

CANADA / JUDGMENT

Griffin v. Griffin

2020 BCSC 1249

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Supreme Court of British Columbia

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2020 BCSC 1249 Griffin v. Griffin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Griffin v. Griffin,

2020 BCSC 1249

Date: 20200825

Docket: E57924

Registry: Kamloops

Between:

Heidi Ann Griffin

Claimant

And

Clifford Harry Griffin, Christopher Robert Griffin,

Robert John Griffin and Lorna Joan Griffin

Respondents

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Claimant:

C. Soll

Counsel for the Respondent, Clifford Harry Griffin:

L. Bennett

Counsel for the Respondents, Robert John Griffin and Lorna Joan Griffin:

M.S. Harrison

Place and Date of Hearing:

Kamloops, B.C.

August 4, 2020

Place and Date of Judgment:

Kamloops, B.C.

August 25, 2020

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I. Introduction

- [1] This is an application by one of the respondents in this matrimonial action, supported by the other three respondents, to disqualify counsel for the claimant on the basis of an alleged conflict of interest.
- [2] Because all of the parties have the same last name, I will refer to them, for the sake of convenience, by their first names. I intend no disrespect in doing so.
- [3] The applicant, Clifford, is married to the claimant, Heidi. In this action, Heidi is suing Clifford for a divorce and certain corollary relief, including a division of family property under the Family Law Act, S.B.C. 2011, c. 25. Heidi has also named Clifford's brother, Christopher, and their two parents, Robert and Lorna (the "Parents") as respondents, because she also claims a beneficial interest in the former family home, which is legally owned by them. Although the pleadings are now closed, no other steps have been taken in the action. Heidi has been trying for several months to advance the action by setting down a judicial case conference but it has not yet taken place due primarily to the need to resolve the question at issue on this application.
- [4] Heidi is represented in this action by Christopher Soll, a lawyer who practices with a law firm now known as Cates Ford Soll & Epp ("CFSE"). When he commenced this action for Heidi on August 20, 2019, Mr. Soll had his own firm, which was known as Soll & Company. On November 1, 2019, Mr. Soll joined what had been until then the firm of Cates Ford Epp to create the new merged firm that he is with today.
- [5] Clifford alleges that Mr. Soll and CFSE should be disqualified from acting for Heidi in this action because of CFSE's longstanding relationship with the respondents and a company that they own, which is known as Canoe River Campgrounds Ltd. ("CRCL"). There are, Clifford says, three aspects to the relationship that create an intolerable conflict with CFSE's current representation of Heidi.
- [6] The first area of concern arises from the fact that CFSE also currently acts as the registered and records office for CRCL and has done so for many years. Because of that ongoing retainer, as well as substantive advice that one or more lawyers at CFSE are alleged to have given CRCL and its principals from time to time, CFSE is, according to Clifford, improperly acting for current clients whose immediate legal interests are directly adverse to one another, without the requisite consent from both to do so.
- [7] The second area of concern arises from an earlier action, now concluded, that Christopher's former spouse, Cheri Renee Dehnke, brought against Christopher, the Parents, CRCL and others between 2008 and 2017 (the "Dehnke Action"). In the Dehnke Action, Ms. Dehnke had sought, among other things, a division of assets under the Family Relations Act, R.S.B.C.

1996, c. 128 [FRA], and a beneficial interest in certain assets legally owned by CRCL, the Parents and others. Jeffrey Shidei, a lawyer who is still with CFSE today, acted for CRCL and the Parents in the Dehnke Action between 2014 and 2017. Clifford alleges that Mr. Shidei received confidential information from them in the course of that retainer, information that could be used unfairly against them in this action should Heidi or her counsel have access to it.

- [8] The third area of concern arises from a meeting that took place in Mr. Shidei's office more recently, on September 12, 2019. The parties have adduced conflicting evidence about who was present and what was said on that occasion. It appears to be common ground that Clifford and the Parents arranged the meeting with a view to retaining Mr. Shidei to act for the Parents in this action. At the meeting, however, Mr. Shidei declined to take the case, citing a conflict of interest. He did so because he had just learned days before that Mr. Soll would soon be joining his firm. Despite Mr. Shidei's refusal to act, Clifford alleges that legal advice pertaining to this action was sought and received from him at the meeting, thereby exacerbating the conflict.
- [9] Mr. Soll responds that the application should be refused. He maintains that there is no conflict but that, even if there were, adequate measures have been taken to mitigate any risk of prejudice to the respondents arising from it. He submits that the tangible prejudice to Heidi that would flow from disqualifying him and his firm at this stage outweighs any such risk. Moreover, he questions Clifford's good faith and timeliness in bringing the application, which he submits has been brought for purely tactical reasons.
- [10] For the reasons that follow, I have concluded that the application should be dismissed.

II. The Facts

A. The First Retainer: CFSE as Registered and Records Office for CRCL

- [11] CRCL is a closely-held family company that was originally incorporated in 2005. At least one of its intended purposes was to hold title to one of several parcels of real property that the Parents had inherited from Robert's parents. Clifford, Christopher and the Parents each own one third of CRCL's shares.
- [12] Clifford deposes that CFSE has been CRCL's registered and records office since its incorporation in 2005. According to CFSE, however, CRCL's corporate filings were originally handled by a solicitor named Elmer Epp. In August 2011, Mr. Epp joined the firm that would later become CFSE and, at the same time, wound down his practice in order to "semi-retire." As part of that process, he transferred the CRCL file to Candace Cates, who is still one of the partners at CFSE today. According to Ms. Cates, CFSE "has not provided any legal services to [CRCL] beyond serving as its registered records office," at least since she took over the file in August 2011. She deposes that she does not recall ever meeting any of the respondents nor acting for any of them, other than CRCL itself and then only to maintain its corporate filings.

- [13] That evidence is contradicted in part by the Parents. They have deposed that "within the past few years" they also met with another lawyer at CFSE, whose name they cannot recall, to get some advice about "a right of way issue involving [CRCL]."

B. The Second Retainer: The Dehnke Action

- [14] On May 13, 2008, Ms. Dehnke commenced an action under the FRA, originally naming Christopher and his company, Chris Griffin Trucking Ltd., as respondents and seeking a division of assets, among other things. On June 30, 2011, she filed an amended notice of family claim that added the Parents, the estates of both of Robert's parents and CRCL as respondents. The amended claim sought, among other things, a beneficial interest in two parcels of real property owned by the respondents, which were specifically identified by legal description as PID 015-365-972 (legally owned by Christopher and the Parents) and 006-844-782 (legally owned by CRCL).
- [15] In 2014, the Parents retained Mr. Shidei to act for CRCL and them in the Dehnke Action. Although the Parents also suggest that Mr. Shidei or CFSE may also have acted at various times for Clifford or Christopher, Mr. Shidei specifically denies this and there is no other evidence to support that assertion. In any event, it appears clear that Mr. Shidei's previous retainer was to represent only CRCL and the Parents.
- [16] Mr. Shidei has deposed that the Dehnke Action concluded and his file was closed in 2017 and that his physical file was destroyed in or about 2018. The firm still retains some archived electronic materials pertaining to the matter, however.

C. The Third Retainer: This Action

- [17] Heidi commenced this action on August 20, 2019. In her notice of family claim, she pleads, among other things, that Christopher and the Parents hold title to the property identified as PID 015-365-972 (which was also one of the properties in which Ms. Dehnke claimed a beneficial interest) in trust for her and Clifford, making it divisible family property. Henceforward, I will refer to that property as the "Family Home."
- [18] The basis for her claim in that regard appears to be that she and Clifford resided in the Family Home from 2008 until their separation in early 2019. She alleges that they moved in after selling their previous residence at 1260 3rd Avenue in Valemount (which I will call the "Previous Home"), and used the proceeds from the sale of the Previous Home to make extensive renovations to the Family Home. According to Heidi, after they did so, Christopher and the Parents told her and Clifford that the Family Home was theirs, regardless of whose names were on title.
- [19] Clifford and the Parents deny that Heidi is entitled to any beneficial interest in the Family Home. Clifford's response to Heidi's assertions in that regard is as follows:

I disagree that we used the sale proceeds to do major renovations. We used the proceeds to pay incurred debt. Any renovations that we did to the bathroom came from separate funds that the claimant and I had borrowed personally, and our financial contributions (which were no more than \$10,000) were offset against rent that we otherwise would have had to pay to my parents.

the claimant and I were never promised the house, ever. We were told by my parents that we could live there as long as we wanted. The arrangement was that we could live rent free for as long as we wanted in exchange for helping out on the ranch, and (if we chose) by assisting with any improvements. The bathroom renovation project was just that. We personally borrowed the money to update the bathroom, and in exchange we continued to live rent free.

I did most of the renovations we did with the help of my friends, thereby saving the claimant and I significant expense. The claimant's contributions toward the property was limited primarily to some minor yard work (planting flowers) and painting two rooms.

[20] Not surprisingly, the Parents' response to Heidi's allegations is similar to Clifford's:

With respect to the family home which Clifford and the Claimant resided in, we never promised that the family home would be theirs. The arrangement was that they could live there rent free for as long as they wanted to, they could help us out on our property and they could make improvements to the family home if they wanted to.

[21] The Parents also take issue with Heidi's suggestion that she earned an equitable interest in the Family Home by contributing the profit that the couple had earned from the sale of the Previous Home. According to the Parents:

we transferred title to [the Previous Home] to Clifford and the Claimant for less than market value (our recollection is that the monies paid to us for that home were \$30,000) and they kept the proceeds from the sale. This home has been inherited by us as well. Clifford and the Claimant sold this property in 2007 and the sale price was \$145,000.

[22] Heidi also claims an interest in Clifford's shares in CRCL, insofar as they are divisible family property owned by him as of the date of the parties' separation.

[23] After they were served with Heidi's claim, the Parents sought to retain Mr. Shidei to act for them again, as he had in the Dehnke Action. Clifford has deposed that, to that end, he arranged a meeting with Mr. Shidei to take place on September 12, 2019 and that he attended with them on that date. In his first affidavit, Clifford described the meeting as follows:

The week prior to the appointment I had sent the papers to Mr. Shidei that I had been served with. He went through those papers at our scheduled meeting and in doing so that was when he indicated that his firm was in a conflict and that he could not represent us. He did not elaborate.

[24] Clifford also described the discussion that took place at the meeting, as follows:

we discussed [Heidi's] divorce proceeding and the issues that were being raised. Mr. Shidei made comments to us of detailed similarities between my case and the prior claim involving Ms. Dehnke and my brother. I recall being surprised and impressed at his detailed recollection of my brother's litigation in which he represented my parents' interests.

[25] The Parents memory of the meeting, as recorded in their second jointly-sworn affidavit, is as follows:

When we first met with Jeff Shidei to discuss retaining him in this matter, we attended at [CFSE]'s offices. Clifford Griffin was with us and Jeff Shidei met with Clifford briefly and myself, Lorna Joan Griffin, briefly. He gave us a few pointers and hints as to what to do. He did not meet with myself, Robert John Griffin, as I did not have my driver's license with me.

[26] In his second affidavit, Mr. Shidei disagreed in various respects with those accounts of the meeting. His response to them was as follows:

- a. On or about September 6, 2019, Robert, Lorna and Clifford had made an appointment to consult with me at 11:30 AM on September 12, 2019 (the "Appointment"). At the time of booking the Appointment, or shortly afterwards, Lorna provided our office with a copy of the Notice of Family Claim filed by the Claimant in this matter. I saw that Mr. Soll was acting for the Claimant. At that time, I was not aware that my firm would shortly be merging with Soll & Company (the "Merger").
- b. On September 9, 2019, several days after the Appointment was booked, I was informed of the Merger. I did not immediately flag a concern regarding the Appointment at that time so, unfortunately, the Appointment was not cancelled ahead of time.
- c. On September 12, 2019, I re-reviewed the Notice of Family Claim in this matter and recognised that I could not act for Robert and Lorna, because the merged firm could not concurrently act for two or more adverse parties in the action.
- d. By the time I realized that I could not act for Robert and Lorna, it was too late to cancel their appointment. When they arrived, I met them in our waiting area. The meeting, such as it was, was very brief. I advised Robert and Lorna that I could not act on their behalf and apologized. They left. The entire exchange took roughly ten minutes or less.
- e. I did not provide Robert, Lorna or Clifford with any legal advice regarding the current matter, though I may have pointed out the need for them to seek counsel and file a Response to Family Claim prior to the deadline. I have never provided anyone with any substantive legal advice regarding the current matter. I did not discuss with Robert, Lorna or Clifford any details of the current matter. I have never discussed with anyone any details regarding the current matter beyond what has been required to prepare my Affidavits. I did not receive any information from Robert, Lorna or Clifford regarding the current matter.

- f. I specifically deny that I made any detailed comments of similarities between the current matter and my prior representation of Robert, Lorna and [CRCL] (the "Old File"). When I met Robert and Lorna in the waiting area, I made some sort of comment along the lines of: 'here you go again,' in an attempt to communicate my empathy that they were being sued by another former daughter-in-law.
- g. I specifically deny that I went through any analysis of the Notice of Family Claim with anyone. I reviewed that document privately and briefly immediately in advance of the scheduled appointment. I returned that document to Robert and Lorna when I saw them.
- h. I specifically deny that I gave Robert, Lorna or Clifford any 'pointers' or 'hints' regarding this matter, beyond emphasizing the importance of filing a Response to Family Claim within the time limits. As soon as I recognized the conflict, I understood that I could not provide any substantive advice to any of the Respondents. I did not and would not provide advice in a situation where I perceived a conflict of interest.
- i. I have no recollection of Clifford's presence on September 12. Respectfully, he did not register with me at all. As previously indicated, the meeting was exceptionally brief.

[27] Mr. Shidei added that although his usual practice when he provides legal advice is to prepare a memorandum to the file recording his advice and to charge a fee for doing so, he did neither of those things in this case.

[28] In a subsequent affidavit, Clifford responded to Mr. Shidei's more detailed account of the meeting by adding this:

I clearly recall being present. When my parents and I entered his office, we were asked for our driver's licenses. My mother, Lorna, and I had ours, but my father, Robert, did not have his. Consequently, my father had to wait in the lobby while my mother and I went into Mr. Shidei's office with him. We talked for about five or ten minutes about the details of my file before he asked to see the papers we were served with (I reiterate that I had sent them to him the week prior). It was at that point that Mr. Shidei realized that he could not represent us. We talked a bit more and he recommended Ms. Bennett.

[29] A week later, on September 19, 2019, Lorna called Mr. Shidei's office once more, this time to relay that Clifford had retained Lorianna Bennett to represent him in this action, and that Ms. Bennett had told Clifford that she did not see any reason why Mr. Shidei could not act for the Parents. Mr. Shidei had his assistant convey to Lorna that he still believed that he could not act for them, regardless of Ms. Bennett's view.

D. Efforts to Address the Alleged Conflict

[30] Despite having recognised that he could not act for the Parents in this action due to the upcoming merger, Mr. Shidei did not take any steps to prevent any relevant confidential information from his closed file being shared with Mr. Soll and his staff in anticipation of their arrival at CFSE on November 1, 2019. Nevertheless, he deposed that neither he nor

Heather Wilson, his assistant and the only other person at the firm who had worked with him on the Dehnke Action, told Mr. Soll about his prior representation of the Parents before Ms. Bennett first raised the issue with Mr. Soll in February 2020.

- [31] Mr. Shidei listed the following reasons to explain why he did not proactively address the potential conflict before then:
- a. I did not turn my mind to whether I had received any confidential information during my time working on the Old File that might be relevant to the current action. I do not know enough about the current action to say whether I have any such confidential information.
 - b. I was aware that conflict checks were being done around the Merger to flag any conflicts of interest between the files of the respective firms. Immediately after the Merger, a number of conflict screens were put in place to protect confidential information received by one of the original firms prior to the Merger that might be relevant to one or more active files of [CFSE]. Having not received any conflict screen regarding the Old File immediately following the Merger, it did not occur to me that there was a conflict between the Old File and the present action. I did not know anything about the status of the present action, nor Mr. Soll's involvement with the present action, until I received the conflict screen in February 2020. I was not aware until recently that the Old File did not flag on the conflict screens because the last name of Lorna and Robert was misspelled 'Griffen' in the records of Cates Ford Epp.
 - c. I understood that Ms. Bennett was aware of the possibility of a conflict on this matter and, to the extent that I thought about it at all, I assumed that any issue would be raised with Mr. Soll prior to or after the Merger. I knew that Ms. Bennett and Mr. Soll shared office space prior to the Merger. I assumed that I would be notified if there was a problem.
- [32] In fact, CFSE's pre-merger conflict checks did not alert the firm to a potential problem with any of the respondents. The Parents were not flagged because, as Mr. Shidei explained, their last name had inadvertently been misspelled in the firm's records. CRCL was not flagged because, unlike Ms. Dehnke in her action, Heidi had not named it as a respondent in this action.
- [33] CFSE was therefore not aware of any problem in that regard until Ms. Bennett first raised it with Mr. Soll by letter dated February 7, 2020, and even then, the letter said nothing about Mr. Shidei and his previous involvement with the respondents. The only issue that Ms. Bennett raised at that time was an alleged conflict between Mr. Soll's representation of Heidi in this action and CFSE's ongoing engagement as CRCL's registered and records office. The letter stated as follows:

My client has just learned that your office may be the registered and records office for [CRCL]. If that is the case, there is a conflict with your continued representation of Ms. Griffin, and she will need to retain new counsel.

[34] It was only in response to that letter that CFSE became aware of a potential problem and took steps to address it. Despite the fact that Ms. Bennett's letter mentioned only CFSE's role as registered and records office for CRCL, the ensuing investigation within the firm revealed that the problem extended beyond that. When Mr. Soll approached Ms. Cates about the matter, they saw a notation in her file indicating that Mr. Shidei had also acted for CRCL in a family matter.

[35] As a result of what he learned in the course of those inquiries, on February 18, 2020, Mr. Soll set up two new confidentiality screens, by way of internal memoranda, to insulate him and his staff in their work on this action from others in the firm.

[36] The first memorandum was directed to Mr. Soll and Ms. Cates and their staff and pertained to CFSE's engagement as CRCL's registered and records office. It described that potential conflict as follows:

[CFSE] has been retained to act on behalf of [Heidi] in a matter involving the breakdown of her relationship with [Clifford] (the "Matter").

[CFSE] also serves as the registered and records office for [CRCL].

There exists a potential conflict of interest between [Heidi] and [CRCL]. The potential conflict arises because [Clifford]'s interest in [CRCL] is one of the subjects at issue in the Matter and we may have received confidential information potentially relevant to the Matter acting in our capacity as the registered and records office for [CRCL].

[37] The second memorandum was directed to Mr. Soll, Mr. Shidei and Ms. Wilson and pertained to Mr. Shidei's previous representation of the Parents. It described that potential conflict as follows:

[CFSE] has been retained to act on behalf of [Heidi] in a matter involving the breakdown of her relationship with [Clifford] (the "Matter"). [Heidi] is advancing a claim in equity against property held by [Robert] and [Lorna] as part of the Matter.

There exists a potential conflict of interest between [Heidi] and [Robert] and [Lorna]. We have acted in the past for [Robert] and [Lorna]. The potential conflict arises because we have acted for [Robert] and [Lorna] in respect of a similar claim advanced by Cheri Dehnke and may have received confidential information potentially relevant to the Matter.

[38] Both memoranda were signed by all of the named lawyers and staff on February 18, 2020. Mr. Shidei, Ms. Cates and one of Mr. Soll's assistants have all deposed that they have since complied with the directions contained in them.

[39] Mr. Soll also responded to Ms. Bennett's letter that same day, stating as follows:

Thank you for your letter dated February 7, 2020. There is no conflict of interest between the firm's representation of [Heidi] and the firm's role as registered and records office for [CRCL]. The two roles are distinct [sic] do not materially adversely affect the firm's loyalty to each client. There

is, of course, a chance that the firm possesses confidential material in our capacity as the registered and records office for [CRCL] that may be relevant to the above captioned matter. Please be advised that we have erected conflict screens in accordance with the Law Society's Code of Professional Conduct for British Columbia to protect all confidential materials at issue.

I trust this satisfies your concern

[40] It did not. In her response dated the following day, February 19, 2020, Ms. Bennett reiterated her earlier concern and noted, for the first time, that there was an additional problem:

Mr. Shidei of your offices previously acted for my client's parents in a similar family dispute involving my client's brother. It is my understanding that when your offices merged with Mr. Shidei's office, Mr. Shidei was unable to continue his representation of Mr. and Mrs. Griffin Sr. in relation to this proceeding as your office had confirmed a conflict.

Given that there is more than one layer of conflict involving your office, we require Ms. Griffin to retain new counsel.

[41] Mr. Soll responded to Ms. Bennett by letter dated February 24, 2020, copying Ms. Harrison, counsel for the Parents. He advised that Heidi would not be retaining new counsel because the problem, to the extent there was one, had been addressed adequately by the two screen memoranda dated February 18, 2020, copies of which were attached to the letter.

[42] Ms. Bennett responded by letter dated March 3, 2020 expressing the view that the screens had not cured the problem and that Mr. Soll could not continue to act for Heidi in this action. She added that she would be seeking instructions to bring an application to court to have him disqualified should he not relent. Ms. Harrison wrote to Mr. Soll on March 4, 2020, stating that it was "our position that your office is in a conflict with you continuing to represent [Heidi]." She added that "[w]e strongly recommend that [Heidi] retain new counsel to represent her in this matter."

[43] By letter dated June 5, 2020 (the long gap appears to have been attributable to the reduced operations of the courts and its impact on litigation during the earlier stages of the current pandemic), Mr. Soll responded to Ms. Bennett and Ms. Harrison that Heidi would not be retaining new counsel.

[44] This application followed.

III. The Legal Framework

- [45] The principles to be applied by a court faced with an application such as this to disqualify an opposing party's counsel of choice due to an alleged conflict of interest were most recently discussed by the Supreme Court of Canada in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 [McKercher]. There, McLachlin C.J., writing for the Court, described at para. 23 the two principal kinds of prejudice that clients may suffer when counsel has conflicting interests:
- [23] The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation.
- [46] To address the risk of prejudice arising from misuse of confidential information, the law prohibits a lawyer from acting in a matter "where he may use confidential information obtained from a former or current client to the detriment of that client" (at para. 24). In order to determine whether such a risk exists, the courts apply a two-part test, which McLachlin C.J. summarised as follows at para. 24, citing *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [Martin]:
- (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of that client?: *Martin*, at p. 1260. If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice: p. 1260.
- [47] In *Sandhu v. Mangat*, 2018 BCCA 454 [Sandhu], Fisher J.A., writing for the Court, described the nature of the evidence that must be adduced to show that two matters are "sufficiently related" for this purpose:
- [46] The onus is on the party asserting a conflict to show that the two retainers are sufficiently related, and there must be clear and cogent evidence, not bald assertions, to support such a finding on a balance of probabilities: *CLS Catering Ltd. v. Mahil*, 2011 BCCA 321 at paras. 25–30; *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1954 at para. 32, *aff'd* 2011 BCCA 120 (in Chambers) and 2011 BCCA 196 (on review).
- [48] With respect to the second question, Sopinka J., writing for the majority of the Court in *Martin*, stated that disqualification will be automatic where it is the same individual lawyer who is in possession of relevant confidential information from a previous retainer. Where,

as here, the previous retainer was handled by another lawyer in the same firm, however, the answer is said to be less clear. In such cases, there remains, "a strong inference that lawyers who work together share confidences," an inference that the court may draw in the absence of "clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the 'tainted' lawyer to the member or members of the firm who are engaged against the former client" (at p. 1260). In cases like this one involving lawyers who have transferred from other firms, the "reasonable measures" will generally be those set out in the professional conduct rules of governing bodies like the Law Society of British Columbia.

- [49] The second kind of prejudice, that arising from a breach of the lawyer's duty of undivided loyalty, generally pertains only to current clients. That prejudice is addressed in the first instance by a prohibitory rule that has come to be known as "the bright line rule." The scope of that rule was summarised by McLachlin C.J. in *McKercher* at para. 41:
- [41] The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related and unrelated matters. However, the rule is limited in scope. It applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting. It applies only to legal -- as opposed to commercial or strategic -- interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected.

[Original emphasis.]

- [50] I say that the duty of undivided loyalty pertains "generally" only to current clients because the Court of Appeal has also recognised the possibility that such a duty may continue to be owed to former clients in certain limited circumstances. In *Sandhu*, Fisher J.A. described those exceptional cases as follows:
- [28] There may also be a broader objective when considering a lawyer's duties to former clients. In *[Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd., 2008 NSCA 22]*, Cromwell J.A. (as he then was) held that even where confidential information is not at risk, the duty of loyalty to a former client may disqualify a lawyer who takes an adversarial position against a former client, undermining the legal work previously done, where it relates to a matter that was central to the previous retainer.
- [33] In *McKercher*, the Supreme Court of Canada confirmed that a lawyer's "main duty" to a former client is to refrain from misusing confidential information, which suggests that there may be some room to consider other duties to former clients that stem from the duty of loyalty. Given this, I am prepared to accept that the duty of loyalty to a former client may in very limited circumstances extend beyond the duty of confidentiality.

[Original emphasis.]

- [51] If a conflict of interest is found, McLachlin, C.J. described the considerations bearing on the remedy to be granted, at paras. 61-65 of McKercher:
- [61] As discussed, the courts in the exercise of their supervisory jurisdiction over the administration of justice in the courts have inherent jurisdiction to remove law firms from pending litigation. Disqualification may be required: (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice.
- [62] Where there is a need to prevent misuse of confidential information, as set out in Martin, disqualification is generally the only appropriate remedy, subject to the use of mechanisms that alleviate this risk as permitted by law society rules. Similarly, where the concern is risk of impaired representation as set out in these reasons, disqualification will normally be required if the law firm continues to concurrently act for both clients.
- [63] The third purpose that may be served by disqualification is to protect the integrity and repute of the administration of justice. Disqualification may be required to send a message that the disloyal conduct involved in the law firm's breach is not condoned by the courts, thereby protecting public confidence in lawyers and deterring other law firms from similar practices.
- [64] In assessing whether disqualification is required on this ground alone, all relevant circumstances should be considered. On the one hand, acting for a client in breach of the bright line rule is always a serious matter that on its face supports disqualification. The termination of the client retainers -- whether through lawyer withdrawal or through a client firing his lawyer after learning of a breach -- does not necessarily suffice to remove all concerns that the lawyer's conduct has harmed the repute of the administration of justice.
- [65] On the other hand, it must be acknowledged that in circumstances where the lawyer-client relationship has been terminated and there is no risk of misuse of confidential information, there is generally no longer a concern of ongoing prejudice to the complaining party. In light of this reality, courts faced with a motion for disqualification on this third ground should consider certain factors that may point the other way. Such factors may include: (i) behaviour disentitling the complaining party from seeking the removal of counsel, such as delay in bringing the motion for disqualification; (ii) significant prejudice to the new client's interest in retaining its counsel of choice, and that party's ability to retain new counsel; and (iii) the fact that the law firm accepted the conflicting retainer in good faith, reasonably believing that the concurrent representation fell beyond the scope of the bright line rule and applicable law society restrictions.

IV. The Issues

- [52] Applying those principles to this case, the following questions are raised:

- a) Do CFSE's current retainers offend the bright line rule or otherwise create a risk of impaired representation;
- b) Was Mr. Shidei's previous representation of the Parents sufficiently related to this action to give rise to a continuing duty of loyalty to them;
- c) Are the current and previous retainers sufficiently related to give rise to a rebuttable presumption that confidential information received from CRCL or the Parents may be used in this action to their prejudice;
- d) Whether presumed or not, does a substantial risk of prejudice persist despite the erection of the confidentiality screens;
- e) Did Mr. Shidei exacerbate the problem by providing legal advice about this action at the meeting on September 12, 2019; and
- f) In light of the answers to questions A-E, should CFSE be disqualified?

V. Discussion

A. Do CFSE's current retainers offend the bright line rule or otherwise create a risk of impaired representation?

- [53] Clifford argues that CFSE cannot properly act for Heidi in this action because the firm has for many years been serving as CRCL's registered and records office. Clifford also alleges that CFSE has occasionally given CRCL's owners legal advice, such as that apparently given in relation to the right of way issue mentioned by the Parents.
- [54] Currently, CFSE acts only for CRCL and not any of its shareholders. A lawyer acting for a corporation who takes instructions from a director is not to be taken as acting for the director personally: *De Cotiis v. McLellan*, 2009 BCCA 596.
- [55] Despite Heidi's claim to an interest in Clifford's shares, she does not advance any claim that is directly adverse to CRCL's legal interests as such. Legally speaking, the question of who holds its shares and in what proportion is a matter of indifference to CRCL. Moreover, Heidi's interest is aligned with that of CRCL's in ensuring that its corporate filings are kept current.
- [56] For those reasons, I am not persuaded that CFSE's current retainers offend the bright line rule or otherwise risk an impaired representation of any current client.

B. Was Mr. Shidei's previous representation of the Parents sufficiently related to this action to give rise to a continuing duty of loyalty to them?

- [57] To demonstrate that they are entitled to a continuing duty of loyalty as former clients of CFSE, the Parents must establish a higher degree of relatedness between the two matters than they must under *Martin*. As set out in *Sandhu*, at paras. 44-45:

- [44] The same concerns apply in respect of lawyers taking adversarial positions, demonstrated by these passages in *Brookville Carriers*:
- [51] the relationship between the two retainers must be very close so that the lawyer in the new retainer is attacking or undermining the value of the legal work provided to the former client or effectively changing sides in a matter that was central to the previous retainer.
- [55] The concept of relatedness for this purpose is much narrower and has an entirely different focus than the concept as applied in the *MacDonald Estate* analysis.
- [45] These comments indicate that the "sufficiently related" requirement is a heightened one for this broader duty of loyalty, as it requires a "very close" relationship between the two retainers and an adversarial position relating to a "central" matter in the previous retainer.

[Emphasis added by Fisher J.A.]

- [58] Given the narrowness of this possible exception to the principle that former clients are generally not owed a continuing duty of loyalty, I am not persuaded that the two matters in issue here are "sufficiently related" in that "heightened" sense.
- [59] While both actions include claims by a former daughter-in-law for an equitable interest in the same property, the identity of the claimant and the evidentiary basis for the claim is different in each case. In particular, Mr. Soll will not be seeking in this action to have an interest in the Family Home recognised for Ms. Dehnke, but only for Heidi. He will therefore not be seeking to undermine or reverse any of the legal work that Mr. Shidei did for CRCL and the Parents in the Dehnke Action.

C. Are the current and previous retainers sufficiently related to give rise to a rebuttable presumption that confidential information received from CRCL or the Parents may be used in this action to their prejudice?

- [60] Clifford has not identified any concrete examples of confidential information that CFSE might have received through Mr. Shidei, Ms. Cates or anyone else at CFSE that could cause prejudice to CRCL or the Parents if it were to become available to Mr. Soll for use in this action.
- [61] I appreciate that the court should not be too exacting in the level of detail that it expects to receive in relation to a former client's previous communications with counsel. As Sopinka J. put it in *Martin* at p. 1260:

In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application.

- [62] But the authorities are clear in requiring more than just bald assertions. Here, there are very few suggestions in the evidence of even a generic risk of that nature. One of them can be found in the Parents' first affidavit, where they deposed as follows:

In the circumstances, it is our strongly held position that Mr. Soll's firm has confidential information, which would impact their representation. Mr. Soll's firm has imputed knowledge of our corporate circumstances and litigation style. It is my [sic] strong view that such knowledge creates a conflict and an artificial barrier does not change that.

[63] In support of his submission that such "imputed knowledge" can suffice as the "relevant confidential information" justifying disqualification under the Martin test, Clifford relies on the judgment of Matthews J. in *Malii v. British Columbia (Attorney General)*, 2019 BCSC 2060, at para. 36, where she stated as follows:

[36] In addition to these general principles, the following factors have been considered in determining whether there is a sufficient relationship to presume that confidential information has passed:

- a. whether the prior retainer resulted in an understanding of the applicant's strengths and weaknesses;
- b. whether the points of connection between the retainers might involve confidential information relating to the present litigation;
- c. whether counsel's insight into the former client's character and personality traits is a matter of legitimate concern; and
- d. whether counsel may have gained insight into litigation strategy that is relevant to the present litigation.

[64] I am not persuaded by that submission. First, I do not read Matthews J. to be suggesting in that paragraph that the rebuttable presumption set out in Martin can arise merely upon a showing that the lawyer has gained knowledge of the former client's "corporate circumstances and litigation style." If it were that simple, the presumption would have to arise in just about every case. Second, she was relying in that paragraph on *Le Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1954 [Louie], a case decided prior to McKercher. She did not have the benefit of other authority suggesting that the law in this regard has evolved in a different direction since Louie was decided.

[65] In McKercher itself, McLachlin J. rejected an argument advanced on similar grounds, stating as follows:

[54] However, I cannot agree that this is a situation where there also exists a risk of misuse of confidential information. CN's contention that McKercher obtained confidential information that might assist it on the Wallace matter -- namely, a general understanding of CN's litigation philosophy -- does not withstand scrutiny. "[M]erely . . . making a bald assertion that the past relationship has provided the solicitor with access to . . . litigation philosophy" does not suffice: *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.), at p. 401. "There is a distinction between possessing information that is relevant to the matter at issue and having an understanding of the corporate philosophy" of a previous client: *Canadian Pacific*

Railway v. Aikins, MacAulay & Thorvaldson (1998), 23 C.P.C. (4th) 55 (Man. C.A.), at para. 26. The information must be capable of being used against the client in some tangible manner. In the present case, the real estate, insolvency, and personal injury files on which McKercher worked were entirely unrelated to the Wallace action, and CN has failed to show how they or other matters on which McKercher acted could have yielded relevant confidential information that could be used against it.

[Original emphasis.]

[66] Since McKercher was decided, the law in this area has become more restrictive. Justice Myers noted the change in McMyn v. The Manufacturers Life Insurance Company, 2015 BCSC 2205, at paras. 29-30:

[29] There have been several cases dealing with a lawyer's knowledge of a former client's personality or litigation philosophy. One of these was the Moffat case, referred to above, and from which the Supreme Court quoted with approval.

[30] In Skjerpen v. Johnson, 2007 BCSC 1290, the Court disqualified a lawyer from acting against a former client on the basis of the lawyer's knowledge of the former client's personality and litigation strategy. However, this case was decided prior to Canadian National Railway and did not refer to either of the cases contained in the quote above (para. 27). More recently, the trial courts have taken a more restrictive view to arguments based on this ground: Merrick v. Rubinoff, 2013 BCSC 2352 and Richard Zokol Enterprises Ltd. v. Sagebrush Golf & Sporting Club Ltd., 2014 BCSC 1666.

[67] If merely gaining knowledge of CRCL and the Parents' "corporate circumstances and litigation style" is not enough, is there other evidence that Mr. Shidei may have received more specific confidential information that might be misused in this action, given the similarity of the claims?

[68] There is undoubtedly at least a superficial similarity between the two claims, as even Mr. Soll's screen memorandum itself acknowledges on its face. Both claims are matrimonial actions brought by a former daughter-in-law claiming an equitable interest in the same piece of real property. The Parents appear to think that those parallels make the claims essentially the same. They have deposed as follows:

Mr. Shidei was very well aware of the property issues involved in the first claim involving ourselves and Christopher, and as those issues are basically the same ones involved in this action, he is very well aware of the property issues in this action.

[69] I am unable to agree that the issues are indeed the same in the requisite sense. On closer scrutiny, the issues do not appear to be the same at all. Ms. Dehnke's claim to an equitable interest in the Family Home flowed from the plain fact that legal title to it is held partly in Christopher's name. In Heidi's case, her trust claim turns on different questions that are unique to that couple, such as:

- a) What was said by the Parents and Christopher about Heidi and Clifford's interest in the Family Home during the marriage;
 - b) What funds and labour did Heidi and Clifford contribute to acquire it;
 - c) What arrangement did the Parents make with Heidi and Clifford when the Previous Home was transferred;
 - d) Should the profits generated by the sale of the Previous Home be credited to them or the Parents;
 - e) Did Heidi and Clifford use the profits from the sale of the Previous Home to carry out the renovations or borrow to do so; and
 - f) How extensive were the renovations to the Family Home and who did the work?
- [70] The confidential instructions that one might reasonably infer Mr. Shidei to have received in the context of the Dehnke Action would not appear to be particularly relevant to those central questions in this action.
- [71] In the result, I am not persuaded that the matters are sufficiently related to give rise to a rebuttable presumption of potential prejudice under the Martin test.
- D. Whether presumed or not, does a substantial risk of prejudice persist despite the erection of the confidentiality screens?
- [72] There remains, nevertheless, the possibility that CFSE received relevant confidential information from the respondents that could be used to their prejudice in this action, even though I have found that no presumption to that effect arises.
- [73] To the extent that CFSE did receive such confidential information, Rule 3.4-11 of the Law Society of British Columbia's Code of Professional Conduct allows a firm to continue to act, despite that fact, in certain circumstances. That Rule states as follows:
- 3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with rule 3.4-20, that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:
- (a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;
 - (b) the extent of prejudice to any party; and
 - (c) the good faith of the parties.
- [74] Rule 3.4-20 states as follows:

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm has:
 - i. taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and
 - ii. advised the lawyer's former client, if requested by the client, of the measures taken.

[75] The evidence before me establishes that CFSE sought to comply with these provisions. When the respondents brought the potential conflict to CFSE's attention, it took reasonable measures to ensure that there would be no disclosure of the respondents' confidential information to Mr. Soll and his staff and it advised the respondents of the measures it had taken.

[76] It must be acknowledged, however, that CFSE did not take those steps as soon as it should have. Ideally, the confidentiality screens should have been erected immediately when Mr. Soll joined the firm. That did not occur until months later for reasons that are explained earlier in this decision.

[77] The question of whether a firm should be disqualified when there has been substantial but imperfect compliance with provisions like Rule 3.4-11 and 3.4-20, was discussed by Newbury J.A., writing for the Court, in *Robertson v. Slater Vecchio*, 2008 BCCA 306. She began the judgment as follows at para. 1:

[1] Since the seminal decision of the Supreme Court of Canada in *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249, so-called "Chinese walls" or "firewalls" have become common phenomena in Canadian law firms. The basic tenets of *MacDonald Estate* are well known: where a lawyer has received confidential information attributable to a solicitor-client relationship at one firm and then transfers to a new firm whose files would place him in a position of conflict, the law will infer that "confidences are likely to be disclosed" unless one can be satisfied, on the basis of "clear and convincing evidence", that all reasonable measures have been taken to eliminate such risk. It is not sufficient for the lawyer merely to provide assurances or to swear an affidavit that no disclosure has occurred or will occur, or even to give an undertaking to this effect. Objective and verifiable standards must be in place such that "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur." (*MacDonald Estate*, 1259-60.)

[78] She then summarised the test to be met as follows, at para. 24:

- [24] The court must determine, then, not whether each of the Guidelines has been followed to the letter, but whether on the facts of the case the lawyer and his or her firm have met the "difficult burden" of the "reasonable member of the public" test formulated by the majority in MacDonald Estate.
- [79] A situation with many parallels to the present case was before this Court in Salley v. Salley, 2011 BCSC 473. That was another matrimonial case in which the wife sought to disqualify the husband's counsel after another lawyer, who had acted for the wife in an earlier matrimonial matter nine years before, joined the husband's counsel's firm. There too, the merged firm was found to have taken some protective measures, but had not done everything that it should have. In particular:
- [66] there were few tangible measures taken on the part of the merged law firm. There was no specific written documentation of any steps that were taken. The law firm did not, as it might have and in my view should have, take the step of advising [the former client] through her counsel of the fact that the conflict had been identified, and of what measures specifically were being taken to ensure that there ought to be no concern on her part concerning possible misuse of confidential information, dated though it might be, on the part of [the transferring lawyer].
- [80] Nevertheless, Verhoeven J. refused to disqualify the firm.
- [81] After considering the evidence adduced on this issue, I am satisfied that CFSE's failure to have the screens up between November 1, 2019 and February 18, 2020 was not attributable to any lack of good faith on the part of the lawyers and staff at the firm. I am also satisfied that the gap did not meaningfully exacerbate the risk of prejudice, because it appears to be unlikely, on the evidence before me, that any relevant confidential information was actually imparted to Mr. Soll or his staff during that time. In this case, there is no real basis for an informed member of the public to believe that relevant confidential information either has been or will be improperly disclosed.
- [82] In summary, I am satisfied that the risk of actual prejudice to the respondents is very low and that CFSE has acted in good faith throughout in its effort to address the issue, despite the delay in erecting the screens.

E. Did Mr. Shidei exacerbate the problem by providing legal advice about this action at the meeting on September 12, 2019?

- [83] By the time the meeting with Mr. Shidei took place on September 12, 2019, Mr. Shidei recognised that he could not act for the Parents in this action because doing so would offend the bright line rule. I agree with Mr. Soll's submission that Mr. Shidei's recognition of that undisputed fact was not an admission as to the existence of the various other kinds of conflicts that are alleged on this application. Nevertheless, Clifford also argues that those other problems were compounded because at the meeting Mr. Shidei also gave him and the Parents legal advice pertaining to this action. Mr. Shidei denies having done so.

- [84] I do not find this allegation convincing for a number of reasons.
- [85] The first problem I have with it is that the advice that Mr. Shidei is alleged to have given them is described in terms that are vague and lacking in substance (according to the Parents, it consisted of "a few pointers and hints as to what to do"; according to Clifford, they "talked for about five or ten minutes about the details of my file"). If, as Mr. Shidei has deposed, the "pointers" and "hints" were merely generic, such as to make sure that they filed a response before the deadline expired, there can be no legitimate grounds for complaint.
- [86] Second, it does not make sense to suggest that Mr. Shidei would have given the respondents meaningful legal advice while telling them, at the same time, that he was unable to act for them. I appreciate that it is possible, as Clifford has alleged, that Mr. Shidei gave them such advice before he had taken the opportunity to review Heidi's notice of family claim for the first time later in the meeting and came to realise, upon doing so, that he had a conflict. If that is indeed how events unfolded at the meeting, however, then whatever advice he gave them before reviewing the notice of family claim would have been uninformed by the claim itself, and therefore not connected to it in any meaningful way.
- [87] Finally, I am also troubled by the timing of this particular allegation. When Clifford first raised a concern about a conflict by way of Ms. Bennett's letter of February 7, 2020, his sole complaint was about CFSE's ongoing engagement as CRCL's registered and records office. Almost two weeks later, on February 19, 2020, Ms. Bennett added a concern about Mr. Shidei's previous representation of CRCL and the Parents in the Dehnke Action. There was no mention of the possibility that Mr. Shidei may also have imparted legal advice on September 12, 2019 until the responding affidavits were delivered in late July 2020, well after this application was brought.
- [88] The allegation appears, in summary, to be an afterthought that is lacking in substance. It is not a credible one.

F. In light of the answers to questions A-E, should CFSE be disqualified?

- [89] I have answered each of the previous questions in the negative.
- [90] What remains to be determined is whether disqualification is still necessary in order to eliminate whatever risk does exist, or otherwise to protect the integrity of the administration of justice.
- [91] Although I have questioned the legitimacy of certain aspects of the respondents' allegations, I accept that this application has not been brought for purely tactical reasons as alleged, but rather out of a genuine concern that CFSE's continuing representation of Heidi is or may be prejudicial to them. Nevertheless, I have found that the actual risk of prejudice to the respondents is very low. That limited risk of prejudice must be weighed against the actual and substantial prejudice that Heidi would suffer if her present counsel were to be disqualified. Although, as Clifford argues, this application was brought relatively early in the litigation, with the pleadings just having closed, that does not mean that there would be little

or no prejudice to Heidi if it succeeded. Mr. Soll is Heidi's counsel of choice. Heidi has already invested in the relationship, for example by having instructed him on the particulars of her claim so that he could prepare the notice of family claim on her behalf. Overall, I am satisfied that the balance lies against disqualification.

[92] For those reasons, I have concluded that the application should be dismissed.

VI. Conclusion

[93] The application is dismissed.

[94] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

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