IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Chapates v. Petro Canada , 2004 NSSC 52

Date: 20040302
Docket: S.H. 83869
Registry: Halifax

Between:

Roger and Marlene Chapates

Plaintiffs

- and -

Petro Canada, a body corporate, Bill's Service Station Limited, a body corporate, John Lewis Siteman and Andrew S. Webber

Defendants

- and -

Graycon Limited

Third Party

Judge: The Honourable Justice Felix A. Cacchione

Heard: February 11th, 2004, in Halifax, Nova Scotia

Written Decision: March 2, 2004

Counsel: B. William Piercey, Q.C., for the Plaintiff/Respondents
Jacqueline Scott and
David A. Cameron, for the Applicant /Defendant (Webber)
John C. MacPherson, Q.C., for the Defendant, Petro Canada
Peter M. Landry, for Third Party, Graycon Limited
John L. Lewis Siteman, self represented

By the Court:

[1] This is an interlocutory application brought by the defendant Webber to remove William Piercey, the plaintiff's solicitor, from the file on the basis of a conflict of interest. The application is supported by the defendant Petro Canada. The defendants Graycon and Siteman took no position on the application.

[2] The plaintiff's action is a claim for damages arising from soil and water contamination of the plaintiff's residential property in Jeddore. The plaintiffs purchased their property from the defendant/applicant Webber.

[3] A history of the proceedings to date is relevant to the determination of this application. The action was commenced on September 25th, 1992 by the plaintiff's former solicitor David W. Richey. In October 1992 the defendant Webber retained the firm of Daley Black to represent him. David Cameron of that firm became his counsel. William Piercey the plaintiff's solicitor was also at that time a member of the same firm.

[4] Discoveries were held for twenty-one days between August 1993 and April 1994. The matter then remained dormant until March 21st, 1997 when the plaintiff filed a Notice of Intention to Proceed. In April 1997 the defendant Petro Canada filed a Notice to Proceed with its cross-claim against the defendants Bill's Service Station Limited and John Lewis Siteman and its Third Party action against Graycon Limited. On March 4th, 2003 the Prothonotary issued a notice pursuant to Civil Procedure Rule 28.11 advising that if a Notice of Trial was not filed within six months advising of the plaintiff's intention to proceed, then the plaintiff's action would be dismissed. On March 14th, 2003 the plaintiff's former solicitor filed a Notice of Intention to Proceed.

[5] Shortly after the completion of discovery examinations the plaintiff applied for a long term disability pension under the Canada Pension Plan alleging in part environmental health problems sustained as a result of the alleged contamination of his property - the subject matter of the main action. The plaintiff spent the next six years pursuing his long term disability pension claim through the various stages of review and appeals. In January 2000 he was granted a long term

disability pension by the Canada Pension Plans Appeal Board. It was after this final ruling that the plaintiff was ready to resume his lawsuit.

[6] It is unclear from the record when it was that the plaintiff was advised by Mr. Richey, his former solicitor, that due to an increased workload Mr. Richey would be unable to continue to devote the attention required to the file to bring it to trial. He urged the plaintiff to seek other counsel.

[7] The plaintiff made a number of attempts over a period of one year or more to find a lawyer who would take over the conduct of his actions. In February 2003 the plaintiff contacted Mr. Piercey with a request that he assume the conduct of his file. Mr. Piercey considered the matter and in June 2003 he agreed to take over the file from Mr. Richey.

[8] On July 11th, 2003 Mr. Piercey filed a Notice of Change of Solicitor pursuant to Civil Procedure Rule 44.01. On July 18th, 2003 he forwarded a copy of the Notice of Change of Solicitor to all the defendants and requested their consent to a extension of time within which to file a Notice of Trial. No consents were given.

[9] On September 18th, 2003 the Prothonotary issued a Notice of Order Dismissing Action. In response Mr. Piercey, the plaintiff's present counsel, filed an application for an extension of time to file his Notice of Trial. This application was to be heard on October 30th, 2003, however it was then set over to the Appearance Day Docket for November 14th, 2003.

[10] On November 14th, 2003 Justice Kelly stayed the issuance of a Notice of Dismissal of Action pursuant to Civil Procedure Rule 28.11(5) until this application for disqualification of Mr. Piercey could be heard.

[11] The parties signed and filed an Agreed Statement of Facts for purposes of this application. It reads as follows:

> 1. Mr. Piercey began practicing with Daley Black on his admission to the Bar on April 7, 1972 and continued to practice with Daley Black until it merged with Patterson Palmer on October 1st, 2001. At that point, Mr. Piercey continued to practice with the merged firm until September 30, 2002.

2. In April 1988 David Cameron joined Daley Black as an Articled Clerk and became an Associate following Mr. Cameron's admission to the Bar in August 1988. From that point, Mr. Piercey and Mr. Cameron practiced as colleagues, either as Associates or Partners, at Daley Black or the merged firm of Patterson Palmer until September 20, 2002, other than from July 1993 to January, 1995 during which period Mr. Cameron left Daley Black to work for the Minister of Justice for the Province of Nova Scotia.

3. In 1992 the Defendant, Andrew Webber approached the late James M. McGowan, Q.C., a former colleague and partner of Mr. Piercey and Mr. Cameron, and requested that Daley Black defend his interest in this litigation, and Mr. McGowan referred Mr. Webber to Mr. Cameron as Mr. McGowan did not practice in the civil litigation area.

4. From the point that Daley Black was retained by Mr. Webber, and other than the above referenced period of time that Mr. Cameron worked for the Minister of Justice, Mr. Cameron directed the defence of the action against Mr. Webber. Further, during Mr. Cameron's absence from Daley Black, Greg Cooper, a former colleague and partner of Mr. Piercey and Mr. Cameron, directed the defence of the action against Mr. Webber.

5. At all times throughout this litigation Daley Black and Patterson Palmer have represented Mr. Webber.

6. In July 2003 and following Mr. Piercey's advice that he had been retained by the plaintiff to represent his interests in this litigation, Mr. Piercey and Mr. Cameron discussed whether he would be able to act and that Patterson Palmer suggested he was in a conflict of interest.

7. Mr. Piercey states at no time did he possess or know of any information (confidential or otherwise) of or relating to any of the Defendants or their interests.

8. Mr. Piercey states he did not discuss this proceeding with Mr. MacPherson or Mr. Cameron or any solicitor of record until July 2003 and was not aware of the existence of the lawsuit until he met Mr. Chapates in February 2003, when he was asked to take over the file from Mr. Chapates' former solicitor, Mr. David W. Ritchey.

9. During the last year that Mr. Piercey was practicing the law with Patterson Palmer, the file of John McPherson as solicitor Petro Canada, remained inactive.

Dated at Halifax, Halifax Regional Municipality, Province of Nova Scotia, this 9th day of January, 2004.

[12] The applicant's submissions are based on *MacDonald Estate v. Martin (Martin v. Gray)* (1990) 77 D.L.R. 4th 249; [1990] 3 S.C.R. 1235. It is argued, based on this case, that once the applicant establishes that there existed a solicitor and client relationship the court will then infer a transfer of confidential information. The burden is then shifted to the respondent (Mr. Piercey) to rebut the presumption that such a transfer of information existed. This burden was described by Sopinka J. in *Martin v. Gray* as a heavy burden. The applicant argues that this case makes it clear that mere conclusory statements and affidavits or undertakings by lawyers not to use the information is not enough since these simply amount to a lawyer saying "trust me". The applicant submits that the respondent has not discharged his burden and therefore he must be removed from the file.

[13] The respondent acknowledged that the matters are sufficiently related because Mr. Cameron and Mr. Piercey were at one time partners in a law firm representing the defendant Webber and now Mr. Piercey is with another law firm representing the plaintiff. Mr. Piercey argues that the specific facts of this case must be examined and that the presumption of the transfer of information is not irrebuttable. He points out that there has been no suggestion that he did work on the applicant (defendant's) file or that he even knew that the applicant's file was in his former law office. He also submits that there is no indication whatsoever by Mr. Cameron that they ever discussed this file while they were associated in the practice of law.

[14] Mr. Piercey argues that the cases of *Montreal Trust Co. of Canada v. Basinview Village Ltd.,* [1995] N.S.J. No. 295 (C.A.), *Fisher v. Fisher* (1986), 76 N.S.R. (2d) 326 (C.A.) cited by the applicant can be distinguished on their facts.

[15] The respondent referred to *United Steelworkers of America v. King*, [1993] N.S.J. No. 475 (N.S.S.C.) where the plaintiffs were represented by a solicitor who had previously been with the firm representing the defendant on a general retainer. He noted that the solicitor sought to be removed in that case, had much closer ties to the file than the respondent in the present case and that the court did not order that solicitor to be removed. The respondent refers to Gruchy, J.'s comments in *the United Steelworkers* case that:

> ...an applicant in a case such as this one ought to be expected to lay a foundation by giving to the Court some hint as to the type of information sought to be protected, without exposing the client to the dilemma described by Mr. Justice Sopinka.

[16] Finally the respondent urges the Court to consider the possibility of some other motive behind the bringing of this application. He refers to Kelly J.'s warning in *Moser et al. v. Halifax (City) et al.* (No. 2) (1992), 107 N.S.R. (2d) 412 that a court must be on guard to ensure that applications of this nature are not made principally for the purpose of depriving clients of their counsel of choice. The respondent submits that in longstanding disputes, such as this one, the Court should be mindful that the removal of counsel may dissuade the plaintiff from proceeding any further.

[17] The test to be used in determining whether there is a disqualifying conflict of interest was set out by Sopinka J. speaking for the majority in *Martin v. Gray* (1990), 77 D.L.R. (4th) 249 at 267 in the following words:

> ...the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.

[18] This requires two questions to be answered. (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?

[19] In the case at bar, it is admitted that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove solicitor Piercey. The judgment in *Martin v. Gray* directs that this Court should infer that confidential information was imparted unless the respondent satisfies the Court that no relevant information was divulged. *Martin v. Gray* makes it clear that a solicitor who has relevant confidential information should automatically be disqualified. In other cases the court should draw an inference that confidential information was disclosed unless it is satisfied on the basis of clear and convincing evidence that all reasonable measures were taken to ensure that no disclosure occurred.

[20] The facts in *Martin v. Gray*, on which the applicant relies, are clearly distinguishable from the facts in the present case. In *Martin v. Gray* the solicitor sought to be removed from the file, had articled with and later became a member of the firm representing the appellant. During her time as an articled clerk and later as junior lawyer she was actively engaged in the case and was privy to many confidences disclosed by the appellant to his solicitor. She was in attendance at numerous meetings between the appellant and his solicitor. She assisted in the preparation of many documents, prepared and attended examinations for discovery, was present when a settlement was discussed by the parties and participated in the taking of *de bene esse* evidence. She also participated during discussions of a settlement with representatives of the respondent's law firm. She then left the law firm representing the appellant and went to work for the law firm acting on behalf of the respondents.

[21] In the present case Mr. Piercey before becoming solicitor for the respondent, practiced in the same law firm as the solicitor for the applicant. The Agreed Statement of Facts filed with the affidavit of the solicitor for the applicant refers to their previous relationship and sets out the history of that relationship at the two law firms where they both practiced. It also indicates that Mr. Piercey was not involved in the conduct of the applicant's file. As well, the agreed statement of facts articulates that Mr. Piercey states that at no time did he possess or know of any information (confidential or otherwise) of or relating to any of the defendants or their interests. Reference is also made in the same document to Mr. Piercey not discussing the proceedings with any of the solicitors of record until July 2003 and as well his being unaware of the existence of the lawsuit until he met the plaintiff (respondent) in February 2003 when he was asked to takeover conduct of the file from the respondent's previous solicitor.

[22] There was no suggestion made in any of the documents filed or in oral argument to contradict the contention by Mr. Piercey that he had no involvement whatsoever with the applicant's file and was unaware that the applicant's file was even in the law office where he worked.

[23] Counsel for the applicant and counsel for the defendant Petro Canada both made reference to Cory J.'s minority judgment in *Martin v. Gray* and urged upon this Court Justice Cory's view that there should be an irrebuttable presumption that solicitor's who work together share each other's confidences so that

knowledge of confidential matters is imputed to other members of the firm. It should be noted however, that Justice Cory did not address the issue of whether a lawyer who has not personally been involved in any way with the client on the matter in issue and who moves to a firm acting for the opponent should also be irrebuttably presumed to have received and imparted confidential information to his new firm. Justice Cory left that issue for another day. This is precisely the issue which is before this Court.

[24] As Glube, J. (as she was then) stated in *Widrig v. Cox Downie* (1992), 114 N.S.R. (2d) 320 (N.S.S.C. - T.D.) at page 327

> Martin and Gray does not stand for the proposition that once a firm has acted for a person they can never act against that person.

[25] Public policy statements regarding the conduct of barristers and solicitors are contained in the Professional Ethics Codes of the various governing bodies regulating the legal profession in Canada.

[26] In 1974 the Canadian Bar Association adopted a Code of Professional Conduct. Chapter V of that Code, entitled Impartiality and Conflict of Interest states the Rule as follows:

> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.

[27] This rule is followed by thirteen commentaries contained in the Code of Professional Conduct. Commentaries 11 and 12 state as follows:

> 11. A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.

> 12. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and his client. However it will be appreciated that the term "client" includes a client of the law firm of which the lawyer is a partner or associate whether or not he handles the client's work.

[28] The above mentioned statements are expressions by the Legal Profession in Canada of the very high standard imposed on a lawyer who finds him or herself in a position where confidential information may be used against a former client.

[29] The Nova Scotia Barristers' Society has enacted its own set of Rules governing the conduct of those members it represents. The Legal Ethics and Professional Conduct Handbook at Chapter 6 entitled Impartiality and Conflict of Interest between Clients set out the rule as follows:

> A lawyer has a duty not to
>
> (a) advise or represent both sides of a dispute; or
>
> (b) act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.

[30] A conflicting interest is defined in the handbook at Guiding Principle (1) as:

> ...one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.

[31] The decision in *Martin v. Gray (supra)* led to the development by the Federation of Law Societies of Canada of a Rule dealing with conflicts arising from transfers of lawyers between law firms. This Rule was adopted by the Nova Scotia Barristers' Society in 1995 and is contained in Chapter 6A of the Legal Ethics and Professional Conduct Handbook. In the notes which follow the Rules set out in Chapter 6A the following comment is made:

> ...In the case of conflicts with any other provisions in the *Handbook*, those other provisions are to be modified as necessary to comply with the spirit of Chapter 6A.

[32] Confidential information is defined in Chapter 6A as:

> ...information obtained from a client which is not generally known to the public.

[33] Subrules 2, 4 and 5 of Chapter 6 A are relevant to the present matter and state as follows:

> 2. This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that:
>
> a. the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client"),
>
> b. the interests of those clients in that matter conflict, and
>
> c. the transferring member actually possesses relevant information respecting that matter.
>
> ...
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> 4. Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless:
>
> a. the former client consents to the new law firm's continued representation of its client, or
>
> b. the new law firm establishes that:
>
> i. it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including:
>
> a. the adequacy of the measures taken under ii,

b. the extent of prejudice to any party,

c. the good faith of the parties,

d. the availability of alternative suitable counsel, and

e issues affecting the national or public interest, and

ii it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

5. Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client:

(a) the member should execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall:

i. notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

ii. deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

[34] It is evident from the provisions of Subrules 2, 4 and 5 that actual possession of relevant information, whether confidential or not, which may prejudice the former client is the key to determining whether a lawyer should be disqualified from acting against a former client.

[35] Turning to the matter at hand, I am satisfied on the evidence before me that Mr. Piercey, the solicitor sought to be removed from this file, has no information, whether confidential or not, which may prejudice the applicant. Mr. Piercey did not work on the applicant's file and was unaware that his former law firm had even been retained by the applicant. He did not receive confidential information

attributable to a solicitor and client relationship relevant to the matter at hand. It follows therefore that there is no risk that the information will be used to prejudice the applicant.

[36] A reasonably informed member of the public viewing this situation would come to the conclusion I have reached, which is that no use of confidential information would occur. As an aside, I am of the opinion that in the eyes of a reasonably informed member of the public the administration of justice would be brought into greater disrepute by the removal of the plaintiff's counsel in a case which has been ongoing for almost twelve years and where in excess of one year was spent by the respondent trying to find a new lawyer who would represent him on a lengthy and complex trial.

[37] A reasonably informed member of the public viewing this application might conclude that the removal of the plaintiff's solicitor was simply an attempt to dissuade the plaintiff (respondent) from continuing with his action.

[38] In summary, I find that the respondent does not possess confidential information concerning the applicant's case which might be used to the prejudice of the applicant. There does not exist nor is there any perceived or reasonably anticipated danger of a breach of confidentiality that would justify the granting of an order removing the respondent's solicitor from this file.

[39] Accordingly the application is dismissed with costs in the amount of $1,000.00 payable forthwith to the respondent.

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Cacchione, J.