Court of King's Bench of Alberta

Citation: Nova Oculus Canada Manufacturing ULC v Sather, 2024 ABKB 517

Date: 20240827
Docket: 2301 02211
Registry: Calgary

Between:

Nova Oculus Canada Manufacturing ULC

Applicant

- and -

Justin Sather, MacuMira Medical Devices Inc., Walter O'Rourke, and Karmastar Consulting Inc.

Respondents

Reasons for Decision of the Honourable Justice R.A. Neufeld

I. Introduction

[1] This decision concerns an application to remove counsel of record. The Applicant, Nova Oculus Canada Manufacturing ULC ("Nova Canada") is a medical technology company. By 2019, it had developed a new medical device and related technology to treat age-related macular degeneration. It had also obtained patents and registered patent applications in selected countries and had begun clinical trial testing required for commercialization. Nova Canada's sole shareholder is a US holding company, which is owned by Nova Oculus Partners, LLC (collectively, "Nova US"). Nova Oculus Partners, LLC is majority-owned by Eva Pocklington. Eva Pocklington is the wife of Peter Pocklington, a former Nova Canada director, who is well known as a former owner of the Edmonton Oilers.

[2] MacuMira Medical Devices Inc. ("MM") is a Canadian company whose president and director is Mr. Justin Sather. In 2015, Eye Machine Canada (Licencing) Corp ("EMC"), a

subsidiary of MM, entered into a licence agreement with the precursor of Nova US, The Eye Machine, LLC ("TEM"), to lease, market, promote, and distribute the medical device in Canada. Among other things, that agreement provided that EMC could terminate the agreement and be entitled to the return of its $1MM USD option payment if Health Canada did not grant regulatory approval of the device by October 10, 2016. In 2019, MM initiated clinical trials for the medical device.

[3] On October 27, 2020, Nova Canada and MM entered into an agreement entitled Assignment of Inventions and Related Patent Rights (the "2020 Agreement"). The 2020 Agreement was negotiated and signed by Mr. Walter O'Rourke in his capacity as president and CFO of Nova Canada. At the time, he was also the sole director and officer of Nova Canada, and the chief operating officer of Nova US. His counterpart at MM was Mr. Sather. MM was represented by counsel, the firm of Maverick Law, and prepared the 2020 Agreement. Nova Canada was not represented by counsel.

[4] Under the 2020 Agreement, MM was granted an assignment of title and transfer of worldwide rights to the medical device in return for certain benefits, including royalties and other payments. The effect was to upgrade MM from licensee of the device to owner. MM aimed to secure necessary regulatory approvals in Canada to commercialize the device, which it says that Nova Canada and its parent, Nova US, would not be able to do because of its inability to raise investment capital—a byproduct of restrictions imposed on Mr. Pocklington due to securities violations in the US.

[5] On September 1, 2022, Nova Canada and MM executed an amended and restated licensing agreement (the "2022 Agreement"). It also increased the consideration that would be payable to Nova Canada as and when commercialization was achieved. A patent agent was engaged to undertake the legal work required for the assignments to take effect.

[6] Once again, Mr. O'Rourke and Mr. Sather negotiated the 2022 Agreement. This time, MM engaged the law firm of Burnet, Duckworth & Palmer LLP ("BDP"). One of its senior partners, Mr. Daryl Fridhandler, KC, attended a series of meetings between the companies and prepared the 2022 Agreement. According to Mr. O'Rourke and Mr. Sather, Mr. Fridhandler did not act as counsel for Nova Canada, but only for MM.

[7] The 2022 Agreement is central to this litigation. Mr. Fridhandler's involvement is at the heart of the application before me, which seeks to have BDP disqualified as litigation counsel for MM.

[8] In November 2022, Nova US became aware of the existence of the 2020 and 2022 Agreements (the "Assignment Agreements") . Mr. O'Rourke advised Mr. Pocklington and former Nova Canada director, Lance Eldred, that he had entered into the Assignment Agreements because he considered them to be in the best interests of Nova Canada. He also stated that he did not believe that the Assignment Agreements would be enforceable because they had not been approved by Nova Canada's shareholders, but MM had insisted on entering the Assignment Agreements regardless.

[9] As feared by Mr. O'Rourke, Mr. Pocklington was very unhappy to learn that these assignments had been made. Mr. O'Rourke was terminated as president and CFO of Nova Canada and soon thereafter Nova Canada commenced the Action against MM, Mr. Sather, Mr. O'Rourke, and Karmastar Consulting Inc. (through which Mr. O'Rourke does business).

II. The Claim

[10] Nova Canada applies for an order removing BDP as counsel of record for Mr. Sather and MM on the grounds that BDP's continued representation creates a risk of (1) improper use of confidential information; (2) impaired or "soft peddling" representation; and/or (3) damaging the repute of the administration of justice.

[11] Nova Canada also claims that BDP has not been forthright with the records in its possession and seeks a procedural order directing BDP to provide all file materials related to the Assignment Agreements to new counsel for Mr. Sather and MM. The new counsel would then be required to provide an updated affidavit of records.

III. The Defence

[12] In response, the Respondents seek an Order dismissing the application with costs, as they claim that BDP should not be disqualified for the following reasons:

(a) Nova Canada was never a client of BDP;

(b) Nova Canada was never a "near-client" of BDP;

(c) BDP had no duty of confidentiality or loyalty to Nova Canada;

(d) if Nova Canada was a "near-client" of BDP, Nova Canada has not shown that BDP received confidential information about Nova Canada, or that any such information could be used against Nova Canada in this Action to its prejudice;

(e) it is too early in the Action to conclude that evidence from Mr. Fridhandler would be required at trial to resolve a contested allegation, and there may not be a trial, since Nova Canada signed a Full and Final Release that may summarily determine the Action; and

(f) if Mr. Fridhandler was ultimately called as a witness at trial, independent counsel could represent him.

IV. Positions of the Parties

1. Position of the Applicant

[13] The Applicant, Nova Canada, argues that BDP should be disqualified from acting as counsel in the litigation between Nova Canada and MM. It does so for three reasons.

[14] First, it says that during the negotiation of the 2022 Agreement, BDP acted as counsel for Nova Canada, as well as MM. In that capacity, it says BDP is presumed to have received confidential information from Nova Canada. As the Respondents have not rebutted the

presumption that Nova Canada will suffer prejudice by BDP's continued involvement in the Action, by failing to provide evidence regarding its ethical walls or compliance with Law Society of Alberta best practices, BDP has no choice but to cease to act, or be ordered to do so.

[15] Nova Canada also argues that BDP has not been forthcoming in the disclosure of information in its files regarding its interaction with Nova Canada, and particularly Mr. O'Rourke. It says that an email from Mr. O'Rourke to Mr. Fridhandler dated August 15, 2022, shows that Mr. O'Rourke gave specific instructions as to the tasks to be undertaken by Mr. Fridhandler. Therefore, even if MM were paying BDP's fees, BDP was acting for both parties.

[16] Nova Canada implies that if it was not a client of BDP, it was a prospective client or "near client," which is the term used in the case law. It was entitled to expect that information provided to BDP, such as its corporate minute book and Mr. O'Rourke's knowledge of Mr. Pocklington's difficulties with the US Securities and Exchange Commission ("SEC"), including his 2021 settlement agreement relating to Nova US's improprieties, would not be used against Nova Canada's interests.

[17] Second, Nova Canada says that as a participant in the "secret backroom deal," whereby Nova Canada's assets were in effect stolen by MM, Mr. Fridhandler is "virtually certain" to be called as a witness when this Action proceeds to trial. This disqualifies BDP from acting as trial counsel.

[18] Third, Nova Canada says that BDP's continued involvement would bring the administration of justice into disrepute. BDP has a clear conflict of interest which is impeding proper document production and has failed to rebut the presumption that confidential information given to Mr. Fridhandler by Nova Canada was shared with the Respondents' BDP trial counsel.

2. Position of the Respondents

[19] The Respondents, Mr. Sather, MM, Mr. O'Rourke, and Karmastar Consulting Inc, oppose the disqualification application. They argue that the application does not meet the standard required for the Court to override their selection of counsel.

[20] To begin with, the Respondents take great issue with the Applicant's characterization of the 2022 Agreement as being the product of nefarious dealings. They emphasize that the agreements reached between Mr. O'Rourke and Mr. Sather delivered real benefits to Nova Canada, including forgiveness of a debt of $1MM USD to an MM affiliate, which Nova Canada was unable to pay. The 2022 Agreement also increased the amount payable under the 2020 Agreement in the event of termination. They acknowledge that Nova Canada did not want to inform Mr. Pocklington of the Assignment Agreements because it expected him to react negatively, but say that Mr. Pocklington was not entitled to be informed, as he was not a shareholder, officer, nor director of Nova Canada.

[21] As noted earlier, both Mr. O'Rourke and Mr. Sather deny that BDP was acting as counsel for Nova Canada in the negotiation of the 2022 Agreement. BDP was acting for MM. It was instructed by MM. It was paid by MM. It reported to Mr. Sather. The only task undertaken by BDP that was not for MM's immediate benefit was preparation of a draft consulting agreement

between Mr. O'Rourke (in his personal capacity) and Nova US. However, they submit that agreement was never executed and had nothing to do with Nova Canada.

[22] The Respondents also dispute the contention that any confidential information was provided by Nova Canada to BDP. They say that the only information provided in respect of the 2022 Agreement, including access to Nova Canada's minute book, etc., was that necessary for its preparation. Moreover, all the information provided by Mr. O'Rourke was given both to BDP and Mr. Sather, and information regarding Mr. Pocklington's problems with securities regulators and other government authorities was well known to Mr. Sather, who has known Mr. Pocklington for many years.

[23] The Respondents say that it is much too early to determine whether Mr. Fridhandler would be required to testify at trial. If the Action is dismissed summarily (as they expect it will be), there will be no need for his testimony at all. If the Action proceeds to trial, the evidence that Mr. Fridhandler might give would depend on whether an agreed statement of facts could be negotiated that would cover the same topics. If necessary, separate counsel could be engaged to present that evidence.

V. Disposition

1. General Principles for Disqualification Applications

[24] Applications for disqualification of counsel involve several competing principles. In the interest of the administration of justice, courts must protect litigants from conflicts of interest. At the same time, courts must allow litigants to choose their own counsel, subject to reasonable limits: ***Harder v Sartorio***, 2020 ABQB 404 at para 15 [***Harder***]; ***MacDonald Estate v Martin***, 1990 CanLII 32 (SCC), [1990] 3 SCR 1235 at 1263 [***MacDonald Estate***].

[25] Disqualification applications also implicate a lawyer's duty of loyalty, which encompasses a duty to avoid conflicts of interest, a duty of commitment to the client's cause, and a duty of candour: ***Canadian National Railway Co v McKercher LLP***, 2013 SCC 39 at para 19 [***McKercher***]. The duty to avoid conflicts of interest and the duty of commitment to the client's cause are the two dimensions of the duty of loyalty relevant to this application.

[26] A lawyer's duty to avoid conflicts of interest and duty of commitment to the client's cause are designed to protect clients against two types of prejudice: prejudice resulting from a lawyer's misuse of the client's confidential information; and prejudice arising from a lawyer's soft-pedaling representation of a client to prioritize other interests than those of the client. A lawyer must avoid prejudicing a current client in both ways, whereas his or her duty to a former client is primarily to avoid misusing confidential information: ***McKercher*** at paras 23, 43-44.

[27] Courts have inherent jurisdiction to remove lawyers from litigation where disqualification is 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": ***McKercher*** at para 61; ***Habina v Saretsky***, 2024 ABKB 24 at para 23 [***Habina***]. The Applicant asserts that all three grounds for disqualification are satisfied in this case.

[28] The test for disqualification of counsel for receipt of confidential information is whether a reasonably informed member of the public would be satisfied that no use of confidential information would occur: ***MacDonald Estate*** at 1260. This requires the court to answer two questions: (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand?; and (2) Is there a risk that the confidential information will be used to the prejudice of the client?: ***MacDonald Estate*** at 1260.

[29] In ***Hong v Hong,*** 2022 ABQB 555, aff'd 2023 ABCA 33, this Court held that "two matters will be sufficiently related if it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter": at para 32. Once the Applicant demonstrates that there was a previous relationship sufficiently related to the retainer from which the lawyer's removal is sought, "the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant": ***MacDonald Estate*** at 1260.

[30] A conflict of interest can arise even if confidential information was acquired through something other than a formal solicitor-client relationship: ***Power v Richardson GMP Ltd,*** 2020 ABQB 192 at para 31. For instance, Rule 3.4-6 of the Law Society of Alberta's *Code of Conduct* prohibits a lawyer, without the client's consent, from acting against a former client in the same matter, a related matter, or in any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice the client: Law Society of Alberta, *Code of Conduct* (7 June 2024), r 3.4-6 [*Code of Conduct*]. Prospective clients are captured under this rule: *Code of Conduct*, r 3.4-6, commentary [2]. While the Court is not required to apply the *Code of Conduct*, it serves as "an important statement of public policy": ***MacDonald Estate*** at 1246.

[31] Under the second question of the ***MacDonald Estate*** test, the Supreme Court of Canada has directed that a lawyer who has relevant confidential information cannot act against that lawyer's client or former client: at 1261. As for whether the lawyer's firm should be disqualified, unless there is clear and convincing evidence to the contrary, the Court should infer that all reasonable measures have been taken to ensure that no disclosure will occur from the disqualified lawyer to the other members of the firm acting against the former client: ***MacDonald Estate*** at 1262.

[32] Turning to a lawyer's duty of commitment to the client's cause and the second ground for disqualification, a lawyer must avoid situations that would impair the lawyer's representation of the client, such as those where the lawyer may be induced to prioritize self-interest: ***McKercher*** at paras 25-26. Under Rules 5.2-1 to 5.2-2, a lawyer who appears as an advocate cannot testify or submit affidavit evidence, unless the matter is purely formal or uncontroverted, or the law, the court, or the *Rules of Court* allow: *Code of Conduct*; ***Stanfield v Low***, 2019 ABCA 83 at para 15. Objective likelihood, rather than mere potential that a lawyer will be called is necessary to remove counsel of choice at an early stage in the proceeding: ***Harder*** at para 34.

[33] Finally, the third ground for disqualification arises when it may be required to protect the integrity and repute of the administration of justice. All relevant circumstances should be considered when assessing whether disqualification is necessary on this basis: ***McKercher*** at paras 63-64.

2. Was Nova Canada a client of BDP?

[34] To answer the first question of the ***MacDonald Estate*** test, I must determine whether BDP received confidential information attributable to a solicitor-client relationship with Nova Canada relevant to the matter at hand.

[35] In ***Jeffers v Calico Compression Systems***, 2002 ABQB 72, the Court held that the test to determine if a solicitor-client relationship exists is "whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party": at para 8 [***Jeffers***]. The applicant bears the burden of proving that the lawyer it is seeking to disqualify was in a solicitor-client relationship with the applicant: ***Savanna Energy Services Corp v CanElson Drilling Inc***, 2010 ABQB 645 at para 88.

[36] At paragraph 8 of ***Jeffers***, the Court listed a number of indicia of a solicitor-client relationship: "a contract or retainer; a file opened by the lawyer; meetings between the lawyer and the party; correspondence between the lawyer and the party; a bill rendered by the lawyer to the party; a bill paid by the party; instructions given by the party to the lawyer; the lawyer acting on the instructions given; statements made by the lawyer that the lawyer is acting for the party; a reasonable expectation by the party about the lawyer's role; legal advice given; and legal documents created for the party." The Court noted that not all indicia need to be present for a solicitor-client relationship to exist.

[37] In a case such as this, it is important to consider the context in which information was exchanged. A reasonable person in the position of Nova Canada would form their belief having regard to all the circumstances, particularly the fact that MM had hired BDP as their counsel for this deal and Nova Canada had elected not to engage Canadian counsel.

[38] I agree with the Respondent that the indicia listed in ***Jeffers*** would lead a reasonable person in the position of Nova Canada to conclude and understand that BDP was acting as counsel to MM. There was no contract or retainer between Nova Canada and BDP. It was MM, not Nova Canada, who paid BDP. No meetings were held between counsel and Mr. O'Rourke that were not also attended by Mr. Sather. Except for a consulting agreement drafted for Mr. O'Rourke to use in his dealings with Nova US, the documents prepared by BDP were done in furtherance of the 2022 Agreement itself. A reasonable party in the position of Nova Canada would conclude and understand that BDP's role in that regard was to document the agreement that had been reached between the parties, and to act in the best interests of MM while doing so, not Nova Canada. Both Mr. O'Rourke and Mr. Sather have testified that, in their view, BDP was acting solely for MM.

[39] As I have found that BDP did not receive confidential information attributable to a solicitor-client relationship with Nova Canada relevant to the matter at hand, I will now consider whether the Applicant has satisfied the Court that a duty of confidentiality existed outside of such a relationship.

3. Did Nova Canada, as a near client, provide BDP with information over which it was entitled to maintain confidentiality?

[40] In ***Dreco Energy Services Ltd v Wenzel Downhole Tools Ltd***, 2006 ABCA 39, the Alberta Court of Appeal held that in certain circumstances, a lawyer may owe a duty of confidentiality to a non-client: at para 7. That duty is different from the one owed to a client. The Court of Appeal said at paras 7-8:

> Though a lawyer (like anyone else) may owe duties of confidentiality to non-clients, that is not the ordinary situation […] Whether they are so obliged depends upon where the information comes from, and under what circumstances. One of those circumstances is the relationship between the parties. Usually a lawyer has but one client, and information which the lawyer gathers from non-clients is held for the lawyer's client alone, not for the informants […] [T]he presumptions in *Martin v. MacDonald* apply only to information from the lawyer's client.
>
> 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] The Applicant asserts that Nova Canada's minute book, the SEC settlement agreement with Mr. Pocklington, and information relating to the business impacts of Mr. Pocklington's SEC involvement is information that would not have been voluntarily revealed to Mr. Fridhandler had this been a *bona fide* transaction.

[42] Nova Canada alleges that the 2022 Agreement was a product of a conspiracy between its former president and CFO, Mr. O'Rourke, and Mr. Sather. It says that the email correspondence between BDP and Mr. O'Rourke in the summer and fall of 2022 (all of which was copied to Mr. Sather), coupled with BDP's litigation conduct—failing to disclose communications, dodging questions about whether it was withholding potentially producible records, obtaining an affidavit containing "hollow assertions and lies", and failing to act in a manner reasonably expected of court officers by not providing a meaningful explanation of its prior relationship with Mr. O'Rourke and Nova Canada—lead to one reasonable inference: that BDP was acting for the conspiracy. The purpose of the alleged conspiracy, it claims, was to steal Nova Canada's intellectual property.

[43] Based on those assertions, Nova Canada contends that "[i]t appears obvious that Mr. Fridhandler has key information about the secret dealings between O'Rourke and Sather because he was involved in some of those dealings."

[44] These are serious accusations, which Nova Canada has made with considerable rhetorical flourish.

[45] A party seeking to disqualify a lawyer outside of a formal solicitor-client relationship must present evidence to establish a reasonable expectation of confidentiality or loyalty, such that it should be treated as a near client: ***Spruce Grove Gun Club v Parkland (County)***, 2018 ABQB 364 at paras 30-33.

[46] Nova Canada has not presented evidence that it had a reasonable expectation of confidentiality or loyalty from BDP, such that it should be treated as a near client. As discussed, MM, as BDP's client, was privy to all communications between Nova Canada and Mr. Fridhandler. Aside from asserting that it is "obvious" that Mr. Fridhandler has key information of some sort, the Applicant has provided no examples of information that was provided to BDP by Nova Canada over which confidentiality was expected or offered.

[47] For example, in argument, counsel advised that there were at least two pieces of information requested by Mr. Fridhandler and provided by Nova Canada of a confidential nature. It says that "[i]t appears that Mr. Fridhandler was provided with Nova's entire minute book and information internal to Nova about its affairs, including Pocklington's involvement and compliance with the SEC settlement agreement and how that may have impacted Nova's business and clinical trials in Alberta." Nova Canada asserts that this information would not have been provided to Mr. Fridhandler or Mr. Sather had this been "a *bona fide* transaction negotiated in the ordinary course between parties acting at arms length and adverse in interest."

[48] Confidential information has been defined as "information one would not voluntarily reveal to an opposing lawyer": ***Paylove v Paylove***, 2001 CanLII 28169 (ONSC) at para 19. I agree with the Respondents that the information provided at counsel's request cannot be considered confidential. It was not provided to BDP alone, but to both BDP and Mr. Sather. It would also be producible evidence in this litigation, whether or not BDP continues to act. And given that Nova Canada was not represented by counsel in the transaction, it is not at all surprising that counsel for MM would ask to review relevant corporate records and receive information regarding the status of the SEC investigation of Nova US and Mr. Pocklington concerning previous solicitation of investment in that company.

[49] As I have answered the first question of the ***MacDonald Estate*** test in the negative, it is unnecessary to consider the second question of the test. However, I will briefly address the Applicant's argument that Nova Canada has and will suffer prejudice by BDP's continued involvement in the Action. Nova Canada claims that since BDP has not provided evidence regarding ethical walls or its compliance with Law Society best practices, the Court "ought to infer that none are in place".

[50] Nova Canada asks this Court to conclude, based on the absence of evidence relating to BDP's ethical screening practices, that no such practices are in place. Without evidence that BDP has received confidential information, the presence or absence of ethical walls is a moot point. No inference of actual prejudice can be drawn.

[51] In summary, I find that this ground for seeking disqualification of BDP lacks merit. Nova Canada was not a client nor near client of BDP, and it had no reasonable expectation of confidentiality over the information it shared with BDP and BDP's client, MM, throughout the negotiation of the 2022 Agreement.

4. Should BDP be disqualified due to the likelihood of Mr. Fridhandler being called as a witness?

[52] The essential allegation advanced by Nova Canada in this litigation is that the assignment of Nova Canada's intellectual property in the device was fraudulent and should be set aside. It says that the assignment was not only done without requisite shareholder approval but

was the product of an agreement that was deliberately kept secret from its shareholders. Nova Canada contends that the email correspondence produced by BDP is proof that Mr. O'Rourke and Mr. Sather knew that shareholder approval would be required but went ahead with their "backroom deal" regardless.

[53] Nova Canada argues that Mr. Fridhandler was privy to the various meetings discussed in the email correspondence, and it believes that he would likely have been involved in other discussions that have not yet been documented and disclosed by BDP. As such, his evidence could be critical at trial or, for that matter, in an upcoming application for summary dismissal.

[54] The Respondents assert that it is premature to disqualify BDP because Mr. Fridhandler may be a witness at trial. They say there is no absolute rule that a lawyer cannot act as counsel in a trial when another lawyer from his or her firm will testify. This depends on the circumstances of the case.

[55] When faced with an application for disqualification on this ground, the Court may ask: "Will the independence of counsel be compromised if he or a member of his firm acts as counsel in a cause in which he is a likely witness?": ***Forward v Zurich Insurance Co***, 2002 ABCA 123 at para 6. Other factors must also be weighed, as articulated in ***Essa (Township) v Guergis; Membery v Hill,*** 1993 CanLII 8756 (ONCJ), 1993 CarswellOnt 473 at para 48 [***Essa (Township)***] and endorsed by Justice Devlin of this Court in ***Harder***. They are as follows:

(a) the stage of the proceedings;

(b) the likelihood that the witness will be called;

(c) the good faith (or otherwise) of the party making the application;

(d) the significance of the evidence to be led;

(e) the impact of removing counsel on the party's right to be represented by counsel of choice;

(f) whether trial is by judge or jury;

(g) the likelihood of a real conflict arising or that the evidence will be "tainted";

(h) who will call the witness if, for example, there is a probability counsel will be in a position to cross-examine a favourable witness, a trial judge may rule to prevent that unfair advantage arising;

(i) the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

[56] In applying these factors, the court must be cognizant of the fact that whenever an application is made to disqualify counsel, the client in jeopardy is the one who may need to retain and educate a new lawyer. This is because the overriding concern in such applications is whether the administration of justice be called into question when a lawyer testifies on behalf of their client, who was represented by the same law firm. This raises the specter of the witness and counsel having conflicting allegiances. On the one hand, the law firm is obligated to advocate to the best of its ability for its client. On the other, the lawyer who is a witness is required to tell the whole truth, and the lawyer who is acting as advocate may feel obligated to protect the

credibility and reputation of his or her colleague. It is for this reason that it is no answer to say that a client has consented to the dual roles. The concern is broader than that of the client's private interests.

[57] In this case, I agree with the Applicant that Mr. Fridhandler is likely to have first-hand knowledge of the discussions that took place over the course of negotiating and drafting the 2022 Agreement. Whether and to what extent he would be able to testify to those discussions without breaching solicitor-client privilege remains to be seen. It also remains to be seen whether one or the other of the parties would be inclined (from a tactical perspective) to call him as a witness at trial, and whether or when a trial would take place.

[58] The uncertainty that accompanies trial preparation and pretrial proceedings, and the importance of a client's right to be represented by its choice of counsel, led Justice O'Brien to decide in ***Essa (Township)*** that the court should be reluctant to make what may be a premature order preventing a solicitor from continuing to act. He further commented that, in his view, a trial judge is better situated to make such an order.

[59] I have similar concerns in this case. To begin with, I do not see how Mr. Fridhandler's evidence would be needed for the purpose of the upcoming summary dismissal application. Such application would be made, in the ordinary course, by way of affidavits and evidence given during questioning on affidavits. If the Respondents are successful in having the Action dismissed because of the release granted by Nova Canada to Mr. O'Rourke and his consulting company, that will be the end of the matter. A trial will not take place.

[60] I also consider that at this time it is highly speculative as to whether either party would, in the result, wish to call Mr. Fridhandler as a witness. For the Applicant to do so without the benefit of pretrial questioning would constitute a significant tactical risk. For the Respondents to do so would constitute a significant risk of disqualification of their trial counsel (with attendant delays and costs), all of which may be quite unnecessary, from a legal and evidentiary perspective, depending on how they have decided to present their defence.

[61] Accordingly, I find that it is premature to decide whether BDP should be disqualified from acting as counsel to the Respondents on the basis that Mr. Fridhandler may be testifying at trial.

5. Is BDP's disqualification necessary for the proper administration of justice?

[62] Nova Canada asserts that the "potential" for Mr. Fridhandler's evidence to be contrary to the evidence of his clients, or to be otherwise consistent with the existence of a conspiracy in which he was involved, necessitates his disqualification to protect the integrity of the administration of justice.

[63] When considering disqualification on this ground, the court asks whether "the conflict between the lawyer's loyalties is so acute that 'a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor'": ***Habina*** at para 27.

[64] For the reasons discussed above, namely the uncertainty that Mr. Fridhandler would even be called as a witness, I do not find that Nova Canada's speculations regarding the nature of his evidence constitute the type of "acute" conflict of interest contemplated in ***Habina***.

VI. Conclusion

[65] I conclude that there was no solicitor-client relationship between Nova Canada and BDP. I find that Nova Canada was not a near client of BDP, and that Nova Canada has not provided evidence that confidential information was received by BDP from Nova Canada to the latter's prejudice or disadvantage. As a result, I find there was no relationship between Nova Canada and BDP such that the firm's representation of the Respondents creates a conflict of interest.

[66] Likewise, I find that, at this early stage of the proceeding, it is premature to disqualify BDP on the basis that Mr. Fridhandler might be called on to testify if the Action proceeds to trial. Given the significant cost in time and money associated with removing a counsel, I am loath to make a premature order, especially since it is speculative whether the Action will proceed to trial, or whether Mr. Fridhandler will be called on to testify.

[67] Finally, I find that the proper administration of justice does not require BDP's removal. Nova Canada has alleged that Mr. Fridhandler is complicit in a conspiracy and, thus, may give evidence contrary to that of his clients out of self-interest. It will be for the trial judge to decide whether the actions of the respondents constituted a tortious conspiracy. At this stage I am unwilling to interfere with the Respondents' right to choose their own counsel based on allegations of conspiracy that lie at the heart of the Action, are denied by the Respondents, and are many months, if not years from being tried. Such interference would be inconsistent with the proper administration of justice.

[68] As I have denied Nova Canada's application to remove BDP as counsel of record for the Respondents, I also deny Nova Canada's request for a procedural order directing Mr. Sather's and MM's new counsel to review BDP's records and update the Respondents' affidavit of records accordingly.

[69] The Respondents are entitled to costs of this application. If the parties cannot agree on costs within 30 days of this decision, that matter can be directed to me for determination by way of written submissions, not to exceed five pages, exclusive of authorities.

Heard on the 31ST day of May, 2024.
Dated at the City of Calgary, Alberta this 27th day of August, 2024.

R.A. Neufeld
J.C.K.B.A.

Appearances:

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