
CANADA / JUDGMENT

McDonald v. McDonald Estate

2013 BCSC 1732

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1732 McDonald v. McDonald Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDonald v. McDonald Estate,

2013 BCSC 1732

Date: 20130919

Docket: S153863

Registry: New Westminster

Between:

Brian Victor McDonald

Plaintiff

And

The Estate of Samuel Alexander McDonald,

Sylvia McDonald as Executor of the Estate of

Samuel Alexander McDonald, Sylvia McDonald,

Robert Samuel McDonald

and McDonald Landing Farms Ltd.

Defendants

- and -

Docket: S153860

Registry: New Westminster

Between:

Julie Madeline McDonald

Plaintiff

And

Brian Victor McDonald, Sylvia McDonald as

Executor of the Estate of Samuel Alexander McDonald,

Sylvia McDonald, Robert Samuel McDonald,

Dean William McDonald and McDonald Landing Farms Ltd.

Defendants

- and -

Docket: S153861

Registry: New Westminster

Between:

Dean William McDonald

Plaintiff

And

Brian Victor McDonald, Sylvia McDonald as Executor

of the Estate of Samuel Alexander McDonald,

Sylvia McDonald, Robert Samuel McDonald

Julie Madeline McDonald and McDonald Landing Farms Ltd.

Defendants

- and -

Docket: S153862

Registry: New Westminster

Between:

Brian Victor McDonald

Plaintiff

And

Sylvia McDonald as Executor of the Estate of Samuel

Alexander McDonald, Sylvia McDonald, Robert Samuel

McDonald, Julie Madeline Rothenbausch,

Dean William McDonald and McDonald Landing Farms Ltd.

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for Plaintiff:

D.A Strebchuk

Counsel for the Defendants, The Estate of Samuel Alexander McDonald, Sylvia McDonald as Executor of the Estate of Samuel Alexander McDonald, Sylvia McDonald, Robert Samuel McDonald and McDonald Landing Farms Ltd.:

K.E. Ducey

Solicitor for Dean William McDonald:

No appearance

Counsel for Defendant, Julie Madeline McDonald:

M.C. Stacey

Counsel for Ralph Albert May and Campbell Froh May & Rice LLP:

C.E. Selby

Place and Date of Hearing:

New Westminster, BC

July 2 and 3, 2013

Place and Date of Judgment:

New Westminster, BC

September 19, 2013

- [1] The plaintiff has applied for a declaration that Campbell Froh May & Rice LLP, ("CFMR") and two of the lawyers at that firm, Ralph May and Katherine Ducey, are conflicted in providing legal services to the plaintiff, the defendants and any other person being a party to or interested in this action and related actions and CFMR be estopped from continuing to provide legal services to the defendants in the actions.
- [2] There are four actions in addition to this action, all of which have been commenced in the Chilliwack Registry, which relate to the McDonald family farm or farms and ownership of the same. I will set out relevant portions of the history of these disputes and provide a brief description of the five actions before dealing with the issues.

I. Background

- [3] Samuel and Sylvia McDonald operated a dairy farm on lands in the Fraser Valley for several years prior to 1983 when they incorporated the dairy farm business, known as "McDonald Farms", under the corporate name of McDonald Landing Farms Ltd. ("MLFL"). The dairy farm remains to this day in the name of MLFL and now operates on two adjoining parcels: the original 100 acre parcel and another 40 acre parcel. The McDonald Farms has been owned by three generations of the McDonald family.
- [4] Samuel and Sylvia McDonald raised four children, Robert, Julie, Brian and Dean. Robert has continued to work on the farm, as has Brian. Both Julie and Dean have moved on and have not been part of the farm operations for several years.
- [5] Prior to 1989, Samuel and Sylvia allegedly offered to Brian that if he were to remain and assist them (being Sam and Sylvia) in conducting the family dairy business, then the parents would grant Brian an interest in and to the dairy farm business. Brian's position is that he remained and worked on the farm for many years in reliance on the assurance made by his parents. The assurance given to Brian by his parents, and his subsequent reliance on it, is at the root of the claim by Brian in the S19882 (New Westminster Action No. S153863), P009922, S21532 (New Westminster Action No. S153862) and S-26274 actions. Brian has worked on the 40 acre parcel in particular and has lived in a house on that parcel with his wife since 1996. It is alleged that the same or similar offers were also made to Robert, Dean and Julie. Julie did contribute for some period of time and worked the farm however she left for reasons unrelated to this litigation. Over time, only Brian and Robert stayed to work the farm with their parents.

- [6] In 1989, Brian suffered catastrophic injuries while working with equipment on the dairy farm. It is not in dispute that Brian's injuries resulted in serious damage to his back and brain. It is not in dispute that Brian continues to suffer from considerable disabilities in expressing his thoughts and suffers from what is described as a "vulnerability to suggestion". He has continued to work on the farm however, save for the recovery time from his back injuries.
- [7] Although Brian has continued to work on the farm, his ability to perform many tasks has been seriously affected and he is unable to perform any managerial work. He has performed tasks to assist the operation of the farm, and in particular to assist his brother Robert. From what I understand from the evidence, he is not in a position to be able to operate the farm, but continues to have the ability to provide limited assistance to the farm.
- [8] In 1996, Samuel and Sylvia each executed a Last Will and Testament which included, inter alia, provisions to the following effect:
- a) Each of Samuel and Sylvia left their estates to each other, however should the other predecease the testator, then the other was to transfer to each of Julie and Dean 3,024 preferred shares of MLFL and 3,023 preferred shares to Brian. The preferred shares for Brian were to be transferred to Robert in trust for Brian. Brian was to be entitled to the income or capital from the 3,023 shares at the discretion of Robert and on Brian's passing, the 3,023 shares were to be transferred to Robert.
 - b) Robert would receive all of the common shares of MLFL and the residue of the estate.

The 1996 will was prepared by a lawyer practicing in Mission, BC.

- [9] At some point in time between 1996 and June of 2000, Samuel and Sylvia determined that they would make an inter vivos transfer of the common shares of MLFL as a gift to their son Robert. In making that decision, they consulted with Laurie Cohen, a chartered accountant who had been advising Samuel, Sylvia and MLFL for several years previous on tax and accounting matters.
- [10] In June of 2000, Ralph May, a partner of CFMR, was contacted by Laurie Cohen. In paragraphs 3 and 4 of Mr. May's affidavit of January 16, 2012, Mr. May deposed the following regarding the retainer he received from Samuel and Sylvia McDonald:
3. In 2000, I was contacted by Laurie Cohen, a chartered accountant acting for Samuel and Sylvia McDonald, to prepare documents recording the gift of all of the common shares in McDonald Landing Farms Ltd. from Samuel and Sylvia McDonald to their son, Robert Samuel McDonald. I was informed by Mr. Cohen that this was to be a gift and that he wanted to make sure the transaction was properly documented to reflect that fact. I understood that the McDonalds had already decided to make this gift prior to my retainer.

4. When I met with Samuel and Sylvia McDonald at Mr. Cohen's home office in Abbotsford to sign documents on June 15, 2000, I asked the defendant Robert Samuel McDonald, to leave the house and take a walk so that I could satisfy myself that the gift was being made voluntarily and without any undue influence on Robert's part. I have no recollection of speaking to anyone in the McDonald family prior to this meeting as my instructions had come from Mr. Cohen, although it is possible. I had not acted for any of the McDonald family prior to this transaction. After meeting with Samuel and Sylvia, I was satisfied that the gift was made of their own free will and out of their desire for Robert McDonald to have control of the family farm which had been in the McDonald family for three generations. Now shown to me and marked Exhibit "A" to this my affidavit is a true copy of the agreement which was signed by Samuel McDonald on June 15, 2000. Sylvia signed a document in the same form confirming the gift of her common shares to Robert.

[11] The 51 common shares of MLFL owned by Samuel and 49 shares owned by Sylvia were then transferred to Robert.

[12] Also on June 15, 2000, Samuel and Sylvia signed a letter to Robert in which they stated:

Re: McDonald Landing Farms Ltd.

We are transferring to you by gift all of our common shares in and loans to McDonald Landing Farms Ltd. at this time.

We wish you to know that it is our wish that you will continue to provide a home on the farm for your brother, Brian, without any rent therefrom for the remainder of his life.

[13] It is Brian's evidence that he was aware of neither the transfer of common shares to Robert nor the letter of June 15, 2000 to Robert from their parents. In his submissions he refers to this as the "Family Secret".

[14] Subsequently, in December 2000, Samuel and Sylvia McDonald retained Mr. May to prepare their new wills. In his affidavit of January 16, 2012, Mr. May attached a copy of Samuel's new will, which mirrored the will which he prepared for Sylvia. In connection with the preparation of the wills, Mr. May stated the following:

I was then retained to prepare new Wills for Samuel and Sylvia McDonald to reflect the fact that the common shares in McDonald Landing Farms had all been transferred to Robert McDonald as an inter vivos gift. Under their previous Wills, Robert McDonald was to receive these shares from the survivor of his parents' estate. Now shown to me and marked Exhibit "B" to this my affidavit is a true copy of Samuel McDonald's Will made in October 1996. Now shown to me and marked Exhibit "C" to this my affidavit is a true copy of Samuel McDonald's Will made in December 2000. Sylvia's will mirrored that of Samuel.

[15] There is no evidence of any communication between the plaintiff, Brian McDonald, and Mr. May or anyone else from CFMR in 2000.

[16] In November of 2003, Dean McDonald shot and killed his wife, Laurie McDonald. On December 18, 2003 Mr. Justice Joyce delivered reasons for judgment on Dean McDonald's bail application and stated:

Robert McDonald, owns a farm in the Mission area which is worth between 2.5 and 3 million dollars and is prepared to stand as surety in any amount the court considers appropriate

This passage from the reasons for judgment of Mr. Justice Joyce was included in the materials before me as evidence that the family must have been aware by that time that Samuel and Sylvia McDonald had transferred the farm (that is, the common shares in MLFL which owned the farm) to Robert McDonald. Brian McDonald has deposed that he was not aware until 2009 of the transfer of the shares of MLFL to his brother. However, I find that the evidence before me shows otherwise, at least in respect of Samuel's 51 common shares.

[17] First, it is most likely he had become aware of Robert's ownership of the farm at what must have been a very traumatic time for the McDonald family with Dean having been charged with the murder of his wife and the farm being offered as security for bail.

[18] Secondly, in January 2004, Robert McDonald arranged for Brian McDonald to meet with Mr. May to execute an application by Brian for a milk quota from the BC Milk Marketing Board. The application was under the Board's Graduated Entry Program, which was implemented to assist children of BC dairy farmers to set up their own dairy farms and to obtain a milk quota at no cost. Of significance is an extract from the examination for discovery of Brian McDonald which is attached as an exhibit to the affidavit of Robert McDonald made April 11, 2013:

510 Q You might have already told me this, but when was it that you learned that Robert had been given the common shares in the farm company?

A Robert told me.

511 Q When was that?

A Prior to me starting up milking.

512 Q What did he say to you?

A He said: Dad gave me this 51 percent.

513 Q How did that subject come up?

A 'Cause his name wasn't on the building programme.

514 Q And you were asking him why not?

A Yeah.

515 Q Did you understand that you weren't eligible for the building programme if you had any quota of your own?

A Yes.

516 Q And so -- And that's why you understood that Robert was saying well, I've already been given quota by Dad, so I'm not eligible for the programme anymore?

A Yes.

517 Q Did you give any thought as to whether you were eligible for the programme given you thought you were inheriting part of the farm, or that you had an interest in the farm?

A Yeah. I -- Say that again. Say that question again.

518 Q Well, when this came up in 2004 did you consider

807 Q I meant to ask, the documents I've got here, this is your application for your milk quota. I take it that's a document you signed?

A Yeah.

808 Q And there would have been other papers submitted?

A Like?

809 Q Well, the list of machinery would be one example?

A Yeah.

810 Q And you have to give them some kind of a business plan or something?

A Yeah.

811 Q Do you have all that paperwork?

A I'm not sure.

812 Q I'm gonna ask that you look for any other documents you have that relate to your application for quota and produce those.

A Okay.

813 Q You read the Declaration of the Applicant before signing it? This is a two-page statement.

A Yeah.

814 Q That is your signature on the second page?

A Yeah

815 Q And in that you made the declaration that neither yourself nor your spouse, that would be Tara, have any financial interest in any other total production quota?

A Yeah.

816 Q So you were declaring you had no interest in the farm quota, correct?

A In the --

817 Q In the farm's quota?

A McDonald Landing?

818 Q Yes.

A Well, the only way to get it, we had to sign that.

819 Q Okay. But that's what you understood you were telling the Milk Board was that you didn't have any interest in the farm's quota?

A I didn't have -- No. It wasn't -- That's not the question. It's not I didn't want to have the interest. I wasn't allowed to have any interest

in it.

820 Q Right. It was owned by -- At this point when you signed this -- Well, you understood some of it was owned by Robert, some of it you thought was owned by your mother, right?

A Yes.

[19] Mr. May executed a further affidavit on April 2, 2013, in which he made reference to his involvement in the application by Brian for the milk quota. Mr. May's affidavit included the following statements:

5. To the best of my recollection and belief:
 - (a) I have met Brian once, in January 2004. Robert was present throughout my meeting with Brian.
 - (b) I have never spoken to Brian on the telephone.
 - (c) I have never corresponded with Brian, except to send him, in his role as president of Granados Farms Ltd. ("Granados") a reporting letter relating to the incorporation of Granados, letters enclosing documents relating to Granados' annual reports, and (on the instructions of Cohen) letters enclosing resolutions for the payment of dividends.
 - (d) I have never received any written communications from Brian.
6. My meeting with Brian and Robert in January 2004 was set up by Robert, who by that time was my main contact person with MLFL. Robert set up the meeting in order to introduce me to Brian for the purpose of executing documents allowing Brian to obtain milk quota from the BC Milk Marketing Board. My time for this meeting was billed to MLFL.
7. Later, in July 2004, Robert instructed me to incorporate Granados on behalf of Brian. To the best of my recollection, I did not receive any instructions regarding the incorporation of Granados from Brian.
8. After the incorporation of Granados, no further work was done for Granados, aside from annual reports and the resolutions in support of the same, and preparation of resolutions for payment of dividends, which were done on Laurie Cohen's instructions.
9. Our firm has records of a very small number of telephone calls relating to Granados between my assistant and Terra-Lee McDonald, who is Brian's wife. There was no confidential information provided to my assistant by Terra-Lee McDonald relating to the matters in question in this litigation. I have no recollection of or records of any other communications relating to Brian or Granados.

- [20] The milk quota sought and obtained by Brian related to the 40 acre parcel was separate and apart from the milk quota which had already been issued for the adjoining 100 acre parcel owned by MLFL.
- [21] Mr. May's evidence is that neither he nor anyone else in his firm has provided legal advice to Brian since 2004. The advice in 2004 related to Brian's application for the milk quota in which Brian declared he had no financial interest in any production quota, including any interest in the family farm. This is evidence Brian was aware he was not an owner. The advice given by Mr. May is the only legal advice Mr. May has given to Brian, and that matter was concluded early in 2004.
- [22] In his affidavits filed on this application, Brian McDonald makes no mention of having met with Mr. May regarding the application for the milk quota. There is no doubt that Mr. May and his law firm did provide legal advice in connection with the milk quota application; this is evidenced by the application and the Certificate of Independent Legal Advice. However, the nature of the application for the milk quota and Brian's silence on whether any confidential information may have been provided by him to Mr. May relating to ownership of the dairy farm leads me to conclude that on this one occasion when Brian met with Mr. May, a reasonable person would be assured that no confidential information was provided by Brian, at least none that was not already known to Robert.
- [23] Therefore, it cannot be said that Brian had a reasonable expectation that any confidential information was to be kept from Robert as Robert was in the room during the meeting, and, in any event, there is no evidence that any confidential information was imparted.
- [24] Although CMFR continued to provide services to Brian's company, Granados Farms Ltd., the position Sylvia in her personal capacity and as executrix of Samuel's estate, Robert McDonald and MLFL (the "Common Defendants"), as well as Mr. May, is that such representation is in no way related to any of the claims made in these actions and that the provision of legal services to Granados does not equate to having provided legal services or advice to Brian. In 2009 the corporate records of Granados were transferred to the law firm now representing Brian. This departure was instigated by Brian.
- [25] Samuel McDonald died on June 9, 2005.
- [26] Brian states that it was not until 2009 that he began to seek documents regarding his interest in the farms. He states that he contacted Mr. May by telephone to seek documents evidencing the transfer of a portion of the farms or the shares in MLFL as he had contemplated pursuant to the assurance given to him by Samuel several years previous.
- [27] Mr. May deposed that he had no recollection of having been contacted by Brian in 2009.

- [28] Brian deposed that as he did not receive a substantive response from Mr. May he then retained counsel, who at the time was Mr. John Meyer. Mr. Meyer corresponded with Mr. May and eventually received from Mr. May a copy of Samuel McDonald's will executed in 2000.

II. The Actions

- [29] In April of 2009, Brian caused a writ of summons and statement of claim to be issued in Action S19882 (the "Unjust Enrichment Action S19882") seeking an interest in the MLFL farm business through the principle of unjust enrichment on a quantum meruit basis, or through a declaration of a constructive or resulting trust.
- [30] In May of 2009, CFMR filed a statement of defence in Action S19882 on behalf of the Common Defendants.
- [31] In June of 2009 Brian commenced a second proceeding, Action P009922, in which he sought the delivery by Sylvia of a copy of any testamentary document signed by Samuel and a citation seeking an application by Sylvia to apply for a grant of probate or for Sylvia to show cause why Brian should not be granted probate or administration of Samuel's estate. CFMR filed a response in Action P009922 for Sylvia stating, inter alia, that probate or administration of Samuel's estate was not necessary and that the estate had already been dealt with by Sylvia.
- [32] In August of 2009 Brian commenced another action, Action S21532 pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "Wills Variation Act Action"), seeking an interest in Samuel's estate. This action is being defended by CFMR on behalf of the Common Defendants.
- [33] In July of 2011, Julie McDonald issued a notice of civil claim in Action CHI-S-S-23050 (New Westminster Action No. S153860) in which Julie seeks an interest in the McDonald Farms business under the principle of unjust enrichment and for a declaration of a constructive or resulting trust. CFMR is also defending the claims in Julie's action on behalf of the Common Defendants.
- [34] In November of 2011, Dean issued a notice of civil claim in Action CHI-S-S-23606 (New Westminster Action No. S153861) similar to that issued by Julie in July of 2011. CMFR are also defending that action on behalf of the Common Defendants.
- [35] Julie is represented by independent counsel and Dean is currently self-represented although I am informed that he has not been actively pursuing the action.

- [36] There have been several notices of application issued in these actions. Included in the orders granted to date is an order of Mr. Justice Groves that the trial of this action and the others referred to above be heard together. As a result, the Unjust Enrichment Action S19882, the Wills Variation Act Action, and the actions commenced by both Julie and Dean (collectively the "Farm Actions") are to be tried together.
- [37] In Actions S19882 and S21532, Mr. Justice Joyce granted an order in which he found that any privilege claimed by the Common Defendants in connection with documents pertaining to the McDonald farm business, the transfer of common shares to Robert and other issues has been waived.
- [38] In February of 2012, Brian amended this action, the Unjust Enrichment Action S19882 to include a claim under the Fraudulent Conveyances Act, R.S.B.C. 1996, c. 163, for the transfer of the common shares in 2000.
- [39] In April of 2013, Brian caused to be issued a notice of civil claim against Ralph May and CFMR in Action S-26274 (the "Law Firm Action") seeking an order that Mr. May and CFMR cease acting against the interests of Brian in Action S19882 and the several other actions in which Brian is a party, damages due to alleged losses caused by the breach of fiduciary duty to Brian, and other incidental relief. The action against CFMR is being defended by independent counsel of the law firm MacLeod & Company. There has been no order directing the trial of action S-26274 be heard together with any of the other actions commenced relating to the McDonald farms.
- [40] The trial of the four Farm Actions, including this one, has now been adjourned on three occasions, including the most recent trial date which had been set for April of 2013 for 15 days. A new trial date has not been scheduled. I am informed by counsel that they have sought the appointment of a Case Management Judge by the Court and a determination on this application before setting the matter once again for trial.
- [41] There has been considerable activity in the Farm Actions including examinations for discovery on seven different occasions, two trial management conferences and several chambers applications.
- [42] In July of 2009 counsel for Brian raised a question with CFMR as to whether that firm was in a conflict of interest position and if so whether CFMR should be representing the Common Defendants in the action commenced by Brian McDonald.
- [43] In response, Katherine Ducey of CFMR wrote to Mr. Meyer on August 4, 2009 and closed her letter with the following paragraph:

Finally, you have raised a question as to whether our firm is in conflict. I have spoken to Mr. May about this issue and it is our view that we are not in a conflict. Mr. May was asked by Robert McDonald to incorporate Granados Farm Ltd. for the benefit of your client. He has never done any other work for your client and has taken no direct instructions from your client. He has not obtained any information from your client which would be relevant to this lawsuit. Our clients have always been the farm, Samuel, Sylvia and more recently Robert McDonald.

- [44] In her letter of August 4, 2009, it appears Ms. Ducey was not aware of the attendance by Mr. May with Brian in 2004 regarding the milk quota for the 40 acre parcel. I do not consider that omission from the letter to be significant.
- [45] At that time, Brian had only commenced the Unjust Enrichment Action S19882. Since then, the claims pursuant to the Fraudulent Conveyances Act and the Wills Variation Act have been added. On the evidence before me, there were no further communications and there was no pursuit of the conflict of interest issue until the eve of the March 11, 2013 trial management conference when the plaintiff served an unfiled and unsworn copy of the application to remove CFMR as counsel for the Common Defendants due to the alleged conflict of interest.
- [46] The Common Defendants deny that there is a disqualifying conflict of interest and claim that this application and the application against Mr. May and CFMR have been brought for tactical reasons. I will discuss this issue later on in these reasons.

III. Legal Principles

- [47] Legal argument on this application was heard on July 2 and 3, 2013. Shortly following the hearing of the application I received correspondence from counsel in which they brought to my attention that on July 5, 2013, the Supreme Court of Canada (SCC) had released the decision in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 [CNR].
- [48] This most recent pronouncement on the subject of conflicts of interest expounds upon an earlier decision of the SCC in *R. v. Neil*, 2002 SCC 70 [Neil]. It was agreed by all parties that supplemental submissions on the impact of the CNR case would be of benefit to the Court in making a decision on this application. I agreed to permit the parties to make these further submissions.
- [49] Conflict of interest matters come before the Court as part of the Court's inherent jurisdiction to control its own process by protecting clients from prejudice and maintaining the repute of the administration of justice; it is from these duties that the supervisory power over lawyers is exercised: CNR at para. 13. Courts also develop the fiduciary duties that govern lawyers in their duties to clients; however, the role of the Court is from the perspective of the proper administration of justice, whereas the role of law societies is to maintain the good governance of the profession: CNR at paras. 14-16.
- [50] The overarching duty of loyalty owed by a lawyer to his client includes:

1. a duty to avoid conflicts of interest;
2. a duty of commitment to the client's cause; and
3. a duty of candour.

[CNR at para. 19, citing Neil at para. 19.]

A breach of any of the three aforementioned duties may warrant disqualification. The determination of whether there is a conflict of interest or another type of breach is a matter which will turn on the facts of each case.

- [51] A review of the legal framework for conflicts of interest is helpful in assessing how to analyze the parties and alleged breaches in this case.
- [52] Where the alleged conflict is between two current clients, as was the case in CNR, the first question is whether the conduct of the law firm falls within the scope of the bright line rule.
- [53] In CNR, the SCC makes clear that the bright line rule plainly prohibits concurrent representation of current clients who are directly adverse in interest: CNR at para. 26. The rule applies to unrelated and related matters alike because even if the representation has to do with unrelated matters, the fact of opposing interests will severely compromise the trust inherent in the solicitor-client relationship. As the Court in CNR aptly stated at para 28:

The reality is that "the client's faith in the lawyer's loyalty to the client's interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse": Restatement of the Law Third: The Law Governing Lawyers (2000), vol. 2, §. 128(2), at p. 339

- [54] While there is no place for further internal balancing once the bright line rule is engaged (CNR at para. 29), the Court in CNR clarified the scope of the bright line rule:

The rule applies where the immediate legal interests of clients are directly adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters. [CNR at para. 32.]

And further at para. 41:

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.

- [55] This second avenue to determine a conflict is only applicable when considering situations where both clients are current clients.

[56] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [*MacDonald Estate*] is an earlier decision of the SCC where the test for a disqualifying conflict of interest was developed for situations where the alleged conflict involved is between former and current clients. The principles were conveniently summarized in *Gardner v. Viridis Energy Inc.*, 2012 BCSC 19 [*Gardner*], starting at para. 22:

[22] The Supreme Court of Canada established the principles to be applied in relation to applications to remove a lawyer in *MacDonald Estates v. Martin* [*MacDonald Estates*], [1990] 3 S.C.R. 1235. Mr. Justice Sopinka described the test as follows at pp. 1259-1260:

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.

Typically, these cases require two questions to be answered: (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 the client?

[23] Such an application involves a balancing of the right of a litigant to counsel of his or her choice, the prejudice of being forced to change counsel in the course of litigation, the interest of public confidence in the integrity of the legal profession and the administration of justice. As noted by Madam Justice Levine, speaking for the court in *Coutu v. Jorgensen*, 2004 BCCA 400, at para. 31:

This Court has previously taken a cautious approach to ordering the removal of counsel contrary to the wishes of the clients: see *Mara (Guardian ad Litem of) v. Blake* (1996), 134 D.L.R. (4th) 716 at para. 13; *Ribiero* at para. 20, quoting *Esson C.J.B.C.* (as he then was) in *Manville Canada Inc. v. Ladner Downs* (1992), 63 B.C.L.R. (2d) 102 at 117 (S.C.), (affirmed in (1993), 76 B.C.L.R. (2d) 273). This cautious approach acknowledges the right of a litigant to his or her choice of counsel and the prejudice from being forced to change counsel in the course of litigation. Balancing those interests are, of course, the interests of public confidence in the integrity of the legal profession and the administration of justice: see *Martin v. Gray* at para. 51.

[24] The issues to be addressed in such an application were summarized by Madam Justice Bennett in *LS Entertainment Group Inc. et al. v. Wong et al.*, 2000 BCSC 1789, at para. 38 as follows:

In summary, the application of the *MacDonald Estate* test for a disqualifying conflict of interest requires a consideration of the following issues:

- (a) Was there a previous solicitor-client relationship between the applicants and the respondents that was sufficiently related to the retainer from which it is sought to remove the solicitor?
 - (b) If there was a "sufficiently related relationship", has the respondent met the burden of satisfying the court that no confidential information was passed that could be relevant to the present action?
 - (c) Is there a risk that the confidential information will be misused?
- [57] The principles in MacDonald Estate have not been overcome by the decision in CNR because CNR did not concern former and current clients; however, the broader principles set out in CNR concerning the duty of loyalty should be considered regardless of whether the relationship involves current or past clients.
- [58] In a very recent decision of this court, Bhandal v. Khalsa Diwan Society of Victoria, 2013 BCSC 1425 [Bhandal], Mr. Justice Johnston reviewed the legal principles as set out in CNR as well as MacDonald Estate, and focused on the distinction between the duty of loyalty that is owed to existing versus former clients. In Bhandal Johnston J. relied on the decision of Cromwell J.A. (as he then was) in Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd., 2008 NSCA 22 [Brookville], for guidance on the approach to follow in situations of lawyers acting against former clients. In Brookville the Court says:
- [20] A lawyer has a duty to both current and former clients to keep their confidences: MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235. Consequently, a lawyer must not act in any matter which puts that obligation in conflict with the duties owed to current clients. To current clients, the lawyer also owes a broader duty of loyalty which goes beyond the duty to keep their confidences. This duty includes avoiding conflicting interests, providing zealous representation and being candid: R. v. Neil, [2002] 3 S.C.R. 631 at para. 19.
- [21] This appeal is not governed by either of these clearly settled principles: it concerns acting against a former, not a current, client and the new retainer does not put the former clients' confidences at risk. The appeal, therefore, raises a threshold question of whether, as the judge found, a lawyer may be disqualified from acting against a former client on the same or a related matter even though by doing so, the lawyer will not place the former client's confidential information at risk.
- [22] I agree with the chambers judge that the answer to this question is yes. There is binding authority to this effect in Nova Scotia. Other courts of appeal have either taken the same position or at least kept the door open to this principle. The recent jurisprudence from the Supreme Court of Canada on the duty of loyalty to current clients does not, in my view, place this view in doubt and many decisions of other courts and text writers have adopted it.

And at para. 49:

In my view, lawyers have a duty not to act against a former client in the same or a related matter and this duty may be enforced by the courts. Although in general, the focus of the analysis will be on whether, by acting, the lawyer is placing at risk the former client's confidential information, the duty is not limited to situations in which that is the case. The chambers judge was right not to limit the duty in that way.

[59] In Bhandal, Johnston J. explained:

[32] These passages show the importance of determining whether the matter on which the lawyer acted for the former client is "related" to the current matter from which the former client seeks to disqualify the lawyer. The court in Brookville said that the current and former retainers would be sufficiently related if:

- 1) "the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer" (para. 17); or
- 2) if "it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter" (para. 50).

[33] The first consideration does not depend on the lawyer having in the past received confidential information from the former client. The court in Brookville held that where a lawyer acts against a former client and none of the former client's confidential information is put at risk by the new retainer, the lawyer still owes a duty of loyalty to the former client, a duty the court said was based on the need to protect and to promote public confidence in the legal profession.

[34] At para. 51 the court noted:

What is of concern is the spectre of a lawyer attacking or undermining in a subsequent retainer the legal work which the lawyer did for the former client or of a lawyer effectively changing sides by taking an adversarial position against a former client with respect to a matter that was central to the previous retainer.

[35] The relationship between the matters on which a lawyer acts or has acted affects the burden of proving whether a client has imparted confidential information to the lawyer such that the lawyer should be disqualified. The court in MacDonald Estate said at para. 46:

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.

[36] The relationship between retainers is also important where confidential information is not a concern. In Brookville, the court said at para. 55:

As I have attempted to explain, the approach to the question of whether two matters are related is entirely different in a MacDonald Estate situation than it is in the case of an alleged disqualifying conflict of interest where confidential information is not at risk. The purpose of assessing the relationship between the two retainers in MacDonald Estate is to determine whether an inference should be drawn that confidential information obtained in the course of the first retainer is relevant to the second. When, as here, confidential information is not at risk, the relationship between the two retainers is considered in order to identify whether the second retainer involves the lawyer attacking the legal work done during the first retainer or amounts, in effect, to the lawyer changing sides on a matter central to the earlier retainer. 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.

[37] It is up to the Society to show that the previous relationship between it and the Law Firm is "sufficiently related" to its present retainer by the petitioners.

[60] Once a breach of a duty is established pursuant to either of these tests, the issue of remedy remains.

[61] In CNR, the Court set out that upon breach of any of the three duties underlying the overarching duty of loyalty to a client, disqualification may be required:

- a) to avoid the risk of improper use of confidential information;
- b) to avoid the risk of impaired representation; and/or
- c) to maintain the repute of the administration of justice.

[CNR at para 61.]

[62] Where there is a need to prevent the misuse of confidential information, disqualification will generally be the only appropriate remedy. The residual third purpose for disqualification was described by the Court in CNR as follows:

[63] 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 Brookville Carriers scope of the bright line rule and applicable law society restrictions.

[63] With these principles in mind, I will turn to their application in the present case.

IV. Analysis

[64] One of the most contested issues in this application is how to properly characterize the nature of the solicitor-client relationships as of the date that the first action was commenced in April of 2009. This is important because, as noted in CNR, the law distinguishes between former and current clients.

[65] The submissions in support of the plaintiff ask me to consider whether the bright line rule was engaged at either in 2004 or in 2009. I accept the submissions of the defendants that it has not been established on this application that Brian's legal interest in obtaining the quota and setting up Granados was in any way in conflict with or directly adverse in interest to the legal interests of the defendants at the time that CFMR was retained by Brian in 2004. I am unable to say whether the bright line rule as set out in CNR was engaged at that time. Further, I agree with the defendants that the relevant time period for assessing this disqualification application is as of April 2009, when CFMR was retained to defend the first law firm action.

A. Is the Bright Line Rule Engaged?

[66] There are a number of reasons for which I have found that the bright line rule is not engaged in the circumstances before me.

[67] First, I am of the view that Brian was not a current client of CFMR at the relevant time, that is, April 2009. The retainers that Brian had with CFMR in 2004 were discrete. The first dealt with the milk quota application and the second was for the incorporation of Granados. After that, CFMR represented the corporate vehicle through which Brian conducted his farming operation, but no longer represented Brian personally.

[68] The plaintiffs argue that Granados cannot, for the purposes of this application, be considered a separate legal entity from Brian himself given the role that Robert had in setting up the corporation on Brian's behalf. Brian contends that his legal interests are inseparable from those of Granados, and vice versa. Even if I were to accept that Brian's legal interests are indistinguishable from those of Granados, the converse is simply not true. Granados is a distinct corporate entity and its legal interests must be considered separate

and apart from its directing officers. In support of that position I refer to the Code of Professional Conduct for British Columbia, 2013, issued by the Law Society of British Columbia, and in particular, Ch. 1, s1.1 which states:

1.1-1 In this Code, unless the context indicates otherwise,

"client" means a person who:

- (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
- (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

The commentary attached to the above section states inter alia:

- [2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;
- [69] I find that Brian was not a current client of CFMR in 2009. It follows that CFMR was not concurrently acting for opposing parties in this action. Granados is not a party to any of the relevant actions.
- [70] Whether the bright line rule applies also requires consideration of whether "it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters": CNR at para. 32. Considerations that come into play are the nature of the relationship between the law firm and the client, the terms of the retainer as well as the types of matters involved: CNR at para. 37.
- [71] On this point, my previous finding is dispositive; there is no concurrent representation. Even if I were wrong on that point, CFMR's solicitor-client relationship with the defendants predated 2004 and therefore predated any relationship with Brian.
- [72] Lastly, it is clear to me that the plaintiff is now framing this application in a tactical manner by relying on the more recent retainer with Granados in an attempt to engage the bright line rule. In doing so he forfeits the benefit of the rule: CNR at para. 36.
- [73] I need now consider whether, on the authorities, a conflict exists between Brian as a former client and the Common Defendants.

B. Is a Conflict Established Between a Former Client and the Common Defendants?

1. Is Confidential Information at Risk?

[74] This issue involves a consideration of the test for a disqualifying conflict of interest set out in MacDonald Estate by the Supreme Court of Canada, and elaborated on more recently by this Court in Gardner and in the decision of Madam Justice Bennett in LS Entertainment Group Inc. et al. v. Wong et al., 2000 BCSC 1789 [LS Entertainment Group]. As set out above, LS Entertainment Group at para. 38 summarizes the test for the application of the Supreme Court of Canada decision in MacDonald Estate as follows:

- (a) Was there a previous solicitor-client relationship between the applicants and the respondents that was sufficiently related to the retainer from which it is sought to remove the solicitor?
- (b) If there was a "sufficiently related relationship", has the respondent met the burden of satisfying the court that no confidential information was passed that could be relevant to the present action?
- (c) Is there a risk that the confidential information will be misused?

I will consider each of these issues in turn.

- a) Was there a Previous Solicitor-client Relationship Between the Applicants and the Respondents that was Sufficiently Related to the Retainer from which it is Sought to Remove the Solicitor?

[75] The only relationship remotely close to the CFMR retainer to defend the Farm Actions is the relationship stemming from the milk quota advice provided by Mr. May to Brian in July 2004.

[76] Based upon my review of the statutory declaration of Brian sworn in support of the milk quota, the advice Mr. May provided to Brian related solely to the requirements to obtain the quota under the Graduated Entry Program of the BC Milk Marketing Board program. The milk quota advice was a discreet matter which was concluded in 2004. Brian's claims in the Farm Actions are founded on an alleged agreement by Samuel to leave Brian a share of ownership of the farm made many years previous. I find no connection between the milk quota advice and Brian's claims. Therefore, there is no "sufficiently related relationship".

- b) If there was a "Sufficiently Related Relationship", has the Respondent Met the Burden of Satisfying the Court that No Confidential Information was passed that could be Relevant to the Present Action?

[77] Even if there were a sufficiently related relationship, from my review of the affidavits and submissions before me, there is no evidence that Brian allegedly provided confidential information to Mr. May. Mr. May met with Brian once in 2004 to advise Brian on the milk quota application. Previously in these reasons for judgment, I referred to Brian making no mention of having met with Mr. May regarding the application for the milk quota. The nature of the application for the milk quota and Brian's silence on whether any confidential information may have been provided by him to Mr. May relating to ownership of the dairy

farm also led me to conclude that on the one occasion when Brian met with Mr. May, a reasonable person would be assured that no confidential information was provided by Brian, at least none that was not already known to Robert.

[78] The information, if any, was not shared in an environment of confidentiality since Robert was also present during the meeting between Brian and Mr. May. The claims against CFMR and Mr. May are the appropriate venue to dispose of the propriety of their dealings with Brian as a client.

[79] A similar decision based on similar facts was that of Mr. Justice Lysky in *Sherman v. Urich*, [1999] B.C.J. No. 1964. In that case, Mr. Justice Lysky found the complaining party had not provided any confidential information to the lawyer alleged to be in conflict and dismissed an application to have the lawyer removed.

c) Is there a Risk that the Confidential Information will be misused?

[80] My finding that there was no confidential information imparted during the "milk quota" retainer or otherwise by Brian is dispositive of this question. There is no confidential information which could be misused.

2. Is CFMR taking an Adversarial Position against the Work it Performed or a Matter Central to the Earlier Retainer?

[81] Where there is no confidential information at risk, the test from *MacDonald Estate* does not apply but the lawyer still owes a duty of loyalty to the former client: *Bhandal* at paras. 32-37, citing *Brookville*. When confidential information is not an issue, the new and old retainers are sufficiently related to disqualify a lawyer when the lawyer takes an adversarial position against a former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer: *Bhandal* at para. 32, citing *Brookville* at para. 17.

[82] My findings under the first branch of the *MacDonald Estate* test are dispositive of this second situation where confidential information is not at risk. As I found above, Mr. May's advice to Brian related solely to the requirements to obtain the milk quota. Brian's claims in the Farm Actions are founded on an alleged agreement by Samuel to leave Brian a share of ownership of the farm made many years previous. Therefore CFMR is not taking an adversarial position with respect to the legal work it performed for Brian.

C. Is Delay in Bringing the Application a Factor?

[83] Brian's first action was commenced in April 2009. The actions commenced by Julie and Dean were issued in July and November of 2011.

[84] As early as July 2009 Brian's counsel alleged CFMR to be in a conflict of interest in representing the defendants and Ms. Ducey of CFMR responded to that allegation in August 2009 denying a conflict and providing reasons for their denial. No steps were taken in the actions to have a conflict declared until issuance of the notice of application in March 2013.

In all of these proceedings, there has been extensive discovery, two trial management conferences and several chambers applications, and CFMR have continued to act on all of those matters without further objection by the plaintiff.

- [85] The defendants have expended considerable time and money in defending this matter to date through the services of CFMR without objection to CFMR's representation for the last four years. Were I to find CFMR in a position of conflict, there would be considerable prejudice to the defendants who would have to retain new counsel. Prejudice to the defendants would be in the form of additional delay, the cost of retaining new counsel and deprivation of retaining counsel of the defendants' choice.
- [86] In *Lafarge Construction Materials Precast Division, A Division of Lafarge Canada Inc. v. Lawson Lundell Lawson & McIntosh*, [1995] B.C.J. No. 2922, Mr. Justice Shaw found the substantial prejudice to the plaintiff in that case, even assuming a conflict, outweighed the substantial prejudice to the plaintiff and dismissed the application to have the defendant's solicitors recused from acting.
- [87] Delay in bringing an application to recuse counsel was also found to be a factor in the following decisions: *de Guzman et al. v. de la Cruz et al*, 2004 BCSC 36 at paras. 28-29; *McDaniel v. Provident Life and Accident Insurance Company*, 2008 BCSC 50 at para. 28; and *Kwong v. Kwong*, 2012 BCSC 1829 at paras. 34-39.
- [88] Considering the authorities above, even if there were a conflict of interest between CFMR against Brian, Julie and Dean, which I did not find, the substantial prejudice to the defendants caused by the delay would result in a dismissal of the plaintiff's application.

V. Conclusion

- [89] Therefore, I find the application of the plaintiffs Brian, Julie and Dean for a declaration that Campbell Froh May and Rice, Ralph, May and Katherine R. Ducey are conflicted in providing legal services in these actions is dismissed.
- [90] The defendants and CFMR are entitled to their costs. Written submissions regarding costs must be received no later than October 21, 2013.

"Jenkins J."

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