

CANADA / JUDGMENT

Barrows Capital Inc. v. Storm Mountain Development Corporation

2020 BCSC 255

COURT

Supreme Court of British Columbia

DECIDED

25 February 2020

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2020 BCSC 255 Barrows Capital Inc. v. Storm Mountain Development Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barrows Capital Inc. v. Storm Mountain Development Corporation,

2020 BCSC 255

Date: 20200225

Docket: S1914255

Registry: Vancouver

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

Between:

BARROWS CAPITAL INC. and FIELDSTONE CAPITAL INC.

Petitioners

And

STORM MOUNTAIN DEVELOPMENT CORPORATION, LONE TREE

PROPERTIES LTD., NELSON LANDING DEVELOPMENT CORPORATION,

STORM MOUNTAIN (BOWEN ISLAND) DEVELOPMENT CORP., and

STORM MOUNTAIN (COLUMBIA LAKE) DEVELOPMENT CORP.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioners:

J.D. Schultz

Counsel for Respondents:

D.W. Moriarty

A. A. Frydenlund, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

January 31, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2020

INTRODUCTION

- [1] On December 16, 2019, the petitioners Barrows Capital Ltd. ("Barrows") and Fieldstone Capital Inc. ("Fieldstone") commenced this proceeding. They are seeking to initiate a secured creditor-led restructuring with respect to the respondents, pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA").
- [2] The respondent, Storm Mountain Development Corporation ("Storm Mountain"), is the parent company of the other respondents, Lone Tree Properties Ltd. ("Lone Tree"), Nelson Landing Mountain Development Corporation, Storm Mountain (Bowen Island) Development Corp. and Storm Mountain (Columbia Lake) Development Corp. (collectively, the "Subsidiaries"). The Subsidiaries are corporate vehicles who were created to hold various residential development properties in BC.
- [3] Barrows/Fieldstone are represented in this proceeding by Dentons Canada LLP ("Dentons").
- [4] On December 19, 2019, the parties first attended in Court in respect of this proceeding. At that time, it was made clear that Storm Mountain and the Subsidiaries contested the granting of the relief sought by Barrows/Fieldstone.
- [5] In addition, opposition to this CCAA proceeding was advanced by other secured lenders of Storm Mountain and the Subsidiaries, SB Investments Canada Ltd. ("SB Invest") and 1085620 B.C. Ltd. ("108"). The main focus of the parties in this proceeding is a development property held by Lone Tree in Lantzville, BC. Generally speaking, SB Invest and 108 are in priority to Barrows/Fieldstone's position in respect of the development property.

- [6] On December 19, 2019, I adjourned the hearing of the petition. It is now scheduled to be heard on March 2, 2020. At that time, it is anticipated that Barrows/Fieldstone will proceed with their application for relief under the CCAA in the face of opposition from Storm Mountain, SB Invest and 108. In broad terms, the opposing parties say that any CCAA relief is inappropriate in the circumstances. In addition, I have been advised that 108 will concurrently seek an order nisi in its foreclosure proceeding against Storm Mountain and Lone Tree in respect of the Lantzville property.
- [7] Pending that hearing, Storm Mountain and the Subsidiaries apply for an order that Dentons is disqualified from acting as counsel for Barrows/Fieldstone in this proceeding.

RELATIONSHIP - STORM MOUNTAIN / DENTONS

- [8] Barrows/Fieldstone are mortgage investment corporations. They held interests in various real properties in BC through participation in syndicated mortgages, administered by Sterling Bridge Mortgage Corp. ("Sterling").
- [9] In 2011, the shareholders of Barrows/Fieldstone decided to wind down their affairs over the ensuing seven years. To facilitate that wind down, they decided to transfer a number of development properties in BC to a special purpose vehicle. This was done as it was necessary for Barrows/Fieldstone to be at arm's length from the developer of those properties. That special purpose vehicle became Storm Mountain and it was intended that the development properties would ultimately be held by the Subsidiaries.
- [10] Commencing in late 2011, the parties entered into a number of complex corporate transactions designed to achieve the purpose of facilitating the developments and wind down. Funding for the structure was to be provided by SB Invest who would advance funds to Storm Mountain, who would in turn advance funds to the Subsidiaries.
- [11] The main legal architect for these complex legal transactions was David Mann, who was at that time a Calgary partner of Fraser Milner Casgrain LLP ("FMC"), the predecessor firm of Dentons. Since that time, Mr. Mann has continued as a partner working in Dentons' Calgary offices. Mr. Mann also had another role in the transactions; he had been a director and minority shareholder of Barrows/Fieldstone since September 2009.
- [12] Mr. Mann acted as legal counsel for all of the parties. His client group at the time included Sterling, and its representative, Keith Prosser, a representative of SB Invest and Amy Hirsch at Paradigm Consulting Services, LLC.
- [13] On December 19, 2011, in connection with the wind down, Mr. Mann took care to advise his group of clients as to the consequences of any possible conflict affecting his ability to continue as their counsel. Mr. Mann requested and received written confirmation from all of his clients that he was acting for all of them in respect of the development and implementation of the strategy to maximize the value of Barrows/Fieldstone (described as the "Plan").

[14] At paragraph 4(e) of that letter agreement, all of his clients agreed that, if a conflict arose, FMC would continue as legal counsel for the "Sterling Group", which I assume includes Sterling and Barrows/Fieldstone:

in the event that a conflict arises between the parties and all parties are no longer able to extend their consent and agreement as outlined above, then FCM would withdraw from its engagement respecting the development, implementation and performance of the Plan (assisting new counsel in assuming that role where necessary and possible to do so), and continue with its ongoing engagement with the Sterling Group including its engagement in relation to the Plan.

[15] Around the same time, Mr. Mann implemented certain corporate steps in accordance with the Plan.

[16] On December 20, 2011, Storm Mountain was incorporated pursuant to the Alberta Business Corporations Act, R.S.A. 2000, c. B-9 (the "ABCA"). On April 11, 2012, Storm Mountain was extra-provincially registered in BC. The office of FMC/Dentons was and continues to be the Registered and Records Office of Storm Mountain in Alberta.

[17] Mr. Mann arranged for other incorporation documents to be prepared for Storm Mountain. Since 2011, FMC/Dentons has maintained Storm Mountain's minute book at its Calgary offices, in accordance with s. 21 of the ABCA. However, as I will discuss below, Denton's holding of Storm Mountain's minute book is currently a matter of some mystery and controversy.

[18] In accordance with Mr. Mann's "Plan", Barrows/Fieldstone transferred their interests to Storm Mountain who in turn transferred ownership of the development properties to the Subsidiaries. In consideration of such transfers, Barrows/Fieldstone received various promissory notes, guarantees and security for amounts owed.

[19] In 2012, SB Invest advanced secured loans to Storm Mountain and the Subsidiaries for the developments. In connection with these loans, on February 28, 2012, Barrows/Fieldstone, Storm Mountain and SB Invest entered into a priorities agreement (the "Priorities Agreement"). This agreement was principally put in place to confirm the respective priorities of SB Invest and Barrows/Fieldstone with respect to the security held against Storm Mountain and the Subsidiaries' assets and to address related matters.

[20] In 2017, 108 advanced loans to Storm Mountain. As with SB Invest, this transaction was accompanied by a subordination agreement to confirm 108's priority with respect to the Lantzville property.

[21] With respect to Storm Mountain and the Lantzville property, essentially the secured creditors are ranked in first, second and third position as 108 (\$13 million), SB Invest (\$25 million) and Barrows/Fieldstone (\$51 million) respectively.

[22] Initially, the directors of Storm Mountain and the Subsidiaries were Ms. Hirsch and Allard Ockeloen (nominees of SB Invest) and John Reed (nominee of Barrows/Fieldstone). The Priorities Agreement provided in Articles 10.3 and 11.3 that none of the initial directors could be replaced by SB Invest or Barrows/Fieldstone unless:

they have failed to act in good faith, have misused funds or have been grossly negligent.

[23] Currently, the directors and management of Storm Mountain are Mr. Ockeloen and Mr. Reed. Mr. Ockeloen is the sole voting shareholder of Storm Mountain. Both men have sworn affidavits in this proceeding.

[24] The crux of the issue here arises from Storm Mountain's contention that Dentons is in a conflict of interest as the firm continues to act as Storm Mountain's counsel, giving rise to a conflict in Dentons' ability to act against Storm Mountain in this proceeding. Alternatively, Storm Mountain says that it was a former client of Dentons and that it is inappropriate for Dentons to now act against it.

[25] Mr. Ockeloen is the only person who gave evidence concerning the ongoing solicitor/client relationship between Storm Mountain and FMC/Dentons since 2011. He has understandably been circumspect in his evidence to avoid waiving privilege over any communications with Dentons, given the ongoing disputes between the parties.

[26] Mr. Ockeloen confirms the following:

- a) Since Storm Mountain's incorporation, Dentons has acted as its Registered and Records Office. Dentons remains its Registered and Records Office and Dentons' continues to hold its minute book;
- b) It is his understanding that, as the Registered and Records Office, Dentons has and maintains confidential information not otherwise available to the general public or shareholders. He further says this information is only available to directors and includes minutes of directors' meetings;
- c) He refers to a heavily redacted opinion letter from Mr. Mann to Storm Mountain dated September 28, 2012. In that letter, Mr. Mann refers to his review and analysis of certain matters. This letter was copied to Mr. Prosser of Sterling (who is also a director of Barrows/Fieldstone);
- d) He refers to two statements of account both dated February 5, 2013 from FMC/Dentons to Storm Mountain totalling approximately \$17,200 for legal services, which reflects time spent by Mr. Mann and others throughout 2012;
- e) He refers to a statement of account dated May 31, 2013 from FMC to Storm Mountain totalling approximately \$5,300 for legal services in the spring 2013;

- f) He refers to a statement of account dated January 31, 2017 from Dentons to Storm Mountain totalling approximately \$2,850 for legal services, which reflects time spent by Mr. Mann and others from fall 2014 to late 2016;
- g) He confirms that since its incorporation, FMC/Dentons has billed and collected in excess of \$400,000 in legal fees from Storm Mountain; and
- h) In December 2017 and 2018, Dentons continued to act for Storm Mountain in respect of communications toward the filing of its annual returns for 2017/2018, and the drafting of related directors and shareholders resolutions. The 2018 documentation was forwarded to Mr. Ockeloen in April 2019.

STORM MOUNTAIN'S POSITION RE DENTONS

- [27] Mr. Ockeloen and Mr. Reed were both served with the petition in this action via email. Mr. Ockeloen does not know if the materials were served on Storm Mountain's Registered and Records Office in Calgary. If such formal service did take place, it would have been Dentons' Vancouver offices (acting for Barrow/Fieldstone) serving Dentons' Calgary offices (the Registered and Records Office) with the materials.
- [28] Indeed, Mr. Mann is listed on page 2 of the petition as one of the four Dentons solicitors acting on behalf of Barrows/Fieldstone against Storm Mountain, while also acting as the main solicitor in charge of Dentons' corporate relationship with Storm Mountain.
- [29] Upon service of the materials, Storm Mountain retained Owen Bird Law Corporation ("Owen Bird") as its counsel. Owen Bird was, at that time, acting as the BC Registered and Records Office for Storm Mountain.
- [30] Before the first hearing date of December 19, 2019, Owen Bird advised Dentons that Storm Mountain objected to Dentons acting against it in these proceedings. This objection was made on the basis that Dentons possessed confidential information about Storm Mountain and that continuing to act was in breach of Dentons' duty of loyalty to Storm Mountain.
- [31] Only weeks later, on January 13, 2020, was Owen Bird advised that Dentons would oppose any efforts to remove them as counsel and that they would oppose any court application by Storm Mountain to do so.

THE MINUTE BOOK MYSTERY

- [32] In late January 2020, matters became more complicated between Barrows/Fieldstone and Storm Mountain when the former made efforts to remove Mr. Reed as a director of Storm Mountain.
- [33] On January 24, 2020, Barrows/Fieldstone gave written notice to Mr. Reed purporting to remove him as a director of Storm Mountain and the Subsidiaries. Earlier, on December 20, 2019, Mr. Reed had sworn and filed his Affidavit #1 in opposition to this proceeding.

- [34] In their letter, Barrows/Fieldstone alleged that Mr. Reed had failed to act in good faith under Articles 10.3 and 11.3 of the Priorities Agreement by taking steps against Barrows/Fieldstone's interests and in filing evidence in opposition to their petition for relief under the CCAA.
- [35] Mr. Reed subsequently retained independent legal counsel. On January 27, 2020, his counsel wrote to Barrows/Fieldstone to deny the allegations of bad faith. Mr. Reed took the position that he had not been properly removed as a director of Storm Mountain and that he continued to hold that position.
- [36] Also arising from Barrows/Fieldstone's removal letter, Mr. Ockeloen sought legal advice from Owen Bird on behalf of Storm Mountain. Owen Bird advised that, in order to provide an opinion on the matter, it would be necessary to review Storm Mountain's minute book in Calgary. Storm Mountain retained Parlee McLaws LLP ("Parlee") in Calgary to attend at Dentons' offices to do so.
- [37] On January 27, 2020, Dentons was advised of Parlee's retainer.
- [38] On January 28, 2020, Parlee was advised by a senior paralegal in Dentons' corporate department in Calgary that it was the registered office for Storm Mountain. The paralegal confirmed that Dentons had some scanned documents but they did not maintain a complete electronic copy of the minute book.
- [39] However, the Dentons paralegal also advised Parlee that the minute book had been "sent out" and was not on site (which I take to mean their Calgary offices). The paralegal further advised that the lawyer in charge of the file was off site and she was trying to get instructions as to whether Dentons had the authority to provide a copy of the minute book and whether Dentons would be taking steps to recall the minute book to Calgary. Finally, the paralegal advised Parlee that Dentons was trying to confirm the exact location of the minute book.
- [40] On January 29, 2020, a lawyer at Parlee spoke to John Regush, an associate lawyer at Dentons' Calgary offices. Mr. Regush is also listed as one of Barrows/Fieldstone's solicitors in the petition in this proceeding, along with Mr. Mann and others.
- [41] Mr. Regush advised Parlee that:
- a) Dentons had sent Storm Mountain's minute book to Vancouver for "due diligence";
 - b) Dentons was working to get the minute book back to Calgary; and
 - c) A letter had been sent by Dentons requesting the return of the minute book, but no response to that letter had been received.

- [42] Neither Mr. Ockeloen nor Mr. Reed authorized Dentons' Calgary offices or anyone else to remove the minute book from that office; nor did they authorize anyone else to review the minute book. They never received or entertained a request for such a review. Mr. Ockeloen also confirms that no such authorization came from Storm Mountain's comptroller or its only other employee.
- [43] Later on January 29, 2020, Parlee emailed Mr. Regush requesting further information on the status of the minute book including: where it was sent and to whom; a copy of the transmittal letter; who at Storm Mountain authorized that the minute book be sent off-site from Dentons; and, a copy of Dentons' letter recalling the minute book to their Calgary offices.
- [44] Mr. Ockeloen states that Storm Mountain needs to review the minute book so that it can obtain legal advice on Barrows/Fieldstone's letter purporting to remove Mr. Reed as a director and also, other matters relating to corporate governance.
- [45] Incredulously, Parlee never received any response from anyone, including Mr. Regush or any other lawyer in Dentons' Calgary office, as to the status of Storm Mountain's minute book. At this hearing, days later, Barrows/Fieldstone's counsel confirmed that he did not have any information to clarify that matter and that they were "looking in it".
- [46] The location of the minute book and what happened to it after it left Dentons' Calgary offices remain a mystery at this time. No lawyer at Dentons' offices (Vancouver or Calgary) has seen fit to provide an answer to those questions or state what they know about the matter.
- [47] Mr. Ockeloen's concern, particularly given Dentons' representation of Barrows/Fieldstone via their Vancouver offices (although the petition refers to both Mr. Mann and Mr. Regush, who both practice in Calgary), is that the minute book is possibly in the hands of third parties who are adverse in interest to Storm Mountain. Needless to say, those third parties may include their current adversaries, Barrows/Fieldstone. Dentons has not made any effort to confirm or deny this possibility. Similarly, Barrows/Fieldstone are silent on the issue.

GOVERNING LEGAL PRINCIPLES

- [48] The parties are in agreement as to the relevant legal principles applicable on this application.
- [49] In *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at para. 19, the Court confirmed that a law firm owes a duty of loyalty to its clients, with that duty having three salient dimensions: (1) a duty to avoid conflicting interests; (2) a duty of commitment to the client's cause; and (3) a duty of candour.

- [50] Following its earlier decision in *R. v. Neil*, 2002 SCC 70, the Court in *McKercher* at para. 8 confirmed the "bright line" rule that provides that a lawyer or law firm may not concurrently represent clients adverse in interest - even where the retainers are unrelated - without obtaining their clients' consent. Essentially, this rule deems there to be a conflict of interest: *McKercher* at para. 38.
- [51] With respect to current clients, the Court is concerned with the risk of misuse of confidential information and a risk of impairment of representation: *McKercher* at paras. 23-26. As was noted by the Court, there are limits to the "bright line" rule that *Barrows/Fieldstone* argue in support of their arguments, and which I will discuss below.
- [52] Even if the "bright line" rule is inapplicable for any reason, the Court has the inherent jurisdiction to order removal of counsel. In that event, the question becomes whether the concurrent representation of clients creates a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client or a third person": *McKercher* at para. 8 citing *Neil* at para. 31. This determination is more contextual and seeks to determine whether the situation is liable to create conflicting pressures on judgment as a result of factors which may reasonably be perceived as affecting judgment: *McKercher* at para. 38.
- [53] The onus lies on the client - here *Storm Mountain* - to establish the existence of a conflict: *McKercher* at para. 38.
- [54] With respect to former clients, the Court in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 emphasized that disqualification may be appropriate to avoid risk of prejudice to the client arising from the use of confidential information in the course of a prior retainer. In that analysis, at 1243, the Court sought to achieve that objective in the context of a balancing of conflicting values:
- a) To maintain the high standards of the legal profession and the integrity of our justice system;
 - b) That a litigant should not be deprived of their choice of counsel without good cause; and
 - c) The desirability of permitting reasonable mobility in the legal profession.
- [55] On the matter of remedy, disqualification is generally the only appropriate remedy to avoid the risk of improper use of confidential information and/or to avoid the risk of impaired representation: *McKercher* at paras. 61-62. The remedy (disqualification) may also be supported where the Court considers it necessary to maintain the repute of the administration of justice, although other relevant considerations may point to another result: *McKercher* at paras. 63-65.

DISCUSSION

[56] The arguments advanced by Storm Mountain turn initially on the question of whether it is a current client of Dentons, thus invoking the "bright line" rule and deeming a conflict.

a) The "Bright Line" Rule

[57] The "bright line" rule is engaged when there is concurrent representation of clients adverse in interest: McKercher at para. 26. If it applies, the rule prohibits concurrent representation without the consent of the clients. The "bright line" rule cannot be rebutted or otherwise attenuated: McKercher at paras. 28-29 and 41.

[58] In Neil at para. 29, the Court articulated the rule as follows:

The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client -- even if the two mandates are unrelated -- unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

[Emphasis in original.]

[59] Storm Mountain contends that it is a current client of Dentons such that the "bright line" rule applies. Storm Mountain says that its immediate legal interests are directly adverse to Barrows/Fieldstone's in this proceeding, such that Dentons should be disqualified from acting for Barrows/Fieldstone without obtaining its consent.

[60] Barrows/Fieldstone in turn argue that Storm Mountain is not a current client of Dentons. Alternatively, they argue that the "bright line" rule should not apply since it is unreasonable to expect that Dentons would not concurrently represent Barrows/Fieldstone in this proceeding.

[61] The onus lies on Storm Mountain to establish that a solicitor/client relationship exists at this time: Milverton Capital Corp. v. Thermo Tech Technologies Inc., 2002 BCSC 773 at para. 60.

[62] Whether Storm Mountain was a current client of Dentons as of December 2019 when this action was commenced is a question of fact, to be assessed based on all of the relevant evidence: Milverton Capital at para. 58; 7102763 Canada Inc. v. 2242869 Ontario Inc., 2014 ONSC 3819 at para. 17; and Halsbury's Laws of Canada (online), Legal Profession (2017 Reissue), (Adamski), "Acting against former clients" (IV.4.(14)) at HLP-205.

[63] As stated above, Storm Mountain was incorporated by FMC (now Dentons) in Alberta on December 20, 2011. Dentons has acted as the solicitors for Storm Mountain since incorporation and has, among other things, acted as its Registered and Records Office. To this date, Dentons remains as Storm Mountain's Registered and Records Office in Alberta and the law firm has continued with its mandate to maintain the corporation in good standing and hold its minute book.

- [64] In their argument, Barrows/Fieldstone argued that Storm Mountain had not produced any evidence of the provision of legal services by Dentons after May 2013. In response, a Dentons statement of account dated January 31, 2017 was produced. This statement refers to legal services being provided by a number of Dentons professional timekeepers, including Mr. Mann himself, throughout 2016.
- [65] Despite Barrows/Fieldstone taking the position that Storm Mountain is not a current client of Dentons, they have not seen fit to provide any evidence that might generally describe when Dentons' provision of legal services (beyond the maintenance of the Registered and Records Office) terminated.
- [66] I find that Mr. Ockeloen's evidence is sufficient to establish the provision of legal services by Dentons to at least the end of 2016 and to support a reasonable inference that the solicitor/client relationship continued after that time beyond simply the maintenance of its corporate records. I also consider that Storm Mountain has put forward a sufficient basis upon which Dentons might have rebutted Mr. Ockeloen's contentions if, indeed, its more general retainer for Storm Mountain had been earlier terminated. Dentons has not responded in any fashion.
- [67] Alternatively, even if a more general retainer on Dentons' part was not established post-2016, Storm Mountain argues that Dentons' role, as its Registered and Records Office is, on its own, sufficient to establish a current solicitor/client relationship so as to invoke the "bright line" rule.
- [68] Storm Mountain refers to the Code of Professional Conduct for British Columbia that contains the following definition of "client" in Chapter 1:
- "client" means a person who:
- (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
 - (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

I was not referred to any similar provision that might pertain in Alberta.

- [69] The parties have referred to a number of cases, said to bear on the issue as to whether a person who retains a law firm to simply act as the Registered and Records Office and maintain a minute book can be considered a "current" client.
- [70] In *Mottershead v. Burdwood Bay Settlement Company Ltd.*, [1991] B.C.J. No. 2554 (S.C.), the Court addressed a situation where a law firm was retained to act in an oppression action to defend both the majority shareholders and the company. Shortly after the litigation began, the law firm became the Registered and Records Office for the company. Justice Allan found a conflict existed since the law firm was required to advise all of the directors of the company and that a potential conflict existed between the personal interests of the

shareholders and their fiduciary duties as directors. In that case, the law firm's representation went well beyond acting as the Registered and Records Office for the company; in fact, it was actively defending the litigation on behalf of the company. As such, I fail to see how the reasoning in this case assists Storm Mountain.

[71] The same can be said for Barrows/Fieldstone's reliance on *British Columbia Association of Optometrists v. British Columbia (Ministry of Health)*, [1998] B.C.J. No. 186 (S.C.). Justice Loo considered whether a lawyer, who acted for an optical company and whose law firm was the Registered and Records Office for three optical companies, was disqualified from sitting as a member of the professional council to investigate matters relating to the profession of optometry.

[72] On the matter of the alleged conflict, Loo J. considered an article from a 1997 Benchers' Bulletin published by the Law Society of British Columbia. That article stated:

Acting against your own client when your firm is the registered and records office.

The Ethics Committee was recently asked whether it is proper for a lawyer to act against a company for which the lawyers' firm is the registered and records office. The Committee's view is that it is proper for a lawyer to act in these circumstances, if the lawyer or law firm has no confidential information relevant to the matter on which the lawyer has been asked to act.

[73] Two observations are merited here.

[74] Firstly, this Bulletin was issued in 1997, before the Supreme Court's decisions in *Neil* (2002) and *McKercher* (2013) confirming the "bright line" rule. Secondly, Loo J.'s decision was that there was no reasonable apprehension of bias in the circumstances there. She did not address the issue before me on this application as to whether a solicitor/client relationship existed between the law firm and the optometry companies.

[75] A similar situation to *Mottershead* arose in *Jeffers v. Calico Compression Systems*, 2002 ABQB 72. In *Jeffers*, a lawyer had acted for two parties in incorporating a company (Calico), including the preparation of a shareholders agreement. A dispute arose between the shareholders. The lawyer continued to act for one of the shareholders and Calico. The plaintiff shareholder (Mr Jeffers) objected.

[76] In *Jeffers*, the court undertook an analysis as to whether the lawyer had a solicitor/client relationship with Mr. Jeffers. The court concluded that such a relationship existed in that case, after considering various indicia that might exist toward determining that issue, including:

- [8] 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. Not all indicia need to be present.
- [77] As noted, Dentons remains the Registered and Record Office of Storm Mountain and should have possession of its minute book. Clearly, FMC/Dentons has acted as Storm Mountain's solicitors from its inception when Mr. Mann caused it to be incorporated in 2011 and when Storm Mountain participated in the complex legal transactions under the reorganization or the wind-up Plan that was implemented in 2012. As recently as January 2017, Dentons was issuing invoices to Storm Mountain for legal services. Into April 2019, just months before filing the petition, Dentons was corresponding directly with Storm Mountain regarding annual filings it had prepared on Storm Mountain's behalf.
- [78] I agree that these are all indicia of an existing solicitor/client relationship. Dentons has not indicated any contrary position.
- [79] Barrows/Fieldstone argue that the preparation of routine annual corporate documents by paralegal staff cannot ground a "current, meaningful solicitor client relationship", sufficient to ground the duty of loyalty, as discussed in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 60.
- [80] It is worth noting at this time that, the Bulletin referred to by Loo J. in *Association of Optometrists* refers to the law firm being able to act as both the Registered and Records Office and against that company only if the lawyer or law firm has no confidential information relevant to the matter on which the lawyer has been asked to act.
- [81] Mr. Mann's and Dentons' mandate to at least late 2016 included advising Storm Mountain on matters generally, including the Plan. Invariably, that would include the matter of the relationships, rights and obligations arising between Storm Mountain and other parties to the Plan, including Barrows/Fieldstone and SB Invest. As I will discuss below, those relationships are central issues engaged by these CCAA proceedings.
- [82] The circumstances considered in *Amack v. AW Holdings Corp.*, 2010 ABQB 759 are entirely distinguishable. In that case, the court found that no solicitor/client relationship existed between the law firm for the applicant, MacPherson Leslie & Tyerman LLP ("MLT") and the respondent company, Booster Juice. MLT had simply acted as an agent for the company's regular counsel toward filing corporate documents for Booster Juice in Saskatchewan. Importantly, the company had not retained MLT in any respect and no legal advice had been given; only paralegals were involved in the filings: see paras. 17-25.

- [83] The fact that the solicitor/client relationship between Dentons and Storm Mountain was perhaps narrowed in recent years to the filing of annual returns and preparation of resolutions does not detract from the overall engagement of Dentons as Storm Mountain's corporate solicitors. It is telling that, despite arguments advanced by Barrows/Fieldstone, no one at Dentons has provided any evidence that they had merely acted in a minor role through paralegals preparing standard corporate filings post-2016.
- [84] In all the above circumstances, I find that Storm Mountain has established that it was a current client of Dentons as of December 2019 when this proceeding commenced and that Dentons continues in that role. I also consider it beyond question that Mr. Mann (and possibly others at Dentons) possess information confidential to Storm Mountain that could be used against it in these proceedings. Mr. Ockeloen states in the uncontradicted evidence found in his Affidavit #1 sworn January 14, 2020 at paras. 9-10 that Dentons and Mr. Mann have and maintain Storm Mountain's confidential information.
- [85] Accordingly, subject to the further argument addressed below, I conclude that the "bright line" rule applies given that the immediate legal interests of Barrows/Fieldstone and Storm Mountain are in play and are directly adverse to each other in this proceeding; McKercher at paras. 33-35.
- [86] Barrows/Fieldstone then argue that, even if the "bright line" rule is engaged, this situation falls outside of its application. They argue that it is unreasonable to expect that Dentons would not act for Barrows/Fieldstone in these circumstances.
- [87] This exception was discussed in McKercher, where the Court stated:
- [37] Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In Neil, Binnie J. gave the example of "professional litigants" whose consent to concurrent representation of adverse legal interests can be inferred:

In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied. [para. 28]

In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie J. stated in Neil, these cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable

expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.

[Emphasis added.]

[88] Barrows/Fieldstone advance this argument on the basis that Storm Mountain and the Subsidiaries were created solely to act as special purpose vehicles to allow them to realize upon the development properties.

[89] They point to the Priorities Agreement executed in February 2012 as indicative of the relationship between the parties and their respective expectations in relation to future issues that might arise. I accept that the Priorities Agreement, as with Mr. Mann's continued joint representation, reflected the close connection between the parties concerning how matters would be managed into the future. The Priorities Agreement refers to:

- a) An "Advisor" (a representative of SB Invest) being appointed who is entitled to attend Storm Mountain's directors' meetings and provide advice to them (Articles 1.1 and 10.4);
- b) A "Review Committee" being struck and populated with designates by Sterling who are representatives of Barrows/Fieldstone. The Review Committee is entitled to review reports from the directors of Storm Mountain and attend meetings with the Advisor and the Storm Mountain directors to discuss matters (Articles 1.1 and 13.1);
- c) Storm Mountain was obligated to allow SB Invest and Barrows/Fieldstone access to the property and assets of Storm Mountain, including access to records, ledgers, reports, document and other writings relating to such property and assets. The Review Committee was entitled to inspect the developments (Articles 4.1 and 13.1); and
- d) As discussed above, SB Invest and Barrows/Fieldstone were entitled to nominate directors of Storm Mountain and remove them under certain circumstances.

[90] However, a reading of the Priorities Agreement reveals and recognizes the parties' understanding and agreement that Storm Mountain is an entity separate and apart from SB Invest and Barrows/Fieldstone. This is particularly evident by the provision that limits their ability to direct and control Storm Mountain's governance; they were only entitled to remove the initial directors in certain circumstances, including a failure to act in good faith; and in Mr. Ockeloen's case, in accordance with his Employment Contract (Articles 10/11).

[91] Read as a whole, the provisions found in the Priorities Agreement were meant to provide a balance to the governance of Storm Mountain as between the two major interested parties at the time (SB Invest and Barrows/Fieldstone), and to afford both secured creditors certain rights relevant to the recovery of their secured loans.

- [92] I do not accept Barrows/Fieldstone's argument that the Priorities Agreement reflects an expectation (let alone a reasonable expectation) on Storm Mountain's part that their own solicitors could act against them in the event of a default under Barrows/Fieldstone's security, where Barrows/Fieldstone took action to realize on that security.
- [93] Sterling, SB Invest and Barrows/Fieldstone were well aware of the potential for this very conflict from the start. Hence, Mr. Mann's objective, as any reasonable solicitor would do, in clarifying the consequences of a conflict arising, as set out in his letter of December 19, 2011. I can only presume that this letter explains why SB Invest does not object to Dentons' continuing representation of Barrows/Fieldstone in a manner adverse to its interests.
- [94] However, Storm Mountain was not even in existence at the time that the December 2011 letter was prepared and executed by Mr. Mann's then client group. Nor did Storm Mountain consent to the terms of that letter at any later time. Such an agreement could no doubt have been easily secured in the halcyon days of the parties' relationship before the current conflict arose (for example, in the security documentation signed by Storm Mountain and the Subsidiaries in favour of Barrows/Fieldstone).
- [95] Storm Mountain is looking down the barrel of a gun aimed at it by its third ranking secured creditors, Barrows/Fieldstone. Storm Mountain is a separate entity from its creditors. Its relationship with its creditors is governed by complex legal documentation setting out their respective rights and obligations. Storm Mountain's board of directors have decided that the efforts of Barrows/Fieldstone in this proceeding should be opposed, presumably concluding that the best interests of Storm Mountain lie elsewhere. Storm Mountain also has other interests at play to consider, particularly the first secured debt owing to 108, and likely other commercial and legal interests.
- [96] At bottom, the gap between the legal and commercial interests of Storm Mountain and Barrows/Fieldstone has considerably widened since the early days in 2011/2012. I do not accept that Storm Mountain reasonably expected that Dentons would act against it in this proceeding, giving rise to the exception to the "bright line" rule. The circumstances considered in 7102763 Canada in which a contrary conclusion was reached at para. 27 are distinguishable from the facts here.
- [97] The "bright line" rule set out in Neil and McKercher applies.
- b) Beyond the "Bright Line" Rule
- [98] My conclusion above is sufficient to provide a basis upon which to disqualify Dentons from acting in this proceeding against Storm Mountain. I will, however, in the alternative, consider the matter if Storm Mountain is a former (not current) client such that the "bright line" rule does not apply, or if the rule is not otherwise engaged by reason of an exception.

- [99] In that event, Storm Mountain takes the position that this Court should still conclude that Dentons is in a conflict and that it ought not to be permitted to continue acting for Barrows/Fieldstone in this proceeding.
- [100] In respect of former clients, a lawyer's duty to avoid conflicting interests is mainly concerned with the misuse of confidential information obtained from a client during a previous retainer: McKercher at para. 23.
- [101] If Storm Mountain is a former client of Dentons, MacDonald Estate at 1260 dictates that two questions must be answered:
- (1) Did Dentons receive confidential information attributable to a solicitor/client relationship relevant to the matter at hand?
 - (2) Is there a risk that it will be used to the prejudice of Storm Mountain?
- [102] In answering the first question, the court may consider evidence that confidential information was in fact imparted. Here, understandably, Mr. Ockeloen has not disclosed what communications took place between Storm Mountain and Dentons, which might be considered a waiver of privilege. However, he states that Mr. Mann obtained confidential information during the course of his retainer for Storm Mountain. No contrary evidence was introduced.
- [103] Alternatively, the former client may establish that a previous relationship existed with the law firm that is "sufficiently related" to the law firm's present retainer in this proceeding. If shown, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no relevant information was imparted: MacDonald Estate at 1260.
- [104] I accept Barrows/Fieldstone's argument that there must be a "cogent and compelling connection" and that bald assertions that the matters are sufficiently related will not suffice: Merrick v. Rubinoff, 2013 BCSC 2352 at para. 15, citing No. 151 Cathedral Ventures Ltd. v. Gartrell, 2000 BCSC 1020 at para. 47.
- [105] I conclude that Storm Mountain has met its burden in providing evidence that Dentons' relationship with it is sufficiently connected to their present retainer for Barrows/Fieldstone. That evidence comes principally from Mr. Prosser himself, and is supplemented by Mr. Ockeloen's evidence.
- [106] Mr. Prosser's Affidavit #1 sworn December 16, 2019 in support of the petition outlines in great detail the genesis of Storm Mountain's very existence. At para. 13, he states:
- [Storm Mountain] was the special purpose vehicle created as part of the independent corporate structure in connection with this wind down, and the purpose of the contemplated structure was to provide an opportunity for Barrows and Fieldstone to maximize the value of their investments.

- [107] Despite Mr. Prosser's reference to an "independent corporate structure" being implemented, it is clear enough that Barrows/Fieldstone and Storm Mountain were on that common path toward development of the properties to a point. Mr. Prosser confirms in his Affidavit #2 sworn January 28, 2020, filed in opposition to this application, that Mr. Mann/Dentons was jointly retained:
6. for the restructuring and consequential steps with the new special purpose vehicle, [Storm Mountain].
- [108] With respect to the relationship between the retainers, one need only look to the substance of Barrows/Fieldstone's arguments in the CCAA proceedings and the evidence that they intend to rely on in support of the relief they seek.
- [109] Mr. Prosser's Affidavit #1 refers to differing views between Barrows/Fieldstone and Storm Mountain as to how to proceed with the developments. He refers to the "Current Restructuring Alternative" put forward by Storm Mountain's management that he contends would be prejudicial to the interests of Barrows/Fieldstone. In essence, he argues that Storm Mountain has strayed from the very purpose for which it was created by Barrows/Fieldstone, stating:
144. From its inception, the purpose of [Storm Mountain] was to permit Barrows and Fieldstone to maximize the value of their investments, and a restructuring alternative that would see significant distributions going to third parties at the expense of Barrows and Fieldstone is antithetical to the purpose of [Storm Mountain].
- [110] When that point of divergence between the parties occurred is not clear from the evidence; however, what is clear is that Mr. Mann continued to act for both parties in fall 2012, when Mr. Mann's opinion to Storm Mountain dated September 28, 2012 was copied to Mr. Prosser. We also know that Mr. Mann was continuing to bill Storm Mountain for legal services in 2016, when again it can be presumed that his joint clients were "on the same page".
- [111] Whenever it occurred, this divergence in interests is now the basis upon which Barrows/Fieldstone wish to impose an involuntary restructuring proceeding on Storm Mountain so as to protect their own interests.
- [112] The relief sought in this CCAA proceeding is far reaching; Barrows/Fieldstone are seeking approval of \$16.48 million in interim financing to pay out 108's secured debt (approximately \$13 million) and provide working capital for the commencement of development activities in Lantzville. Given Mr. Prosser's concerns and disagreement with the position of Mr. Ockeloen and Mr. Reed, Barrows/Fieldstone are also seeking the appointment of a Chief Restructuring Officer ("CRO") and a residential real estate development consultant in these proceedings, both to be empowered to assist in the "Restructuring". Reading between the lines, this really means tasking the CRO and consultant with the operations of the business and moving toward a completion of the Lantzville development in a manner with which Storm Mountain disagrees.

- [113] The relationship existing between Barrows/Fieldstone and Storm Mountain over the years since 2011 is proffered by Mr. Prosser, at least in part, as supporting the appropriateness of an order that Storm Mountain should be put in this restructuring proceeding. Whether such relief is appropriate is a matter of this Court's discretion pursuant to s. 4 and 5 of the CCAA. Even if such relief is appropriate, the other extraordinary relief (interim financing and appointments of the CRO and consultant) sought by Barrows/Fieldstone also remain subject to this Court's statutory discretion.
- [114] Needless to say, I make no comment or determination as to the merits of Barrows/Fieldstone's arguments and what I understand to be the countervailing arguments to be advanced. Those will be considered in the fullness of time.
- [115] However, in the meantime, in the face of those outstanding issues, I have no difficulty concluding that Dentons' previous representation of Storm Mountain is directly related to its current representation on behalf of Barrows/Fieldstone.
- [116] Barrows/Fieldstone contend that it is "inherently unlikely" that Dentons possesses any confidential information that is sufficiently related to its present retainer "given the amount of time that has passed since Dentons provided services to Storm Mountain". They cite *Alberta Cement Corporation v. Bakewell*, 1999 ABQB 1001 at paras. 14 and 27 in support.
- [117] I accept that retainers at differing times may be indicative of a lack of connection between the matters and that a time lapse should be considered in the overall circumstances. However, the relationship between the retainers here - focussed on the development of the properties and repayment of the loans to Barrows/Fieldstone and the differing views of the parties as to how that might be accomplished - have not, in my view, been affected by the passage of time. They remain at the core of Dentons' retainers - whether for Barrows/Fieldstone and Storm Mountain initially, or for Barrows/Fieldstone alone at this time.
- [118] I accept that Storm Mountain has presented sufficient evidence to support an affirmative answer to the first question per *MacDonald Estate*. I find that Dentons is possessed of Storm Mountain's confidential information attributable to a solicitor/client relationship with Dentons that is very relevant to the present issue.
- [119] The second question, per *MacDonald Estate*, is whether there is a risk that confidential information will be misused.
- [120] The statements of the Court in *MacDonald Estate* at 1261 are to the point on this issue: "[a] lawyer who has relevant confidential information cannot act against his client or former client".

- [121] There is no basis here to engage in a consideration of whether there is "clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur", as discussed at 1262 of MacDonald Estate. Dentons does not purport to have even considered the matter of the potential misuse of Mr. Mann's knowledge of Storm Mountain's confidential information. There are simply no "measures" to consider.
- [122] Indeed, based on Barrows/Fieldstone's argument discussed below, it appears that they consider that Mr. Mann's knowledge with respect to Storm Mountain's confidential matters can and may be used against Storm Mountain in this proceeding and that Dentons apparently agrees.
- [123] Barrows/Fieldstone's answer is that no "misuse" of this confidential information can occur. They rely on the access provisions found in Article 4.1 of the Priorities Agreement, to which I've already generally referred. The full Article provides:
- Storm Mountain, at the request of the parties hereto shall permit each Creditor or its designated agents, access at all reasonable times and upon reasonable prior written notice to any property or assets of Storm Mountain including the right to make copies of or extracts from any books of account and all records, ledgers, reports, documents and other writings relating to such property and assets, at the Creditor's expense.
- [124] Barrows/Fieldstone argue that this provision indicates an intention that it would have "open access to all information" regarding Storm Mountain and its Subsidiaries. They then argue that, in light of this right to disclosure on the part of Barrows/Fieldstone, there is no risk that Dentons could misuse confidential information since Barrows/Fieldstone could request this information in any event from Dentons.
- [125] I disagree. While Article 4.1 sets out Storm Mountain's agreement as to Barrows/Fieldstone's entitlement to access books and records, I do not interpret that provision as allowing Barrows/Fieldstone unfettered access to confidential and privileged information and communications with its counsel, save with Storm Mountain's consent. Barrows/Fieldstone point to Mr. Mann's opinion dated September 28, 2012, copied to Mr. Prosser, although this was at an earlier time when Mr. Mann clearly had a joint retainer between them and I would presume that Storm Mountain gave its specific consent to this communication.
- [126] Taken to its logical conclusion, Barrows/Fieldstone's argument with respect to Article 4.1 would allow them (and SB Invest) access to the privileged legal advice that Storm Mountain is presently receiving from its new counsel retained in this proceeding, Owen Bird. It would be unthinkable to suggest that such entitlement exists given the circumstances; needless to say, Barrows/Fieldstone do not believe this to be the case.
- [127] On the matter of the potential for the misuse of confidential information, I return to the matter of the minute book.

- [128] Mr. Ockeloen's uncontradicted evidence is that, as the Registered and Records Office of Storm Mountain, Dentons has and maintains confidential information that is not otherwise available to the general public or shareholders.
- [129] Dentons' "loss" or "misplacement" of the minute book, possibly outside of Alberta, is a serious matter.
- [130] This situation has potentially exposed Storm Mountain to a contravention of s. 21 of the ABCA in terms of the records being located other than where the directors designated. Section 21(9) provides that a corporation contravening that section is guilty of an offence and liable to a fine not exceeding \$5,000.
- [131] If Dentons has dealt with the minute book, other than in accordance with the directions of the directors (as appears to be the case based on what is now known), significant consequences may arise with respect to Dentons in relation to their professional responsibilities.
- [132] In the face of this serious issue, Dentons has remained silent, despite the controversy concerning the minute book being raised on January 27, 2020, well before this hearing. Dentons has failed to respond to Mr. Ockeloen's Affidavit #2 sworn and filed January 30, 2020 when this matter was raised. In the days following January 29, 2020 when Mr. Regush provided advice to Parlee, Dentons failed to provide any further information to their client, Storm Mountain, concerning the matter.
- [133] This troubling circumstance cannot be resolved on this application. However, the fact that it exists - and that Dentons has chosen not to respond to it - serves to highlight and raise more concerns and questions as to whether Dentons is, in fact, misusing Storm Mountain's confidential information that it possesses in the course of its representation of Barrows/Fieldstone in this proceeding.
- [134] Indeed, Mr. Ockeloen states in his Affidavit #2 that Dentons' actions in relation to the minute book are presently impairing Storm Mountain's ability to obtain legal advice both in respect of this proceeding and generally. He states:
19. [Storm Mountain] needs to be able to review its minute book so that it can receive advice on the Removal Letter and other matters relating to corporate governance.
- [135] I would reiterate that the corporate governance of Storm Mountain is a central issue in these CCAA proceedings.
- [136] I conclude that Storm Mountain has met its burden in respect of the second question given that there are serious concerns that Dentons will - or may already be - misusing its confidential information. In addition, Storm Mountain has shown that Dentons has already, by its actions in relation to Storm Mountain's minute book, impaired Storm Mountain's ability to obtain legal representation in respect of this matter.

REMEDY

[137] As stated in McKercher at paras. 39 and 64, a law firm or lawyer acting in breach of the "bright line" rule will usually result in that lawyer or law firm being disqualified. In the context of the MacDonald Estate test, it will usually be the case that the only appropriate remedy to prevent misuse of confidential information is disqualification: McKercher at paras. 61-62.

[138] In all of these circumstances, I conclude that Dentons must be disqualified from acting any further for Barrows/Fieldstone in this proceeding.

[139] I also grant costs in favour of Storm Mountain against Barrows/Fieldstone, jointly and severally, on the usual scale and in any event of the cause.

"Fitzpatrick J."

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