

SUPREME COURT OF NOVA SCOTIA

Citation: *Hussey v. Hussey Estate*, 2018 NSSC 329

Date: 20181205

Docket: SYD No. 474744

Registry: Sydney

Between:

William T. Hussey

Applicant

v.

Glenda MacKinnon, Personal Representative of the Estate of Violet Lucinda
Hussey

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Patrick J. Murray

Written Submissions: October 5 and 15, 2018

Written Decision: December 5, 2018

Subject: Barrister and Solicitors; Proof in Solemn Form

Summary: Applicant's solicitor in Proof in Solemn Form had previously met with Testator with regard to her Will.

Issues: Alleged conflict of interest, Will instructions not finalized, but completed by another solicitor.

Result: Court found solicitor should not continue to act for beneficiary. Repute of administration of justice, a factor in decision of the Court.

Cases Cited: *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *Johnson v. Rudolph*, 2013 NSSC 210; *Montreal Trust Co. of Canada v. Basinview Village Ltd.*, [1995] N.S.J. No. 295 (NSCA); *R v. Clarke*, 2012 NSSC 406; *Williams v. Halifax City*, 2010 NSSC 467.

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Counsel: Duncan MacEachern, counsel for William Hussey
Darren Morgan, counsel for Glenda MacKinnon

By the Court:

Introduction

[1] The motion before the Court is made by Glenda MacKinnon, a personal representative of the Estate of her mother, Violet Hussey. Violet Hussey passed away on May 19, 2011.

[2] The other representative of the estate is Violet's son, William T. Hussey. Both representatives were appointed by Grant of Probate issued on January 13, 2012.

[3] Violet Hussey died with a Will, dated October 4, 2010. The terms of her Will are in dispute as they pertain to her real property in Ingonish, Cape Breton.

[4] Prior to completing her Will, Violet Hussey met with legal counsel to obtain advice. She first met with Mr. Duncan MacEachern. They discussed her Will including her real property.

[5] Violet Hussey did not complete her Will with Mr. MacEachern. Instead, she later had her Will completed in consultation with solicitor, Hugh R. McLeod.

[6] Mr. MacEachern, now represents her son, William Hussey, who is a beneficiary in addition to being a personal representative.

[7] In this motion, Glenda MacKinnon seeks an Order requiring Mr. MacEachern to withdraw and be removed as solicitor for William T. Hussey.

[8] Mr. MacEachern states he received no final instructions from Ms. Hussey. As such, he maintains he is not in conflict in representing William T. Hussey, who is a beneficiary named in his mother's Will.

[9] Mr. MacEachern also submits his notes of the meeting with the testatrix have been disclosed and he is no longer in possession of confidential information.

[10] The Estate having waived solicitor client privilege, as her former solicitor Mr. MacEachern maintains there is nothing to be gained by him representing Mr. Hussey, and no prejudice to the Estate or to Ms. MacKinnon.

[11] On the contrary, counsel for Ms. MacKinnon argues that Mr. MacEachern is in an obvious conflict. He has direct evidence to give on the very issue in dispute. Ms. MacKinnon bears the onus of proof.

Factual Background

[12] A Notice of Application pursuant to the *Probate Act*, has been filed by William T. Hussey, seeking and Order to compel Glenda MacKinnon, as a personal representative of the

Estate of Violet Lucinda Hussey, to execute deeds of conveyance, in compliance with directions contained in the Last Will and Testament of Violet Lucinda Hussey, the deceased.

[13] The Application was filed with the Court of Probate on March 27, 2018. An initial hearing date was scheduled for the 22 day of May, 2018.

[14] The Application seeks that Glenda MacKinnon, as personal representative of the estate of Violet Lucinda Hussey, together with her brother, William T. Hussey, as personal representative, execute both a deed of conveyance for the parcel of land containing the family home and distinguished as PID 85050649 and a second deed for a lot of land containing ocean frontage and distinguished as PID 85169464.

[15] In response to the application initiated by William T. Hussey, Glenda MacKinnon, is seeking the remedy of the disqualification of Duncan H. MacEachern, as solicitor of record, based upon an allegation of conflict of interest.

[16] Glenda MacKinnon has raised the issue of a conflict of interest given that the office of Lorway MacEachern provided a consultation to the deceased Violet Lucinda Hussey on November 20, 2009.

[17] The representatives of the Estate waived solicitor client privilege and have authorized the release of the file of the deceased reflecting an office consultation of November 20, 2009.

[18] Mr. MacEachern submits that the file information duplicated and disclosed for this motion, reveals the extent of his involvement with respect to the meeting with Violet Hussey. This consisted of a one hour office consultation. He confirms that a review of the file reveals discussions pertaining to potential changes to her Last Will and Testament, and the disposition of two lots in Ingonish.

[19] Mr. MacEachern states however that his former client Ms. Hussey did not finalize her Will instructions and provided no direction as to what, if any, changes were to be made and her Last Will and Testament dated the 10 day of May, 2007. This Will is annexed to the affidavit of Ms. MacKinnon filed July 17, 2018 at Tab G.

[20] In addition, Mr. MacEachern states at no time were any legal services ever provided by his law firm to the estate of Violet Lucinda Hussey, or its personal representative Glenda MacKinnon.

Analysis and Decision

[21] The Applicant, William Hussey submits that throughout this analysis, this Court must be cognizant that the issue in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, focused on the representation of the concurrent interests of two clients. This Court is cognizant of this. There are however a number of governing principles in *McKercher* which are applicable to the present case including the role of the Court in resolving conflicts.

[22] Broadly stated a solicitor has duty to avoid a conflict of interest. In the present case it is perhaps less apparent that an actual conflict exists due to the disclosure of Mr. MacEachern's notes. Although some of the information is no longer confidential, there is still the question of Ms. Hussey's initial intention with respect to the conveyances in the Will, which was discussed with Mr. MacEachern in 2009.

[23] Duncan MacEachern is therefore a potential witness in the litigation. Although he is not representing Violet Hussey's estate he still owes a duty of loyalty to her and the duty to avoid a conflicting interest with her Estate.

[24] In *McKercher*, the Supreme Court of Canada was faced with a law firm representing two existing clients who had adverse and opposing interests. This case is unlike *McKercher* because Mr. MacEachern is not representing two existing clients.

[25] On the other hand, the information received by Mr. MacEachern is not peripheral in any sense. Instead the meeting he had with the testatrix goes directly to the issue in dispute. What appears to have been discussed between Ms. Hussey and her solicitor at that time, was the division of the lot or lots as it pertained to the house and the lower field.

[26] Mr. MacEachern's invoice, found by Ms. MacKinnon on her own accord, refers to an office consultation with Ms. Hussey and states, "ascertain how to dispose of lands in Ingonish", and "taking of instructions with respect to division of property". (Exhibit F of Ms. MacKinnon's affidavit)

[27] Ms. MacKinnon argues that Mr. MacEachern has relevant evidence to give and it is expected that he will be subpoenaed to give evidence at the hearing of the Application.

[28] Mr. MacEachern says he has nothing to add to the notes. He is however, subject to cross-examination on them by the opposing party, Ms. MacKinnon. He is "in the middle of it", in a manner of speaking, and likely will be an important witness.

[29] The Court has right to control its processes and that includes authority over counsel appearing before it who are officers of the court. In *McKercher* McLachlin, C.J. discussed the role of the courts:

13 Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.

[30] Counsel have a fiduciary duty to their clients and former clients. This includes a duty not to act for clients whose legal interests are directly adverse. (See Code of Conduct, Tab 1 of Applicant's authorities). In *McKercher* the court stated:

8 The case at hand requires this Court to examine the lawyer's duty of loyalty to his client, and in particular the requirement that a lawyer avoid conflicts of interest.

As we held in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), the general "bright line" rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent — regardless of whether the client matters are related or unrelated: para. 29. However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a **former client**, or a third person": Neil, at para. 31.

[Emphasis added]

[31] The late Ms. Hussey is a former client. The discussion she had with her counsel pertained to her Will. It will be up to the hearing judge to decide admissibility issues. That said, the discussions with Ms. Hussey may be admissible under the principled approach, given that she is deceased. In terms of reliability, Mr. MacEachern is an officer of the court and the notes will serve to corroborate the conversation. The evidence may have significant probative value.

[32] I agree with the Applicant that a conflict does not automatically give rise to disqualification of the lawyer involved. There are factors to be weighed by the Court before making that decision. These include for example, behaviour disintitling the complaining party from making the motion and prejudice to a new client's interest in retaining counsel of its choice.

[33] In this case the hearing date scheduled for May 2018 was adjourned upon the Respondent informing the Applicant that this motion would be made, one week prior.

[34] The removal of a solicitor is not a minor consideration. Mr. MacEachern has been retained by Mr. Hussey and has done a significant amount of work for him, including the filing of the Application on March 27, 2018. The motion alleging a conflict was filed within three months of the Application, on July 17, 2018. Delay has not really been argued.

[35] In his affidavit in response to the motion Mr. MacEachern states:

34. I have no relevant evidence to provide to the court other than I was consulted by the deceased, Violet Hussey to revise her Last Will and Testament of May 10th, 2007 and was subsequently not provided with any reason or further contact in regard to attempting to finalize any legal documentation on her behalf.

[36] Mr. MacEachern is now advocating for an interpretation of the Will of Ms. Hussey, in advancing the interest of his current client William Hussey. Concerning the meeting with his former client, and testatrix Ms. Hussey, he states:

28. In conclusion, the essence of my meeting with the deceased, Violet Hussey focused upon potential revisions to her Last Will and Testament Dated may 10th, 2007. From my review of my file and my recollection I can think of no advice I have provided to her.

[37] It is difficult to discern from the notes alone, exactly what instructions or advice may have been given. At paragraph 30 of his affidavit Mr. MacEachern states:

30. I represented only Violet Lucinda Hussey in respect to discussions pertaining to her potential revisions to her Last Will and Testament, for which I was never retained to complete on her behalf. I have no information for which would be relevant to any future finalization of the application of William Hussey in respect to an order compelling conveyance of the short lot.

[38] It may be that Mr. MacEachern has nothing more to add, as he has said. He met with the testatrix and by his own admission he discussed in some detail what is now the issue in dispute, the house lot and the lower field (ocean lot).

[39] Disclosure of solicitors notes, meets his duty of candour but does not change the fact that he is a compellable witness as to the bequests she was considering, at that time. An example of this evidence can be found in his own affidavit filed in support of the motion at paragraph 23.

23. Annexed as **Exhibit "8"** is a true copy of a Will Questionnaire which reflects instructions taken on November 20th, 2009. Essentially from my review of the instructions it appears Violet Lucinda Hussey sought that all bequests in her May 10th, 2007 would remain the same, with the exception that Donald Hussey was to receive the house lot and William Hussey Jr. was to retain the lower field (ocean frontage lot). It is my understanding she was considering providing a life interest in the house lot to Darryl and Glenda.

[40] In addition, Mr. MacEachern participated in having the land surveyed on the basis of there being two lots. In paragraph 18 of his affidavit William Hussey states:

18. I verify my solicitor, Duncan H. MacEachern at my instructions completed a process to properly reflect that my family's property was comprised of two (2) distinct lots as opposed to one (1) lot.

[41] Whether these were the lots intended to be conveyed under the Will, their configuration and so on, will be a key issue in the Application. In his client's recent letter brief of October 5, Mr. MacEachern states:

...the information contained in the will questionnaire reflects at most the musings of the testatrix as to what she might consider in respect to divisions of her estate. It must be remembered the directions were never finalized.

[42] Whether they were musings or not, it appears Ms. Hussey herself viewed the meeting as important enough to prepare an affidavit to explain the intentions in her Will and the legal advice she stated she received, at paragraphs 10 and 11:

10. **THAT** I have made several Wills and have received advice from Duncan MacEachern, Barrister and Solicitor, because of my worries on how to do things right to divide things equally. However, I have decided not to take that advice.

11. **THAT** I realize this is an unequal division which has troubled me for many years and as a result of this I have had the occasion to seek the advice of two lawyers but have decided to take the advice of Hugh R. McLeod and that is to do what I want and to my own self be true.

[43] In my respectful view, this shows that a conflict likely exists because it underscores the importance of the previous discussions regarding the Will, whether or not her instructions to Mr. MacEachern were finalized.

[44] I believe the circumstances call for Mr. MacEachern to be neutral and objective. The interpretation of the Will of Violet Hussey is at the heart of this matter. These bequests clearly troubled her. She sought the advice of two lawyers.

[45] I do not find there is an issue with respect to 1) risk of improper use of confidential information; or 2) risk of impaired representation, subject to my earlier reference to the duty of loyalty and the duty to avoid a conflict.

[46] I find however, that there is a legitimate concern here in maintaining the repute of the administration of justice. The notes made by the solicitor during his meeting with the testatrix and any advice he may have given to her is clearly relevant to the issue before the Court, and the deeds sought by William Hussey.

[47] I find that a conflict does exist between the interests of William Hussey who maintains there are two lots previously created by deed and those of Mr. MacEachern's former client, Violet Hussey. The clients are not concurrent but the issue certainly is. The Will of Ms. Hussey makes no mention of these previously deeded lots. Her affidavit at paragraph 8 states, "it is my understanding it is not possible to divide my estate into two lots."

[48] Respectfully, I reject that the notes of Ms. Hussey were merely "musings", simply because she did not finalize her instructions. Also, because the Estate might be prepared to accommodate the Applicant, in terms of the procedure at the hearing, does not eliminate the conflict or the concern as to the appearance of one. (*MacDonald Estate v. Martin*, [1990] 3 S.C.R.; 1235)

[49] Fiduciary obligations do not always fit neatly into one category or another. Whether a conflict exists is dependent on the facts of the individual case. Mr. MacEachern has been actively involved in the preparation of the lots sought to be conveyed by William Hussey, who is himself a personal representative of the Estate, with a fiduciary obligation of his own. What will be the proper legal description for those lots as described in the will has yet to be determined.

[50] In the result, I respectfully conclude that Mr. MacEachern should not continue as counsel for William Hussey. Otherwise, there would be a "cloud" over the proceedings which would make it difficult for the parties to the Application and the Court hearing the matter. This is not a decision taken lightly. I recognize the importance of an individual's right to choice of counsel. Nor is this a statement in any way in regard to ethics or discipline on the part of the solicitor.

[51] In reaching this decision, I have reviewed and considered the caselaw provided by the parties including: *Johnson v. Rudolph*, 2013 NSSC 210; *Montreal Trust Co. of Canada v. Basinview Village Ltd.*, [1995] N.S.J. No. 295 (NSCA); *R v. Clarke*, 2012 NSSC 406; *Williams v. Halifax City*, 2010 NSSC 467.

Costs

[52] The range of costs in Tariff “C” of *Rule 77*, for an application which is more than an hour but less than one half day is \$750-\$1,000. There was also the post hearing submissions requested by the Court.

[53] Exercising my discretion, considering the amount of material and the nature of the application, I award costs to the Respondent, Ms. MacKinnon, in the amount of \$1,000.

[54] Order accordingly.

Murray, J.