Federal Court  Cour fédérale

Date: 20190906

Docket: T-538-19

Citation: 2019 FC 1147

Ottawa, Ontario, September 6, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

GCT CANADA LIMITED PARTNERSHIP

Applicant

And

VANCOUVER FRASER PORT AUTHORITY and ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

I. Introduction

[1] The Applicant, GCT Canada Limited Partnership (GCT), seeks an order removing Lawson Lundell LLP (Lawson) as counsel for the Vancouver Fraser Port Authority (VFPA) in relation to the applications for judicial review GCT has brought challenging several decisions relating to proposed development in the port of Vancouver, as well as in the environmental

review process for this project that is currently underway before a Review Panel established by the Canadian Environmental Assessment Agency (CEAA).

[2] GCT was never a client of Lawson. Nevertheless, GCT claims that Lawson is in a conflict of interest because it gained access to confidential information about these matters in the context of its due diligence review for the British Columbia Investment Management Corporation (BCI) relating to the potential acquisition by BCI of a minority stake in GCT. The conflict arises because Lawson represents VFPA in the CEAA Review Panel process as well as the judicial review applications, and the confidential information related to GCT's position on the projects that lie at the heart of these proceedings.

[3] In this Motion, GCT claims that Lawson obtained confidential information relevant to the dispute between GCT and VFPA in the context of a solicitor-client relationship, and that it did not take adequate or timely measures to prevent that information from being shared within the law firm. This is sufficient to trigger a conflict of interest, and the disqualification of Lawson from these matters.

[4] VFPA argues that this is a purely tactical motion, which GCT has timed to disrupt the current legal processes. VFPA contends that because GCT was never a client of Lawson, the rules must be applied more flexibly. VFPA submits that it was not legally adverse to GCT at any time prior to the commencement of the judicial review proceedings, and that as soon as those were launched Lawson took appropriate measures to deal with any potential conflict. VFPA contends that GCT has failed to meet its onus of proving that confidential information was actually shared with the firm. Moreover, Lawson counsel involved in these matters have sworn

affidavits stating that they did not receive any of GCT's confidential information. Removing Lawson as its counsel now would cause VFPA significant prejudice.

[5] The background for this motion is a dispute between GCT and VFPA and the Attorney General of Canada about a proposed expansion of the container capacity of the port of Vancouver. VFPA plays several roles in relation to the port: it is the landlord of companies that lease facilities, including GCT; it is one of the "regulators" that controls activities in the port; it is also a proponent and developer of the port. As explained below, these proceedings focus on the VFPA's roles as regulator and proponent.

[6] VFPA is currently seeking approval from the CEAA for its proposed expansion of the port, called the Roberts Bank Terminal Two project (RBT2). GCT opposes this project, and it wants to go forward with its own expansion project. VFPA, in its role as regulator, has denied GCT approval for its proposed expansion of the container facilities at Delta Port, known as the Deltaport 4 Project (DP4). Lawson represents VFPA in the environmental assessment process for RBT2, and advised VFPA in regard to its decision to deny preliminary project approval for GCT's DP4 project. This is the core of the underlying dispute between GCT and VFPA, and provides the backdrop to the motion before the Court.

[7] GCT's motion to remove Lawson as counsel for VFPA is grounded on the argument that Lawson obtained confidential information about GCT's legal strategy relating to RBT2 and DP4 in the context of its due diligence review for BCI. GCT claims that Lawson did not take adequate steps to prevent any sharing of this information with the lawyers who act for VFPA, and therefore it must be removed as counsel.

[8] For the reasons that follow, I am granting this motion in part.

II. Background

[9] VFPA is a port authority that operates pursuant to the provisions of the *Canada Marine Act*, SC 1998, c 10 and the *Port Authorities Operations Regulations*, SOR/2000-55, as amended, as well as Letters Patent. These authorize VFPA to act as both regulator and landlord in regard to the port. In the past, VFPA has also been a proponent of large scale infrastructure developments and expansions at the port. GCT operates the Deltaport container terminal located at the Roberts Bank Port Facility, under a lease with VFPA.

[10] VFPA has been a proponent of an expansion of the Roberts Bank Port Facility since 2003. RBT2 did not proceed at that time, but was submitted for approval to the CEAA in September 2013. VFPA retained Lawson with respect to RBT2 on February 6, 2014, and Lawson has acted for it continuously since that time. On June 16, 2015, Lawson established an ethical wall around its work on RBT2, for reasons unrelated to this motion. This was to ensure that only lawyers and other staff working on this project would have access to the electronic file held by Lawson, and that lawyers working on this project would not discuss their work with other counsel in the firm.

[11] The approval process for RBT2 has advanced through various stages and the public hearings of the CEAA Review Panel on this project were held between May 14 and June 24, 2019. Lawson was counsel for VFPA at these hearings. GCT also participated, and opposed the approval of the project. Final submissions were to be presented to the Review Panel by August 16, 2019.

[12] In November 2017, Lawson was retained by BCI to provide tax advice on a potential acquisition by BCI of an interest in GCT (the Transaction). Lawson conducted a conflict check and determined that it could act in regard to this transaction. GCT was not a "client" of Lawson's and the firm was of the view that GCT was adverse in interest to BCI, or at a minimum that their interests were not aligned.

[13] In early April 2018, BCI contacted Lawson to discuss whether it could conduct a due diligence review in the context of its possible acquisition of an interest in GCT. No new conflict check was undertaken. VFPA describes the perspective of Lawson at the time in the following way:

> During its conflict check, Lawson had identified the VFPA as an existing client of Lawson. However, given that the Transaction involved a share transaction relating to a third party who was not a client, and the work itself was far removed from the kind of work being done for the VFPA, it was not expected Lawson would have any need to call on personnel working for VFPA to assist.

[14] Prior to accepting the retainer, David Allard, the lead partner at Lawson dealing with these discussions, raised with BCI the fact that Lawson represented VFPA, and indicated that Lawson had not done any work related to the leases held by GCT, or any other matters relating to the Transaction. Out of an abundance of caution, Mr. Allard advised BCI that Lawson would not use any lawyers doing work for the VFPA on the due diligence review. In addition, BCI was to only communicate with three Lawson counsel about any matter relating to the Transaction. This was done in order to avoid involving any lawyers who worked for VFPA in the due diligence review, and was contrary to the usual practice in prior interactions between BCI and Lawson pursuant to which the BCI lead could contact any Lawson lawyer to ask a question relating to its general retainer.

[15] John Smith, the Chair of Lawson's Conflicts and Ethics Committee who ran the conflict check, never spoke directly with Bradley Armstrong, the lawyer heading the team working on the VFPA matter. Mr. Smith testified that he was not aware of DP4. The lead counsel on the VFPA matter sent a short reply to an e-mail that was circulated in the firm in the course of the conflict check, stating that he did not think it was a problem for the firm to act for BCI in the Transaction.

[16] Lawson was then retained by BCI to undertake the due diligence review, which commenced on May 10, 2018. A physical data room and a virtual data room were established to hold the materials relating to this review. The virtual data room was administered by a third party that specializes in this sort of work, and a limited number of Lawson counsel were given authorization to access the materials in that facility.

[17] For its part, GCT released its information relating to the due diligence review under the terms of a comprehensive confidentiality agreement that applied to Lawson as well as to others involved in the review. The agreement states that the information is to be used only for the purpose of evaluating, negotiating, or implementing a potential purchase transaction. It provides that disclosure by GCT does not constitute a waiver of any solicitor-client privilege that may attach to any of the information. It also contained an addendum requiring law firms or other professional advisors to acknowledge that the members of the team involved in the Transaction would not provide any other services to the VFPA (among others), and that the law firm would establish "the customary information barriers" in order to prevent disclosure of the confidential information to anyone else in the firm not involved in the due diligence review. This was a pre-

condition to providing the confidential and proprietary information that was necessary for the due diligence review. BCI entered into the confidentiality agreement on October 24, 2017.

[18] During the course of the review, it became evident that advice on certain questions relating to Aboriginal issues was required, and the Lawson counsel best equipped to provide that advice was Keith Bergner, who was part of the team working on RBT2 for VFPA. In view of the limited timeframe for the due diligence review, Lawson decided that it was necessary for Mr. Bergner to provide the advice, although this breached its rule of keeping the two teams separate. Mr. Bergner had a conversation with Ms. Wagner of BCI, and he informed her that he might be limited in the nature of the advice he could provide given his work for another client. In the end, Mr. Bergner stated that he was able to provide the advice to BCI relying only on publicly-available information.

[19] The due diligence review was completed by May 30, 2018, and an extensive report was delivered to BCI.

[20] In addition to Lawson's work for VFPA on RBT2, it was consulted on the decision by VFPA to not proceed with the project and environmental review processes for DP4 being pursued by GCT. Lawson states that it was aware of DP4 as of January 2017. The record is not complete on the question, but there is evidence that GCT had discussions with VFPA about DP4 during that period. GCT submitted a formal Preliminary Project Enquiry to VFPA on February 5, 2019. VFPA replied to that on February 29 [*sic*], 2019, stating that it would not proceed with its project or environmental review processes. The explanation for that decision includes consideration of several factors which are not relevant to the determination of this Motion.

However, it should be noted that in the decision letter, VFPA provides the following rationale for its decision:

> We emphasize these points to ensure that you are fully aware that the RBT2 Project is our preferred project for expansion of capacity at Roberts Bank. You must understand that your DP4 proposal, even if it is able to receive the necessary environmental and regulatory approvals, could only be considered as subsequent and incremental to the RBT2 Project.

[21] GCT launched its judicial review applications against VFPA on March 28, 2019. Earlier in March, BCI had contacted Lawson to advise them that GCT was contemplating taking this step, and to seek advice in respect of its position as a shareholder of GCT. Lawson assured BCI that the measures that had been put in place earlier, including the segregation of the legal teams, remained in place.

[22] Once the judicial reviews were launched, Lawson created internal measures to restrict access to the information it held relating to the Transaction, because it was then evident that VFPA and GCT were adverse in interest.

[23] As the procedures relating to the judicial review applications advanced, both BCI and GCT became concerned that Lawson had failed to take adequate and timely steps to protect the confidential information relating to these matters, and as a result, GCT launched this motion.

III. Issues

[24] There are only two issues before the Court:

A. Has GCT established that Lawson is in a conflict of interest in regard to these matters?

B. If so, is the remedy of disqualification of Lawson appropriate in the judicial review proceeding, and related to this, should such an Order be issued in regard to the CEAA process as well?

IV. Analysis

A. *Has GCT established that Lawson is in a conflict of interest in regard to these matters?*

[25] GCT alleges that Lawson is in a conflict of interest because it failed to take adequate measures to protect the confidential information it obtained in the context of a solicitor-client relationship, and this information is relevant to the matters in dispute between GCT and VFPA, which was and remains a client of Lawson.

[26] GCT submits that it has more than met the test to disqualify Lawson for having failed to adequately protect the confidential information it received relating to these matters. It argues that GCT and VFPA were adverse in interest since at least early 2017, long before the launch of the judicial review, and that despite its assurances to BCI, several Lawson counsel working on the VFPA matter did have access to the confidential information from GCT. Moreover, Lawson had not established adequate controls over its paper or electronic files, and therefore any lawyer at the firm could have accessed the confidential information.

[27] GCT argues that a reasonably informed member of the public would be satisfied that Lawson counsel working for VFPA could have had access to confidential information from GCT about the very matters in dispute before the CEAA Review Panel, and in the judicial review proceedings. This is sufficient to establish a disqualifying conflict of interest, and Lawson has

not met its heavy burden of establishing that it took timely and effective steps to prevent possible misuse of the confidential information.

[28] VFPA submits that it was not in a legally adverse relationship with GCT prior to the launch of the judicial reviews; before then they were, at most, business competitors. Since GCT was never a client of Lawson, the legal tests must be applied more flexibly. Lawson counsel working on the VFPA matter have sworn that they did not receive any confidential materials from the team working on the Transaction, and once the judicial reviews were launched Lawson took timely and appropriate steps to prevent any access to the confidential information.

[29] The seminal case on lawyers' conflicts of interest relating to possible misuse of confidential information is *MacDonald Estate v Martin*, [1990] 3 SCR 1235 [*Martin*]. The Supreme Court of Canada framed its consideration of the issue as involving three competing values: (i) "the concern to maintain the high standards of the legal profession and the integrity of our system of justice"; (ii) "the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause"; and (iii) "the desirability of permitting reasonable mobility in the legal profession." *Martin* and subsequent cases make clear that the pre-eminent value that must guide consideration of all lawyers' conflicts cases is the first: the Court must be guided by the desire to maintain the high standards of the legal profession and to seek to maintain the integrity of our system of justice (see, for example: *R v Neil*, 2002 SCC 70 at para 12 [*Neil*]; *Ontario v Chartis Insurance Company of Canada*, 2017 ONCA 59 at para 70 [*Chartis*]; *Chapters Inc v Davies, Ward & Beck LLP*, 52 OR (3d) 566 (CA) at para 20 [*Chapters Inc.*]).

[30] In order to achieve these goals, a number of rules have been established, but many of these do not apply in this case because they involve the situation where a lawyer or law firm represents two clients, or seeks to act against a former client, or when a lawyer moves from one firm to another, or two law firms merge (see Paul M. Perell, *Conflicts of Interest in the Legal Profession* (Toronto: Butterworths, 1995) for a helpful categorization of the cases). Thus the "bright line" rules established in cases like *Neil* may provide instructive general guidance, but they have no direct application in this case insofar as they relate to a lawyer's relationship with a client.

[31] Two more recent Supreme Court decisions provide helpful guidance on the application of the test set out in *Martin*, as well as its underlying rationale. In *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36 [*Celanese Canada*] the issue concerned access to confidential information by lawyers in the context of an *Anton Piller* order. Justice Binnie described the matter in this way:

> 2 This appeal thus presents a clash between two competing values – solicitor-client privilege and the right to select counsel of one's choice. The conflict must be resolved, it seems to me, on the basis that no one has the right to be represented by counsel who has had access to relevant solicitor-client confidences in circumstances where such access ought to have been anticipated and, without great difficulty, avoided and where such counsel has failed to rebut the presumption of a resulting risk of prejudice to the party against whom the *Anton Piller* order was made.
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> 3 This Court's decision in *MacDonald Estate v Martin*, [1990] 3 S.C.R. 1235, makes it clear that prejudice will be presumed to flow from an opponent's access to relevant solicitor-client confidences…

[32] Justice Binnie provided the following summary of the law regarding the removal of counsel for possession of confidential information:

> 42 In *MacDonald Estate*, the Court held, in the context of a moving solicitor, that once the opposing firm of solicitors is shown to have received "confidential information attributable to a solicitor and client relationship relevant to the matter at hand" (p. 1260), the court will infer "that lawyers who work together share confidences" (p. 1262) and that this will result in a *risk* that such confidences will be used to the prejudice of the client, unless the receiving solicitors can show "that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (p. 1260). Only where there is "clear and convincing evidence" (p. 1262) to the contrary will the presumption be rebutted. Thus "[a] *fortiori* undertakings and conclusory statements in affidavits without more" (p. 1263) will not suffice to rebut the presumption of dissemination. For the purposes of the present case, it is important to note that Sopinka J. imposed no onus on the moving party to adduce any further evidence as to the nature of the confidential information beyond that which was needed to establish that the receiving lawyer had obtained confidential information attributable to a solicitor and client relationship which was relevant to the matter at hand.
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> [Emphasis in original.]

[33] The types of prejudice addressed by the conflict of interest rules established in *Martin* and subsequent decisions were discussed by Chief Justice McLachlin in *Canadian National Railway Co v McKercher* LLP, 2013 SCC 39 [*McKercher*]:

> (c) *Types of Prejudice Addressed by Conflict of Interest Rules*
>
> [23] The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation. I will examine each of these aspects of the conflicts rule in turn.

> (d) *Confidential Information*
>
> [24] The first major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information. The duty to avoid conflicts reinforces the lawyer's duty of confidentiality – which is a distinct duty – by preventing situations that carry a heightened risk of a breach of confidentiality. A lawyer cannot act in a matter where he may use confidential information obtained from a former or current client to the detriment of that client. A two-part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: (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 that client?: *Martin*, at p. 1260. If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice: p. 1260.

[34] The determination of whether a conflict exists is largely a factual inquiry, and each case must be examined on its own merits. Given the wide variety of circumstances in which an alleged disqualifying conflict can arise, it is necessary to approach each case by recalling the core rationale of the doctrine and the requirement for a degree of flexibility in its application to the facts of the particular case, considering all of the relevant contextual factors. In the words of Justice Binnie in *Neil*: "The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests" (at para 15). (See, to the same effect, *Strother v 3464920 Canada Inc*, 2007 SCC 24 [*Strother*] at para 51.)

[35] In this case, a number of elements of the doctrine must be assessed, including:

(1) Do the rules apply in a situation where the information originated from a party who is not a client of the firm?

(2) Did Lawson obtain confidential information, and was it in the context of a solicitor-client relationship?

(3) Is the confidential information relevant to the matters in issue?

(4) When did GCT and Lawson become adverse in legal interest? When did this move beyond a situation of competition between business entities?

(5) Did Lawson take timely and effective measures to protect the confidential information, once VFPA became legally adverse to GCT?

(1) Do the rules apply in a situation where the information originated from a party who is not a client of the firm?

[36] Although many of the cases in which the question arises involve a direct solicitor-client relationship between the lawyer or the law firm with a "client", the test in *Martin* does not require that such a relationship be established. The question stated is "Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?"

[37] In *Almecon Industries Ltd v Nutron Manufacturing Ltd* (1994), 57 CPR (3d) 69, [1994] FCJ No 1209 (QL) (FCA) [*Almecon Industries*], the Federal Court of Appeal ruled that the conflict of interest rules could apply outside of a strict solicitor-client relationship, and that the primary consideration was whether confidential information was obtained in the context of a solicitor-client relationship, regardless of whether that information originated from the "client". The Court noted at paragraph 33 that "the overriding policy concern in *Martin* was that no use of confidential information would occur. Precedence was given to the preservation of confidentiality of information imparted to a solicitor." If a confidential relationship existed, the conflict rules would apply.

[38] This approach was also taken by the Supreme Court of Canada in *Celanese Canada*, where Binnie J. found that the *Martin* decision is the governing authority for removal of counsel for possession of confidential information, and further that the relevant elements of the *Martin* analysis "do not depend on a pre-existing solicitor-client relationship. The gravamen of the problem here is the possession by opposing solicitors of relevant and confidential information attributable to a solicitor-client relationship to which they have no claim of right whatsoever" (at para 46).

[39] I find that this is consistent with both the underlying policy rationale, and the very specific wording used in the *Martin* decision. Although in most cases lawyers will obtain confidential information in a solicitor-client relationship only from their client, situations may arise where such information is obtained from other parties. In my view, the goal of maintaining the high standards of the legal profession and public confidence in the integrity of our system of justice requires that the conflict rules should extend to such a situation.

[40] I agree with VFPA that where the confidential information giving rise to the alleged conflict originates from a party who is not a client of the law firm, the rules set out in *Martin* should be applied with a degree of flexibility. As the Alberta Court of Appeal stated in *Dreco Energy Services Ltd v Wenzel Downhole Tools Ltd*, 2006 ABCA 39 at paras 7-8:

> [7] Though a lawyer (like anyone else) may owe duties of confidentiality to non-clients, that is not the ordinary situation…
>
> [8] Where someone who is not the client gives the lawyer information and expects the lawyer to hold it in confidence, more analysis is necessary. *Martin v MacDonald* is not a rubber stamp to apply to non-client situations. The result in law or equity may be the same, or may differ, but more evidence and more legal analysis is needed to reach the result.

[41] There is no dispute that GCT was never a "client" of Lawson. In this case, however, I find that the conflict rules do apply to Lawson because GCT imparted confidential information to Lawson in the context of a solicitor-client relationship between Lawson and BCI. Indeed, the very nature of the BCI retainer required Lawson to examine confidential and proprietary information about GCT in order to provide advice to its client. In examining the following elements of the test, I accept that the *Martin* rules must be considered and applied with a degree of flexibility in view of the fact that this is a situation involving a non-client, but I find they do apply.

(2) Did Lawson obtain confidential information, and was it in the context of a solicitor-client relationship?

[42] In this case, VFPA argues that GCT has not established that any of its confidential information was actually shared. It says that the information is not identified with sufficient precision and there is insufficient evidence that any confidential information was actually provided to Lawson. VFPA submits that the evidentiary requirements must be higher in a situation involving a non-client, and that the inference that confidential information would be shared within a law firm that is drawn where the information came from a client does not apply here.

[43] In *Martin*, the conundrum facing lawyers and courts in addressing the conflict issue without revealing the very confidences that are in issue was highlighted by Justice Sopinka: "In answering the first question, the court is confronted with a dilemma. In order to explore the matter in any depth may require the very confidential information for which protection is sought to be revealed" (at p 1260). In order to resolve this, Sopinka J. established the following rule:

> 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 information passed, but the burden must be discharged without revealing the specifics of the privileged communication.
>
> (p 1260)

[44] In *Almecon Industries*, the inference that confidential information was imparted was extended to situations involving other parties who were "involved in or associated with the client in that matter" (paras 38-39). This was found to be consistent with the rationale for the rules as explained in *Martin*, in which "[t]he overriding policy concern… was that no use of confidential information would occur. Precedence was given to the preservation of confidentiality of information imparted to a solicitor" (at para 34).

[45] VFPA contends that this rule must be applied with more flexibility in this case, given that GCT was never Lawson's client. Furthermore, GCT has not met is onus because the records about who had access to which documents in the virtual data room are no longer in existence, and GCT took no steps to preserve that information. Finally, VFPA submits that the information that GCT complains of was not relevant to the due diligence review Lawson conducted for BCI, and Lawson counsel working on the due diligence review have confirmed that they did not share the information with anyone outside of the team. Similarly, Lawson counsel working on the VFPA matter have sworn that they did not receive any confidential information about GCT from any of the lawyers working on the Transaction.

[46] The first question is whether Lawson obtained confidential information. The onus is on GCT to establish this, on the usual civil standard of balance of probabilities. GCT provides the following description of the information it provided to Lawson in the course of the transaction:

a) A confidential discussion paper regarding GCT's strategy on the competing RBT2 and DP4 projects;
b) Confidential reports and presentations for GCT's board of directors, prepared with the assistance of counsel, including detailed presentations by GCT's management regarding its strategy and relevant legal considerations on the competing RBT2 and DP4 projects;
c) GCT's confidential board minutes, detailing the board's discussions about the RBT2 and DP4 projects; and
d) Third-party scientific, engineering and environmental reports commissioned by GCT which relate to the RBT2 and DP4 projects.

[47] This description is sufficient to indicate the nature of the confidential information in issue in this motion. The information was provided by GCT to Lawson in the context of the solicitor-client relationship between Lawson and BCI, and it was provided subject to the confidentiality agreement signed by BCI. The terms of that agreement are explicit: the information was to remain confidential, any solicitor-client privilege relating to the information was not waived, the information would be guarded by an "information barrier" preventing any sharing within the firm, and members of any law firm involved in the due diligence review would not provide other legal services to VFPA.

[48] I find that the description of the information, bolstered by the terms of the confidentiality agreement, is sufficient to meet the test set out in the case law: see *Celanese Canada*, at para 42.

In this case, in view of the evidence filed on the question, it is not necessary to infer that confidential information was shared. I find that GCT has met its onus of demonstrating that confidential information was shared. It is not seriously disputed that Lawson received this information in the context of a solicitor and client relationship between it and BCI. The information is described with sufficient detail to support the conclusion that it is confidential and relevant. There is no dispute that it was obtained by BCI and Lawson subject to the terms of an express confidentiality agreement. This is sufficient to meet this element of the analysis.

[49] I am not persuaded by the VFPA argument that GCT was required to provide more evidence that Lawson counsel may have had access to the confidential information, and in particular that the absence of specific records from the virtual data room is fatal to the GCT claim. I find that the inability of GCT to establish, with records from the company that ran the virtual data room, which document was uploaded or when it was accessed does not diminish the weight of the affidavit evidence. These sorts of details are not necessary to demonstrate that confidential information was provided by GCT and was made available to Lawson. In the circumstances of this case, nothing more is required.

[50] This element of the test has been satisfied.

(3) Is the confidential information relevant to the matters in issue?

[51] The law requires that the confidential information be relevant to the matters in dispute between the parties. The point has been expressed in a number of ways. In *McKercher* the Chief Justice found at paragraph 54 that "[t]he information must be capable of being used against the client in some tangible manner." In that case the law firm's awareness of the Canadian National

Railway Co.'s (CN) litigation philosophy, and any confidential information it held about real estate, insolvency, and personal injury files, were found to be unrelated to the claim for damages on which the firm was retained.

[52] It is not necessary to engage in a lengthy discussion of this point. The description of the information set out above also makes clear that it included information that is relevant to the matters in issue between GCT and VFPA. Indeed, Lawson obtained confidential information about GCT's position and legal strategy relating to the very matters in dispute between the parties in the CEAA Review Panel as well as the underlying judicial review.

[53] A key element of the due diligence review conducted by Lawson was to consider any legal issues that would have a material effect on the current financial state and future prospects of GCT. On the limited record before me, I do not have detailed information on the two projects. However, there is sufficient indication in the materials to demonstrate that each of the two projects involved a significant financial investment and a substantial increase in the capacity of the port, which would in turn generate significant ongoing revenue. In light of the size and importance of the respective projects, it is easy to understand why this information was relevant to the review.

[54] Furthermore, it is evident that the information about GCT's plans and strategies relating to RBT2 and its own DP4 proposal would be relevant to the law firm that is representing VFPA in the environmental assessment process and in relation to its decision regarding approval of the GCT project.

[55] I find that this element of the test has also been met.

(4) When did GCT and Lawson become adverse in legal interest? When did this move beyond a situation of competition between business entities?

[56] The parties are in fundamental disagreement about when they became adverse in legal interest. GCT submits that it was in a legally adverse relationship with VFPA throughout the relevant period, and at least since January 2017. It describes RBT2 and DP4 as "competing" proposals, and points to the inherent conflict of interest in VFPA's dual roles of regulator and proponent.

[57] I note in passing that neither party has emphasized the role played by VFPA as landlord, and although its approval was required in order for the Transaction to be completed, I find that nothing turns on this. The VFPA role as landlord is a fact, but it is not particularly relevant to this Motion.

[58] VFPA submits that it was, at most, a business competitor with GCT until the moment that GCT launched its applications for judicial review. VFPA points to the jurisprudence which finds that the conflict rules do not apply to constrain a law firm from representing parties who may be opposed in interest from a strategic or business perspective. The rules only apply where a legally adverse relationship exists.

[59] Case-law supports the proposition that the conflict of interest rules only apply where the facts demonstrate that the parties are legally adverse in interest. In *Strother* the Supreme Court found that the conflict rules will not generally apply to limit a law firm from representing competing businesses, as long as the confidential information of each client is appropriately protected, and the competition does not relate to a unique opportunity: "the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different

clients who are in the same line of business, or who compete with each other for business… The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity" (at paras 54-55).

[60] This was affirmed by the Supreme Court in *McKercher*, in which the Chief Justice affirmed both the stringency of the "bright line" rule in regard to the duties of counsel towards their clients, and also the limitations on the application of that rule. The following summary captures these points:

> [41] The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related *and* unrelated matters. However, the rule is limited in scope. It applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. It applies only to legal – as opposed to commercial or strategic – interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected.
>
> [Emphasis in original.]

[61] In the circumstances of this case, I agree with VFPA that the mere fact that it acted as landlord and regulator of GCT did not, in and of itself, give rise to a situation where VFPA was legally adverse in interest to GCT. There is no doubt that once VFPA learned that GCT was about to launch its applications for judicial review, the relationship was one of legal adversity. I do not accept, however, VFPA's argument that it was only then that it became legally adverse relationship to GCT.

[62] As I have noted previously, on the record before me it is evident that VFPA has been a proponent of RBT2 for many years, and it has been actively pursuing CEAA approval of that project since 2013. The project is of major significance to VFPA, and it has invested time and resources to obtain the necessary approvals. While the procedure before the CEAA may not be identical to civil litigation, it is a process with significant legal impacts before an administrative tribunal with specific and significant statutory authorities. In that process there are parties who support and oppose projects, and they often retain counsel to advance their positions. Such parties are, by any measure, legally adverse in interest.

[63] The question here is when did VFPA become aware that GCT was not supporting, or was actively opposing, approval of its project in the CEAA process, because GCT was pursuing an alternative expansion option, namely DP4? At that point VFPA knew, or ought to have known, that the situation had evolved beyond business competition, and that it was in a legally adverse relationship with GCT.

[64] The record is not entirely clear as to when, precisely, GCT first expressed its position before the CEAA, or when, exactly, VFPA learned that GCT was not supporting approval of RBT2. However, there is correspondence which indicates that as early as September 22, 2014, GCT made submissions to the CEAA on the proposed terms of reference for the Review Panel that was to examine RBT2, in which GCT challenges various assumptions underlying the proposed project and called for a "more thorough review of alternative means of carrying out the project including a discussion on the densification of existing terminals." I find that while this is not a ringing endorsement of RBT2, neither is it sufficiently clear and unequivocal to support a conclusion that VFPA and GCT had become legally adverse in interest as of that point.

[65] There is subsequent correspondence, however, which makes it clear that GCT was actively opposed to the approval of RBT2. In submissions to the CEAA Review Panel dated February 8, 2019, GCT states the following:

> The Proponent's RBT2 project that was originally proposed in 2003 and then again in 2013 is now outmoded and, GCT submits, no longer viable given changes in a number of market factors. It is GCT's view that the long-term sustainability of our gateway is only achievable through careful terminal design that reflects a modern, innovative, and a more sustainable approach to planning and constructing such an expansion. To that end, GCT's submission regarding the Proponent's sufficiency of information focuses on gaps in three key areas: 1. Project Rationale; 2.Alternative Means Assessment; and 3. Environmental Impact Statement.

[66] It is not necessary to quote the GCT submission further; the passage above makes it clear that GCT did not support approval of RBT2. This submission was provided to the CEAA Review Panel, and it was also provided to VFPA. In view of the nature of the Review Panel process, the stage of the proceeding, and the interests of the respective parties, I find that, at least as of February 8, 2019, VFPA was or ought to have been aware that it was in a legally adverse relationship with GCT in regard to the CEAA approval process.

[67] The fact that Lawson advised VFPA on the denial of approval of the Preliminary Project Enquiry for DP4 bolsters this conclusion. By January 2017 Lawson was aware that GCT was advancing a separate proposal to expand the container capacity of the port. At this time Lawson had been acting for VFPA on RBT2 for several years and it would have been familiar with the environmental, commercial, and regulatory context for both projects. Lawson advised VFPA on its decision letter, dated February 29 [*sic*], 2019, denying approval for the Preliminary Project Enquiry submitted by GCT. This letter, it should be recalled, states that VFPA is not proceeding

with the approval process for the GCT project because its preferred project for port expansion was RBT2, and that any further consideration of the GCT project would have to wait until RBT2 had been approved. This confirms the conclusion that GCT and VFPA were in a legally adverse relationship as of February 2019.

[68] In light of my conclusions above, it is not necessary for me to make a finding in regard to whether there was also a legally adverse relationship regarding the VFPA role as regulator and landlord in relation to DP4 proposed by GCT. This may be an issue that is pertinent to the consideration of the merits of the application for judicial review, and it is best left to the judge hearing that matter.

[69] In view of my finding that VFPA was in a legally adverse relationship with GCT at least as of February 8, 2019, this element of the test is also satisfied.

(5) Did Lawson take timely and effective measures to protect the confidential information, once VFPA became legally adverse to GCT?

[70] GCT argues that it was legally adverse to VFPA throughout the period of the due diligence review (*i.e.* as of May 2018), and that the evidence filed on the motion makes it clear that Lawson failed to take adequate or timely steps to protect its confidential information from being shared with the counsel working on the RBT2 approval process. GCT submits that Lawson was familiar with the steps it needed to take in order to meet the conflict test; this is demonstrated by the measures the firm put in place in 2015 to protect the information regarding RBT2. Once the due diligence review commenced, however, Lawson failed to take similar measures to protect the confidential information it obtained from GCT. These measures were not put in place until the applications for judicial review were launched.

[71] GCT submits that, in the meantime, many different Lawson counsel had access to the confidential information relating to the Transaction, including approximately one third of the team working for VFPA on RBT2. GCT points, in particular, to the fact that Mr. Bergner provided advice to BCI on Aboriginal issues at the same time as he was providing advice to VFPA on the very same matters.

[72] Moreover, GCT contends that the issue is not limited to which Lawson counsel had access to the virtual data room for the Transaction. It argues that Lawson has also failed to demonstrate that it took steps to safeguard the confidential information it held in its own computer system or paper files; instead, the evidence is that any Lawson employee could access this information, and the computer records filed on the motion show that several employees not involved in the Transaction did access it.

[73] VFPA starts from the position that Lawson was under no obligation to take further steps to protect the information until the applications for judicial review were launched; prior to that Lawson was acting for BCI and VFPA on matters that were unrelated, or at most that involved simple competition between businesses.

[74] VFPA also points to the affidavit evidence it filed from the lead lawyer on the due diligence review, which states that he did not specifically direct any member of the team to review the confidential information relating to RBT2 or DP4, and that he does not recall anyone raising any issue relating to these projects during the due diligence review. Further, the affidavit states that the matter is not referred to in either the lengthy due diligence review or the key issues report that was provided to BCI, nor does it appear in the extensive binder of materials that accompanied the report.

[75] VFPA also points to the affidavit from John Smith, the chair of the Lawson Conflicts and Ethics Committee, which indicates that a report from its internal information technology department identified all of the lawyers who worked for VFPA and who also accessed any documents relating to the Transaction. This report shows that only two of these counsel had worked on other matters relating to VFPA. One of these counsel was Mr. Bergner, whose involvement has been described previously. The other had a discrete role relating to BCI's internal approvals of the Transaction, and did not access any of the documents relating to the substance of the due diligence review. This affidavit also states that twenty-seven of the twenty-nine lawyers who worked on the BCI due diligence review confirmed that they had not shared any confidential information relating to GCT with anyone outside of the group working on the review. Of the two lawyers who had shared information, once simply provided a copy of the due diligence review to a colleague as an example of how such a report might be structured, while the other counsel stated she had no recollection of having reviewed that report.

[76] Similarly, the affidavit states that almost all of the lawyers working on RBT2 for VFPA confirm that they have not received any confidential information relating to GCT from any of the lawyers who worked on the due diligence review. Of the three counsel in addition to Mr. Bergner who did have such access, each of them is said to have had a minimal role in the matter.

[77] VFPA argues that this evidence shows that there has not actually been any sharing of the confidential information, and therefore a reasonably informed member of the public would be satisfied that there was no reason for concern that the confidential information had been misused. VFPA states that they have met their onus to rebut any concern about the sharing of confidential information.

[78] The *Martin* decision remains the leading authority on conflict relating to the risk of misuse of confidential information. It established a rebuttable presumption that where relevant confidential information is imparted in the context of a solicitor-client relationship, the information would be shared within the firm. The Court did not adopt the strict rule applied in the United States, pursuant to which any demonstration of a "possibility of real mischief" was sufficient to disqualify the lawyer or firm. Instead, Sopinka J. adopted a "bright line" rule forbidding a lawyer who has confidential information from acting against a client or former client (p 1261). In such a case, the disqualification is automatic. In other situations, where the question is whether partners or associates of the lawyer should be barred from acting, the following test (p 1262) will apply:

> There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. … Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession.

[79] In *Martin*, Sopinka J. specifically dealt with the issue of affidavits by lawyers, and found that this would not be sufficient (p 1263):

> *A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every

> case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica, supra,* to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.

[80] In *McKercher,* the Chief Justice stated that when a situation of potential conflict falls outside the scope of the bright line rule, "the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict – there is only a deemed conflict of interest if the bright line rule applies." As noted previously, in that decision the Chief Justice emphasized the consideration of relevant contextual factors.

[81] The jurisprudence also establishes that the objective measures necessary to rebut the inference that confidential information was shared must be put into effect in a timely manner. This will obviously depend on the circumstances; the key question is whether the firm acted diligently as soon as the conflict, or potential conflict, arose: see *Ford Motor Company of Canada v Osler, Hoskin & Harcourt* (1996), 27 OR (3d) 181, [1996] OJ No 31 (QL) (Gen Div) [*Ford Motor Co.*]; *1964 Bay Inc (Budget Car Rentals Toronto Limited) (Re),* 2008 CanLII 54295 (ON SC). In *Ford Motor Co.*, Justice Winkler discussed the rationale for this at paragraph 65 (QL):

> It is settled law… that the screening mechanism must be put in place when the conflict first arises… Failure to fulfil this requirement is fatal to the continuation of the Osler, Hoskin retainer… For if the screen is not in place for a material period of time… there is no "clear and convincing" evidence within the meaning of *MacDonald Estate v. Martin*, with the result that the inference must be drawn that relevant confidential information was

> conveyed. To adopt the words of Huband J.A. in York Investments, "the appropriate measure cannot be put in place after the event and still satisfy the public concern that no breach of confidentiality will take place." …

[82] To summarize the applicable legal principles:

- Where confidential information relevant to the matter in which the alleged conflict is imparted in the context of a solicitor-client relationship, there is an inference that it was shared within the firm; if the information was imparted by a party who is not a client of the lawyer or law firm, it is necessary to consider the circumstances to determine whether the lawyer was under a duty to treat it as confidential; the onus is on the claimant to establish this;
- Once this is established, the onus shifts to the responding party; the inference that confidential information has been shared can be rebutted, either by: (i) demonstrating that no confidential information was actually shared (see, for example, *Sikes v Encana*, 2017 FCA 37, leave to appeal to SCC refused, Doc 37509, 2017 CarswellNAT 6020), or that the information is not relevant to the matter on which the lawyer seeks to act (see, for example, *McKercher* and *MediaTube Corp v Bell Canada*, 2014 FC 237 [*Mediatube*]); or (ii) that the lawyer and law firm took adequate, objectively verifiable and timely measures that would satisfy a reasonably informed member of the public that there was no real risk that the information was shared.
- Each case must be examined on its merits, and the relevant contextual factors should be considered, including the size of the law firm, the nature of the alleged conflict, the potential impact of disqualification on the client, and whether the claim is being advanced for strategic purposes or by a client which could not reasonably object to the lawyer

> acting for the client. The overarching goal is to adopt and apply the rules in a manner which best protects and advances the integrity of the legal system.

[83] I find that the most relevant period in assessing whether Lawson took adequate and timely steps is between the date that Lawson knew or ought to have known that VFPA and GCT were in a legally adverse relationship (at the latest, February 8, 2019), and the date of the launch of the applications for judicial review (March 28, 2019). Although Lawson was in possession of confidential information from GCT relating to the two projects prior to February 8, 2019, it was under no obligation to take special steps to prevent the sharing of that information within the firm at any time prior to that date because I find that no actual legal conflict arose prior to the time that VFPA and GCT became legally adverse in interest, per *McKercher* at paragraphs 32-35. In view of my finding, it is not necessary to consider further the issue of whether Lawson should have taken earlier steps in view of the obvious potential for a conflict situation to arise.

[84] It should have been clear to Lawson, at least as of February 8, 2019, that there was a potential or actual conflict of interest arising from the risk that the confidential information it held from GCT about the VFPA matters could be shared with others in the firm who were advising VFPA on these very same matters. This is sufficient to trigger the duty on Lawson to take steps to prevent any sharing of that information.

[85] I find that Lawson has failed to meet its onus of demonstrating that it took adequate, timely and objectively verifiable measures to protect the confidential information. The measures Lawson did take in 2015 to secure the information about RBT2 were to prevent the sharing of information about that project with others in the firm. I would underline, however, that this was meant to prevent information from being shared with others in the firm; there is no evidence that

it somehow restricted any member of that team from gaining access to information from others in the firm. That is to say, the measures Lawson put in place may have prevented information about RBT2 from going out to others in the firm, but it was not intended to prevent information going into the team from elsewhere in the firm.

[86] Furthermore, for the reasons set out in *Martin*, I find the affidavits of the lawyers are insufficient.

[87] First, the Lawson affidavit evidence in which the counsel who conducted the due diligence review state they did not access this information, and that it was not reflected in the due diligence report or background materials, is largely irrelevant. GCT does not contend that the conflict arose because some Lawson lawyers working for BCI had access to this information; rather, the claim is that the firm and those lawyers did not take sufficient measures to prevent any sharing of that information with the members of the firm who were working for VFPA on RBT2.

[88] Second, the affidavits of the lawyers that speak to the point that the lawyers working on the Transaction did not share the confidential information with the team working for VFPA fall within the category of proof that Sopinka J. found to be insufficient in *Martin*; as he expressed it, such affidavits are "no more than the lawyer saying, 'trust me'" (at p 1263).

[89] If one was to parse the wording of the affidavits, it could be argued that their careful wording casts doubt on the weight that should be attributed to the statements. To take but one example, the affidavit evidence states that the lawyers who worked on the VFPA matter did not obtain any confidential information from any of the lawyers who worked on the Transaction. One is left to wonder whether they obtained any of the confidential information by other means,

either from the paper files or the Lawson computer system. In noting this I do not wish to call into question the professional integrity of any of the Lawson counsel. Rather, it is mentioned simply to emphasize the wisdom of the approach adopted by Sopinka J. in *Martin*, which requires law firms to adopt objectively verifiable measures in accordance with the governing professional standards, rather than relying upon affidavits from lawyers in the firm.

[90] In this context, it should be mentioned that certain allegations were raised that counsel for Lawson on the judicial review had interfered with the cross-examination of one of the Lawson witnesses. It was suggested that this cast doubt upon all of the evidence filed by Lawson. In view of my conclusions on this issue I do not need to address this unfortunate and regrettable matter any further.

[91] For the reasons set out in *Martin*, I find that it is not tenable to parse the particular wording of the various affidavits to determine whether they demonstrate that there is no reason for concern. Moreover, I do not find that the affidavit evidence here would satisfy a reasonably informed member of the public that there was no risk that confidential information that could have been relevant to Lawson's work for VFPA could have been shared within the firm: see *Chapters Inc.* at para 37.

[92] In *McKercher*, the Chief Justice stated that when a situation of potential conflict falls outside the scope of the bright line rule, "the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict – there is only a deemed conflict of interest if the bright line rule applies." VFPA argues that GCT has failed to meet its onus, while GCT claims that this rule does not apply because *McKercher* did not involve a situation where the conflict arose because confidential information had been imparted.

[93] I find that *McKercher* and other cases since *Martin* have given greater emphasis to the need to consider all of the relevant circumstances if the bright line rule against concurrent representation does not apply. In the case at bar, the conflict does not arise because of concurrent representation of two clients; it bears repeating that GCT was never a client of Lawson. However, I find that *McKercher* also confirms that the conflict rules will be applied strictly to prevent a substantial risk of sharing of confidential information imparted in a solicitor-client relationship. That is the situation in this case, and I find that GCT has met its onus of establishing a substantial risk that confidential information would be misused, and Lawson has failed to meet its burden of demonstrating that it took timely, adequate and objectively verifiable steps to prevent the sharing of the information within the firm.

(6) Summary of the Analysis on Issue 1: whether Lawson is in a conflict

[94] I find that Lawson is in a conflict, because: Lawson obtained confidential information in the context of a solicitor-client relationship; this information is relevant to the underlying dispute between GCT and VFPA in both the applications for judicial review and the CEAA Review Panel processes; and Lawson failed to take timely and adequate steps to protect this confidential information once a legally adverse relationship arose between GCT and VFPA.

[95] To return to the fundamental question that must be answered in any analysis of a situation of a conflict of interest arising because a lawyer has obtained confidential information: would a reasonably informed member of the public be satisfied that no use of the confidential information would occur if Lawson is allowed to continue to represent VFPA in these proceedings?

[96] To put the issue at its starkest, I find that a reasonably informed member of the public would describe the risk of misuse of confidential information in the following way: VFPA was a long-standing client of Lawson and it was pursuing a major port expansion project. Lawson had been its counsel on that project for many years. VFPA and Lawson were aware since January 2017 that GCT was proposing an alternative project to expand the port, and by February 2019 Lawson knew that GCT was actively opposing CEAA approval of the VFPA project. In the course of doing work for another client, Lawson came into possession of confidential information about GCT's legal analysis and strategy in regard to the VFPA project, and its own alternative project. Lawson counsel working for VFPA on the project would have been very interested in using that information to provide advice to VFPA on these matters. Lawson cannot provide sufficient, independently verifiable, guarantees that the confidential information was not used; it relies on affidavits from lawyers that basically state "trust us."

[97] This summary puts the matter in its starkest terms, but I find that it is a fair assessment of what a reasonably informed member of the public would think about the situation. I find that when Lawson was first retained by BCI to provide advice on the Transaction, its conflict check failed to identify the potential issue with its dual representation of VFPA and BCI. When Lawson was retained to undertake the due diligence review, it did not conduct a more thorough conflict check, and the problem was again not identified. This resulted in a situation in which Lawson obtained confidential information from GCT, in the context of a solicitor-client relationship. This information is undoubtedly relevant to the matters in issue in the judicial review and CEAA Review Panel proceedings. Lawson did not take adequate and timely steps to prevent any sharing of, or access to, this confidential information because it had not identified the situation of conflict.

[98] GCT has established that Lawson was in a conflict of interest. This leads to the second issue, as to the appropriate remedy.

B. *Is the remedy of disqualification of Lawson appropriate, and related to this, should such an Order issue in regard to the CEAA process as well as the applications for judicial review?*

[99] This issue involves two questions, which I shall deal with separately in light of the conclusions that I reach on each of them.

(1) Should Lawson be disqualified from continuing to represent VFPA in the applications for judicial review?

[100] GCT argues that once it is demonstrated that a lawyer had access to confidential information in a situation giving rise to a potential conflict, a heavy burden shifts to the lawyer to demonstrate that adequate, objectively verifiable, and timely steps were taken to prevent the sharing of this information within the firm. In this case, GCT submits that Lawson did not meet this burden. GCT submits that the Supreme Court's decision in *Martin* is the binding relevant authority, and it establishes that if the onerous burden is not met by the lawyer having access to the confidential information, the appropriate remedy is to disqualify the lawyer or law firm, since nothing short of that will ensure that public confidence in the integrity of the legal system is maintained. GCT argues that any "balancing" of interests in determining whether disqualification is appropriate is an error of law, since the test set out in *Martin* incorporates the relevant interests: *Chartis* at paras 69-71.

[101] VFPA argues that the removal of counsel is a drastic remedy that would cause it significant prejudice. It contends that the stringent approach set out in *Martin* does not apply to

situations that do not involve clients. Moreover, subsequent decisions make it clear that a more contextual analysis must be undertaken, including the Supreme Court decision in *McKercher*, and a recent decision of Madam Justice Catherine Kane of this Court in *Mediatube*.

[102] VFPA stressed that neither of these decisions was referred to by GCT, and submits that there are several factors in this case which weigh against the remedy of disqualification, including: the fact that GCT was never a client of Lawson; the long-standing nature of the retainer for VFPA, and the prejudicial impact that a change of counsel would have on VFPA; the loss to VFPA of its choice of counsel, when remedies short of that could address the problem; and the strategic timing of the motion to disqualify, just prior to the final submissions in the CEAA matter, and long after GCT learned that Lawson was representing VFPA in all of these matters.

[103] I agree with the submission of VFPA that more recent decisions have put more emphasis on a contextual approach. In *McKercher* the Supreme Court put it in this way:

> [61] As discussed, the courts in the exercise of their supervisory jurisdiction over the administration of justice in the courts have inherent jurisdiction to remove law firms from pending litigation. Disqualification may be required: (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.

[104] This passage was cited in *Mediatube*, where Kane J. stated at paragraph 33 "…even if a conflict of interest is found, either because confidential information is misused or the situation falls within the scope of the bright line rule, disqualification of the law firm is not the only remedy and is not automatic, but may be required in some circumstances…"

[105] It is important to make two key distinctions in regard to these decisions. First, neither *McKercher* nor *Mediatube* were cases that involved a risk of misuse of confidential information. In *McKercher* the conflict arose because the law firm represented claimants seeking substantial damages from CN, which had been a long-standing client of the firm. The Supreme Court makes clear that it finds there was no risk of misuse of confidential information: see paras 10 and 54. In *Mediatube* the claim was that a law firm could not act for a client that was claiming against Bell Canada, because it had previously acted for one of the Bell "family" of companies. This claim was rejected by Kane J., who explicitly found no relevant confidential information was at risk: see paras 121-24.

[106] Second, insofar as there is a discussion in *McKercher* (at para 62) of the appropriate remedy in a situation of a risk of misuse of confidential information, it does not favour the position advanced by VFPA: "Where there is a need to prevent misuse of confidential information, as set out in *Martin*, disqualification is generally the only appropriate remedy, subject to the use of mechanisms that alleviate this risk as permitted by law society rules." In *McKercher* the Court gives particular emphasis to the need to consider a number of relevant circumstances where the purpose is to "protect the integrity and repute of the administration of justice" in circumstances where confidential information has not been imparted (see paras 63-64), or where there is no longer a risk of misuse of confidential information because the solicitor-client relationship has ended (see para 65). To the same effect, in *Strother*, Binnie J. found that remedies short of disqualification should be examined in cases where there is no issue of confidential information (see para 59).

[107] These considerations do not arise in the case at bar. As noted previously, Lawson obtained confidential information from GCT, which was not its client, in the context of its solicitor-client relationship with BCI. I have previously found that the information is relevant to the underlying dispute between VFPA and GCT. I have also found that Lawson did not take timely and adequate, objectively verifiable measures to prevent any sharing of this confidential information within the firm.

[108] VFPA submits that because the risk of misuse of confidential information arose in the context of a "non-client" relationship, the drastic remedy of disqualification should not apply automatically, and it argues the situation calls for a more flexible application of the doctrine, and consideration of the types of factors enumerated in *McKercher*. VFPA contends that a remedy other than disqualification is appropriate in the circumstances of this case.

[109] To return to the foundations of the conflict doctrine, this question must be assessed by considering what rule best achieves the underlying objective of furthering the confidence of the public in the integrity of the administration of justice. To repeat the words of Binnie J. in *Neil*: "The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests" (at para 15).

[110] Where, as in this case, the confidential information that is revealed is subject to solicitor-client privilege, and is directly relevant to the matters in dispute, it is not evident why the origin of the confidential information should affect the remedy that is appropriate. As noted previously, it may be rare that a lawyer obtains this sort of confidential information from a party who is not a client, but where that does occur the interests are virtually identical to those that arise where the

information originated directly from the client. Viewed from the perspective of the integrity of the system of justice, and the fairness of the adversarial system, the risks are the same.

[111] Justice Binnie described it in the following way in *Celanese Canada*:

> 34 Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands. Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. The defendant's witnesses ought not to have to worry in the course of being cross-examined that the cross-examiner's questions are prompted by information that had earlier been passed in confidence to the defendant's solicitors. Such a possibility destroys the level playing field and creates a serious risk to the integrity of the administration of justice. To prevent such a danger from arising, the courts must act "swiftly and decisively" as the Divisional Court emphasized. Remedial action in cases such as this is intended to be curative not punitive.

[112] In that decision, Binnie J. found that the remedy of disqualification should not be automatic:

> 56 I agree with the courts below that if a remedy short of removing the searching solicitors will cure the problem, it should be considered. As the intervener Canadian Bar Association ("CBA") puts it in its factum, the task "is to determine whether the integrity of the justice system, viewed objectively, requires removal of counsel in order to address the violation of privilege, or whether a less drastic remedy would be effective". The right of the plaintiff to continue to be represented by counsel of its choice is an important element of our adversarial system of litigation. In modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made. There is no such thing, in these circumstances, as automatic disqualification.

[113] However, in that case Binnie J. concluded at paragraph 60 that the privileged documents came into the hands of the law firm "in a way that was unintended but avoidable. Inadequate precautions were taken. Those who fail to take precautions must bear the responsibility." Considering all of the relevant factors, Binnie J. concluded that the remedy of disqualification of the firm was appropriate.

[114] I find that the circumstances in the case at bar also involve a situation which may have been unintended but was certainly avoidable. Lawson failed to conduct an adequate conflict check when it was first retained by BCI to provide tax advice on the Transaction, and it apparently failed to understand with sufficient granularity the nature of the work it was engaged in on behalf of VFPA on the CEAA retainer. When Lawson was then retained by BCI to conduct the due diligence review it did not conduct a thorough conflict check, and again the nature of the conflict, or potential conflict, between VFPA and GCT did not emerge. Nor did it become evident to Lawson as the matters progressed. This led to the situation where Lawson was acting for VFPA in matters in which it was in a legally adverse relationship with GCT, while it had confidential information about GCT's position on the very matters in dispute – matters, it should be recalled, on which Lawson was advising VFPA.

[115] Lawson must take responsibility for its failure to take adequate and timely measures to prevent the sharing of this confidential information within the firm. I find that no remedy short of disqualification is appropriate in the circumstances. I accept that this will cause disruption and hardship to VFPA, and may lead to some delay in the judicial review proceedings, but I note as well that the only active matters currently before the Court involve a challenge by GCT to the denial of its Preliminary Project Enquiry relating to DP4, as well as a recently-filed motion by

VFPA that this application has been rendered moot by the adoption and proclamation of the new *Impact Assessment Act*, SC 2019, c 28. These matters are important, but do not have the same degree of urgency for the parties in comparison with the original (and now stayed) proceeding involving the CEAA Review Panel proceedings.

[116] I note that in *Martin* and *McKercher* the Supreme Court has found that the law on conflicts must seek to give priority to the interest of protecting and promoting the integrity of the legal system, over the organizational structures chosen by law firms, or the personal and professional interests of lawyers seeking to advance their careers. The Supreme Court of Canada has noted that while the disruption and hardship to clients is an important consideration, it should not be the pre-eminent factor in applying the law of conflicts of interest.

[117] For these reasons, I find that an order disqualifying Lawson from acting for VFPA in the judicial review applications is the only appropriate remedy that will ensure that the public confidence in the integrity of the legal system is maintained.

(2) Should an order issue removing Lawson as counsel in the CEAA Review Panel proceedings?

[118] GCT also seeks an order removing Lawson as counsel in the CEAA Review Panel proceedings, on the basis that the same conflict that disqualifies Lawson from continuing to act in the applications for judicial review should bar it from continuing to represent VFPA before the Review Panel. If anything, the confidential information is more useful to Lawson in those proceedings than in the judicial reviews.

[119] VFPA submits that this Court does not have the jurisdiction to issue this order, since the Federal Court is not a court of inherent jurisdiction. VFPA also argues that since GCT did not raise this objection before the Review Panel, it should not be allowed to do so on this motion.

[120] I agree with the second argument advanced by VFPA. It is premature to deal with the application by GCT in regard to whether Lawson should be disqualified from representing VFPA in the CEAA Review Panel proceedings, because GCT, as a party to those proceedings, has not raised this objection before the Review Panel.

[121] It is not necessary to engage in a lengthy discussion of the doctrine on this point; it is clear and consistent. The rationale for not dealing with such matters on judicial review before they have been raised before the administrative decision-maker is set out by the Federal Court of Appeal in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30-33. The general rule is that a party must make its argument first before the administrative decision-maker, and only when that process is finished can they proceed to court.

[122] In the case at bar, GCT did not seek an order from the Review Panel to disqualify Lawson as counsel in its proceedings. GCT was a party in the Review Panel proceedings, and made submissions on other issues. I find that there are no exceptional circumstances that warrant a departure from the usual rule in this case, and therefore I dismiss the application by GCT for an order disqualifying Lawson from representing VFPA in the CEAA Review Panel proceedings.

[123] In light of this finding, I do not need to address the VFPA argument regarding the jurisdiction of the Federal Court, and I will say no more about it.

V. Costs

[124] GCT sought costs on a higher scale than the usual tariff. VFPA sought an opportunity to make further submissions if it was ordered to pay costs. In the exercise of my discretion pursuant to Rule 400, I find that there are no special considerations that warrant an award of costs outside of the usual scale, and pursuant to Rule 407 I award costs to GCT, payable by VFPA, in accordance with column III of Tariff B, for two counsel, plus reasonable disbursements. If the parties are unable to agree on an amount, they may make submissions of no more than three (3) pages (excluding draft bills of costs or other supporting evidence) within fourteen (14) days of this Order.

VI. Conclusion

[125] For these reasons, I find that:

1. GCT has established that Lawson is in a conflict of interest because it obtained confidential information relevant to the dispute between GCT and VFPA, in the context of a solicitor-client relationship between Lawson and BCI, and Lawson did not take adequate or timely steps to prevent this information from being shared within the firm;
2. The remedy of disqualification is appropriate in the circumstances;
3. The application by GCT for an order disqualifying Lawson from representing VFPA in the CEAA Review Panel proceedings is dismissed, because GCT did not seek such an order from the Review Panel and there are no exceptional circumstances warranting a departure from the usual rule that parties must first seek their remedies from the administrative decision-maker;

4. I award costs to GCT, payable by VFPA, in accordance with column III of Tariff B, for two counsel, plus reasonable disbursements. If the parties are unable to agree on an amount, they may make submissions of no more than three (3) pages (excluding draft bills of costs or other supporting evidence) within fourteen (14) days of this Order.

ORDER in T-538-19

THIS COURT'S JUDGMENT is that:

1. Lawson Lundell LLP is disqualified from representing the Vancouver Fraser Port Authority in the applications for judicial review in Court File Numbers: T-537-19 and T-538-19.

2. The application by GCT for an order disqualifying Lawson from representing VFPA in the CEAA Review Panel proceedings is dismissed.

3. I award costs to GCT, payable by VFPA, in accordance with column III of Tariff B, for two counsel, plus reasonable disbursements. If the parties are unable to agree on an amount, they may make submissions of no more than three (3) pages (excluding draft bills of costs or other supporting evidence) within fourteen (14) days of this Order.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-538-19
STYLE OF CAUSE:	GCT CANADA LIMITED PARTNERSHIP v VANCOUVER FRASER PORT AUTHORITY AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JULY 2, 2019
ORDER AND REASONS:	PENTNEY J.
DATED:	SEPTEMBER 6, 2019

APPEARANCES:

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