

CANADA / JUDGMENT

Harris v. Reichardt

2001 BCSC 1824

COURT

Supreme Court of British Columbia

DECIDED

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9898

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

Mr. Justice A.F. Wilson

In Chambers

December 19, 2001

BETWEEN:

JUDY HARRIS

PLAINTIFF

AND:

JOAN REICHARDT

DEFENDANT

Counsel for the Plaintiff: T.L. Napora

Counsel for the solicitor of record for the Defendant: P.M. Goody

- [1] THE COURT: This is an application by the plaintiff in this action seeking an order restraining the counsel of record for the defendant from continuing to act as counsel for the defendant in these proceedings. A number of issues are raised in such an application: first, whether the current litigation is sufficiently related to the previous representation; second, whether the defendant can show that no confidential information was imparted that could be relevant to the existing retainer; and third, if confidential information could have been imparted, is there a risk that it will be used to the prejudice of the plaintiff?
- [2] Both counsel provided me with briefs of authorities in this matter, although they substantially overlap. The leading case is the decision of the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. The other cases referred to by counsel really are only applications of the principles set out in that case. As to the first issue, of whether matters are sufficiently related, Mr. Justice Sopinka said this at para. 46:

In answering the first question, the court is confronted with a dilemma. 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. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

- [3] On the next issue, as to whether confidential information was imparted, those comments are obviously relevant, but para. 44 is also relevant, in which Mr. Justice Sopinka said, starting halfway through the paragraph:

In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in *Rakusen*, "that is a thing which you cannot prove" (p. 841). I would add "or disprove." If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the

reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

- [4] The counsel for counsel of record for the defendant has referred to *Moffatt et al v. Wetstein et al*, the decision of Granger J. of the General Division of the Ontario Court, reported [1996] 29 O.R. (3d) 371, and also to the decision of Mr. Justice Edwards of this court in *Golden Capital Securities Ltd. v. Holmes*, an unreported decision, Vancouver Registry No. 964230, in which judgment was filed on August 26th, 1998. Those cases appear to place an onus on the client to show that the confidential information was used and, in particular Mr. Justice Edwards, appears to suggest that that should be by "compelling and cogent evidence". It is my view that that is not consistent with the decision of Mr. Justice Sopinka in para. 46 of *MacDonald*, the provision which I already quoted, that once it is shown by the client that there existed a previous relationship related to the retainer, then the court should infer the confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. That paragraph clearly states that the onus is on the solicitor, and that it is a very heavy burden.
- [5] This particular action is a defamation action. The statement of claim alleges statements by the defendant, who was then the president of the Nelson and District Housing Society, which statements, in effect, allege a forgery of documents by the plaintiff. The other action alleged a breach of the Municipal Act by the plaintiff in this action when she was a municipal councillor in Nelson, as a result of a conflict, in that she had an interest in a contract with the Nelson Youth at Risk Housing Society. Counsel for the solicitor of record for the defendant, and the solicitor himself in his own affidavit, said that there is no relationship between the two actions: that the one relates to breaches of a section of the Municipal Act, whereas the other is defamation, and there is no relationship between the issues in the Municipal Act action and those in the defamation action, relating to the claim or the possible defences of denial of the statement, qualified privilege or truth. But I consider that to be a much too narrow view of the issues raised in the actions. Specifically, I consider that the integrity and reputation of the plaintiff in this action is integral to both of the actions. With respect to the first action alleging the contravention of the Municipal Act, Mr. Justice Davies in para. 22 of his reasons for judgment did find that there was a contravention of the relevant section. However, he was satisfied that, as Ms. Harris did what she did in good faith, in an effort to assist council, and not for any improper motive, that she should not be disqualified from continuing to hold office. That is in para. 24.
- [6] Here, apart from the issues of credibility that obviously arise, particularly if a defence of truth is raised, there are also damages issues which relate directly to the integrity of the plaintiff and her reputation in the community. I am satisfied that there is a sufficient relationship between the two actions for a number of the reasons set out by counsel for the

plaintiff, particularly that both of the actions raise issues relating to the integrity and conduct of Ms. Harris as a development consultant, her responsibilities as such, and her relationship with, among others, the representatives of the British Columbia Housing Authority. In that regard, it is relevant that the allegation on which this action is founded is of a statement made to Andrew Orr, a project officer for B.C. Housing, who also provided evidence in the Municipal Act action by way of a letter attached to Ms. Harris's affidavit. Although that may not go directly to her integrity, it does show that there is a relationship with B.C. Housing that is relevant to both actions, and that a defamation of Ms. Harris's character may well affect that relationship. So I am satisfied that there is a sufficient relationship between the two actions.

- [7] As to whether there was confidential information imparted, and whether there is risk of it being used against the interest of the plaintiff, it may be useful to refer to the affidavits. In her affidavit, the plaintiff states at paras. 10 and 11:
10. I am concerned that matters that I discussed with [her counsel in the Municipal Act action] my legal counsel in the case of Germaine v. Gaden (phonetic) could be used to my detriment in the case at bar. In particular, we discussed the nature and manner in which I carry on business and what I see as my duties and responsibilities.
11. I am further concerned that the matters I discussed with my previous counsel gave him an added insight into my character and various personality traits.
- [8] I agree with counsel that a mere insight into the character of the party may not be sufficient to support a claim of breach of confidential information, but discussions of matters that relate to integrity well could. In that regard, counsel in his affidavit says:

Ms. Harris did not provide me information in confidence in the prior relationship which is relevant to this action or prejudicial to her interests in this action. If I believed that she had done so, I would not have accepted this retainer. I cannot identify a factual connection between this action and the former action. The former action involved a statutory test for disqualification of a municipal councillor. The present action involves the very narrow questions of whether or not words allegedly spoken were defamatory. If they were spoken and are defamatory, some or all of the defences to a defamation action may be joined.

As I have already commented, I consider that that view of the two actions is too narrow, that there are broad issues, specifically relating to the integrity of the plaintiff, in this action which arise in both of the actions. Those matters do not appear to have been considered in the affidavit of counsel.

- [9] I am thus satisfied that, even if the onus were on Ms. Harris, she has established that there was potentially a disclosure of confidential information which could be used in a manner adverse to her interests in this action. The test, as I have said, is that set out in the MacDonald case, specifically referring again to para. 44:

The test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.

In this case, I am not satisfied that a reasonably informed member of the public would be satisfied that is the case.

[10] Clearly there has to be a balancing of interests done in a case of this nature: primarily the interest of the present client in counsel of her choice, as compared to the confidence of the public in the operation of the judicial system. Again, I will refer to the decision of Mr. Justice Sopinka in the MacDonald case. At para. 69, he said:

The judicial system and the confidence of the public in its operation are too important to be put at risk by any appearance of unfairness. Unfortunately, no matter how scrupulously ethical an individual lawyer or firm may be, the appearance of unfairness will always be present when, as in this case, one or more lawyers who had a substantial relationship with a client become members of a firm acting for an opposing party. The opportunities for disclosure, even of an inadvertent nature, are too frequent and the possibility of discovering such disclosures too minimal to permit anything less than the irrebuttable presumption that the knowledge of one member of a law firm constitutes the knowledge of all the lawyers in that firm. Only such a test will ensure the public confidence in the administration of justice.

In that case, Mr. Justice Sopinka was dealing with a situation where the former counsel for one party had moved to the firm which was then representing the opposing party. We do not have that situation here. Here we are dealing with Ms. Harris's former counsel acting for the defendant in this action.

In para. 71, Mr. Justice Sopinka said:

The other factor to be weighed against maintaining the integrity of the justice system was that litigants ought not to be lightly deprived of their chosen counsel. It seems to me that to give undue weight to this factor would unduly benefit the large corporate clients who are said by my colleague to be the *raison d'être* of the larger firms. It is they who would retain counsel of their choice and primarily benefit from the change in the irrebuttable presumption of shared knowledge. I can see no reason for extending any special benefit or privilege to such clients of large firms. They, like any client who must seek new counsel, will suffer from inconvenience, loss of time and the inevitable worry and concern over such a change. However, the legal profession has many able counsel. The requirement of change imposed on a client is, on balance, a small price to pay for maintaining the integrity of our system of justice.

Again, the facts are not particularly applicable, in that the MacDonald case did deal with large firms in a large city. Here we are dealing with an individual lawyer in a small community, and the availability of other counsel is obviously a factor that must be taken into account. However, I am not satisfied that there are not other equally competent counsel available to the defendant in this action, if her present counsel is not allowed to continue.

- [11] I also note that this application has been brought very early on in the process. I understand the action was commenced only in November of this year, and that if any significant proceedings have been taken, they have been minimal. I do not believe there even is a statement of defence filed yet.
- [12] MR. GOODY: No, there isn't, My Lord.
- [13] THE COURT: Yes, there was an appearance filed on November 14th, 2001. There has not been a statement of defence, so obviously there have not been examinations for discovery. And that, I think, is also a factor to be taken into account. There has not been any delay in bringing on this application. So, for all of those reasons, the application is granted. The plaintiff will be entitled to costs of the application against the solicitor personally. Anything further, gentlemen?
- [14] MR. NAPORA: Just to clarify. Some say these applications should be brought by way of petition so it is separate, but those costs I presume are payable forthwith after assessment, just to be clear?
- [15] THE COURT: That seems reasonable. Mr. Goody, any submissions on that point?
- [16] MR. GOODY: If they're payable by [the solicitor] personally, I can't think of any reason where, after taxation or agreement, they wouldn't be payable. There's no point waiting for the outcome of the lawsuit.
- [17] THE COURT: Yes.
- [18] MR. GOODY: It's not going to make any difference.
- [19] THE COURT: No, I cannot see any reason either.

"A.F. Wilson, J."

The Honourable Mr. Justice A.F. Wilson

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