Date: 20080312

Docket: T-830-05

Citation: 2008 FC 332

Vancouver, British Columbia, March 12, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ROBBINS & MYERS CANADA, LTD.

Plaintiff

and

TORQUE CONTROL SYSTEMS LTD.; and ANDREW WRIGHT

Defendants

REASONS FOR ORDER AND ORDER

O'KEEFE J.

[1] This is a motion by the defendants pursuant to Rule 51 of the *Federal Courts Rules*, S.O.R./98-106 for an order setting aside the order of Prothonotary Lafrenière dated September 24, 2007 in which the Prothonotary found that the firm of Ridout & Maybee LLP (Ridout) was disqualified from acting for the defendants in this proceeding.

Background

[2] The patent at issue in the underlying proceeding is entitled, "Pull-through Tubing String Rotator for An Oil Well" (the '975 Patent). The invention that was the subject of the '975 Patent was initially owned by a company called Alberta Basic Industries Ltd. (ABIL), whose employees conceived the invention.

[3] ABIL retained Peter Everitt (Everitt) then of Kvas Miller Everitt (Kvas Miller) to prepare and file patent applications for the invention in both the United States and Canada. The applications named three ABIL employees as the inventors (Ring, Blundell and Wright).

[4] Everitt filed an application for the invention in Canada on January 24, 2000. This application was changed after Everitt no longer represented ABIL. The '975 Patent for the invention issued late claiming priority from the US application. Kvas Miller remained the agent and representative for ABIL in respect of the '975 application until April 24, 2001.

[5] ABIL assigned the invention and the '975 application to Robbins & Myers Canada, Ltd. (Robbins) on June 12, 2001. The '975 Patent issued to Robbins on December 14, 2004.

[6] Robbins issued a statement of claim against the defendants in May 2005. The statement of claim alleged that the defendants had infringed various claims of the '975 Patent.

[7] On May 27, 2005, Everitt spoke to Robbins' solicitor and informed him that Kvas Miller had been retained to defend the claim for the defendants and requested an extension of time to file a statement of defence. At this point, Kvas Miller's former representation of ABIL was brought to Robbins' solicitor's attention but Robbins' solicitor made no objection to the defendants' representation by Kvas Miller at this time. The defendants filed their defence in June 2005 and the defence indicated that the firm of Kvas Miller was the defendants' solicitor of record.

[8] Counsel for Robbins wrote to Kvas Miller on March 16, 2006, requesting that the firm withdraw as counsel due to "clear conflict of interests" arising from its previous involvement with the '975 Patent. Kvas Miller refused to withdraw.

[9] In or about June 2006, Chris Kvas (Kvas) and Everitt joined the law firm of Ridout which has also refused to withdraw as counsel for the defendants.

[10] Curtis Ring (Ring), engineering manager for ABIL from 1997 to 2001, stated in his affidavit that Everitt and his prior firm, Kvas Miller were privy to confidential and privileged information concerning the '975 Patent divulged during the preparation and filing of the '975 Patent.

[11] In his affidavit, Ring stated that in his conversations with Everitt he disclosed confidential information about the invention, some of which was not disclosed in the text of the '975 Patent. Ring cannot remember the specifics of the conversations with Everitt but he does state that as a matter of normal practice, these conversations would have necessarily included "discussions of

issues relating to the inventive features of the Invention, advantages over prior rotators . . .". In addition, Ring stated that there were "additional confidential discussions about the inventive features, prior art, different embodiments, meaning of the language and scope of the claims that were not incorporated into the text of the '975 Patent".

[12] Andrew Wright (Wright) was employed by ABIL as a manager salesman from 1996 to 1999. Wright was not present during any of the conversations between Ring and Everitt concerning the '975 Patent. Wright was told by Everitt that he (Everitt) had no confidential information concerning any aspect of the '975 Patent or the invention described in the '975 Patent, as any information he received was found in the text of the document published by the Patent Office. This information was provided by Wright in an affidavit.

[13] Everitt did not file his own affidavit. Wright stated the defendants' lawyer did not file an affidavit as the plaintiff said that the filing of such an affidavit would preclude Ridout from acting on the motion to remove Ridout as the defendants' solicitors.

Analysis and Decision

[14] Standard of Review

The Federal Court of Appeal in *Merck & Co.* v. *Apotex Inc.* 2003, 30 C.P.R. (4th) 40 at paragraphs 17, 18 and 19 stated:

> This Court, in *Canada* v. *Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (F.C.A.), set out the standard of review to be applied to discretionary orders of prothonotaries in the following terms:

> Following in particular Lord Wright in *Evans* v. *Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourcière J.A. in *Stoicevski* v. *Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) they raise questions vital to the final issue of the case.
>
> Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*. [MacGuigan J.A., at pp. 462-463; footnote omitted.]

MacGuigan J.A. went on, at pp. 464-465, to explain that whether a question was vital to the final issue of the case was to be determined without regard to the actual answer given by the prothonotary:

> It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after the prothonotary's decision. Any other approach, is seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory

> rulings from attack (except in relation to errors of law).
>
> This is why, I suspect, he uses the words "they [being the orders] raise questions vital to the final issue of the case", rather than "they [being the orders] are vital to the final issue of the case". The emphasis is put on the subject of the orders, not on their effect. In a case such as the present one, the question to be asked is whether the proposed amendments are vital in themselves, whether they be allowed or not. If they are vital, the judge must exercise his or her discretion *de novo*.

To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:

Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

a) the questions raised in the motion are vital to the final issue of the case, or

b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

Issues

[15] Are the questions raised vital to the final issue of the case?

The issue in this case is whether the removal of the Ridout firm as solicitors of record for the defendants is a question vital to the final issue in the case. In my opinion, this question is not vital to

the final issue of the case. There is no evidence on the record that would suggest that the Ridout firm is the only firm able to provide a defence for the defendants.

[16] Was the Prothonotary's order based upon a wrong principle or upon a misapprehension of the facts?

In order to succeed, the defendants must show that the order of Prothonotary Lafrenière was clearly wrong, in the sense that his exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts. I will now review the law and the various errors that the defendants state the Prothonotary made in his decision.

[17] Law on conflict of interest

In *Blank* v. *Canada (Minister of Justice)* 2006 SCC 34, the Supreme Court of Canada stated at paragraph 26:

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[18] The Supreme Court of Canada in *McDonald Estate* v. *Martin*, [1990] 3 S.C.R. at 1235 had the following to say about a qualifying conflict of interest:

The Appropriate Test

44 What then should be the correct approach? Is the "probability of mischief" standard sufficiently high to satisfy the public requirement that there be an appearance of justice? In my opinion, it is not. This is borne out by the judicial statements to which I have referred and to the desire of the legal profession for strict rules of professional conduct as its adoption of the Canadian Code of Professional Conduct demonstrates. The probability of mischief test is very much the same as the standard of proof in a civil case. We act on probabilities. This is the basis of *Rakusen*. I am, however, driven to the conclusion that the public, and indeed lawyers and judges, have found that standard wanting. In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in *Rakusen*, "that is a thing which you cannot prove" (p. 841). I would add "or disprove". If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

45 Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

46 In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was

> disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. 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 such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.
>
> 47 The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

The Prothonotary stated the test correctly in his decision at paragraph 17.

[19] Existence of a Previous Solicitor/Client Relationship Sufficiently Related to the Retainer from which Removal of the Solicitor is Sought

The defendants alleged that the Prothonotary erred in finding that a solicitor/client relationship existed between the plaintiff and the defendants' counsel (Everitt). The defendants listed indicia of a solicitor/client relationship and submitted that no solicitor/client relationship existed. The defendants admitted that there was a solicitor/client relationship between Everitt and ABIL when the '975 Patent was prepared, but the defendants deny there ever was or is now a solicitor/client relationship between Everitt and the plaintiff. The Prothonotary correctly noted that neither Ridout nor Everitt ever had any relationship with Robbins.

[20] The Prothonotary stated at paragraph 25 of his decision:

> However, in deciding whether a previous relationship exists, the word "client" can be taken to include "persons who were involved in or associated with" the client in connection with the original matter: *UCB Sidac International Ltd.* v. *Lancaster Packaging Inc.* (1993), 51 C.P.R. (3d) 449 at 452 (Ont Ct GD) (Sidac). This expansion of the definition of client was adopted by Justice Barry Strayer in *Almecon Industries Ltd.* v. *Nutron Manufacturing Ltd.* (1994), 55 C.P.R. (3d) 327, and subsequently affirmed by the Federal Court of Appeal at (1994), 57 C.P.R. (3d) 69.

[21] In *UCB Sidac International Ltd.* v. *Lancaster Packaging Inc.* (1993), 51 C.P.R. (3d) 449 (Ont. Ct. G.D.), the Court stated at page 452 :

> . . . The second is that the central question addressed in the judgment was not the two "typical" questions noted, but the overriding question: "Is there a disqualifying conflict of interest?" (see p. 267). In addressing this question, one should look to see whether there is "a previous relationship" not only between the lawyer and the client but also between the lawyer and the "person involved in or associated with" the client in connection with the original matter "which is sufficiently related to the retainer from which it is sought to remove the solicitor" to justify the removal sought.

[22] As a result of this jurisprudence, it is necessary to look beyond the strict solicitor/client relationship. In fact, Justice McDonald writing for the Federal Court of Appeal in *Almecon Industries Ltd.* v. *Nutron Manufacturing Ltd.* (1994), 57 C.P.R. (3d) 69 stated at page 88:

> . . . It is possible, in cases where a previous relationship establishes a clear nexus with the solicitor's retainer, to conclude that the *Martin* test should be applied. . . .

[23] Prothonotary Lafrenière, in essence, found that since ABIL had assigned the invention and the '975 Patent application to Robbins, then Robbins as assignee "could reasonably expect that ABIL's counsel would not act against its interests with respect to the validity of the patent. . . ." In this case, Ridout, as counsel for the defendants, alleged in its statement of defence that the '975 Patent was invalid.

[24] In my opinion, the Prothonotary's finding that there was a previous solicitor/client relationship between Everitt and the plaintiff was not clearly wrong, in the sense that the exercise of discretion by the Prothonotary was not based upon a wrong principle or upon a misapprehension of the facts.

[25] Was relevant confidential information on a balance of probabilities, likely imparted to Everitt by Ring on behalf of ABIL?

The Prothonotary concluded that relevant confidential information was likely imparted to Everitt by Ring when dealing with the '975 Patent. Although not referenced directly by the

Prothonotary, Justice Sopinka of the Supreme Court of Canada stated the following in *MacDonald Estate* above, at paragraph 46 (already quoted but reproduced here for ease of reference):

> . . . 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 swcrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

[26] In the present case, I agree with the Prothonotary's finding of the existence of a previous solicitor/client relationship sufficiently related to the retainer from which removal of the solicitor is sought. That being the case, it is to be inferred that confidential information was imparted to Everitt unless Everitt has satisfied this Court that no such information was imparted that could be relevant. The evidence provided by the defendants was contained in the Wright affidavit but Wright had no first-hand knowledge of the evidence. He was told by Everitt that he did not reveal any confidential information while working on the '975 Patent applications. This is hearsay evidence and as such, does not satisfy me that no relevant information was imparted.

[27] In addition, as noted by the Prothonotary, there was some evidence from the plaintiff's witness Ring that he had shared confidential confidential information with Everitt, although he could not remember the specifics.

[28] Will the confidential information be used to prejudice the former client?

In relation to the second branch of the test, Justice Sopinka in *MacDonald Estate* above, stated at paragraph 47:

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

[29] Justice Sopinka at paragraphs 49 and 50 in *MacDonald* Estates above, went on to discuss the jurisprudence with respect to partners:

> Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. 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. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession. It can be expected that the Canadian Bar Association, which took the lead in adopting a Code of Professional Conduct in 1974, will again take the lead to determine whether institutional devices are effective and develop standards for the use of institutional devices which will

> be uniform throughout Canada. 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. In this regard, it must be borne in mind that the legal profession is a self-governing profession. The Legislature has entrusted to it and not to the court the responsibility of developing standards. The court's role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.
>
> 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.

[30] Based on the above jurisprudence, I am of the opinion that since Everitt has been found to have received confidential information; he is disqualified from acting. He simply cannot act. The larger question is whether Ridout as a firm disqualified because it might misuse the confidential information against the plaintiff. I am of the opinion that there is not sufficient evidence that steps

have been taken by Ridout to ensure that confidential information in the hands of Everitt will not be disclosed to Kvas or other members of Ridout. The only evidence before Prothonotary Lafrenière was a statement of information and belief that physical and computer files no longer exist at Kvas Miller Everitt or Ridout & Maybee LLP. This evidence does not deal with the personal knowledge of Everitt which he could impart to his partners.

[31] I am of the view that there is a risk that the confidential information will be used to the prejudice of the client.

[32] In my view, these two standards strike a balance between the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and the maintaining and strengthening of the administration of justice. On the other hand, it also reflects the ability of a client to pick the lawyer of his or her choice. It allows a solicitor to act against a former client "provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur." (see *MacDonald Estate* above at paragraph 51).

[33] In coming to the conclusion that both Everitt and Ridout as a firm are disqualified from acting for the defendant due to a conflict of interest, I would repeat part of paragraph 38 of Prothonotary Lafrenière's decision:

> Part of the Defendants' defence in this proceeding is the impugnment of the validity of the '975 Patent, for which the application was prepared and filed by the very lawyer whose firm now seeks to invalidate it. A reasonably-informed person could not, in such

> circumstances, be satisfied that there would be no improper use of confidential information imparted as a result of a solicitor-client relationship. . . .

[34] The Prothonotary's decision on this point was not clearly wrong; his exercise of discretion was not based upon a wrong principle or upon a misapprehension of the facts.

[35] Delay and alleged waiver

The defendants alleged that the plaintiff's delay in objecting to a conflict of interest prevents the plaintiff from asserting this matter. I agree that Prothonotary Lafrenière did not exercise his discretion based on a wrong principle or upon a misapprehension of the facts when he found that the delay in objecting to a conflict of interest did not correct the existence of the conflict and that any prejudice suffered by the defendants could be remedied by an award of costs. In *Echerguard Products Ltd.* v. *Rocky's of B.C. Leisure Ltd.* (1993) 54 C.P.R. (3d) 545 (C.A.), the Federal Court stated at page 553:

> The respondent submits that the appeal should be dismissed because of the delay which elapsed between the time Mr. Sinnott became employed by Bereskin & Parr and the making of the formal objection in May of 1992. I cannot see how the conflict of interest could be erased because of that delay alone. It may well be that delay or other factors are to be considered in determining the terms upon which a court will order the removal of a solicitor or solicitors from the record, but that is an entirely different matter.

[36] The defendants also stated that Prothonotary Lafrenière erred in ruling that the plaintiff had not waived its right to object to a conflict of interest. Prothonotary Lafrenière stated in paragraphs 32 and 33 of his decision:

> The Defendants submit that at the commencement of the proceedings, Robbins expressly consented to the representation of the Defendants by their counsel and thereby waived any right that it may have had to challenge the representation of the Defendants by Ridout. The Defendants also argue that because Robbins has delayed in bringing this motion, they should be allowed to continue with counsel of their choice.
>
> The fact that counsel for Robbins did not raise any objection when he was informed that Kvas Miller was representing the Defendants does not establish that the conflict of interest was waived. The matter was raised in an informal manner between counsel for the parties in the context of a request for an extension of time. It is unclear whether the implications of the information were fully understood by Robbins' counsel at the time. In the circumstances, I am not satisfied that Robbins ever condoned, let alone waived, the conflict of interest.

[37] I am of the opinion that the Prothonotary was not clearly wrong, in the sense that his exercise of discretion was not based upon a wrong principle or upon a misapprehension of the facts in reaching this conclusion.

[38] In conclusion on the whole of his discretion, I am of the opinion that Prothonotary Lafrenière was not clearly wrong, in the sense noted in paragraph 38 above and as such, I see no reason to interfere with the order rendered.

[39] The defendants' motion must therefore be dismissed with costs to the plaintiff.

ORDER

[40] **IT IS ORDERED that** the defendants' motion is dismissed with costs to the plaintiff.

"John A. O'Keefe"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Christopher J. Kvas	FOR THE DEFENDANTS

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