

SUPREME COURT OF NOVA SCOTIA

Citation: *DLF Law Practice Incorporated v. Atkinson et al.*, 2024 NSSC 206

Date: 20240712

Docket: PIC No. 525281 and PIC No. 521514

Registry: Halifax

Between:

DLF Law Practice Incorporated, a body corporate, and Donn Fraser

Plaintiffs

v.

Eric Atkinson, SPI ET Pomquet Inc., a body corporate, Jennifer Hamilton Upham, Kate Harris, Joel Sellers, Julie MacPhee, Mary Jane Saunders, Dennis James, Gerald Green and 3241964 Nova Scotia Limited (Previously Known As Carm Legal Services Inc.), a body corporate, and the legal partnership known as the firm Patterson Law

Defendants

DECISION ON REMOVAL OF COUNSEL

Judge: The Honourable Justice Scott C. Norton

Heard: July 10, 2024, in Halifax, Nova Scotia

Decision: July 12, 2024

Counsel: Donn Fraser, self-represented
DLF Law Practice Incorporated, on its own behalf by its Officer
Donn Fraser
Michael Scott, for the Defendants Patterson Law, Denis James, Kate
Harris, and Jennifer Hamilton-Upham
Gavin Giles, KC, for the remaining Defendants, not participating

By the Court:

Introduction

[1] The Plaintiffs bring this motion for an order disqualifying and removing the lawyer of record for certain Defendants in this proceeding because that lawyer is a partner in the Defendant law firm that he represents. The Plaintiffs assert that this creates a conflict of interest justifying his removal as counsel.

[2] The underlying proceeding is one in a series filed by the Plaintiffs following dissolution of a law firm in which the Plaintiff, Donn Fraser, was a partner (through the Plaintiff professional corporation). Several of the Defendants, who were partners with the Plaintiffs in the dissolved firm subsequently joined the Defendant law firm. The Plaintiffs' Statement of Claim alleges liability against the Defendant law firm for the tort of conspiracy and accessory liability for assisting in fiduciary breach by other Defendants who subsequently became partners in the Defendant law firm.

[3] The Plaintiffs' motion raises the following issues:

1. Is the counsel of record for the Defendant law firm and certain of its partners in a conflict of interest because counsel of record is a partner in the firm?
2. Is the counsel of record in a conflict of interest as a potential witness at the trial?
3. If the answer to either question is yes, is removal the appropriate remedy?

[4] I have concluded that the counsel of record should be removed because, on the particular facts of this case, his partnership in the Defendant law firm creates a conflict between his obligations of objectivity and detachment, which are owed to the court, and his obligations to his clients to present evidence in as favourable light as possible. This is a conflict that cannot be waived by the client because the conflict is between counsel and the justice system. In so finding, I wish to be clear that I do not suggest any impropriety whatsoever on the part of counsel of record.

Underlying Legal Principles

[5] The court possesses the inherent jurisdiction to remove or disqualify counsel for a conflict of interest. The Supreme Court of Canada has stated that this jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to supervisory jurisdiction: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at para. 18.

[6] This motion involves the determination of competing interests: (1) the right of a party to select counsel of their choice; (2) maintaining the high standards of the legal profession and the integrity of the administration of justice; and (3) basic principles of fundamental fairness. An order for removal should not be made unless there are compelling reasons: *R. v. Speid*, (1983), 43 O.R. (2d) 596; *Brogan v. Bank of Montreal*, 2013 NSSC 76, at para. 35.

[7] The Supreme Court of Canada has said that the most important and compelling factor is the preservation of our system of justice: *Martin, supra*. At p. 1265, Justice Cory explained:

The necessity of selecting new counsel will certainly be inconvenient, unsettling and worrisome to clients. ... 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.

[8] As to what will amount to compelling reasons, they must be such that would cause a fair-minded and reasonably informed member of the public to conclude that removal is necessary for the proper administration of justice: *Foley v. Victoria Hospital London Health Services Centre*, 2023 ONSC 4978, at para. 17.

[9] In *Brogan*, Associate Chief Justice Smith, as she then was, adopted the flexible and case specific approach taken in *Essa Township v. Guergis*, (1993) 15 O.R. (3d) 573. The following factors are to be considered:

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 or relationship between counsel, the prospective witness and the parties involved in the litigation.

Analysis

1. *Is the counsel of record for the Defendant law firm and certain of its partners in a conflict of interest because counsel of record is a partner in the firm?*

[10] Michael Scott is a partner in the law firm Patterson Law. Patterson Law has been sued as a partnership along with certain named individual partners all facing claims and potential liability under causes of action including the tort of conspiracy and accessory liability for assisting in fiduciary breaches by other Defendants. Mr. Scott is the counsel of record in this proceeding for the Defendants Patterson Law, Dennis James, Kate Harris, and Jennifer Hamilton-Upham (collectively the "Patterson Defendants"). Without doubt, the individual Patterson Defendants will be witnesses at examinations for discovery and at trial.

[11] Mr. Scott has a professional relationship with the Patterson Defendants who are his partners and colleagues. In addition, as a partner in the Patterson Law firm, Mr. Scott faces liability and financial consequences or prejudice as a result of the claims made against the partnership in the proceeding.

[12] The Nova Scotia Barristers' Society *Code of Professional Conduct* states:

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.

Commentary

...

Examples of areas where conflicts of interest may occur

10. 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.

...

- 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.

[emphasis added]

[13] The *Code of Professional Conduct*, while relevant, is not binding on the court. The court's jurisdiction stems from the fact that lawyers are officers of the court and their conduct is subject to the court's supervisory jurisdiction. The court must analyze the nature of the impugned relationship and consider whether the relationship will interfere with the lawyer's duty to provide objective, disinterested professional advice. 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: *Brogan, supra*, at para. 42.

[14] This same principal was addressed by the Ontario Court of Justice in the context of a law firm that brought an action to collect fees. A member of the firm was retained on behalf of the firm. The client filed a motion to have the firm removed as solicitor of record for the firm. The motion was granted: *Zeppieri & Associates v. Weingarten*, [1998] O.J. No. 544. Justice Spence found, at para. 4:

...The basic reason is that the court, the opposing party and the public are entitled to be assured of the independence of counsel from the interests of the client. The same concerns apply where the law firm itself is itself the client, indeed perhaps even more so.

[15] In addition, the Alberta Court of Appeal has opined that the overriding concern is whether counsel's execution of his role would be compromised by his loyalty to his partners or firm. Would counsel be able to make sound judgments and

arguments about his partners' credibility? *Stanfield v. Low*, 2019 ABCA 83, at para. 20. That Court of Appeal stated, at paras. 21-22:

[21] To similar effect, the Manitoba Court of Appeal held in *Oliver, Derksen, Arkin v Fulmyk*, (1995), 126 DLR (4th) 123, that an advocate's role before the court may be impaired "where the witness is a partner ... of the law firm ...and the other lawyer's evidence concerns a matter arising from the law firm's practice. The advocate then has an interest in the court accepting the lawyer's evidence as its rejection reflects on all members of the firm".

[22] In *Downham v Wawanesa Mutual Insurance Company*, 2005 ABQB 299, the court applied *Forward* to conclude that an entire firm must be restrained from acting where one member of the firm was in a position of conflict. That lawyer's conflict arose because he had been involved in the process leading to an alleged agreement. The facts around the formation of the agreement were disputed, meaning that the lawyer would likely become a witness. To explain the difficulties created when counsel is in a conflict, the court at para 31 quoted the following passage from *Urquhart v Allen Estate*, [1999] OJ No 4816 (Ont SCJ) at para 27:

First, it may result in a conflict of interest between counsel and his client. That conflict may be waived by the client, as indeed, was done in this case. The second problem relates to the administration of justice. The dual roles serve to create a conflict between counsel's obligations of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible. This is a conflict that cannot be waived by the client as the conflict is between counsel and the court/justice system.

The court concluded at para 32 that acting as counsel while being a witness to disputed events was "the kind of conflict that would prevent counsel from acting in an objective and detached manner."

[emphasis added]

[16] I wish to be perfectly clear that I do not doubt the integrity and honesty of Mr. Scott. I do not impugn his conduct in this or any other proceeding in any way.

[17] However, having considered the factors set out in *Essa, supra*, I conclude that compelling reasons exist that would cause a fair-minded and reasonably informed member of the public to conclude that removal is necessary for the proper administration of justice.

[18] There is an incompatible and irreconcilable conflict between Mr. Scott's role as a business and law partner of the Patterson Defendants to whom he owes fiduciary obligations of loyalty, and his duty as an officer of the court to be objective and

detached. The allegations against the individual Patterson Defendants are personal and emotionally charged (at least in the mind of the Plaintiffs). Further, the allegations deal directly with operational decisions of the Defendant law firm. Although we are at an early stage in the proceedings, and despite Mr. Scott not being involved in the management of the law firm, his relationship as partner in the Defendant law firm and as counsel serve to create a conflict between his obligations of objectivity and detachment, which are owed to the court, and his obligations to his clients to present evidence in as favourable light as possible. It is the appearance of the conflict that matters, not whether the court considers that it is likely or even possible that it would actually cause Mr. Scott to act improperly.

[19] In the circumstances, it is not necessary for me to consider whether a conflict of interest arises from Mr. Scott being called as a potential witness.

[20] Having found a conflict of interest, I deem it reasonable and appropriate to order that Mr. Scott be removed as counsel for the Patterson Defendants. Similarly, no other member of the Patterson Law firm may act as counsel of record for the Patterson Defendants. The Patterson Defendants shall have 30 days from the date of the Order to file a Notice of New Counsel. As case management judge I order that the proceeding be stayed for that 30 day period.

[21] The Plaintiffs are entitled to costs based on Tariff C. I am not persuaded that the circumstances justify an increased award. The hearing took approximately one hour. The materials were moderate in volume for a motion. The Patterson Defendants jointly shall pay to the Plaintiffs jointly the sum of \$1,000 forthwith and in any event of the cause.

Norton, J.