

SMALL CLAIMS COURT OF NOVA SCOTIA

**Citation: *Re/Max Nova v. Lockyer and
4438047 Nova Scotia Ltd.*, 2023 NSSM 51**

Date: 20230914
Docket: 523336
Registry: Halifax

Between:

Re/Max Nova

Claimant

v.

Henry Lockyer and 4438047 Nova Scotia Limited

Respondent

Adjudicator: Michael J. O'Hara
Hearing Date: September 12, 2023
Decision Date: September 14, 2023
Appearances: Henry Lockyer, Defendant
Michaela Sheppard, Counsel for the Claimant

By the Court:

DECISION and ORDER

[1] This is a motion by the Defendants to remove the law firm of Weldon McInnis from acting for the Claimant on the basis that there is a conflict of interest.

[2] As well, the Defendant, 4438047 Nova Scotia Limited, requests that it be released from these proceedings on the basis that it never signed the Buyer Designated Brokerage Agreement.

[3] Both of these matters as well as a request for additional documents were outlined in the Defendants' letter of June 15, 2023, and received by the Court on June 16, 2023. Ms. Sheppard indicated that she had not received the letter and one was scanned to her at the time of the hearing by Mr. Lockyer. In the result, we dealt with two of the matters – the alleged conflict issue and the removal of 4438047 Nova Scotia Limited. The request for additional documents was not dealt with before me.

[4] At the hearing I indicated that, at this stage, I was not prepared to consider removing 4438047 Nova Scotia Limited from these proceedings. As stated at that time, I did not consider it appropriate to remove a defendant in a pre-hearing motion based on the assertion of the defendant and without hearing all the evidence and submissions. In my view, the proper course is for the matter to proceed to a hearing on merits, where the adjudicator will hear all of the evidence regarding the claim and ultimately make a decision based on that. In most cases (and this one falls under that heading), it would not be possible to know whether there is a case against a particular defendant until all of the evidence and submissions are heard.

[5] In the result, I dismissed that motion.

[6] The other motion deals with an alleged conflict of interest which, according to Mr. Lockyer, disqualifies the Weldon McInnis firm from acting for the Claimant. Ms. Sheppard is a lawyer at Weldon McInnis so she would also be disqualified by that. As will be known to legal practitioners, there are a number of cases dealing with alleged conflicts of interest and requests to remove counsel because of that. I will refer to some of that law in my further comments below.

[7] Basically, what is alleged by Mr. Lockyer is that because Ms. Jean Beeler of Weldon McInnis acted as *guardian ad litem* for Mr. Henry Lockyer and his brother, Spencer Lockyer, in or about 2016 that her former law firm, Weldon McInnis, is in a conflict by acting for the Claimant in this present matter. Therefore, he asserts that they should be removed as a result of this conflict.

[8] He notes that the property tax statements and assessment notices for the property on Purcells Cove Road which Ms. Beeler holds as trustee for Mr Lockyer and his brother continue to go to 118 Ochterloney Street in Dartmouth which is the address for Weldon McInnis. He notes that Ms. Beeler's LinkedIn account still shows that she is associated with the Weldon McInnis law firm although, he now knows that she retired from the practice of law in 2020.

[9] Mr. Lockyer indicated that until recently, he did not know that since 2020 she was no longer the *guardian ad litem* although he points out that she continues to be the trustee for certain assets held on behalf of him and his brother including the property on Purcells Cove Road. As to information that Ms. Beeler and by extension the Weldon McInnis law firm would have, he says that they would know about the assets that he owns, his net worth and that this information may well have encouraged the current claim to be brought.

[10] Ms. Beeler gave evidence and referred to the Order appointing her as *guardian ad litem* of February 3, 2016, and the Order discharging her which was dated September 4, 2020. She indicated that she was involved in the estate matters

as *guardian ad litem* which was done at the request of the original lawyer for Stephen Lockyer, the father of Henry Lockyer.

[11] She stated that she was not Henry Lockyer's lawyer and did not provide legal advice and that her role could be seen as similar to that of a parent. She confirmed that she did charge the estate for her services as *guardian ad litem*. When legal issues arose she consulted with Matthew Moir, another lawyer at that law firm. She indicated that she considered herself as being in a solicitor-client relationship with Mr. Moir.

[12] Ms. Beeler stated that the interests of Henry Lockyer and his brother, Spencer Lockyer, who were minors at the time, needed independent representation because the will of their late mother was being challenged by their father and that could have affected their interests as beneficiaries under that will. She stated that she was never in possession of any confidential information relevant to this current claim and did not and could not have disclosed any such information to present counsel for the Claimant.

[13] Ms. Beeler could not recall whether she ever directly advised Henry Lockyer that she was no longer the *guardian ad litem* but indicated that his father, Stephen Lockyer, certainly knew about it and, to her recollection, it was Stephen Lockyer who had requested her discharge as *guardian ad litem*. As to the property information from HRM going to the 118 Ochterloney address, she indicated that that is because that is the practice of the Municipality which simply defaults to the last address.

Analysis

[14] While the submission is made on behalf of the Claimant that Henry Lockyer was never a client of Weldon McInnis, I am not convinced that this is a proper approach in the law. It seems to me to be drawing a very fine distinction where a

minor has a *guardian ad litem* who is a lawyer and whose law firm is providing legal advice to the benefit of the minor individual to say that the law firm is not acting for the minor and that there is no solicitor-client relationship between the minor and the law firm.

[15] I note here that in *Re Lockyer Estate*, 2018 NSSC 128, Justice Hood refers in several occasions to the Weldon McInnis account and at one point notes that it was in the amount of \$11,000. Ms. Beeler confirmed that that account would have been for her services both as *guardian ad litem* and for any legal services provided by Matthew Moir. As I understood it, their account was actually issued to the estate of Donna Lockyer, the deceased mother of Henry and his brother.

[16] Without delving too deeply into the estate matter, I would have little doubt that the Weldon McInnis law firm would be seen to have a solicitor/client relationship towards Henry Lockyer and Spencer in that period and up to when the settlement was reached towards the end of 2016. It would have had the typical obligations arising from such relationship such as confidentiality and other obligations well known to the legal profession.

[17] I find that certainly for purposes of an application to remove the law firm because of an alleged conflict, that Henry Lockyer is to be considered a former client of the McInnis Weldon law firm.

[18] The matter does not end there. Law firms can and often do act against former clients. However, there are rules regarding that and Ms. Sheppard has quoted the most pertinent which is from the Nova Scotia Barristers Society Code of Professional Conduct of Nova Scotia in 3.4-10, which reads as follows:

Acting Against Former Clients

3.1-10 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.

[19] The Code of Professional Conduct is not the only law regarding this matter. In an application to remove a lawyer, the common law is probably the more relevant source.

[20] In *Lappin v. Bauer*, 2015 NSSC 108, Justice Edwards quotes from a decision of *Johnson v. Rudolph*, 2013 NSSC 2010, as follows:

[13] In *Johnson v. Rudolph*, 2013 NSSC 2010 at paragraphs 47-51, Hood J. noted the following:

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), 1995 NSCA 131 (CanLII), 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. ...

[21] As noted, lawyers and law firms owe a duty of loyalty a former client even when there is no question of confidential information being passed. However, it would appear that this only applies when the new matter is related in some manner with the previous matter.

[22] The Commentary to the Rule appears to accurately state the law applicable to this case:

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.

[23] Here, I can see no connection between this current matter which involves a claim against Mr. Lockyer and his company for real estate commission on a totally unrelated transaction and a former matter which involved the estate of his late mother. This present claim is a “...*fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client*”.

[24] That then leaves the question of whether any confidential information has been passed which would somehow prejudice Mr. Lockyer. He says that the law firm would know about the assets that he has an interest in and therefore have some idea of his net worth.

[25] As was pointed out and with which I agree, the real estate owned, including that owned in trust, by and for the benefit of Mr. Lockyer is part of the public record through Property Online. Therefore, it would not be viewed as confidential information.

[26] Also, there would be Court files from the estate litigation that could be searched and that would be considered part of the public record.

[27] I was not provided with any information through the witnesses or other documents filed that would suggest that the Weldon McInnis law firm possesses or had available to it confidential information that is relevant to or would prejudice Mr. Lockyer in this present claim.

[28] The request to disqualify Weldon McInnis must fail.

ORDER

[29] It is hereby ordered that the Defendant's motion to disqualify the Weldon McInnis law firm is hereby dismissed.

[30] The motion to remove the Defendant, 4438047 Nova Scotia Limited, is hereby dismissed.

Small Claims Court Adjudicator
Michael J. O'Hara