Dockets: 2000-2382(IT)G
2002-1965(IT)G

BETWEEN:

JOAN A. WILLIAMSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on March 30, 2009 at Edmonton, Alberta

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	Priscilla Kennedy
Counsel for the Respondent:	Brooke Sittler

ORDER

Upon applications by the appellant to remove the Department of Justice as counsel, it is ordered that Linda Plitt, Rhonda Nahorniak and any other lawyers at the Department of Justice who have worked on the appeals referenced by Court docket numbers 2000-2382(IT)G and 2002-1965(IT)G are disqualified from these appeals.

Each party shall bear their own costs in respect of this motion.

Signed at Ottawa, Canada this 23rd day of April 2009.

"J. Woods"

Woods J.

Citation: 2009 TCC 222
Date: 20090423
Dockets: 2000-2382(IT)G
2002-1965(IT)G

BETWEEN:

JOAN A. WILLIAMSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] This motion concerns the issue of lawyers, legal assistants and conflicts of interest. The appellant has applied for orders to remove the Department of Justice ("DOJ") as counsel in two appeals instituted in this Court.

[2] The appellant, Joan Williamson, instituted appeals in this Court in 2000 and 2002. Counsel informed me at the hearing that neither of these actions has yet reached the discovery stage.

[3] The appeals may be referenced by Court docket numbers 2000-2382(IT)G and 2002-1965(IT)G, and will be referred to in these reasons as the "2000 Appeal" and the "2002 Appeal," respectively, or as the "TCC Appeals" collectively.

[4] Also relevant to this motion is an action that was commenced by the appellant in the Alberta Court of Queen's Bench (the "QB Action"). The subject matter of this action is essentially the same as in the 2000 Appeal. The QB Action has been discontinued.

[5] The appellant submits that there are two separate conflicts of interest that justify the disqualification of the DOJ.

[6] The first arises as a result of the employment by the DOJ of Diana Kwan, a lawyer who had involvement in private practice with at least one of these matters. It is not suggested that Ms. Kwan has had any involvement with these matters at the DOJ.

[7] The second involves the employment by the DOJ of Linda Plitt as a legal assistant and paralegal. It is submitted that a disqualifying conflict arose because Ms. Plitt had prior involvement with these matters when she worked for a law firm and she has worked on the same matters at the DOJ.

[8] It is submitted that the failure of the DOJ to place a "Chinese Wall" in respect of Ms. Kwan and Ms. Plitt has caused a disqualifying conflict of interest.

Preliminary issues

[9] Before considering the merits, two evidentiary issues that were raised by the respondent should be discussed.

[10] The first concerns the weight to be given to an affidavit of Dawn Repchinski that was filed on behalf of the appellant.

[11] The respondent submits that the affidavit should be given no weight because counsel for the appellant, Priscilla Kennedy, has more direct knowledge of the relevant facts and would be a better deponent. Ms. Repchinski is a paralegal who has worked for Ms. Kennedy periodically since April 2001.

[12] In support of her position, the respondent relies on: (1) the decision of Hamlyn J. of this Court in *Belchetz v. The Queen*, 98 DTC 1230, aff'd 99 DTC 5726, and (2) the decision of Rothstein J., then of the Federal Court-Trial Division, in *Harper v. Minister of Employment and Immigration*, [1993] FCJ No. 212.

[13] In terms of whether Ms. Kennedy would be a better deponent, I agree with the respondent. She was the lawyer in charge of these matters during most if not all of the relevant period. Ms. Repchinski's affidavit is largely based on information provided to her by Ms. Kennedy, which information was verified by Ms. Repchinski to the extent possible by a review of the appellant's file.

[14] Ms. Kennedy argued at the hearing that she was not the best deponent because during the relevant period she was often out of the office working on another matter. With respect, this does not make Ms. Repchinski a better deponent. Almost every paragraph in Ms. Repchinski's affidavit starts with the phrase: "That I am informed by Priscilla Kennedy and verily believe …"

[15] Ms. Kennedy clearly would have been a better deponent than Ms. Repchinski, and I have taken this into account in ascribing weight to Ms. Repchinski's affidavit. The affidavit is entitled to some weight, however.

[16] The second issue concerns a cross-examination conducted by Ms. Kennedy on one of the affidavits of Ms. Plitt.

[17] The respondent submits that no weight should be given to this cross-examination because Ms. Kennedy should not have conducted it. I would note that this point was raised by counsel for the respondent during the cross-examination and Ms. Kennedy chose to continue with the cross-examination in spite of it.

[18] In support of the respondent's position, counsel referred me to the decision of Twaddle J.A. in *R. v. Deslauriers,* [1993] 2 WWR 401 (MBCA).

[19] In this case, it is clear that Ms. Kennedy had significant knowledge of the relevant facts and she also took a counsel role in cross-examining Ms. Plitt. As described in *Deslauriers*, this is improper. Ms. Kennedy also should not have appeared at this hearing, although the respondent did not take issue with this.

[20] In the following excerpt from *Deslauriers*, it is explained why Ms. Kennedy's conduct is improper.

> […] a lawyer should not appear as counsel on a motion where his affidavit is before the court. Nor should he appear on an appeal from an order made on that motion.
>
> The rigour of this rule is sometimes relaxed where the facts deposed to by counsel are non-controversial or where the interests of justice demand it. This relaxation is, however, a concession to expediency, ordinarily permitted only where the lawyer's credibility will not be impeached and where neither his conduct nor judgment is questioned.
>
> The scope of the rule is not limited to cases where counsel gives evidence directly. It extends to cases in which counsel relies on an affidavit sworn on the basis of information received from counsel, whether or not the affidavit expressly

> says so. My brother Philp recalls a case, heard last spring, in which this Court insisted that independent counsel be retained in such circumstances.
>
> Counsel's objective role is also compromised in a case such as this where his own conduct or judgment has to be taken into account by the court in resolving an issue between the parties. Counsel ends up in these circumstances justifying his own conduct and judgment and attacking those of opposing counsel. This is a situation which should be avoided. Whenever possible, other counsel should be retained.
>
> Reluctant as we therefore were to hear counsel, We recognized that in a case involving allegations of delay it was undesirable that further delay should be encountered as a result of a rule which had not been applied in the Queen's Bench and which may not have been fully understood. Of the two evils, we preferred to ignore the lack of counsel's objectivity and to subjugate our own embarrassment at having to debate the issue of reasonableness with those whose conduct and decisions were being judged in the interest of avoiding the further delay that would otherwise have occurred.
>
> [Emphasis added]

[21] Ms. Kennedy's decision to act as counsel in this motion has put the Court in the same difficult position as the Court was put in *Deslauriers*. However, I do not think that ignoring the cross-examination of Ms. Plitt, as suggested by the respondent, is an appropriate response.

[22] Like the appeal court in *Deslauriers*, I have decided to overlook Ms. Kennedy's actions in the interest of not further delaying these proceedings by requiring different counsel. These proceedings have been outstanding for a considerable period of time, and it is desirable that they be heard on their merits without further delay.

Facts

[23] At most relevant times, the appellant has been represented in the TCC Appeals by Ms. Kennedy, a lawyer who currently practices at the Edmonton offices of Davis LLP. The actions were instituted during the time that Ms. Kennedy practiced at Parlee McLaws LLP, also in Edmonton.

[24] The respondent has been represented until recently by the tax services section of the DOJ in Edmonton. After this motion was filed, carriage of these matters was transferred to the Saskatoon office pending the outcome.

[25] As for Diana Kwan, she was employed as a junior associate at Parlee McLaws in Edmonton in 1999 and 2000. During this time, she had some involvement with matters respecting the appellant that were handled by Ms. Kennedy.

[26] Beginning November 2001, Ms. Kwan commenced employment as a lawyer at the DOJ. She has worked there exclusively in non-tax areas, first in the Vancouver office and then in Ottawa.

[27] As for Linda Plitt, she was employed as a legal assistant by Parlee McLaws for a five-month period from May 8 to September 29, 2000. She was assigned to work for Ms. Kennedy.

[28] The extent of Ms. Plitt's involvement in these matters is not clear. Her affidavit states that she has no recollection of working on any matter involving the appellant while she was at Parlee McLaws. But we do know that she arranged for the filing of the notice of appeal for the 2000 Appeal and that she wrote a letter to the DOJ concerning a scheduling matter on behalf of Ms. Kennedy. Beyond that, it is not clear what she did concerning the TCC Appeals or the QB Action.

[29] Ms. Repchinski's affidavit suggests that Ms. Plitt worked on the appellant's file throughout the five months that she was at Parlee McLaws. I put very little weight on this evidence, mainly because it is quite vague.

[30] In October 2000, Ms. Plitt commenced to work at the DOJ in Edmonton. Initially, she did not work in the tax services section, but she was transferred there beginning January 8, 2001 after she had identified a conflict of interest with a criminal matter that she had previously worked on.

[31] In the tax services section, Ms. Plitt initially worked as a legal assistant for Rhonda Nahorniak, a senior tax counsel, and three or four other counsel. This continued until 2004, with the exception of a period of maternity leave from December 2001 to December 2002. Beginning in 2004, Ms. Plitt became a paralegal, which involved doing specific tasks for many lawyers.

[32] Ms. Nahorniak has had carriage of the TCC Appeals at the DOJ until the files were recently reassigned to the Saskatoon office.

[33] Ms. Plitt swore two affidavits in respect of this motion. The first suggests that Ms. Plitt's first involvement with these matters at the DOJ was only as a paralegal

when she was asked to process a matter of costs for the QB Action in December 2007. This was after the QB Action had been discontinued.

[34] A supplementary affidavit was sworn after counsel for the respondent in this motion had reviewed the DOJ file for the 2002 Appeal. This affidavit indicates that, throughout 2003 and 2004, Ms. Plitt tended to a number of administrative matters relating to the 2002 Appeal. Ms. Plitt states in her supplementary affidavit that she does not recall any of these tasks.

Discussion

General

[35] The principle to be applied in determining whether there is a disqualifying conflict of interest in circumstances where a lawyer changes law firms was settled by the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 SCR 1235 (*"Martin")*. The question to be answered is: Would the public represented by a reasonably informed person be satisfied that no use of confidential information would occur?

[36] In general, the test requires a consideration as to whether confidential information was received at an old law firm and whether there is a risk that it will be used to the prejudice of the client at a new law firm.

[37] The focus of this test is not whether there was in fact a disclosure of confidential information but the perception of justice. It aims to enhance public confidence in the legal profession. In addition, the focus on the public is a recognition that the use of confidential information is not something that is generally susceptible of proof.

[38] It is also clear that the same general principle applies if a legal assistant changes law firms: *Hildinger v. Carroll*, [2004] O.J. No. 291 (Ont CA); and *Chern v. Chern*, 2006 ABCA 16.

[39] In this case, the question is whether the test is satisfied in relation to Ms. Kwan and Ms. Plitt.

Diana Kwan

[40] Applying these principles to Diana Kwan, I am satisfied that the test is easily passed.

[41] Focusing on what a member of the public would think, it would be perceived that Ms. Kwan may possess some confidential information that is relevant to the TCC Appeals based on her work at Parlee McLaws. However, the public would not have a real concern in the circumstances that such confidential information would be used to the prejudice of the appellant by the DOJ.

[42] The appellant submits that a "Chinese Wall" should have been set up when Ms. Kwan started working for the DOJ. I see no reason for such action where Ms. Kwan does not work either in Edmonton or in the tax section.

[43] There is no disqualifying conflict of interest in relation to Ms. Kwan.

Linda Plitt

[44] The issue is less clear as regards to Ms. Plitt.

[45] The authorities to which I have been referred point out that there are many differences between the roles of a non-lawyer and a lawyer which are relevant in determining whether there is a disqualifying conflict of interest in reference to a non-lawyer. For example, a legal assistant may be less likely than a lawyer to be privy to confidential information. According to the judicial decisions, a determination of a disqualifying conflict of interest for a non-lawyer is very much dependant on the particular facts.

[46] In *Chern*, the Alberta Court of Appeal discussed the onus of proof in a case such as this.

[47] The first step is for the appellant to show that Ms. Plitt had a prior relationship at Parlee McLaws sufficient to raise a rebuttable presumption that she possessed relevant confidential information relevant to either of the TCC Appeals.

[48] If this onus is satisfied, it then shifts to the respondent to rebut it.

[49] The next question is whether there is a risk that this information could be used to the prejudice of the appellant by the DOJ.

[50] The respondent suggests that there is no concern because Ms. Plitt does not even recall working on the appellant's file at Parlee McLaws. It is suggested that Ms. Plitt cannot reasonably be considered to possess confidential information in these circumstances.

[51] The problem with this is that it is based on Ms. Plitt's own statements. Ms. Plitt may be very trustworthy, but in *Martin*, it was noted that such statements are not sufficient. The focus on the public interest demands this.

[52] Further, even if it is accepted that Ms. Plitt does not recall this matter at this time, there is a possibility that her memory might be triggered by working on these matters in future.

[53] One should consider the matter from an objective standpoint. Was Ms. Plitt's involvement with the appellant's file such that it was likely to make her privy to confidential information?

[54] I note that Ms. Plitt became the assistant for Ms. Kennedy shortly before the filing of the notice of appeal for the 2000 Appeal. Typically, this is a time in which confidential information would be passed to a lawyer and may come into the possession of a legal assistant.

[55] In my view, a member of the public would conclude that Ms. Plitt may well have acquired confidential information concerning the TCC Appeals during the time that she worked at Parlee McLaws.

[56] In *Ocelot Energy Inc. v. Jans*, [1998] SJ No. 287, a legal assistant who had changed law firms was found to have a disqualifying conflict of interest where she had worked on the same matter at both firms. The Court stated:

> [30] In my opinion a reasonably informed person would not be satisfied that no use of confidential information would occur in circumstances where a former member of the staff of a law firm who had full access to and had worked extensively on a client's file, was working directly for the lawyer representing the party opposed to the client in the litigation, and appeared to be working directly on the particular file for the new lawyer.

[57] The respondent points out that the circumstances here are different from *Ocelot* and other cases involving legal assistants because Ms. Plitt did not have extensive involvement with the appellant's file at Parlee McLaws.

[58] Although the period of Ms. Plitt's employment at Parlee McLaws was relatively brief, it was a time during which the 2000 Appeal was being actively worked on.

[59] In my view there is a perception in the present circumstances that Ms. Plitt might have acquired relevant confidential information while she was at Parlee McLaws.

[60] If Ms. Plitt did acquire relevant confidential information, her involvement with these matters at the DOJ gives rise to a perception that the information might be used to the detriment of the appellant by the DOJ.

[61] In 2003 and 2004, Ms. Plitt worked directly for Ms. Nahorniak. Ms. Nahorniak was dealing with Ms. Kennedy regarding the TCC Appeals and Ms. Nahorniak knew that Ms. Plitt had worked for Ms. Kennedy. It appears that no steps were taken to make sure that Ms. Plitt did not work on matters that she had previously worked on with Ms. Kennedy.

[62] Since 2004, Ms. Plitt has worked as a paralegal assisting a number of lawyers. In 2007 she prepared material relating to costs for the QB Action.

[63] An informed member of the public might well have a concern in the circumstances that relevant confidential information might be passed to lawyers working on these files at the DOJ and potentially be used to the prejudice of the appellant.

[64] The respondent submits that disqualification in these circumstances places too much of a burden on the DOJ. It is submitted that it would be impossible to screen where the relevant person has no recollection of the matter.

[65] I do not agree with this. In this case, for example, the DOJ knew that Ms. Plitt had worked for Ms. Kennedy. Precautions could have been taken when Ms. Plitt started to work in the tax services section to ensure that there would not be a conflict of interest, or more importantly, a perception of a conflict of interest. They could, for example, have contacted Ms. Kennedy concerning matters that Ms. Kennedy had carriage of.

[66] In my view, it is important to the administration of the tax system that a perception of conflict of interest in tax appeals be avoided. The DOJ handles a large number of tax appeals and potential conflicts of interest no doubt arise from

time to time. The public needs to have confidence that appropriate steps are taken to minimize the risk of the inappropriate use of confidential information. I would conclude that there is a disqualifying conflict of interest in this case.

[67] What is the appropriate remedy?

[68] In *Martin*, the Supreme Court comments that there are three competing values to take into account: the integrity of the system of justice, the right of a person to legal counsel of their choice, and the desirability for reasonable work mobility.

[69] I have tried to take these factors into account and have concluded that the appropriate remedy is to disqualify Ms. Plitt, Ms. Nahorniak and other lawyers at the DOJ who have worked on the TCC Appeals. There is no necessity to disqualify the entire Edmonton office of the DOJ, or for that matter the entire DOJ as submitted by the appellant.

[70] It may be argued that the disqualification of the lawyers in this case is unnecessary. It is very unlikely that any confidential information has passed to the lawyers to date because Ms. Plitt's involvement with these matters at the DOJ appears to be quite limited. The conclusion to disqualify the lawyers stems from an abundance of caution given the importance that public perception has in a situation such as this. I would also comment that the assignment of new lawyers should not be too onerous because the TCC Appeals are still at the pre-discovery stage.

[71] Before concluding, I would comment briefly about the issue of mobility of legal assistants. In one prior decision, this was not considered to be a significant factor in determining disqualification. I disagree with this. In my view, mobility for legal assistants is an important consideration to be taken into account.

[72] In this case, the respondent did not argue that mobility of legal assistants is a concern. It makes sense to me that it would not be in a large department such as the DOJ.

[73] As for costs, Ms. Kennedy submits that solicitor-client costs should be awarded to her client. It is suggested that Ms. Plitt should have known that she had a conflict of interest as a result of the decision concerning her by Binder J. in *The Queen v. Le*, 2001 ABQB 195.

[74] The *Le* decision involved a conflict of interest concerning a criminal prosecution.

[75] The background to the case is that Ms. Plitt had identified the conflict herself when she began to work on a file at the DOJ that she had previously worked on for a lawyer in private practice. The DOJ then transferred her from the prosecutions section to the tax services section.

[76] An issue arose as to the disqualification of the lawyers involved in the criminal prosecution. The matter came before Binder J. in *Le* and he concluded that the lawyers who had worked on the prosecution were also disqualified.

[77] Ms. Kennedy's submission regarding costs and the *Le* decision has no merit. Binder J. made it clear that his decision should be restricted to the area of criminal law. There was no reason for Ms. Plitt, or for anyone else at the DOJ, to interpret *Le* as having any application to the circumstances in this motion.

[78] My conclusion regarding costs, taking all the circumstances into account including that the appellant was only partially successful, is that the parties should bear their own costs in respect of this motion.

Signed at Ottawa, Canada this 23rd day of April 2009.

"J. Woods"

Woods J.

CITATION:	2009 TCC 222
COURT FILE NOs.:	2000-2382(IT)G 2002-1965(IT)G
STYLE OF CAUSE:	JOAN A. WILLIAMSON AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 30, 2009
REASONS FOR ORDER BY:	The Honourable Justice J. Woods
DATE OF ORDER:	April 23, 2009

APPEARANCES:

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