattie said (in para. 17) that he later informed Mr. Marryatt that he had sold the property. Mr. Marryatt was not involved in Mr. Hattie's conveyance of his interest in the property.

[10] Mr. Hattie stated in his affidavit that when he became a party to the proceeding, he raised the concern with Mr. Marryatt about McInnes Cooper representing the Plaintiff against him. On learning that McInnes Cooper was not withdrawing from its representation of the Plaintiff, he asked Mr. Marryatt to represent him, but Mr. Marryatt refused, citing conflict of interest.

[11] Mr. Hattie was not cross-examined on his affidavit.

[12] Mr. Marryatt did not file an affidavit, but was permitted to give *viva voce* evidence pursuant to Rule 23.08(4). It provides:

> A person may give evidence in chambers by direct examination, followed by cross-examination, only if a judge is satisfied that it is impossible or undesirable for a party to present the evidence by affidavit.

[13] While the Plaintiff objected to Mr. Marryatt testifying, counsel for Mr. Hattie indicated that Mr. Marryatt had been subpoenaed but would not provide an affidavit. I concluded that in the circumstances it was impossible for him to provide an affidavit and allowed him to testify. Mr. Marryatt testified that he had represented Mr. Hattie personally since 1982. He said that the bulk of the legal work he did for Mr. Hattie and his companies was related to property development, including lot sales and financing. He said he did not consider Mr. Hattie a former client.

[14] On cross-examination, Mr. Marryatt confirmed that the last personal file for Mr. Hattie was opened in January 2005 and closed in September 2006. He also

confirmed that he did not represent Mr. Hattie personally in the acquisition or conveyance of the property that is the subject of the proceeding. He said the McInnes Cooper personnel responsible for considering potential conflicts had indicated to him that no conflict arose from the firm representing the Plaintiff.

[15] George W. MacDonald Q.C. of McInnes Cooper, the Plaintiff's counsel, also filed an affidavit, dated December 19, 2012. In it he stated that prior to the filing of the Amended Notice of Action adding Mr. Hattie as a defendant on June 15, 2011, he "confirmed that there were no open files in the McInnes Cooper system whereby anyone in my Firm was acting for Archie Hattie in a personal capacity".(para. 3) On Cross-examination, he explained the process of checking for conflicts. He said he would have known of the number of matters in which Mr. Marryatt had represented Mr. Hattie. He said he later became aware that Mr. Marryatt represented Mr. Hattie's companies.

[16] On cross-examination, he also said the phrase "former client" meant nothing to him. He would consider whether he had a file open for a client. He said there are some clients for whom he acts all the time. He did not agree with the

suggestion that this meant that once a file was closed, he could act adversely to that client.

[17] Mr. MacDonald also stated in his affidavit that he confirmed that "no one at McInnes Cooper had been involved for Mr. Hattie or any other person in connection with the conveyance" of the subject property. (para. 3)

[18] Mr. MacDonald addressed the suggestion that McInnes Cooper had been involved with matters respecting the subject lands on one occasion. That was in 2008 when C.C. Robinson, Q.C. wrote to the Chief Engineer at the Nova Scotia Department of Transportation with respect to a 1997 covenant by the Province to provide highway access to the subject lands. Mr. MacDonald stated that he was informed by Mr. Robinson "that the issue in question was the application of an Access Agreement between the predecessor in title to the Lands and the Department of Transportation (para. 5). He added that "[n]o response was ever received to the letter and no further services of any kind were provided by Mr. Robinson."

[19] On cross-examination, he was directed to a copy of an invoice respecting this matter, which referred to a letter from the Department of Transportation. On re-direct, he said the file number on the invoice was not listed on Mr. Hattie's personal file list or on those of any of his companies. He also pointed out that the letter to the Department begins with the words "We are the solicitors for Dr. Gordon Rudolph..."

[20] Mr. MacDonald attached as an exhibit to his affidavit copies of correspondence, including a letter from Mr. Hattie's counsel dated June 27, 2011, 12 days after the date of the Amended Statement of Claim which added Mr. Hattie as a Defendant. That letter raised the alleged conflict of interest arising from McInnes Cooper's representation of the Plaintiff. In a responding letter of June 30, Mr. MacDonald wrote, among other things, that the McInnes Cooper firm had given "full consideration to the question of possible conflict of interest before effecting service of documents. ..." He invited opposing counsel to call him to discuss any "further elaboration..." Mr. MacDonald said on cross-examination that in his reply he did not address all the points raised by Mr. Hattie's counsel, but that he said everything that needed to be said.

[21] Subsequent correspondence from Mr. Hattie's counsel is dated September 23, 2011, forwarding Mr. Hattie's defence; June 12, 2012, respecting an appearance day motion; July 20, 2012, respecting Mr. Hattie's affidavit of documents; November 8, 2012, respecting a date assignment conference; and November 16, 2012, enclosing Mr. Hattie's Affidavit Disclosing Documents. Mr. MacDonald was asked on cross-examination whether there was activity on the matter between the filing of Mr. Hattie's defence in September 2011 and the request for a date assignment conference filed by Mr. MacDonald in May 2012. He said he was not sure if this was the next step.

[22] Mr. MacDonald said the next time the alleged conflict of interest was raised after June 2011 was at the appearance day motion in June 2012. At that time, counsel for Mr. Hattie said he anticipated receiving instructions to raise the conflict of interest issue. The date assignment conference was set for November 9, 2012. On that date, Mr. MacDonald received the Notice of Motion respecting the alleged conflict of interest.

[23] Also attached to Mr. MacDonald's affidavit was a portion of a discovery

transcript of the Defendant Gordon Rudolph. In it, he stated that other co-owners of the subject lands had "minimal input" into the site. He specifically included Mr. Hattie in this group, saying he had "minimal input; he was always there if I had any questions..." According to the transcript, Mr. Rudolph agreed with the suggestion that Mr. Hattie was a "sounding board."

ANALYSIS

1) *Delay*

[24] The plaintiff says Mr. Hattie delayed raising conflict of interest and implicitly waived the right to raise the issue.

[25] There is authority to the effect that:

> ... if a party is or should have been aware of a conflict of interest and unduly delays in bringing an application to have the impugned lawyer removed from the file, then such delay can operate as a waiver of any potential conflict of interest. (*Bortnak v. Bortnak*, 2011 SKQB 226, at para. 17).

[26] Courts have held that excessive delay will lead to prejudice and injustice if a party is forced to change counsel, and may be a basis to dismiss a motion to disqualify. In *Brett v. Superior Propane Inc.*, 2002 NSSC 78, at paras. 23-24, affirmed at 2002 NSCA 111, LeBlanc, J. said in para. 23:

> ... the 3 year delay in complaining of a conflict of interest is in itself a reason to deny the motion ...

[27] In *Serniak v. Teitel*, [2004] O.J. No. 474 (C.A.), the court said in para. 2:

> 2 This is not a case of 'mere delay'. Even assuming that there was such a conflict or breach, Ms. Serniak's active participation for a period of 4 ½ years through 19 days of assessment hearing reasonably leads to the conclusion that she acquiesced in Mr. Teitel's conduct. It was not open to her at the end of that period to raise the issue for the first time. Louie v. Lastman (2002), 61 O.R. (3d) 459 (Ont. C.A.) at paras. 16-218.

[28] In *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1954 (application for leave to appeal dismissed, 2011 BCCA 120), the defendant had indicated that he did not object to the plaintiff being represented by the McCarthy Tétrault firm, which had previously represented him in an unrelated proceeding. However, at the end of trial, he brought an application for removal, claiming that in the course of their earlier representation, McCarthy Tétrault counsel would have become aware

of certain general information about him that could be used against him. The trial judge held that it was incumbent upon the defendant to seek removal “at the earliest reasonable opportunity,” and that, relying on his counsel, he had “clearly and unequivocally waived any conflict that might have arisen in connection with McCarthy Tétrault's prior representation” (paras. 44-45). The trial judge at para. 46 had concluded:

> ... it would be inequitable to permit Dr. Louie to resile from his unambiguous representations, made personally and through counsel, to the effect that he did not object to McCarthy Tétrault representing Hospitality (para. 46).

[29] Courts have denounced the practice of raising an alleged conflict in order to manipulate the situation so as to gain a tactical advantage. In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie, J. said in para. 14:

> 14 If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other ‘ethical’ relief using ‘the integrity of the administration of justice’ merely as a flag of convenience, fairness of the process would be undermined. ...

[30] In order to establish waiver, the essential elements are

> full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a

> formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained. (Federal Business Development Bank v. Steinbock Development Corp. Ltd. (1983), 42 A.R. 231, [1983] A.J. No. 896).

[31] A party may avoid waiver by expressly preserving the right to raise a conflict of interest issue. In *Dobbin v. Acrohelipro Global Services Inc.*, 2005 NLCA 22, defendant's counsel had agreed to settlement negotiations "notwithstanding that the conflict issue remains outstanding " (para. 24) on the understanding that it would not be "an admission or statement that no such conflict exists." Plaintiffs' counsel responded 'we can confirm our clients' acceptance of the terms „„" (para. 25)

[32] Welsh, J.A. then said in para. 26:

> 26 If Mr. Harrington was of the view that Vector had already waived its right to allege conflict of interest, it is reasonable to assume that he would not have responded to Vector's letter in the way he did. Indeed, Mr. Harrington's letter clearly led Vector to understand that the conflict of interest issue had not been resolved or waived.

Failing to do so may lead to a finding of implicit waiver. In *Thompson v. Thompson*, 1999 SKQB 33, Allbright, J. said:

> 15. In essence, by her conduct in this matter, the applicant has, in my view, waived any potential conflict of interest.

[33] The plaintiff submits that the delay is sufficient reason to dismiss the motion for removal of counsel, regardless of the merits. This was the approach taken in *Le Soleil*, *Brett*, and other cases. The plaintiff says Mr. Hattie did not expressly preserve his right to raise an alleged conflict of interest . His previous counsel raised the allegation in correspondence on June 27, 2011. In that correspondence, counsel asserted that Mr. Hattie was a current client of McInnes Cooper and that he would not consent to the firm acting for a client with interests adverse to his own. McInnes Cooper responded on June 30. Mr. MacDonald wrote that the firm had given "full consideration to the question of possible conflict of interest." He also said that the claim against the former owners was in the Amended Statement of Claim. He invited Mr. Hattie's counsel to contact him to discuss the matter further. There was no response from Mr. Hattie's counsel.

[34] Given that Mr. Hattie has raised the issue of conflict of interest, without explanation, after allowing some 18 months to pass, the plaintiff says his conduct amounts to an implicit waiver of his right to raise the issue, and suggests that he has raised it for purposes of manipulation or tactical advantage.

[35] Mr. Hattie denies that there was any waiver. He says the case law cited by the Plaintiff is distinguishable. In *Le Soleil Hospitality*, for instance, there had been an express waiver of any conflict of interest claim. In *Brett*, the issue was not raised until several years after it became apparent; here, it was raised with counsel immediately.

[36] In *Bortnak*, there was no undue delay (albeit the relevant passage of time was only a few weeks), and the court emphasized the importance of considering the specifics of the timeline involved. The failure to bring the application immediately was not fatal. In *Dobbin*, the court emphasized that the waiving party must have "full knowledge of its rights and an unequivocal and conscious intention to abandon them" (para. 23). These elements, Mr. Hattie says, were not present here.

[37] In *Thompson*, the complaining party actively avoided raising the issue of conflict, which was not the case here. In *Serniak, supra,* and *J.T. Miller Construction Ltd. v. South Calgary Properties Ltd.* (1995), 29 Alta. L.R. (3d) 393 (Alta. C.A.), there was extensive activity on the file during the delay period, unlike in the present proceeding. In *Ramsbottom v. Morning* (1991), 48 C.P.C. (2d) 177

(Ont. C.J. (Gen. Div.)), there was a substantial delay period during which the issue was not raised before the motion was brought.

[38] I am not satisfied that this is a case where any alleged conflict has been waived by reason of delay. I conclude that there was no unequivocal and conscious intention to abandon Mr. Hattie's rights. While there was a delay of some length, there was limited activity in the proceeding during that period. Further, the issue was raised at an early stage, notwithstanding that the motion was not brought until some time later. For these reasons, I conclude that the motion should not be dismissed for reasons of undue delay.

2. *Conflict of interest*

[39] The Supreme Court of Canada considered the issue of disqualifying conflicts of interest in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, [1990] S.C.J. No. 41. Sopinka J., for the majority, set out the pertinent questions as follows: "(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?" (para. 48).

[40] Sopinka J. described the standard for determining whether confidential information was received in the following terms, at para. 49:

> ... In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

[41] On the second question,"whether the confidential information will be misused", Sopinka J. said, at para. 50:

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

[42] Mr. Hattie raises several related issues respecting the allegation of conflict of interest.

a) Is Mr. Hattie a current client of McInnes Cooper?

[43] Mr. Hattie claims to be a current client of McInnes Cooper. It is a "bright line" rule that:

> a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client -- *even if the two mandates are unrelated* -- unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. *(R. v. Neil*, 2002 SCC 70, at para. 29 (emphasis in original). See also *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, at para. 51, quoting *Neil).*

[44] Mr. Hattie says he regards the firm as the lawyers for himself and his company. Mr. MacDonald says he searched for open files relating to Mr. Hattie and found none. This is supported by the list of files attached as an exhibit to Mr. Hattie's affidavit, which shows no open files in his name in his personal capacity. The most recent file in Mr. Hattie's name was closed in September 2006. Mr. Hattie takes the position that the question is not whether there is an open file, but

whether there is an ongoing solicitor-client relationship. Even by this standard, I am not satisfied that Mr. Hattie is a current client of McInnes Cooper.

[45] I am likewise not convinced that representation of companies linked to Mr. Hattie renders him a current client in his personal capacity. While there were apparently open files in company names at the time when McInnes Cooper was retained by Ms. Johnson, it does not follow that a solicitor-client relationship persisted with Mr. Hattie himself. As *Brett*, *supra*, indicates, individuals and companies are different parties (para. 27).

[46] I conclude that Mr. Hattie is not a current client of McInnes Cooper. As such, the law respecting former clients applies in this situation.

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. ...

[52] Mr. Hattie acknowledges that Mr. Marryatt, or the McInnes Cooper firm generally, did not act for him in acquiring the interest in the subject lands, nor did they act for him when he conveyed his interest. The correspondence from Mr.

Robinson at McInnes Cooper in August 2008 dealt only with an access issue between the landowners and the Department of Transportation. It did not involve a continuing matter, nor did it relate to the title to the property. Although the deed at issue in this matter was executed about two months later, there is no reference to title or conveyancing in Mr. Robinson's letter.

[53] As to whether this is a case where the lawyer received "confidential information attributable to a solicitor and client relationship relevant to the matter at hand," as contemplated by *MacDonald Estate*, Mr. Hattie is of the opinion that it is. He says McInnes Cooper has knowledge about his "negotiation habits, his net worth and specifics of his personal circumstances" which constitute "confidential information that would impact the matter at hand and that would give McInnes [Cooper] a considerable advantage."

[54] If this were a basis for mandatory disqualification, however, there would likely be a blanket prohibition against any lawyer representing any former client. By definition the lawyer-client relationship will almost invariably involve the possession of general knowledge of this kind. As Cromwell J.A. said in *Brookville Carriers*, *supra*, at para. 55:

> 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.

[55] Where confidential information is not put at risk, the question is whether the matter in which the lawyer now proposes to act is a related one. Cromwell, J.A. at para. 17 said:

> A matter is 'related' ... if the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer.

[56] More generally, Cromwell J.A. said, it is necessary to consider "the underlying purpose of the inquiry" (para. 50). In situations where the concern is not the risk to confidential information, he said at para. 51:

> …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... 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.

[57] Cromwell J.A,.in para, 52, cautioned against an over-broad application of this principle, in view of "the important right of parties to retain and instruct the counsel of their choice or of lawyers to earn a living free of undue restriction." He also alluded to the spectre of "the possible strategic use of applications to disqualify counsel" (para. 52).

[58] The basis for Mr. Hattie's claim that this is a "related matter" as contemplated by *Brookville Carriers* is that McInnes Cooper and Marryatt represented "him and his various businesses in a variety of property transactions," as well as non-conveyancing work relating to the property in question. Over time, it is submitted, McInnes Cooper advised him "regarding all manner of conveyances and financing issues as to development land he owned or in which he had an interest." As a result, Mr. Hattie claims, "the matters are directly related and certainly sufficiently so as to prevent McInnes Cooper [from] acting for Johnson absent Hattie's consent."

[59] In essence, it is submitted that the nature of the work done in the past, some of which related in a general way to conveyancing and financing (though none of

that advice related to the property in question) makes this a matter related to the historic retainers.

[60] This bears a slight resemblance to the situation in *Greater Vancouver (Regional District) v. Melville*, 2007 BCCA 410. In that case, the most that could be said was that

> [b]y acting as counsel in the Trespass Action, the respondent is no doubt employing legal knowledge and skills acquired while carrying out his former retainer for the appellants. He is not 'attacking' them, or the advice he gave them. There is no legal use in the Trespass Action for any confidential information received during his retainer by the appellants, because none of it is relevant to his present retainer. (para. 30).

[61] Similarly, it is not clear how the current retainer would lead to McInnes Cooper attacking or undermining the advice it previously gave Mr. Hattie.

[62] Mr. Hattie does not offer any specifics as to how this fund of general knowledge will specifically provide an advantage in the present proceeding, or how such information is relevant to this proceeding. There is no "general duty not to act against a former client," as the Court of Appeal made clear in *Brookville Carriers* (para. 31). Neither Mr. Hattie's business practices respecting real

property development nor his negotiating habits are the subject matter of the present proceeding. The action is concerned with the conveyance of an interest in co-owned land, alleged to be fraudulent due to being made shortly before a scheduled summary judgment motion against one of the co-owners, Douglas Rudolph. The deed was recorded one day before the motion, which led to an order for judgment against Mr. Rudolph for $267,000.00.

[63] In *Brookville Carriers*, Cromwell J.A. was careful to note, “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” (para. 51).

[64] I cannot see any basis upon which to conclude that this is the case here. Mr. Hattie's position is not that there is some specific conflict between related retainers, but rather that the historic lawyer-client relationship which involved advice in related areas of law should disqualify McInnes Cooper.

[65] The presumption in *MacDonald Estate* is that the lawyer has received confidential information that is relevant to the new matter. In *Brookville Carriers* the court spoke of a duty not to act against a former client in a related matter. I see no basis in the authorities to conclude that the present matter is related to the historic retainers of McInnes Cooper by Hattie such that the firm should be disqualified. There must be clear and cogent evidence that the matter is related. The onus is on the party alleging the relationship, in this case Mr. Hattie. I am not satisfied that McInnes Cooper has any knowledge respecting Mr. Hattie's personal circumstances and business practices that is connected to the issue in this proceeding.

[66] ln several cases, lawyers have been disqualified even where there is no risk of confidential information passing. In those cases, courts have confirmed a lawyer's fiduciary duty to a former client, and the public interest in the administration of justice. Every litigant must have confidence that their lawyer will not subsequently act against them in a related matter.

[67] I am not satisfied that McInnes Cooper's present retainer is related to any previous legal work done by the firm for Mr. Hattie. I cannot conclude that

allowing Mr. MacDonald and the McInnes Cooper firm to continue to act for Ms. Johnson in this proceeding would reflect badly on the administration of justice. Nor am I satisfied that it would cause litigants generally to lack confidence in their lawyers' continuing loyalty.

[68] I conclude that Mr. Hattie is a former client of McInnes Cooper; that the prior retainer is not related to the present retainer; and that, in any event, the prior retainers in which the firm provided legal services to Mr. Hattie personally, no confidential information was received by McInnes Cooper that could prejudice Mr. Hattie in this matter. I also find that this is not a case where the right to raise an alleged conflict of interest was waived by reason of undue delay.

[69] The motion to disqualify counsel is dismissed. The Respondent shall have costs of $1,200, plus reasonable disbursements, payable forthwith in any event of the cause.

Hood, J.