Date: 20070309

Docket: T-956-06

Citation: 2007 FC 276

Ottawa, Ontario, the 9th day of March 2007

Present: The Honourable Mr. Justice Blais

BETWEEN:

GENEX COMMUNICATIONS INC.

Applicant

and

JEAN-FRANÇOIS FILLION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an interlocutory decision rendered and forwarded to the applicant on June 5, 2006, by an adjudicator appointed under section 242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), allowing an objection to disqualify made by the respondent concerning René Dion, a lawyer representing the employer, Genex Communications Inc. (the applicant).

RELEVANT FACTS

[2] On May 5, 2005, Jean-François Fillion (the respondent) filed an unjust dismissal complaint under sections 240 et seq. of the Code. Pursuant to section 242 of the Code, lawyer Jean Gauvin (the adjudicator) was appointed as adjudicator to hear the respondent's complaint.

[3] René Dion is vice-president of the applicant's legal affairs department and has also acted as counsel *ad litem* for the applicant and respondent in a series of civil suits, including a suit instituted by Sophie Chiasson. For the purposes of the unjust dismissal complaint, he had been appointed as a representative of the employer to attend the hearing of the complaint before the adjudicator. In this file, the firm of Desjardins Ducharme LLP was retained to act as the applicant's legal representative.

[4] On May 15, 2006, at the pre-hearing conference before the adjudicator, counsel for the respondent announced that he intended to officially object to the presence of Mr. Dion as representative of the applicant and as an assistant to counsel *ad litem*. This objection was subsequently reiterated by counsel for the respondent in a letter dated May 17, 2006. It was worded as follows:

> [TRANSLATION]
> Accordingly, we ask the tribunal to rule that Mr. Dion is disqualified from acting as representative of the employer at the hearing and must not give any assistance to counsel *ad litem* in this case, namely, to André Johnson or any other member of his firm, and that Mr. Dion must not prejudice Mr. Fillion's rights by, among other things, disclosing information contrary to the solicitor–client privilege between Jean-François Fillion and René Dion.

[5] In a letter dated May 26, 2006, Mr. Dion contacted counsel for the respondent to reassure him that there was no conflict of interest or other impediment that would warrant his being disqualified from the adjudication process. In another letter dated May 26, 2006, this one addressed to the adjudicator, counsel for the applicant responded to the arguments made by counsel for the respondent concerning Mr. Dion’s disqualification from representing the employer during the adjudication process.

[6] At the hearing before the adjudicator on June 5, 2006, the parties reiterated their submissions on Mr. Dion’s disqualification. Following pleadings by counsel, the adjudicator rendered his decision orally, allowing the objection to Mr. Dion’s appearing as the employer’s representative and acting as resource person for the applicant’s counsel *ad litem*.

[7] At the June 6, 2006 hearing before the adjudicator, the applicant advised the adjudicator and the respondent that it intended to file an application for the judicial review of the adjudicator's decision on the disqualification of Mr. Dion, dated June 5, 2006.

[8] On June 20, 2006, the Court stayed the execution of the adjudicator’s decision and suspended the continuation of the hearing before the adjudicator until the Court disposed of the application for judicial review.

ISSUES

[9] The Court must determine the following issues in this application for judicial review:

(1) Did the adjudicator exceed his jurisdiction in declaring that Mr. Dion was disqualified from representing the employer and from acting as resource person for counsel *ad litem* during the adjudication?

(2) Did the adjudicator err in applying a principle of law or in assessing the evidence?

STANDARD OF REVIEW

[10] It is necessary to apply a pragmatic and functional analysis to determine the standard of review applicable to the review of a decision of an adjudicator appointed under the Code. The four criteria to be considered are the following:

(1) the nature of the appeal or review mechanism;

(2) the relative expertise of the tribunal;

(3) the purpose of the legislation; and

(4) the nature of the question.

[11] The first factor, namely, the nature of the appeal or review mechanism, suggests that the Court must show a certain degree of deference for an adjudicator's decision in the absence of a right of appeal and in the presence of a privative clause under section 243 of the *Code*, which states:

243. (1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.	**243.** (1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.

(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.	(2) Il n'est admis aucun recours ou décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action d'un arbitre exercée dans le cadre de l'article 242.

[12] The Federal Court of Appeal ruled on the area of expertise of an adjudicator appointed under the Code in *Canada Post Corporation v. Pollard*, [1994] 1 F.C. 652, [1993] F.C.J. No. 1038 (QL). Décary J.A. wrote the following at paragraph 25:

> **25** Furthermore, the area of expertise of the adjudicator is a rather limited one. He is "any person that the Minister considers appropriate as an adjudicator" (subsection 242(1)), he is appointed on an ad hoc basis and he is to consider complaints made by a limited class of employees (subsections 240(1) and 242(3.1)) with respect to one single issue, namely, unjust dismissal (paragraph 242(3)(a)). His expertise is far less extensive than that of the members of the Canada Labour Relations Board and that of an arbitrator appointed pursuant to Part I of the Code. The Supreme Court, in *Bradco*, at page 337, and in *Mossop*, at page 585, was not very much impressed, albeit at a different stage of the review process, with the status of ad hoc bodies which have as restricted powers and expertise as the adjudicator has under the Code. To paraphrase the words of counsel approved by Beetz J. in *Bibeault*, at pages 1094-1095, it can be seen at the outset that the legislator did not see fit to give the adjudicator a general, exclusive jurisdiction over implementation of and compliance with all the provisions of the Code. He chose instead the approach of conferring a general power to the Canada Labour Relations Board and several specific powers over specific and defined matters to other decision-makers and even then he did not give the same powers to all.

[13] However, within this area of expertise, that is, "to receive and assess evidence, but also to apply his/her expertise in the solution of the labour relations dispute to be adjudicated upon", the

Federal Court of Appeal recognized the adjudicator's expertise (*Atomic Energy of Canada Ltd. v. Sheikholeslami (C.A.),* [1998] 3 F.C. 349, [1998] F.C.J. No. 250 (QL)).

[14] With regard to the purpose of the legislation, the Code may be described as being polycentric because of the multiple objectives stated in its preamble. However, the purpose of Part III is much more limited and therefore does not require a high degree of deference. As stated by the Federal Court of Appeal in *Dynamex Canada Inc. v. Mamona,* [2003] F.C.J. No. 907 (QL), 2003 FCA 248, at paragraph 35:

> In summary, the object of Part III of the Canada Labour Code is to protect individual workers and create certainty in the labour market by providing minimum labour standards and mechanisms for the efficient resolution of disputes arising from its provisions.

[15] Finally, the degree of judicial deference will be strongly influenced by the nature of the question. First of all, a question concerning the jurisdiction of an adjudicator will be assessed according to the standard of correctness. As was stated by the Federal Court of Appeal in *Beothuk Data Systems Ltd., Division Seawatch v. Dean (C.A.),* [1998] 1 F.C. 433, [1997] F.C.J. No.1117, at paragraph 27:

> . . . The law is now settled that, notwithstanding the curial deference owed to tribunals protected by a privative clause, an interpretation by a tribunal of a statutory provision which confers jurisdiction upon it, or which limits the scope of its jurisdiction, is to be reviewed on a correctness standard.

[16] However, once it has been determined that an adjudicator acted within his or her jurisdiction, a decision rendered under section 242 will generally be subject to review on the standard of patent unreasonableness (*Mihalicz v. Royal Bank of Canada,* [1998] F.C. J. No. 1857

(QL), (1998) 160 F.T.R.1, *McKeown v. Royal Bank of Canada (F.C.T.D.),* [2001] 3 F.C. 139, [2001] F.C.J. No. 231 (QL)).

[17] This being said, in *Dynamex Canada*, *supra*, the Federal Court of Appeal also ruled on the nature of the question by distinguishing a "question of law of a kind that is normally considered by the courts" which does not require "the special expertise of a referee". Such an question is subject to the standard of correctness, while a question of mixed general law and fact will be subject to the standard of reasonableness *simpliciter*.

ANALYSIS

(1) Did the adjudicator exceed his jurisdiction in declaring that Mr. Dion was disqualified from representing the employer and from acting as resource person for counsel ad litem during the adjudication?

[18] In his decision, the adjudicator stated that he had jurisdiction to deal with the matter of the disqualification of Mr. Dion pursuant to his powers concerning procedure, the holding of a hearing and the presentation of evidence, which are provided for under section 242 of the Code.

[19] The applicant contested this interpretation, arguing that the adjudicator, who was appointed under the Code, derives all his powers from this statute and therefore does not have any inherent or residual jurisdiction. Contrary to the adjudicator, the applicant submits that nothing in the relevant sections of the Code supports the conclusion that the adjudicator had jurisdiction to determine that Mr. Dion was disqualified from acting as representative of the applicant.

[20] The respondent agrees with the adjudicator's interpretation and submits that he had jurisdiction to rule on the objection pursuant to the powers granted to him under section 242 of the Code.

[21] First of all, it is necessary to examine the scope of the jurisdiction of an adjudicator under section 242, which reads as follows:

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).	**242.** (1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.
(2) An adjudicator to whom a complaint has been referred under subsection (1)	(2) Pour l'examen du cas dont il est saisi, l'arbitre :
(*a*) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;	*a*) dispose du délai fixé par règlement du gouverneur en conseil;
(*b*) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and	*b*) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

(*c*) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).	*c*) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16*a*), *b*) et *c*). […]

. . .

[22] It is clear upon reading paragraph 242(2)(*b*) that an adjudicator is master of his or her proceedings. This authority is in compliance with the rule stated by the Federal Court of Appeal in *Fishing Vessel Owners' Assn. of British Columbia v. Canada (Attorney General)*, 1 C.P.C. (2d) 312 (F.C.A.), at page 319:

> Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or by the rules of Court.

[23] Therefore, the power to control its procedure should logically include the adjudicator's power to ensure procedural fairness during a hearing. I agree with the adjudicator R.C. Dumoulin, who wrote the following in his preliminary decision in *Iny-Somberg v. Laurentian Bank of Canada*, [1999] C.L.A.D. No. 526, at paragraph 14: "The principles of *audi alteram partem* and procedural fairness should be safeguarded by the adjudicator during the pre-hearing process as well as in the conducting of the hearing itself." This duty to enforce procedural fairness must include among other things the duty of ensuring an impartial hearing. In *Smith Mechanical Inc. v. Thomson*, [1985] C.S. 782, [1985] Q.J. No. 124 (QL), the Honourable Mr. Justice Charles D. Gonthier of the Quebec Superior Court, as he then was, wrote the following:

> [TRANSLATION]

> ¶ 12 An impartial hearing implies not only impartiality on the part of the tribunal, but also independence and disinterestedness on the part of the lawyers who are tasked with asserting the rights of their clients. This also implies that a litigant must have to his or her counsel in confidence, which can only be ensured through the protection of confidential information secrecy and total loyalty.

[24] It is nevertheless useful to note that the disqualification objection made in this case was quite unusual, as it did not concern counsel for either one of the parties, as Mr. Dion was not acting as a lawyer but rather as an employee that the employer, a legal person, had appointed to represent it at the hearing. However, Mr. Dion had acted as counsel for the respondent and for the applicant before the Quebec Superior Court under a joint mandate. This distinction is important for the purposes of the analysis of the adjudicator's jurisdiction in this case.

[25] However, I am of the opinion that, by choosing to retain the services of external counsel while assigning Mr. Dion as its representative, the applicant makes it necessary to examine in more detail the hearing process before the adjudicator and to ensure that procedural fairness as well as the respective rights of the parties are respected. Consideration of this additional factor makes me even more inclined to give a liberal interpretation to the adjudicator's jurisdiction in accordance with procedural fairness.

[26] I also intend to examine the applicant's submission, which relies on a decision of Mr. Justice Andrew W. MacKay J. in *CRTC v. Canada*, [1991] 1 F.C. 141, [1990] F.C.J. No. 819 (QL), to the effect that the right of a legal person to assign a person to represent it and to define the role to be played by that person for the purposes of litigation to be heard by a tribunal belongs exclusively to that legal person. The decision of MacKay J. dealt with an application to quash an order of the

Human Rights Tribunal excluding a CRTC representative from the hearing until it was his turn to testify. McKay J. concluded as follows at paragraph 26 of this decision:

> Where a party is a corporate or statutory body it can only be represented at the hearing and can only instruct counsel by a natural person who for all intents and purposes at the inquiry is deemed to represent the corporate or statutory body. If that body is not free to select its representative as it sees fit, then the person who stands in at the hearing and whose presence is primarily to instruct counsel may not have the full confidence of those responsible for the corporate or statutory body. That surely is the basis on which a body selects its representative and is the key to accepting the representative named as the person with the responsibility assigned by the corporation, or in this case CRTC, to instruct counsel on its behalf. In my view, under subsection 50(1) of the Act, a statutory body, here CRTC, is entitled to representation and to instruct counsel at the hearing of the Tribunal by the person designated by that statutory body, CRTC, and its opportunity to participate in the hearing as assured by subsection 50(1) may not be limited by excluding that designated representative even though he or she may be a potential witness.

[27] Although at first sight this decision of MacKay J. may seem to be applicable to the present situation, I share the respondent's opinion to the effect that this judgment must be distinguished on the facts. In that case, the tribunal had decided to exclude the employer's chosen representative from the hearing room because he would be called to testify. As MacKay J. stated at paragraph 28 of his decision, the employee's right could have been protected in such a situation by the tribunal's subsequent weighing of the probative value of the testimony of the employer's representative.

[28] In fact, such situations often arise before tribunals. It is not unusual for a representative of one of the parties to be called on to testify at some point during the hearing, without being excluded from the hearing room for that.

[29] It seems clear to me that the respondent does not question the employer's right to choose its representative at the time of the hearing before the adjudicator. However, he is right in submitting that this right must be balanced against other rules of natural justice and regulations of public order, such as rules of ethics applicable to lawyers regarding confidentiality and conflicts of interest.

[30] In addition, in the present case, mitigation of the infringement of the respondent's rights is not as simple as in *CRTC v. Canada*, *supra*, because, as was stated by the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (*MacDonald Estate*), the use of confidential information by a lawyer is usually impossible to prove or to rebut.

[31] Therefore, I am of the opinion that the adjudicator had jurisdiction to allow the disqualification objection made against Mr. Dion because of his obligation to safeguard procedural fairness and thus ensure that the respondent had an impartial hearing.

(2) Did the adjudicator err in applying a principle of law or in assessing the evidence?

[32] In the alternative, the applicant submits that, even if the adjudicator had jurisdiction in this matter, he erred in applying the *MacDonald Estate* judgment to the present situation and rendered a decision in the absence of any evidence, based on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him.

[33] The respondent counters that the adjudicator's decision reflected the evidence on the record and took into consideration the letters exchanged, the submissions and admissions by counsel for both parties and the documents on the record. The adjudicator did indeed recognize that there was a

distinction between the situation in *MacDonald Estate* and the present one but clearly explained his reasons in favour of applying this judgment. *MacDonald Estate* is a leading case which has been applied in various situations where disqualification was sought (see, *inter alia*, *Métro Inc. v. Regroupement des marchands actionnaires*, J.E. 2002-2046 (C.A.)).

[34] The motion presented to the adjudicator by the respondent required that the adjudicator consider several factors, namely: (1) the respondent's right to an impartial hearing and to the continued loyalty and professional secrecy which every lawyer must uphold, (2) the employer's right to be represented by an employee of its choice at the hearing, and (3) the protection of the integrity of the judicial process, such that justice is not only done but seen to be done.

[35] To do so, the adjudicator applied the test developed by the Supreme Court of Canada in *MacDonald Estate* to determine in which circumstances a lawyer may be disqualified from acting for a client. He therefore examined various factors as mentioned by Sopinka J.:

> [13] ¶ In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession . . . .

[36] Although these values considered by the Supreme Court, just like the factual situation giving rise to that decision, are not identical to the situation in the present case, there is sufficient similarity to apply the test developed in *MacDonald Estate.* First of all, the right to be represented by a lawyer of one's choice may be equated with an employer's right to be represented by an employee of its choice. As far as Mr. Dion is concerned, although he did not act as counsel for the applicant at the

hearing before the adjudicator, he nevertheless was subject to the *Code of Ethics of Advocates*, R.S.Q., c. B-1, r.1, which provides the following, among other things:

3.06.01. An advocate shall not use, for his benefit, for the benefit of the partnership or joint-stock company within which he engages in his professional activities or for the benefit of a person other than the client, confidential information obtained while he engages in his professional activities.	**3.06.01.** L'avocat ne peut utiliser à son profit, au profit de la société au sein de laquelle il exerce ses activités professionnelles ou au profit d'une personne autre que le client, les renseignements confidentiels qu'il obtient dans l'exercice de ses activités professionnelles.
3.06.02. An advocate shall not agree to perform professional services if doing so entails or may entail the communication or use of confidential information or documents obtained from another client without the latter's consent, unless required by law.	**3.06.02.** L'avocat ne peut accepter de fournir des services professionnels si cela comporte ou peut comporter la communication ou l'utilisation de renseignements ou documents confidentiels obtenus d'un autre client sans le consentement de ce dernier, sauf si la loi l'ordonne.

[37] In addition to the duty of confidentiality, every lawyer also has a broader duty of loyalty as specified by the Canadian Bar Association in its *Code of Professional Conduct* (Revised Edition, 2006) at Chapter 5:

The lawyer shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.	L'avocat ne doit pas conseiller ou représenter des parties ayant des intérêts opposés, à moins d'avoir dûment averti ses clients éventuels ou actuels et d'avoir obtenu leur consentement. Il ne doit ni agir, ni continuer d'agir dans une affaire présentant ou susceptible de présenter un conflit d'intérêts.

Moreover, the Commentary on this rule states the following:

1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment on behalf of, advice to, or loyalty to a client or prospective client.	**1.** Il y a conflit d'intérêts lorsque les intérêts en présence sont tels que le jugement et la loyauté de l'avocat envers son client ou envers un client éventuel ou en son nom peuvent en être défavorablement affectés.
. . .	[…]
12. A lawyer who has acted for a client in a matter should not thereafter, in the same or any related matter, act against the client (or against a person who was involved in or associated with the client in that matter) or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person.	**12.** L'avocat qui a agi pour un client ne doit ni agir ultérieurement contre lui (ou contre des personnes qui s'étaient engagées ou associées avec le client) dans la même affaire ou dans une affaire connexe, ni se placer dans une position telle qu'il pourrait être tenté, ou être perçu comme tenté, de violer le secret professionnel. Cependant, il est parfaitement licite pour un avocat d'agir contre un ancien client, dans une affaire totalement nouvelle n'ayant aucun lien avec les services qu'il aurait pu rendre antérieurement à cette personne.

This duty of loyalty is also recognized in the *Code of Ethics of Advocates*, which provides the following:

3.00.01. An advocate owes the client a duty of skill as well as obligations of loyalty, integrity, independence, impartiality, diligence and prudence.	**3.00.01.** L'avocat a, envers le client, un devoir de compétence ainsi que des obligations de loyauté, d'intégrité, d'indépendance, de désintéressement, de diligence

et de prudence.

[38] The professional obligation of confidentiality, like the duty of loyalty, protects the current client as well as the previous client and is in relation to the lawyer personally, regardless of the capacity in which he or she subsequently acts.

[39] Having confirmed the applicability of *MacDonald Estate*, it is now necessary to consider the test developed by the Supreme Court of Canada in this judgment. Sopinka J. wrote the following at paragraphs 44 to 51:

> ¶44. What then should be the correct approach? Is the "probability of mischief" standard sufficiently high to satisfy the public requirement that there be an appearance of justice? In my opinion, it is not. This is borne out by the judicial statements to which I have referred and to the desire of the legal profession for strict rules of professional conduct as its adoption of the Canadian Code of Professional Conduct demonstrates. The probability of mischief test is very much the same as the standard of proof in a civil case. We act on probabilities. This is the basis of ***Rakusen***. I am, however, driven to the conclusion that the public, and indeed lawyers and judges, have found that standard wanting. 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.
>
> ¶45. 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?

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.

¶47. The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

. . .

> ¶ 50 *A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica*, *supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.
>
> ¶51. These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

[40] In applying the test developed by the Supreme Court of Canada, there is no doubt in my mind that there is a “substantial relationship” between the case before the adjudicator and the recent litigation in which Mr. Dion had acted as counsel for the respondent. As noted by the adjudicator, Mr. Dion [TRANSLATION] “acted as counsel for the complainant and his employer in a case in which both were co-defendants and which it is plausible to think the employer will cite against the complainant in this case”. Having shown this substantial relationship, the adjudicator had to infer that confidential information had been disclosed, subject to evidence to the contrary. In fact, such evidence had to be sufficiently probative to convince the adjudicator that [TRANSLATION] “a reasonably informed member of the public would be persuaded that no information of this nature was disclosed”, failing which the adjudicator would have to conclude that such confidential

information could be misused and that Mr. Dion therefore could not now act against his former client.

[41] The applicant states that no confidential information was disclosed, because Mr. Dion had acted under a joint mandate. As a general rule, when a lawyer acts for two parties, the information disclosed by one party will not be considered to be protected by privilege in respect of the other party (*Chersinoff v. AllState Insurance Co.* (1969), 3 D.L.R. (3d) 560 (B.C.C.A.), *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.)). However, it is possible that in practice, such an explanation would not be sufficient to persuade the Court that a reasonably informed person would be satisfied that no confidential information had been passed on (*Zaworski v. Carrier Lumber Ltd.*, 2003 BCSC 565, [2003] B.C.J. No. 829 (QL)).

[42] In his decision, the adjudicator acknowledged that information obtained for the purposes of a joint defence is not generally considered to be confidential. However, he did not believe that such an explanation could satisfy reasonably informed members of the public that no confidential information would be disclosed in the course of the hearing and that the respondent had no reason to entertain apprehensions in this regard.

[43] In these circumstances, the conclusion reached by the arbitrator is, in my view, reasonable and should therefore not be set aside.

[44] Finally, the applicant submits that the adjudicator erred in ruling that the respondent was not barred from making his objection, even though he had accepted unreservedly that Mr. Dion, in the

ordinary course of his employment, had acted for the applicant and its counsel *ad litem* since the month of April 2005.

[45] The respondent, however, submits that the adjudicator was correct in not considering the time elapsed to be a bar against the objection, because no time had elapsed between the moment Mr. Dion's role before the adjudicator became known and the respondent's objection.

[46] I agree with the respondent on this point. The respondent's failure to object to the presence of Mr. Dion during the negotiation process does not prevent the respondent from objecting to such a situation when the issue is brought before an adjudicator, at which time the matter has become litigious (*Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2001 BCSC 1560, [2001] B.C.J. No. 2828 (QL)).

[47] In *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, the Supreme Court of Canada examined the factors to be considered in deciding whether or not a motion to disqualify should be allowed. One of the factors used by the Court is the stage of the proceedings, as discussed at paragraph 64 of this judgment:

> . . . At advanced stages of complex litigation, an order removing counsel can be "extreme" and may have a "devastating" effect on the party whose counsel is removed (*Michel v. Lafrentz* (1992), 12 C.P.C. (3d) 119 (Alta. C.A.), at para. 4). That is not the case here. No doubt substantial costs have been incurred by all parties, but BLG advised Cassels Brock by letter dated July 15, 2003, i.e. within less than a month after commencement of the litigation, and a few days after learning of the privilege controversy, that "[t]his is a most serious matter and we intend to bring it to the attention of the Court at the earliest opportunity." The removal motion was launched July 24, 2003. There was therefore ample early notice that removal was being sought.

[48] In the present case, the respondent argues, with good reason, that because the objection had been made at the beginning of the case before the adjudicator, the adjudicator was warranted in concluding that the lack of an objection by the respondent during settlement negotiations was not to be interpreted as a waiver of his right to object to Mr. Dion's presence during the adjudication process.

[49] For all these reasons, the application for judicial review will be dismissed.

ORDER

1. The application for judicial review is dismissed;

2. With costs.

"Pierre Blais"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-956-06
STYLE OF CAUSE:	GENEX COMMUNICATIONS INC. v. JEAN-FRANÇOIS FILLION
PLACE OF HEARING:	Québec
DATE OF HEARING:	February 22, 2007
REASONS FOR JUDGMENT AND JUDGMENT BY:	The Honourable Mr. Justice Blais
DATED:	March 9, 2007

APPEARANCES:

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Jean-Guy Villeneuve / Guylaine Lacerte	FOR THE RESPONDENT

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