Federal Court of Appeal  Cour d'appel fédérale

Date: 20170217

Docket: A-222-16

Citation: 2017 FCA 37

CORAM: **NOËL C.J.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

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

Appellants

and

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

Respondents

Heard at Ottawa, Ontario, on February 15, 2017.

Judgment delivered at Ottawa, Ontario, on February 17, 2017.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal from a decision of the Federal Court wherein Bell J. (the Federal Court judge) dismissed an appeal from an interlocutory order issued by Prothonotary Lafrenière (the Prothonotary) wherein he refused to grant C. Steven Sikes ("Dr. Sikes"), Aquero, LLC and Aquial, LLC's (collectively "the appellants") motion to have Smart & Biggar/Fetherstonhaugh

LLP (“Smart & Biggar”) removed as solicitors of record of EnCana Corporation, Cenovus FCCL Ltd., FCCL Partnership and Cenovus Energy Inc. (collectively, “the respondents”).

[2] For the reasons which follow, I am of the view that the appeal cannot succeed.

I. Background

[3] In mid-2008, Dr. Sikes entered in communication with eight different law firms in an effort to obtain representation to enforce the appellants’ rights arising from a pending patent in Canada. Among those that were contacted, and declined to act by reason of being conflicted out, was Smart & Biggar, the respondents’ current solicitors of record (Reasons of the Prothonotary, para. 12).

[4] Following a referral from a lawyer at Ogilvy Renault LLP, Dr. Sikes located Mr. Garland on Smart & Biggar’s website and proceeded to call him on June 16, 2008 (Reasons of the Prothonotary, para. 13). From the undisputed factual account before the Prothonotary, it is established that a 15-minute call ensued in which Dr. Sikes informed Mr. Garland that he was in search of representation in respect of “a Canadian patent pending and a possible infringement situation related to water clarification chemicals and processes in the oil-sands region” (Reasons of the Prothonotary, para. 13). As per Smart & Biggar’s conflict of interest policy, Mr. Garland obtained information from Dr. Sikes and opened a general file named “Aquero Company” (Reasons of the Prothonotary, para. 13).

[5] In subsequent email correspondence, Dr. Sikes reaffirmed his interest in obtaining Smart & Biggar's representation to which Mr. Garland replied that he would have to complete a standard conflict check (Reasons of the Prothonotary, para. 15). Dr. Sikes contacted Mr. Garland on two additional occasions prior to being informed, on June 23, 2008, that Mr. Garland could not act for the appellants due to a conflict of interest (Reasons of the Prothonotary, para. 16). Mr. Garland nevertheless provided Dr. Sikes with recommendations as to potential law firms to represent the appellants (Reasons of the Prothonotary, para. 16).

[6] In May of 2015, more than a year after the appointment of Smart & Biggar as solicitors of record for the respondents in the already ongoing matter opposing the parties (Reasons of the Prothonotary, paras. 17-20), counsel for the appellants filed a motion for removal of Smart & Biggar on the basis of the June 2008 interactions between Dr. Sikes and Mr. Garland (Reasons of the Prothonotary, para. 29).

[7] In support of their motion, the appellants alleged that confidential information had passed from Dr. Sikes to Mr. Garland and that legal advice was given to Dr. Sikes (Reasons of the Prothonotary, para. 3). An affidavit sworn by Dr. Sikes was filed in support of the motion, and in response, the respondents filed affidavits sworn by Mr. Garland and by Mr. Graham, another lawyer with Smart & Biggar (Reasons of the Prothonotary, para. 30). Only Dr. Sikes was cross-examined on his affidavit (Reasons of the Prothonotary, para. 31).

[8] The Prothonotary, who was also acting as case management judge, dismissed the motion for removal of Smart & Biggar as solicitors of record holding that Mr. Garland's unchallenged

evidence established that the information communicated by Dr. Sikes was general and non-confidential in nature, and that Mr. Garland had not provided legal advice. While Mr. Garland may not have had specific recollection of the 15-minute conversation, his evidence was corroborated by the notes which he had taken during the phone call and was also consistent with Smart & Biggar's conflict of interest review procedure (Reasons of the Prothonotary, para. 31). In short, the Prothonotary accepted Mr. Garland's assertion that he would not have strayed from this procedure.

[9] The Prothonotary awarded costs to the defendants (respondents before us) to be paid forthwith in any event of the cause (Order of the Prothonotary, para. 2).

[10] The Federal Court judge dismissed the appeal that ensued. He simply referred to the Prothonotary's conclusion that no solicitor–client relationship materialized and found no basis to intervene with this finding (Reasons of the Federal Court judge, para. 16). In coming to his conclusion, the Federal Court judge gave the Prothonotary's decision a high degree of deference considering that the decision to remove solicitor of record is discretionary in nature and highly factual, and also because the Prothonotary had been the case management judge overseeing the underlying action (Reasons of the Federal Court judge, para. 13).

[11] On the issue of costs, the Federal Court again refused to intervene with the Prothonotary's costs award and ordered that "the appellants shall jointly and severally pay costs [on appeal] to respondents […] in any event of the cause" (Order of the Federal Court judge, para. 2).

II. Analysis and disposition

[12] In *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943, para. 79 [*Hospira*], this Court held that henceforth discretionary decisions issued by prothonotaries are reviewable pursuant to the *Housen v. Nikolaisen*, 2002 SCC 33 framework. In a case such as the present one where each level of decision-maker is in agreement as to the outcome, this Court must look to the Prothonotary's decision to determine whether the Federal Court judge erred in law or made a palpable and overriding error in refusing to intervene (*Hospira*, paras. 83-84).

[13] In dismissing the motion for removal, the Prothonotary advanced two distinct grounds. First, he held that the appellants failed to demonstrate the existence of a solicitor–client relationship between Dr. Sikes and Smart & Biggar. Turning to what he identified as "[t]he real issue", he went on to hold that no confidential information that could be used to the prejudice of the appellants had been conveyed by Dr. Sikes to Smart & Biggar (Reasons of the Prothonotary, paras. 7, 8, and 55).

[14] Addressing this second ground, the appellants recognize that in order to succeed on their motion, the Prothonotary had to be satisfied that "there [was] a risk that confidential information would be misused" (memorandum of the appellants, para. 18 citing *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, paras. 15, 23, and 44-51 [*MacDonald Estate*]). However, they challenge the Prothonotary's conclusion that there was no such risk.

[15] The appellants raise this challenge on a variety of grounds, all of which focus on the Prothonotary's alleged misunderstanding of the test set out in *MacDonald Estate*, which requires the Court to consider the following questions: (1) Did the lawyer received confidential information attributable to a solicitor–client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client? (*MacDonald Estate*, para. 45).

[16] The appellants' main ground of appeal is that the information that was passed on by Dr. Sikes to Smart & Biggar is presumed to be confidential and that the Prothonotary failed to give effect to this presumption. In the end, the appellants claim to have been wrongly burdened with proving "a thing which [they] could not prove" (memorandum of the appellants, paras. 13 and 45 citing *MacDonald Estate*, paras. 44-46 and *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 876 [*Descôteaux*]).

[17] I accept that the conveyance of information by Dr. Sikes to Mr. Garland took place while they were exploring an eventual solicitor–client relationship and that given the rule set out in *Descôteaux*, the presumption of confidentiality arguably extends to the information so passed.

[18] This does not fit squarely within the parameters of the test set out in *MacDonald Estate* inasmuch as the presumption of confidentiality applied in that case is premised on the existence of a solicitor–client relationship. *Descôteaux* was not referred to in *MacDonald Estate* presumably because the solicitor–client relationship at the source of conflict in that case was in place at the relevant time (*MacDonald Estate*, para. 2), and as a result no issue arose as to when

information is presumed to be conveyed in confidence in the process leading to a retainer (*Descôteaux*, at 876-877).

[19] I agree with the appellants that when read in light of *Descôteaux*, an argument can be made that the two questions set out in *MacDonald Estate* have to be answered even where a solicitor–client relationship does not actually materialize, with the result that the presumption of confidentiality discussed in *MacDonald Estate* arguably applies to the information that was conveyed by Dr. Sikes to Mr. Garland.

[20] The Prothonotary in one paragraph at the end of his reasons uses language which suggests that he relied on this presumption and that moreover he understood it to operate against the appellants. His ultimate conclusion is premised by the words "I find that the [appellants] have failed to discharge their burden […]" (Reasons of the Prothonotary, para. 55).

[21] I need not decide whether the Prothonotary erred in this regard because assuming, without deciding, that the presumption favoured the appellants, the decision of the Prothonotary does not hinge on who had the burden or who benefited from the presumption.

[22] The appellants did not rest their case on this presumption, instead choosing to adduce specific evidence on point. Dr. Sikes swore a lengthy affidavit, on which he was cross-examined at length, and in which he identified with specificity the confidential exchanges which took place and the advice received (Reasons of the Prothonotary, paras. 32 and 34). This evidence was challenged by Mr. Garland in the affidavit that was filed in response.

[23] The conclusion reached by the Prothonotary rests on his appreciation of the contradictory evidence placed before him. In the end, he preferred the clear and unchallenged evidence of Mr. Garland and discarded the "tattered" evidence of Dr. Sikes (Reasons of the Prothonotary, para. 54). Specifically, he found that Dr. Sikes's cross-examination exposed misstatements, mischaracterizations, embellishments (Reasons of the Prothonotary, para. 42) and that his evidence was in part misleading (Reasons of the Prothonotary, para. 52).

[24] The Prothonotary explains his conclusion at paragraph 51 of his reasons under the heading Analysis and Conclusion as follows (Reasons of the Prothonotary, para. 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.

[25] In so holding, the Prothonotary did not place the appellants in a situation where they had to prove something which they could not prove. In *MacDonald Estate*, the Supreme Court observed that where confidential information comes to the knowledge of members of a legal firm targeted by a motion to disqualify, it becomes almost impossible to show that such information will not be used in a prejudicial fashion (*MacDonald Estate*, para. 44). However, the Supreme Court also made it clear that there may be cases where "the solicitor satisfies the Court that no information was imparted which could be relevant" to the underlying dispute (*MacDonald Estate*, para. 46). This is precisely what the Prothonotary found in this case based on evidence on point tendered by both parties.

[26] Although Mr. Garland was unable to recall in detail the seven year old conversation, the Prothonotary found that he was a seasoned lawyer accustomed to his firm's conflict of interest review procedure. His handwritten notes taken during the phone call corroborated his position that no advice or counselling was given or sought, and that the information conveyed was general in nature (Reasons of the Prothonotary, para. 39). This evidence, coupled with Dr. Sikes's cross-examination, led the Prothonotary to conclude that no information relevant to the matter in issue had been conveyed (Reasons of the Prothonotary, para. 55). This is a conclusion that was open to the Prothonotary on the evidence before him.

[27] It follows that the Federal Court judge had no reason to intervene, and that the appeal should accordingly be dismissed.

[28] As a last point of contention, the appellants challenge the award of costs made by both the Prothonotary and the Federal Court judge. I can see no basis for interfering with these awards.

[29] I would dismiss the appeal with costs.

"Marc Noël"

Chief Justice

"I agree
Richard Boivin J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-222-16
STYLE OF CAUSE:	C. STEVEN SIKES, AQUERO, LLC AND AQUIAL, LLC v. ENCANA CORPORATION, CENOVUS FCCL LTD., FCCL PARTNERSHIP AND CENOVUS ENERGY INC.
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CONCURRED IN BY	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	FEBRUARY 17, 2017

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