Federal Court  Cour fédérale

Date: 20230731

Docket: T-855-22

Citation: 2023 FC 1046

Montréal, Quebec, July 31, 2023

PRESENT: Mr. Justice Gascon

PROPOSED CLASS PROCEEDING

BETWEEN:

JOHN PAUL INGARRA,
KYLE PINNELL,
PAUL TANTALO,
and 5046013 ONTARIO INC.

Plaintiffs

and

DYE & DURHAM LIMITED,
OMERS INFRASTRUCTURE MANAGEMENT INC.,
and DOPROCESS LP

Defendants

ORDER AND REASONS

I. Overview

[1] The Defendants, Dye & Durham Limited [Dye & Durham] and DoProcess LP [DoProcess], seek an order removing Cartel & Bui LLP as counsel of record to the Plaintiffs, Mr. John Paul Ingarra, Mr. Kyle Pinnell, Mr. Paul Tantalo, and 5046013 Ontario Inc. This motion arises in the context of a proposed class action brought by the Plaintiffs, in which they allege that Dye & Durham and DoProcess engaged in a conspiracy to increase the price of real estate conveyancing software through Dye & Durham's acquisition of DoProcess from OMERS Infrastructure Management Inc. [OMERS Infrastructure] — who also appears as Defendant in this matter. According to the Plaintiffs, this transaction would have breached section 45 of the *Competition Act*, RSC 1985, c C-34 [Act] on illegal agreements between competitors, as well as sections 21 and 22 of the *Criminal Code*, RSC 1985, c C-46 [Criminal Code]. Pursuant to section 36 of the Act, the Plaintiffs claim damages resulting from the alleged breach, estimated to be in the amount of $200 million for the class members.

[2] In their motion, Dye & Durham and DoProcess submit that Mr. Calvin Goldman, the Plaintiffs' former counsel of record, would have received confidential information regarding their businesses in the course of previous retainers Mr. Goldman had for a predecessor company of Dye & Durham, OneMove Technologies Inc. [OneMove]. Because Mr. Goldman worked on the statement of claim in this proposed class proceeding [Statement of Claim] with the Plaintiffs' current counsel of record, Messrs. Nicholas Cartel and Glenn Brandys from Cartel & Bui, Cartel & Bui would now be "tainted" and would therefore need to be removed as counsel of record to prevent a potential misuse of Dye & Durham's and DoProcess' confidential information.

[3] This motion raises two issues: 1) was Mr. Goldman in a conflict of interest when he advised the Plaintiffs and worked with Cartel & Bui on the Statement of Claim? 2) if so, should Cartel & Bui and Messrs. Cartel and Brandys be removed as counsel of record to the Plaintiffs because of their relationship with Mr. Goldman?

[4] For the reasons that follow, the motion to remove Cartel & Bui as counsel of record will be dismissed. Further to my review of the evidence and the applicable case law, I am not persuaded that confidential information relevant to the matter at hand was imparted to Mr. Goldman in the context of his previous retainers, nor that it was passed upon Cartel & Bui. Cartel & Bui can therefore continue to act as counsel of record to the Plaintiffs in this matter.

II. Background

A. *The parties*

[5] Dye & Durham provides cloud-based software and technology solutions for legal and business professionals. Dye & Durham Corporation is Dye & Durham's key operating subsidiary.

[6] OneMove provided web-based real estate transaction platforms. Among others, OneMove operated the real estate conveyancing software platform branded "eConveyance™" [eConveyance]. eConveyance is a cloud-based software application that simplifies the process of buying, selling, and financing residential real estate transactions by connecting all of the participants in the property transfer process. In 2016, OneMove amalgamated with Dye &

Durham Corporation. As a result, Dye & Durham, through Dye & Durham Corporation, now operates eConveyance. OneMove's former Chief Executive Officer [CEO], Mr. Matthew Proud, is now CEO of Dye & Durham.

[7] DoProcess was a limited partnership that operated a suite of products related to real estate conveyancing and title searching, including the real estate conveyancing software called "Conveyancer," subsequently rebranded as "Unity." When it was owned by OMERS Infrastructure, DoProcess was an affiliated entity of Teranet Inc. [Teranet], which runs the electronic title registration system for the province of Ontario.

[8] In December 2020, Dye & Durham acquired DoProcess from OMERS Infrastructure. In June 2022, DoProcess was subsequently dissolved. All its properties were distributed to entities that were then amalgamated with Dye & Durham Corporation.

[9] Cartel & Bui is a law firm based in Toronto, Ontario. Mr. Cartel and Mr. Brandys work as lawyers at that firm. Mr. Goldman is a lawyer who established his own firm, The Law Office of Calvin Goldman, in 2020. Before he started his own firm, Mr. Goldman was Chair of the Competition, Antitrust and Foreign Investment Group at Goodmans LLP in Toronto. He was a partner at Goodmans from 2014 to September 2020. Mr. Goldman's law firm shares office space with Cartel & Bui, but the two firms are independent from one another.

B. *The factual context*

[10] At the time the proposed class action was commenced in late April 2022, the Plaintiffs' counsel of record were Messrs. Cartel and Brandys of Cartel & Bui and Mr. Goldman of The Law Office of Calvin Goldman.

[11] In June 2022, Dye & Durham and DoProcess communicated their concerns about Mr. Goldman's alleged conflicts of interest because of his past involvement — when he was a partner at Goodmans — in competition law matters involving Dye & Durham's predecessor OneMove. Following these exchanges between the parties, Mr. Goldman and his firm withdrew as counsel of record to the Plaintiffs, but Cartel & Bui did not. When he ceased acting in this matter, Mr. Goldman was clear that that he did not acknowledge that he was or had been in any form of conflict of interest.

[12] Dye & Durham and DoProcess allege that, in two specific instances, Mr. Goldman obtained confidential information from Dye & Durham's predecessor OneMove, as follows.

(1) The 2014 retainer

[13] In 2014, Mr. Proud — in his capacity as CEO of OneMove at the time — communicated with Mr. Goldman and other lawyers at Goodmans to seek advice about a potential abuse of dominance complaint under section 79 of the Act. An abuse of dominant position occurs when a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the result that competition has been, is, or is likely to be prevented or lessened substantially in a

market. Mr. Proud was of the view that the conduct of DoProcess prevented the expansion of the eConveyance software into Ontario.

[14] In the context of that retainer, Mr. Proud purportedly provided Mr. Goldman with confidential and commercially sensitive information about OneMove's business and products, including:

a. a description of OneMove's eConveyance product, the functionality of conveyancing software generally, and how OneMove's products compared to those offered by DoProcess and Teranet;
b. Mr. Proud and OneMove's views on the importance of integrating conveyancing software with title insurance offerings;
c. a description of OneMove's market share, and planned expansion into Ontario; and
d. a description of OneMove's allegations surrounding DoProcess and Teranet's anti-competitive conduct.

[15] According to Mr. Proud's affidavit evidence and his cross-examination, all of this information was provided verbally to Mr. Goldman during a single telephone conversation. No documents were handed out to Mr. Goldman at the time.

[16] Despite the fact that they had initially accepted to act for OneMove and stated they had no legal conflicts, Mr. Goldman and Goodmans subsequently advised OneMove that they were withdrawing from that retainer due to business conflicts.

[17] In his affidavit, Mr. Goldman testified that he had "no recollection of that [2014] consultation, or of Mr. Proud."

(2) The 2016 abuse of dominance complaint

[18] In 2015, Mr. Goldman and Goodmans started to act for an entity named Information Services Corporation [ISC] in relation to ISC's subsequent investment in OneMove. ISC is not related to Dye & Durham.

[19] In 2016, Mr. Goldman and Goodmans advised ISC again and worked with OneMove in submitting an abuse of dominance complaint — the very complaint discussed by Mr. Proud with Mr. Goldman in the context of the 2014 retainer — against DoProcess. At the time, ISC and OneMove agreed to the terms of a joint defence agreement [JDA].

[20] Dye & Durham and DoProcess submit that, in the context of those mandates for ISC, Mr. Goldman received significant confidential information about OneMove's business and its views on the conveyancing software industry and competitors. Because Mr. Goldman received a copy of the complaint submitted to the Competition Bureau [Bureau], Dye & Durham and DoProcess submit that Mr. Goldman obtained confidential information about OneMove's business and perspectives on the industry, including:

a. a description of OneMove's eConveyance application and the functionality of conveyancing software generally;
b. OneMove's views of the competitive importance of integrating software seamlessly with title insurers and land registry operators, such as Teranet;

c. OneMove's views of the key providers of conveyancing software, their products and market positions, including OneMove's views of DoProcess and its Conveyancer application;
d. allegations regarding DoProcess and Teranet's alleged anti-competitive practices, which were preventing OneMove's expansion into Ontario;
e. a description of pricing models of the conveyancing software offered by OneMove and DoProcess; and
f. OneMove's views as to what market conditions would facilitate a more meaningfully competitive market.

[21] I pause to underline that, on that retainer, Mr. Goldman was not acting for OneMove with respect to ISC's investment or to the contemplated abuse of dominance complaint to the Bureau. Mr. Goldman was instead solely acting for ISC. Mr. Goldman indeed submits that neither he nor any other colleague of his at Goodmans acted for Mr. Proud or OneMove with respect to the abuse of dominance complaint to the Bureau. He further points out that the JDA specifically provided that no lawyer-client relationship with the other party's counsel would be created, and that the agreement could not be used to seek to disqualify counsel on the basis of information being shared.

[22] In his affidavit, Mr. Goldman affirmed that no confidential information was imparted to him in his capacity as counsel to ISC in the context of this 2016 abuse of dominance complaint. Mr. Goldman was not cross-examined on his affidavit.

[23] In their respective affidavits and on cross-examination, Messrs. Cartel and Brandys both stated that they did not receive any confidential information regarding Dye & Durham or DoProcess from Mr. Goldman. They further indicated that the Statement of Claim was drafted and the proposed class action was commenced on the sole basis of publicly available information.

C. *The relevant statutory framework*

[24] The relevant legislative provisions are found in the Act and the Criminal Code. They read as follows.

(1) The Act

Recovery of damages	**Recouvrement de dommages-intérêts**
36 (1) Any person who has suffered loss or damage as a result of	**36 (1)** Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	**a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	**b)** soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant

loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

…

[…]

Conspiracies, agreements or arrangements between competitors

Complot, accord ou arrangement entre concurrents

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

(a) to fix, maintain, increase or control the price for the supply of the product;

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

…

[…]

Definitions

Définitions

(8) The following definitions apply in this section.

(8) Les définitions qui suivent s'appliquent au présent article.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

prix S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

…

[…]

Prohibition if abuse of dominant position

79 (1) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

Ordonnance d'interdiction : abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne à qui a été accordée en vertu de l'article 103.1 la permission de présenter une demande, il conclut à l'existence de la situation suivante :

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;

(b) that person or those persons have engaged in or are engaging in a practice

b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique

of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

d'agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

(2) The Criminal Code

Parties to offence

21 (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence

Participants à une infraction

21 (1) Participent à une infraction :

a) quiconque la commet réellement;

b) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;

c) quiconque encourage quelqu'un à la commettre.

Intention commune

(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la

would be a probable consequence of carrying out the common purpose is a party to that offence.

perpétration de l'infraction, participe à cette infraction.

Person counselling offence

Personne qui conseille à une autre de commettre une infraction

22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

22 (1) Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été commise d'une manière différente de celle qui avait été conseillée.

Idem

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(2) Quiconque conseille à une autre personne de participer à une infraction participe à chaque infraction que l'autre commet en conséquence du conseil et qui, d'après ce que savait ou aurait dû savoir celui qui a conseillé, était susceptible d'être commise en conséquence du conseil.

Definition of *counsel*

Définitions de *conseiller* et de *conseil*

(3) For the purposes of this Act, ***counsel*** includes procure, solicit or incite.

(3) Pour l'application de la présente loi, ***conseiller*** s'entend d'amener et d'inciter, et ***conseil*** s'entend de l'encouragement visant à amener ou à inciter.

III. Analysis

A. *Mr. Goldman's alleged conflict of interest*

[25] The first issue to be determined is whether Mr. Goldman was in a conflict of interest when he advised the Plaintiffs and worked with Cartel & Bui on the Statement of Claim, due to his previous retainers involving OneMove.

(1) The legal test

[26] The test to assess whether a conflict of interest arises from a lawyer's possession of confidential information has been established by the Supreme Court of Canada in *MacDonald Estate v Martin*, [1990] 3 SCR 1235 [*Martin*] at page 1260 and *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 [*McKercher*] at paragraph 24. In those decisions, the Supreme Court of Canada laid out a two-part approach to assessing conflicts over the potential misuse of confidential information:

1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
2) Is there a risk that it will be used to the prejudice of the client?

[27] In *MediaTube Corp v Bell Canada*, 2014 FC 237 [*MediaTube*] at paragraphs 27 and 28, the Court summarized how the *Martin* test applies. In the first part of the test, the moving party bears the onus of establishing that confidential information relevant to the matter at hand was

shared with the lawyer in the previous relationship. This can be met in two ways: 1) the moving party may adduce evidence that confidential information was in fact imparted to the lawyer during the solicitor-client relationship; or 2) the moving party may demonstrate that the lawyer's new retainer is "sufficiently related" to the matters covered in the prior relationship. If the latter option is satisfied, a rebuttable presumption arises that the law firm possesses confidential information which raises a risk of prejudice (*Martin* at pp 1260–1262; *MediaTube* at para 27). The test of whether the confidential information is relevant to the matter at hand requires the moving party to demonstrate that the confidential information or a portion of it received in the first retainer would likely be part of the factual context directly informing the lawyer's advice to the new client.

[28] Conversely, a defendant can rebut the inference that confidential information has been shared in two ways: 1) by demonstrating that no confidential information was actually shared; or 2) by demonstrating that the information is not "sufficiently related" or relevant to the matter on which the lawyer seeks to act (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2019 FC 1147 [*GCT*] at para 82).

[29] In *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36, the Supreme Court of Canada commented on its previous *Martin* decision and said the following at paragraph 42: "it is important to note that Sopinka J. [who authored the *Martin* reasons] imposed no onus on the moving party to adduce any further evidence as to the nature of the confidential information beyond that which was needed to establish that the receiving lawyer had obtained confidential information attributable to a solicitor and client relationship which was relevant to the matter at

hand." Accordingly, the moving party is only required to demonstrate that matters are "sufficiently related" in order to benefit from the presumption of receipt of relevant confidential information by the lawyer.

[30] The second part of the *Martin* test deals with the risk that confidential information will be used to the prejudice of the former client (*MediaTube* at para 28). If the lawyer's new retainer is found to be "sufficiently related" to the matters on which the lawyer worked for a former client, and the rebuttable presumption arises, the courts should then "infer that confidential information was imparted unless the [lawyer] satisfies the court that no information was imparted which could be relevant" (*Martin* at p 1260). This presumption can only be rebutted by the defendant if there is sufficient evidence to demonstrate that no relevant confidential information was effectively disclosed as a result of the prior relationship. But this is not an easy burden to discharge, as Sopinka J. emphasized in *Martin*: "[n]ot only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication" (*Martin* at p 1260).

[31] Having said that, I underline that *Martin* expressly recognizes that there may be cases where a party can satisfy "the court that no information was imparted which could be relevant" to the underlying dispute (*Martin* at p 1260).

[32] I pause to point out that the two-part *Martin* test is anchored in an overriding policy principle which has to inform and guide the courts in answering whether or not a disqualifying

conflict of interest arises in any particular case: the test must be such that "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur" (*Martin* at pp 1259–1260). Stated differently, the test is whether a reasonably informed member of the public "would conclude that counsel's removal is necessary for the proper administration of justice" (*Kaiser (Re)*, 2011 ONCA 713 [*Kaiser*] at para 21).

[33] The *Martin* decision also establishes a presumption that, where relevant confidential information is imparted in the context of a solicitor-client relationship, the information received by the "tainted" lawyer would be shared within the law firm that acquired it.

[34] The framework developed in *Martin* is not limited to solicitor-client relationships. It extends to information provided by other parties involved or associated with the firm's client. Accordingly, if confidential information is "attributable to a solicitor-client relationship," the *Martin* test applies (*GCT* at paras 36–39, 44).

[35] The *Martin* test was recently used by the Court in *McLean v Suhr*, 2018 FC 1000 [*McLean*]. In that case, the Court echoed the words of the Supreme Court of Canada in *Martin* and reiterated the importance, when considering conflicts of interest, to strike an appropriate balance between "the need to maintain a high standard for the legal profession and integrity of the judicial system, the right of litigant to choice of counsel, and the desirability for reasonable mobility in the legal profession" (*McLean* at para 28; see also *Martin* at p 1243).

[36] Indeed, it is fair to say that Canadian courts have taken a cautious approach and exercised a high level of restraint before interfering with a party's choice of counsel and exercising their discretion to remove counsel (*Kaiser* at para 21; *Salager v Dye & Durham Corporation*, 2017 BCSC 470 [*Salager*] at para 56). In other words, the courts will not issue orders removing counsel lightly.

[37] In the end, the determination of whether a conflict of interests exists is largely a factual inquiry, and the courts must examine each case on its own merits (*GCT* at para 34). In the present case, and for the reasons that follow, I find that Dye & Durham and DoProcess have not discharged their burden on the first part of the *Martin* test. In my view, they fail the test on the two fronts identified in *MediaTube*. First, I am not persuaded that, on a balance of probabilities, confidential information was provided to Mr. Goldman as part of the 2014 retainer or the 2016 abuse of dominance complaint. Second, the matters on which Mr. Goldman worked as part of the previous retainers are not "sufficiently related" to the matter now at issue in this proposed class action to justify the removal of Plaintiffs' counsel (*GCT* at para 82). In light of these findings, there is no need to determine whether, under the second part of the *Martin* test, there is a risk that relevant confidential information obtained in the 2014 retainer and the 2016 abuse of dominance complaint will be used to the prejudice of Dye & Durham and DoProcess.

(2) There is no clear and compelling evidence that confidential information was in fact imparted to Mr. Goldman

[38] Dye & Durham and DoProcess argue that Mr. Goldman had access to confidential information relevant to the present proposed class action as a result of his prior solicitor-client

relationship with Dye & Durham's corporate predecessor OneMove and the other ISC mandates he was part of. Dye & Durham and DoProcess submit that, since OneMove provided Mr. Goldman its own views about its business and products and about the implications of DoProcess' anti-competitive conduct for the broader conveyancing software market place and its competitiveness, this is confidential information capable of being used in some tangible manner now that Dye & Durham (as the successor to OneMove) is being sued on the theory that its acquisition of DoProcess is an illegal, anti-competitive conspiracy.

[39] Cartel & Bui respond that the information Mr. Proud mentions in his evidence is not confidential and is available in the public domain. In addition, they claim that Dye & Durham and DoProcess have failed to give any indication other than a general reference to alleged confidential information that Mr. Goldman would have received.

[40] I agree with Cartel & Bui that the moving parties have failed to demonstrate that confidential information was imparted to Mr. Goldman as part of the 2014 retainer or 2016 abuse of dominance complaint.

[41] Dye & Durham and DoProcess acknowledge that the confidentiality of the information claimed to be misused is relevant (*GCT* at para 46; *Chapters Inc v Davies, Ward & Beck LLP*, [2001] OJ No 206 (CA) [*Chapters*] at paras 31–32, 34–35), and that it is their burden to establish this, on the usual standard of balance of probabilities. Without revealing the information itself, Dye & Durham and DoProcess have to provide an outline of the nature of the information such

that the Court is in a position to assess whether it is confidential and whether it is relevant to the new matter (*Chapters* at paras 29–30).

[42] I am not convinced that, based on the evidence before me, confidential information has been provided to Mr. Goldman as part of the 2014 retainer or the 2016 abuse of dominance complaint, nor that such confidential information was effectively relayed to Cartel & Bui. In other words, I find no realistic possibility of relevant confidential information having been acquired by Mr. Goldman about Dye & Durham or DoProcess that can be used to the prejudice of Dye & Durham and DoProcess in the proposed class action. There are three reasons for that.

(a) *There is no evidence of "confidential" information*

[43] First, I am unable to conclude that the information identified by Mr. Proud in his affidavit is more likely than not to be confidential information. Regarding the 2014 retainer, Dye & Durham and DoProcess claim that Mr. Goldman obtained confidential information raised in the Statement of Claim relating to market positions in the conveyancing software industry, the preferential integration of Teranet software with Dye & Durham software, the difficulty of firms switching conveyancing software, and market conditions. More specifically, Mr. Proud identified the following information, allegedly relayed to Mr. Goldman in a single telephone conversation: a description of OneMove's eConveyance product, the functionality of conveyancing software generally, and how OneMove's products compare to those offered by DoProcess and Teranet; OneMove's views on the importance of integrating conveyancing software with title insurance offerings; a description of OneMove's market share, and planned expansion into Ontario; and a description of OneMove's allegations surrounding DoProcess and Teranet's anti-competitive

conduct. This also included information on potential points of differentiation between OneMove's and DoProcess' products and relative market positions.

[44] Turning to the 2016 abuse of dominance complaint, Mr. Proud identified the following information, allegedly emanating from the abuse of dominance complaint submitted to the Bureau: a description of OneMove's eConveyance application and the functionality of conveyancing software generally; OneMove's views of the competitive importance of integrating software seamlessly with title insurers and land registry operators, such as Teranet; OneMove's views of the key providers of conveyancing software, their products and market positions, including OneMove's views of DoProcess and its Conveyancer application; statements regarding DoProcess' and Teranet's alleged anti-competitive practices, which were preventing OneMove's expansion into Ontario; a description of pricing models of the conveyancing software offered by OneMove and DoProcess; and OneMove's views as to what market conditions would facilitate a more meaningfully competitive market.

[45] Dye & Durham and DoProcess maintain that the Statement of Claim uses information from all of the categories that Mr. Proud asserts he shared with Mr. Goldman in the previous retainers.

[46] In my view, the lists of information provided by Mr. Proud are not sufficient to establish the confidentiality of the information claimed to have been disclosed to Mr. Goldman. The descriptions of the information remain very generic, with no specific documents or categories of documents identified. In fact, Mr. Proud acknowledged that no documents were provided to

Mr. Goldman as part of the 2014 retainer. Moreover, the evidence adduced by Messrs. Cartel and Brandys in their respective affidavits and on cross-examination indicated that the alleged confidential information described by Mr. Proud is publicly available from multiple public sources and common knowledge of practitioners in the field. In addition, by its very nature, information on topics such as products, market conditions, competitors' activities and conduct, integration of businesses, or market positions of players in an industry is typically not confidential when it is not clear that it encompasses strategic or financial information.

[47] The current situation is quite different from the specific information found to be confidential in *GCT*, where well-identified reports, papers, presentations to the board, and board minutes were singled out by the plaintiffs (*GCT* at para 46). In that case, the Court found those descriptions sufficient to reflect the confidential nature of the information in issue. Here, however, the generic descriptions made by Mr. Proud do not allow me to conclude that confidential information was necessarily involved and imparted to Mr. Goldman as part of the 2014 retainer or 2016 abuse of dominance complaint.

[48] In addition, the evidence establishing that Cartel & Bui only used publicly available information to prepare the Statement of Claim has not been contradicted. Messrs. Cartel and Brandys affirmed in their affidavits that they obtained information from public sources to prepare the Statement of Claim, and they provided detailed references to specific evidence emanating notably from Exhibits 2 and 3 to Mr. Proud's affidavit containing Dye & Durham's July 13, 2020 Prospectus [Prospectus] and July 30, 2021 Annual Information Form [AIF]. The Prospectus discussed the conveyancing software services offered in the industry, eConveyance,

growth prospects in the conveyancing software sector, and the competitive strengths of Dye & Durham, while the AIF provided information on the industry context and the risks to Dye & Durham's business and the industry in general. These documents contain numerous references regarding the public nature of the information on the functionality of conveyancing software, marketing activities, the real estate conveyancing software platforms, and client integration. When information allegedly misused is found to be public, it tips the scales in favour of the responding party who argues that the information is not confidential (*Chingee v Canada (Attorney General)*, 2019 FC 532 [*Chingee*] at para 49).

(b) *There is no detail on the alleged "confidential" information*

[49] Second, the evidence referred to by Dye & Durham and DoProcess contains no detail on the alleged confidential information. It is true that the moving parties had the right not to explain the details of their relationship with Mr. Goldman and the claimed confidential information. But, they still had to show that relevant confidential information was effectively imparted to Mr. Goldman. The descriptions of alleged confidential information must be sufficient to allow the Court to determine the nature of the confidential information at issue in the motion (*GCT* at para 47). Unlike the situation in *GCT*, I do not find that the description of the alleged confidential information made by Dye & Durham and DoProcess is sufficient to meet the test set out in the case law (*GCT* at para 48).

[50] In *GCT* and *Chapters*, on which Dye & Durham and DoProcess relied in their submissions, the moving parties seeking removal of counsel provided the description of particular documents containing confidential information, such as material presented to the

company's board of directors, the board minutes, expert reports, financial statements, and information on future strategies concerning specific matters. The nature of the information was easily identified without the need to actually reveal the confidential information itself, as the nature of the documents was a sufficient indicator of the degree of confidentiality of the information they contained (*GCT* at paras 46–47; *Chapters* at para 6). In *GCT* for example, the Court found that the description of the documents provided by the moving party described the information "with sufficient detail to support the conclusion that it is confidential and relevant" (*GCT* at para 48).

[51] However, this is not the case here. Dye & Durham and DoProcess cannot claim that the present case is similar to *GCT* and *Chapters* because, in those two precedents, the Court had knowledge of specific documents exchanged, from which it could infer the confidential nature of the information they contained. In the case at bar, the Court is left with general categories of information that, by definition, could include both confidential and non-confidential information. There is no evidence and no detail allowing me to conclude that, on a balance of probabilities, information allegedly conferred on Mr. Goldman in these categories was confidential. There is "insufficient specific information before the Court to find that whatever information was provided at those times is confidential or sufficiently related" (*Chingee* at para 50).

[52] Dye & Durham and DoProcess rely on paragraph 32 of the *Chapters* case to argue that the categories of information they provided are sufficient. But that paragraph is actually a summary that the court was able to provide based on more specific information submitted by the moving party. Here, however, Dye & Durham and DoProcess provided only the level of

information that the court summarized in *Chapters*, without first providing the specific information to the Court as required. Therefore, they fall far short of identifying the nature of the information, as did the moving parties in *Chapter* — and in *GCT*. The possibility that Mr. Goldman obtained confidential information is only theoretical, and not realistic, due to the lack of clear and compelling evidence to that effect (*Chapters* at para 30).

[53] In other words, Dye & Durham and DoProcess did not provide clear reasons demonstrating that the possibility that Mr. Goldman obtained relevant confidential information is more than theoretical.

[54] Moreover, Mr. Proud failed to draw a link between the alleged confidential information and the Statement of Claim to which Mr. Goldman contributed. In his evidence, Mr. Proud did not indicate which allegations of the Statement of Claim reflected confidential information allegedly imparted to Mr. Goldman. He did not describe, with any granularity, the confidential information and documents that he claims were provided to Mr. Goldman. The Court is therefore left to speculate as to how the alleged confidential information could have found its way in the Statement of Claim.

(c) *There is no evidence of "confidential" information shared with Cartel & Bui*

[55] Third, there is no clear and convincing evidence establishing that confidential information was relayed to Cartel & Bui or that any confidential information was shared between Mr. Goldman and Cartel & Bui. Mr. Proud indeed acknowledged that he does not know whether

Mr. Goldman shared confidential information with Cartel & Bui or not. Conversely, the affidavits of Messrs. Cartel and Brandys state that no confidential information was shared and that Mr. Goldman had no role in the research, investigation, and drafting of the Statement of Claim. Furthermore, the presumption established in the *Martin* decision regarding the "tainted lawyer," as discussed above, cannot apply, since I do not find that relevant confidential information was imparted in the context of a solicitor-client relationship.

(d) *Conclusion*

[56] In light of all this evidence, I conclude that Dye & Durham and DoProcess have not established, on a balance of probabilities, that confidential information was imparted to Mr. Goldman further to the 2014 retainer or the 2016 abuse of dominance complaint. They therefore do not meet the first way identified by the Court in *MediaTube* to satisfy the first part of the *Martin* test.

(3) Mr. Goldman's previous retainers are not "sufficiently related" to the proposed class action

[57] Dye & Durham and DoProcess also submit that, in any event, the matters covered in the 2014 retainer and the 2016 abuse of dominance complaint are "sufficiently related" to the proposed class action because they all concern the real estate conveyancing software market. This is the second way identified by the Court in *MediaTube* to satisfy the first part of the *Martin* test.

[58] Cartel & Bui respond that the alleged confidential information emanating from these two previous matters is unrelated to the proposed class action. They submit that the subject matter of the previous retainers, namely, an alleged abuse of dominance under section 79 of the Act, refers to principles of competition law and factual issues that are entirely distinct from and unrelated to the alleged breach of section 45 of the Act at the source of the present proposed class action.

[59] Again, I agree with Cartel & Bui.

[60] Further to my review of the evidence on the record, I find that Dye & Durham and DoProcess have failed to demonstrate how the nature of the information that was allegedly imparted on Mr. Goldman in the previous retainers is "sufficiently related" to the matters at issue in this proposed class action. Stated differently, I cannot find clear, cogent, and compelling evidence that the two matters are related to the point where it would justify a disqualification of Cartel & Bui.

(a) ***The "sufficiently related" requirement***

[61] The notion of "sufficiently related" matters was not an issue in the *Martin* case as the two retainers clearly concerned the same piece of litigation. But, Sopinka J. nonetheless saw the counterpart American test of "substantial relationship" as a useful reference point (*Martin* at p 1260). As stated in *Chapters* at paragraph 28, a determination of whether there is a substantial relationship between two matters turns on the possibility, or appearance thereof, that confidential information might have been given to a lawyer in relation to the subsequent matter in which disqualification is sought. The rule involves a realistic appraisal of the possibility that

confidences had been disclosed in the one matter, which will be harmful or detrimental to the client in the other.

[62] Given the drastic impact of a finding of conflict of interest, there must be cogent and compelling evidence of a sufficient connection between the two matters at issue. To be sufficiently related to satisfy the test, the information previously imparted to the lawyer must be "capable of being used against" the client in some "tangible manner" (*McKercher* at para 54; *GCT* at para 51; *Chapters* at para 30; see also *Salager v Dye & Durham Corporation*, 2017 BCSC 470 [*Salager*] at para 30).

[63] Dye & Durham and DoProcess argue that this threshold for relevance is a "low" one. With respect, I do not agree. This is not what the case law has established. There must instead be clear and cogent evidence that, in the particular circumstances of each case, it is reasonably possible that the lawyer acquired confidential information in one matter that would be relevant to the determination of other matter. There needs to be clear, cogent, and compelling evidence that the retainers and the new matter are sufficiently connected (*MediaTube* at paras 106, 109, 121–122, 127; *Hogarth v Hogarth*, 2016 ONSC 3875 [*Hogarth*] at paras 31, 33; *Remus v Remus*, 2002 CanLII 2763 (ONSC) [*Remus*] at paras 13–14). As it serves to create a rebuttable presumption of transfer of confidential information, the Court has qualified the threshold for establishing this connection as "high" (*MediaTube* at para 109).

[64] The former client must show that the possibility of relevant confidential information having been acquired is realistic and not just theoretical (*Chapters* at para 30; *Hogarth* at para

31): "[f]or the court to find that the retainers are sufficiently related, it must conclude that in all the circumstances it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter" (*Chapters* at para 30; see also *Chingee* at para 29; *Salager* at para 55, citing *Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd*, 2008 NSCA 22 at paras 50–52).

[65] In *Hogarth*, the court stated that the test of "sufficient relationship" is whether, given the nature and detail of the confidential information received in the first retainer, it is "likely that at least some of that information could be relevant to the current matter" and "likely to be part of the factual context directly informing" counsel's advice to the new client (*Hogarth* at para 32, citing *Chapters* at para 36). The information "will be relevant if it assists the lawyers to advance the cause of the new client against the old client" (*Chapters* at para 36). It is incumbent on a party seeking to disqualify a solicitor to specify why the documents and information supplied previously to the lawyer are connected or related to the new matter rather than leave the court to have to guess at the degree of connection (*Hogarth* at para 33).

[66] The moving parties therefore had to specify why the information previously supplied to Mr. Goldman in the 2014 and 2016 retainers is sufficiently connected or related to the proposed class action and how it can be harmful to Dye & Durham and DoProcess in this matter. Mere assertions of similarity or generalities are not enough to remove a solicitor (*Remus* at paras 13–14), and a tenuous link will not suffice. The sufficiency of the relationship must be looked at in light of the underlying purpose of the inquiry. When the focus is the protection of the client's confidential information, there must be evidence showing that it is reasonably possible that the

confidential information obtained in the prior retainer can be used against the client in a tangible manner in the new retainer. In both *Martin* and *McKercher*, the Supreme Court indicated that the confidential information must be capable of being detrimental to the client in the new matter (*McKercher* at para 24; *Martin* at p 1260; see also *Chapters* at para 30).

(b) ***No likely use of confidential information in a tangible manner***

[67] In the present case, I am not convinced that information capable of being used in a tangible way against Dye & Durham and DoProcess in the current proposed class action — a criminal conspiracy case — has been provided to Mr. Goldman in the previous retainers — two civil abuse of dominance matters — so that removal of counsel is warranted. Here, Dye & Durham and DoProcess have offered no more than a bare assertion that the past relationships with OneMove provided Mr. Goldman with access to Dye & Durham's strategic and tactical decision-making processes that would directly inform the Plaintiffs in the proposed class action. As the Supreme Court held in *McKercher* at paragraph 54, that is insufficient to establish that the firm acquired confidential information capable of being used against the client in some tangible manner.

[68] The information listed in Mr. Proud's affidavit, which he purports to remember sharing with Mr. Goldman, concerns different and unrelated principles of competition law that have nothing to do with this proposed class action.

[69] In order to assess the relevance of the information to the matters at issue, it is essential to understand the contents and purpose of the legal provisions at stake. This goes back to the

fundamental structure of the Act. The Act adopts a bifurcated approach to anti-competitive behaviour. On the one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions. Currently, there are some 25 criminal offences under the Act, the most prominent being section 45 prohibiting price-fixing and other "hard-core" cartel-like agreements between competitors. Conversely, other types of conduct are considered only potentially anti-competitive, are not treated as crimes, and are instead subject to civil review and potential sanctions, but only if they have anti-competitive effects. Abuse of dominance is one of those civil provisions.

[70] This proposed class action is predicated on an alleged contravention of section 45 of the Act and a claim for damages under section 36 of the Act. A person commits an offence under section 45 when that person: (i) conspires, agrees or arranges; (ii) with a competitor of that person with respect to a product or service; (iii) to do any of the three things mentioned in subsection 45(1), namely, fix prices; allocate sales, territories, customers or markets; or control output. Since section 45 is a criminal offence, the requisite criminal intent or *mens rea* must also be demonstrated (*Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 [*Jensen*] at para 97).

[71] Since the 2009 amendments to the Act entered into force, the focus of the assessment under section 45, and the key constituent of the provision, is whether there is an agreement between competitors (as competitors are defined in subsection 45(8)) to engage in one of the three prohibited conducts. Under that criminal provision, the Plaintiffs are no longer required to establish that the impugned agreement has or will have the effect of preventing or lessening competition substantially. The existence of actual or likely anti-competitive effects is no longer

relevant, since the element that required a demonstration of specific anti-competitive effects, namely, an "undue" lessening or prevention of competition, was eliminated from the provision. The proof of anti-competitive effects is no longer necessary, and competitive injury is now presumed and implicit for conduct covered by section 45. In other words, section 45 describes three categories of agreements that are so likely to harm competition and to have no pro-competitive benefits that they are deserving of sanction without a detailed inquiry into their actual competitive effects (*Jensen* at para 96; see also *Mohr v National Hockey League*, 2021 FC 488 at paras 38, 57).

[72] What the Plaintiffs will therefore need to demonstrate in the proposed class action is the existence of an agreement between Dye & Durham and DoProcess to engage in the price-fixing conduct described in the Statement of Claim. They will also need to demonstrate the intention of the parties to enter into the alleged agreement — at the time Dye & Durham acquired DoProcess —, and the *mens rea* to agree on the prohibited conduct. No questions of market assessment, anti-competitive conduct, market conditions, or substantial lessening of competition arise under section 45 of the Act.

[73] By comparison, the section 79 complaint, which animated the two previous retainers involving Mr. Goldman, is completely separate and distinct from the proposed class proceeding. A complaint concerning an alleged abuse of dominance under section 79 of the Act can only be made out if a practice of anti-competitive acts is established and if it can be proven that the acts have had or are likely to have "the effect of preventing or lessening competition substantially." In the context of an abuse of dominance complaint, it is clear that issues such as market

definition, anti-competitive effects, and the conduct of competitors are central and determinative of the outcome of the complaint.

[74] Contrary to what Dye & Durham and DoProcess allege, it is therefore highly relevant that an abuse of dominance complaint involves a vastly different legal framework than a claim under section 45. Whether two matters are "sufficiently related" must be assessed in reference to the actual issues to be decided in the two matters, and informed by the issues in dispute.

[75] In light of the foregoing, I am not persuaded that the information received by Mr. Goldman in the 2014 retainer and the 2016 abuse of dominance complaint — in the context of retainers dealing with an alleged abuse of dominance — is "sufficiently related" to the matters raised in the proposed class action and that it is capable of being used against Dye & Durham and DoProcess in some "tangible manner" in the new action. Despite the able submissions made by counsel for Dye & Durham on this point, I do not find that general information on the real estate conveyancing software market, on OneMove's business and products, or on OneMove's views of its competitors or market conditions can be qualified as "sufficiently related" to the issues to be determined in the proposed class action. They are not part of the factual context directly informing Cartel & Bui in their proposed class action against Dye & Durham and DoProcess. More specifically, none of the information relates to an alleged agreement involving Dye & Durham or DoProcess, or to their intention in that respect.

[76] It may be arguably possible that the information coming from the previous retainers could have a peripheral relevance, but the argument sounds theoretical and speculative. In my

view, a remote possibility that some information "could" have some contextual relevance is not enough to meet the requirement of the first part of the *Martin* test, especially in the absence of any evidence on the potential harmful or detrimental effect of such information on the client.

[77] I would add that this is also not a situation where Mr. Goldman is attempting to undermine the legal advice he had provided to Dye & Durham's predecessor OneMove. The matter in dispute — and the key determinative issue — in the proposed class action will be the existence of an agreement to fix prices between Dye & Durham and DoProcess, and their intention to enter into such agreement. It is far from the alleged anti-competitive conduct of DoProcess which was at the source of the abuse of dominance complaint in the previous retainers.

[78] There is no evidence supporting the assertion that Mr. Goldman or Cartel & Bui could use confidential information obtained in the 2014 retainer or the 2016 abuse of dominance complaint to the detriment of Dye & Durham or DoProcess in this proposed class action (*McKercher* at para 24).

[79] I have to decide this issue of "sufficiently related" matters based on the evidence before me and on a balance of probabilities, and no clear, cogent, and compelling evidence has been presented to disqualify Mr. Goldman or Cartel & Bui.

[80] The present case can easily been distinguished from the *Chapters* and *GCT* matters relied upon by Dye & Durham and DoProcess. In *Chapters*, it was obvious that the issues to be dealt

with by the Bureau in the new matter would be the same as they were in the prior instance and required that the "same kind of information be addressed" (*Chapters* at para 35). In the new matter, the law firm Davies was acting for an entity called Trilogy in the context of an unsolicited offer for the Chapters shares. In the prior retainer, Davies had previously acted for Coles when Smith acquired it and the two amalgamated to form Chapters. The two matters involved transactions which were subject to the same provisions of the Act, where the anti-competitive effects of the transactions were the central issue, and where the Bureau had to determine whether a substantial lessening of competition was likely. The evidence demonstrated that it was reasonably possible that Davies received confidential information pursuant to the Chapters retainer that could be directly relevant to the Trilogy matter (*Chapters* at para 37).

[81] In *GCT,* there was also clear and compelling evidence that the lawyer had obtained confidential information relating to the very matters in dispute between the parties.

[82] This is not the case here. I find no clear and compelling evidence that the possibility of relevant confidential information having been acquired is realistic and not just theoretical (*Chingee* at paras 48–50). None of the information allegedly discussed in the context of the 2014 and 2106 retainers and described by Mr. Proud relates to an existing or potential agreement between Dye & Durham and DoProcess in the context of the 2022 acquisition, or to the state of mind of both parties regarding such a potential agreement. In fact, Dye & Durham and DoProcess have provided no evidence demonstrating why and in what respect the confidential information allegedly obtained in the first two retainers was connected or related to this proposed class action (*Hogarth* at para 33; *Remus* at para 14).

[83] Dye & Durham and DoProcess argue that Mr. Proud's view of the competitive marketplace, which was communicated to Mr. Goldman, has a role to play in establishing the foreseeability of the outcome of the agreement under section 45 of the Act — that is, the *mens rea* element of the offence. They submit that Mr. Goldman has admitted this relevance in paragraph 30 of his affidavit, where he stated that "[a]ny allegations in the statement of claim concerning the market for providing conveyancing software platforms in Canada are relevant only to the foreseeability of the result of the impugned agreement, that is, the *mens rea* of an offence under s. 45 of the Competition Act." They also suggest that market information may be relevant in assessing damages under section 36 of the Act.

[84] With respect, I do not agree that this constitutes "clear and cogent" evidence of a sufficient connection to the proposed class action, or that such a connection is sufficient to justify the disqualification of Cartel & Bui as counsel of record. In order for the information to be "capable of being used against the client in some tangible manner" (*McKercher* at para 54), the requirement of tangibility demands a realistic possibility that the information will be capable of being used against the client in the new matter. In this case, counsel for Dye & Durham and DoProcess admitted that there is no way to know, at this stage of the proceedings, whether or not any information emanating from the previous retainers can be used due to the lack of case law on the subject. This only serves to demonstrate the theoretical aspect of the relevance they allege. Moreover, the *mens rea* for a section 45 illegal agreement arises from the agreement, and is met when it is demonstrated that the competitors intentionally entered into the agreement found to exist.

[85] On the record before me, I do not find clear and convincing evidence able to show a real possibility that any information possibly given to Mr. Goldman could be used against Dye & Durham and DoProcess in this proposed class proceeding.

[86] The determination of the existence of conflicts of interest is fact-specific (*GCT* at para 34). Without anything more than general assertions on the nature of the information exchanged such as OneMove's views as to what market conditions would facilitate a more meaningfully competitive market, it would be inappropriate to interfere with the right of the Plaintiffs to choose their own counsel.

[87] The circumstances of the events described by Mr. Proud should have allowed him, without revealing the specifics, to give more than general allegations about the nature of the information exchanged and how it relates to the current proposed class action (*Chingee* at paras 49–50). Here, Dye & Durham and DoProcess offer "no more than a bare assertion that the past relationship" provided access to some degree of information (*Salager* at para 58). They have not established that the previous retainers and the proposed class action are sufficiently related such as to result in a presumption that OneMove provided confidential information to Mr. Goldman relevant to this proposed class action. The information about OneMove's business and products and the alleged anti-competitive conduct of DoProcess do not meet the requirement of "clear and cogent" evidence necessary to remove the Plaintiffs' counsel of choice. A fair-minded and reasonably informed member of the public would not conclude that the proper administration of justice compels the removal of Cartel & Bui. The market information, alleged anti-competitive conduct, and business positioning of OneMove and DoProcess relied upon by the moving parties

in their materials are all irrelevant to the objective determination that will need to be done in the proposed class action regarding an illegal agreement to enter into one of the prohibited conducts contained in section 45 of the Act.

[88] I do not dispute that the interest in protecting and promoting the integrity of the legal system takes precedence over hardship caused to clients when they are forced to retain different lawyers (*GCT* at para 116). However, the moving party is still required to provide clear and cogent evidence that confidential information obtained is relevant and sufficiently related to the matter at hand. In *MediaTube* at paragraph 115, this Court relied on paragraphs 13 and 14 of *Remus* where the Superior Court of Ontario mentioned that it was incumbent on a party seeking to disqualify a solicitor to "specify why the documents and information supplied previously to the solicitor are connected or related to the new matter rather than leave the court to have to guess at the degree of connection" (*Remus* at para 14).

[89] Here, I am of the view that Dye & Durham and DoProcess did not provide "clear and cogent evidence" on the sufficient relevance of information purportedly exchanged with Mr. Goldman in past occurrences. In fact, the Court is instead left "to guess at the degree of connection." This is not sufficient to establish the presumption as set out in *Martin*.

[90] In sum, Dye & Durham and DoProcess have failed to establish that the past mandates in which Mr. Goldman was involved are sufficiently related to this proposed class action. They also failed to prove that confidential information was actually imparted to Mr. Goldman. In the circumstances of this case, I am not persuaded that a reasonably informed member of the public

— i.e., a person informed of the distinction between an alleged illegal agreement under section 45 of the Act and a potential abuse of dominance under section 79 of the Act — would believe that confidential information sufficiently related to the proposed class action was passed on to Mr. Goldman in the context of the 2014 retainer or 2016 abuse of dominance complaint (*Martin* at p 1260).

(4) Risk of misuse of confidential information

[91] The risk of misuse of confidential information is the second stage of the *Martin* analysis, but the Court does not need to deal with it in the circumstances. Because there is no evidence that confidential information relevant to the present matter was imparted to Mr. Goldman, there is no risk of misuse of such information.

B. *Cartel & Bui's removal as counsel of record*

[92] In light of my previous findings, there is no disqualifying conflict of interest for Cartel & Bui and no reason to remove them as counsel of record to the Plaintiffs.

IV. Conclusion

[93] On the record before me, I am not convinced that confidential information was conveyed by OneMove to Mr. Goldman as part of the 2014 retainer or the 2016 abuse of dominance complaint. I am also not persuaded that the previous retainers and involvement of Mr. Goldman with OneMove and the matters at issue in this proposed class action are sufficiently related.

Flowing from this, I find that no relevant confidential information was passed on from OneMove to Mr. Goldman or from Mr. Goldman to Cartel & Bui. As a result, neither Mr. Goldman nor Cartel & Bui is in a conflict of interest, and Cartel & Bui is able to continue to represent the Plaintiffs in the proposed class action.

[94] The motion for removal of Cartel & Bui as counsel of record is therefore dismissed with costs.

[95] Following the hearing of this matter on October 6, 2022, the parties conferred on the issue of costs, as requested by the Court. The moving parties (Dye & Durham and DoProcess) and Cartel & Bui informed the Court that they have agreed that the costs of the motion should be fixed at $11,000 (inclusive of disbursements and tax), payable to the successful party.

ORDER in T-855-22

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Costs in the agreed upon all-inclusive, lump-sum amount of $11,000 are awarded to the Plaintiffs.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-855-22
STYLE OF CAUSE:	JOHN PAUL INGARRA, KYLE PINNELL, PAUL TANTALO and 5046013 ONTARIO INC. v DYE & DURHAM LIMITED, OMERS INFRASTRUCTURE MANAGEMENT INC., and DOPROCESS LP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 6, 2022
ORDER AND REASONS:	GASCON J.
DATED:	JULY 31, 2023

APPEARANCES:

Michael L. Shell	FOR THE RESPONDING PARTY CARTEL & BUI LLP
Sean Dewart	FOR THE RESPONDING PARTY THE LAW OFFICE OF CALVIN GOLDMAN, K.C.
Nicholas J. Cartel Glenn M. Brandys	FOR THE PLAINTIFFS
Robert W. Staley Emrys C. Davis Douglas A. Fenton	FOR THE DEFENDANTS DYE & DURHAM LIMITED AND DOPROCESS LP
Akiva Stern	FOR THE DEFENDANT OMERS INFRASTRUCTURE MANAGEMENT INC.

SOLICITORS OF RECORD:

MICHAEL L. SHELL LITIGATION Toronto, Ontario	FOR THE RESPONDING PARTY CARTEL & BUI LLP
DEWART GLEASON LLP Toronto, Ontario	FOR THE RESPONDING PARTY

	THE LAW OFFICE OF CALVIN GOLDMAN, K.C.
CARTEL & BUI LLP Toronto, Ontario	FOR THE PLAINTIFFS
BENNETT JONES LLP Toronto, Ontario	FOR THE DEFENDANTS DYE & DURHAM LIMITED AND DOPROCESS LP
MCCARTHY TÉTRAULT LLP Toronto, Ontario	FOR THE DEFENDANTS OMERS INFRASTRUCTURE MANAGEMENT INC.