SUPREME COURT OF YUKON

Citation: *E.A.G. v. D.L.G.*, 2010 YKSC 24

Date: 20100604
S.C. No. 09-D4166
Registry: Whitehorse

Between:

E.A.G.

Plaintiff

And

D.L.G.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman — Counsel for the Plaintiff
Carrie Burbidge — Counsel for the Defendant

REASONS FOR JUDGMENT
(Application to Remove Counsel)

INTRODUCTION

[1] On March 25, 2010, Ms. Burbidge, counsel for D.L.G. (the father) applied to remove Ms. Hoffman, counsel for E.A.G. (the mother), on the grounds that Ms. Hoffman had represented D.L.G. ten years ago in his first divorce.

[2] I orally dismissed the application without costs reserving my reasons for judgment. These are my reasons.

BACKGROUND

[3] Ms. Hoffman commenced this action on behalf of the mother on September 24, 2009.

[4] Ms. Hoffman obtained an Order Without Notice on September 24, 2009.

[5] On September 28, 2009, Mr. Horembala filed an appearance on behalf of the father.

[6] On February 16, 2010, the father filed a Notice of Self-Representation until he was able to retain Ms. Burbidge, who filed her appearance on March 4, 2010.

[7] As set out in *E.A.G. v. D.L.G.*, 2010 YKSC 21, at para. 18 – 20, the mother and father, with the advice of counsel, attempted to reconcile for approximately the three months of October, November and December 2009. To that end, the "no contact" portion of the Without Notice Order dated September 24, 2009, was not enforced by agreement on the understanding that it could be reinstated by letter notice between counsel.

[8] The attempted reconciliation failed and the "no contact" provision was reinstated in early January 2010. All financial support, except for the use of a motor vehicle and payment of daycare for the children, was withdrawn by the father.

[9] Counsel for the mother set a hearing date of January 26, 2010, to address interim custody, access, and child and spousal support. Counsel agreed to adjourn that date to February 25, 2010.

[10] On February 25, 2010, the father appeared seeking an adjournment. He was without counsel as Mr. Horembala was no longer acting for him. The applications were adjourned on terms to March 25, 2010.

[11] On March 19, 2010, Ms. Burbidge filed her application to remove Ms. Hoffman as counsel of record for the mother.

[12] The allegation of the father set out in his affidavit #2 filed March 19, 2010, is as follows:

> 7. Ten years ago, Debbie Hoffman represented me in my first divorce. Attached to this my Affidavit as Exhibit "A" is a copy of a letter from Kathy Kinchen, my ex-wife's lawyer, to Debbie Hoffman. In the letter, Ms. Kinchen asks for financial records for my [company A].

[13] The letter dated January 25, 2000, requested Ms. Hoffman, who was acting for the father, to make financial disclosure regarding company A for the year ending September 30, 1999. The letter also proposed that Ms. Kinchen's client would release all her claims against company A in return for payment of a sum of money due and owing.

[14] The mother filed affidavit #3 on March 24, 2010, responding on information and belief as follows in para. 5:

> (a) To the best of my knowledge, Ms. Hoffman did not represent the Defendant in his first divorce. The Defendant's first divorce was from [N.G.] and I don't believe [N.G.] was represented by Kathleen Kinchen.
>
> (b) In further response to paragraph 7, Ms. Hoffman has advised me, and I believe it to be true that she was briefly retained by the Defendant for his second divorce. Ms. Hoffman advises that she transferred the Defendant's file to Shayne Fairman in or about April 2000 after taking a job in the Cabinet Office at the Government of Yukon. Ms. Hoffman advises me that she did not retain a copy of the file and that the full file was transferred to Mr. Fairman. Ms. Hoffman further advises that she does not recall reviewing information that may be relevant in this proceeding with respect to the Defendant's finances or [company A] when she had the file.
>
> (c) In further response to paragraph 7 of the Defendant's Affidavit #2, Ms. Hoffman transferred the file in April

> 2000. I did not move to the Yukon until December 21, 2000 and the Defendant and I were not married until March 17, 2001.

[15] In the current dispute between the mother and the father, the financial statements of company A from 2007 and 2008 are in issue along with corporate tax returns from 2005 – 2008.

THE LAW

[16] Gower J. has recently summarized the principles of *MacDonald Estate v. Martin*, [1999] 3 S.C.R. 1235, in *Miller et al. v. Government of Yukon et al.*, 2010 YKSC 22. I repeat them here from para. 5 of that judgment:

> [5] The leading case in determining whether there is a disqualifying conflict of interest is *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. It sets out the following principles:
>
> 1. There are two questions to be answered:
>
> a) Did the lawyer receive confidential information from the former client relevant to the matter at hand?
>
> b) Is there a risk that it will be used to the prejudice of the former client? (para. 45)
>
> 2. In answering the first question, once it is shown by the former client that there existed a previous solicitor-client relationship which is "sufficiently related" to the retainer from which it is seeks to remove the lawyer, "the court should infer" that confidential information *was* imparted, *unless* the lawyer satisfies the court that no information was imparted which could be "relevant" (para. 46).
>
> 3. In answering the second question, when a lawyer has relevant confidential information from the former client, the lawyer cannot act against that client and disqualification is automatic (para. 47).
>
> 4. There are two interests at stake, in the circumstances of this case, which must be balanced:

> a) The public's confidence in the integrity of the profession and in the administration of justice; and
>
> b) The interest of a member of the public in retaining counsel of their choice (para. 51).
>
> These interests are sufficiently flexible to permit a lawyer to act against a former client, provided that a reasonable member of the public, who is informed of all the facts, would conclude that no unauthorized disclosure of confidential information has occurred or would occur (para. 51).

[17] Ms. Burbidge relied upon the case of *Rosin v. MacPhail*, [1997] B.C.J. No. 7 (C.A.). In that case, the British Columbia Court of Appeal ordered that a lawyer named Schuck be disqualified from acting against Ms. Rosin. Mr. Schuck had acted for Ms. Rosin in a divorce action against her previous husband between 1983 and 1985 while she was living with Mr. MacPhail, for whom Mr. Schuck now wishes to act. Ms. Rosin has brought a constructive trust action against Mr. MacPhail. Mr. Schuck was a friend of Mr. MacPhail's and had acted on his behalf prior to 1983. Mr. Schuck had an active social relationship with both Ms. Rosin and Mr. MacPhail.

[18] Ms. Rosin commenced her action in 1992 and Mr. Schuck began to act for Mr. MacPhail in 1995. Ms. Rosin immediately objected to Mr. Schuck acting for Mr. MacPhail. The basis of her objection was that Mr. Schuck had financial knowledge of her situation when she was divorcing her first husband and living with Mr. MacPhail, and that he had socialized with both Rosin and MacPhail during the relationship. Mr. Schuck stated that he had not acted for Ms. Rosin since 1985 and he denied having confidential information.

[19] The court concluded that Mr. Schuck necessarily became privy to confidential information about Ms. Rosin that might become relevant in the court action (para. 19).

Esson J. concluded that Mr. Schuck had not met the heavy burden of satisfying the court that no confidential information had been imparted which could be relevant in the constructive trust case against Mr. MacPhail (para. 24).

[20] Ms. Hoffman relied upon the case of *Kjartanson v. Rutley,* [1995] M.J. No. 328 (Q.B.). In that case, a firm had represented Mr. Rutley, a lawyer, on the dissolution of his law partnership in 1992. Mr. Rutley then became involved in a lawsuit with Kjartanson on a completely different matter in 1994 after the termination of Rutley's retainer and Mr. Kjartanson retained the same firm that had previously represented Rutley.

[21] Kjartanson commenced the action in December 1994 and the conflict issue was not raised until March 1995 by Rutley. Kennedy J. dismissed the application to remove the law firm for the following reasons:

1. the financial information that the firm knew about Rutley was in 1992 and it was irrelevant to the case at bar (para. 17);
2. it is a powerful strategy to raise the possibility of a conflict and a true conflict did not exist (para. 23);
3. Rutley, a practicing lawyer, did not raise the conflict in interest at the earliest opportunity and waived any claim to a conflict in interest (para. 24);

[22] In *Schamber v. Schamber*, [1999] M.J. No. 362 (Q.B.), the wife applied to remove the law firm acting on behalf of the husband because she had given financial information to the same firm that had acted for the husband and wife jointly for the purchase of their matrimonial home and preparation of their wills.

[23] Allen J. decided that the key question was whether the firm received confidential information relevant to the matter at hand (para. 2).

[24] Allen J. dismissed the application because the wife was unable to show how the financial information previously provided to the law firm had any relationship to the matter at hand (para. 11). Allen J. concluded at paras. 13 and 14 as follows:

> 13 In essence, the wife argues that a prior relationship should be sufficient to disqualify the firm because a reasonable member of the public would require it to maintain his or her faith in the integrity of the system. However, before determining what a reasonably informed member of the public might think, I must find that the confidential information is relevant to the matter at hand. On these facts, I do not find the necessary connection of relevance established.
>
> 14 In determining the issue, I am required to balance three competing interests: maintaining the high standards of the legal profession and the integrity of the system, not lightly depriving litigants of choice of counsel and allowing for a reasonable amount of mobility in the legal profession as set out in *MacDonald Estate v. Martin et al*.

[25] The issue of delay in bringing an application for removal of a lawyer was addressed in *Lafarge Construction Materials Precast Division, A Division of Lafarge Canada Inc. v. Lawson Lundell Lawson & McIntosh*, [1995] B.C.J. No. 2922 (S.C.). In that case, one of the defendants in a complex action became aware that Lawson Lundell acted for a related company of the defendant. Over a nine-month period, examinations for discoveries were held, mediation took place and a trial date was set. The defendant then applied to remove Lawson Lundell as the plaintiff's lawyer.

[26] Shaw J. assumed without finding that there was in fact some conflict and concluded at para. 16:

> In my opinion, in all of the circumstances of this case, whatever conflict there may be is not of such a serious nature that it outweighs what I consider to be the substantial prejudice that will accrue to the plaintiff in the wall collapse action should it be deprived at this late date of counsel of its choice. It is clear the trial date will be lost because of the necessity of retaining new, experienced counsel, and the difficulty of finding counsel to take on that project. The present counsel is steeped in the case, the claim exceeds $5 million, and the issues are difficult and complicated.

ANALYSIS

[27] The first issue to be determined is whether Ms. Hoffman received confidential information from the father that is relevant to the case at bar. The record in this application is very thin.

[28] There is no question that Ms. Hoffman was acting for the father ten years ago in a matrimonial dispute. However, there is no allegation by the father that Ms. Hoffman either received confidential information or that it has any relationship to this proceeding ten years later. Ms. Hoffman stated that she could not recall reviewing any information relevant to this court action.

[29] In the present litigation, the financial issues relate to company A after 2005.

[30] I conclude that on the facts of this application to remove Ms. Hoffman, there was a retainer by the father but there is no factual basis to establish that confidential information about company A was received or that it is “sufficiently related” to the matter now before the court.

[31] In addition to my decision on the lack of a factual basis or sufficient relationship, I have concluded that the father by his delay of approximately six months will cause substantial prejudice to the mother in retaining new and experienced family law counsel. In this respect, I am balancing the right of the mother to choice of counsel with the

public's confidence in the integrity of the legal profession and in the administration of justice. The mother has left the family home and retained experience counsel and is in the course of complex applications. The expense, delay and difficulty in retaining new counsel are significant.

[32] I take judicial notice of the fact that it is a challenge for a spouse to retain legal counsel specializing in family law in the Yukon. Put simply, the handful of available lawyers becomes even more limited when the spouse is a business person who may have relationships with one or more law firms. There is no suggestion that the spouse in this case was attempting to disqualify the handful of lawyers who practice family law from acting for the wife. Suffice it to say that the ability to retain local counsel in family law matters is always a challenge.

[33] In my view, allegations of conflict in interest must be raised immediately and followed by a timely application so that the client of the lawyer alleged to be in conflict is not prejudiced with respect to his or her choice of counsel. Family law litigation is costly and stressful enough by its very nature without the added burden of strategic applications causing delay and increasing costs to family law litigants.

[34] I conclude that the principle of choice of counsel in family law where resources are scarce and the public interest in the expeditious and economic conduct of legal proceedings involving children and child support are paramount in this case.

[35] The application is dismissed.

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VEALE J.