Docket: 2014-3415(IT)G

BETWEEN:

ADOLF WOESSNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on March 27, 2017 at Calgary, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Matthew Clark Rami Pandher
Counsel for the Respondent:	Charles Camirand

ORDER

WHEREAS the Respondent brought a motion for:

1. the removal of counsel of record because of a conflict of interest;

2. an extension of time to complete the remaining steps of the litigation; and

3. costs;

AND UPON reading the material filed and hearing submissions from counsel for the Appellant and counsel for the Respondent;

THIS COURT ORDERS THAT:

1. The Respondent's motion for removal of Appellant counsel, Matthew Clark, as well as the law firm, Shea Nerland Calnan LLP, is granted with costs.

2. By consent further costs, in the amount of $237.00, are awarded to the Respondent in respect to the Appellant's cancellation of a scheduled examination for discovery, payable forthwith.

3. The Appellant shall have 60 days from the date of this Order and Reasons for Order to find alternate counsel and to advise both Respondent counsel and the Court.

4. After the Appellant has found alternate counsel, both parties shall have 60 days from the date the Appellant has advised the Court of his new counsel, to contact and advise the Court with respect to a proposed timeline for the remaining steps in the litigation.

Signed at Ottawa, Canada, this 28th day of June 2017.

"Diane Campbell"

Campbell J.

Citation: 2017 TCC 124
Date: 20170628
Docket: 2014-3415(IT)G

BETWEEN:

ADOLF WOESSNER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J.

Introduction:

[1] The Respondent brings this motion to remove the Appellant's lawyer, Matthew Clark, and his law firm, Shea Nerland Calnan LLP ("Shea Nerland"), as counsel of record, in this appeal on the grounds of a conflict of interest. The Respondent also requests an extension of time to complete the remaining steps of the litigation together with costs of this motion. The Respondent alleges that a conflict of interest will arise because one or more partners and a former associate of the law firm are likely to be called as witnesses at the hearing with the result that Mr. Clark will be unable to properly represent the Appellant.

[2] The motion arises in respect to an appeal that has been brought under the General Procedure in respect to the Appellant's 1997, 1998, 1999 and 2000 taxation years. In reassessing the Appellant, the Minister of National Revenue (the "Minister") disallowed business losses that resulted from capital cost allowance ("CCA") deductions that were claimed in respect to his acquisition costs of an interest in certain software. According to the assumptions of fact contained in the Reply to the Notice of Appeal, the Appellant participated as an investor in a software tax shelter scheme that was developed and promoted by the following: a United States Corporation, Betasoft Games Ltd. ("Betasoft"), its United States parent corporation, American Softworks Corp. ("ASC"), the Canadian law firm, Shea Nerland and a Canadian corporation, Softech Asset Management Corp

("SAM"). The Minister further asserts that SAM is also directed and managed by several current and former partners and associates of Shea Nerland.

[3] At the heart of this appeal is a series of agreements entered into by the investors, including the Appellant, to purchase an interest in software that was owned by Betasoft for consideration consisting of cash and indebtedness represented by a promissory note. The Respondent asserts that, in acquiring the interest in the Betasoft software in late 1997, the Appellant participated in a computer software tax shelter designed to take advantage of a favourable 100 percent CCA by paying a relatively small down payment in cash with the larger balance to be paid according to the terms of a promissory note. According to the Respondent, the Appellant never repaid the loan. The Minister denied all of the Appellant's claimed business losses resulting from the CCA deductions on the basis that the interest acquired in the software was a tax shelter, as defined in subsection 237.1(1) of the *Income Tax Act* (the "*Act*") and since it was not registered, no amount was deductible by the Appellant pursuant to subsection 237.1(6).

[4] The Respondent has further asserted that, in addition to Betasoft, both Shea Nerland and SAM were also promoters of the software tax shelter scheme and that Dennis Nerland, a partner at Shea Nerland, and Alykan Mamdani, an associate with this law firm during the relevant period, were directors of SAM. According to the Respondent Mr. Mamdani, who has since left the law firm, was also President and CEO of SAM. It is further alleged that both Mr. Mamdani and Mr. Nerland have continued to act in these roles at least up to the date of the commencement of the litigation.

[5] Finally, the Respondent claims that Shea Nerland provided legal advice to the Appellant in respect to the various agreements he executed and the related transactions and that SAM entered into a contract to provide managerial, consulting, financial and supervisory services to the Appellant with respect to the acquisition of his interest in the software owned by Betasoft.

[6] Respondent counsel first raised his concerns in regard to this alleged conflict of interest by letter to Appellant counsel dated July 20, 2015. Counsel again reiterated his concerns respecting Appellant counsel's ability to represent the Appellant by email dated October 23, 2015. The alleged conflict of interest was also discussed informally at a status hearing held on November 4, 2015. However, the Court declined to consider the issue at that time as there was no motion before

the Court. On September 21, 2016, a scheduled examination for discovery was postponed at the request of the Appellant.

[7] The Respondent filed the present motion on September 23, 2016, seeking to disqualify Mr. Clark and his law firm, Shea Nerland, from continuing to represent the Appellant. The Appellant filed a response opposing the Respondent's motion on March 22, 2017, together with an affidavit of Ralph Woessner, the Appellant's son, who is administering his father's affairs pursuant to a Power of Attorney.

Appellant's Position:

[8] Appellant counsel argues that he should be permitted to continue to represent Mr. Woessner because there is no conflict of interest since the interests of the Appellant, his counsel and the law firm are aligned. Appellant counsel relied on this Court's decision in *Hochberg v The Queen*, 2004 TCC 487, which concluded that where the interests of the parties are aligned, counsel should not be disqualified from representing both the promoter of the tax shelter and the investors in that shelter. In Ralph Woessner's affidavit, he states that his father is fully aware of the Minister's assumptions of fact in the appeal and specifically that the members of Shea Nerland were promoters of the alleged tax shelter scheme. However, the Appellant and his son do not believe that there is any conflict of interest because their interests are aligned with those of Shea Nerland and its members or former associates.

[9] Appellant counsel submits that even if this Court concludes that a conflict of interest exists, it should give deference to the wishes of the Appellant because this is not a case where it is necessary to protect the administration of justice. In addition there will be increased costs and delay to the Appellant if he is compelled to find alternate counsel. In Ralph Woessner's affidavit, he states that his father, the Appellant, has a "payment arrangement…on a favourable basis" and that it would be otherwise "difficult to pursue the Tax Court appeal". (Affidavit of Ralph Woessner, paragraph 8). These factors should weigh against granting the Respondent's motion.

[10] Finally, Appellant counsel submits that neither he nor his firm should be disqualified on the grounds of their past representation of Mr. Mamdani. While this issue was not specifically raised by the Respondent in his written submissions or at the motion hearing, it appears that the Appellant is asserting that Shea Nerland previously represented Mr. Mamdani after he left the law firm as one of its associates, but that Appellant counsel would not be subject to any disqualifying

conflict of interest because of the passage of time since that representation. (Appellant's Response to Respondent's Motion, paragraphs 28 and 31).

Respondent's Position:

[11] The Respondent contends that Shea Nerland was a promoter of the alleged unregistered tax shelter in which the Appellant invested and that at least one current partner, Mr. Nerland, and one former associate of the law firm, Mr. Mamdani, also continue to act as directors of SAM, the corporation that manages the investors' interest in this alleged tax shelter. Consequently, the Respondent believes it is likely that Mr. Nerland and Mr. Mamdani will be required to testify at the hearing in respect to the key factual issues. This will compromise Appellant counsel's ability to fully commit to his client at the hearing where his employer, Shea Nerland, and his colleagues in the firm, as well as a former associate, will be witnesses. His obligations to his employer and his colleagues will interfere with his duty to his client, Mr. Woessner.

Jurisprudence:

[12] The general test for the removal of legal counsel due to a conflict of interest is whether a "fair-minded and reasonably informed member of the public would conclude that the removal of the solicitor is necessary for the proper administration of justice" (*Boudreau v Marler*, [2004] OJ No 1543 (Ont CA) at paragraph 60; *Carterra Management Inc. v Palm Holdings Canada Inc.*, 2011 ONSC 7087, at paragraph 6; *Mazinani v Bindoo*, 2013 ONSC 4744, at paragraph 60(iv) and *Esco Corp v Quality Steel Foundries Ltd.*, 2003 FC 993 at paragraph 22).

[13] A solicitor may face disqualification due to a conflict of interest in two situations: first, where counsel assumes the dual role of both advocate and witness in the same proceeding and, second, where counsel is likely to be placed in a position of having to examine or cross-examine a member of his or her own law firm as part of the proceedings. In the first instance, courts have consistently held that a solicitor must be disqualified from continuing to act (*Canada (Director of Investigation & Research v Irving Equipment*, [1988] 1 FC 27 (FCTD) and *Urquhart v Allen Estate*, [1999] OJ No 4816 (Ont. SCJ)). In the second instance, although it is generally accepted that there is no automatic bar to a solicitor continuing as counsel of record where an affiliated colleague will testify at a proceeding, the courts have adopted differing judicial approaches in deciding whether particular circumstances warrant disqualification. While some courts have adopted a more discretionary framework, others have followed a more rigid one,

downplaying the interests of the affected party and considering a narrower set of factors.

[14] A leading case in Canada on the disqualification of counsel on grounds of conflict of interest, where an affiliated colleague is likely to testify at the hearing, is the decision of the Ontario Divisional Court in *Essa Township v Guergis*, [1993] OJ No 2581 (Ont Div Ct), sometimes cited under the name of one of the trial level decisions, *Heck v Royal Bank of Canada*, [1993] OJ No 229 (Ont Gen Div). The court considered the issue of whether a conflict existed where it appeared that another lawyer, from the same firm that was representing the plaintiff, would be called to testify at the trial. Justice O'Brien stressed the potential hardships that litigants may experience when they are forced to change their counsel in the course of litigation. He stressed that courts should be reluctant to prematurely disqualify counsel and law firms where the potential for a conflict of interest has not fully materialized. At paragraphs 43 and 44, he stated the following:

> **43** I believe courts should be reluctant to make what may be premature orders preventing solicitors from continuing to act. In view of the expense of litigation and the enormous waste of time and money and the substantial delay which can result from an order removing solicitors, courts should do so only in clear cases. I adopt the approach taken on this point in *Carlson v. Loraas Disposal Services Ltd.* (1988), 30 C.P.C. (2d) 181 at p. 188, 70 Sask. R. 161 (Q.B.).
>
> **44** As discussed in the *Carlson* decision, an application to remove counsel can be made to the trial judge when it is certain there is a problem. In this case Mr. Green may, or may not be, subpoenaed to testify. Concessions or admissions may be made which will obviate the need to call him as a witness. The evidence he could give may be readily obtainable from other witnesses. As issues are developed, or resolved during trial, his evidence may not be required at all. A trial judge will be in a much better position to determine if his firm should be disqualified.

[15] Justice O'Brien, at paragraphs 45 to 46 of this decision, stated that he was not prepared to establish a bright-line rule that would bar counsel from acting in all cases where a lawyer from the same firm would be providing evidence either through testimony or by affidavit:

> **45** I do not accept the argument that when a lawyer is compelled to testify against the "other" side in a lawsuit the lawyer's firm must always be prevented from acting in the lawsuit. There are a variety of scenarios which might develop at, or during, trial. The possible conflict as discussed in the *Kitzerman* decision, *supra*, should not automatically result in a law firm's removal. In the course of litigation an honest witness is often compelled to give evidence which will assist a

> party that witness feels is "opposite". I do not agree that such a possible conflict requires removal in all cases. There may be some where it does. I am not persuaded that decision should be made at this pre-trial stage of the proceedings in this case.
>
> **46** It should also be borne in mind that all applications to remove solicitors from the record are not brought with the purest of motives. The expense and delay involved in retaining new counsel may work to the substantial benefit of an opposing party in some cases.

[16] In determining whether removal of counsel is warranted in a proceeding, Justice O'Brien at paragraph 48 of *Essa* outlined a non-exhaustive set of factors that a court may utilize in considering whether counsel should be disqualified. Those factors include: the stage of the proceeding, the likelihood that the witness will be called, the good faith of the party making the application or motion, the significance of the evidence to be led, the impact of removing counsel on a party's right to be represented by counsel of choice, whether the trial will be by judge or jury, who will call the witness and what unfair advantage may result where counsel may be cross-examining a favourable witness and the connection/relationship among counsel, a prospective witness and the parties involved in the litigation. The court in *Essa* concluded that, based on an application of these factors, the trial court had been premature in ordering the removal of counsel. Since the decision in *Essa*, these factors have been consistently applied in a long line of cases in Ontario involving alleged conflicts of interest where counsel from a firm representing one of the parties may be called to testify (*Boudreau v Loba Ltd.*, 2015 ONSC 4877; *Talisman Resort GP Inc. v Kyser*, 2013 ONSC 1901; *Bedford Resources Holdings Ltd. v 743584 Ontario Inc.*, [2009] OJ No 1299 and *Essex Condominium Corp. No. 89 v Glengarda Residences Ltd.*, 2007 CarswellOnt 1421 (Ont SCJ)). As well, the decision in *Essa* has been endorsed by the Ontario Court of Appeal in *Boudreau v Marler*, and by other courts in other provinces (*Goji's Franchising Corp v McCabe*, 2014 NBQB 163; *Brogan v Bank of Montreal*, 2013 NSSC 76 and *Matic v Waldner*, 2013 MBQB 75) and the Federal Courts (*Butterfield v Canada (AG)*, 2005 FC 396; *Bojangles International LLC v Bojangles Cafe Ltd.*, 2005 FC 272 and *Cross-Canada Auto Body Supply (Windsor) Ltd. v Hyundai Auto Canada*, 2006 FC 133).

[17] The Respondent relied on two cases which predate the decision in *Essa*. In *Pari Air Ltd. v Blue Sky Air Limited*, [1986] 3 WWR 719 (Sask QB), the Saskatchewan court relied on a number of factors similar to those outlined in the later decision in *Essa*. In concluding that counsel and his law firm should be

disqualified from continuing to represent the plaintiff at trial, the court, at paragraph 11, listed the following factors:

> …the significance of the anticipated testimony, the likelihood that in discussing the case in the office the testimony of the witness may become interwoven with the client's best interests and thus, unconsciously, become tainted, and the stage in the proceedings at which the event occurs on which the testimony may be sought or at which the need for such evidence becomes apparent,…

[18] Similarly, in *International Business Machines Corp. v Printech Ribbons Inc.*, [1993] FCJ No 1237 (FCTD), Justice Nadon concluded that a law firm may not continue to act as counsel of record on a motion if one of the members of that firm swore an affidavit which will be relied upon in deciding that particular motion. Justice Nadon relied on the reasoning of the trial level decision in *Essa*, (again also referred to as *Heck*), which had not as yet been overturned by the Ontario Divisional Court in *Essa*. Concurring with the reasons of the court in *Heck*, Justice Nadon at paragraph 34 cited *Heck*:

> I conclude that this practice should generally not be permitted because it may create an impression of impropriety and unfairness in the mind of the public and because it places counsel in an unacceptable conflict of interest where counsel's duty to the court conflicts with counsel's duty of loyalty and protection to the witness who is a business associate and counsel's duty to provide objective advice and representation to the client. When any counsel's business associate's skill, judgment, veracity or integrity is challenged that counsel would have difficulty being objective.
>
> Where counsel has a connection to a witness who will testify on issues where factual or expert credibility is at issue there is a risk and a possible perception that counsel may be inappropriately influenced by that relationship to the detriment of counsel's duties to the court and the client.
>
> The role of counsel of record in our system requires the assumption of an independent position from which the counsel can represent the client with objectivity and fulfil counsel's duties to the court from a position of detachment. When a counsel calls as a witness a close relative or someone with whom counsel has an employment relationship, the client, the public and the presiding judge will not be assured that counsel will act with that degree of objectivity required by our adversary system.
>
> This is not an issue which should turn on the wishes of the client or the witness because their acceptance of the practice could not eliminate the conflict with the duty of counsel to the court and could not eliminate any appearance of impropriety in the eyes of the public.

(Emphasis added)

[19] However, in a later decision, *Imperial Oil Ltd. v Lubrizol Corp.*, 116 FTR 112, [1999] FCJ No 74 (FCTD), dealing with the same issue, Justice Nadon fully endorsed the rationale subsequently developed by the Ontario Divisional Court in *Essa*.

[20] Some courts have adopted the more rigid position that as a general rule counsel should be disqualified on grounds of a conflict of interest whenever another member of the same firm is likely to offer evidence, whether testimonial or by affidavit. In *Shipdock Amsterdam B.V. v Cast Group Inc.*, [2000] FCJ No. 295 (FCTD), Justice O'Keefe of the Federal Court held that where counsel has deposed to facts in an affidavit to be used in a motion then another member of the same firm should not argue the motion. It should be noted, however, that Justice O'Keefe cited only the earlier decision of Justice Nadon in *International Business Machines*.

[21] This Court has considered the removal of counsel of record in only limited circumstances and none of those decisions considered the reasoning of the Ontario Divisional Court in *Essa*. However, the framework adopted in *Essa* was endorsed and the factors applied by the Federal Court of Appeal in *Cross-Canada Auto Body Supply*, where the court stated that counsel should generally be barred from introducing evidence from affiliated members of the firms, based on the policy rationale that such evidence, being inherently less credible, will be detrimental to the client's interests. Where there is a risk that goes to the weight of the evidence being considered, then such a risk should be avoided by disqualifying counsel of record unless it is otherwise clearly necessary to continue with that counsel.

[22] Although none of the decisions from this Court have involved removal of counsel of record where a lawyer from the same firm would be providing testimony by affidavit or at the hearing, Appellant counsel relied on these decisions to support their argument against removal of counsel in the motion before me.

[23] Most of this Court's decisions relevant to this motion were canvassed by Chief Justice Rossiter in this 2016 case, *Attisano v The Queen*, 2016 CarswellNat 966 (TCC). After reviewing several cases including the Supreme Court of Canada decision in *Cunningham v Lilles*, 2010 SCC 10, he concluded that the Tax Court of Canada has the inherent power to remove counsel of record where such an order is necessary in order to control its own processes, even though neither the *Act* nor the Rules of this Court specifically authorize the Court to make such an order.

Although this point was not addressed in the present motion, I agree with the conclusion reached in *Attisano*.

[24] *Attisano* involved an alleged conflict of interest where counsel representing the taxpayer in that case had also previously represented other taxpayers who had also been directors of the corporation that was under assessment. The court concluded that appellant counsel was barred from continuing to act due to his prior representation of the appellant's co-directors where the issue of joint and several liability would arise. Justice Rossiter went on to make the following comment and conclusion at paragraph 28:

> It would therefore appear that if the Appellant wishes the lawyers to continue to act for him after having been fully informed of the potential conflict of interest, then the Court should not interfere on his behalf. However, if there is a conflict of interest with respect to former clients and they have not waived the conflict, the Appellant may not be entitled to have the lawyers continue to act for him. This is the case before the Court. There is no evidence whatsoever or indication that Mr. T and Mr. D have consented, in any way, to the Appellant's counsel continuing to represent the Appellant.

[25] With respect, I do not believe that the jurisprudence from other Canadian courts support such a statement. Even when an appellant has been given full disclosure of the risks involved in going forward with counsel of record, in some circumstances, the administration of justice and the integrity of the tax system will be of paramount importance and may require removal of counsel despite an appellant's wishes.

[26] In *Hochberg*, which had been referenced in the *Attisano* decision, Justice Bowie concluded that counsel would not be disqualified from representing taxpayers who invested in a tax shelter where counsel had previously represented the promoter of the tax shelter scheme who had been convicted of fraud. Justice Bowie noted that the taxpayers felt that their interests coincided entirely with those of the promoter.

[27] In the 1994 decision in *Moffat v The Queen*, [1994] 1 CTC 2756 (TCC), Justice Bell commented, without making specific findings, on whether filing an affidavit from a lawyer, within the law firm that was representing the taxpayer, constituted a conflict of interest in respect to the taxpayer's counsel of record. He acknowledged the divergent judicial approaches to this issue and cited both the decisions in *Pari Air Ltd.* and the trial decision in *Heck* which reached similar results by adopting a stricter rule or framework. Justice Bell, at paragraph 25,

commented that "…when a partner or associate will be giving evidence, issues such as credibility will be important" but he did not clarify which framework, if any, had been adopted by this Court.

[28] Three other cases decided by this Court are not particularly relevant to the issue before me. Two of those dealt with the potential exposure to and subsequent use of confidential information where solicitors and employees of one firm or of the Department of Justice change employment and are subsequently involved with the subject matter (*Williamson v The Queen*, 2009 TCC 222, and *L & D Petch Contracting v The Queen*, 2010 TCC 211). Both decisions emphasized the importance of the public's perception of a conflict of interest in respect to the operation of the judicial system. In the third case, Justice Bowman (as he was then) ordered the removal of counsel on a motion because that counsel had been suspended by the Law Society (*Spillman v The Queen*, 98 DTC 1565 (TCC)).

Analysis:

[29] I turn now to the application of the caselaw to the issue before me. The question which I must decide is whether a law firm should be permitted to continue to represent an investor in a tax shelter scheme that was allegedly developed, promoted and managed in part by members of that firm. The relevant caselaw has established at least two potential frameworks to assist the Court in the determination of such an issue. There has been wide acceptance by Canadian courts of the decision of the Ontario Divisional Court in *Essa* which establishes a non-exhaustive set of factors to be utilized in determining if counsel of record should be disqualified in respect of conflict of interest. The decision in *Essa* has also been specifically endorsed by the Federal Court of Appeal in *Cross-Canada Auto Body Supply*. Other cases, such as *Pari Air Ltd.*, appear to downplay the importance of protecting the interests of the affected party and provide a narrower set of factors that the court should consider. Finally, cases such as *Shipdock*, favour a more rigid general rule that counsel should be disqualified on grounds of conflict of interest where another member of the lawyer's firm is likely to offer evidence either through testimony or by affidavit.

[30] Whether I follow the more flexible set of factors established in *Essa* or the more rigid framework adopted in *Pari Air Ltd.*, I would reach the same conclusion in these circumstances. However, since the Federal Court of Appeal provided specific endorsement of *Essa*, I believe it provides the most appropriate framework upon which the present motion should be decided. I intend to apply each of the *Essa* factors to the facts before me keeping in mind that this is not an exact science.

As Justice Conlan stated in *Talisman Resort,* at paragraph 41, when applying these factors it is "…not a lesson in arithmetic. We do not make decisions by adding up the checkmarks on each side."

Factor 1 – The Stage of the Proceedings:

[31] The different approaches to the question of whether a court should address a motion for disqualification of counsel in the early stages of a proceeding, when the impact on the affected party may be slight, versus closer to the trial or hearing, when the reviewing judge may be in a better position to assess the likelihood that an affiliated lawyer to the counsel of record will in fact testify, were canvassed by Master Beaudoin of the Ontario Superior Court in *George S. Szeto Investments Ltd. v Ott*, [2006] OJ No 1174 (Ont SCJ), at paragraphs 11-13:

> **11** …There are those cases that suggest that a motion to remove a solicitor should be made at an early stage of the proceedings so as to allow the Plaintiff to retain new counsel without difficulty and to minimize the financial impact on the Plaintiff. (*Khataan v. Kozman (c.o.b. College Medical Group*), [1997] O.J. No. 3104 at para. 8 (Ont. Ct. Gen. Div.); *Ottawa Triple "A" Management Ltd. v. Ottawa (City)*, [1998] O.J. No. 891 at para. 8 (Ont. Ct. Gen. Div.), *Breslin v. Breslin* [2003] O.J. No. 5207 (S.C.J.)).
>
> **12** Another line of cases suggest that the application to remove should be deferred to the trial judge who is in the best position to determine if a firm should be disqualified. (*Essa (Township) v. Guergis*; *Membery v. Hill* (*supra*); *Zesta Engineering v. Cloutier*, [2000] O.J. No. 2893, para. 11 (S.C.J.); *International Business Machines Corp. v. Printech Ribbons Inc. (T.D.)*, [1994] 1 F.C. 692, paras. 38-40 (Trial Division)).
>
> **13** In my view, the apparent conflict between these lines of cases is easily resolved by examining when the court can conclude that there is more than real likelihood that the solicitor will be called as witness. If there is some doubt, "merely a potential", the courts have been more generous in allowing counsel to remain on the record and deferring the matter until after discoveries or leaving the matter to the trial judge. Where the court is satisfied on the record before it that the counsel will be called as a witness, the decisions favour an early determination of the issue.

[32] This appeal has not yet advanced to the examination for discovery stage. Despite the significant period of time that has elapsed since the filing of the Notice of Appeal on September 17, 2014, this proceeding is still in its early stages. Examinations were scheduled for September 21, 2016, but were postponed just

prior to that date when the Appellant counsel advised that the Appellant was no longer available to proceed on that date.

[33] However, based on the pleadings and the written and oral submissions of counsel for both parties, there is a sufficient record before the Court to enable me to determine whether there is a "real likelihood", and not simply the mere potential, that Mr. Nerland and Mr. Mamdani will be called as witnesses, if not by the Appellant then certainly by the Respondent. I do not believe that this proceeding has reached a stage in which the prejudice, which may be experienced by the Appellant due to delay and increased costs, outweighs the interest of maintaining the high standards of the legal profession and the integrity of our system of justice.

[34] Consequently, the current stage of this proceeding and the delay caused by the disqualification of Appellant's counsel, will not be impediments to granting the Respondent's motion.

Factor 2 - The Likelihood that the Witness will be Called:

[35] The testimony of both Mr. Nerland and Mr. Mamdani appears to be central to the resolution of the appeal and the determination of whether the Appellant will be entitled to the claimed CCA deductions. This impacts both the likelihood that they will be called as material witnesses at the hearing and the significance of their testimony to the outcome of the Appellant's appeal.

[36] Although Appellant counsel indicated that he did not intend to call Mr. Nerland or Mr. Mamdani as witnesses, he did admit during his oral submissions that it remained a possibility. Even if they are not called by Appellant counsel, there was a submission by Respondent counsel that he would call them because they are key witnesses. I believe it is more than a likelihood that these two individuals will be called to testify as to their communications with the Appellant regarding his investment and also with respect to the involvement in the alleged software tax shelter scheme of the law firm, Shea Nerland, SAM, Betasoft and ASC.

[37] Therefore this factor weighs in favour of granting this motion because it is likely that both Mr. Nerland and Mr. Mamdani will be called as witnesses.

Factor 3 – The Good Faith (or Otherwise) of the Party Making the Application:

[38] This is a neutral factor in this motion. There is no assertion by the Appellant that the Respondent has acted in bad faith in bringing this motion.

[39] According to the affidavit of Manon Bourgeois, Respondent counsel first raised this issue with the Appellant in an email in July 2015, then again in a second email in October 2015 and finally raised the issue during a status hearing in November 2015. Written submissions by both parties confirm that settlement negotiations were ongoing during this period relating to the Appellant's appeal, as well as several related appeals. Settlement was successfully concluded in all appeals except for the Appellant's appeal. The Respondent's written submissions state that counsel expected that if the Appellant's appeal was also settled, it would negate the alleged present conflict and the need for this motion.

[40] The fact that Respondent counsel anticipated that a successful settlement of this appeal would negate the alleged conflict explains why the motion was not filed until September 2016. With the possibility of a settlement significantly reduced, the Respondent directed his mind to the filing of this motion within a week of being advised that the Appellant was unwilling to settle.

Factor 4 – The Significance of the Evidence to be Led:

[41] This factor is an important one in favour of granting the Respondent's motion. Previously in these Reasons, I concluded that the testimony of Mr. Nerland and Mr. Mamdani will be of vital importance in determining whether the scheme was in fact a "tax shelter" that was not registered. Their testimony concerning the transactions which involved the Appellant, the other investors, the law firm, Betasoft and SAM, will likely be central to the resolution of the appeal.

[42] Furthermore, there was no indication in the oral or written submissions that the Respondent will be able to produce this evidence by some other means. Courts will be hesitant to disqualify counsel where there is a possibility that the evidence may be adduced by other means (*Watkins v Toronto Terminals Railway*, 2014 ONSC 5553 (Ont SCJ)). However, there is no indication in this motion that would allow me to conclude that there are other persons that could give the necessary evidence regarding the nature of the communications with the Appellant and the circumstances of his investment in the alleged software tax shelter scheme.

Factor 5 – The Impact on the Party's Right to be Represented by Counsel of Choice:

[43] The right of a party to freely engage legal counsel of their choosing is of paramount importance but it is not an absolute right. Nevertheless, this right will weigh heavily against ordering the removal of counsel. It is a right that will be accorded deference whenever possible but in some circumstances it may be required to "…yield to the paramount public interest in preserving the integrity of the system, as well as its appearance." (*781332 Ontario Inc. v Mortgage Insurance Co. of Canada*, [1991] OJ No 1592 (Gen Div), as quoted in *Condoluci v Martins*, [2004] OJ No 4501 (Ont SCJ) at paragraph 26.

[44] In this case, Appellant counsel has argued that his disqualification, as well as that of his law firm, will be extremely prejudicial to his client, Adolf Woessner. The affidavit of the Appellant's son states that such disqualification would cause a financial burden for the Appellant because Shea Nerland has provided his father with a "payment arrangement…on a favourable basis" and that it would be otherwise "difficult to pursue the Tax Court Appeal." (Affidavit of Ralph Woessner, paragraph 8). However, courts have repeatedly noted that the right to choose counsel can be outweighed where it would "detrimentally affect the administration of justice" (*George S. Szeto Investments Ltd*. and *Karas v Ontario*, 2011 ONSC 5181 (Ont SCJ)) and further that financial impact upon a party is not an automatic bar to the removal of counsel (*Mazinani*).

[45] The only evidence submitted by Appellant counsel on this point was the affidavit of the Appellant's son. The affidavit did not elaborate on the nature and terms of the payment arrangement provided by Shea Nerland, nor did it contain any detail regarding the financial impact on the Appellant with respect to retaining new counsel beyond the bald statement that it would be difficult for the Appellant to otherwise continue the appeal. These statements, standing alone, were insufficient to allow me to conclude that the Appellant would be unduly prejudiced by the removal of Mr. Clark and his law firm as counsel of record.

[46] Furthermore, even if there was sufficient evidence for me to conclude that the Appellant would be prejudiced financially, the present case is one in which considerations of the proper administration of justice and the integrity of the tax system outweigh any prejudice to the Appellant from the removal of counsel of record. In this case, there is a strong likelihood that Appellant counsel will be required to cross-examine his partner and a former associate on matters bearing directly on the quality of the legal services provided to the Appellant and the law firm's participation in the alleged tax shelter scheme. In such circumstances, it would be inappropriate to allow considerations of the financial impact on the Appellant to supersede the very real risks to the integrity of the tax system and to

the maintenance of high professional standards in the conduct of tax appeals before this Court.

Factor 6 – Whether the Trial is by Judge or Jury:

[47] This factor is not relevant in Tax Court appeals.

Factor 7 – Who Will Call the Witness:

[48] This factor may be relevant where there is a probability counsel will be in a position to cross-examine a favourable witness, resulting in an unfair advantage arising. In this motion, it is likely that the Respondent counsel will call Mr. Nerland and Mr. Mamdani to testify, putting Appellant counsel in the position of cross-examining them. Although this raises some concerns, I consider some of the other factors to be more relevant to my decision.

Factor 8 – The Relationship/Connection between Counsel, the Prospective Witness and the Parties Involved in the Litigation:

[49] There are two connections at play that raise concern. While the relationship between the Appellant, Mr. Woessner, and Shea Nerland is at the heart of this motion, it is the relationship between Matthew Clark, the Appellant counsel and his law firm and more specifically Mr. Nerland and Mr. Mamdani that will have significant impact in this appeal. Appellant counsel and Mr. Nerland are colleagues and partners in the same firm. While Mr. Mamdani is a former associate with the firm, his precise present connection with Appellant counsel is unknown as there appears to be a continuation of strong links between this individual and Appellant counsel's law firm. This is evidenced by Mr. Mamdani continuing to act as President, CEO and director of SAM. Mr. Nerland continues to be a director of SAM and it was SAM that entered into the contract to provide managerial, consulting, financial and supervisory services to the Appellant in respect to his investment in the software.

[50] Finally, the Respondent asserts that it was Shea Nerland that provided the legal advice to the Appellant in the first instance in respect to his investment. Key factual matters are at the heart of the involvement of these parties to the transactions as they relate to the Appellant. The interests of those various parties may not be identical and in fact may be adverse to the interests of the Appellant. Appellant counsel may unknowingly be putting himself at variance to his role as advocate for his client as opposed to partisanship and loyalty he may have to his

firm and his colleagues. As a result, his ability to represent his client, the Appellant, in an objective and independent manner will be impaired. There is also concern about the nature of the discussions and disclosures that have been made to the Appellant about these potential conflicts although I have no reason to conclude that consent given to counsel to act in this appeal is anything other than a fully informed and understood consent.

Conclusion:

[51] Removal of counsel of record will always be an extreme remedy and must not be ordered except in the clearest of cases. The conflict of interest giving rise to the request for disqualification must be real, substantial and ongoing. If the conflict is contingent, remote or premature, the removal should not be granted (*Essa*, at paragraphs 43 and 47).

[52] Essentially, all of the factors outlined in *Essa*, with the exception of the right of the Appellant to choose his own counsel, favour the granting of this motion. The degree to which Shea Nerland appears to be immersed in the promotion and management of the alleged tax shelter scheme and the likely importance of the testimony of Mr. Nerland and Mr. Mamdani, necessitate an order for the removal of Appellant counsel and the law firm in order to maintain the reputation of the administration of the judicial system and to avoid the appearance of impropriety to the public.

[53] If I allowed Appellant counsel to remain as counsel of record and let this scenario play out at the hearing, there is also an extremely high likelihood of conflict arising to the detriment of the Appellant, Mr. Woessner. This risk is not minimal or remote in these circumstances but actual and likely. Consequently, it is unrealistic to conclude that Mr. Clark will be able to balance his obligations to his partners and colleagues with his professional obligations to his client, Mr. Woessner. Therefore this risk places the present case squarely within the scope of the concern identified by the Federal Court of Appeal in *Cross-Canada Auto Body Supply*.

[54] The multiple conflicts, that are likely to arise in these circumstances, are evident. Although the Appellant has apparently received full disclosure and has consented to his counsel continuing, the second problem relating to the administration of justice cannot be waived. There may be conflicts between Appellant counsel's obligations to Mr. Woessner to present his case in the most favourable light and counsel's obligations of objectivity in view of his law firm's

central involvement in this Appellant's investment. As noted in some of the jurisprudence, this conflict cannot be waived by a client where that conflict involves counsel, as an officer of the Court and his role within the justice system. The assumption that counsel, who is representing a client and fulfilling his duty to the court at the same time, will be independent of undue influences, is a requirement of our system. When counsel of record has the type of intricate "connection" to a witness, as in this case, there can be no assurances to the court, the public or the client that counsel, in fact and in appearance, will act objectively in those duties. Hence the high probability of appearance of impropriety in the public's eyes.

[55] These comments bring me back to the central question to be asked and that is whether a fair-minded, reasonably informed member of the public would conclude, in the circumstances of the present case, that there is a compelling reason for disqualifying counsel of record such that the proper administration of justice requires it. For the reasons I have outlined, I am granting the Respondent's motion together with costs for removal of Appellant counsel, as well as the law firm, Shea Nerland.

[56] Both parties had also agreed that the Appellant would pay $237.00 to the Respondent to indemnify the Respondent for costs associated with the Appellant's cancellation of the scheduled examination for discovery. I order those costs in the amount of $237.00 to be paid forthwith. The Appellant shall have 60 days from the date of this Order and Reasons for Order to find alternate counsel and to advise both Respondent counsel and the Court. After the Appellant has found alternate counsel, both parties shall have 60 days from the date the Appellant has advised the Court of his new counsel, to contact and advise the Court with respect to a proposed timeline for the remaining steps in the litigation.

Signed at Ottawa, Canada, this 28th day of June 2017.

"Diane Campbell"

Campbell J.

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PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	March 27, 2017
REASONS FOR ORDER BY:	The Honourable Justice Diane Campbell
DATE OF ORDER:	June 28, 2017

APPEARANCES:

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Counsel for the Respondent:	Charles Camirand

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