SUPERIOR COURT

(*Commercial Division*)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-11-050029-160

DATE : May 3, 2016

PRESIDED BY : THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

ROBERT JENNINGS
Plaintiff
And
LÉO BAZINET
And
MICHEL BAZINET
And
ANDREW VAILLANT
Defendants
And
REPLICOR INC.
And
SÉGUIN RACINE AVOCATS LTÉE
Mis en cause
And
DENTONS CANADA LLP
Respondent Attorneys

JUDGMENT ON THE MOTION OF THE DEFENDANT MICHEL BAZINET
TO DISQUALIFY THE PLAINTIFF'S ATTORNEYS

JH5439

INTRODUCTION

[1] One of the Defendants asks that the law firm acting for the Plaintiff be disqualified from acting in the present matter, because the Defendant met with and disclosed information to a Senior Business Advisor who works for the law firm but is not a lawyer.

CONTEXT

[2] Robert Jennings is a direct or indirect shareholder of Replicor inc., as well as a director and the former chairman of its board of directors.

[3] On January 22, 2016, Jennings[1] filed a motion in oppression against Michel Bazinet, who is the president, chief executive officer, director, secretary and chairman of the board of Replicor, as well as against two other directors and officers of Replicor. Jennings is represented in these proceedings by Dentons Canada LLP.

[4] Six weeks earlier, on December 11, 2015, Bazinet called Pierre Lortie, who works at Dentons as a "Senior Business Advisor".[2] Lortie is not a lawyer.

[5] Bazinet and Lortie met at Dentons on December 17, 2015. Their versions of the details of the meeting and the information disclosed by Bazinet during the meeting differ. However, they agree that the subject of the meeting was the dispute amongst the directors of Replicor and that Bazinet described to Lortie at least in general terms the nature of the dispute. Further, they confirm that during the meeting, Bazinet asked Lortie to act as an independent director and chairman of the board of Replicor.

[6] Following this meeting, Lortie did not open a file and did not bill Bazinet or Replicor for his time. Bazinet and Lortie planned to speak and to meet again, but they did not do so prior to January 19, 2016.

[7] On January 19, 2016, Bazinet learned that Dentons was acting for Jennings in the lawsuit that Jennings was about to file against him. He sent an urgent email to Lortie[3] and they spoke on January 20, 2016.

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1 The use of last names will lighten the text and make it clearer. It should not be seen as a lack of respect for the individuals concerned.

2 Exhibit R-1. The Court consulted the English version of the Dentons web site to obtain the proper translation of "Conseiller principal, Affaires".

3 Exhibit PL-2.

[8] Lortie immediately advised Dentons of the issue and an ethical wall was put in place on January 21, 2016.[4] Bazinet's lawyer was advised of the wall the same day.[5]

[9] Still on January 21, 2016, the parties attempted to negotiate a conciliation protocol whereby the parties would jointly appoint Lortie as conciliator. The clause providing that the Defendants renounced to invoking Lortie's appointment as conciliator as a ground to disqualify Dentons did not appear to be problematic. However, the parties did not agree on the conciliation protocol.[6]

[10] The lawsuit was filed the next day.

[11] Three days later, Bazinet filed his motion to disqualify Dentons.

[12] When the motion for safeguard orders in this matter was first presented on January 27, 2016, Dentons indicated that it might withdraw if its presence in the file risked delaying the file.[7] However, when the motion for safeguard orders and other issues were postponed to March 21, 2016, Dentons and its client decided instead to contest the motion to disqualify.

ISSUES

[13] Bazinet raises two grounds for disqualifying Dentons:

1. There is a risk that the confidential information disclosed by Bazinet to Lortie on December 17, 2015 will be misused by Dentons in the present matter for the benefit of Jennings; and

2. Dentons breached its duty of loyalty to Bazinet by taking proceedings against him without his consent.

[14] These grounds flow from a string of Supreme Court cases dealing with the duties inherent in the lawyer-client relationship and the potential conflicts of interest that arise from those duties. These duties and the resulting conflicts have been codified in Québec in the *Code of Professional Conduct of Lawyers*.[8]

[15] If Lortie was a lawyer, the analysis of the conflict in the present matter would raise the usual issues:

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4 Exhibit P-35.
5 Exhibit P-36.
6 A draft agreement with Me Tessier's comments was produced at the hearing but was not given an exhibit number.
7 Exhibit R-2.
8 CQLR chapter B-1, r. 3.1.

- Was there a lawyer-client relationship between Lortie and Bazinet?
- Did Bazinet disclose or is he presumed to have disclosed confidential information to Lortie in the context of that relationship?
- Was the ethical wall put in place on January 21, 2016 sufficient to allay any concerns with respect to the misuse of the confidential information?
- Was there a breach of the duty of loyalty?

[16] Since Lortie is a non-lawyer working for a law firm, the Court must decide as a preliminary question whether the usual rules and analysis apply and, if so, to what extent.

ANALYSIS

1. What conflict rules apply to a non-lawyer working for a law firm?

[17] The rules on conflict of interest in Canada flow from the duties inherent in the lawyer-client relationship.

[18] Those rules were developed by the Supreme Court of Canada in *MacDonald Estate* v. *Martin,*[9] *R.* v. *Neil,*[10] *Strother* v. *3464920 Canada Inc.*[11] and *Canadian National Railway Co.* v. *McKercher LLP.*[12] These cases arose in common law jurisdictions.

[19] The role of lawyers in Québec is similar to their role in the common law system. As a result, the common law case law is largely applicable in Québec. As mentioned above, the Code is a codification of those cases.

[20] The result is that, in principle, the conflict rules in the Code and in the case law apply to lawyers and not to non-lawyers. Moreover, they apply to lawyers and not to law firms.

[21] Does this mean that those rules have no application to the non-lawyer employee of a law firm?

[22] The Court does not believe so.

[23] With respect to the issue of confidential information, the Code and the case law recognize that a non-lawyer employee of a law firm may possess confidential

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9 [1990] 3 S.C.R. 1235.
10 2002 SCC 70.
11 2007 SCC 24.
12 2013 SCC 39.

information such that the hiring of that employee by another law firm may give rise to a conflict of interest.

[24] Several judgments in the common law provinces deal with the potential conflict resulting from the hiring of a legal assistant. In *Hildinger* v. *Carroll*, the Ontario Court of Appeal concluded that "in some circumstances a non-professional employee's change of firms could give rise to a disqualifying conflict of interest".[13] In that case, the court held that the requirement in *MacDonald Estate* that the new firm prove that the confidential information would not be used had been satisfied in that the legal assistant did not work for the lawyer in the new firm involved in the case but rather worked for another lawyer on another floor, she had been told not to discuss the case with the lawyer and had not done so, and she had no financial relationship with the lawyer because of the way the new firm was structured. This judgment has been applied by other Canadian courts.[14]

[25] The Canadian Bar Association's 2008 Task Force on Conflicts of Interest concluded that the rules on the transfer of lawyers should apply to legal assistants, but only if they actually worked for the lawyer involved in the matter:

> The validity of the inference depends on the nature of the role and expertise of the staff member. Some staff members are directly and substantively involved in client matters and others are not. Articling students, law clerks, patent and trademark agents, planners and other professionals and paraprofessionals ("professional staff") often have ongoing substantial involvement in client matters. Legal assistants have ongoing involvement but their involvement is not necessarily substantive. Librarian researchers, translators, process servers, title searchers, electronic document specialists and word processing operators ("professional staff") undertake specific technical tasks in client matters without ongoing involvement. Other staff members are not really involved in client representation at all. For example, accounting and computer staff ("administrative staff") may have access to confidential information by virtue of their work but are not involved in client matters.
>
> ...
>
> ... The Task Force believes that professional staff should be governed by the same rules which apply to lawyers. Legal assistants should be governed by the same rules but only where they assist lawyers who are actually involved in the adverse matter. Specialist and administrative staff should not be governed by these rules but should be advised when employed of their obligation to observe their confidentiality obligations to clients of their former firms.

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13 [2004] O.J. No. 291 (Ont. C.A.) (motion for leave to appeal dismissed, S.C.C., November 25, 2004, n° 30379).

14 *K. (M.S.)* v. *T. (T.L.)*, 2011 ONSC 5478; *Chern* v. *Chern,* 2006 ABCA 16. See *contra*: *J-Star Industries, inc.* v. *Berg Equipment Co. (Canada),* [1992] 3 F.C. 639.

> These categorizations should be applied substantively and not formalistically. If, for example, a specialist staff member has direct and substantive involvement in client matters then they should be subject to full protective measures despite their title or designation.[15]
>
> (Emphasis added)

[26] The Code deals with the transfer of non-lawyer employees in Section 62:

> **62.** A lawyer who retains the services of a person who worked with another professional must take reasonable measures so that such person does not disclose to him confidential information of the clients of the other professional.

[27] The Code also deals more generally with the protection of confidential information by the non-lawyer employees of a law firm, but it does so as a further duty of the lawyer:

> **61.** A lawyer must take reasonable measures to ensure that every person who collaborates with him when he engages in his professional activities and, where applicable, the firm within which he engages in such activities, protects confidential information.
>
> ...

[28] As a result, the lawyers at Dentons have the obligation to take reasonable measures to ensure the protection of confidential information by Lortie.

[29] However, in reviewing the rules applicable to Lortie, the Court finds that it is not appropriate to treat Lortie merely as an employee assisting the lawyers in their professional activities.

[30] His page on the Dentons web site describes him as a Senior Business Advisor. The page sets out in detail Lortie's considerable experience in the business world.

[31] The Court can only conclude that Lortie attracts clients to the firm, meets with clients and provides clients with advice. Even if the advice that he gives is presumably more in the nature of business advice than legal advice, the line can be a thin one.

[32] As a result, his status within Dentons is closer to that of a senior person in a multidisciplinary firm than an employee of a law firm.

[33] In its *Guide 2005 de déontologie en milieu multidisciplinaire*, the Québec Bar suggests that the multidisciplinary firm must respect the Code:

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[15] CBA Task Force on Conflicts of Interests, *Conflicts of Interest : Final Report, Recommendations and Toolkit*, August 2008, p. 85.

> Un premier défi de la société multidisciplinaire consiste à exiger, particulièrement en matière de conflits d'intérêts, d'indépendance et de loyauté, que tous ses membres adoptent une conception commune de ces notions lorsque les services d'un avocat sont requis, fondée sur le code de déontologie applicable aux avocats, lequel regroupe des normes particulièrement exigeantes en ces matières.
>
> Il est donc fondamental que la société prenne les mesures nécessaires pour assurer le respect du Code de déontologie, en tenant compte des risques accrus que peut engendrer l'exercice du droit dans un contexte multidisciplinaire, principalement lorsqu'il est question d'identification et de gestion des conflits d'intérêts réels ou potentiels au sein de la société, de l'indépendance de l'avocat ou de sa loyauté envers son client.[16]
>
> (Emphasis added)

[34] One case in Québec took a narrower view. In *4463251 Canada inc.* c. *Duo-Regen Technologies Canada inc.,*[17] the Superior Court concluded that a meeting with a patent agent who was working for a law firm did not prevent the law firm from acting against the client ten years later. Clearly, the ten year delay was an important factor, but the Court also mentions that there was no prior lawyer-client relationship. The Court of Appeal granted leave to appeal from this judgment,[18] but the appeal was dismissed as moot because the respondents changed lawyers before the appeal was heard.[19]

[35] In the Court's view, it is not appropriate to take a narrow view of conflicts of interest because of the public interest and the need to uphold public confidence in the system.

[36] For that reason, the Court concludes that the conflict of interest rules applicable to lawyers are generally applicable to someone in Lortie's position. Dentons holds him out as part of the firm. He clearly holds a senior position within Dentons and he is likely to meet with clients and to receive sensitive business information from clients. The Court concludes that these clients and this information deserve the same protection as the confidential information shared with a lawyer at Dentons in the course of a lawyer-client relationship. A reasonable client would certainly expect that.

[37] However, in the application of those rules, it may be appropriate to adjust them to reflect Lortie's status as a non-lawyer. The Court will come back to this issue throughout its analysis.

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16 Service de recherche et de législation du Barreau du Québec, *Guide 2005 de déontologie en milieu multidisciplinaire*, p. 17. It appears that the *Regulation Respecting the Practice of the Profession of Advocate within a Limited Liability Partnership or Joint-Stock Company and in Multidisciplinarity,* CQLR, chapter B-1, r. 9 applies to Dentons because Lortie is a member of the Ordre des ingénieurs du Québec.

17 2012 QCCS 4344.

18 2012 QCCA 697.

19 2012 QCCA 1707.

2. Was a relationship formed between Bazinet and Lortie in December 2015? Did Bazinet become a client of Dentons?

[38] Bazinet telephoned Lortie on December 11, 2015, and they met at Dentons on December 17, 2015. Bazinet described the situation at Replicor to him at least in general terms and asked him if he was interested in joining the Replicor board and becoming chairman of the board.

[39] This was not a casual conversation. It was a scheduled meeting at Lortie's office. Bazinet was consulting Lortie in his capacity as a Senior Business Advisor at Dentons. The Court finds that Bazinet hired Lortie to provide him with business advice on December 17, 2015.

[40] The fact that Lortie did not open a file and did not bill Bazinet or Replicor for the meeting is not relevant.[20]

[41] There was no follow up on this meeting before January 19, 2016. However, the evidence shows that the meeting on December 17, 2015 was not a one-shot deal. Bazinet and Lortie were supposed to speak again and were supposed to meet at Replicor, but they had not done so before January 19, 2016. Moreover, the exchanges between Bazinet and Lortie on January 19 and 20, 2016 show Bazinet's surprise that Dentons was acting for Jennings and confirm that Bazinet believed that his relationship with Lortie was continuing beyond December 17, 2015.

[42] The Court therefore concludes that Bazinet hired Lortie on December 17, 2015 at the latest and that this relationship continued until January 20, 2016.

[43] Did Bazinet thereby become a client of Dentons?

[44] Bazinet's only contact with Dentons was with Lortie. He did not meet any Dentons lawyer.

[45] Further, as discussed above, his relationship with Lortie is not a lawyer-client relationship. Lortie is not a lawyer and the purpose of the meeting was not to obtain legal advice from Lortie. Bazinet was seeking business advice.

[46] However, Dentons holds Lortie out on its web site as a Senior Business Advisor and as part of the firm. The meeting between Bazinet and Lortie took place at Dentons offices. Bazinet states in his sworn declaration:

> 8. Le défendeur, Michel Bazinet, a arrêté son choix sur Monsieur Lortie principalement pour le profil d'expérience et sur la position d'influence qu'il occupe au sein du cabinet Dentons Canada LLP, un cabinet d'avocats nord-américain renommé.

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[20] *Boulad* c. *2108805 Ontario inc.*, 2011 QCCS 2205, par. 23-25.

[47] The assertion that Bazinet met with Lortie because of his influence within Dentons seems somewhat exaggerated.

[48] Nevertheless, when Dentons hires a Senior Business Advisor and offers business advice as a service to its clients and someone comes to Dentons to get business advice from the Senior Business Advisor, that person becomes a client of Dentons, even if there is no lawyer and no legal advice involved.

3. Did Lortie receive confidential information from Bazinet?

[49] Bazinet claims that he gave confidential information to Lortie. He states in paragraph 9 of his sworn declaration dated January 25, 2016:

> 9. Lors de cette rencontre, le défendeur, Michel Bazinet, a confié à Monsieur Pierre Lortie la position prise par la majorité du conseil d'administration, relativement au différend les opposant à Monsieur Robert Jennings, y compris les modalités de financements à venir et lui a demandé d'agir comme administrateur indépendant et président du conseil d'administration de Replicor Inc. pour l'avenir.

[50] He adds in his sworn declaration dated April 18, 2016:

> 6. Je lui ai confié de l'information privilégiée relativement à la dispute opposant le conseil d'administration à Monsieur Robert Jennings;
>
> 7. Cette information étant confidentielle et privilégiée, il est difficile pour moi d'élaborer plus amplement sur la nature des renseignements qui ont été transmis;
>
> 8. Je considère que Monsieur Pierre Lortie a perçu, lors de notre entretien, mes forces et mes faiblesses ainsi que mes questionnements relativement au litige m'opposant à Monsieur Robert Jennings;

[51] Lortie denies that he received any confidential information. He states in his declaration sworn on February 8, 2016:

> 10. Les informations échangées lors de notre rencontre étaient de portée générale quant au climat qui régnait au sein du conseil d'administration. Dr. Bazinet ne m'a pas confié d'informations de nature stratégique ni d'informations détaillées quant au conflit. Leur caractère général ne peut en aucun cas conférer un avantage aux autres parties au litige si elles leur avaient été révélées car, à ce niveau de généralité, les positions respectives sont bien connues de toutes les parties.

[52] It is very difficult for Bazinet to prove that he disclosed confidential information to Lortie without disclosing that information in court. It is precisely for this reason that the

Supreme Court established a presumption of disclosure of confidential information in *MacDonald Estate*.[21]

[53] Even though Lortie is not a lawyer, the nature of his relationship with Bazinet is such that the Court finds it appropriate to apply the same presumption to the meeting between Bazinet and Lortie. The Court therefore concludes that Bazinet disclosed confidential information to Lortie on December 17, 2015.

[54] Further, given that the meeting between Bazinet and Lortie and the current mandate on behalf of Jennings deal with the same subject-matter, the Court presumes that the information disclosed to Lortie is relevant to the Jennings mandate and, if disclosed to the lawyers at Dentons involved in the Jennings mandate, could be misused.

4. Was the ethical wall put into place on January 21, 2016 sufficient to allay the risk of misuse of the confidential information?

[55] If one member of a law firm possesses confidential information with respect to a client and the firm wants to act against that client, the firm must put into place measures, such as an ethical wall, to ensure that the information is not shared within the firm, in particular with the members of the firm working on the other mandate. In the absence of such measures, the courts presume that information is shared amongst lawyers in a law firm.

[56] Dentons put an ethical wall into place on January 21, 2016.

[57] To be effective, an ethical wall must respect the conditions set out in section 75 of the Code:

> **75.** Where a lawyer who engages in his professional activities within a firm is in a conflict of interest, every other lawyer in the firm must take reasonable measures to ensure that confidential information in the file involving the conflict of interest is not disclosed to him. Moreover, the lawyer who is in a conflict of interest and every other lawyer in the firm must see to it that such measures apply to the other persons with whom they collaborate when engaging in their professional activities.
>
> In assessing the effectiveness of these measures, the following, in particular, must be taken into consideration:
>
> (1) the size of the firm;
>
> (2) the precautions taken to prevent access to the confidential information by the lawyer who is in a conflict of interest;

[21] *Supra* note 9, p. 1260.

(3) the instructions given as to the protection of confidential information involved in the conflict of interest; and

(4) the isolation of the lawyer in a conflict of interest with respect to every person in the firm who has access to the file.

[58] Upon review of the ethical wall put into place by Dentons, the Court is satisfied that it respects the conditions set out in Section 75 of the Code and is effective.

[59] Bazinet raises the delay between the date on which the conflict first arose and the date on which the ethical wall was put into place.

[60] Dentons put the ethical wall in place on January 21, 2016, as soon as it had knowledge of the conflict. However, the conflict existed before January 21, 2016: Bazinet met with Lortie on December 17, 2015, and it is reasonable to presume that Jennings was a client of Dentons for at least a couple of weeks before the 45 page proceeding drafted on his behalf was filed on January 21, 2016. As a result, there is a period of at least a couple of weeks when Jennings and Bazinet were both clients of Dentons and there was no ethical wall preventing information from flowing.

[61] It is clear that the firm must act with diligence to identify conflicts and, when necessary, put a wall up. In the present matter, Dentons failed to identify the conflict when it arose because Lortie had not opened a file. As a result, when the file for Jennings was opened, it was impossible for Dentons to know about the conflict. It is therefore possible that information flowed during that period.

[62] The presumption of information sharing established by the Supreme Court in *MacDonald Estate* applies between lawyers working together[22] and it is not absolute.[23] Lortie states in his sworn declaration that he never discussed his meeting with Bazinet or anything relating to Replicor with anyone at Dentons until the conflict issue was raised on January 20, 2016. Although the Supreme Court rejected such conclusory statements in *MacDonald Estate*[24], this is an issue where the Court might have been prepared to give some weight to the fact that Lortie is not a lawyer. Lortie's statement that he did not share the information is credible because he was consulted on a business matter and there was no reason for him to consult a lawyer at Dentons on the issue. It would have been useful, however, if evidence had been presented to the Court with respect to Lortie's interactions with the lawyers at Dentons: Where was his office? How much time did he spend in the office? Did he generally get lawyers involved in his files? Did he participate in internal meetings where files were discussed?

[63] In any event, the delay between the conflict arising and the ethical wall being put into place is only a couple of weeks. The courts in Québec have been less strict than

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22 *Supra* note 9, p. 1262.
23 *Stanford International Bank Limited (Trustee of)*, 2013 QCCA 988.
24 *Supra* note 9, p. 1263.

the courts elsewhere in Canada with respect to this delay. The Court of Appeal has ruled that delays of one year are too long.[25] The Superior Court, in a decision upheld by the Court of Appeal, held that a delay of five weeks « ne constitue pas ... un facteur important à considérer ».[26] The Superior Court accepted a delay of three weeks in another file because a lawyer was on vacation.[27]

[64] As a result, the Court accepts that the ethical wall put in place by Dentons is effective and was not late. The conflict argument based on the risk that the confidential information disclosed by Bazinet will be used against him is dismissed.

5. Did Dentons breach the duty of loyalty? Is that cured by an ethical wall?

[65] Section 72 of the Code provides:

> **72.** There is a conflict of interest when there is a substantial risk that the lawyer's own interests or his duties to another client, a former client, or another person would adversely interfere with his duties to the client and, in particular:
>
> (1) when he acts for clients with conflicting interests; or
>
> (2) when he acts for clients whose interests are such that he might tend to favour certain among them or that his judgment and loyalty may be unfavourably affected.
>
> When the lawyer engages in his professional activities within a firm, conflict of interest situations must be assessed with regard to all the firm's clients.
>
> (Emphasis added)

[66] As a result, a lawyer cannot act for a client if that client's interests are in conflict with the interests of another client of the firm.

[67] In the present matter, The Court has found that Bazinet was a client of Dentons. Section 72 does not require that Bazinet be a client of a lawyer within the firm. While that mandate was in place, Dentons accepted a mandate from Jennings to sue Bazinet.

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25 *Métro inc.* c. *Regroupement des marchands actionnaires inc.*, J.E. 2004-2046 (C.A.) (motion for leave to appeal dismissed, S.C.C., April 21, 2005, n° 30677); *Lavery, de Billy, s.e.n.c.r.l.* c. *Groupe Jean Coutu (PJC) inc.*, 2010 QCCA 937 (motion for leave to appeal dismissed, S.C.C., December 23, 2010, n° 33788).

26 *Bergeron* c. *Jung* J.E. 2001-138 (C.S.), p. 15 (conf. by *Adessky, Poulin* c. *Lévesque, Beaubien, Geoffrion inc.*, AZ-01019524 (C.A.), motion for leave to appeal dismissed, S.C.C., December 13, 2001, n° 28606).

27 *Microbrasserie Charlevoix inc.* c. *Mailloux*, REJB 2002-32026 (C.S.), par. 30.

[68] In doing so, Dentons breached its duty of loyalty to Bazinet. The fact that the mandate from Bazinet and the mandate from Jennings deal with exactly the same matter only worsens the breach.

[69] Again, Dentons did not act deliberately. It did not know about the prior mandate from Bazinet because no file had been opened.

[70] While it is clear that an ethical wall can resolve a problem of confidential information received from a former client, an ethical wall is not adequate to resolve a loyalty issue. A law firm that decides to sue an existing client must obtain consent from that client, whether in advance or at the time that the issue arises.[28]

[71] It is not alleged that Dentons obtained Bazinet's consent that Dentons could act against his interests much less sue him on exactly the same subject matter for which he consulted Dentons. The only argument advanced is the clause in the draft conciliation protocol whereby, if Lortie acted as conciliator, Bazinet and the other Defendants would waive the conflict. However, the draft conciliation protocol was never signed and Lortie never acted as conciliator. Moreover, the conflict which is raised is related to the meeting in December, not to Lortie acting as conciliator in January. There was no consent by Bazinet.

[72] For these reasons, the Court concludes that Dentons is in conflict.

6. Section 74 of the Code

[73] Section 74 of the Code provides as follows :

> **74.** To decide any question concerning a conflict of interest, consideration must be given to the higher interests of justice, the explicit or implicit consent of the parties, the extent of prejudice for each of the parties, the time elapsed since the situation arose that could give rise to the conflict, as well as the good faith of the parties.

[74] As a result, the Court must consider the following factors before disqualifying Dentons:

- the higher interests of justice,
- the explicit or implicit consent of the parties,
- the extent of prejudice for each of the parties,
- the time elapsed since the situation arose that could give rise to the conflict, and

[28] *Supra* note 10, par. 29.

- the good faith of the parties.

[75] The Court has already discussed some of these issues.

[76] The Court considers that both parties acted in good faith.

[77] It is clear that Bazinet did not consent, either when he met with Lortie or subsequently, to Dentons acting against him. When he learned of the conflict, he contacted Lortie on an urgent basis, and when Dentons failed to withdraw from its representation of Jennings, he filed the motion to disqualify within three days. The unsigned conciliation protocol is not relevant.

[78] Dentons did not deliberately breach its duty of loyalty, but did so unknowingly as a result of a failure to open a file. The conflict was discovered within a couple of weeks.

[79] Moreover, it is clear that Jennings will suffer a prejudice if Dentons is disqualified and he is required to hire a new lawyer. This prejudice is always present when a lawyer is disqualified. The prejudice is lessened in the present case by the fact that the case is at an early stage. The risk of prejudice to Bazinet is limited because the Court is considering at this stage only the prejudice arising from the breach of the duty of loyalty.

[80] The overriding factor in this case and in most cases is the higher interests of justice. In the present matter, the Court considers that the higher interests of justice require that Dentons be disqualified. If the Court allows Dentons to continue to act despite the existing relationship with Bazinet at the time that Dentons instituted proceedings against him on behalf of another client in exactly the same matter, the reputation of lawyers and of the legal system itself in the eyes of the reasonable person will be hurt.

[81] The Court therefore concludes that Dentons must be disqualified from acting for Jennings.

FOR THESE REASONS, THE COURT:

[82] **GRANTS** the motion of the defendant Michel Bazinet to disqualify Dentons Canada LLP;

[83] **DECLARES** that Dentons Canada LLP is disqualified from acting on behalf of the Plaintiff in the present matter;

[84] **THE WHOLE** with legal costs to follow the outcome of the suit.

Stephen W. Hamilton, J.S.C.

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Date of hearing: April 19, 2016

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-026071-167
(500-11-050029-160)

MINUTES OF THE HEARING

DATE: May 18, 2016

THE HONOURABLE YVES-MARIE MORISSETTE, J.A.

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LÉO BAZINET **ANDREW VAILLANT**	Mtre VANDA NINA FERNANDEZ *(FNC AVOCATS)*
ROBERT JENNINGS	**ABSENT**
REPLICOR INC.	Mtre ERIC CHRISTIAN LEFEBVRE *(Norton Rose Fulbright Canada S.E.N.C.R.L.,s.r.l.)*

SÉGUIN RACINE AVOCATS LTÉE	ABSENT

DESCRIPTION: **Application for leave to appeal from a judgment rendered on May 3, 2016, by Stephen W. Hamilton of the Superior Court, District of Montreal**

Clerk: Shirley Thomas	Courtroom: RC-18

HEARING

10: 30	Commencement of the hearing. Identification of counsel. The motion is contested. Exchange between Yves-Marie Morissette, J.A. and Mtre Mitchell.
10: 33	Representations by Mtre Mitchell.
10: 47	Representations by Mtre Tessier.
10: 53	Exchange Between Yves-Marie Morissette and the attorneys.
10: 53	Representations by Mtre Fernandez.
10: 54	Exchange between Yves-Marie Morissette, J.A. and Mtre Tessier.
10: 55	Exchange between Yves-Marie Morissette, J.A. and Mtre Lefebvre.
10: 55	Reply by Me Mitchell.
10: 58	Recess.
12: 07	Resumption of the hearing.
12: 07	**By the judge:** Judgment – see page 4
12: 13	Conclusion of the hearing.

SHIRLEY THOMAS

Clerk

PAR LE JUGE

JUGEMENT

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[1] Le requérant, un cabinet d'avocats, demande la permission d'appeler d'un jugement de la Cour supérieure[1] prononcé par l'honorable Stephen Hamilton. Ce jugement l'a déclaré inhabile à représenter l'un de ses clients dans le cadre d'un recours formé le 22 janvier 2016 en vertu de la *Loi canadienne sur les sociétés par actions.*

[2] Le jugement, qui à première vue paraît solidement motivé, comporte un certain nombre de conclusions de fait qui retiennent l'attention dans un débat amorcé en raison d'un conflit d'intérêts potentiel. Le juge estime ainsi que la demande dont il est saisi est en quelque sorte la conséquence d'un imbroglio administratif, que les parties de part d'autre agissaient de bonne foi dans l'ignorance d'un possible conflit, et que les mesures mises en place lors de la découverte de cette possibilité étaient à la foi promptes et efficaces, de sorte qu'aucun échange d'information ne pouvait se produire au détriment de la partie en demande devant lui.

[3] Cela dit, poussant plus loin l'analyse, le juge formule une dernière question en ces termes : « Did Dentons breach its duty of loyalty? Is that cured by an ethcal wall? » Il répond par l'affirmative à la première interrogation et par la négative à la seconde, ce qui l'amène à conclure que « Dentons is in conflict ».

[4] Cette question, ainsi énoncée, et circonscrite par les faits particuliers de l'affaire tels qu'ils ressortent du dossier et des conclusions du juge, est nouvelle et sérieuse. Il serait opportun dans le meilleur intérêt de la justice qu'elle soit soumise à une formation de la Cour. Par ailleurs, en y répondant comme il l'a fait, le juge prive une partie de la représentation par les avocats de son choix, ce qui peut constituer, comme c'est le cas ici, une situation visée par le deuxième alinéa de l'article 31 *C.p.c.*

[5] Je suis donc d'avis qu'il y a lieu d'accorder la permission d'appeler. Mais comme il me paraît possible à ce stade que le jugement visé par la requête soit infirmé ou qu'il soit confirmé, et que l'hypothèse d'une représentation continue par des avocats en conflit d'intérêts se concrétiserait si les procédures se continuaient en première instance et si de fait le jugement était ultérieurement confirmé par la Cour, il me paraît tout aussi nécessaire d'ordonner la suspension de ces procédures jusqu'au jugement final que prononcera la Cour.

POUR CES MOTIFS :

[6] **J'ACCORDE** la permission d'appeler et **J'ORDONNE** la suspension des procédures en première instance.

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[1] 2016 QCCS 2067.

[7] **JE FIXE** le pourvoi pour une audition le **7 octobre 2016, en salle Antonio Lamer, à 9h30,** pour une durée de **60 minutes (30 minutes chaque partie)**;

[8] **J'ORDONNE** à la partie appelante, après avoir fait notifier copie à la partie intimée, de déposer au greffe au plus tard le **16 juin 2016**, cinq exemplaires d'une argumentation n'excédant pas **15 pages**. Tous les documents nécessaires pour statuer sur l'appel *(jugement attaqué, actes de procédures, pièces, extraits de déposition...)* doivent y être joints;

[9] **J'ORDONNE** à la partie intimée, après avoir fait notifier copie à la partie appelante, de déposer au greffe, au plus tard le **1er août 2016**, cinq exemplaires d'une argumentation n'excédant pas **15 pages** et, s'il y a lieu, d'un complément de documentation;

[10] **JE RAPPELLE** aux parties les articles 376 *C.p.c.* et 55 du *Règlement de procédure civile* :

> 10.1. L'appel devient caduc lorsque l'appelant n'a pas déposé son mémoire ou son exposé avant l'expiration des délais impartis pour ce dépôt. Le greffier délivre un constat de caducité, à moins qu'un juge ne soit saisi d'une demande de prolongation.
>
> 10.1.1. L'intimé ou toute autre partie qui ne respecte pas les délais pour le dépôt de son mémoire ou de son exposé est forclos de le faire; de plus, il ne peut être entendu à l'audience, à moins que la Cour d'appel ne l'autorise.

[11] *Présentation.* L'exposé comporte une page de présentation, une table des matières et une pagination continue.

> 11.1.1. De plus, les dispositions relatives aux mémoires *(incluant les mentions finales de l'auteur)* s'appliquent aux exposés en faisant les adaptations nécessaires.

[12] **JE RAPPELLE** aux parties l'avis du 30 juillet 2014 de la juge en chef qui les invite à produire avec leur documentation papier une version technologique en format PDF ou Word sur un support matériel courant (tel qu'un DVD ou une clé USB) permettant la recherche par mots-clés;

[13] **LE TOUT**, frais de justice à suivre.

YVES-MARIE MORISSETTE, J.C.A.

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No : 500-09-026071-167
(500-11-050029-160)

PROCÈS-VERBAL D'AUDIENCE

DATE : Le 7 octobre 2016

CORAM : LES HONORABLES FRANÇOIS PELLETIER, J.C.A.
LORNE GIROUX, J.C.A.
JEAN BOUCHARD, J.C.A.

APPELANTE	AVOCATS
DENTONS CANADA LLP	Me DOUGLAS MITCHELL Me DAVID ÉTHIER *(Irving Mitchell Kalichman)*
INTIMÉ	AVOCATE
MICHEL BAZINET	Me CÉLINE TESSIER *(Séguin Racine, avocats ltée)*
MIS EN CAUSE	AVOCATE
REPLICOR INC.	
LÉO BAZINET **ANDREW VAILLANT**	Me NINA VANDA FERNANDEZ *(FNC avocats)*
ROBERT JENNINGS	

SÉGUIN RACINE AVOCATS LTÉE	

En appel d'un jugement rendu le 3 mai 2016 par l'honorable Stephen W. Hamilton, de la Cour supérieure, district de Montréal.

NATURE DE L'APPEL : **Jugement rendu en cours d'instance – inhabilité d'un cabinet d'avocats.**

Greffière d'audience : Marcelle Desmarais	Salle : Antonio-Lamer

AUDITION

9 h 30	Argumentation par Me Douglas Mitchell.
9 h 57	Suspension de la séance
10 h 04	Reprise de la séance.
10 h 04	Argumentation par Me Céline Tessier.
10 h 19	Réplique par Me Douglas Mitchell.
10 h 21	Fin de l'argumentation de part et d'autre.
	Suspension de la séance.
10 h 27	Reprise de la séance.
	Arrêt unanime prononcé par l'honorable François Pelletier, J.C.A. – voir page 3.

Marcelle Desmarais

Greffière d'audience

PAR LA COUR

ARRÊT

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[1] Pour des motifs qui seront déposés dans les jours à venir, la Cour rejette l'appel avec frais de justice.

FRANÇOIS PELLETIER, J.C.A.

LORNE GIROUX, J.C.A.

JEAN BOUCHARD, J.C.A.

COUR D'APPEL

CANADA

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-026071-167
(500-11-050029-160)

DATE DE L'ARRÊT : 7 octobre 2016
DÉPÔT DES MOTIFS : 18 octobre 2016

CORAM LES HONORABLES : FRANÇOIS PELLETIER, J.C.A.
LORNE GIROUX, J.C.A.
JEAN BOUCHARD, J.C.A.

DENTONS CANADA LLP
APPELANTE – Procureurs du demandeur
c.

MICHEL BAZINET
INTIMÉ – Défendeur
et
LÉO BAZINET
ANDREW VAILLANT
MIS EN CAUSE – Défendeurs
et
ROBERT JENNINGS
MIS EN CAUSE – Demandeur
et
REPLICOR INC.
SÉGUIN RACINE AVOCATS LTÉE
MIS EN CAUSE – Mis en cause

MOTIFS D'UN ARRÊT RENDU SÉANCE TENANTE

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[1] L'appelant se pourvoit contre un jugement rendu le 3 mai 2016 par la Cour supérieure du district de Montréal (l'honorable Stephen W. Hamilton), qui l'a déclaré inhabile à occuper pour M. Robert Jennings dans un litige commercial opposant ce dernier à l'intimé[1].

[2] Après un entretien téléphonique du 11 décembre 2015, l'intimé, le 17 décembre suivant, rencontre M. Pierre Lortie, un ingénieur de formation portant le titre de « Conseiller principal, Affaires » au sein du cabinet appelant aux bureaux duquel la rencontre a d'ailleurs lieu. Dans le contexte d'un conflit entre administrateurs et actionnaires d'une société dans laquelle l'intimé est président et chef de la direction, il discute avec M. Lortie de la possibilité pour ce dernier d'entrer au conseil d'administration de la société en crise. À la suite de cette rencontre, M. Lortie n'ouvre aucun dossier et ne dresse aucune note d'honoraires.

[3] Une autre rencontre est prévue entre les deux hommes, mais elle n'a jamais lieu. En effet, les 19 et 20 janvier 2016, l'intimé apprend que le cabinet appelant agit pour le compte de M. Jennings, un ancien président du conseil de la même société, dans le cadre d'un recours en oppression à être intenté contre trois administrateurs actuels, dont l'intimé. Alors que ce dernier est en voyage en Asie, il communique immédiatement avec M. Lortie à qui il laisse un message vocal en plus de lui faire parvenir un courriel dont la teneur reflète sa grande anxiété. Dès le 25 janvier suivant, il demande par requête une déclaration d'inhabilité du cabinet appelant à occuper pour M. Jennings.

[4] En appel, la question de la confidentialité des échanges entre M. Pierre Lortie et l'intimé n'est plus en litige. Le juge de première instance a déterminé que la mise en place d'un écran déontologique (Muraille de Chine) entre M. Lortie et les employés appelés à travailler avec lui et les autres membres du cabinet était suffisante et faite avec assez de diligence pour pallier les risques de divulgation de renseignements confidentiels.

[5] L'appelant conteste cependant la décision du juge voulant que la déclaration de son inhabilité, à la demande de l'intimé, était justifiée à cause de l'existence d'un conflit de loyauté à l'égard de l'intimé.

[6] L'appelant plaide d'abord qu'il ne pouvait y avoir de conflit de loyauté en l'espèce étant donné qu'il n'existait pas d'entente de service entre M. Lortie, un professionnel non-avocat, ou le cabinet et l'intimé.

[7] Il s'agit d'une question de fait et l'analyse qu'en fait le juge de première instance ainsi que sa conclusion qu'une relation professionnelle s'est établie entre l'intimé et le cabinet appelant[2] trouvent un solide appui dans la preuve administrée devant lui.

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1 *Jennings c. Bazinet*, 2016 QCCS 2067, J.E. 2016-1393.
2 *Id.*, paragr. 17-48.

[8] Au surplus, la grande précision du contenu de l'agenda convenu entre l'intimé et M. Lortie pour une seconde rencontre fait bien voir que ces sujets ont été au moins ciblés lors de leur première rencontre[3]. Elle démontre également que l'intimé avait « des motifs raisonnables de croire »[4] qu'une relation de client à cabinet d'avocats s'était établie entre lui et le cabinet appelant.

[9] L'appelant fait ensuite valoir que, si un conflit de loyauté existe, le remède de la déclaration d'inhabilité est trop radical puisque la mise en place de l'écran déontologique est suffisante pour remédier au problème.

[10] Le juge détermine, au contraire, que, bien qu'un écran déontologique puisse pallier la transmission d'informations confidentielles obtenues d'un client, ce n'est pas suffisant en l'espèce pour régler le problème du conflit de loyauté.

[11] S'appuyant sur la notion de « conflit d'intérêts » telle que définie à l'article 72 du *Code* et sur l'arrêt de la Cour suprême *R. c. Neil*[5], le juge de première instance postule la règle de principe alors applicable. Selon cette règle, si un cabinet décide de poursuivre un client, il doit obtenir son consentement, soit à l'avance, soit, comme en l'espèce, dès que la question surgit.

[12] Pour décider si une déclaration d'inhabilité s'impose, le juge applique ensuite les critères de l'article 74 du *Code* :

> **74.** Pour décider de toute question relative à un conflit d'intérêts, il est tenu compte de l'intérêt supérieur de la justice, du consentement explicite ou implicite des parties, de l'étendue du préjudice pour chacune des parties, du laps de temps écoulé depuis la naissance de la situation pouvant constituer ce conflit ainsi que de la bonne foi des parties.

[13] Le juge conclut que le critère déterminant ici est celui de l'intérêt supérieur de la justice et que ce critère requiert que le cabinet appelant soit déclaré inhabile à occuper contre l'intimé :

> [80] The overriding factor in this case and in most cases is the higher interests of justice. In the present matter, the Court considers that the higher interests of justice require that Dentons be disqualified. If the Court allows Dentons to continue to act despite the existing relationship with Bazinet at the time that Dentons instituted proceedings against him on behalf of another client in exactly

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3 Déclaration sous serment de M. Pierre Lortie, 8 février 2016, paragr. 13.

4 Le *Code de déontologie des avocats*, LRLQ, c. B-1, r. 3.1 [ci-après cité : *Code*] définit ainsi la notion de « client » :

> 3. Aux fins du présent code : 1° « client » inclut toute personne ou, le cas échéant, toute organisation à qui l'avocat rend ou s'engage à rendre des services professionnels; ce terme s'entend aussi d'une personne qui consulte un avocat et qui a des motifs raisonnables de croire qu'une relation entre avocat et client existe.

5 *R. c. Neil*, [2002] 3 R.C.S. 631, 2002 CSC 70, paragr. 29, p. 649.

> the same matter, the reputation of lawyers and of the legal system itself in the eyes of the reasonable person will be hurt.
>
> [81] The Court therefore concludes that Dentons must be disqualified from acting for Jennings.

[14] La Cour est d'avis que cette conclusion est conforme à la règle de droit et justifiée par la preuve.

[15] Cette conclusion est également celle que la Cour suprême reconnaît comme justifiée dans le cas d'un manquement au devoir de loyauté d'un avocat envers son client dans l'arrêt *Compagnie des chemins de fer nationaux du Canada c. McKercher LLP*[6]. Bien qu'il s'agisse d'une affaire ayant son origine en Saskatchewan, la Cour énonce le principe que les tribunaux investis d'une compétence inhérente disposent du pouvoir de surveiller la conduite des litiges dont ils sont saisis, ce qui inclut celui de trancher les questions soulevées par la représentation d'un client en particulier par un avocat. De façon générale, l'objectif des tribunaux est alors d'éviter tout préjudice au client et de préserver la considération dont jouit l'administration de la justice[7].

[16] Selon la Cour suprême, l'avocat et, par extension, le cabinet d'avocats, ont envers leurs clients un devoir de loyauté qui comporte trois aspects : le devoir d'éviter les conflits d'intérêts, le devoir de dévouement à la cause du client et le devoir de franchise[8]. Elle reconnaît de plus que la préservation de l'intégrité et de la considération dont jouit l'administration de la justice est un motif susceptible, à lui seul, de rendre nécessaire une déclaration d'inhabilité dans le cas de violation de ce devoir de loyauté envers un client[9].

[17] Les enseignements de la Cour suprême rejoignent les dispositions de l'article 74 du *Code* que le juge de première instance a appliquées aux faits de l'affaire. De plus, tout comme le recommande le plus haut tribunal du pays[10], le juge a tenu compte de toutes les circonstances pertinentes pour déterminer si la déclaration d'inhabilité s'imposait afin de protéger l'intérêt supérieur de la justice, selon le *Code*, ou l'intégrité et la considération dont jouit l'administration de la justice, selon la Cour suprême.

[18] La Cour fait siens les motifs pour lesquels le juge de première instance a jugé que, dans les circonstances de l'espèce, la déclaration d'inhabilité s'avérait nécessaire. C'est le cas en particulier de la gravité du manquement au devoir de loyauté lorsque l'intimé est poursuivi par le cabinet appelant dans le même dossier que celui pour lequel il est devenu le client de ce cabinet. Il en est de même de la diligence avec laquelle,

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6 *Compagnie des chemins de fer nationaux du Canada c. McKercher LLP*, [2013] 2 R.C.S. 649, 2013 CSC 39.

7 *Id.*, paragr. 13, p. 657.

8 *R. c. Neil*, *supra*, note 5, paragr. 19, p. 645-646; *McKercher*, *supra*, note 6, paragr. 19, p. 659.

9 *McKercher*, *supra*, note 6, paragr. 64-65, p. 675-676.

10 *Id.*

ayant été informé de la situation de conflit d'intérêts, l'intimé a demandé le retrait du cabinet appelant.

C'est pour ces motifs qu'à l'audience la Cour a rejeté l'appel, avec les frais de justice.

FRANÇOIS PELLETIER, J.C.A.

LORNE GIROUX, J.C.A.

JEAN BOUCHARD, J.C.A.

Me Douglas Mitchell
Me David Éthier
Irving Mitchell Kalichman
Pour l'appelante

Me Céline Tessier
Séguin Racine, avocats ltée
Pour l'intimé

Me Nina Vanda Fernandez
FNC avocats
Pour Léo Bazinet et Andrew Vaillant

Date d'audience : 7 octobre 2016