

Federal Court



Cour fédérale

**Date: January 29, 2016**

**Docket: T-1345-13**

**Citation: 2016 FC 110**

**BETWEEN:**

**C. STEVEN SIKES, AQUERO, LLC  
AND AQUIAL, LLC**

**Plaintiffs/  
Defendants by Counterclaim**

**and**

**ENCANA CORPORATION,  
CENOVUS FCCL LTD.,  
FCCL PARTNERSHIP AND  
CENOVUS ENERGY INC.**

**Defendants/  
Plaintiffs by Counterclaim**

**ORDER AND REASONS**

**LAFRENIÈRE P.**

[1] This is a motion on behalf of the Plaintiffs, C. Steven Sikes (“Dr. Sikes”), Aquero, LLC and Aquial, LLC (“Aquial”), for an order removing Smart & Biggar/Fetherstonhaugh LLP (“Smart & Biggar”) as solicitors of record of the Defendants, EnCana Corporation, Cenovus FCCL Ltd., FCCL Partnership and Cenovus Energy Inc. (hereinafter referred to as either “the Defendants” or “the EnCana Defendants”).

[2] It is common ground between the parties that Mr. Garland, a partner with the law firm of Smart & Biggar, had some dealings with Dr. Sikes, a principal of the corporate Plaintiffs, in June 2008. At the time, the Plaintiffs were seeking to retain counsel to enforce the patent rights asserted in the underlying action. This was well before Smart & Biggar was retained to act on behalf of the EnCana Defendants.

[3] The Plaintiffs submit that a review of the circumstances behind the substantive communications between Dr. Sikes and Mr. Garland establishes that relevant confidential information was provided by Dr. Sikes and legal advice was given by Mr. Garland. The Plaintiffs maintain that the confidential nature of the information exchanged between the two leads to the inevitable conclusion that Smart & Biggar is in a disqualifying conflict of interest under the applicable legal test.

[4] The motion is opposed by the Defendants. They submit that Dr. Sikes only provided general, non-confidential information of the kind typically required for a law firm to conduct a conflict of interest review. They also deny that any legal advice was dispensed by Mr. Garland.

I. Issues to be determined

[5] The parties agree on the test to be applied in determining whether counsel should be disqualified due to a conflict of interest. The Court must inquire: (1) whether a lawyer received confidential information attributable to a solicitor-client relationship; and (2) if so, is there a risk that the relevant confidential information will be used to the prejudice of the former client: *MacDonald Estate v Martin* [1990] SCR 1235 at para 45.

[6] The evidence on this motion establishes that there was no existing solicitor and client relationship between Dr. Sikes and Smart & Biggar when Dr. Sikes initially contacted Mr. Garland. According to the Defendants, none was established in the initial telephone call between Dr. Sikes and Mr. Garland.

[7] The fact that a client file is not opened and no retainer is paid is not determinative that no solicitor-client relationship exists. However, the mere disclosure of information necessary for a lawyer to complete a conflict of interest review does not create a solicitor-client relationship.

[8] The real issue to be determined on this motion is whether a reasonable person with knowledge of all the facts would reasonably form the belief that Mr. Garland received relevant confidential information from Dr. Sikes that could be used to the prejudice of the Plaintiffs, thereby disqualifying Smart & Biggar from acting on behalf of the Defendants in this case.

[9] Before delving into the merits of the motion, I propose to set out some background facts that are not in dispute and the procedural history of the action and then briefly summarize the parties' evidence.

## II. Background Facts

[10] The following facts are not in dispute and are supported by the evidence adduced by the parties on this motion.

[11] On November 6, 2007, Mr. Mark Hochwit, then President and CEO of Aquial, sent a letter to EnCana FCCL Oil Sands Ltd. (“EnCana”) raising concerns regarding the handling of certain information of Aquial by EnCana as well as the potential infringement by EnCana of Aquial’s pending worldwide patent application. Shortly after receiving a letter from EnCana dated May 14, 2008 rejecting Aquial’s allegations, Dr. Sikes contacted counsel at Gowlings LLP (“Gowlings”), a law firm prosecuting the ‘723 Patent in Canada, to obtain advice and representation on how to best enforce the Plaintiffs’ rights.

[12] Dr. Sikes was advised of a conflict on the part of Gowlings and was referred to Joan Van Zant at Ogilvy Renault LLP as potential counsel for the matter. On June 9, 2008, Dr. Sikes contacted Ms. Van Zant by leaving a voicemail message. He then followed up with an email explaining that the Plaintiffs were interested in a general discussion of their rights in Canada and provided her with a list of potentially conflicted parties. Dr. Sikes called Ms. Van Zant one week later, at which point she identified a potential conflict. Ms. Van Zant referred Dr. Sikes to several other lawyers, including Mr. Garland.

[13] Dr. Sikes searched Mr. Garland’s profile on Smart & Biggar’s website, printed a copy of the webpage, and proceeded to call Mr. Garland on June 16, 2008. During their telephone call, which lasted approximately 15 minutes, Dr. Sikes indicated that he was looking for representation in Canada related to a Canadian patent pending and a possible infringement situation related to water clarification chemicals and processes in the oil-sands region. Mr. Garland obtained information from Dr. Sikes (more about that later) and opened a general file named “Aquero Company” for the purpose of a conflict of interest review.

[14] Immediately following their conversation, Dr. Sikes sent an email to Mr. Garland stating that he had enjoyed their discussion. Dr. Sikes confirmed in his email that the Plaintiffs were interested in a general discussion about their rights in Canada and how to proceed in asserting their rights assuming that the patent would be issued soon in Canada. He also added that the technology would impact the water-treatment companies that provide services and chemicals to the operating companies, such as Baker Petrolite, Nalco Chemical, Champion Technologies, GE/Betz and Innovative Chemical Technologies Canada, as well as the operating companies themselves, namely Syncrude, Suncor, ASAGD and CSS, including EnCana.

[15] Mr. Garland responded by email later that same day, indicating that he would complete a standard conflict of interest check and get back to Dr. Sikes as soon as possible. Mr. Garland indicated that he would limit the conflict check to the water-treatment companies as it was not immediately clear to him, without reviewing the patent or discussing the technology and marketplace further, that his law firm would necessarily be acting against the interests of the operating companies.

[16] Dr. Sikes made two follow up phone calls to Mr. Garland prior to being informed by Mr. Garland on June 23, 2008 that he could not act for the Plaintiffs. Dr. Sikes subsequently contacted other law firms recommended by Mr. Garland and then prepared a “combination litigation/business plan” based on his discussions with counsel.

### III. Procedural History

[17] The underlying proceeding is a patent infringement action instituted by the Plaintiffs on August 7, 2013. The Statement of Claim named the EnCana Defendants, as well as Conocophillips Canada and Baker Hughes Canada Company, as Defendants (collectively “the Initial Defendants”). The Plaintiffs’ pleading was amended on August 14, 2013 (“Amended Statement of Claim”) and further amended on December 1, 2014 (“Second Amended Statement of Claim”).

[18] The Plaintiffs alleged in the Amended Statement of Claim that the Initial Defendants had and were breaching the Plaintiffs’ rights under Canadian Patent No. 2,595,723 (the ‘723 Patent). The ‘723 Patent relates generally to chemical composition and their methods of use for de-oiling water produced during oil recovery operations by steam-assisted gravity drainage.

[19] On March 3, 2014, a Notice of Status Review (Notice) was issued pursuant to Rule 380(1)(a) of the *Federal Courts Rules* as 180 days had elapsed since the issuance of the Statement of Claim and no statement of defence had been filed and no motion for default judgment was pending. Counsel for the Plaintiffs submitted a letter on March 13, 2014 explaining that the parties had agreed to delay any further steps in the action in order to allow time to discuss a possible resolution of certain issues. It was anticipated that one or more motions would be brought by the Initial Defendants prior to filing their respective defences.

[20] On March 21, 2014, Mr. Cameron Weir with Smart & Biggar sent a letter to the Registry to advise that his law firm was representing the EnCana Defendants. Mr. Weir confirmed that,

subject to the outcome of discussions with the Plaintiffs, his clients intended to file a motion for particulars and/or to strike portions of the Statement of Claim, as well as a motion for security for costs, prior to filing any defence.

[21] By Order dated March 25, 2014, the action was allowed to continue as a specially managed proceeding. I was designated case management judge by the Chief Justice on April 3, 2014.

[22] The Initial Defendants filed separate motions on April 15, 2015 seeking an order striking the Amended Statement of Claim in its entirety, or portions thereof, and an order requiring the Plaintiffs to post security for their costs. The Plaintiffs wholly discontinued the action against Conocophillips Canada and Baker Hughes Canada Company on June 17, 2014.

[23] The Defendants' motions were heard in Calgary on August 13, 2014. During the hearing, the Plaintiffs were ordered to post an amount of \$50,000.00 as security for the Defendants' costs up to the completion of examinations for discovery. The Plaintiffs further agreed to amend their Amended Statement of Claim to correct deficiencies in respect to allegations of infringement.

[24] By Order dated September 10, 2014, the Plaintiffs were directed to serve a draft Second Amended Statement of Claim on the Defendants within thirty (30) days of posting security for costs. In the event consent to file was not forthcoming from the Defendants, the Plaintiffs were directed to bring a motion for leave to file the Second Amended Statement of Claim.

[25] On November 6, 2014, the Plaintiffs brought a motion for leave to file a Second Amended Statement of Claim, having failed to obtain the Defendants' consent. The motion was ultimately resolved between the parties. Immediately following a case management conference held on December 1, 2014, the Plaintiffs filed their Second Amended Statement of Claim.

[26] The Defendants filed their Statement of Defence and Counterclaim on January 15, 2015. They essentially deny the allegations of infringement and assert that the '723 Patent is invalid, void and of no effect. The Defendants plead, in particular, at paragraph 16(b) that the Plaintiffs are estopped from seeking the remedies requested "on the basis of acquiescence, estoppel and/or [laches]."

[27] On February 24, 2015, counsel for the Plaintiffs sent a letter to counsel for the Defendants expressing concerns about a conflict of interest on the part of Smart & Biggar. The entirety of the letter is reproduced below.

During the scoping of our document discovery, something has come to our attention which we feel we must bring to your attention immediately. Specifically, please find attached a copy of an email which was unearthed in our document review which indicates rather detailed discussions between Dr. Sikes and yourself, and before Smart & Biggar had run what looks like a limited conflict's check.

The only reason Dr. Sikes was looking back at these dated emails in the discovery process was because your clients' pleading of equitable laches. That led Dr. Sikes to go through [is] records to show he was not just sitting back while seeing his rights abused, and was in fact making a number of strides seeking to protect those interests.

Please note that Dr. Sikes, upon hearing your name and seeing you in the courtroom in Calgary on September 10, 2014, approached you and identified himself, suggesting (or more properly asking) if you had conversed before. It appeared to him that you did not recall speaking with him.

Which brings us to the present. Dr. Sikes, upon reviewing the attached email and his phone records has now recollected more details of what appear material interactive conversations with you. Dr. Sikes has become very concerned about that shared subject matter, how it may be reflected in the pleadings of the defendants, and how it may affect the future conduct of this matter.

In particular, Dr. Sikes recalls, after looking at his phone records, that he had a 15 minute call with you on June 16, 2008. In that call, he believes you discussed the concept of suing Encana and recalls you giving counsel suggesting the problems in suing a large, well-financed entity. In any event, he believes that conversation also was more directed at going after the known service provider of Baker-Hughes as an alternative to Encana.

It seems to me that such counsel is material at the very least to the laches defence as it is no coincidence that the voice mail referenced in your pleadings was connected to Dr. Sikes considering he should perhaps not sue the Encana Defendants, and indicate to Encana that Baker Hughes was perhaps the appropriate party to pursue.

Regardless, and as you also know, the threshold of someone becoming a "client" can be low, and it looks like that may have occurred here through your counsel to Dr. Sikes. Of course, and alternatively, you are perhaps a potential witness in this matter to show that Dr. Sikes was indeed seeking to assert his rights, which was by all accounts quite difficult where every large patent firm sees ultimate business conflicts in suing players in this industry.

As you know, a seminal authority on conflict dictates that a lawyer's duty of loyalty has 3 salient dimensions: a duty to avoid conflicting interests; a duty of commitment to the client's cause; and a duty of candour. We suggest that your continued representation of the Encana Defendants creates substantial risk of greater conflict affecting the administration of justice from this situation.

We are not sure what exactly to do about this presently, but we certainly expect that the usual procedure of dealing with such conflicts by affidavits and undertakings to establish that no

confidential information could appear to be used to the Plaintiffs' detriment was not done here. Doing a "Chinese Wall" after the fact looks problematic as you cannot put toothpaste back in the tube. We are only telling you of this conflict as a courtesy so that you may consider your and your clients' future options. I otherwise have no current instructions on further actions but will be advising my clients further.

[28] Mr. Elliott Simone, a partner at Smart & Biggar responsible for handling questions relating to conflicts of interest, replied to the letter from Plaintiffs' counsel on March 2, 2015. Mr. Elliott wrote that he had discussed the matter with Mr. Garland and reviewed Dr. Sikes' email dated June 15, 2008, as well as the firm's records. Based on his review, Mr. Elliott was satisfied that the contact made by Dr. Sikes back in 2008 did not represent a conflict of interest for his firm. He concluded his letter with the following comments:

Finally, I understand from Kevin Graham that during cross-examinations held at your offices back in June 2014, Dr. Sikes indicated to Mr. Graham that he had contacted our firm with respect to this matter and our firm was unable to represent him due to a conflict. As such, the suggestion in your letter that this issue has only recently come to your clients' attention as a result of the "document review" is clearly not the case. If there was a legitimate conflict concern, one would have expected that it would have been raised by your clients well before this time given that our firm has been representing the defendants in this action for over a year and a half. As such, we can only conclude that the issue is only now being raised purely for tactical reasons.

#### IV. Plaintiff's Motion for Removal of Smart & Biggar

[29] On April 16, 2015, counsel for the Plaintiffs submitted a letter to the Registry to advise that he had received instructions to bring a motion on the conflict of interest issues. The Plaintiffs proceeded to file their motion record on May 15, 2015, seeking the following relief:

- (a) an Order removing Smart & Biggar/Fetherstonhaugh LLP ("Smart & Biggar") as solicitors of record for the Defendants;
- (b) an Order declaring that Smart & Biggar has obtained confidential information from the Plaintiffs which is sufficiently related to this action;
- (c) an Order declaring that Smart & Biggar is in a position of conflict of interest, and has breached its duty of confidentiality to the Plaintiffs in representing the Defendants in this action;
- (d) an Order immediately removing Smart & Biggar as solicitors of records for the Defendants in this action
- (e) an Order prohibiting Smart & Biggar from revealing confidential information obtained from the Plaintiffs to anyone, including: (1) the Defendants (and any employees, directors or affiliates thereof), or (2) subsequent new counsel of record for the Defendants;
- (f) an Order requiring Smart & Biggar to provide an undertaking to the Court that no confidential information obtained from the Plaintiffs has been communicated to the Defendants or their subsequent new counsel of record;
- (g) an Order requiring subsequent new counsel of record for the Defendants to provide an undertaking to the Court that no information related to any allegations of infringement of the Patent, except that which could be obtained from public sources, was communicated to them by Smart & Biggar;

- (h) costs of the motion to the Applicants on an indemnity basis; and;
- (i) such further and other relief this Honourable Court deems just.

[30] In support of their motion, the Plaintiffs rely on the affidavit of Dr. Sikes sworn on April 2, 2015 (Sikes Affidavit). The Defendants filed two affidavits in response - one by Mr. Garland and the other by Mr. Kevin Graham (Mr. Graham), another lawyer with Smart & Biggar.

[31] Dr. Sikes was cross-examined on his affidavit on June 9, 2015. There was no cross-examination of the Defendants' affiants.

#### V. Affidavit Evidence of Dr. Sikes

[32] As noted earlier in these reasons, Dr. Sikes had a 15 minute telephone conversation with Mr. Garland on June 16, 2008. Dr. Sikes summarizes the conversation as follows at paragraph 11 of his affidavit:

11. In contrast to my interaction with Ms. Van Zant, my recollection of that telephone conversation was that it was focused and detailed. I recall establishing with Mr. Garland that the conversation was confidential. Mr. Garland was interested as to why I thought my technology had been infringed, what evidence there was about that, the nature of the intellectual property itself, and whether there were prior communications with any potential litigants. We also discussed some procedural issues such as the venue for any litigation, typical duration of IP litigation, and also typical defences against allegations of infringement, and my specific circumstances, rather than at general level. I do not recall Mr. Garland trying to establish any other potential plaintiffs in the matter.

[33] Dr. Sikes states that he sent a “somewhat standardized email” that he had earlier prepared to Mr. Garland after speaking to him on the phone.

[34] At paragraph 14 of his affidavit, Dr. Sikes characterizes the conversation with Mr. Garland as “interactive”:

...I had questions and ideas of my own that Mr. Garland vetted, corroborated and discouraged. I relied on Mr. Garland’s feedback (and pertinent questions) and used that as a frame of reference in going forward with some kind of plan to address the breach of the Plaintiffs’ rights, and trying to commercialize the 723 Patent. This was incorporated into notes regarding those initial telephone solicitations that I can establish as contemporaneous at that time. These notes included matters such as how we would let other parties know about our technology, how we wanted to address seeking business opportunities, avoiding contact with adverse parties, and who were the most likely defendants. A true copy of my contemporaneous notes (redacted for non-relevant and potentially prejudicial/privileged items) is attached to my Affidavit as Exhibit “F”. The provision of the redacted portion is in no way a waiver over the privilege attached to this document.

[35] The unredacted portions of the typewritten notes prepared by Dr. Sikes read as follows:

2. We should avoid at the outset with any further interactions with potential adversary companies (primary infringers). Our interactions to date seem to have been appropriate, probably unavoidable, maybe even necessary, and could prove useful later. However, having made the effort with such companies, now we can focus on the operating companies and attempt to attract their business.

6. The litigation can be entered in the province or in the federal court. The federal court has jurisdiction over all of the provinces. An individual province has jurisdiction only over itself, so a finding in Alberta may not carry over to other provinces. The recommendation is to proceed at the federal level if possible.

12. An adversary can submit prior art and other information to the patent office during the examination. An adversary also is allowed to submit filings to provoke an interference. However, an adversary would have to weigh the potential for negative outcomes from CIPO. CIPO typically does not like to receive adversarial communications during an examination. If some type of adversarial papers had been filed, we would have been notified.

Peter thinks that we should stay with Gowlings regarding the patent applications and associated filings with the CIPO.

[36] Dr. Sikes states at paragraph 20 of his affidavit that he came across material relating to his discussions with Mr. Garland when he was instructed by counsel to start preparing for upcoming document discoveries, including documents potentially relevant to the laches allegations raised by the Defendants. Dr. Sikes claims that he became much more concerned about his communications after reviewing the Defendants' laches defence as he believed the Plaintiffs' later conduct was at least in part related to his discussion with Mr. Garland.

#### VI. Affidavit Evidence of Mr. Garland

[37] Mr. Garland acknowledges in his affidavit that he was contacted by Dr. Sikes with respect to his company potentially retaining Smart & Biggar; however, he does not have a specific recollection of his discussions with Dr. Sikes given that they occurred seven years previously.

[38] Mr. Garland indicates that he is well versed in his law firm's conflict of interest review procedure and the manner in which a "cold" telephone call from a non-client relating to a potential new mandate should be handled. In accordance with the procedure, Mr. Garland states that he obtained the required information from Dr. Sikes and opened a general file for Aquero for

the purpose of the conflict of interest review. Attached as exhibits to his affidavit are copies of all of the documents in Smart & Biggar's possession recording or relating to his discussions with Dr. Sikes, including his personal notes taken during the initial telephone call on June 16, 2008.

[39] Mr. Garland's handwritten notes on his initial conversation with Dr. Sikes are contained in one page. Beyond setting out the contact information for Dr. Sikes and Aquero Company, they reflect the following:

- a note "from Joan VZ" (establishing that Dr. Sikes was referred to Mr. Garland by Joan Van Zant);
- a note "Alberta/Sask – oil sands" (which is the marketplace that the patent at issue relates to);
- a note "small R&D company";
- the identity of Dr. Sikes' U.S. and Canadian patent prosecution counsel and general information about the patent application in issue, including the PCT application number;
- a listing of the adverse parties, namely:
  - Baker Petrolite
  - Nalco Chemical Co.
  - G.E. – Betz
  - Champion Technologies
  - ICTC → Innovative Chemical Technologies Canada
- the words "how to proceed?" and "he will send me an email with the info for conflict checks".

[40] Mr. Garland states that the information received from Dr. Sikes was general and of a non-confidential nature. He claims that, beyond requesting general background information required for a conflict of interest review, he would not have solicited any information of the type referenced in the third sentence of paragraph 11 of Dr. Sikes' affidavit. He also maintains that

while he may have answered some general questions relating to patent litigation in Canada, he would not have discussed with Dr. Sikes his “specific circumstances” or provided any legal advice before the conflict of interest review was completed.

VII. Affidavit Evidence of Mr. Graham

[41] Mr. Graham states that he reviewed the evidence contained in the Sikes Affidavit, and in particular the evidence in paragraph 17 relating a conversation between him and Dr. Sikes. Mr. Graham recalls speaking to Dr. Sikes during an off-the-record discussion at a cross-examination of Dr. Sikes conducted in Calgary on June 20, 2014, and not June 13, 2014 as asserted by Dr. Sikes. According to Mr. Graham, Dr. Sikes stated that he had previously contacted Smart & Biggar regarding enforcement of the patent at issue and that he was advised that Smart & Biggar was unable to act due to a conflict. Mr. Graham specifically recalls that Dr. Sikes told him that he could not remember who at Smart & Biggar he had spoken to.

VIII. Cross-examination of Dr. Sikes

[42] As stated earlier, Dr. Sikes was cross-examined on his affidavit. The cross-examination exposed a number of misstatements, mischaracterizations, embellishments and errors in Dr. Sikes’ evidence. Representative examples of faulty memory and hyperbole in Dr. Sikes’s evidence, as well as instances where Dr. Sikes was vague or evasive on cross-examination, are conveniently reproduced in Schedule A to the Defendants’ written representations. I will review a few examples that are particularly troubling.

[43] Dr. Sikes stated at paragraph 14 of his affidavit that his conversation with Mr. Garland was incorporated into notes that he could “establish as contemporaneous at that time”. The document attached as Exhibit “F” is later identified as a true copy of his contemporaneous notes, redacted for what Dr. Sikes claimed were “non-relevant and potentially prejudicial/privileged items.” Dr. Sikes admitted when pressed in cross-examination that the document in question was not actually a contemporaneous record, but rather a “litigation business plan” setting out Dr. Sikes’ summary of information obtained as a result of his interviews with Canadian IP firms he contacted in 2008. He further conceded that the plan was only written out after his third call with Mr. Garland on June 23, 2008, a full week after his initial conversation with Mr. Garland.

[44] In my view, Dr. Sikes was attempting to bolster his evidence by twice portraying his business plan as “contemporaneous” at paragraph 14 of this affidavit. The emphasis on this adverb was clearly intended to mislead the Defendants and the Court into believing that his notes were made at the time of initial call with Mr. Garland, that they were an accurate and complete record and that they were untainted by subsequent events. This was clearly not the case.

[45] Cross-examination also revealed that the discussions referenced in paragraph 11 of the Sikes Affidavit were not directed to Dr. Sikes’ “specific circumstances” as alleged. First of all, Dr. Sikes could not provide any details of the said circumstances. Secondly, he acknowledged in cross-examination that Mr. Garland had not reviewed the patent application at the time of the initial telephone call. It is apparent that Mr. Garland would not have been able to provide any useful advice with respect to Dr. Sikes’ circumstances without further information, including conducting a review of the patent in issue.

[46] Another troubling aspect of Dr. Sikes' evidence which cast into question his credibility is his repeated insistence that all of the information imparted to Mr. Garland (and to each of the other Canadian IP firms) was confidential simply because the communication was made in confidence. The fact that a communication was made in confidence does not establish that the information imparted in that communication was in fact confidential. Beyond vague assertions, Dr. Sikes does not explain what the information was and why such information was confidential.

[47] Dr. Sikes also refused to provide clearly relevant documents through selectively asserting privilege. This impeded Mr. Garland's ability to fully respond to the allegations made against him and this Court's ability to determine whether any confidential information or legal advice was in fact provided.

[48] At the hearing of the motion, I asked counsel for the Plaintiffs whether the Plaintiffs would be prepared to provide to the Court, on a confidential basis, a copy of the handwritten notes that Dr. Sikes had made on Mr. Garland's profile page that he had printed out and over which privilege had been claimed. The Plaintiffs ultimately agreed to produce the document. Upon reviewing the document, it is clear that the content of the sparse scribbled notes is in no way privileged or confidential. Once again, the Defendants and the Court were misled into believing that the notes contained some sensitive, important and highly confidential information and that there were valid reasons for not disclosing them.

[49] In light of the above, I agree with the Defendants that an adverse inference should be drawn from the fact that an unexpurgated version of the document attached as Exhibit "F" was

not produced. I can only assume that portions that have not been produced undermine the evidence of Dr. Sikes and the position of the Plaintiffs on this motion.

[50] During the cross-examination, Dr. Sikes attempted to add to his evidence by asserting that Mr. Garland had provided “advice” to not pursue the operating companies and only to pursue the water-treatment companies, which was “in part” the basis for the Plaintiffs’ delay in commencing this action. These assertions by Dr. Sikes are simply not credible. Dr. Sikes’ characterization of the alleged advice varied throughout the cross-examination, ultimately resulting in Dr. Sikes acknowledging that all that was discussed with Mr. Garland (and vetted by Dr. Sikes) was the “standard business practice” that it was inadvisable to sue your customers if it can be avoided.

#### IX. Analysis and Conclusion

[51] The evidence in the affidavits produced by the parties was conflicting in many respects. At first blush, the allegations made by Dr. Sikes in his affidavit appeared quite serious. However, in light of the significant concessions and admissions made by Dr. Sikes during the withering cross-examination by Defendants’ counsel, I am not satisfied that any relevant confidential information related to the present action was ever provided by Dr. Sikes to Mr. Garland, or that Mr. Garland provided any legal advice to Dr. Sikes.

[52] Dr. Sikes’ evidence was self-serving, vague, uncorroborated and, in parts, misleading. He attempted to paint himself as vulnerable and an inexperienced person seeking to obtain legal litigation services. He further demonstrated an abysmal ignorance of the concepts of privilege and

confidentiality. It is apparent to me that either Dr. Sikes did not have the faintest idea as to what these concepts were or, if he did, he blandly asserted privilege without justification.

[53] Although Mr. Garland has no specific recollection of his initial conversation with Dr. Sikes, I have no reason to doubt his evidence that the information he received from Dr. Sikes was general and of a non-confidential nature and that no legal advice was provided. Mr. Garland's evidence was not challenged in cross-examination and is largely corroborated by his notes taken while the discussion was actually taking place. Moreover, it is consistent with his law firm's conflict of interest review procedure.

[54] In determining the disputed facts in this motion, I am left with Dr. Sikes' tattered evidence and the clear and unchallenged evidence of Mr. Garland. In the circumstances, I prefer Mr. Garland's evidence over that of Dr. Sikes.

[55] Being substantially in agreement with the Defendants' submissions, I find that the Plaintiffs have failed to discharge their burden of establishing that a reasonably informed member of the public in possession of all the relevant facts would conclude that there was a solicitor and client relationship between Dr. Sikes and Smart & Biggar or that confidential information relevant to the matter at hand was provided to Mr. Garland.

[56] The motion shall accordingly be dismissed.

[57] During the hearing, the parties made submissions in relation to costs. The Defendants subsequently provided a Bill of Costs showing that counsel's fees relating to the motion

exceeded \$125,000.00 (including GST) and disbursements totalled \$8,991.36 (including GST). The Defendants reiterated their request that, in the event that the motion was dismissed, costs be awarded in their favour in the amount of \$20,000.00 (plus GST), for a total of \$29,991.36 (including GST). They further requested that costs be made payable forthwith and in any event of the cause.

[58] I see no reason to deviate from the general rule that costs should follow the event. Upon reviewing the Defendants' Bill of Costs, I conclude that the costs and disbursements claimed by the Defendants (except for those relating to Mr. Garland, who was an affiant and not counsel on this motion) are reasonable taking into account the complexity of the issues raised, and the amount of work involved. I am also satisfied that costs should be made payable forthwith in light of the nature of the motion, which is separate and distinct from the issues raised in the pleadings.

**THIS COURT ORDERS that:**

1. The motion is dismissed.
2. Costs in the amount of \$29,991.36 shall be awarded to the Defendants, to be paid forthwith in any event of the cause.

"Roger R. Lafrenière"  
-----  
Case Management Judge

Vancouver, British Columbia  
January 29, 2016

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1345-13

**STYLE OF CAUSE:** C. STEVEN SIKES, AQUERO, LLC AND  
AQUIAL, LLC v ENCANA CORPORATION,  
CENOVUS FCCL LTD., FCCL PARTNERSHIP  
AND CENOVUS ENERGY INC.

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** AUGUST 14, 2015

**REASONS FOR ORDER:** LAFRENIÈRE P.

**DATED:** JANUARY 29, 2016

**APPEARANCES:**

Ronald J. Robinson

FOR THE PLAINTIFFS/  
DEFENDANTS BY COUNTERCLAIM

Steven B. Garland  
Kevin K. Graham

FOR THE DEFENDANTS/  
PLAINTIFFS BY COUNTERCLAIM

David W. Aitken

FOR THE DEFENDANTS  
ON MOTION TO REMOVE SMART & BIGGAR  
AS SOLICITORS OF RECORD

**SOLICITORS OF RECORD:**

Ronald J. Robinson  
Calgary, Alberta

FOR THE PLAINTIFFS/  
DEFENDANTS BY COUNTERCLAIM

Smart & Biggar  
Ottawa, Ontario

FOR THE DEFENDANTS/  
PLAINTIFFS BY COUNTERCLAIM

Aitken Klee LLP  
Ottawa, Ontario

FOR THE DEFENDANTS  
ON MOTION TO REMOVE SMART & BIGGAR  
AS SOLICITORS OF RECORD