

CANADA / JUDGMENT

De Cotiis Estate

2024 BCSC 1024

COURT

Supreme Court of British Columbia

DECIDED

13 June 2024

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2024 BCSC 1024 De Cotiis Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Cotiis Estate,

2024 BCSC 1024

Date: 20240613

Docket: S236077

Registry: Vancouver

Re: The Estate of Addolorata De Cotiis

Before: The Honourable Justice Majawa

Reasons for Judgment

In Chambers

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Deceased:

S.G. Cordell

Counsel for the Applicant, Brian Mason in his capacity as Executor of the Will and Trustee of the
Estate of Addolorata De Cotiis:

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Counsel for the Application Respondent, Lilliana Hughes:

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The Respondent, appearing in person:

T.D. Cotiis

The Respondent, appearing in person:

N.N.D. Cotiis

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 11-13, 2024

May 21, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 13, 2024

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OVERVIEW

- [1] The events giving rise to this application began with the taking and use of hundreds, or possibly thousands, of documents belonging to Addolorata De Cotiis (the "Deceased") relatively shortly after her death. There is no dispute that the documents at issue are prima facie subject to solicitor-client privilege (the "Privileged Documents"). This Court's decision is about the consequences of the disclosure and use of the Privileged Documents by Daniel Barker, the lawyer for one of the Deceased's children.
- [2] Brian Mason is the applicant. He is the Deceased's former solicitor and was also named as the Deceased's executor. For reasons that will be explained later, Mr. Mason, brings this application in his capacity as the Deceased's former solicitor. He is represented by Mr. Cordell in this capacity. The notice of application before me was filed on January 5, 2024, (the "Notice of Application"). Mr. Mason was also represented by separate counsel, Ms. Kuntz, at the hearing in his capacity as the named executor of the Deceased's estate.
- [3] Mr. Mason seeks orders in respect of the conduct of Mr. Barker. Mr. Barker is counsel for Donato De Cotiis, who is one of the Deceased's adult children. Mr. Mason seeks the delivery of all of the documents removed from the Deceased's residence, including the Privileged Documents, to him so that he can hold and preserve them while the Deceased's estate is administered and while this, and other related, litigation proceeds.
- [4] Mr. Mason also seeks an order that Mr. Barker, and all lawyers at or associated with Barker and Company (the "Law Firm") be disqualified from acting for or further advising Donato, or any other party, in any manner directly or indirectly related to the estate of the Deceased. Mr. Mason also seeks a sealing order in respect of affidavits and pleadings that include or refer to the Privileged Documents.
- [5] Lillianna Hughes and Paolina De Cotiis, two of the Deceased's daughters, are application respondents and were represented by counsel. They both support the relief sought by Mr. Mason in his application.

- [6] Ninno Nick De Cotiis ("Nick") is a son of the Deceased. He opposes Mr. Mason's application and has aligned himself with Donato and Mr. Barker.
- [7] Teresa De Cotiis is one of the Deceased's daughters and lived with the Deceased at the time, and in the years leading up to, the Deceased's death. Her position in this application changed from being opposed to Mr. Mason's application to supporting it.
- [8] For the reasons that follow, I have decided that Mr. Mason's application should be granted in its entirety. Mr. Barker's conduct with respect to the Privileged Documents is egregious. Mr. Barker and the Law Firm will be disqualified from acting for or advising anyone in respect of the estate of the Deceased.
- [9] Given that many of the individuals involved in this matter share the same last name, I will refer to many of the members of the De Cotiis family by their first names. In doing so I mean no disrespect.

BACKGROUND FACTS

- [10] The Deceased died on June 16, 2023, leaving a will and codicil that were executed in 2007 in which Mr. Mason was appointed executor (the "2007 Will"). Mr. Mason is of the view that the 2007 Will is the Deceased's last will and testament.
- [11] At the time of the Deceased's death, she was the executrix of her late husband's, Marcangelo De Cotiis, estate and the administrator of the estate of her late brother, Giovanni Procaccini.
- [12] On an unknown date before July 27, 2023, Donato attended the Deceased's home and conducted a search unauthorized by the Deceased's executor or the court, and took over 40 bags, boxes and file folders of documents belonging to the Deceased, including the Privileged Documents. The documents were scanned and distributed to others.
- [13] The parties agree that the documents taken from the Deceased's residence that are at issue are prima facie subject to solicitor-client privilege, and I have no trouble in finding that they are. There is therefore no need to describe them in detail. For illustrative purposes, the nature of the Privileged Documents listed at para. 12 of the Notice of Application can be summarized as including documents relating to: legal advice the Deceased obtained from a lawyer in 2005 in relation to an estate plan she was then considering; correspondence between Mr. Mason and the Deceased respecting estate planning the Deceased undertook with Mr. Mason's assistance in 2007, in 2012, and in the period between 2020 and 2023; and correspondence between Mr. Mason, the Deceased and her authorized agent in respect of a property dispute in which Donato was the party in opposition to the Deceased. Although these documents would be clearly subject to solicitor-client privilege with a cursory read of the contents, many of these documents were also marked privileged and confidential.
- [14] There is no evidence that the Deceased ever waived privilege over the Privileged Documents.

- [15] Following the Deceased's death, a number of proceedings have been commenced relating to her estate and the estates of Marcangelo and Mr. Procaccini.
- [16] On July 14, 2023, Donato commenced an action seeking to vary the 2007 Will (the "WVA/Validity Action"). Donato is represented by Mr. Barker in the WVA/Validity Action. The notice of civil claim was amended on August 2, 2023, to allege that the 2007 Will is invalid due to the Deceased's incapacity or as a result of undue influence upon her at the time it was made. The amended notice of civil claim asserts a will made by the Deceased in 1993 should operate. The WVA/Validity Action was filed in the Vancouver Registry under No. S235022.
- [17] On July 27, 2023, Mr. Barker wrote to Mr. Mason. Mr. Barker's correspondence referred to, and attached documents that were subject to the Deceased's privilege. Mr. Mason immediately advised Mr. Barker of the privilege claim. At this time, Mr. Mason, as the Deceased's executor, had been unable to gain access to the Deceased's home to gather and protect documents. Such access was not granted to Mr. Mason until April 2024.
- [18] Given the dispute as to the validity of the 2007 Will, on August 31, 2023, Mr. Mason, as petitioner, commenced the petition in which this application is brought. In that petition, Mr. Mason seeks to be appointed interim administrator of the Deceased's estate (the "Interim Administrator Petition"). The Interim Administrator Petition also sought an order for delivery-up of the Privileged Documents as Mr. Mason had become aware that Donato had taken and, through his counsel Mr. Barker, was using those documents without any indication that either had authority to do so.
- [19] On September 29, 2023, Mr. Mason, as applicant, brought an application in an existing probate file (No. P100339) related to Marcangelo's estate. In that application, Mr. Mason sought an order appointing himself as administrator de bonis non of Marcangelo's estate (the "Marcangelo Administrator Application").
- [20] As will be discussed in further detail later in these Reasons, Mr. Mason has repeatedly sought the return of the Deceased's documents from Donato and Mr. Barker, including the Privileged Documents, and has warned Mr. Barker against using them. Mr. Mason told Mr. Barker that the documents should be returned to him and that, once returned, they would be listed in the normal course, with a claim of privilege articulated so that any challenge could be made, and dealt with, in the context of the appropriate proceeding.
- [21] Despite this, Mr. Barker inexplicably advised Mr. Mason that he had "no choice" but to use the Privileged Documents in court filings. Then, on October 18, 2023, Donato, as petitioner, through Mr. Barker, commenced a petition seeking orders passing over Mr. Mason as administrator and executor of the Deceased's estate and other relief (the "Passing Over Petition"). The Passing Over Petition was filed in the Vancouver Registry Petition under No. S236977.

- [22] It is important to note that the Passing Over Petition and two affidavits of Donato filed in support of it, attach and make extensive use of the Privileged Documents. It is also important to note that the Privileged Documents used and referred to in the Passing Over Petition and its supporting materials are the same documents that were subject to the delivery-up orders sought by Mr. Mason in the extant Interim Administrator Petition filed on August 31, 2023. It is clear from Donato's court filings, and from the argument made on his behalf at the hearing of this application, that Donato is seeking to use the Privileged Documents as the bedrock of his position that Mr. Mason should not be allowed to act as the Deceased's executor, amongst other things.
- [23] In addition to their use in the Passing Over Petition, the Privileged Documents have been further used directly, and or referenced extensively, in the related proceedings by Mr. Barker, including:
- a) in the Marcangelo Administrator Application by way of an affidavit of Donato filed October 17, 2023, and in a notice of application filed by Donato on that same day;
 - b) in proceedings in the Interim Administrator Petition by way of affidavits filed October 23, 2023, and in Donato's petition response and application response; and
 - c) in the WVA/Validity Action by way of affidavit filed November 15, 2023, and in an application response and cross application.
- [24] In addition, Mr. Barker has used the Privileged Documents to inform an action commenced by Antonio Procaccini and Maria Morton against the Deceased and Ms. Hughes on October 23, 2023, (the "Procaccini Action"). The allegations made by Mr. Barker on behalf of the plaintiffs in the Procaccini Action are in respect of the Deceased's administration of her late brother's, Giovanni Procaccini, estate. The action includes allegations of breaches of trust on the part of the Deceased. If it is not clear, I wish to emphasize that by way of the Procaccini Action, parties other than Donato have used the Deceased's Privileged Documents to commence an action against the Deceased's interest. And those parties are represented by Mr. Barker and the Law Firm.
- [25] Following numerous exchanges of correspondence, on November 27, 2023, Mr. Barker assured Mr. Mason in writing that no further use would be made of the Privileged Documents until the issue was settled by this Court.
- [26] Given the number of related proceedings, a Case Planning Conference occurred on December 14, 2023. Associate Judge Hughes ordered that the within application proceed before all other extant and anticipated applications respecting the Deceased's estate. In conformance with Associate Judge Hughes' order, Mr. Mason commenced the application at bar on January 5, 2024.
- [27] Despite Mr. Barker's assurance that no further use of the Privileged Documents would be made, and despite the application at bar being extant, Donato, through Mr. Barker, commenced a new proceeding making use of and referring to the Privileged Documents. On

January 15, 2024, Mr. Barker filed a petition seeking orders pursuant to ss. 58 and 59 of the Wills, Estates, and Succession Act, S.B.C. 2009, c. 13 [WESA], amongst other relief (the "WESA Petition"). I accept Mr. Mason's position that Mr. Barker gave no indication that the WESA Petition was being anticipated either before or during the case management process.

- [28] It is clear that in the WESA Petition, Mr. Barker is relying on the Privileged Documents to allege that they should be treated as a will or that the 2007 Will should be rectified in conformance with them. Interestingly, the relief sought and factual allegations made by Mr. Barker on behalf of Donato in the WESA Petition, are entirely inconsistent with those made in the WVA/Validity Action in which Donato seeks the 2007 Will to be invalid such that a 1993 will would operate or that the 2007 Will should be varied by way of a traditional variation claim.
- [29] Also, on January 15, 2024, Mr. Barker filed a response to the application currently before me. In that response, Mr. Barker, inexplicably in my view, does not address Mr. Mason's application for his disqualification, despite such application being front and centre in the Notice of Application. Instead, Mr. Barker raises a number of arguments in support of his position that the Privileged Documents are not in fact privileged because they are subject to the wills exception and/or the future crime and fraud exception, or that they somehow lost their privileged status by having been in Teresa's possession at some point. Mr. Barker's arguments in this application response are entirely based upon the arguments raised in the WESA Application which Mr. Barker filed on the same day.
- [30] It should also be noted that throughout these proceedings, Mr. Barker has made allegations on behalf of his clients impugning the conduct of Mr. Mason and Ms. Hughes and has gone so far as to allege that Mr. Mason has conducted himself fraudulently or encouraged others to act as such by, for example, actively and fraudulently preventing the Deceased from concluding a new will. However, I find that such allegations are completely unfounded. There is absolutely no admissible evidence before me that supports such a serious claim.

MR. BARKER'S APPEARANCE AT THE HEARING

- [31] Before further discussing the merits of the application before me and Mr. Barker's response to it, I find it necessary to comment on Mr. Barker's appearance at the hearing.
- [32] At the outset of the hearing, given that Mr. Barker's conduct as counsel was squarely at issue in the application, I was advised that, despite his presence at counsel table, Mr. Barker would not be making submissions. Instead, I was told that a different lawyer present with him at counsel table would be making submissions on behalf of the application respondent.
- [33] After Mr. Mason, and those respondents in support of his position, had concluded their submissions, Mr. Barker advised the Court that he in fact intended to make submissions in response. As I understood his position, Mr. Barker took this approach because, during their submissions, both counsel for Mr. Mason (and the other respondents in support of this position) accepted that Mr. Barker was not part of the search for and collection of the

Privileged Documents that were taken from the Deceased's home. Originally, based at least in part on affidavit evidence submitted by Teresa, Mr. Mason took the position that Mr. Barker was present at the Deceased's residence and participated in the removal of the Privileged Documents. Shortly before the hearing of this application, Mr. Barker swore an affidavit in which he denied such participation. Faced with this denial, and Teresa's inherently unreliable evidence, both counsel for Mr. Mason, and the others, accepted that Mr. Barker was not part of the search and collection. As I understand it, this concession in respect of Mr. Barker's lack of participation is for the purposes of this application only.

- [34] When Mr. Barker advised the Court that he intended to make submissions in response, I asked whether this was appropriate given that Mr. Barker's conduct in respect of the review and use of the Privileged Documents was still very much at issue and his disqualification as counsel was the principal issue that needed to be decided. Upon further reflection, Mr. Barker decided that the counsel with him at counsel table would in fact present the argument in response to Mr. Mason's application. At that time, it was not apparent to the Court that this other counsel was in fact a junior lawyer practising in Mr. Barker's law firm (the "Associate Counsel").
- [35] When a lawyer is faced with an application to be disqualified as counsel on the basis of their conduct, it would, in my view, be prudent for that lawyer to retain independent counsel to respond on their behalf. The Associate Counsel, as a relatively junior member of the profession and a member of Mr. Barker's law firm, was put in the unenviable position of having to respond to allegations of misconduct against the named member of the law firm in which she practices, and to whom she presumably reports.
- [36] Throughout the proceeding, it was apparent that Mr. Barker was directing the Associate Counsel's submissions at almost every turn: he whispered to her throughout her submissions, prompting her with what to say and do and guiding her responses to the Court's questions. Indeed, Mr. Barker was the one who signed the written submissions handed up by the Associate Counsel during the hearing, including the submissions that were directly intended to respond to the disqualification application. So, while the Associate Counsel was the one on her feet during the application, Mr. Barker might as well have been. In my view, proceeding in this manner was wholly inappropriate in the circumstances.
- [37] I would like to make it clear that I do not assign any blame to the Associate Counsel for how this matter was argued. She was placed in an untenable position by Mr. Barker, and, in the circumstances, she likely did the best that she could.

SHOULD MR. BARKER AND HIS FIRM BE DISQUALIFIED?

The Parties' Positions

- [38] As stated at the outset, Mr. Mason seeks disqualification of Mr. Barker and the Law Firm from acting or providing advice on this or any matter related to the estate of the Deceased, including the Procaccini Action. Given that privilege is the client's to waive, and that a

lawyer is legally and ethically bound to protect privileged information that belongs to their client, the application before me, including the application for return of the Privileged Documents and disqualification of counsel, was brought by Mr. Mason in his capacity as the Deceased's former solicitor: *Bell v. Smith*, [1968] S.C.R. 644 at 670-671, 1968 CanLII 17 (S.C.C.). The application was argued by Mr. Cordell.

- [39] Ms. Kuntz represented Mr. Mason in his capacity as executor of the Deceased's estate. Given the litigation filed by Donato in which Mr. Mason's appointment as administrator is challenged, Mr. Mason as executor is unable assert the privilege claim in that capacity or to provide substantial responses to the claims being made by Donato and Mr. Barker. Mr. Mason, as executor, supports the application brought by himself in his capacity as the Deceased's former solicitor who can assert and protect her claim of privilege. As presumptive executor, Mr. Mason proposes that he retain the documents, list them, and proceed in the normal course.
- [40] As referenced above, Mr. Barker's response to this application does not directly address the application for his disqualification. Rather, the response is focused on justifying Mr. Barker's continued possession of the Privileged Documents on the basis that they are subject to one or more exceptions or exclusions to the law of privilege. For reasons which I will explain later, I will not decide whether the claimed exclusions apply.
- [41] At the hearing of this application, the Associate Counsel provided the Court with written submissions signed by Mr. Barker. Like the response to the Notice of Application, these written submissions solely focused on whether the Privileged Documents were subject to an exclusion. On the third day of the hearing before me, the Associate Counsel provided written submissions, also signed by Mr. Barker, that attempt to address the disqualification issue. In these written submissions, instead of directly responding to Mr. Mason's argument and the six factors set out in the jurisprudence in respect of disqualification of counsel, Mr. Barker instead relied upon a single consideration as the key factor in determining whether his actions and use of the Privileged Documents were appropriate: the way in which the documents came into Mr. Barker's possession. As I will briefly touch on later in these reasons, the argument put forward in this respect has no merit.
- [42] As referenced at the outset, Paolina and Ms. Hughes support Mr. Mason's application. Nick opposes Mr. Mason's application and supports the position advanced by Mr. Barker.
- [43] To say that Teresa's position fluctuated would be to put it mildly. In the time immediately following the Deceased's death, it appears that Teresa was supportive of Mr. Mason's position. However, as the matter progressed this changed and at the outset of the hearing of this application, Teresa was adamantly opposed to the relief sought by Mr. Mason and had joined with Donato and Mr. Barker in alleging that Mr. Mason has somehow conducted himself in a fraudulent manner. During the adjournment of the application between the third and fourth day of hearing, Teresa entirely changed her position and now supports Mr. Mason's application. No cogent explanation has been provided for these changes in position.

Teresa has sworn affidavits in these proceedings that she later resiled from on more than one occasion. I have placed no weight on the evidence provided by Teresa in coming to my decision in this matter.

The Legal Principles

Relevant Principles of Solicitor-Client Privilege and Application to this Case

- [44] Mr. Mason's application for the disqualification of Mr. Barker as counsel is based upon Mr. Barker's alleged improper use of the Privileged Documents. Therefore, it is necessary to comment on the law applicable to solicitor-client privilege before discussing the law on disqualification.
- [45] It is well accepted and understood that solicitor-client privilege plays a pivotal role in Canada's justice system. Solicitor-client privilege is no longer an evidentiary rule. Solicitor-client privilege is substantive law applicable to all interactions between a client and their lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other capacity: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10 [Blood Tribe].
- [46] In *Blood Tribe* at paras. 9-11, the Supreme Court of Canada explained that solicitor-client privilege is fundamental to the proper functioning of our legal system. To ensure public confidence, access to justice, and the quality of justice within Canada, solicitor-client privilege must be as close to absolute as possible.
- [47] Solicitor-client privilege has essentially been raised to a quasi-constitutional status. As the Supreme Court of Canada made clear in *R v. McClure*, 2001 SCC 14 at paras. 17-35, solicitor-client privilege is a class privilege and does not involve a balancing of interests in a particular case. Privilege will only yield in clearly defined circumstances and is not abrogated because of relevance, fairness, or following a balancing of interests.
- [48] I disagree with the position put forward by Mr. Barker that the admission into evidence of privileged documents is subject to a weighing or balancing of various factors in a particular case. In putting forward this position, Mr. Barker relies on a 19th century decision of the Court of Appeal of England in *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.), which he says was relied upon in a 2008 decision from Ontario, *Eizenshtein v. Eizenshtein*, [2008] O.J. No. 2600, 2008 CanLII 31808 (O.N.S.C.) and in a 2013 decision of this Court, *McDermott v. McDermott*, 2013 BCSC 534.
- [49] In *McDermott*, the Court described the *Eizenshtein* case as follows:
- [184] In *Eizenshtein* at para. 45, Wildman J. provided a non-exhaustive list of some of the factors that a court might consider in making a determination whether privileged material improperly obtained should be admitted into court proceedings over the objection of the client: (a) whether the evidence is relevant to an issue before the court; (b) whether a principled analysis of the circumstances of disclosure requires, in fairness, that the

material be disclosed; and (c) whether the probative value of the evidence outweighs the prejudicial effect of admitting it. At para. 32, he explained the overriding concern in these applications, stating that the "court is required to conduct an inquiry to determine, in all the circumstances, whether the information is so important to the outcome of the case that it should be admitted despite the existence of the privilege".

- [50] In my view, the approach taken in *Eizenshtein* is not consistent with the class-based approach to solicitor-client privilege as discussed in *Blood Tribe*, *McClure*, and many other decisions since. Rather, it appears to be the case-by-case approach which the Supreme Court of Canada has explicitly warned against. I note that *Eizenshtein* was decided before the Supreme Court of Canada's decision in *Blood Tribe*.
- [51] Following a mid-trial voir dire, the Court in *McDermott* admitted the documents in question because it found that privilege had been waived; the case is therefore not directly on point. To the extent that *McDermott* follows or applies the approach to solicitor-client privilege discussed in *Eizenshtein*, I decline to follow it. *McDermott* has never been followed by this Court, or any other court, for the proposition that solicitor-client privilege should be approached on a case-by-case basis. *McDermott* does not consider any of the Supreme Court of Canada decisions that discuss the class nature of privilege such as *McClure*, where the Court unequivocally rejected a case by case balancing of interests:
- [35] solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
- [52] In circumstances where a privilege holder has died, the privilege is controlled by their representative. The power to waive privilege rests with the executor or administrator once appointed. As discussed above, this would likely be Mr. Mason but for the litigation commenced by Donato challenging his appointment. An administrator appointed pending litigation plays a caretaker role and does not have the power to waive a Deceased's privilege. Any question about authority to waive, or the Deceased's substantive right to solicitor-client privilege, should be maintained until letters of representation have been issued: *Novak v. Seemann*, 2023 BCSC 1784, at paras. 42-50; *Stapleton v. Doe*, 2017 BCSC 12.
- [53] Contrary to the position advanced by Mr. Barker, a mere loss of physical custody over privileged material does not terminate privilege. Where documents are disclosed without the client's consent, the court will intervene to order the inspecting party to return all copies of the privileged documents and restrain the use of information contained in or derived from them: *Heli-Log Services Ltd. v. Acro-Aerospace Inc.*, 2006 BCSC 61 at para. 54 and the authorities cited therein.
- [54] Particularly relevant to this case, is counsel's obligation not to use or review privileged materials that come into their possession. In *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 61, Justice Hunter clarified the proper practice for counsel who come into possession of documents that appear to be subject to solicitor-client privilege not

belonging to that lawyer's client. In those circumstances, the lawyer is under an obligation, and in fact is "duty bound", to set the document aside and not review or use it before issues related to privilege are settled.

- [55] As Mr. Barker conceded, the documents at issue are prima facie privileged. As mentioned above, there is no evidence before me that anyone authorized to do so has waived the Deceased's privilege over them.

Relevant Principles Regarding Disqualification of Counsel

- [56] In the circumstances of this case, as was the case in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, two competing values require resolution to answer the question of whether Mr. Barker and the Law Firm should be disqualified from acting in this and related matters. The two competing values are (1) the value of solicitor-client privilege discussed above; and (2) the right of a party to select their counsel of choice. In *Celanese*, the Supreme Court of Canada helpfully sets out the applicable legal framework for resolving this conflict.
- [57] At para. 42 of *Celanese*, the Court explained that a solicitor in receipt of privileged materials must demonstrate that a reasonably informed member of the public "would be satisfied that no use of confidential information would occur". Thus, in the case at hand, the onus is on Mr. Barker to satisfy this test.
- [58] At para. 59 of *Celanese*, the Court listed six factors to consider when determining whether counsel should be disqualified from acting in a particular case where they have had wrongful access to materials covered by solicitor-client privilege. Those factors are:
- a) how the documents came into the possession of the litigant or its counsel;
 - b) what the litigant and their counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;
 - c) the extent of review made of the privileged material;
 - d) the contents of the solicitor-client communications and the degree to which they are prejudicial;
 - e) the stage of the litigation; and
 - f) the potential effectiveness of a firewall or other precautionary steps to avoid mischief.

Mr. Barker and the Law Firm Should be Disqualified

- [59] Mr. Barker's handling of the Privileged Documents can only be described as egregious. Applying the considerations listed in *Celanese*, I have no trouble in concluding that the only appropriate remedy is for Mr. Barker and the Law Firm to be disqualified as counsel in this and any related matter.

[60] In concluding that Mr. Barker and the Law Firm must not be permitted to act any further, I am cognizant of the importance of the right of a party to have their counsel of choice and that choice as being an important element of our adversarial system of litigation: Celanese at para. 56. However, in my view, there is no remedy short of the removal of counsel that will cure the problems that Mr. Barker is responsible for in this case.

[61] I will discuss each of the factors identified in Celanese in turn.

The Way in Which the Privileged Documents Came into Mr. Barker's Possession

[62] Mr. Barker argues that the way in which the documents came into his possession is a key consideration militating against his disqualification. While I agree that this is a proper factor to consider, I do not agree that this factor militates against Mr. Barker's disqualification.

[63] Mr. Barker's position is stated in the first paragraph of his written submissions:

What distinguishes this case, as to conduct of Donato De Cotiss and his Solicitor, is that all of the records of the [Deceased] were in the physical custody and control her eldest daughter [Teresa], who had lived at that house, with her mother and brother for over 40 years.

[64] Physical loss of control of the documents does not terminate privilege. Neither Teresa nor Donato had the power to waive privilege. Only the properly confirmed executor had that power, and, even then, that power is limited: *Becker v. Hagehassan*, 2021 BCSC 1508 at paras. 16-20. Upon the Deceased's death, presumptive control of her privilege moved to Mr. Mason as executor and authorized representative of the estate. Once a challenge was made to his authority as executor, as has been done here, Mr. Mason was required to seek probate to confirm his position as executor before taking any steps to waive or consider waiving privilege; and then privilege should only be waived if there is a compelling need to see or disclose privileged documents to administer the estate.

[65] As explained in oral submissions, Mr. Barker's view is that privilege had essentially been waived or lost because Teresa allegedly facilitated Donato's removal of the documents. Mr. Barker goes further and says that privilege was lost simply because the Deceased shared a residence with her daughter Teresa and the documents were accessible by her. Absolutely no authority was provided in support of these propositions, and as referenced above, there is no evidence that the Deceased ever waived privilege over the documents.

[66] The problem with the argument advanced by Mr. Barker is obvious. A finding that a Deceased lost privilege over documents simply because that person shared a residence with a family member would lead to all sorts of mischief in estate (and other) litigation. The sanctity of solicitor-client privilege does not yield simply because a person shares a residence with someone else and stores documents in that residence. Such a finding would gut the essence and importance of privilege and turn the established law of waiver on its head.

- [67] For the purposes of this application, on the strength of Mr. Barker's recently provided affidavit, Mr. Mason, and the parties that support his application, have accepted that Mr. Barker did not participate in the search for and removal of the documents from the Deceased's residence. However, as pointed out by Ms. Kuntz on behalf of Mr. Mason, Mr. Barker nonetheless admits in his affidavit that he attended at the Deceased's residence on July 28, 2023, and that Donato, his wife Tracey Cambridge, Nick, Teresa, and Antonio De Cotiis were present. In the letter he wrote on July 27, 2023, to Mr. Mason, Mr. Barker stated that "we are early in gathering material documents ". Clearly, Mr. Barker attended the property around the same time when it is alleged that Donato, Ms. Cambridge, and Ms. Hughes were there collecting records.
- [68] I agree with Ms. Kuntz that Mr. Barker's attendance at the property at this time would have been an opportune moment, as an officer of the court, to provide appropriate advice and guidance to his client Donato about the propriety of removing records from the Deceased's home. Instead, Mr. Barker received the records from Donato and Ms. Cambridge, or at least took copies of them (or possibly both), advised Mr. Mason that they were still collecting documents, and proceeded to use and disclose those documents repeatedly.
- [69] It is not entirely clear to me the precise role that Teresa played in the collection and/or provision of the Privileged Documents. The affidavit evidence on this matter is in conflict, and, as I said, I can place no reliance on Teresa's evidence. However, I need not make this determination for the purposes of this application. It is clear that Donato and Ms. Cambridge attended the Deceased's home, took documents away, reviewed them (perhaps with Mr. Barker's assistance), sorted them, scanned some (or maybe all) of them, and provided them to Mr. Barker, all with a view to assist Donato's position in the litigation.
- [70] The fact is that the Privileged Documents came into Mr. Barker's possession through a deliberate search of the Deceased's personal belongings in her own home by someone not authorized to do so. In no way can it be said that Mr. Barker came to possess the documents by inadvertence. Contrary to the position advanced by Mr. Barker, the way in which the documents came into his possession militate in favour of his disqualification as counsel.

Mr. Barker's Actions upon Recognition that the Documents were Potentially Privileged

- [71] There is no dispute that the Privileged Documents are subject to solicitor-client privilege on their face. As stated earlier, when these were provided to Mr. Barker he should have set the documents aside and not reviewed or used them until issues of privilege had been decided: Lee at para. 61. Arguably, he should have provided the documents to Mr. Mason who was the presumptive executor. He did neither.
- [72] Instead of providing them to Mr. Mason, or sequestering them and having privilege issues determined by this Court, Mr. Barker disseminated the Privileged Documents, prepared pleadings relying on them, attached them to affidavits and had them filed in court

proceedings, then republished them repeatedly by referring to and attaching them in other proceedings. Mr. Barker also provided the Privileged Documents to strangers to the Deceased's estate who then commenced a lawsuit, filed by Mr. Barker, against the Deceased based on those documents (the Procaccini Action). This was done while Mr. Barker knew that privilege had been asserted over the documents, that they were clearly subject to privilege on their face, and for the vast majority of time while a petition seeking their delivery-up was extant.

- [73] In addition, Mr. Barker continued to use the Privileged Documents after having specifically stated in writing to Mr. Mason on November 27, 2023, that he would make no further use of them until court time was scheduled to deal with the issue. As discussed above, one such use was in the WESA Petition and supporting materials filed on January 15, 2024. The WESA Petition was filed at the same time as Mr. Barker filed a response to this application. Mr. Mason made it clear in this application that he sought Mr. Barker's disqualification for his use of the Privileged Documents. In fact, Mr. Barker was advised as early as November 2023 that Mr. Mason took the view that Mr. Barker should be disqualified as counsel for his use of the Privileged Documents. Nonetheless, Mr. Barker continued to use the documents with full knowledge that an application was extant that sought injunctive relief in respect of that very same conduct and after having promised to not continue using the documents.
- [74] Mr. Barker suggests that the onus was on Mr. Mason to have the documents returned. In the written argument, Mr. Barker says that Mr. Mason, as the designated executor and presumptive administrator of the estate, "had the power in July and August 2023 to attend in court on an urgent basis to obtain an order for the delivery up" of all documents belonging to the Deceased.
- [75] To the extent that Mr. Barker is attempting to excuse his conduct by pointing to what he thinks Mr. Mason should have done, I reject it. In any event, consistent with his duties as the Deceased's former counsel and as the presumptive executor of her estate, Mr. Mason did in fact seek to have the documents returned; first by way of letter and then formally by way of the Interim Administrator Petition filed on August 31, 2023, and on numerous occasions subsequently. Unfortunately, Mr. Barker would not accept service of the Interim Administrator Petition on behalf of Donato, and service was not completed until October. During this time Mr. Barker continued to use the documents, and during this time Mr. Mason continued to seek their return.
- [76] I reject Mr. Barker's position that Mr. Mason did not engage in the issue of the Privileged Documents or that Mr. Mason did not make it clear that a court application would be necessary to determine the use of those documents. It is clear on the record before me that Mr. Mason sought the return of the Privileged Documents and all documents removed from the Deceased's residence as early as July 28, 2023. It was clearly communicated to Mr. Barker that privilege was asserted and that a court application to deal with the Privileged Documents would be necessary. This was communicated to Mr. Barker on numerous occasions in writing, particularly between July 28, 2023, and October 12, 2023, and also by

way of filing legal processes.

- [77] The record of communications also shows that Mr. Barker himself knew that privilege was an issue and that the court was the proper mechanism for dealing with the issue. Yet in the face of this knowledge, Mr. Barker unilaterally decided that there was no applicable privilege, or that the privilege was subject to exclusions, without the need to bring a court application (an application that he had acknowledged in earlier correspondence was necessary). On this basis, Mr. Barker made repeated use of privileged materials over many proceedings in more than a dozen filings.
- [78] The fact that Ms. Hughes also took documents from the property is not, in my view, relevant to the consideration of Mr. Barker's actions. And, for the purposes of this application, I need not make any determination as to who removed documents first. In any event, the evidence before me is that any documents that Ms. Hughes did remove were turned over to Mr. Mason as executor.
- [79] Mr. Barker's approach was not a principled one. Rather, it seems that Mr. Barker had concluded that he was the final arbiter of whether documents were privileged and what use could be made of them. The many arguments that Mr. Barker has raised in respect of the documents being excluded from, or not being subject to, privilege that he argued in response to this application were not mentioned in his original correspondence in July 2023. Rather these arguments were advanced later as an ex post facto explanation for having retained the documents. I need not conclude whether these arguments adequately or accurately explain Mr. Barker's conduct; however, I have no trouble in concluding that the arguments he raises do not excuse it.
- [80] Mr. Barker has improperly used the Privileged Documents in response to this application and as a springboard for litigation commenced against the Deceased. He has improperly used the Privileged Documents to inform new pleadings with a view to justifying their continued retention and use. Mr. Barker's actions with the Privileged Documents weigh heavily in favour of disqualification.

The Extent of Mr. Barker's Review of the Privileged Material

- [81] I agree with Mr. Mason that the scope of the search and the extent to which the Privileged Documents have been reviewed, kept, or used by Donato or Mr. Barker and the Law Firm, is unknown and likely can never be known with precision. The onus is on Mr. Barker not only to return the privileged materials but also to advise Mr. Mason as to the extent to which the materials have been reviewed: Celanese at para. 62. However, no detailed account of exactly what was reviewed, taken, scanned, and used has been provided by Donato or Mr. Barker. This militates in favour of Mr. Barker's disqualification.
- [82] It is not clear what exactly was taken from the Deceased's home and whether all of the documents removed from the Deceased's residence have been returned or provided to Mr. Mason. In October 2023, Teresa delivered approximately 40 bags, boxes and file folders of

documents to Mr. Mason at his house. At that time, Teresa stated that not all the documents taken by Donato and provided to Mr. Barker had been returned to her. Donato has since asserted that all of the documents were returned. I am unable to resolve this conflict and need not do so for purposes of this application.

- [83] Mr. Barker prepared a list of documents dated November 3, 2023, which as I understand it, listed records Donato has acknowledged taking from the Deceased's residence. However, Mr. Mason does not know if the list includes records contained in bags of documents that Teresa has previously insisted had not been returned to her or delivered to Mr. Mason.
- [84] Mr. Mason has examined the documents that were removed from the Deceased's residence and returned to him via Teresa. In conducting this examination, he has identified approximately 900 documents which he says are subject to solicitor-client privilege, including communications between the Deceased and Mr. Mason and the Deceased and four other lawyers. Mr. Mason attests that it is his belief that certain original documents are missing and that only copies of those documents remain in the collection returned.
- [85] The evidence as to the extent of Mr. Barker's involvement in the review of the 40 bags, boxes, and file folders of documents, including the approximately 900 documents potentially subject to solicitor-client privilege, is very vague. The evidence indicates that Donato and Ms. Cambridge scanned some of the documents before they were returned to the Deceased's home, that scans of those documents were provided to Mr. Barker, and that the scanned documents included the Privileged Documents now in issue.
- [86] It is not clear to what extent Mr. Barker was involved in the review and vetting of the documents taken from the Deceased's home before they were scanned. From the evidence before me, I infer that Mr. Barker was involved in the vetting and review of the documents removed from the residence. Mr. Barker suggested as much in his July 27, 2023, letter to Mr. Mason where he advised that "we are early in gathering materials". Mr. Barker is very careful in his affidavit to state that at no time did he take "physical possession" of documents taken from the Deceased's residence and that he only possesses the scanned copies. However, as pointed out by Mr. Cordell, Mr. Barker does not say that he did not see and review the balance of the documents. Mr. Barker also fails to give any accounting of when and which electronic documents were provided to him or the extent of his review.
- [87] Unfortunately, it is impossible to say to what extent Mr. Barker reviewed the documents taken from the Deceased's residence. However, it is very unlikely that the only documents that Mr. Barker has seen are those that he has since produced or those that were scanned. We cannot know because no inventory was kept by Mr. Barker.
- [88] Mr. Barker should be in a position to satisfy this Court what documents were reviewed on the basis of reliable evidence. In this case, the only explanation as to the extent of the documents reviewed are Mr. Barker's vague and conclusory statements. As stated in *Celanese*, this is unacceptable:

[62] In the absence of knowing what Celanese's solicitors and counsel looked at we are left in the dilemma anticipated by Sopinka J. in *MacDonald Estate*, at p. 1263:

conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not.

The Contents of the Privileged Documents and the Degree to which they are Prejudicial

[89] Prejudice to the privilege holder is presumed and the onus is on Mr. Barker to rebut that presumption: *Celanese* at paras. 48-51. However, I need not rely on a presumption of prejudice in this case because the existence of the prejudice is established in the evidence.

[90] The Deceased has been significantly prejudiced by the use and disclosure of the Privileged Documents because those documents have been used by Donato, through Mr. Barker, to challenge the Deceased's estate planning both in terms of the executor of the estate and in terms of her testamentary dispositions (i.e., the WVA/Validity Action and the WESA Petition). Furthermore, the Privileged Documents have been used by Mr. Barker as the basis for an action brought against the Deceased on behalf of strangers to the estate (i.e., the Procaccini Action).

[91] I have no trouble concluding that it is clear and obvious that the taking, review, and use of the Privileged Documents has resulted in, and will or is likely to continue to cause, the Deceased prejudice. Thus, this factor weighs heavily in favour of Mr. Barker's disqualification.

The Stage of the Litigation

[92] While there are a multiplicity of proceedings arising from Deceased's death, all litigation is at the early stages. Aside from this application, nothing has proceeded beyond the pleadings. This is not a situation where complex litigation had advanced and an order removing counsel could have a devastating effect on the party whose counsel is removed. Thus, this factor too weighs in favour of Mr. Barker's disqualification at this time: *Celanese* at para. 64.

The Potential Effectiveness of Precautionary Steps

- [93] I agree with Mr. Cordell that given that the Law Firm is a small firm with relatively few lawyers, there is no reason to believe that some sort of firewall around the Privileged Documents would be effective. In fact, Mr. Barker's involvement of the Associate Counsel at this application, and counsel's approach in arguing this case, is illustrative of the reality of this concern. This factor too weighs in favour of Mr. Barker's and the Law Firm's disqualification.
- [94] In any event, Mr. Barker and the Law firm have proposed nothing to address this factor in either the application response or in the written or oral submissions.

Conclusion

- [95] Each and every factor identified by the Supreme Court of Canada in *Celanese* weighs in favour of Mr. Barker's disqualification. Thus, I have no trouble concluding that Mr. Barker has not discharged the onus upon him of proving that no reasonably informed member of the public "would be satisfied that no use of confidential information would occur". Rather, through his actions, Mr. Barker has demonstrated precisely the opposite. The privileged material has been misused over and over again. I can only infer that Mr. Barker is likely to continue to do so to the prejudice of the Deceased if he is to remain as counsel.
- [96] Justice Goepel, then of this Court, in *Williams and Williams v. Stephenson et al.*, 2005 BCSC 1271, stated:
- [84] In *National Bank Financial*, counsel improperly obtained documents protected by solicitor-client privilege. Although Scanlan J. found that counsel did not act in bad faith, he held an expression of regret was not sufficient, concluding at ¶ 125:

The appropriate remedy in circumstances where solicitor-client privilege has been deliberately breached or counsel have acted in flagrant or reckless disregard of confidentiality rights is directed by the primary goals of denunciation and deterrence. This need for denunciation is in addition to the need for protection against prejudice.

- [85] I have reached the conclusion that similar considerations apply in this case. This is not a case of mere inadvertence. Mr. Zworski should have known he had no right to view the documents absent a court order and should have known to return the documents as soon as he realized they were in his possession. As noted in *Grenzservice*, it is not sufficient to say that the plaintiffs suffered no harm. Expressions of regret are not sufficient. The integrity of the judicial system requires sanctions when counsel fail in their duties and obligations.

[Emphasis added.]

- [97] I find the conclusion of Goepel J. to be equally applicable to the case at bar (although, I note that Mr. Barker has not offered any expression of regret and the Deceased has suffered harm by way of prejudice as discussed above). This is not a case of inadvertent disclosure; Mr.

Barker should have known better. He should have known he had no right to view the documents, regardless of how they were obtained, who provided them to him, or what proprietary claims were made by those who lived in the house with the Deceased. He should have known to properly inventory the documents and provide the documents to Mr. Mason or sequester them until a court order was made as opposed to repeatedly disclosing and using them. In the circumstances I have described in these Reasons, there is a marked need for denunciation and deterrence in addition to protection for the Deceased against the prejudice arising from the disclosure of the Privileged Documents. The integrity of the judicial system requires the sanction of disqualification.

ARE THE PRIVILEGED DOCUMENTS SUBJECT TO AN EXCLUSION?

- [98] All parties agree the documents listed at paragraph 12 of the Notice of Application are prima facie subject to solicitor-client privilege. As referenced earlier, Mr. Barker has made numerous arguments that certain exclusions to privilege apply. While considerable time was spent arguing the position with respect to the application of the exclusionary rules, given my conclusion on disqualification of Mr. Barker, I decline to determine if the claimed exclusions apply. In my view, the matters should proceed under the proper procedure with new counsel. There are number of other reasons why I have come to this conclusion.
- [99] Determining the nature of the documents, and whether the claimed exclusions apply, is complicated because of the numerous proceedings which all seek different relief and to which some exclusions may apply and some may not.
- [100] The matter is further complicated by the fact that Mr. Barker and the Associate Counsel have seen and extensively reviewed the Privileged Documents already. I also have concerns about the extent of other documents that Mr. Barker may have reviewed, as discussed above.
- [101] I do not wish to make any comments that would potentially be seen as binding a future judge hearing argument over whether exclusions apply to certain documents. However, I will note the following which is relevant to my consideration of Mr. Barker's conduct in this matter. Mr. Barker says that Donato relies on the wills exception and future fraud and crime exception in respect of some of the Privileged Documents. Mr. Barker's approach to this argument can only best be described as an "ends justifies the means" argument. In essence, Mr. Barker argues that the Privileged Documents are not privileged because they contain suspicious content that supports their position. In oral argument, the Associate Counsel said that "the cat is out of the bag" and that this supports their position on the exclusions. Of course, if the cat is out of the bag, it is only out of the bag because of Mr. Barker's conduct.
- [102] A significant part of the argument that the future fraud and crime exception is engaged is based on allegations that Ms. Hughes and Paolina are complicit in some fraudulent behaviour in consort with Mr. Mason in respect of the Deceased's estate planning. Without commenting on Mr. Barker's characterization of the contents of these documents, Mr. Barker's approach is circular, not principled, and contrary to the proper method by which

exclusionary claims such as those advanced by Mr. Barker are to be made. For example, as Mr. Cordell points out, in making a claim that a document is subject to the fraud and future crime exception, a bifurcated process is applied: Only once the applicant has proved, without reference to the privileged materials, a *prima facie* case that the exclusion exists, does the court move on to the second step. In this case, Mr. Barker has provided no independent evidence that would support the exclusionary claims. He simply and exclusively points to the Privileged Documents that he has improperly retained.

[103] In the second step of the bifurcated process, the Court examines a solicitor's file materials to confirm the documents fall within the exception. In doing so, the court may consider privileged evidence from the privilege holder's solicitor which is disclosed only to the court: *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 24; *Pinnacle Gaming Solutions Inc. v. BC Lottery Corp.*, 2019 BCSC 1501 at para. 23. It is noteworthy that in the circumstances of this case, Mr. Mason is unable to waive the Deceased's privilege as he might be able to if he is confirmed as executor. Thus, Mr. Mason is unable to provide this Court with privileged evidence to respond to the allegations being made by Mr. Barker.

[104] Having seen, analysed, and combed through an indeterminable amount of the Deceased documents, Mr. Barker and the Associate Counsel are unable to divorce themselves from their knowledge of those documents and make arguments as to the applicable exclusions without referring to the contents of the documents themselves.

[105] I am not satisfied that the submissions I have received are sufficient, or that the circumstances are appropriate, to finally determine the issue of whether certain exclusions may apply to some or all of the Privileged Documents. In my view, the entire proceeding has been tainted by the way in which Mr. Barker has dealt with the Privileged Documents. In the circumstances, I am not satisfied that I can properly adjudicate the matter of whether any exclusions apply. In coming to this conclusion, I am in no way commenting on the Associate Counsel's competency in advancing the position on behalf of Mr. Barker. As stated earlier, it is my view that the Associate Counsel was put in an untenable position in the circumstances of this case.

[106] I am satisfied that the Privileged Documents are *prima facie* privileged and that a declaration as such is warranted. A final determination of whether certain exclusions may apply to abrogate that privilege can be made in the relevant proceeding by means of the proper method as the litigation advances.

DISPOSITION AND COSTS

[107] For the foregoing reasons, the relief sought by Mr. Mason in paras. 1-7 of the Notice of Application is granted.

- [108] I am satisfied that a sealing order is appropriate in respect of the documents identified in the draft order and attached as Schedule A to the Notice of Application. Solicitor-client privilege is an exception to the open court principle. Such privilege is of overriding importance. Where materials are filed containing such information, they should be sealed: *Merritt v. Canada (Attorney General)*, 2020 BCSC 1887.
- [109] Anyone in possession of any document or record belonging to the Deceased immediately before her death or any copy of any such document is to deliver it up to Mr. Mason and permanently delete any remaining physical or electronic copy so that it cannot be recovered. Without restricting the generality of the preceding order, Donato, Mr. Barker, and all employees, associates, and contractors of the Law Firm are to deliver up those documents and destroy any copies that they may have.
- [110] Upon receipt of the documents, Mr. Mason is to hold and preserve them without modification addition or deletion. If letters of administration are granted to an executor or administrator of the estate other than Mr. Mason, he is to deliver all of the Deceased's documents to that executor or administrator.
- [111] Mr. Barker and all lawyers at or associated with the Law Firm are restrained and enjoined from acting for, acting further for, or advising Donato, Antonio Procaccini, Maria Morton, or any other party in any matter directly or indirectly related to the estate of the Deceased, including but not limited to this proceeding, claims against the Deceased or her estate, and Vancouver Registry proceedings numbered P100339, S236077, S236977, S235022, S237174, and S240282.
- [112] This Court declares that the documents referred to at para. 12 of the Notice of Application (the Privileged Documents) are subject to solicitor-client privilege belonging to the Deceased which has not been waived. This is without prejudice to arguments being made in the future as to the applicability of any exclusionary rules in the relevant proceedings.
- [113] Everyone, save and except an executor of the Deceased to whom letters probate are issued, or an administrator appointed by the court, are restrained and enjoined from making use of the Privileged Documents without further order of the Court.
- [114] Mr. Mason, both in his capacity as executor and as the Deceased's personal lawyer seek special costs of this application. Paolina and Ms. Hughes also seek special costs.
- [115] In my view, special costs are warranted for the same reasons that Mr. Barker is to be disqualified. Mr. Barker's actions, on behalf of Donato, in respect of the Privileged Documents are reprehensible and deserving of rebuke. While special costs should be awarded with restraint, the circumstances warrant this award. The court must disassociate itself from such conduct: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (C.A.); *Muller v. Muller*, 2010 BCSC 1381.

[116] Mr. Mason (in both capacities), Paolina and Ms. Hughes are all entitled to their special costs of the proceeding payable by Donato, to be assessed. These costs are not to be paid out of the Deceased's estate.

"Majawa J."

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