IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20140203
Docket: E17904
Registry: Nelson

Between:

Allan Kent Weber

Claimant

And:

Anne Brigitte Leclerc

Respondent

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment
In Chambers

Counsel for the Claimant:	S.E. Wallach
Counsel for the Respondent:	T.W. Pearkes
Place and Date of Trial/Hearing:	Nelson, B.C. February 3, 2014
Place and Date of Judgment:	Nelson, B.C. February 3, 2014

[1] **THE COURT:** This is a case in which a law firm applies in a family law litigation for a ruling as to whether or not they are conflicted in acting for their client, the respondent, Anne Brigitte Leclerc. I am satisfied, having heard from counsel, and I thank them for their helpful submissions, that the appropriate and leading case in the area of when a lawyer is in conflict as a result of a previous relationship with a party is in the case of *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. In that case, on page 260 in my version of it, Sopinka J. for the court says:

> 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?

[2] In the previous paragraph, the court comments as follows under the words, "Appropriate Test," it says:

> 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.

[3] Turning to the facts, Mr. Weber says, and it does not appear to be disputed, that he had contact with the firm that is now known as Pearkes & Fernandez on the following basis. He says that he was involved in a motor vehicle accident and, in November 2011, he contacted the then firm of Timothy W. Pearkes Law regarding his motor vehicle accident. He says that he spoke in regards to that accident and that that resulted in a telephone call from Mr. Timothy Pearkes who provided with summary advice.

[4] So sometime after contacting Mr. Pearkes' office in November 2011, he received a phone call from Mr. Pearkes and got some summary advice.
Mr. Pearkes' law firm then appears to have joined with Ms. Fernandez and has become the law firm of Pearkes & Fernandez. Mr. Pearkes, who represents the firm, and the affidavits in support of their application describe their firm as being a firm of two lawyers, one paralegal, a Mr. Greg Haydu, and one legal assistant by the

name of Erin Peitzsche. It appears that Mr. Weber wished to get some advice in regards to his matrimonial matter and attended the office of Pearkes & Fernandez in January 2013. He says that he briefly spoke with a Mr. Haydu, the legal assistant, telling him he wanted to see a lawyer and then he got a phone call from Erin Peitzsche. This phone call was apparently on the 23rd of January 2013. I do not have the notes of the phone call in front of me, but they are described in Allan Kent Weber's affidavit of the 22nd of January 2014.

[5] From there, it seems apparent that, and the timing may be crucial here, in January 2013, a memo was created, some email was created by Ms. Peitzsche to the lawyers and the legal assistant in the firm and that is the last contact that they had with Mr. Weber and it appears, from what I understand the case to be, that Mr. Weber, several months later, commenced action in the matrimonial area and served his wife, Anne Leclerc. Ms. Leclerc retained the firm of Pearkes Fernandez and, hence, the problem that brings the parties to court today. On the 21st of November 2013, Mr. Weber, through his current counsel, Ms. Wallach, advised that they felt the law firm of Pearkes & Fernandez was in conflict.

[6] There are two crucial facts here which are important, in my view, in setting the circumstances and forming the decision. The first crucial fact, in my view, is that at no time did Mr. Weber ever speak to a lawyer or even a legal assistant regarding the substance of his family law claim. No cases have been provided where a person has spoken or given information to a non-legally trained person, in this case, an administrative assistant or, to use old-fashioned language, a secretary. There is no case provided to me where the mere giving of information to a secretary is sufficient to establish a solicitor-client relationship, to use the language in *MacDonald Estate*, a solicitor-client relationship relevant to the matters at hand. I am not saying, presumptively, that some discussion with a legal assistant might at some point and under some circumstances give rise to a solicitor-client relationship, but what appears to have been the case here and what appears to be the practice in the law firm of Pearkes & Fernandez is that the administrative assistant or secretary or legal assistant simply calls to get factual information to determine who the parties are and what the matter might be about.

[7] The second important fact here and that crucial fact, in my view, is the nature of the information which appears to have been exchanged. Again, counsel for Mr. Weber objected to me reviewing the actual notes and I have chosen not to. Mr. Weber has summarized what those notes consist of in paragraph 13 of his affidavit. They are, in my view, innocuous bits of information, information such as names of children, marital status, date of separation, list of debts, list of assets, matrimonial home information such as who is on title and who contributed, amount left on the mortgage, whether either party owns their own business, and what is their occupation. Under the new *Family Law Act*, contribution is fairly irrelevant during the course of a relationship unlike it was in the old days of constructive and resulting trust for people in common law relationships.

[8] The information that seems to have been obtained by the legal assistant is information which, for the most part, would appear in the pleadings, ultimately, and does not involve litigation strategy, does not involve the exchange of legal advice, and does not appear, because it is not suggested by anyone, that there was request for information about legal advice or strategy during this relatively innocuous telephone conversation with a legal assistant. In my view, under those circumstances, there is no evidence before me that the lawyers received confidential information at all, never mind if that confidential information was attributable to a solicitor-client relationship.

[9] I would pause to say that it is clearly relevant to the matters at hand, but in my view, there is no evidence that confidential information was obtained and there is no information before me that this ever got to the stage of being a solicitor-client relationship. I note parenthetically that Nelson is a small community and, if it was simply the case that someone could call a law firm and give them their specs or their particulars about their pending family law break-up and eliminate that law firm from acting for them, that would create incredible mischief in the legal community, particularly in smaller communities such as Nelson and many others that exist in the province. There are probably a half dozen people who would do this type of work in Nelson, if that, and no disrespect intended to Nelson and if I have got the number wrong, I apologize, but that seems to be my perception of who practices this type of

law in Nelson and one must bear that in mind when answering the overriding question about whether or not a reasonably informed person in the public would be satisfied that there would be no use of the confidential information.

[10] In these circumstances, as I have said, I am not satisfied that confidential information was disclosed. In that respect, a reasonably informed person would be satisfied that its distribution or its use in the litigation would not occur. It would be an unfortunate circumstance if every time someone called a law firm and gave their name and talked a little bit about their problem it would forever conflicted that law firm. I say when they called a law firm, I am exclusively saying they called a law firm and did not speak to a lawyer. Legal assistants do not and cannot give legal advice. There is no suggestion that this legal assistant did give legal advice or did discuss strategy. She simply took information at the request of someone and passed that generic information, information which would be no different than would be found in a pleading, to the lawyers in the firm by way of some sort of internal communication and that was the end of the contact. There is no suggestion that Mr. Weber ever spoke to a lawyer at this firm or to a legal assistant at this firm in regards to the substance of his concern, his family law concern, and, in my view, this is simply not an appropriate case for the court to say that there was confidential information exchanged, that there was a solicitor-client relationship of some sort established, and some sort of confidence established such that would prohibit the law firm from acting.

[11] So I am going to grant the order sought by the firm which is there is a declaration that the law firm, Pearkes & Fernandez, is not in a conflict of interest with respect to Mr. Allan Weber and is, therefore, not disqualified from acting as counsel of record for the respondent, Anne Brigitte Leclerc, in this proceeding.

"The Honourable Mr. Justice Groves"