

Citation: Kee & Ors. v. MacDonald
2003 PESCTD 63

Date: 20030806
Docket: GSC-16792
Registry: Charlottetown

**PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION**

BETWEEN:

JANE KEE, STEPHEN MERRILL,
MICHELINE VACHON and JULIUS DORY

PLAINTIFFS

AND:

IAN MacDONALD and
GOVERNMENT OF PRINCE EDWARD ISLAND

DEFENDANTS

BEFORE: The Honourable Chief Justice J. Armand DesRoches

Plaintiffs
David J. Doyle

Acting on Own Behalf
Solicitor on behalf of Applicant, David G. Coles
and Boyne Clarke

Place and Date of Hearing

Charlottetown, Prince Edward Island
July 29, 2003

Place and Date of Decision

Charlottetown, Prince Edward Island
August 6, 2003

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Prince Edward Island Supreme Court - Trial Division
Before: DesRoches, C.J.
(In Chambers)
Date of Hearing: July 29, 2003
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[4 Pages]

**Barristers and Solicitors - Relationship with clients - Termination of relationship -
Withdrawal of lawyer and his law firm.**

Case Considered: *Chagpar v. Minsos & Co.*, [1999] A.J. No. 1396.

Rule Considered: *Rules of Court, Province of Prince Edward Island 1996*, Rule
15.04(1).

Text Considered: *Canadian Bar Association Code of Professional Conduct*, Chapter
XI, Commentary 5.

Plaintiffs/Respondent Acting on Own Behalf
David J. Doyle, Solicitor for Applicant, David G. Coles and Boyne Clarke

DesRoches C.J.:

[1] David G. Coles of the law firm Boyne Clarke of Dartmouth, Nova Scotia made a motion seeking his and his firm's removal as solicitor of record of the plaintiffs. With the consent of all the parties, the motion was heard by telephone conference call pursuant to Rule 1.07 of the **Rules of Court**. Jane Kee, one of the plaintiffs, participated in the conference call representing the plaintiffs. Neither Mr. Stewart, counsel for the defendant Ian MacDoanld, nor Ms. Demone, counsel for the defendant Government of Prince Edward Island opposed the motion, and they did not participate in the hearing.

[2] I need not detail the circumstances leading up to this motion. It is sufficient for purposes of this decision to say that material filed by way of affidavit by Mr. Coles, and letters and documents provided to the Court by Ms. Kee clearly demonstrate that there has been a complete breakdown in the solicitor/client relationship between Mr. Coles and the plaintiffs including a loss of confidence such that it is impossible for Mr. Coles to continue representing the plaintiffs' interests. Indeed, Ms. Kee does not dispute that the plaintiffs' relationship with Mr. Coles is not as it should be.

[3] Ms. Kee does not oppose the removal of Mr. Coles as the plaintiffs' solicitor of record. Her position is that the firm of Boyne Clarke has an ongoing contractual obligation to provide effective representation to the plaintiffs and, if it is not to be by way of the services of Mr. Coles, then the firm must provide another one of its lawyers to fill the vacancy.

[4] It appears from the affidavit material filed on the motion that Jeffrey Morris, Managing Partner at Boyne Clarke, has made efforts to have another lawyer in the firm represent the plaintiffs in this action. I am informed that the subject of this litigation and its level of complexity are such that, while they are within the expertise of Mr. Coles, not all other lawyers of the firm would be equally capable of providing the degree of legal assistance the plaintiffs require. According to Mr. Morris, only two lawyers at Boyne Clarke, other than Mr. Coles, are capable of assuming appropriate carriage of this case. These lawyers are unwilling to accept the case because they are convinced the disagreement that exists between Mr. Coles and the plaintiffs would exist as well between them and the plaintiffs. Furthermore, these lawyers are aware of, and take exception to certain comments made by the plaintiffs concerning Mr. Coles, comments which Mr. Coles considers highly disparaging and with which he takes strong exception. These comments, made about one of the partners of the firm (Mr. Coles) is another reason why the two lawyers are unwilling to assume carriage of the case.

[5] Although Rule 15.04(1) of the **Rules of Court** provides that a solicitor may move, on notice to his/her client, for an order removing him/her as solicitor of record, a solicitor owes a duty to the client not to withdraw his/her service except for good

cause. This basic rule is set out in Chapter XI of the **Canadian Bar Association Code of Professional Conduct**. Commentary 5 to the basic rule states, in part:

5. Situations where a lawyer would be entitled to withdraw, although not under a positive duty to do so, will usually only arise where there has been a serious loss of confidence between the lawyer and the client. Such a loss of confidence goes to the very basis of the relationship.

[6] There is no question there are sufficient grounds to justify the removal of Mr. Coles as the plaintiffs' solicitor or record. The question is, should the firm be required to continue to represent the plaintiffs?

[7] The relationship of solicitor and client, when established, exists not only in relation to the one solicitor in a firm who has carriage of the file, but extends to all other solicitors employed in that firm. This is well established by the many cases dealing with solicitors' conflict of interests. There is a rebuttable inference to be drawn that confidences between a solicitor and his/her client are shared among solicitors in a firm. It stands to reason, therefore, that the loss of confidence and the breakdown of the necessary relationship between a solicitor and the client inevitably will extend to all the solicitors of the firm. This proposition was recognized by Lee J. of the Alberta Court of Queen's Bench in **Chagpar v. Minsos & Co.**, [1999] A.J. No. 1396. In that case, a firm of solicitors (Minsos & Co.) had withdrawn their services claiming there had been a loss of confidence between Mr. Masson, one of the members of the firm, and a client by the name of Chagpar. Considering the nature of the solicitor/client relationship, Lee J. stated at paragraphs 24-27:

24 In the case of Russell & Dumoulin v. Farrell [1997] B.C.J. No. 753 (B.C.S.C.) Registrar Doolan considered the issue of loss of confidence and when a solicitor will be justified in withdrawing services as a result of a loss of confidence. Registrar Doolan first considered the special relationship which exists between a solicitor and client, including the right of privilege with respect to communication or documents and the exceptionally high degree of trust which is necessary, as stated at paragraph 15, "...in a relationship where the client is expected to tell all without reservation to his or her lawyer".

25 Having established the essential nature of trust and goodwill which must exist in the solicitor and client relationship Registrar Doolan states at paragraph 16:

Even the smallest act which brings into question the inviolability [sic] of that relationship, whether caused by the client or the solicitor, may result in irreparable damage to, and severance of, the solicitor and client relationship. Where a client raises the issue of a solicitor's bona fides, or questions his solicitor's professional conduct, the solicitor

must immediately question the advisability of continuing the relationship.

26 I am satisfied in the present case that the relationship between solicitor and client was severely damaged and a great loss of confidence arose out of several incidences, including: -

1. Mr. Chagpar's actions on April 13, 1999, in questioning the professional conduct of Mr. Masson and in accusing Mr. Masson of having done nothing to benefit Mr. Chagpar in his wrongful dismissal action;
2. Mr. Chagpar's regular telephone calls to Mr. Minsos to ask him to ensure that Mr. Masson was dealing with his wrongful dismissal action properly, which actions undermined the relationship of trust and confidence between Mr. Masson and Mr. Chagpar;
3. Mr. Chagpar's refusal to respect Mr. Masson's advice regarding settlement, and his obvious lack of respect for Mr. Masson's legal skills demonstrated by Mr. Chagpar's almost daily telephone calls to inquire as to why the matter had not yet been settled;
4. Mr. Chagpar's lack of forthrightness regarding his financial concerns by taking a vacation trip to Los Angeles and not informing Mr. Masson of this trip at the same time that Mr. Chagpar was telephoning Mr. Masson on a daily basis to tell him how desperately he needed money.

27 Mr. Chagpar's conduct, particularly in questioning the professional conduct of Mr. Masson, led to a serious breakdown in the solicitor and client relationship which resulted in Minsos & Company having little choice but to withdraw services.

[8] I certainly do not suggest the plaintiffs have acted in the same way Mr. Chagpar did. They have, however, questioned the professional competence and conduct of Mr. Coles. It is clear to me that the solicitor/client relationship between not only Mr. Coles and the plaintiffs, but between the firm of Boyne Clarke and the plaintiffs as well, has deteriorated to such an extent that to require the firm to continue to act for the plaintiffs would be detrimental both to the firm and to the plaintiffs.

[9] Ms. Kee commented that if Boyne Clarke were not required to find another counsel within the firm to take carriage of this case, the plaintiffs would be put in the almost impossible situation of trying to find another lawyer or firm to retain at this juncture or, failing that, to represent themselves in this complex litigation. I am not

unmindful of the grave difficulties my decision will cause the plaintiffs. I am convinced, however, that requiring Boyne Clarke to continue their representation, would not be doing the plaintiffs a favour, nor assuring their best interests. Given the circumstances described by Mr. Morris, it is easy to foresee yet another motion seeking again the removal of the solicitor of record within a short period of time should Boyne Clarke be required to provide one of its lawyers to represent the plaintiffs.

[10] For all of the above reasons, an order shall issue whereby David G. Coles and the firm of Boyne Clarke are removed as solicitor of record of the plaintiffs in this action. I would further order that no motions, applications or process to which the plaintiffs are required to respond are to be initiated before September 30, 2003 in order to allow the plaintiffs sufficient time to retain new counsel. David G. Coles and/or Boyne Clarke shall deliver to (or to the order of) the plaintiffs all papers and property to which the plaintiffs are entitled and shall give the plaintiffs all information that may be required in connection with the case. After deducting any amounts outstanding for services rendered to date (including the nominal amount of \$500 costs for this motion) Boyne Clarke shall account for all funds to the plaintiffs which the firm holds or has previously dealt with, and shall refund any funds not earned during their employment as plaintiffs' counsel. David G. Coles and Boyne Clarke shall cooperate with any new counsel properly retained by the plaintiffs to ensure an expeditious and orderly transfer of the matter and to minimize expense and avoid, to the extent possible, prejudice to the plaintiffs.

C.J.

August 6, 2003